

CT 03-2

Tax Type: Cigarette Tax

Issue: Possession of Unstamped Cigarettes

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

THE DEPARTMENT OF REVENUE)	No. 00-0000-0-00
OF THE STATE OF ILLINOIS)	Cigarette Confiscation
)	
v.)	No. 00-0000-0-00
)	Cigarette Confiscation
JOHN DOE, d/b/a ABC Food Mart)	John E. White
)	Administrative Law Judge
Respondent)	

RECOMMENDATION FOR DISPOSITION

Appearances: Mark Muchin appeared on behalf of the Illinois Department of Revenue; John Doe appeared *pro se*.

Synopsis: This matter arose after agents of the Illinois Department of Revenue (“Department”) seized 548 packages of cigarettes from a business, ABC Food Mart, located in Chicago, Illinois. The Department thereafter notified John Doe (“Doe”) that a hearing would be held to determine whether those cigarettes were subject to forfeiture pursuant to § 18a of the Cigarette Tax Act (“CTA”), and whether Doe was liable for a penalty pursuant to § 18b of the CTA.

A hearing was held at the Department’s Office of Administrative Hearings in Chicago. I have considered the evidence and arguments presented at hearing, and I am including in this recommendation findings of fact and conclusions of law. I recommend

that the Director order the cigarettes forfeit, and that Doe be held liable for a § 18b penalty.

Findings of Fact:

1. On September 10, 1996, Sam Rossi (“Rossi”), an agent of the Department’s Bureau of Criminal Investigation (“BCI”) and another agent went to ABC Food Mart to serve a summons to a person, Employee, who worked there. Department Ex. 1 (Investigative Summary Report prepared by Rossi), p. 2; Hearing Transcript (“Tr.”), p. 8 (Rossi).
2. While there, Rossi saw cartons and packages of cigarettes that did not bear Illinois tax stamps near the front register and in a display. Department Ex. 1, p. 2; Tr. p. 8 (Rossi). Rossi seized those cigarettes, and discovered that they consisted of 548 packages. Department Ex. 1, p. 2; Tr. p. 8 (Rossi).
3. Employee, the only person present at the business at that time, told Rossi that the storeowners were John Doe and Joe Blow. Department Ex. 1, p. 2; Tr. p. 9 (Rossi). Neither Doe nor Blow was at the business at the time of the seizure. Department Ex. 1, p. 2.
4. Employee also told Rossi that he (Employee) purchased the cigarettes from a person unknown (by name) to him about two or three days ago for \$10 per carton, and that he knew that the cigarettes were not properly stamped. Department Ex. 1, p. 3; Tr. p. 9 (Rossi).
5. Prior to the date of the seizure, Doe had prepared an Illinois Certificate of Registration form, on which he named himself as the sole proprietor of the

business conducted as ABC Food Mart. Department Ex. 3 (Department form NUC-1), *passim*; Tr. pp. 15-16 (Doe).

6. ABC Food Mart was not a licensed cigarette distributor. Department Ex. 1, p. 3.
7. Doe was formerly found liable for a penalty pursuant to § 18b of the CTA regarding cigarettes seized from a different business location on September 10, 1996. Department Ex. 4 (administrative Notice of Decision issued to, *inter alia*, Doe on or about 1/12/99).

Conclusions of Law:

The issues are whether the 548 packages of unstamped cigarettes shall be declared forfeit pursuant to § 18a of the CTA, and whether Doe is liable for a penalty for possessing those cigarettes pursuant to section 18b of the CTA. Section 18a of the CTA provides, in part:

After seizing any original packages of cigarettes, or cigarette vending devices, as provided in Section 18 of this Act, the Department shall hold a hearing and shall determine whether such original packages of cigarettes, at the time of their seizure by the Department, were not tax stamped or tax imprinted underneath the sealed transparent wrapper of such original packages in accordance with this Act, or whether such cigarette vending devices, at the time of their seizure by the Department, contained original packages of cigarettes not tax stamped or tax imprinted underneath the sealed transparent wrapper of such original packages as required by this Act. ...

If, as the result of such hearing, the Department shall determine that the original packages of cigarettes seized were at the time of seizure not tax stamped or tax imprinted underneath the sealed transparent wrapper of such original packages as required by this Act, or that any cigarette vending device at the time of its seizure contained original packages of cigarettes not tax stamped or tax imprinted underneath the sealed transparent wrapper of such original packages as required by this Act, the Department shall enter an order declaring such original packages of cigarettes or

such cigarette vending devices confiscated and forfeited to the State, and to be held by the Department for disposal by it as provided in Section 21 of this Act.

35 ILCS 130/18a.

Here, the evidence shows that, on September 10, 1996, BCI agents seized 548 packages of cigarettes that did not have Illinois tax stamps affixed to them, as required by the CTA, from the location where ABC Food Mart conducted business. Department Ex. 1, p. 2. Under § 13 of the CTA, there is statutory presumption that unstamped original packages of cigarettes found in the place of business of any person who is not a licensed distributor of cigarettes are being held in violation of the provisions of the CTA. 35 ILCS 130/13. ABC Food Mart was not a licensed cigarette distributor. Department Ex. 1, p. 3. Therefore, I conclude that the cigarettes should be confiscated and forfeited to the State.

