

**U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review Branch**

**Shiv Tobacco Outlet,**

**Appellant,**

**v.**

**Case Number: C0203071**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a Transfer of Ownership Civil Money Penalty (TOCMP) in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was properly imposed by the Retailer Operations Division against 5 U.S.C. § 552 (b)(6) & (b)(7)(C), former owners of Shiv Tobacco Outlet 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (hereinafter “Appellant”), for selling or transferring ownership of a store that was permanently disqualified from the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(2) and 7 CFR § 278.6(g) in its administration of SNAP when it assessed a TOCMP in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) against the Appellant.

**AUTHORITY**

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that “[A] food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS.”

**CASE CHRONOLOGY**

In a letter dated August 12, 2013, FNS’s Retailer Operations Division charged Shiv Tobacco Outlet, under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), with 5 U.S.C. § 552 (b)(6) & (b)(7)(C) violations of trafficking in SNAP benefits. The record shows that a determination letter was sent to the firm on September 23, 2013. As a result of these actions, Shiv Tobacco Outlet was permanently disqualified from SNAP effective October 21, 2013.

The September 23, 2013, determination letter stated that in the event that the firm's ownership sold or transferred ownership of the store subsequent to its disqualification, it would be subject to and liable for a transfer of ownership civil money penalty as provided by SNAP regulations at 7 CFR § 278.6(f)(2), (3) and (4). The letter noted that the amount of the TOCMP would be calculated based on regulations at 7 CFR § 278.6(g).

Documentation in the case record shows that on April 11, 2017, a SNAP application was submitted to FNS for a new store at the same location where Shiv Tobacco Outlet had previously operated. According to the application, this new store, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), was owned by 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (hereinafter "new owners").

Upon discovering that a new application had been submitted at a location where SNAP violations had previously occurred, the Retailer Operations Division requested additional documentation from 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to verify that the disqualified owners were not affiliated with the new store in any way and to ascertain whether or not the transfer of ownership from the Appellant to the new owners was bona fide. In response to this request, the new owners submitted a number of documents, including a Bill of Sale showing that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) sold their inventory to the new owners for 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

In a letter dated January 16, 2018, the Retailer Operations Division informed the Appellant that because its store was sold or transferred during its disqualification period, a TOCMP in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was being assessed against the owners of Shiv Tobacco Outlet in accordance with SNAP regulations at 7 CFR § 278.6(f)(2), (3) and (4), and § 278.6(g).

In a letter postmarked January 26, 2018, the Appellant, through counsel, appealed the Retailer Operations Division's assessment of the TOCMP by requesting an administrative review. The request was granted and implementation of the TOCMP has been held in abeyance pending completion of this review.

## **STANDARD OF REVIEW**

In an appeal of adverse action, such as the imposition of a civil money penalty, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

## **CONTROLLING LAW**

The controlling law in this matter is found in the Food & Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(f)(2) and (g) establish the authority upon which a TOCMP may be imposed against a retail food store or wholesale food concern.

7 U.S.C. § 2021(e)(1) states:

In the event any retail food store or wholesale food concern that has been disqualified under subsection (a) of this section is sold or the ownership thereof is otherwise transferred to a purchaser or transferee, the person or persons who sell or otherwise transfer ownership of the retail food store or wholesale food concern shall be subjected to a civil penalty in an amount established by the Secretary through regulations to reflect that portion of the disqualification period that has not yet expired. If the retail food store or wholesale food concern has been disqualified permanently, the civil penalty shall be double the penalty for a ten-year disqualification period, as calculated under regulations issued by the Secretary. The disqualification period imposed under subsection (b) shall continue in effect as to the person or persons who sell or otherwise transfer ownership of the retail food store or wholesale food concern notwithstanding the imposition of a civil penalty under this subsection.

