

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2006-04-20-03
ID: P-05-184-H
DATE: APRIL 20, 2006
DISPOSITION: DENIED
TAX TYPE: CIGARETTE
APPEAL: NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROTESTANT (“Protestant”) appears pro se.¹ The Excise Tax Section, Audit Division (“Division”), Oklahoma Tax Commission appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On November 10, 2005, the protest file was received by this office for further proceedings consistent with the Uniform Tax Procedure Code² and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.³ On November 17, 2005, a letter was mailed to the Protestant that this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-05-184-H. The letter also advised the Protestant that a Notice of Prehearing Conference would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Oklahoma Tax Commission*. On November 30, 2005, the Notice of Prehearing Conference was mailed to the last known address of the Protestant, setting the prehearing conference for December 19, 2005, at 10:30 a.m. CST.⁴ At the request of the Protestant the prehearing conference was rescheduled for January 5, 2006, at 10:30 a.m. CST.

On December 9, 2005, a Notice of Prehearing Conference for the rescheduled prehearing was mailed to the last known address of the Protestant. The prehearing conference was held by telephone as requested by the Protestant on January 5, 2006, at 10:30 a.m. CST. During the prehearing conference the Protestant advised that additional assessments had been received. The parties agreed to consolidate the protests to all proposed assessments and to submit this matter for decision on the record. On February 14, 2006, the Division forwarded the Protestant a copy of the entire contents of the Division’s file, which contained all proposed assessments. On

¹ “**pro se**” (proh **say or see**), *adv. & adj.* [Latin] For oneself; on one's own behalf; without a lawyer <the defendant proceeded pro se> <a pro se defendant>. -- Also termed *pro persona*; *in propria persona*; *propria persona*; *pro per*. See PROPRIA PERSONA. BLACK’S LAW DICTIONARY (8th ed. 2004), available at <http://westlaw.com>. (March 16, 2006).

² OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

³ OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

⁴ OKLA. STAT. ANN. tit. 68, § 208. The notice was mailed to the Protestant at 123 FAKE STREET, ANYCITY, California 99999, and to 9999 S.W. 99TH Street, BIG CITY, Oklahoma 99999.

February 17, 2006, the Division filed an Interim Status Report and Request for Scheduling Order.⁵

On February 21, 2006, a Scheduling Order was mailed to the parties advising that pursuant to the agreement between the parties the Division was to file a verified response no later than March 3, 2006, and that the Protestant could file a response on or before April 3, 2006, at which time the case would be submitted for decision. On March 3, 2006, the Division filed its Verified Response. The verification attached to the response was duly sworn under oath, on behalf of the Division, by SUPERVISOR, Auditor Supervisor, Excise Tax Section, Audit Division, Oklahoma Tax Commission.⁶ On March 14, 2006, the Protestant filed a Response to the Division's Verified Response. The record was closed and this matter was submitted for decision on March 14, 2006.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, the Division's Verified Response, and the Protestant's Response, the undersigned finds:

1. The Protestant purchased cigarettes from ONLINE STORE an out-of-state internet/mail order cigarette retailer, as follows, to-wit:

Invoice No.	Invoice Date	Brand	No. of Cartons
SS000530803 ⁷	06/22/05	NY SENECA MN LT 100 SP	4
SS000565728 ⁸	07/11/05	NY SENECA MN LT 100 SP	4
SS000608328 ⁹	08/08/05	NY SENECA MN LT 100 SP	5
SS000656490 ¹⁰	09/08/05	NY SENECA MN LT 100 SP	5
SS000693047 ¹¹	09/30/05	NY SENECA MN LT 100 SP	5
Total			23

2. Oklahoma Cigarette Tax Stamps¹² were not purchased and affixed to the cigarettes by ONLINE STORE and Cigarette Tax ("ACX") was not collected by ONLINE STORE or remitted

⁵ The status report confirmed that the Protestant had been contacted by phone on February 17, 2006, and the Protestant agreed that this matter would be submitted on the record.

⁶ See OKLA. ADMIN. CODE § 710:1-5-28(c).

⁷ Division's Exhibit D.

⁸ Division's Exhibit E.

⁹ Division's Exhibit F.

¹⁰ Division's Exhibit H.

¹¹ Division's Exhibit G.

¹² OKLA. STAT. ANN. tit. 68, § 301 (8) (West 2001):

The term "stamp" as herein used shall mean the stamp or stamps by use of which:

by the Protestant at the time the purchases took place.¹³ The Protestant did not possess an Oklahoma Cigarette License at the time of the purchases.

3. The Protestant purchased the cigarettes from ONLINE STORE by Mastercard and the cigarettes were delivered to the Protestant via BestWay or United States Postal Service (“USPS”) at 9999 S.W.99TH St., BIG CITY, OK 99999.¹⁴

4. On October 7, 2005, the Division issued a proposed ACX assessment¹⁵ against the Protestant for the purchase of cigarettes from ONLINE STORE on June 22, 2005, and July 11, 2005, as follows, to-wit:

ACX Due	\$82.40
Interest through 12/07/05	5.35
Tax & Interest due within 60 Days:	\$87.75
Penalty @ 10%	8.24

-
- a. the tax levied pursuant to the provisions of Section 301 et seq. of this title is paid,
 - b. the tax levied pursuant to the provisions of Section 349 of this title is paid, or
 - c. the payment in lieu of tax authorized pursuant to a compact entered into by the State of Oklahoma and a federally recognized Indian tribe or nation pursuant to the provisions of subsection C of Section 346 of this title is paid.

