

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2006-08-08-07 (NON-PRECEDENTIAL)
ID: P-06-051-H
DATE: AUGUST 8, 2006
DISPOSITION: DENIED
TAX TYPE: CIGARETTE
APPEAL: NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROTESTANT appears pro se.¹ The Excise Tax Section, Audit Division (“Division”), Oklahoma Tax Commission, appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On March 13, 2006, the protest file was received by this office for further proceedings consistent with the Uniform Tax Procedure Code² and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.³ On March 15, 2006, a letter was mailed to the Protestant stating that this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-06-051-H. The letter also advised the Protestant that a Notice of Prehearing Conference would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Oklahoma Tax Commission*. On March 31, 2006, the Notice of Prehearing Conference was mailed to the last known address of the Protestant, setting the prehearing conference for April 25, 2006, at 11:00 a.m.⁴

The prehearing conference was held as scheduled on April 25, 2006, at 11:00 a.m. The Protestant did not appear and the Protestant did not request an oral hearing in his protest. On April 26, 2006, the Prehearing Conference Order was mailed to the parties advising that the Division was to file a verified response no later than thirty (30) days from the day of the order.

On May 26, 2006, the Division filed its Verified Response. The verification attached to the response was duly sworn under oath, on behalf of the Division, by AUDITOR, Auditor

¹ “**pro se**” (proh **say or see**), *adv. & adj.* [Latin] For oneself; on one's own behalf; without a lawyer <the defendant proceeded pro se> <a pro se defendant>. -- Also termed *pro persona*; *in propria persona*; *propria persona*; *pro per*. See PROPRIA PERSONA. BLACK’S LAW DICTIONARY (8th ed. 2004), available at <http://westlaw.com>. (March 16, 2006).

² OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

³ OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

⁴ OKLA. STAT. ANN. tit. 68, § 208 (West 2001). The notice was mailed to the Protestant at the following addresses:

9999 BOGUS STREET, METROPOLIS, Kansas 12345
123 FAKE STREET, BIG CITY, Oklahoma 12345

Supervisor, Excise Tax Section, Audit Division, Oklahoma Tax Commission.⁵ The Protestant did not file a response. The record was closed and this matter was submitted for decision on May 31, 2006.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, and the Division's Verified Response, the undersigned finds:

1. The Protestant purchased cigarettes from ONLINE STORE, an out-of-state internet/mail order cigarette retailer, as follows, to-wit:

Invoice No.	Invoice Date	Brand	No. of Cartons
OT000190106 ⁶	10/06/05	KINGSLEY LT 100 SP	10
Total			10

2. Oklahoma Cigarette Tax Stamps⁷ were not purchased and affixed to the cigarettes by ONLINE STORE and Cigarette Tax ("ACX") was not collected by ONLINE STORE or remitted by the Protestant at the time the purchases took place.⁸ The Protestant did not possess an Oklahoma Cigarette License at the time of the purchases.

3. The Protestant purchased the cigarettes from ONLINE STORE by Visa and the cigarettes were delivered to the Protestant via the United States Postal Service ("USPS") at 123 FAKE STREET, BIG CITY, Oklahoma 12345.⁹

⁵ See OKLA. ADMIN. CODE § 710:1-5-28(c).

⁶ Division's Exhibit B.

⁷ OKLA. STAT. ANN. tit. 68, § 301(8) (West Supp. 2006):

The term "stamp" as herein used shall mean the stamp or stamps by use of which:

- a. the tax levied pursuant to the provisions of Section 301 et seq. of this title is paid,
- b. the tax levied pursuant to the provisions of Section 349 of this title is paid, or
- c. the payment in lieu of tax authorized pursuant to a compact entered into by the State of Oklahoma and a federally recognized Indian tribe or nation pursuant to the provisions of subsection C of Section 346 of this title is paid.

⁸ Division's Exhibit B. At the bottom of the ONLINE STORE invoice appears the following:

As part of the TRIBAL NATION, we are currently not required to collect state sales tax for products sold on Native land. Nonetheless, we are required under federal law to report all sales and shipments of cigarettes to the state taxing authority within your home state. *You should contact the taxing authority within your state to determine your tax obligation on the use of these products within your state.* (Emphasis added.)

⁹ Division's Exhibit B.