35 ILCS 130/18a.

As to the assessment of a penalty, § 18b of the CTA provides:

With the exception of licensed distributors, anyone possessing cigarettes contained in original packages which are not tax stamped as required by this Act, or which are improperly tax stamped, shall be liable to pay, to the Department for deposit in the State Treasury, a penalty of \$15 for each such package of cigarettes in excess of 100 packages. Such penalty may be recovered by the Department in a civil action.

35 ILCS 130/18b.

Doe is liable for a § 18b penalty if he possessed the unstamped cigarettes. The Department asserts that Doe should be held liable because the cigarettes were seized from the business Doe personally owned. In response, both Doe and a friend offered sworn testimony that Doe had sold, or more accurately, abandoned, the business to another person prior to the seizure date. Tr. pp. 15-17 (Doe), 30-31 (Witness). Actually, Doe's

description of his interest in ABC Food Mart varies. He first testified that he never actually owned ABC Food Mart, and that he signed his name to the application for an Illinois business registration license — on which he named himself as the owner of ABC Food Mart — because the true owner, Joe Blow, told him to do so. Tr. pp. 15-16 (Doe). Later, however, Doe testified that, in fact, he and Blow owned ABC Food Mart at one time. Tr. p. 20 (Doe). In any event, Doe testified that he stopped owning the business about six months after he signed the application for a business license, when he was shot during a robbery at the store. Tr. pp. 15-16 (Doe).

Doe, however, offered no corroborating documentary evidence to support his assertion that he never owned the business where the cigarettes were found, or that he did not own it when the cigarettes were seized. That is to say, Doe offered no written agreement(s) between him and the putative purchaser of the business, showing that he, in fact, sold that business. Nor did he offer a copy of the notices or forms required by either §§ 3 or 5j of the Retailers' Occupation Tax Act when one either discontinues or sells a retailing business. 35 ILCS 120/3; 35 ILCS 120/5j. Illinois laws governing the sale and/or discontinuation of a retail business require that there be some documentary evidence to establish that such a transaction, in fact, took place. Doe had none, and a taxpayer cannot rebut the Department's prima facie determination — here, that Doe owned and operated ABC Food Mart — merely by offering testimony that that determination is wrong. Fillichio v. Department of Revenue, 15 Ill. 2d 327, 333, 155 N.E.2d 3, 7 (1958); A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833, 527 N.E.2d 1048, 1053 (1st Dist. 1988).

Moreover, strong public policy concerns caution against giving any weight to Doe's description of the agreement between him and Blow, the person Doe now says was ABC Food Mart's true owner. Comerica Bank-Illinois v. Harris Bank Hillside, 284 Ill. App.3d 1030, 1033, 682 N.E.2d 380, 382 (3d Dist. 1996) ("Courts will not enforce private agreements that are contrary to public policy."). Doe testified that Blow directed him to name himself falsely as the owner of ABC Food Mart because Blow wanted the manager of the stores he (Blow) owned to have responsibility for what occurred at the store a particular manager managed. Tr. p. 16 (Doe). He also testified that a manager would manage a store for Blow in exchange for a percentage of the profit. Tr. p. 16 (Doe). If Doe is telling the truth, then his agreement with Blow wholly undermines their duty to accurately report the owner(s)¹ of a retail business conducted in Illinois. That is directly contrary to § 2a of the Retailers' Occupation Tax Act. 35 ILCS 120/2a (making it unlawful to engage in business as a retailer in Illinois without having a valid business registration number). There is no dispute that Doe prepared and filed an application for an Illinois business registration number for the retailing business conducted as ABC Food Mart, and that he named himself as the sole proprietor of that business. In short, Doe wants the Department to disregard the effect of the documents he signed under oath regarding his sole ownership of ABC Food Mart because, he now says, he was lying when he prepared them. I will not do that. Comerica Bank-Illinois, 284 Ill. App.3d at 1033, 682 N.E.2d at 382.

¹ An agreement by two or more persons to conduct a business for a percentage of the business' profits is a partnership. 805 ILCS 205/7(4) ("The receipt by a person of a share of the profits of a business is prima facie evidence that he or she is a partner in the business"); In re Estate of Goldstein, 293 Ill.App.3d 700, 711, 688 N.E.2d 684, 691 (1st Dist. 1997). Under those circumstances, Hasan would still be required to name himself as an owner of ABC Food Mart on a retail business registration application. *See* 35 ILCS 120/2a.

Further, I give no weight to Witness's testimony that Doe did not own ABC Food Mart on September 10, 1996, because he was not competent to offer it. Witness testified that Blow, and not Doe, owned ABC Food Mart (Tr. p. 30 (Witness)), and that by September 1996, Doe no longer worked at ABC Food Mart. Tr. p. 31 (Witness). Upon cross-examination, however, Witness admitted "knowing" those facts because his friend Joe Blow told him those things. Tr. pp. 31-32 (Witness). Witness clearly had no personal knowledge of these facts. I did not believe either Doe's or Witness's testimony, and no books and records were offered to corroborate it.

