

## Chapter 6

### Confiscation of Contraband Cigarettes

Cigarettes found at any point within South Carolina on which the tax has not been paid are subject to confiscation by the Department of Revenue, its employees and any peace officer of the State.<sup>1</sup> Any proceeding against cigarettes seized are considered a proceeding in rem.<sup>2</sup>

The confiscation of untaxed cigarettes applies to untaxed cigarettes in the possession of any wholesaler, retailer, or any other person, regardless of whether or not that person was the first person to receive the untaxed cigarettes into South Carolina. However, except for cigarettes being offered for sale, cigarettes must be in the possession of a wholesaler for more than 72 hours and in the possession of a retailer for more than 24 hours before they are subject to confiscation.<sup>3</sup>

Since the cigarettes tax is no longer a stamp tax but is paid via a reporting method,<sup>4</sup> it is not possible to determine whether the tax has been paid merely by inspecting the cigarettes themselves. Therefore, it must be determined by reviewing invoices and other records if the person in possession of the cigarettes (1) is registered to file and remit the cigarette tax or (2) has purchased the cigarettes from another person who is registered to file and remit the cigarette tax or (3) has otherwise purchased untaxed cigarettes.

#### A. Examples of Cigarettes Subject to Confiscation<sup>5</sup>

(1) Retailer A travels to another state, purchases cigarettes in that state, and returns to South Carolina to sell these cigarettes at his store. Retailer A is not registered to file and remit the cigarette tax. These cigarettes are contraband subject to confiscation.

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<sup>1</sup> South Carolina Code §12-21-2870

<sup>2</sup> South Carolina Code §12-21-2900. South Carolina Code §12-21-2870. *Black's Law Dictionary, Sixth Edition*, states in part: "In the strict sense of the term, a proceeding "in rem" is one which is taken directly against property or one which is brought to enforce a right in the thing itself."

<sup>3</sup> South Carolina Code §12-21-2870.

<sup>4</sup> South Carolina Code §12-21-735.

<sup>5</sup> While it is not a tax issue, wholesalers and retailers of cigarettes should be aware that it is illegal to sell or distribute "gray market cigarettes" in South Carolina. "Gray market cigarettes" are those that are not intended to be sold in the United States. The packages may be labeled "For export only," "U.S. tax exempt," or "For use outside U.S." Cigarette packages which do not comply with federal labeling and advertising requirements with regards to labels, warnings or other information are also considered "gray market cigarettes." Anyone who sells or distributes "gray market cigarettes" in violation of the state law may be sentenced to a maximum three years in jail and a \$1,000 fine. Law enforcement officers may seize and destroy any illegal cigarettes or may sell the cigarettes to the manufacturer to be exported outside the United States. See South Carolina Code §16-17-505 and SC Department of Revenue news release dated October 8, 1999.

- (2) Retailer B orders cigarettes over the Internet for sale in her South Carolina store. Retailer B is not registered to file and remit the cigarette tax. These cigarettes are contraband subject to confiscation.
- (3) Wholesaler C orders cigarettes from another wholesaler who is located outside of South Carolina. Wholesaler C receives the cigarettes via common carrier and will sell the cigarettes from his South Carolina wholesale distribution facility to retailers located inside and outside of South Carolina. Wholesaler C is not registered to file and remit the cigarette tax. These cigarettes are contraband subject to confiscation, whether in the possession of Wholesaler C or in the possession of a South Carolina retailer who purchased the cigarettes from Wholesaler C.
- (4) Mr. Smith travels outside of South Carolina and purchases a supply of cigarettes for use by him and his wife. If Mr. Smith does not remit the tax on these cigarettes upon his return to South Carolina, the cigarettes are contraband subject to confiscation.

## **B. Seizure and Confiscation of Untaxed Cigarettes**

The General Assembly has established two procedures for the seizure and disposition of untaxed cigarettes found in South Carolina. The first procedure, noted in Section (A) below, requires a court case to determine the final disposition of the cigarettes seized. The second procedure, noted in Section (B) below, allows the Department to accept a compromise and return the seized cigarettes to the person from whom they were seized.

### (A) Seizure and Prosecution to Secure Forfeiture of the Seized Cigarettes

The following outlines the procedure for confiscating untaxed cigarettes found in South Carolina and prosecuting the case to secure forfeiture of the seized cigarettes:

- (1) If untaxed cigarettes are found any place within South Carolina, the Department may seize those cigarettes without warrant. Untaxed cigarettes may also be seized by peace officer of the State.<sup>6</sup>
- (2) Upon seizure of untaxed cigarettes, the cigarettes must be appraised if in the opinion of the person making the seizure the value of the cigarettes seized is \$100.00 or more.<sup>7</sup>
  - (a) The appraisal must contain a list with a description of the cigarettes seized and must be prepared in duplicate.