4. On January 17, 2006, the Division issued a proposed ACX assessment¹⁰ against the Protestant for the purchase of cigarettes from ONLINE STORE on October 6, 2005 (“Audit Period”), as follows, to-wit:

ACX Due	\$103.00
Interest through 03/17/06	6.67
Tax & Interest due within 60 Days:	\$109.67
Penalty @ 10%	10.30
Tax, Interest & Penalty due after 60 Days:	\$119.97

5. The proposed ACX assessment is based upon information provided to the Division pursuant to the provisions of the “Jenkins Act.”¹¹

6. On February 20, 2006, the Division received a timely protest to the proposed ACX assessment.¹²

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.¹³

¹⁰ Division’s Exhibit A. *See* Division’s Exhibit B. *See also* Division’s Exhibit C, the Division’s audit work papers for the proposed ACX assessment. Each of the ten (10) cartons purchased by the Protestant was taxed at the rate of \$10.30 per carton in accordance with the Act.

The proposed ACX assessment also advises the Protestant that Oklahoma Use Tax is due on the purchases (Before January 1, 2005) and, if the Protestant has not already paid Oklahoma Use Tax on his Oklahoma Income Tax form, to complete the enclosed Oklahoma Use Tax Form and submit the remittance as instructed by the form.

See OKLA. STAT. ANN. tit. 68, § 1355(11) (West Supp. 2006):

Effective January 1, 2005, sales of cigarettes on which the tax levied in Section 301 et seq. of this title or tobacco products on which the tax levied in Section 401 et seq. of this title has been paid.

See also OKLA. STAT. ANN. tit. 68, § 1404(4) (West 2001):

The provisions of Section 1401 et seq. of this title shall not apply:

...

4. In respect to the use of tangible personal property now specifically exempted from taxation under Oklahoma Sales Tax Code;

¹¹ 15 U.S.C.A. § 375 et seq.

¹² Division’s Exhibit D. The Protestant states that because he ordered the cigarettes in METROPOLIS, Kansas (Home Residence), but had the purchase delivered to his apartment in BIG CITY, Oklahoma (Work Location Residence), that no ACX is due to the State of Oklahoma.

¹³ OKLA. STAT. ANN. tit. 68, § 221 (West Supp. 2006).

2. The Oklahoma Cigarette Tax Stamp Act¹⁴ (“Act”) imposes a tax upon any unlicensed consumer¹⁵ who buys directly from any distributor, jobber, manufacturer, warehouseman, or wholesaler, or other person, within or without the State of Oklahoma any cigarettes in excess of forty (40), at any one time to which are not affixed the stamps required by the Act.¹⁶ The Protestant purchased in excess of forty (40) cigarettes from ONLINE STORE, which were unstamped.

3. For purposes of the Act, any sale of cigarettes to an individual in Oklahoma shall be treated as a sale to a consumer unless such individual is licensed as a distributor or retailer of cigarettes by the Tax Commission.¹⁷ The Protestant did not hold a license at the time of the purchases.

¹⁴ OKLA. STAT. ANN. tit. 68, § 301 et seq. (West 2001). The purpose of the tax is to provide revenue for the expense of the state government. *See* OKLA. STAT. ANN. tit. 68, § 303 (West 2001).

¹⁵ OKLA. STAT. ANN. tit. 68, § 301(5) (West Supp. 2006) states:

The term “consumer” is defined to be a person who receives or who in any way comes into possession of cigarettes for the purpose of consuming them, giving them away, or disposing of them in a way other than by sale, barter or exchange.

¹⁶ OKLA. STAT. ANN. tit. 68, § 305(C) (West Supp. 2006) states:

Any unlicensed consumer who buys direct from any distributor, jobber, manufacturer, warehouseman, or wholesaler, or other person, within or without this state, any cigarettes in excess of forty, at any one time to which are not affixed the stamps required by Section 301 et seq. of this title shall, before purchasing such cigarettes, secure from the Tax Commission a written license and shall pay therefor an annual fee of Twenty-five Dollars (\$25.00), and shall immediately, upon the receipt of any unstamped cigarettes, report the same to the Tax Commission on such forms as the Tax Commission may prescribe, and immediately purchase from the Tax Commission proper stamps and attach the same to all such cigarettes received. It shall be unlawful for any person to sell or consume cigarettes on which the tax, as levied by Section 301 et seq. of this title, has not been paid, and which are not contained in packages to which are securely affixed the stamps evidencing payment of the tax imposed by Section 301 et seq. of this title.

