

CT 05-2

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
OF THE STATE OF ILLINOIS

v.

ABC, INC., d/b/a
XYZ Tobacco Shop

Respondent

No. 0000-0000-0-00
Cigarette Confiscation

Mimi Brin
Administrative Law Judge

RECOMMENDATION FOR DECISION

Appearances: Shepard Smith, Special Assistant Attorney General, for the Illinois Department of Revenue

Synopsis:

This matter comes on for hearing pursuant to the seizure on October 22, 2004 by the Illinois Department of Revenue (hereinafter the "Department") of 20 packages of "Bronco" cigarettes from the premises of ABC, Inc. d/b/a XYZ Tobacco Shop (hereinafter the "XYZ"), a retail tobacco shop in Illinois. These cigarette packages did not have proper Illinois cigarette tax stamps affixed to them as mandated by the Cigarette Tax Act, 35 ILCS 130/1 *et seq.* (hereinafter the "Act"). In these proceedings, the Department seeks, *inter alia*, to impose a civil penalty against XYZ. Mr. John Doe, the corporate secretary, appeared at the hearing on behalf of XYZ. Following the submission of all evidence and a review of the record, it is recommended that this matter be resolved

in favor of the Department, and in support thereof, I make the following findings of fact and conclusions of law:

Findings of Fact:

1. On October 22, 2004, an agent for the Department, Jeffrey Gaida (hereinafter “Gaida”), found 20 packages of “Bronco” cigarettes on the premises of ABC, Inc. d/b/a XYZ Tobacco Shop, a retail tobacco seller, located in Illinois. Department Gr. Ex. 1 (Department of Revenue Investigative Summary Report *passim*); pp. 10-13 (XYZ Illinois Business Registration); p. 24 (Department of Revenue Inventory and Receipt); p. 26 (RC-35 Seizure Report, Evidence Inventory and Receipt) These packages of cigarettes did not have affixed to them proper Illinois cigarette stamps as mandated by the Cigarette Tax Act; Id.
2. At that time and at that place, Gaida seized and confiscated those 20 cigarette packages; Id.
3. The cigarettes at issue were found by Gaida on the storage racks behind the sales rack and were available for retail sale. Department Gr. Ex. No. 1, p. 3 (Investigative Summary Report); p. 26 (RC-35 Report)
4. At the time of the seizure, the store manager, Doe, was on the premises and communicated with Gaida. Department Gr. Ex. No. 1, *passim*; p. 24 (Evidence Inventory and Receipt) Neither the corporate president, Ron Doe, nor the corporate secretary, John Doe, was on the premises at that time. Department Gr. Ex. No. 1, *passim*; pp. 10-13 (Illinois Business Registration)
5. XYZ was not licensed by the Department as a cigarette distributor or transporter. Department Gr. Ex. 1, p. 15 (Memorandum from Marc A. Bucci,

Administrative Assistant, Miscellaneous Taxes Division); Tr. p. 14 (Doe statement)

Conclusions of Law:

In this matter, the Department seeks not only the forfeiture of the 20 non-Illinois stamped packages of “Bronco” cigarettes confiscated from the premises of XYZ, but also seeks to have assessed a civil penalty against XYZ for the possession of these cigarettes.

The Cigarette Tax Act provides as follows:

§13. Whenever any original package of cigarettes is found in the place of business or in the possession of any person who is not a licensed distributor under this Act without proper stamps affixed thereto, or an authorized substitute thereon, underneath the sealed transparent wrapper of such original package, as required by this Act, the prima facie presumption shall arise that such original package of cigarettes is kept therein or is held by such person in violation of the provisions of this Act.
35 ILCS 130/13

What is clear and uncontested in this matter is that 20 packages of cigarettes were found on the premises of XYZ, and that they were available for retail sale. What is contested is whether these packages were unstamped, as averred by Gaida, or whether they were “partially” stamped as proffered by Doe. Tr. p. 16 (Doe stating that he does not disagree that the cigarette packages were partially stamped)

Although Mr. Doe testified for XYZ, his testimony is of concern. There is no indication that he spoke of the packages being partially stamped based upon his own knowledge. Therefore, I cannot conclude that Mr. Doe is competent to testify regarding what kind, if any, stamps may have been on the packages. In addition, neither the store manager, who was present at the time of the confiscation, nor the distributor from whom XYZ purportedly purchased the packages, was present at the hearing. Thus, the only

competent testimony regarding the existence of stamps on the packages was that of Gaida, who testified consistently with his written report that the pertinent cigarette packages were unstamped.

Regardless, the law does not make a distinction between totally unstamped packages or “partially” stamped ones. The statute mandates that “proper” stamps be affixed to cigarette packages sold at retail in Illinois. 35 **ILCS** 130/13 There is nothing in the statute which defines what “partial” stamps might be, and there is, furthermore, nothing in the law which permits the sale by an Illinois retailer of “partially” stamped cigarettes. So, even if the “Bronco” cigarette packages had partial stamps on them, there is still a violation of Illinois law because partial stamps do not equate, legally, to proper stamps. Tr. p. 16

The statute clearly provides that improperly stamped cigarette packages found “in the place of business or in the possession of any person who is not a licensed distributor” establishes a “prima facie presumption” that such cigarettes are there in violation of the Act. 35 **ILCS** 130/13 For purposes of this confiscation and civil penalty action, it is necessary that the unstamped or improperly stamped cigarettes were found on the business premises, in this case, a retail tobacco store. 35 **ILCS** 130/13 It is not required by this civil penalty provision that there be evidence presented by the Department of an intent by the business to sell improperly stamped cigarettes. Id.; compare 35 **ILCS** 130/24 (class 4 felony applicable upon showing of intent to sell or offer for sale unstamped cigarette package) Therefore, it is not pertinent in this matter, nor is there a determination made here, as to whether the violation claimed is the fault of the distributor or of XYZ. Tr. p. 22 (Doe stating that the responsibility for the improper stamps lies with the distributor)

On the issue of the civil penalties sought herein, the Act states:

§ 18c. Possession of not less than 10 and not more than 100 original packages not tax stamped or improperly tax stamped; penalty. With the exception of licensed distributors, anyone possessing not less than 10 and not more than 100 packages of cigarettes contained in original packages that are not tax stamped as required by this Act, or that are improperly tax stamped, is liable to pay to the Department, for deposit into the Tax Compliance and Administration Fund, a penalty of \$10 for each such package of cigarettes, unless reasonable cause can be established by the person upon whom the penalty is imposed. Reasonable cause shall be determined in each situation in accordance with rules adopted by the Department.

35 ILCS 130/18c; see also 130/18a for forfeiture of seized cigarettes

Mr. Doe was the only person to offer that the distributor was to blame in this matter, and that the distributor acknowledged its liability. Tr. p. 22 Because neither the store clerk, nor the distributor appeared at hearing, I am unable to conclude that XYZ showed reasonable cause for its failure to offer for retail sale properly stamped cigarettes. As a result, based upon the facts of this matter as established by the evidence presented, as well as the clear mandates of the pertinent sections of the Act, the Department's requests that the seized cigarette packages be forfeited to the State, and that a civil penalty be assessed against XYZ, are appropriate.

WHEREFORE, for the reasons stated above, it is recommended that the 20 packages of cigarettes confiscated by the Department from ABC Inc., d/b/a XYZ Tobacco Shop, on October 22, 2004 be forfeited to the State of Illinois and, further, that a civil penalty of \$200.00 be assessed against XYZ.

Date: 6/6/2005

Mimi Brin
Administrative Law Judge