

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 2003-08-20-06 / PRECEDENTIAL
ID: P0200204
DATE: 08-20-03
DISPOSITION: SUSTAINED
TAX TYPE: CIGARETTE TAX
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties stipulate to the following:

1. On October 31, 2001, PROTESTANT COMPANY took delivery of 162,000 cigarettes at its place of business located at 999 South ANY Street, ANONYMOUS, Oklahoma. At the time of delivery, the Cigarette Stamp Tax imposed by 68 O.S. §§ 301-325 had not been paid with respect to the 162,000 cigarettes.

2. On November 1, 2001, PROTESTANT COMPANY took delivery of an additional 6,000 cigarettes at its place of business. At the time of delivery, the Cigarette Stamp Tax imposed by 68 O.S. §§ 301-325 had not been paid with respect to the 6,000 cigarettes. The cigarettes delivered on 10/31/01 and 11/1/01 will be collectively referred to herein as the "Cigarettes."

3. On November 3, 2001 at approximately 1:12 a.m., PROTESTANT COMPANY'S warehouse in which the Cigarettes were stored was completely consumed by fire due to arson.

4. The Cigarettes were not sold or removed from PROTESTANT COMPANY'S warehouse prior to the fire on November 3, 2001.

5. PROTESTANT COMPANY did not pay the Cigarette Stamp Tax imposed by 68 O.S. §§ 301-325 with respect to the Cigarettes.

Additional findings:

1. That on September 27, 2002, the Division caused to be issued a proposed cigarette tax assessment against Protestant for the period of January 1, 2000 through November 2, 2001, in the amount of \$2,698.81, inclusive of tax in the amount of \$2,168.90, interest accrued through October 31, 2002, in the amount of \$313,02, and penalty in the amount of \$216.89.

2. That the assessment is based on an office audit of Protestant's records.

ISSUE AND CONTENTIONS

The issue presented for decision is whether 68 Okla. Stat. § 305(G) requires a wholesaler to pay the Cigarette Stamp Tax imposed by 68 Okla. Stat. §§ 301-325 on untaxed cigarettes that are destroyed by fire while in the wholesaler's possession.

Protestant contends that it is not liable for the tax on the cigarettes that were never used or consumed prior to being destroyed in the warehouse fire. In support of this contention, Protestant argues that the Legislature intended for the Cigarette Stamp Tax to be imposed on the "sale or use" of cigarettes in the state and that in this case, the cigarettes were destroyed by an act of arson prior to any sales and, therefore, the cigarettes were not sold or used in the state and no statutory presumption operates to deem them sold or used in the state. Protestant further argues that the destruction of untaxed cigarettes by arson is not within the scope of the tax as it is stated in Section 303.

The Division contends that Protestant had possession of the unstamped cigarettes and is, therefore, liable for the tax on said cigarettes. In support of this contention, the Division argues that the statute provides that anyone having possession of unstamped cigarettes in this state shall be liable for the tax on such cigarettes in case the same are lost or unaccounted for and that in this case, the cigarettes became "lost or unaccounted for" after the fire of Protestant's warehouse.

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. 2001, § 221(D).

2. The Cigarette Stamp Tax Act, 68 O.S. 2001, §§ 301 et seq., levies an excise tax on "the sale, use, gift, possession, or consumption of cigarettes within the State of Oklahoma". 68 O.S. 2001, §§ 302-302-4. The tax shall be paid only once on any cigarettes sold, used, received, possessed, or consumed in this state and shall be evidenced by stamps or an impression by use of a metering device. *Id.* The impact of the tax is on the vendee, user, consumer, or possessor of cigarettes in this state. *Id.*

3. The subject of the cigarette stamp tax is "[t]he sale, gift, barter, or exchange of cigarettes, or the having possession of cigarettes for consumption". (Emphasis added). 68 O.S. 2001 § 303.

