JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2004-08-24-19
ID: P-04-022-K
DATE: AUGUST 24, 2004
DISPOSITION: DENIED
TAX TYPE: SALES TAX
APPEAL: NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

By letter dated January 18, 2002, the Division caused to be issued a proposed assessment of sales tax, interest and penalty against Protestant for the period of April, 2000 through December, 2001. Protestant filed a timely written protest to the assessment by letter dated February 15, 2002 and received by the Division on February 18, 2002. Protestant did not request an oral hearing in the letter of protest.

The protest was inadvertently misplaced and/or "overlooked in error" by the Division. It was subsequently found on November 21, 2003, and the Division by letter dated December 2, 2003, responded to the protest. On February 17, 2004, the Division forwarded its file in this matter to the ALJ's Office for further proceedings consistent with the Uniform Tax Procedure Code[1] and the Rules of Practice and Procedure before the Oklahoma Tax Commission[2]. The case was assigned to ADMINISTRATIVE LAW JUDGE.

A *Notice of Prehearing Conference* was issued on March 2, 2004, scheduling a pre-hearing conference in this cause for April 13, 2004. Protestant responded to the *Notice* by letter dated March 6, 2004, in which Protestant requested a continuance of the conference due to medical reasons and gave "permission to discuss this business with [his] WIFE". On April 12, 2004, the parties were notified by *Notice of Prehearing Conference* that the continuance request was granted, the pre-hearing conference scheduled for April 13, 2004, was canceled and the pre-hearing conference was rescheduled for April 29, 2004.

By letter dated April 28, 2004, Protestant requested a second continuance of the pre-hearing conference due to "the fact our transportation is broke down" and WIFE was "unable to get off work". The Division objected to this continuance request because "failure to appear in person is not a valid reason." The pre-hearing conference was held as scheduled without Protestant's participation.

Notice was thereafter served on the parties that due to Protestant's failure to appear at the pre-hearing conference, the Division was directed to file a *Verified Response to Protest* on or before June 1, 2004, at which time the record would be closed and the case submitted for decision. Protestant did not respond to this notice.

The *Division's Verified Response to Protest* was filed April 29, 2004. Attached to the *Division's Response* were Exhibits A through E.

FINDINGS OF FACT

Upon review of the file and records, including the *Division's Verified Response to Protest* and attached exhibits, the undersigned finds:

1. On or about June 4, 1996, Protestant filed a Business Registration with the Tax Commission reporting that he intended to do business as BUSINESS in Bartlesville, Oklahoma with a date of first sales subject to sales/use tax in Oklahoma as August 10, 1996. Exhibit A.

2. The Business Registration indicated that the principal type of business was retail and service and that the principal taxable product or service was car parts.

3. Protestant filed sales tax reports with the Tax Commission for the periods of August, 1996 through February, 1999 and May, 1999, but failed to remit the taxes reported by the returns to the Tax Commission. Letter of the Division dated December 2, 2003 and Tax Warrant Nos. STS XXXX1 and STS XXXX2.[3]

4. The letter of December 2, 2003, also notifies Protestant that the Division has not received "reports for the estimated periods of March, 1999 through April, 1999, and June, 1999 through December, 2001 as a final report."[4]

5. By letter dated January 18, 2002, the Division caused to be issued a proposed sales tax assessment against Protestant for the period of April, 2000 through December, 2001, in the amount of $2,636.09, consisting of sales tax in the estimated amount of $2,100.00, interest accrued through March 29, 2002, in the amount of $326.09 and penalty in the amount of $210.00. Exhibit B.

6. By letter dated February 15, 2002, Protestant timely protested the proposed assessment, asserting that he disagreed with the amount assessed "until [he] can disprove [sic] or verify [the Division's] records, and [his] records." Exhibit C.

7. Protestant did not assert any errors alleged to have been committed by the audit.

8. The amount of the estimated sales tax assessed by the Division is reasonable and has a basis in fact as indicated by the amount of the sales tax reported by Protestant.