7 CFR § 278.6(f)(2) reads, in part,

In the event any retail food store or wholesale food concern which has been disqualified is sold or the ownership thereof is otherwise transferred..., the person or other legal entity who sells or otherwise transfers ownership...shall be subjected to and liable for a civil money penalty in an amount to reflect that portion of the disqualification period that has not expired, to be calculated using the method found at § 278.6(g). If the retail food store...has been permanently disqualified, the civil money penalty shall be double the penalty for a ten year disqualification period...

7 CFR § 278.6(g) outlines the steps for calculating the TOCMP amount, in relevant part: Determine the firm's average monthly redemptions...for the 12-month period ending with the month immediately preceding that month during which the firm was charged with violations. Multiply the average monthly redemption figure by 10 percent. Multiply the product arrived at in paragraph (g)(2) by the number of months for which the firm would have been disqualified....The civil money penalty may not exceed an amount specified in § 3.91(b)(3)(i) for each violation.

Although regulations at 7 CFR § 3.91(b)(3)(i) provide for a maximum civil penalty of \$100,000<sup>1</sup> for each violation, FNS has established an \$11,000 limit per violation. It is also important to note that in Step 3 of § 278.6(g), above, 240 is the number of months used to calculate the civil money penalty for permanent disqualifications. This is in accordance with 7 U.S.C. § 2021(e)(1) and SNAP regulations at 7 CFR § 278.6(f)(2).

## **APPELLANT'S CONTENTIONS**

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant denies that the business, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), has been sold. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is incorporated in the state of South Carolina, is registered with the South Carolina Secretary of State, and is a corporation in good standing with the state.
- The assessment of a penalty is based on erroneous information.

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<sup>1</sup> As of March 14, 2018, the maximum civil penalty for each violation as listed in 7 CFR § 3.91(b)(3)(i) is \$113,894.

- The business, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), entered into a lease at the property located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This is the location where Shiv Tobacco operated.
- The owner of the property sold the building, so 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was forced to relocate. As of February 13, 2018, the business was still in the process of locating a suitable property to continue on with the business.
- The property at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), has never belonged to 5 U.S.C. § 552 (b)(6) & (b)(7)(C), nor was it purchased by the owners of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). They were simply tenants of the building.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) business license shows a mailing address in 5 U.S.C. § 552 (b)(6) & (b)(7)(C), rather than the store location.
- Considering these facts, the matter should be dismissed as the civil money penalty was assessed in error. In this case, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) has not been sold nor has the ownership been transferred.

In support of these contentions, the Appellant provided the following documentation:

- Copy of a printout from the South Carolina Secretary of State's office showing that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is a corporation in good standing. According to this document, the registered agent is 5 U.S.C. § 552 (b)(6) & (b)(7)(C), whose address is 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- Copy of a lease agreement, dated March 1, 2013, between 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- Copy of a Retail License from the South Carolina Department of Revenue, dated March 12, 2012. The license shows the business as 5 U.S.C. § 552 (b)(6) & (b)(7)(C), operating at 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It also shows the trade name as Shiv Tobacco Outlet with a mailing address in 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

## ANALYSIS AND FINDINGS

The primary issue for review in this case is whether or not it was lawful for the Retailer Operations Division to impose a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transfer of ownership civil money penalty against the Appellant firm. To this regard, statute at 7 U.S.C. § 2021 and SNAP regulations at 7 CFR § 278.6(f)(2) are clear that a TOCMP shall be assessed if a store which has been disqualified is subsequently sold or the ownership of the firm is transferred prior to the end of the disqualification period. This review has no authority to dismiss or modify the penalty for any reason except in those cases where it is shown that a transfer of ownership did not occur; a monetary penalty was assessed in a manner not in accordance with regulation; or when there was an error in calculating the TOCMP amount.

Based on a review of the evidence provided by the Appellant as well as documentation in the case record, it is the finding of this review that a sale or transfer of ownership did occur between the Appellant 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Among the documents submitted by 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when 5 U.S.C. § 552 (b)(6) & (b)(7)(C) applied for SNAP participation was a Bill of Sale signed by 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and both owners of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This document states that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) agreed to “buy the entire inventory from 5 U.S.C. § 552 (b)(6) & (b)(7)(C)... The total value of the inventory purchased was 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C) paid partial amount for the inventory in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The remaining balance will be settled in installments by December 2017.”