4. Upon withdrawal from storage, and before making any sale or distribution of cigarettes for consumption thereof, a wholesaler shall affix or cause to be affixed thereto the stamp required by the Cigarette Stamp Tax Act. 68 O.S. 2001, § 305(A). In the event unstamped cigarettes in the possession of a wholesaler are "lost, stolen or unaccounted for, in transit, storage or otherwise", a presumption exists that the cigarettes were used and consumed in Oklahoma and the wholesaler is liable for the tax thereon. 68 O.S. 2001, § 305(G).

5. The Division argues that the facts show Protestant had possession of unstamped cigarettes, that the cigarettes while in storage became lost or unaccounted for, and therefore, Protestant is liable for the tax on such cigarettes. Protestant argues that the cigarettes are neither lost nor unaccounted for, but were destroyed by arson, and therefore, the statutory presumption is overcome by the evidence. Protestant further argues that the cigarettes are not subject to the levying language of the Act since the cigarettes were neither sold, used nor possessed for consumption.

6. Terms in a statute are given their plain and ordinary meaning, except when a contrary intention plainly appears. **Neer v. Oklahoma Tax Commission**, 1999 OK 41, 982 P.2d 1071 (Okla. 1999). **Matter of the Income Tax Protest of Ashland Exploration, Inc.**, 751 P.2d 1070 (Okla. 1988).

7. The term "lost" means "not made use of, won, or claimed", "no longer possessed" and "no longer known". *Webster's Ninth New Collegiate Dictionary* 706 (1987). "An article is 'lost' when the owner has lost the possession or custody of it, involuntarily and by any means, but more particularly by accident or his own negligence or forgetfulness, and when he is ignorant of its whereabouts or cannot recover it by an ordinarily diligent search." *Black's Law Dictionary* 852 (5th ed. 1979). The term also means "ruined or destroyed physically or morally". *Webster's*, supra.

8. Where the meaning of a word is doubtful, the rule of statutory construction known as "noscitur a sociis" may be used to ascertain the meaning of the doubtful word by reference to the meaning of words associated with it. **Application of Central Airlines**, 199 Okl. 300, 185 P.2d 919 (Okla. 1947).

9. The term "stolen" means "to take or appropriate without right or leave and with intent to keep or make use of wrongfully". *Webster's Ninth New Collegiate Dictionary* 1153 (1987). The term "unaccounted" means "not accounted" with the synonym "unexplained." *Webster's*, supra at 1282. The phrase "account for" means "to furnish a justifying analysis or explanation" and "to be the sole or primary factor." *Webster's*, supra at 50.

10. The subject matter and purpose of a statute are material to ascertaining the meaning of a word or phrase used and that language should be construed to be harmonious with the purpose of the act, rather than in a way which would defeat it. **Bishop v. Takata Corp.**, 2000 OK 71, 12 P.3d 459 (Okla. 2000).

11. Here, the undersigned finds that in each instance where an article is "lost (in its traditional sense), stolen or unaccounted for", the article still exists and a presumption may be made that the article can be used or consumed. However, where an article is destroyed it no longer exists and cannot be used or consumed. Therefore, being mindful that the purpose of the Act is to tax the consumption of cigarettes¹, that tax statutes are penal in nature² and subject to strict construction³ and that any ambiguity or doubt regarding the meaning of a taxing statute must be resolved in favor of the taxpayer⁴, the undersigned finds that the term "lost" within the context of 68 O.S. 2001, § 305(G) does not include cigarettes which are destroyed and cannot be used or consumed.

12. Protestant's protest to the proposed cigarette tax assessment should be sustained.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is DETERMINED that the protest be sustained.

OKLAHOMA TAX COMMISSION

¹ 68 O.S. 2001, § 303.

² *Globe Life and Accident Insurance Company v. Oklahoma Tax Commission*, 1996 OK 39, 913 P.2d 1322 (1996).

³ *Mid-Continent Pipeline Co. v. Crauthers*, 267 P.2d 568 (Okla. 1954).

⁴ *Samson Hydrocarbons Company v. Oklahoma Tax Commission*, 1998 OK 82, 976 P.2d 532, 536 (Okla. 1998) and *Strelecki v. Oklahoma Tax Commission*, 1993 Ok 122, 872 P.2d 910, 920 (Okla. 1996).