JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2005-01-06-17
ID: MV-04-017-H
DATE: JANUARY 6, 2005
DISPOSITION: DISMISSED
TAX TYPE: IFTA
APPEAL: NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above styled and numbered cause comes on for consideration pursuant to assignment regularly made by the Oklahoma Tax Commission to ALJ, Administrative Law Judge. PROTESTANT, ("Protestant") appears through REPRESENTATIVE[1] The IRP/IFTA Section of the Audit Division, Oklahoma Tax Commission ("Division") is represented by OTC ATTORNEY, Office of General Counsel, Oklahoma Tax Commission.

The hearing on the Division's Motion to Dismiss was held on September 27, 2004, at approximately 1:30 p.m. The Protestant failed to appear at the hearing or respond to the notice. The notice was forwarded to the last known address of the Protestant's representative.[2] It was noted for the record that neither the Protestant nor his representative had contacted the Division's representative or the Office of Administrative Law Judge concerning the hearing. The Division called one witness, WITNESS, Administrator, IRP/IFTA Section, Audit Division, who testified regarding the records of the Division. The Division's Exhibits A and B were identified, offered and admitted into evidence.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, and the Division's Motion to Dismiss, the undersigned finds:

1. The Protestant was licensee #XXXXXXXXX under the International Fuel Tax Agreement ("IFTA") in the base jurisdiction of the State of Oklahoma for the audit period of the 1st Quarter of 2002 through and including the 3rd Quarter of 2002 ("Audit Period").

2. On June 17, 2003, the Division mailed the Protestant a notice that an IFTA audit would be conducted for the 1st Quarter of 2002 through the 4th Quarter of 2002.[3]

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[1] The court file contains an audit packet, which was forwarded by the Division as part of the protest file on this matter. The Administrative Law Judge is taking judicial notice of the materials contained in the court file for the purpose of completing the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (2003). On January 21, 2002, the Protestant, through a Power of Attorney, appointed REGISTRATION COMPANY. or its employees, as his Attorney-in-Fact. The term began January 21, 2002, and continues until cancelled.

[2] OKLA. STAT. ANN. tit. 68, § 208 (West 2001). The notice was mailed to REPRESENTATIVE, REGISTRATION COMPANY., 123 FAKE STREET, ANYTOWN, MO 12345

[3] See Note 1.

3. On January 21, 2004, the Division attempted to contact the Protestant's agent of record by phone, but the phone had been disconnected.[4]

4. On January 27, 2004, the Division sent the Protestant a letter that referenced the Division's letter of June 17, 2003, and the Division's attempt to contact the Protestant's agent on January 21, 2004.[5] The letter requested all of the Protestant's operational mileage records, including DOT logs (if available), trip sheets, and monthly or quarterly mileage statements (including total miles by fleet and total miles by vehicle for each month or quarter), for the IFTA audit period of January 1, 2002, through December 31, 2002.[6]

5. The Protestant did not provide the records requested by the Division to conduct the audit.

6. The Division based the audit upon the best information available, the Protestant's IFTA reports for the audit period.

7. On April 13, 2004, the Division mailed the Protestant the Licensee Audit Report ("LAR") and mailed the Inter-jurisdictional Audit Report ("IAR") to the member jurisdictions affected by the audit. The LAR advised the Protestant that the assessment would become final if it was not appealed within (30) days.[7] The LAR proposed an assessment for "diesel" fuel tax in the amount of $1,455.50, penalty in the amount of $145.55, and interest in the amount of $302.67, for a total of $1,903.72.[8]

8. On May 10, 2004, the Division sent the Protestant a billing statement in the amount of $1,903.72, in accordance with the LAR.[9]

9. On July 26, 2004, the Division received a protest to the proposed assessment on behalf of the Protestant, from REPRESENTATIVE, REGISTRATION COMPANY.[10]

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[4] See Note 1. According to the records of the Division, the Protestant's agent was AGENT, 123 ANYSTRET., FAKECITY, OK 12345, and his phone was disconnected when the auditor attempted to contact him on January 21, 2004.

[5] See Note 1.

[6] See Note 1. The Division also requested all original fuel tickets acquired during the period of January 1, 2002, through December 31, 2002, for all vehicles. The letter further advised the Protestant that "If you are unable to furnish the records on or before February 27, 2004, an IFTA assessment may be made based upon the penalty provisions as set forth by IFTA.

[7] See Note 1. Due to a scrivener's error the LAR is dated April 13, 2002, instead of April 13, 2004.

[8] See Note 1.

[9] Division's Exhibit B. The billing statement notes that the Protestant's appeal period begins from the date of the LAR.

[10] Division's Exhibit A. REPRESENTATIVE, REGISTRATION COMPANY, faxed the protest to the Division on Monday, July 26, 2004, at 3:30 p.m. No basis is given for the protest.

10. On September 3, 2004, the Division filed a Motion To Dismiss on the basis that the Protestant had filed his protest out of time. The protest was not filed within sixty (60) days after the mailing date of the LAR.

