JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2005-02-10-02
ID:	P-04-125-K
DATE:	FEBRUARY 10, 2005
DISPOSITION:	DENIED
TAX TYPE:	SALES/TOURISM
APPEAL:	NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Division conducted a 3.2 beer depletion audit of the available records of Protestant's business for the period inclusive of May, 2002 through January, 2004. As a result of the audit, the Division on June 4, 2004 caused to be issued proposed sales and tourism tax assessments against Protestant. Protestant timely protested the proposed assessments by letter dated June 23, 2004. Protestant did not request a hearing in the letter of protest.

On September 2, 2004, the Division forwarded its file, consisting of cover memorandums, the letter of protest and the proposed assessment letters, to the Office of the Administrative Law Judges ("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 cause was docketed as Case No. P-04-125-K and assigned to ALJ, Administrative Law Judge[3].

A pre-hearing conference was scheduled in this cause for October 21, 2004, by *Notice of Prehearing Conference* issued September 29, 2004.[4] Protestant neither appeared at the pre-hearing conference nor responded to the notice thereof. Thereafter, notice was served on the parties that the record in this cause would be closed and the case submitted for decision upon the filing of a verified response to protest by the Division. Protestant did not respond to this notice.

The *Division's Verified Response to Protest* was filed in the ALJ's Office on November 5, 2004. Attached to the response were Exhibits A-1, A-2, B-1, B-2, C and D.

FINDINGS OF FACT

Upon review of the file and records, including the proposed sales and tourism tax assessments of June 4, 2004, the letter of protest, and the *Division's Verified Response to Protest* and attached Exhibits, the undersigned finds:

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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] *OAC*, 710:1-5-22(b).

[4] *OAC*, 710:1-5-28.

1. That Protestant was the sole proprietor and owner of a business known as the NIGHTCLUB, a nightclub serving low-point beer[5], located in Midwest City, Oklahoma during the audit period, May 1, 2002 through January 31, 2004. Exhibits A-1[6] and A-2[7].

2. That Protestant does not challenge the fact that he was the person responsible for collecting, reporting and remitting sales and tourism taxes to the Tax Commission on his sales of Low-Point Beer to consumers. Exhibit C.

3. That the Division conducted a field audit of Protestant's available sales records for the period inclusive of May, 2002 through January, 2004.[8]

4. That the Division determined Protestant had under-reported sales of Low-Point Beer by an average of $2,602.57 per month during the audit period.

5. That as a result of the audit, the Division by letters dated June 4, 2004 proposed the assessments of additional sales and tourism taxes against Protestant for the audit period. Exhibits B-1 and B-2.

6. That the sales tax assessment proposed an aggregate amount due for the audit period of $5,206.77, consisting of tax in the amount of $3,947.31, interest accrued through July 31, 2004, in the amount of $864.72, and a thirty-day delinquent penalty of $394.74. Exhibit B-1.

7. That the tourism tax assessment proposed an aggregate amount due for the audit period of $67.42, consisting of tax in the amount of $52.60, interest accrued through July 31, 2004, in the amount of $9.57, and a thirty-day delinquent penalty of $5.25. Exhibit B-2.

8. That Protestant timely protested the proposed assessments by letter dated June 23, 2004. Exhibit C.

9. That the letter of protest is not verified. Exhibit C.

10. That Protestant remitted the amounts assessed in full and under protest by checks drawn on his personal account dated July 30, 2004. Exhibit D.

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[5] 37 O.S. 2001, § 163.2(1).

[6] Copy of a "Renewal for Coin-Operated Device Decal" filed with the Tax Commission on April 29, 2004. The renewal was signed by Protestant and dated April 28, 2004.

[7] Copy of a "County Beverage Permit" issued to Protestant d/b/a NIGHTCLUB for the purpose of selling Low-Point Beer for consumption on and/or off the premises at "123 FAKE STREET, Midwest City, Oklahoma 73XXX" for a period of three years beginning the 5th day of May, 2001.

[8] In performing the audit, the auditor also reviewed the records of the wholesale beer distributors pertaining to the purchases of Low-point Beer by Protestant during the audit period. Exhibits B-1 and B-2.

ISSUE AND CONTENTIONS

The issue presented for decision is whether the Division erred by utilizing Protestant's prices in calculating the amount of Protestant's unreported sales.

Protestant does not disagree with the quantity of Low-Point Beer shown to have been purchased by him during the audit period from the wholesale beer distributors' records and utilized by the Division in performing the audit. Protestant disputes the method utilized to determine the amount of unreported sales. Protestant contends that the unreported sales should be computed at his cost. In support of this contention, Protestant asserts that the amount of beer not reported was given away at no charge.

The Division contends that the assessments should be sustained. In support of this contention, the Division argues that "Protestant failed to provide any records or documents to show that he gave away the unreported 3.2 beer."

CONCLUSIONS OF LAW

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

2. The sale of Low-Point Beer for on and/or off premises consumption is subject to sales and tourism taxes. 68 O.S. 2001, §§ 1354(A)(9) and 50012(A)(2).

3. Typically, a sale for purposes of the Oklahoma Sale Tax Code[9] and Oklahoma Tourism Promotion Act[10] entails the "transfer of either title or possession of tangible personal property for a valuable consideration", 68 O.S. 2001, §§ 1352(15), 50011(7) and 50012(A); and the amount of taxes levied on the transfer is measured by the gross receipt or gross proceeds of the transaction whether in money or otherwise, 68 O.S. 2001, §§ 1354(A), 1352(7), 50012(A) and 50011(4). However, for purposes of the sales tax code, the vendor shall include in the gross proceeds derived from sales to consumers or users "the sales value of all tangible personal property which has been purchased for resale, * * *, and withdrawn from stock in trade for use or consumption * * *, and shall pay the tax on the sales value of this tangible personal property withdrawn from stock in trade for consumption or use". 68 O.S. 2001, § 1362(C). The Oklahoma Tourism Promotion Act does not have a provision corresponding with Section 1362(C).

4. 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. State ex rel. Oklahoma Tax Commission***, 1988 OK 91, 768 P.2d 359.

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[9] 68 O.S. 2001, § 1350 et seq.

[10] 68 O.S. 2001, § 50010 et seq.

5. Here, the Division utilized Protestant's prices in calculating the amount of Protestant's unreported sales during the audit period. With respect to the sales tax assessment, Protestant argument is without merit since the sales tax code specifically provides that tangible personal property purchased for resale and withdrawn from stock in trade for use or consumption shall be reported and the tax paid on the sales value of such property, rather than its cost to the vendor. With respect to the tourism tax assessment, Protestant failed to present any evidence to show how much, if any of the Low-Point Beer purchased for resale was given away at no charge, and as such, the assessment must be sustained.

6. Protestant's protests to the proposed sales and tourism tax assessments should be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of PROTESTANT, be denied. It is further recommended that the proposed amounts of the assessments be determined to be correct.

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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.