

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2006-10-10-06 (Non-Precedential)
ID: P-06-078-K
DATE: OCTOBER 10, 2006
DISPOSITION: DENIED
TAX TYPE: SALES
APPEAL: NONE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATEMENT OF THE CASE

A field audit utilizing the depletion method was conducted by the Division on Protestant's available purchase and sales records and the sales records of Protestant's wholesalers of liquor, wine and beer (WHOLESALE 1 and WHOLESALE 2) for the period of January 1, 2003 through December 31, 2005. As a result of the audit, the Division by letter dated March 10, 2006, proposed the assessment of sales tax, interest and penalty against Protestant. Protestant timely protested the assessment by letter received March 28, 2006.¹ The letter of protest was not verified and a hearing on the protest was not requested therein.²

On May 4, 2006, the protest was referred to the Office of the Administrative Law Judges ("ALJ's Office") for further proceedings consistent with the Uniform Tax Procedure Code³ and the Rules of Practice and Procedure before the Oklahoma Tax Commission⁴. The protest was docketed as Case No. P-06-078-K and assigned to ALJ, Administrative Law Judge.⁵

A pre-hearing conference was scheduled for June 28, 2006, by *Prehearing Conference Notice* issued May 24, 2006.⁶ The pre-hearing conference was held as scheduled. Protestant neither appeared at the conference nor responded to the *Notice*. By correspondence faxed June 26, 2006, to the representative of the Division, Protestant submitted additional information in support of the protest. The faxed correspondence was not verified. By letter dated June 29, 2006, the parties were notified that the record in this cause would be closed and the case submitted for decision upon the filing of a *Verified Response to Protest* by the Division.⁷ Protestant did not respond to this notice.

¹ Rule 710:1-5-22(a) of the *Oklahoma Administrative Code* ("OAC").

² OAC, 710:1-5-22(a), 710:1-5-23 and 710:1-5-25(6).

³ 68 O.S. 2001, § 201 et seq.

⁴ OAC, 710:1-5-20 through 710:1-5-47.

⁵ OAC, 710:1-5-22(b).

⁶ OAC, 710:1-5-28(a).

⁷ OAC, 710:1-5-28(c).

The *Division's Verified Response* was filed July 6, 2006. Attached to the *Response* were Exhibits A through G. Protestant did not file a response to the *Division's Verified Response*.⁸ The record in this cause was closed and the case submitted for decision on August 1, 2006.⁹

FINDINGS OF FACT

Upon review of the file and records, including the *Division's Verified Response* and Exhibits attached thereto, the undersigned finds:

1. Protestant is the owner of and does business as LIQUOR STORE, a retail liquor store located in SMALL TOWN, Oklahoma. Exhibit A.¹⁰

2. Protestant operates his business under sales tax permit number XXX issued June 25, 2001. Exhibit A.

3. A field audit utilizing the depletion method was conducted by the Division's auditor on Protestant's available purchase and sales records for the period of January, 2003 through and including December, 2005. Exhibits B¹¹, D¹² and F¹³.

4. During the audit period, Protestant purchased liquor and wine exclusively from WHOLESALER 1 of ANYTOWN, Oklahoma, and strong beer exclusively from WHOLESALER 2 of ANYTOWN, Oklahoma. Exhibit D, Page 2.

5. Protestant did not provide beginning or ending inventories for the depletion audit and did not keep detailed sales records during the audit period. Paragraph 3 of the Statement of Facts, *Division's Verified Response*.

6. Protestant provided his price mark-ups for spirits, wine and strong beer. Spirits price mark-ups were 35% for .200 ml bottles, 30% for .375 ml bottles, 25% for .750 ml bottles, 20% for 1 liter bottles and 15% for 1.75 liter bottles. Protestant also advised that he sold cases of spirits at \$10.00 over the case price of the spirits. Wine price mark-ups were 30% for .375 ml bottles, 25% for .750 ml bottles, 20% for 1 liter bottles and 15% for 5.0 liter boxes. Strong beer price mark-ups were 15% for 12 oz., 16 oz. and 24 oz. cans and bottles. Exhibit B.