11. On September 7, 2004, the Office of Administrative Law Judge sent the parties a Notice to Appear on September 27, 2004, at 1:30 p.m., and show cause why the protest should not be dismissed for failure to give notice of appeal within the time allowed under the Agreement and under state law.[11]

12. The Division's Motion to Dismiss was heard on September 27, 2004, at 1:30 p.m.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this action.[12]

2. The Oklahoma Tax Commission is vested with jurisdiction to consider the Motion to Dismiss.[13]

3. The State of Oklahoma entered into and is a member of IFTA with other states and provinces "to establish and maintain the concept of one fuel use license and administering base jurisdiction for each licensee and to provide that a licensee's base jurisdiction will have the primary responsibility for administering this Agreement and executing its provisions with respect to such licensee."[14]

4. The provisions of the IFTA Articles of Agreement ("the Agreement"), Audit Manual, and Procedures Manual are binding upon this jurisdiction as a member of the Agreement and the Protestant as a licensee under the Agreement.[15]

5. As a member of the Agreement, the Tax Commission is obligated to audit its licensees on behalf of all member jurisdictions.[16]

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[11] Due a scrivener's error the notice stated in pertinent part, "Division asserts Protestant failed to give notice of appeal within the time allowed under the *International Registration Plan*." On September 9, 2004, a corrected notice was sent to the parties correcting the notice to reflect this was an IFTA assessment.

[12] OKLA. STAT. ANN. tit. 68, § 207 (West 2001), and OKLA. STAT. ANN. tit. 68, 607(E) (West 2001).

[13] OKLA. STAT. ANN. tit. 68, § 221(E) (West 2001) and OKLA. ADMIN. CODE § 710:1-5-46 (2003).

[14] IFTA Articles of Agreement Section R150. See also OKLA. STAT. ANN. tit. 68, § 607(E) (West 2001).

[15] IFTA Articles of Agreement Section R120.

[16] IFTA Articles of Agreement Section R1310.

6. All audits conducted by members of IFTA must be in compliance with all requirements established in the Agreement, Procedures Manual, and Audit Manual.[17]

7. As a licensee under the Agreement, the Protestant is required to preserve his records upon which the quarterly returns are based.[18] If the records of the licensee are not available, the audit will be completed using the best information available to the base jurisdiction.[19] The burden of proof is on the licensee.[20]

8. The base jurisdiction will furnish the licensee with the LAR and its customary notice of assessment, billing or other notification which would signify the beginning of the licensee's appeal period.[21] Upon completion of the audit of a licensee, the audit findings shall be provided to member jurisdictions, in which distance was accrued, as to the accuracy of the licensee's IFTA tax returns.[22] The Division sends out the IAR simultaneously with the assessment and LAR.[23]

9. The findings of the base jurisdiction's audit as to the amount of fuel taxes due from any licensee shall be presumed to be correct.[24]

10. The Protestant failed to produce any records, except copies of the IFTA Quarterly reports filed with the jurisdiction of Oklahoma for 2002.[25] The IFTA Quarterly reports were the best information available to the Division upon which to base the audit and assessment of the Protestant.

11. The Division's audit of the Protestant was conducted in accordance with the Agreement, Audit Manual, and Procedures Manual.[26]

12. The appeal process shall be conducted in accordance with the procedures established by the base jurisdiction.[27]

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[17] IFTA Articles of Agreement Section R1330.

[18] IFTA Articles of Agreement Sections R700 and R1210, and IFTA Procedures Manual Section 530.100.

[19] IFTA Articles of Agreement Section R1210.200. See also IFTA Audit Manual Section A540.200.

[20] IFTA Articles of Agreement Section R1210.300. See also IFTA Audit Manual Section A540.200.

[21] IFTA Audit Manual Section A690.100.

[22] IFTA Audit Manual Section A100.

[23] See Note 1.

[24] IFTA Audit Manual Section A730.

[25] See Note 1. The Protestant's 4th Quarter 2002 IFTA report states that the Protestant did not have operations from October 1, 2002, through December 31, 2002.

[26] IFTA Articles of Agreement Section R1200. See also IFTA Audit Manual Appendix A, Examples A and B.

13. The jurisdiction of Oklahoma has established procedures for the appeal of actions or audit findings.[28]

14. In order for a protest to be considered timely, it must be filed pursuant to Oklahoma Statutes, within sixty (60) days after the date of mailing of the assessment, unless an extension is granted within the sixty (60) day period.[29]

15. The letter of protest in this matter was not received within the sixty (60) day provision provided by Oklahoma Statutes, and the Protestant did not request an extension within the sixty (60) day period.

16. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[30] A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.[31]

17. The Protestant has failed to meet his burden of proof that the assessment of additional diesel fuel tax was in error.

DISPOSITION

IT IS THEREFORE ORDERED, based upon the specific facts and circumstances of this case, that the protest be dismissed, and that the total amount assessed for unpaid IFTA diesel fuel tax be fixed as the Protestant's deficiency, and that those amounts be determined as due and owing, including penalty and interest, accrued and accruing.

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[27] IFTA Articles of Agreement Section R1400. The appeal procedures in the Agreement are only used if the base jurisdiction does not have provisions in its administrative procedures laws for appeals of actions or audit findings.

[28] See OKLA. ADMIN. CODE §§ 710:1-5-20 et. seq. (2003). See also OKLA. STAT. ANN. tit. 68, 221(C) (West 2001).

[29] See Note 28.

[30] The standard of review in an administrative proceeding is preponderance of the evidence. *Oklahoma Tax Commission Order No. 1999-04-08-003* (citing) *Oklahoma Tax Commission Order No. 1991-10-17-061*. OKLA. ADMIN. CODE § 710:1-1-77(b) (2003) provides in pertinent part that "preponderance of the evidence" means the evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which as a whole shows that the fact sought to be proved is more probable than not.

[31] OKLA. ADMIN. CODE § 710:1-5-47 (2003). See *Enterprise Management Consultants, Inc. v. Oklahoma Tax Comm'n*, 1988 OK 91, 768 P.2d 359.