While there can be no doubt that the unstamped cigarettes were seized from Doe's business, the facts of this case do not establish that Doe ever had actual possession of the cigarettes. That is, Doe was not present at the business when they were seized, and Employee, the person who was present, admitted to Rossi that he had purchased them for sale at the store. Department Ex. 1, pp. 2-3. Thus, the question is, even if Doe did not have actual possession of the cigarettes, did he have constructive possession of them? *See, e.g., Daley v. El Flanboyan Corp.*, 321 Ill. App. 3d 68, 746 N.E.2d 854 (1st Dist. 2001).

Possession may be actual or constructive. Illinois law provides that, "A person has actual possession when he has immediate and exclusive possession over a thing. A person has constructive possession when he lacks actual possession of a thing but he has both the power and the intention to exercise control over a thing directly or through another person. If two or more persons share the immediate and exclusive control or share the intention and the power to exercise control over a thing, then each person has possession." People v. Walker, 779 N.E.2d 268, 273 (2d Dist. 2002) (*citing* Illinois Pattern Jury Instructions, Criminal, No. 4.16 (4th ed. 2000)).

Here, the Department has introduced documentary evidence that Doe owned and operated the business at which the contraband cigarettes were seized. Department Exs. 1-2. “When [property] is found on premises under a defendant’s control, this fact, in and of itself, gives rise to an inference that defendant has knowledge and possession of the [property].” Daley v. El Flanboyan Corp., 321 Ill. App. 3d at 75, 746 N.E.2d at 861 (the “property” the court was discussing being cocaine); *see also* 35 **ILCS** 130/13 (presumption of improper possession when unstamped cigarettes are found in the business of anyone but a licensed cigarette distributor).

The Department also introduced a copy of a Department administrative decision involving Doe, and regarding BCI’s seizure of cigarettes from another business conducted at a location away from ABC Food Mart. Department Ex. 4. The facts found in that agency decision include the facts that Doe was observed on three separate occasions in 1996 behind the cash register of another business, and that on each of those dates, unstamped cigarettes were seized from the immediate area where Doe was observed. Department Ex. 4, pp. 2-4 (findings of fact). One of the dates Doe was at the other business, and when unstamped cigarettes were seized from the area in his immediate vicinity, was September 10, 1996. *Id.*, pp. 2-3.

The situation we have here is that, on September 10, 1996, Rossi seized unstamped cigarettes from ABC Food Mart, where Doe was not physically present at the time of the seizure. On the same date, Rossi seized cigarettes from another business where Doe was physically present and from an area within Doe’s immediate control. Department Ex. 4. Doe, again, was found liable for a § 18b penalty regarding that other incident. *Id.* He was also charged with, and found not guilty of, the criminal violation of possessing unstamped

cigarettes regarding that incident. Tr. pp. 37 (Rossi), 43 (Doe). At hearing, Doe testified that he was found not guilty of possessing the unstamped cigarettes in the other case because a witness came into criminal court and testified that she, and not Doe, owned the business where the cigarettes were seized. Tr. p. 43 (Doe). Rossi, at hearing, offered a different reason why Doe was found not guilty. Tr. pp. 37-38 (Rossi). The truth is that I do not know why Doe was exonerated of possessing unstamped cigarettes seized regarding that other incident. What is clear from this record, however, is that Doe *believed* that he was exonerated because someone testified that Doe did not own the store in which the cigarettes were seized. Tr. p. 43 (Doe). And thereafter, both Doe and another witness appeared in this case and testified that ABC Food Mart was not Doe's business. As I have already concluded, however, I do not find their testimonies credible.

At the time of the seizure, Doe owned ABC Food Mart, and, therefore, he also shared control over the store's premises. *See El Flanboyan Corp.*, 321 Ill. App. 3d at 75, 746 N.E.2d at 861 (liquor license revocation upheld after court agreed that the part-time manager of business, and agent of corporate proprietor, had constructive possession of controlled substances seized by police from a rear storage area of tavern). Here, Employee acknowledged that the unstamped cigarettes seized on September 10, 1996 were being offered for sale at ABC Food Mart. Department Ex. 1, p. 3. Finally, there is no credible evidence in this record to show that Employee was anything other than ABC Food Mart's — and therefore Doe's — employee or agent. Thus, this record includes sufficient circumstantial evidence showing that Doe had constructive possession of the unstamped cigarettes seized from his business on September 10, 1996.

Conclusion:

The 548 packages of cigarettes recovered from ABC Food Mart did not bear Illinois tax stamps as required by the CTA. Department Ex. 1, pp. 2-3. Therefore, I conclude that the cigarettes seized should be confiscated and forfeited to the State. 35 **ILCS** 130/18a. I also conclude that Doe possessed the cigarettes seized from his business, and that he is liable for a § 18b penalty in the amount of \$6,720. 35 **ILCS** 130/18b (448 x 15 = 6,720).

Date: 1/21/2003

John E. White
Administrative Law Judge