⁸ See, Note 7.

⁹ OAC, 710:1-5-39(a).

¹⁰ Business Registration filed with the Tax Commission on June 10, 2001.

¹¹ Oklahoma Tax Commission, Audit Division, Records Request.

¹² Consisting of two (2) pages, inclusive of "Reported Sales Workpaper" and "Comparison of Expected Sales with Reported Sales."

¹³ Oklahoma Tax Commission/Audit Division, Field Audit Report – Posting and Assessment Sheet, inclusive of an Addendum to Field Audit Write up prepared June 16, 2006.

7. The Division's auditor allowed a straight average mark-up of 20% for all products sold despite the fact that 98% of Protestant's total purchases during the audit period were spirits and wine and the calculated average mark-up for spirits and wine is 24%. Exhibits B and D.

8. The Division's records reflect that Protestant filed sales tax reports and remitted the amount due from said reports for all months of the audit period except August, 2005; October, 2005; and December, 2005.¹⁴ Exhibits C¹⁵ and F.

9. The auditor compared Protestant's reported sales to Protestant's purchases of spirits, wines and beers which records were provided by WHOLESALER 1 and WHOLESALER 2, multiplied Protestant's purchases by the average mark-up of 20% and originally determined that Protestant had under-reported sales of \$21,596.60 for 2003; \$68,844.80 for 2004; and \$27,950.09 for 2005, for a total of \$118,391.49. Exhibit D.

10. After Protestant filed his sales tax reports for the months of September and November, 2005, the under-reported sales for 2005 were revised to an amount of \$27,621.15, for a total of under-reported sales of \$118,062.55 for the audit period. Exhibit F.

11. Sales tax was assessed on the revised under-reported sales of \$118,062.55 for the audit period and the amounts of \$9,986.94, \$11,136.45 and \$14,987.97 as reflected on Protestant's sales records for the delinquent months of August, October and December, 2005; respectively, for a total amount of unreported sales for the audit period of \$154,173.91. Exhibit F.

12. As a result of the audit, the Division by letter dated March 10, 2006, proposed the assessment of sales tax, interest and penalty against Protestant. Exhibit E.¹⁶

13. Protestant timely protested the assessment by letter received March 28, 2006. Exhibit E.

14. The amount in controversy as revised and exclusive of interest accrued subsequent to June 30, 2006, is \$17,658.49, inclusive of tax of \$13,681.62, interest accrued through June 30, 2006, of \$2,608.72 and penalty of \$1,368.15. Exhibit F.

15. On June 26, 2006, Protestant submitted a list consisting of four pages which Protestant asserts are case sales of spirits and wine that were sold at \$10.00 over cost. Exhibit G. This submission was not verified by Protestant.

¹⁴ Reports for the months of September and November, 2005 were filed after the audit was completed.

¹⁵ Copies of Protestant's sales tax reports.

¹⁶ Consisting of three pages; Letter of proposed assessment, protest letter and copy of the envelope in which the protest letter was forwarded.

ISSUE AND CONTENTIONS

The issue presented for decision is whether Protestant sustained his burden of proving that the proposed sales tax assessment is incorrect in any respect.

Protestant contends that the proposed assessment is incorrect in that the Division did not take into account case sales of spirits and wine. In support of this contention, Protestant argues that the Division erred in assessing sales tax on his entire inventory of spirits and wine available for sales at the bottle price times 20% when he had several case sales of spirits and wines at \$10.00 above cost.

The Division contends that Protestant's protest to the proposed sales tax assessment should be denied and that the revised amount in controversy inclusive of any additional accrued and accruing interest should be fixed as the deficiency due and owing by Protestant for the audit period. In support of this contention, the Division argues that because Protestant failed to keep and maintain adequate records of his sales transaction; specifically the case sales, his allegation of error can not be sustained.

CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter of law that:

1. The Tax Commission is vested with jurisdiction over the parties and the subject matter of this action. 68 O.S. Supp. 2002, § 221(D).

