

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2007-02-08-02 (Non-Precedential)
ID: P-06-175-H
DATE: FEBRUARY 8, 2007
DISPOSITION: DENIED
TAX TYPE: CIGARETTE
APPEAL: NONE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

PROCEDURAL HISTORY

On October 6, 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 October 10, 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-06-175-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 October 24, 2006, the Notice of Prehearing Conference was mailed to the last known address of the Protestant, setting the prehearing conference for November 15, 2006, at 11:00 a.m.⁴

The prehearing conference was held as scheduled. The Protestant did not appear in person or by telephone. On November 16, 2006, the Prehearing Conference Order was mailed to the parties advising that this matter would be closed and the case submitted for decision on the merits upon receipt from the Division of a verified response.

On December 18, 2006, the Division’s Verified Response was filed with the verification attached to the response being duly sworn under oath, on behalf of the Division, by SUPERVISOR, Audit Supervisor, Excise Tax Section of the Audit Division, Oklahoma Tax

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 (June 11, 2005).

⁴ OKLA. STAT. ANN. tit. 68, § 208 (West 2001). The notice was mailed to the Protestant at PROTESTANT’S ADDRESS.

Commission.⁵ The Protestant did not respond to the Division's Verified Response. On December 19, 2006, the record in this matter was closed and the case submitted for decision.

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. On July 24, 2006, the Division issued the *first* proposed ACX assessment⁶ against the Protestant for the purchase of cigarettes from ONLINE STORE during *May 2006*, as follows, to-wit:

| | |
|--|---------|
| ACX Due | \$51.50 |
| Interest through 09/24/06 | 2.85 |
| Tax & Interest due within 60 Days: | \$54.35 |
| Penalty @ 10% | 5.15 |
| Tax, Interest & Penalty due after 60 Days: | \$59.50 |

2. The Protestant paid the proposed ACX in full by Check No. 1870 in the amount of \$51.50.⁷

3. 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 |
|--------------------------|--------------|------------------|----------------|
| SS001087606 ⁸ | 06/16/06 | NATIVE FF 100 SP | 2 |
| SS001114455 ⁹ | 07/05/06 | NATIVE FF 100 SP | 3 |
| Total | | | 5 |

4. Oklahoma Cigarette Tax Stamps¹⁰ were not purchased and affixed to the cigarettes by ONLINE STORE and Cigarette Excise Tax ("ACX") was not collected by ONLINE STORE or

⁵ See OKLA. ADMIN. CODE § 710:1-5-28(c) (June 25, 1999).

⁶ Referred to as Division's Exhibit A. A copy of the assessment was not attached to the Division's Verified Response, but is contained in the Court File.

⁷ On October 16, 2006, a letter was received by this office from the Protestant, which stated that he had already paid the tax portion of the proposed assessment. The Protestant paid the ACX on the July 24, 2006, assessment, not the proposed assessment dated August 23, 2006.

⁸ Division's Exhibit C.

⁹ Division's Exhibit D.

¹⁰ 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,

remitted by the Protestant at the time the purchases took place.¹¹ The Protestant did not possess an Oklahoma Cigarette License at the time of the purchases.

5. The Protestant purchased the cigarettes from ONLINE STORE by VISAE and the cigarettes were delivered to the Protestant via S-USPS at PROTESTANT'S ADDRESS.¹²

6. On August 23, 2006, the Division issued a *second* proposed ACX assessment¹³ against the Protestant for the purchase of cigarettes from ONLINE STORE on *June 16, 2006*, and *July 05, 2006*, as follows, to-wit:

| | |
|--|---------|
| ACX Due | \$51.50 |
| Interest through 10/23/06 | 2.50 |
| Tax & Interest due within 60 Days: | \$54.00 |
| Penalty @ 10% | 5.15 |
| Tax, Interest & Penalty due after 60 Days: | \$59.15 |

7. The proposed ACX assessment is based upon information provided to the Division pursuant to the provisions of the "Jenkins Act."¹⁴

8. The Division received a timely filed letter of protest to the proposed ACX assessment dated August 23, 2006.¹⁵

-
- b. the tax levied pursuant to the provisions of Section 349 of this title is paid, or
 - c. the payment in lieu of taxes 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.

¹¹ Division's Exhibit C and Exhibit D. At the bottom of each ONLINE STORE invoice appears the following:

Tobacco sales to minors are illegal. We sell and deliver tobacco only to customers 21 years of age or older with verifiable proof of age. Tobacco sales are taxable in most localities. We are not required to collect taxes from our customers. The purchaser is responsible for payment of any state, local or excise taxes, so please contact your state government for information on remitting any taxes on reported sales. Refer to our website (www.ONLINESTORE.com) for additional information. [Emphasis added.]

¹² Division's Exhibits C through D.

¹³ Division's Exhibit B. *See* Division's Exhibits C and D. *See also* Division's Exhibit E, the Division's work papers for the proposed ACX assessment. Each of the five (5) cartons purchased by the Protestant was taxed at the rate of \$10.30 per carton in accordance with the Act.

¹⁴ 15 U.S.C.A. § 375 et seq.

¹⁵ The Division's Verified Response refers to the protest as Division's Exhibit F. The exhibit is not attached to the response, but a copy of the protest is contained in the court file.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.¹⁶

2. The Oklahoma Cigarette Tax Stamp Act¹⁷ (“Act”) imposes a tax upon any unlicensed consumer¹⁸ 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.¹⁹ The Protestant purchased in excess of forty (40) cigarettes, at any one time from ONLINE STORE, which were unstamped as required by the Act.

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.²⁰ The Protestant did not hold a license at the time of the purchases.

¹⁶ OKLA. STAT. ANN. tit. 68, § 221 (West Supp. 2006).

¹⁷ 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).

¹⁸ 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.

¹⁹ 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.

²⁰ 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

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.²¹ 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 of Ten Dollars and Thirty Cents (\$10.30).²² The Protestant purchased five (5) cartons of cigarettes from ONLINE STORE on June 16, 2006, and July 5, 2006 (“Audit Period”), resulting in the proposed assessment of ACX in the total amount of \$51.50, excluding penalty and interest.²³

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.²⁴

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.²⁵

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

(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;”

²¹ OKLA. STAT. ANN. tit. 68, § 221(A) (West Supp. 2006).

²² 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 (June 25, 1999).

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) (West 2001), and 302-5 (40 mills per cigarette) (West Supp. 2006), 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. Five (5) cartons times \$10.30 equals \$51.50 in ACX.

²³ *See* Division’s Exhibit B. *See also* Division’s Exhibits C through E.

²⁴ OKLA. STAT. ANN. tit. 68, § 217(A) (West Supp. 2006).

²⁵ OKLA. STAT. ANN. tit. 68, § 217(D) (West Supp. 2006).

cigarettes purchased, the prima facie presumption shall arise that such cigarettes were sold without proper stamps being affixed thereto.²⁶

9. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.²⁷

10. The Protestant has failed to produce any evidence and has cited no authority that the proposed ACX assessment dated August 23, 2006, for the purchases 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 dated August 23, 2006, 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.

²⁶ 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.

²⁷ See *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.