

Identification of Unlicensed Transportation of Tobacco

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Objectives: It is necessary to unify the subjective and objective factors to determine that the unlicensed transportation of tobacco constitutes the crime of illegal business operation, which objectively has the elements of serious circumstances and subjectively has the elements of "clearly knowing". "Clearly knowing" means that the actor has subjective fault and is imputable. If there is evidence to prove that those who are entrusted to transport tobacco are "unaware" of others' unlicensed business activities, they should carefully identify unlicensed tobacco transport activities as illegal business activities, and it is more in line with the principle of unification of subjectivity and objectivity. Unlicensed tobacco transportation seized in transit should be deemed as attempted illegal business operation.

Key words: tobacco transportation; illegal operation; subjective elements; attempted crime

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Tobacco controls in different countries all develop with the gradual awareness of the harm of tobacco. On May 24, 1999, in order to eliminate the harms of tobacco on mankind, the World Health Organization (WHO) Assembly concluded a convention on tobacco control.¹ when tobacco retailers are closed, tobacco users may be more likely to quit and /or reduce use compared to when retailers are open.² Continued surveillance and renewed regulatory efforts are warranted.³ Our country exercises a system of tobacco monopoly. Article 21 of the Tobacco Monopoly Law of the People's Republic of China stipulates that "the carrier of the consigned or self-transported tobacco monopoly products must hold the transportation license issued by the department of tobacco monopoly administration or an agency authorized by the department of tobacco monopoly administration; without the license, the carrier shall not carry the goods. However, the law does not clearly stipulate whether those who transport without a license should be investigated for criminal responsibility if the

circumstances are serious. The Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Specific Application of Laws in Handling Criminal Cases of Illegal Production and Sale of Tobacco Monopoly Products stipulates: "Anyone who violates national laws and regulations on tobacco monopoly management or has no permission of the tobacco monopoly administrative department, license certificates of tobacco monopoly production enterprise license, tobacco monopoly wholesale enterprise license, special tobacco monopoly operation enterprise license and tobacco monopoly retail license shall be guilty of illegal operation in accordance with Article 225 of the Criminal Law. However, the explanation does not explicitly list the cases without tobacco transportation certificate, so there are different opinions on whether unlicensed transporting tobacco is a simple administrative illegal act or constitutes an illegal business crime in judicial practice. There is a view that unlicensed transportation should not be punished as illegal business operation.⁴ But other people may see it differently.⁵The staff engaged in the consignment and

delivery business may use express channels to illegally operate tobacco monopoly products who shall be punished as the crime of illegal business operation. To fully implement the tobacco monopoly management system and protect the legitimate rights and interests of market participants, it is necessary to accurately characterize the act of unlicensed transporting tobacco, and unify the law enforcement standards and identification standards.

METHODS

In this paper, some cases of unlicensed transportation of tobacco constituting the crime of illegal business operations are taken as the research object, and several controversial points in the identification of the behavior nature of unlicensed transportation of tobacco are analyzed. Corresponding opinions and suggestions are put forward from the aspects of legal principles, legislative purposes, subjective state of actors, objective elements, etc.

DISCUSSION

The Definition of "Unlicensed Transportation".

Article 2 of the Measures for the Administration of Transportation licenses for Tobacco Monopoly Products stipulates that tobacco monopoly products shall not be transported without transportation licenses for tobacco monopoly products. However, according to the relevant regulations and judicial practice, it is necessary to have elements of serious circumstances to constitute unlicensed transport tobacco: first, a specific quantity is reached. If the specific quantity is not reached, relevant approval documents are not required. The Notice of the State Tobacco Monopoly Bureau on Adjusting the Relevant Matters Concerning the Management of Cigarette Carrying in Different Places stipulates that the maximum limit of cigarette carrying in different places is 10,000 cigarettes per person (50 cartons). Second, the transportation spans a specific region. Article 34 of the Regulations for the Implementation of the Tobacco Monopoly

Law stipulates: "The transportation license for tobacco monopoly products shall be examined and approved and issued by the tobacco monopoly administrative department at or above the provincial level or its authorized institution. Measures for the administration of tobacco monopoly products transportation license shall be formulated by the department of tobacco monopoly administration under the State Council. Article 34 of the Regulations for the Implementation of the Tobacco Monopoly Law stipulates that "tobacco monopoly products transported across cities and counties in provinces, autonomous regions and municipalities directly under the Central Government shall be consigned or shipped by the provincial tobacco monopoly administrative department or its authorized institution." It can be seen that only the transportation of tobacco monopoly products in the administrative areas across cities and counties needs to apply for the transportation license, but there is no such provision that transportation of tobacco monopoly products between townships and towns within the jurisdiction of the county needs to apply for the transportation license.