Also submitted by the new owner was a copy of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), dated April 21, 2017, showing a payment of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to 5 U.S.C. § 552 (b)(6) & (b)(7)(C). A second check for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was written to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on June 21, 2017. The new owner also submitted copies of several business licenses from the State of South Carolina showing that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is the owner of the store located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Based on this evidence it is quite clear to this review that the business that was known as 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (dba Shiv Tobacco Outlet) and which had been operating at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), sold all of its inventory to a new store known as 5 U.S.C. § 552 (b)(6) & (b)(7)(C). That new store had valid business licenses for operation at that same location. While it is entirely possible that the corporation name 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and the trade name Shiv Tobacco Outlet are still valid in the state of South Carolina, they are no longer connected with 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Additionally, all other components that make up a store, including food inventory, equipment, etc. appear to have been sold to 5 U.S.C. § 552 (b)(6) & (b)(7)(C). In short, the Appellant appears to have sold everything associated with its store and walked away with nothing but the proceeds of the sale and its trade name. This review finds such action to be tantamount to a transfer of ownership. There is no requirement in SNAP regulations that the sale of a store include the corporation or trade name. There is also no requirement that TOCMP penalties be imposed only upon sellers of real property on which a store is located. It is very common for store owners to lease retail space from a separate property owner.

The Appellant has stated that it was forced to leave the premises because the property itself was sold to another buyer. According to the Appellant, it is still in the process of obtaining a suitable location to continue with the business. This argument implies that the store was not sold at all, but simply relocated. Unfortunately this claim is not persuasive, particularly since all of the Appellant’s inventory was sold and because 5 U.S.C. § 552 (b)(6) & (b)(7)(C) has not resumed operations at another location.

It should be noted that all documentation from 5 U.S.C. § 552 (b)(6) & (b)(7)(C), particularly the Bill of Sale document, appears to be legitimate and proof of a bona fide sale. Accordingly, it is the determination of this review that the assessment of a TOCMP against Shiv Tobacco Outlet, under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is wholly appropriate and was imposed in accordance with established statute and regulation.

### **TOCMP Calculation**

As noted earlier, regulations at 7 CFR § 278.6(g) outline the steps for calculating the TOCMP amount. The TOCMP is derived from the firm's SNAP redemption volume during the 12 months immediately prior to being charged with the violations that led to the store's disqualification. Modifications to a TOCMP may occur only when there is an error in calculation or when the TOCMP exceeds the statutory limit. This review has no authority to modify a TOCMP amount for any other reason. The calculation of the TOCMP in this case is as follows:

#### **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**

In this case, the calculated TOCMP of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) exceeds the sanction limit, which is 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Each trafficking pattern identified in the August 12, 2013, charge letter is considered a single violation of the SNAP regulations. Therefore, the TOCMP was assessed using 5 U.S.C. § 552 (b)(6) & (b)(7)(C) violations at a maximum amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) each. Based on regulations cited at 7 CFR § 278.6(g), it is the determination of this review that a TOCMP in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was properly assessed in this matter.

### **CONCLUSION**

The permanent disqualification of Shiv Tobacco Outlet took effect on October 21, 2013. A review of the documentation in this case indicates that following this disqualification the store was sold to 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Therefore, 7 CFR § 278.6(f)(2) of the SNAP regulations is applicable, and the assessment of a TOCMP is required. A review of the calculation indicates that the amount of the TOCMP as assessed by the Retailer Operations Division is proper. Based on a preponderance of the evidence, the decision by the Retailer Operations Division to impose a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) civil money penalty against 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is sustained.

To arrange payment, the Appellant must contact FNS's Financial Management Accounting Division at (703) 605-0483 within 30 days of receipt of this decision.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. If a judicial review is desired, the complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant owner resides or is engaged

in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

JON YORGASON  
Administrative Review Officer

July 25, 2018