¹⁷ OKLA. STAT. ANN. tit. 68, § 301(13) (West Supp. 2006) in pertinent part states:

a. The term “delivery sale” means any sale of cigarettes to a consumer in Oklahoma where either:

- (1) the purchaser submits the order for such sale by means of a telephonic or other method of voice transmission, the mails or any other delivery service, or the Internet or other online service, or
- (2) the cigarettes are delivered by use of the mails or other delivery service.

...

d. For purposes of this paragraph, any sale of cigarettes to an individual in Oklahoma shall be treated as a sale to a consumer unless such individual is licensed as a distributor or retailer of cigarettes by the Tax Commission;

OKLA. STAT. ANN. tit. 68, § 301(14) (West Supp. 2006) states that “[t]he term ‘delivery service’ means any person, including but not limited to the United States Postal Service, that is engaged in the commercial delivery of letters, packages, or other containers;”

4. In cases where no monthly reports are filed as required by the Act, the Tax Commission may, by using any information available to it, determine the amount of tax due and propose to assess it against the person liable.¹⁸ There were no monthly reports filed on the purchases made by the Protestant from ONLINE STORE.

5. The Act imposes a tax on a carton of cigarettes at the rate Ten Dollars and Thirty Cents (\$10.30).¹⁹ The Protestant purchased ten (10) cartons of cigarettes from ONLINE STORE during the Audit Period, resulting in the proposed assessment of ACX in the total amount of \$103.00, excluding penalty and interest.²⁰

6. If any tax imposed by Oklahoma Law is not paid before the tax becomes delinquent, interest at the rate of one and one-quarter percent (1¼ %) per month or fifteen percent (15%) per annum shall be collected from the date of the delinquency until paid.²¹

7. If the tax and interest proposed by an assessment is not paid within sixty (60) days of the mailing of the proposed assessment, a penalty of ten percent (10%) shall be added thereto and collected and paid.²²

8. If, upon examination of invoices or from other investigations, the Tax Commission finds that cigarettes have been sold without stamps affixed as required by the Act, and the Protestant is unable to furnish evidence of sufficient stamp purchases to cover unstamped cigarettes purchased, the prima facie presumption shall arise that such cigarettes were sold without proper stamps being affixed thereto.²³

¹⁸ OKLA. STAT. ANN. tit. 68, § 221(A) (West Supp. 2006).

¹⁹ The Administrative Law Judge is taking judicial notice that a “mill” is equal to \$0.001 for the purpose of completing the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (2004).

See OKLA. STAT. ANN. tit. 68, §§ 302 (4 mills per cigarette), 302-1 (2.5 mills per cigarette), 302-2 (2.5 mills per cigarette), 302-4 (2.5 mills per cigarette), and 302-5 (40 mills per cigarette) (West 2001), for a total of Fifty-one and One-half (51.5) mills per cigarette or \$0.0515 per cigarette. A pack of cigarettes contains 20 cigarettes and a carton contains 10 packs. 200 cigarettes times \$0.0515 equals \$10.30 in cigarette tax per carton. Ten (10) cartons times \$10.30 equals \$103.00.

²⁰ *See* Division’s Exhibits A through C.

²¹ OKLA. STAT. ANN. tit. 68, § 217(A) (West Supp. 2006).

²² OKLA. STAT. ANN. tit. 68, § 217(D) (West Supp. 2006).

²³ OKLA. STAT. ANN. tit. 68, § 305(D) (West Supp. 2006):

If, upon examination of invoices or from other investigations, the Tax Commission finds that cigarettes have been sold without stamps affixed as required by Section 301 et seq. of this title, the Tax Commission shall have the power to require such person to pay to the Tax Commission a sum equal to twice the amount of the tax due. If under the same circumstances, a person is unable to furnish evidence to the Tax Commission of sufficient stamp purchases to cover unstamped cigarettes purchased, the prima facie presumption shall arise that such cigarettes were sold without proper stamps being affixed thereto.

9. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.²⁴

10. The Protestant has failed to produce any evidence and has cited no authority that the proposed ACX assessment for the purchase of cigarettes during the Audit Period is incorrect, or that the sum is not due and owing.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION based upon the specific facts and circumstances of this case that the protest to the proposed ACX assessment during the Audit Period should be denied.

It is further ORDERED that the total amount of ACX and penalty assessed for the Audit Period be fixed as the Protestant's deficiency and that those amounts be determined as due and owing, including interest, accrued and accruing.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are generally applicable or are limited in time and/or effect. Non-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.

²⁴ See *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.