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Code").¹⁷ An excise tax is levied upon the gross receipts or gross proceeds of all sales, not otherwise exempted by the Code. 68 O.S. 2001, § 1354(A). Incorporated cities, towns, and counties are authorized to levy taxes as the Legislature may levy for purposes of state government, including a consumer sales tax. 68 O.S. 2001, §§ 2701 et seq. and 1370 et seq., as amended.

3. The sale¹⁸ of "[f]ood, confections, and all drinks sold or dispensed by hotels, restaurants, or other dispensers, and sold for immediate consumption upon the premises or delivered or carried away from the premises for consumption elsewhere is expressly made subject to sales tax. 68 O.S. 2001, § 1354(A)(9). *See, OAC, 710:65-19-5(a)* which provides:

Persons selling alcoholic beverages to purchasers for use or consumption are required to remit sales tax to the Commission upon the total retail value from such sales, pursuant to *OAC, 710:20-5-4*, notwithstanding the fact that manufacturers and

¹⁷ 68 O.S. 2001, § 1350 et seq.

¹⁸ Defined to mean "the transfer of either title or possession of tangible personal property for a valuable consideration regardless of the manner, method, instrumentality, or device by which the transfer is accomplished in this state". 68 O.S. 2001, § 1352(15); renumbered § 1352(21) by Laws 2003, c. 413, § 1, eff. Nov. 1, 2003.

importing distributors of alcoholic beverages are required to pay certain taxes.

4. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect, and in what respect. OAC, 710:1-5-47. See, *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission*, 1988 OK 91, 768 P.2d 359. In sales tax matters, “[t]he burden of proving that a sale was not a taxable sale shall be upon the person who made the sale.” 68 O.S. 2001, § 1365(E). See, *Dunn v. State ex rel. Oklahoma Tax Commission*, 1993 OK CIV APP 105, 862 P.2d 1285. Section 1365(E) further provides in pertinent part:

It shall be the duty of every tax remitter required to make a sales tax report and pay any tax under [the Code] to keep and preserve suitable records of the gross daily sales together with invoices of purchases and sales, bills of lading, bills of sale and other pertinent records and documents which may be necessary to determine the amount of tax due hereunder and such other records of goods, wares and merchandise, and other subjects of taxation under [the Code] as will substantiate and prove the accuracy of such returns. * * * All such records shall remain in Oklahoma and be preserved for a period of three (3) years, unless the Tax Commission, in writing, has authorized their destruction or disposal at an earlier date, and shall be open to examination at any time by the Tax Commission or by any of its duly authorized agents.

See, *Kifer v. Oklahoma Tax Commission*, 1998 OK CIV APP 34, 956 P.2d 162

5. In administrative proceedings, the burden of proof standard is “preponderance of evidence.” 2 Am.Jur.2d *Administrative Law* § 357. See, Oklahoma Tax Commission Order No. 91-10-17-061. “Preponderance of evidence” means “[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black’s Law Dictionary 1064 (5th ed. 1979). It is also defined to mean “evidence which is more credible and convincing to the mind * * * [T]hat which best accords with reason and probability.” *Id.*

6. Here, Protestant failed to establish by any competent, relevant or material evidence the error alleged to have been committed by the Division. Although, Protestant submitted a four (4) page listing of case sales of spirits and wines, Protestant obviously did not provide the best evidence of said sales; i.e., the source documentation of the list. Also, Protestant alleges that cases of spirits and wine were sold at \$10.00 above cost; however, Protestant has not submitted any evidence whatsoever to establish this fact. Further, the undersigned finds that the auditor’s use of an average mark-up of 20% for spirits and wine rather than the calculated average of approximately 24% more than likely compensates Protestant for the lack of accounting for case sales, if any, in the audit and assessment.

7. Protestant’s protest to the proposed sales tax assessment should be and the same is hereby denied.

DISPOSITION

THEREFORE, based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestant, OWNER d/b/a LIQUOR STORE, be denied. It is further ORDERED that the amounts in controversy, inclusive of any additional accrued and accruing penalty and interest, be respectively fixed as the deficiencies due and owing.

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.