9. The Division has notified Protestant on more than one occasion of its willingness to accept actual sales tax reports for the period at issue, but none have been filed. Paragraph D of Section I of the *Division's Verified Response to Protest.*

10. The total amount in controversy is $2,636.09. Exhibit B.

CONCLUSIONS OF LAW

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

1. The Tax Commission is vested with jurisdiction over the parties and subject matter of this action. 68 O.S. 2001, § 221(D).

2. Every sale of tangible personal property, unless otherwise exempted by the provisions of the Oklahoma Sales Tax Code[5], is subject to the levy of an excise tax on the gross receipts or gross proceeds of the sale. 68 O.S. 2001, § 1354(A)(1). See, 68 O.S. 2001, § 1352(7) and (15).

3. The excise tax levied on each sale of tangible personal property is required to be paid by the consumer or user to the vendor of the property and the vendor is required to collect from the consumer or user the full amount of the excise tax or an amount equal as nearly as possible or practicable to the average equivalent thereof. 68 O.S. 2001, § 1361(A).

4. Any sum or sums collected or accrued or required to be collected or accrued are deemed to be held in trust for the State, and, as trustee, the collecting vendor has a fiduciary duty to the State in regards to such sums and is subject to the trust laws of the State. 68 O.S. 2001, § 1361(F).

5. The vendor of tangible personal property or services subject to the excise tax levied by the Oklahoma Sales Tax Code is required to remit the excise tax to the Tax Commission. 68 O.S. 2001, § 1362(A).

6. The levied excise tax is due and payable on the first day of each month and it is the duty of all tax remitters to deliver to the Tax Commission by the twentieth day of each month a sales tax report showing the gross receipts or gross proceeds arising from all sales taxable or nontaxable during the preceding calendar month. 68 O.S. Supp. 2003, § 1365(A).

7. Every tax remitter required to make a sales tax report and pay any excise tax is required 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. 68 O.S. Supp. 2003, § 1365(E).

8. If any taxpayer shall fail to make any report or return as required by any state tax law, the Tax Commission, from any information in its possession or obtainable by it, may determine the correct amount of tax for the taxable period, and propose in writing the assessment of tax for the period. 68 O.S. 2001, § 221(A).

9. In all proceedings before the Tax Commission, 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. Oklahoma Tax Commission***, 768 P.2d 359 (Okl. 1988).

10. Here, Protestant has neither asserted any cognizable factual errors nor presented any justiciable issues of law in regard to the proposed action of the Division. Further, the amount of the estimated sales tax assessed by the Division for the period of April, 2000 through December, 2000 is reasonable and has a basis in fact as indicated by the amount of the sales tax reported by Protestant during the prior reporting periods. Accordingly Protestant's protest to the proposed sales tax assessment is denied.

DISPOSITION

THEREFORE, based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of PROTESTANT, d/b/a BUSINESS, be denied. It is further ORDERED that the amount in controversy, inclusive of interest accrued and accruing, but exclusive of interest accrued during the period the protest was inadvertently misplaced or overlooked in error, be fixed as the deficiency due and owing.

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.

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[1] 68 O.S. 2001, § 201 et seq.

[2] Rules 710:1-5-20 through 710:1-5-47 of the *Oklahoma Administrative Code* (*OAC*).

[3] Official Notice is taken of the letter and the tax warrants, copies of the letter and printouts of the Tax Warrant System - Tax Warrant Detail are contained in the file of the ALJ's Office. Tax Warrant No. STS XXXX1 shows a sales tax liability for the period of August, 1996 through February, 1999 in the amount of $2,335.57. Tax Warrant No. STS XXXX2 shows a sales tax liability for the period of March, 1999 through December, 1999 in the amount of $1,500.00. Also contained in the file of the ALJ's Office is a copy of the Tax Warrant System - Tax Warrant Detail for Tax Warrant No. STS XXXX3, Official Notice of which is taken, showing a sales tax liability for the period of January, 2000 through March, 2000 in the amount of $450.00.

[4] See, Note 3.

[5] 68 O.S. 2001, § 1351 et seq.