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<sup>6</sup> “The department may enter upon the premises of any taxpayer or the business premises of any other person and examine or cause to be examined by any agent or representative designated by it for that purpose any books, papers, records, memoranda, commodities or other things bearing upon the amount of taxes payable and secure from such taxpayer or other person any other information directly or indirectly concerned in the enforcement of [Chapter 21 of Title 12]. South Carolina Code §12-21-2860.

<sup>7</sup> South Carolina Code §12-21-2910.

- (b) The appraisal must be made by 3 sworn appraisers selected by the person who seized the cigarettes. These 3 appraisers must be respected and disinterested citizens of South Carolina who reside in the county where the cigarettes were seized.
- (c) The appraisal must be attested by the person seizing the cigarettes and the 3 selected appraisers.
- (d) For their service, the 3 appraisers must be allowed a sum of \$1 per day, not exceeding 2 days. These funds must be paid of the Department out of any revenue received from the sale of the confiscated cigarettes.

If in the opinion of the person seizing the cigarettes the value of the cigarettes seized is less than \$100.00, then an appraisal is not required.<sup>8</sup>

- (3) The person who seized the cigarettes must publish a written notice at 3 places within the county in which the cigarettes were seized.<sup>9</sup> The notice must:<sup>10</sup>
  - (a) describe the cigarettes seized,
  - (b) state the time, place and reason for the seizure, and
  - (c) state that any person claiming the seized cigarettes must make a claim in writing within 30 days of the first publication of the notice.
- (4) If a person files a written claim within the 30 days specified in the notice stating an interest in the cigarettes seized, that person may execute a bond to the Department in a penal sum equal to twice the value of the cigarettes seized with sureties to be approved by the clerk of court in the county in which the cigarettes were seized. However, in no case may the bond be less than \$100.00. This is conditioned that the obligors, in the case of condemnation of the cigarettes seized, must pay to the Department the full value of cigarettes seized, all costs and expenses of the proceedings (including reasonable attorney's fees).<sup>11</sup>
- (5) When the Department receives the bond, it must send a duplicate list or description of the cigarettes to the solicitor of the circuit in which the cigarettes were seized. The solicitor must prosecute the case to secure forfeiture of the cigarettes.<sup>12</sup>

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<sup>8</sup> South Carolina Code §12-21-2910.

<sup>9</sup> South Carolina Code §12-21-2920.

<sup>10</sup> South Carolina Code §12-21-2920.

<sup>11</sup> South Carolina Code §12-21-2930.

<sup>12</sup> South Carolina Code §12-21-2930.

- (6) The cigarettes must be delivered to the claimant pending the outcome of the case.<sup>13</sup>
- (7) If a claim is not filed, or a bond is not given, within the 30 days specified in the notice, the cigarettes are forfeited without any further proceedings.<sup>14</sup>
- (8) If the cigarettes are forfeited as set forth above, then the cigarettes must be donated by the Department to the SC Department of Mental Health for patient use.<sup>15</sup>

(B) Seizure and Acceptance of Compromise to Return the Seized Cigarettes

The following outlines the procedure for confiscating untaxed cigarettes found in South Carolina and accepting a compromise for the return of the seized cigarettes to the person from whom they were seized:

- (1) If untaxed cigarettes are found any place within South Carolina, the Department may seize those cigarettes without warrant. Untaxed cigarettes may also be seized by peace officer of the State.
- (2) Upon seizure of untaxed cigarettes, the cigarettes must be appraised if in the opinion of the person making the seizure the value of the cigarettes seized is \$100.00 or more.<sup>16</sup>
  - (a) The appraisal must contain a list with a description of the cigarettes seized and must be prepared in duplicate.
  - (b) The appraisal must be made by 3 sworn appraisers selected by the person who seized the cigarettes. These 3 appraisers must be respected and disinterested citizens of South Carolina who reside in the county where the cigarettes were seized.
  - (c) The appraisal must be attested by the person seizing the cigarettes and the 3 selected appraisers.
  - (d) For their service, the 3 appraisers must be allowed a sum of \$1 per day, not exceeding 2 days. These funds must be paid of the Department out of any revenue received from the sale of the confiscated cigarettes.

If in the opinion of the person seizing the cigarettes the value of the cigarettes seized is less than \$100.00, then an appraisal is not required.<sup>17</sup>

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<sup>13</sup> South Carolina Code §12-21-2930.

<sup>14</sup> South Carolina Code §12-21-2940

<sup>15</sup> South Carolina Code §12-21-2975.

<sup>16</sup> South Carolina Code §12-21-2910.

<sup>17</sup> South Carolina Code §12-21-2910.

- (3) If the Department determines that the person in possession of the untaxed cigarettes did not intend to violate the cigarette tax law, then the Department may, at its discretion, return the seized cigarettes to the person from whom they were confiscated if the following conditions are met:<sup>18</sup>
- (a) The person from whom the cigarettes were confiscated pays the Department an amount equal to the assessed value of the confiscated cigarettes.
  - (b) The person from whom the cigarettes were confiscated pays the tax and any applicable penalties due on the cigarettes.

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<sup>18</sup> South Carolina Code §12-21-2960