JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **98-07-30-007 / NOT PRECEDENTIAL**
ID: **P9800026**
DATE: **07-30-98**
DISPOSITION: **SUSTAINED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. PROTESTANTS, registered with the Tax Commission on February 26, 1996, for the purpose of engaging in the business of selling tangible personal property (bulk candy) through coin-operated vending machines, under the business name of XXX Distributors. PROTESTANTS' stated date of beginning business was March 21, 1996, and their principal business location was stated as AN ANONYMOUS LOCATION IN OKLAHOMA.

2. PROTESTANTS paid for and received decals for three coin-operated bulk vending machines. PROTESTANTS paid the fees applicable for the remaining half of the fee year ending June 30, 1996. The locations where these machines were to be located was not stated, nor is such information required on the Commission's application forms. The PROTESTANTS also paid for and received a sales tax permit.

3. At or about the time of registration, PROTESTANTS' account was assigned a SIC code number by the Commission for informational and statistical purposes, from the Standard Industrial Classification (SIC) Manual (1987), a publication of the United States Office of Management and Budget. The SIC code assigned was that of "[e]stablishments primarily engaged in the retail sale of products by means of automatic merchandising units, also referred to as vending machines."

4. PROTESTANTS operated their business from approximately March 21, 1996, until approximately May 25, 1997, at which time PROTESTANTS ceased doing business. PROTESTANTS did not make or file any sales tax reports.

5. As a result of not receiving any sales tax reports or returns from the PROTESTANTS, the Commission's Account Maintenance Division on November 21, 1997, proposed an assessment against the PROTESTANTS of sales taxes, penalty and interest, totaling $3,915.85, for the period March 21, 1996, through September 30, 1997. The amount proposed was based upon an estimated sales tax liability of $150 per month, which is equivalent to gross taxable sales of approximately $1,875.00 per month.

6. In making its estimate, the Account Maintenance Division relied solely on a mathematical average of sales tax receipts reported by all sales tax permit holders in the state who had been assigned the same SIC code as these PROTESTANTS. That group included several accounts that reported substantial monthly sales tax receipts from other than vending machine sales. The great majority of accounts in this category were vending machine-only accounts, and reported no sales tax receipts at all. Other than this computer-generated statewide list, the Account Maintenance Division made no attempt to determine PROTESTANTS' true sales tax liability.

7. PROTESTANTS filed a protest, and stated that their entire business consisted of two vending machines[1]. In their protest, PROTESTANTS alleged, but did not prove, that their total gross sales while in business amounted to approximately $300.

CONCLUSIONS OF LAW

1. In proceedings before the Tax Commission, the burden is on the taxpayer to show that the Commission's action or proposed action is incorrect, and in what manner. *Enterprise Management Consultants, Inc. v. Oklahoma Tax Comm'n*, 768 P.2d 359 (Okla. 1988); OAC 710:1-5-47. However, that action must appear to have a reasonable foundation; it cannot be arbitrary or capricious. *See, Hennessey v. Independent School Dist. No. 4, Lincoln County*, 552 P.2d 1141 (Okla. 1976) ("Administrative action must have a reasonable or rational basis if it is to avoid the stigma of arbitrariness.")

2. And, while the taxpayer has the burden of proof, that proof may come from anywhere, including the Tax Commission's own records. *See, e.g., Aetna Ins. Co. of Hartford, Conn. v. Taylor*, 86 F.2d 225, 227 (5th Cir. 1936) ("The burden of proof is satisfied by actual proof of the facts of which proof is necessary, regardless of which party introduces the evidence.") It is therefore appropriate in every protest to require the division that proposed an assessment to *fully* explain the basis for and the reason behind such proposal.

[1] Taxpayers' protest did not explain what happened to the third machine.

3. The Tax Commission may not apply an arbitrary formula or schedule in determining taxes without regard to the actual facts of the case. *Oklahoma Tax Comm'n v. First National Bank & Trust Co*., 178 Okla. 260, 62 P.2d 1220 (1936); *Fort Howard Paper Co. v. Oklahoma Tax Comm'n*, 792 P.2d 87 (Okla. App. 1989), *overruled on other grounds*, 952 P.2d 45, 51 (Okla. 1998). That is what happened here. The Account Maintenance Division proposed to assess sales tax liability against these PROTESTANTS based upon an arbitrary, computer-generated schedule that bore little or no relation to the PROTESTANTS' activities or business, and which in and of itself is essentially worthless and not supported by law.[2] The proposed assessment cannot stand.

DISPOSITION

For the reasons stated, the foregoing protest is sustained.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was **NOT** deemed precedential by the Commission. This means that the legal conclusions are not 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.

[2] This "SIC code list" purports to summarize and average the sales tax liability of persons primarily engaged in selling products through coin-operated vending machines, whereas such sales are generally exempt from sales tax. 68 O.S. 1991, § 1551; 68 O.S. Supp. 1995, § 1355(5).