Identification of "Clearly Knowing"

According to Article 6 of the Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Specific Application of Laws in Handling Criminal Cases of Illegal Production and Sale of Tobacco Monopoly Products, if anyone knowingly provides loans, funds, account numbers, invoices, certificates and licenses, or provides production and business premises, equipment, transportation, warehousing, storage, mailing, import and export agency and other convenient conditions, or provides production technology and cigarette formula for those committing crimes listed in Article 1 of this Interpretation, he/she shall be investigated for criminal responsibility as accomplice. In practice, most cases regard "clearly knowing" as the constitutive requirements of the crime of illegal business operations. Some judgment documents clearly state the elements of "clearly knowing" of unlicensed tobacco transportation constituting crime of illegal business operation, while some judgment documents have not made clear that. From the cases explaining "clearly knowing", the contents of "clearly

knowing" are different, such as "knowingly" providing convenient conditions such as transportation for those producing and selling fake and inferior tobacco monopoly products; "knowingly" transporting tobacco without license for transportation of tobacco monopoly products; "having not obtained the license for tobacco monopoly business and the transportation certificate for tobacco monopoly products". This paper holds that "clearly knowing" is one of the elements of the crime of illegal business operation for unlicensed tobacco transportation. After the revision of the Administrative Punishment Law, both the subjective and objective elements are needed for administrative illegal acts and criminal acts. "Clearly knowing" means that the actor has subjective faults and is imputable. It can be divided into substantive "clearly knowing" and presumed "clearly knowing". The "clearly knowing" of different actors may be different. The unlicensed seller transporting tobacco for sale under the circumstance that he/she clearly knows that tobacco is a national monopoly item but he/she has no tobacco franchise certificate or transportation license or the entrusted seller "clearly knowing" that the client does not have a tobacco franchise license and that he/she has no tobacco transportation license shall bear corresponding legal responsibilities whether he/she intentionally or negligently ignore laws and regulations. The burden of proof of "clearly knowing" should be borne by the public security and inspection organs, which should prove the actor's subjective state by building a complete chain of evidence.

Identification of "not Clearly Knowing".

The logic of unlicensed transportation with "clearly knowing" is clear, but there are many controversies about unlicensed transportation without "clearly knowing", especially how to identify the "not clearly knowing" of the consigned transporters. In practice, some parties to the case defend that they are entrusted to transport and are not clear about the real situation of the transported goods and they have no intentio

n of illegally operating tobacco. Some judicial organs have not demonstrated the subjective fault of the parties, but directly determined that the actor constitutes the crime of illegal operation according to the transport behavior of the actor. To accurately characterize the entrusted behavior, it is necessary to clarify the relationship between transportation and operation. Some people think that illegal operation is a compound behavior, including acquisition, storage, processing, transportation, wholesale and other links. When the actor completes any link, it will affect market system stability and order, which is regarded as the completion of illegal operation. There are also views that the act of transporting tobacco itself is a separate business act.

This paper holds that it is necessary to closely follow subjective elements to characterize the behavior of entrusted tobacco transportation, that is, whether it is a "clearly knowing". If there is evidence that the transportation actor "does not clearly know" about other people's unlicensed operation, the unlicensed tobacco transportation should be prudently regarded as an illegal operation crime, and it is more in line with the principle of unification of subjectivity and objectivity to regard it as an administrative illegal action. The reasons are as follows: first, the entrusted transportation behavior without "clearly knowing" is usually not aimed at obtaining tobacco business income; second, the transportation of tobacco as a separate type of illegal business is not clearly stipulated by the superior law. The illegal business activities listed in the judicial interpretation of tobacco monopoly are mainly production and sales, and there is no superior law that can make an expanded explanation. Third, after arresting some unlicensed tobacco transporters, their clients have not been brought to justice, and the transporters were directly identified as accomplices in the crime of illegal business operation, which may lead to unclear basic facts. In practice, there are cases in which the transporter is not guilty because of the change of the determination of the client's behavior.

Identification of "Attempted Crime"

There are different opinions on whether the unlicensed tobacco transportation seized by the public security organs in transit constitutes an attempted crime of illegal business operation. In some cases, it is

an attempted crime because it is found by the public security organs in transit but fails due to reasons other than its will. However, there are also cases where people are caught when carrying out the act of transporting tobacco without a license for transporting tobacco monopoly products. Such acts have already met the statutory elements of the crime of illegal business operation, and do not conform to the legal provisions on attempted crimes. In this paper, it is considered that the seizure of unlicensed tobacco in transit should be regarded as the attempted crime of illegal business operation. Referring to Article 2 of Interpretation of Several Issues Concerning Specific Application of Laws in Handling Criminal Cases of Producing and Selling Fake and Inferior Commodities by the Supreme People's Court and the Supreme People's Procuratorate, "if the fake and inferior products have not been sold, but the value of goods reaches more than three times the sales amount stipulated in Article 140 of the Criminal Law, the production and sale of fake and inferior products (attempted) shall be punished by conviction", the tobacco transportation behavior seized should not be regarded as a completed crime because it has not yet affected the market or consumers and there is no substantial "operation".

CONCLUSIONS

It is necessary to strict control tobacco over the country. As a special monopoly commodity, unlicensed tobacco transportation should be absolutely forbidden. The significance of system and regulation lies in better liberating and developing production, accurately characterizing administrative illegal acts and criminal acts, and accurately combating tobacco illegal acts, which is an important guarantee for promoting the implementation of tobacco monopoly system.

Author Declaration

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