JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2004-09-23-05
ID: P-04-058-H
DATE: SEPTEMBER 23, 2004
DISPOSITION: DENIED
TAX TYPE: WASTE TIRE
APPEAL: NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A prehearing conference was scheduled in this matter on June 28, 2004, at 10:30 a.m. A Notice of Prehearing Conference was mailed to the Protestant's attorney on May 28, 2004. The Protestant's attorney did not appear at the prehearing conference. Thereafter on June 30, 2004, notice was served upon the parties that this cause would be closed and the matter submitted for decision upon the filing of a verified response to the protest by the Division. The Division filed its Verified Response to Protest on July 16, 2004. No response was received from the Protestant. The record was closed and this case was submitted for decision on August 3, 2004.

FINDINGS OF FACT

Upon review of the file and records, and the Division's Verified Response, the undersigned finds:

1. Protestant is the sole proprietor of BUSINESS, a business that primarily buys and sells junk tires, wheels, and rims. The business is located at 123 FAKE STREET, FAKEVILLE, OK 99999.

2. The Division conducted a field audit of Protestant's business and reviewed the following:

- Protestant's "No Remit" Waste Tire Reports.
- Protestant's "Tires/Labor Summary" of the tires sold on a monthly basis from January 2000 through December 2002.
- Protestant's Daily Sales Tickets.
- Department of Environmental Quality ("DEQ") Waste Tire Reimbursement Manifests.[1]

3. The Division concluded from the audit that the Protestant had failed to charge, collect, and remit waste tire fees during the audit period of May 1, 2000, through April 30, 2003.[2]

[1] Division's Exhibits A-1 through A-3 and Division's Exhibit B.

[2] Division's Exhibits A-1 through A-3 and Division's Exhibit B. According to the field audit work papers dated August 3, 2003, the audit does not include January 2003 through April 2003. The assessment is based upon the examination of the Protestant's records for 2000, 2001, and 2002. The Division's auditor added an average of six tires to the Protestant's monthly tire sales due to missing daily sales tickets for 03/27/01, 11/22/01, and 09/29/02.

4. On September 18, 2003, the Division issued an assessment against Protestant for waste tire fees,[3] as follows, to-wit:

Audit Period:	05/01/00 to 04/30/03
Waste Tire Fee	$5,992.00
Interest through 10/31/03	1,836.50
Tax and Interest due within 30 Days	7,828.50
30 day delinquent Penalty @ 10%	599.20
Tax, Interest & Penalty due after 30 Days	$8,427.70

5. On November 4, 2004, the Division received a timely filed protest on behalf of the Protestant.[4] The basis of the protest is that during 2000, 2001, and 2002, approximately 85% of the tires sold by the Protestant were *used* tires where the waste tire fees would have already been paid. The Protestant does not dispute that the waste tire fee is due upon the new tire purchases and sales, but makes an equitable argument for relief from the waste tire fees on the *used* tires.[5]

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[6]

2. The waste tire fee is levied on tires sold for use on motor vehicles.[7]

3. The Oklahoma Tax Commission has promulgated rules as provided by law to facilitate the administration, enforcement and collection of the waste tire fee under the Oklahoma Waste Tire Recycling Act ("Act").[8]

From the no remit Waste Tire Report Worksheets, it appears that the Protestant files on a semiannual basis, January through June, with the report being due July 15th, and July through December, with the report being due January 15th.

[3] Division's Exhibit C-1. The Division also issued a sales tax assessment pursuant to the field audit, which was not protested.

[4] Division's Exhibit C-2.

[5] Division's Exhibit C-2. The protest letter also notes that the sales tax assessed was paid on August 13, 2003, and that the Protestant requests a waiver on the remaining balance. The request for a waiver must be processed through the Office of General Counsel. The Office of the Administrative Law Judge does not have the authority to grant the waiver of penalty and interest. That authority is granted to the Commissioners, pursuant to 68 O.S. § 221(A).

See also Division's Exhibit C-3, consisting of invoices for the Protestant's purchase of new tires from Friend Tire Company for 2000, 2001, and 2002.

[6] 68 O.S. § 207.

[7] 27A O.S. § 2-11-401 et seq.

[8] 27A O.S. § 2-11-409(A) and *OAC 710:95-5-1* et seq.

4. The Protestant is a "tire dealer" as defined by the Act.[9]

5. A waste tire fee of One Dollar ($1.00) per tire shall be assessed at the time any tire with a rim diameter of 17½ inches or less is sold by a tire dealer.[10]

6. A tire dealer shall not assess a fee on the sale of used or retreaded tires when he can document that the recycling fee has been previously paid.[11]

7. A tire dealer shall report and remit the waste tire fees to the Oklahoma Tax Commission in the same manner as sales tax is reported and remitted under 68 O.S. § 1365.[12]

8. The failure to remit the waste tire fee when the report is filed shall cause the fee to become delinquent, and the tire dealer forfeits any claim to a discount.[13] If the fee is not paid before the fee becomes delinquent, interest on the total delinquent fee shall be collected at the rate of one and one-quarter percent (1¼%) per month from the date of the delinquency until paid.[14] If the fee is not paid within fifteen days after the fee becomes delinquent, there shall be added a penalty of ten percent (10%) on the total amount of the fee due and delinquent.[15] All penalties and interest shall be recoverable as part of the fee imposed.[16]

9. An assessment is presumed correct and the Protestant bears the burden of showing that it is incorrect, and in what respect.[17]

10. The Protestant has failed to meet his burden of proof in this matter. The Protestant has produced no evidence that the waste tire fee has been previously paid on the *used* tires, which are the subject of this case. The Protestant has not cited any authority that the assessment issued by the Division is incorrect.

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[9] 27A O.S. § 2-11-402(4), states:

> A "tire dealer" is any person engaged in the business of selling new and used tires to final consumers, not for resale.

[10] 27A O.S. § 2-11-403(A)(1)(a)(1) and *OAC 710:95-5-3(b)(1)*.

[11] 27A O.S. § 2-11-403(A)(3) and *OAC 710:95-5-8(b)*.

[12] 27A O.S. § 2-11-403(B)(1) and *OAC 710:95-5-11*.

[13] 27A O.S. § 2-11-403(B)(3).

[14] 27A O.S. § 2-11-403(C).

[15] 27A O.S. § 2-11-403(D).

[16] 27A O.S. § 2-11-403(E).

[17] *OAC 710:1-5-47*. See *Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission*, 1988 OK 91, 768 P.2d 359.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the protest be denied, and the total amount assessed for the waste tire fees, including penalty and interest, accrued and accruing, be fixed as the Protestant's deficiency and that those amounts should be determined as 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.