

STATE OF VERMONT  
WASHINGTON COUNTY, SS.

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STATE OF VERMONT )  
 )  
 v. )  
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 FORTUNE TOBACCO COMPANY, )  
 Defendant. )

Washington Superior Court  
Docket No. 584-9-02  
WASHINGTON COUNTY

Entry Order

This is an action for enforcement under the Vermont Non-Participating Tobacco Manufacturers Act, 33 V.S.A. §§ 1912-1914. Defendant was served under Rule 4(k)(1)(D) but has never appeared in this case. The State now seeks a Rule 55 default judgment. The State is represented by Dinah Yessne, Esq. The State's motion is granted.

The affidavits on file establish that Defendant is a nonparticipating tobacco manufacturer which has violated the Act by failing to establish and fund a 33 V.S.A. § 1914(a)(2) escrow fund for sales year 2001. Specifically, Defendant improperly withheld \$2.99 for sales year 2001. By letter dated August 13, 2002, the State provided notice to Defendant of the need to comply with 33 V.S.A. § 1914(a)(2). Because of the notice provided, this violation is a "knowing" violation under the Act.

The statutory remedy for a knowing violation of 33 V.S.A. § 1914(a)(2) is a civil penalty in the amount of up to 15% of the amount improperly withheld per day, not to exceed 300% of the amount withheld. See 33 V.S.A. § 1914(c)(2). The Defendant is responsible for reasonable attorney fees and costs as well pursuant to 33 V.S.A. § 1914(c)(4).

If the penalty were calculated at 15% per day, the civil penalty would exceed 300% of the amount improperly withheld. The court therefore imposes a civil penalty of \$8.97 (300% of \$2.99) for the sales year 2001 violation. Affidavits and other documents on file establish reasonable attorney fees of \$776.25 and costs of \$21.53.

The State has requested that the court order the Defendant to establish a qualified escrow fund, deposit into the fund the improperly withheld amount from sales year 2001, file certification of compliance with the Attorney General for sales year 2001; file the same certification for all subsequent sales years; and otherwise comply in the future with the Act. These are affirmative statutory obligations that the Defendant has failed to meet. Appropriate relief in the event of a second knowing violation would be the injunctive relief provided for at 33 V.S.A. § 1914(c)(3).

The State has also requested prejudgment interest on the amount Defendant has

improperly withheld from the fund. "The principal rationale for awarding prejudgment interest as of right is that, where damages are liquidated or readily ascertainable, 'the defendant can avoid the accrual of interest by simply tendering to the plaintiff a sum equal to the amount of damages.'" Bull v. Pinkham Eng'g Assoc., 170 Vt. 450, 463 (2000) (quoting Agency of Natural Resources v. Glens Falls Ins. Co., 169 Vt. 426, 435 (1999)). Prejudgment interest is not appropriate in this case because the improperly withheld amount is not an item of monetary relief granted to the State. Moreover, the Defendant, not the State, would receive any interest accruing from the fund, if it had been properly established and funded. See 33 V.S.A. § 1914(b).

### Order

For the foregoing reasons:

- 1) the motion for default is granted;
- 2) the State shall prepare a proposed Judgment Order and Decree.

Dated at Montpelier, Vermont this ~~20~~<sup>27</sup> day of May, 2003.



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Mary M. Teachout  
Superior Court Judge