¹³ Division’s Exhibits D through H. At the bottom of each ONLINE STORE invoice appears the following:

As part of the Seneca Nation of Indians and the Iroquois Confederacy, we are currently not required to collect state sales tax for product sold on Native land. Nonetheless, we are required under federal law to report all sales and shipments of cigarettes to the state taxing authority within your home state. *You should contact the taxing authority within your state to determine your tax obligation on the use of these products within your state.* (Emphasis Added)

¹⁴ Division’s Exhibits D through H.

¹⁵ Division’s Exhibit A. See Division’s Exhibits D and E. See also Division’s Exhibit I, the Division’s work papers for the proposed ACX assessment. Each of the eight (8) cartons purchased by the Protestant was taxed at the rate of \$10.30 per carton in accordance with the Act.

The proposed ACX assessment also advises the Protestant that Oklahoma Use Tax is due on the purchases (Before January 1, 2005) and, if the Protestant has not already paid Oklahoma Use Tax on her Oklahoma Income Tax form, to complete the enclosed Oklahoma Use Tax Form and submit the remittance as instructed by the form.

See OKLA. STAT. ANN. tit. 68, § 1355(11) (West 2001):

Effective January 1, 2005, sales of **cigarettes** on which the tax levied in Section 301 et seq. of this title or tobacco products on which the tax levied in Section 401 et seq. of this title has been paid.

See also OKLA. STAT. ANN. tit. 68, § 1404(4) (West 2001):

The provisions of Section 1401 et seq. of this title shall not apply:

- 4. In respect to the use of tangible personal property now specifically exempted from taxation under Oklahoma Sales Tax Code;

Tax, Interest & Penalty due after 60 Days: \$95.99

5. On October 21, 2005, the Division issued a proposed ACX assessment¹⁶ against the Protestant for the purchase of cigarettes from ONLINE STORE on August 8, 2005, as follows, to-wit:

ACX Due	\$51.50
Interest through 12/07/05	2.85
Tax & Interest due within 60 Days:	\$54.35
Penalty @ 10%	5.15
Tax, Interest & Penalty due after 60 Days:	\$59.50

6. On November 18, 2005, the Division issued a proposed ACX assessment¹⁷ against the Protestant for the purchase of cigarettes from ONLINE STORE on September 8, 2005, as follows, to-wit:

ACX Due	\$103.00
Interest through 01/18/06	5.11

¹⁶ Division's Exhibit B. *See* Division's Exhibit F. *See also* Division's Exhibit J, the Division's work papers for the proposed ACX assessment. Each of the five (5) cartons purchased by the Protestant was taxed at the rate of \$10.30 per carton in accordance with the Act.

See OKLA. STAT. ANN. tit. 68, § 1355(11) (West 2001):

Effective January 1, 2005, sales of **cigarettes** on which the tax levied in Section 301 et seq. of this title or tobacco products on which the tax levied in Section 401 et seq. of this title has been paid.

See also OKLA. STAT. ANN. tit. 68, § 1404(4) (West 2001):

The provisions of Section 1401 et seq. of this title shall not apply:

4. In respect to the use of tangible personal property now specifically exempted from taxation under Oklahoma Sales Tax Code;

¹⁷ Division's Exhibit C. *See* Division's Exhibits G and H. *See also* Division's Exhibit K, the Division's work papers for the proposed ACX assessment. Each of the ten (10) cartons purchased by the Protestant was taxed at the rate of \$10.30 per carton in accordance with the Act.

See OKLA. STAT. ANN. tit. 68, § 1355(11) (West 2001):

Effective January 1, 2005, sales of **cigarettes** on which the tax levied in Section 301 et seq. of this title or tobacco products on which the tax levied in Section 401 et seq. of this title has been paid.

See also OKLA. STAT. ANN. tit. 68, § 1404(4) (West 2001):

The provisions of Section 1401 et seq. of this title shall not apply:

4. In respect to the use of tangible personal property now specifically exempted from taxation under Oklahoma Sales Tax Code;

Tax & Interest due within 60 Days:	\$108.11
Penalty @ 10%	10.30
Tax, Interest & Penalty due after 60 Days:	\$118.41

7. The proposed ACX assessments are based upon information provided to the Division pursuant to the provisions of the “Jenkins Act.”¹⁸

8. On October 20, 2005, and November 18, 2005, the Division received timely filed letters of protest to the proposed ACX assessments for periods of June 2005 through August 2005.¹⁹ The Division has stipulated to the timeliness of the protest to the proposed ACX assessment for the period of September 2005.²⁰

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.²¹

2. The Oklahoma Cigarette Tax Stamp Act²² (“Act”) imposes a tax upon any unlicensed consumer²³ who buys directly from any distributor, jobber, manufacturer, warehouseman, or wholesaler, or other person, within or without the State of Oklahoma any cigarettes in excess of

¹⁸ 15 U.S.C.A. § 375 et seq.

¹⁹ Division’s Exhibit L. The letters articulate several bases for the protest of the proposed ACX assessments including, but not exclusive of the following, to-wit:

- The Protestant was unaware that any additional payment of taxes was due to the State of Oklahoma on the purchase of the cigarettes.
- The Protestant lives and works in California. The address at 9999 S.W. 99TH is not her primary place of residence.
- The Protestant does not recall receiving the cigarettes.
- The assessment of tax, penalty, and interest are excessive.

The Protestant also requests a pay plan and a waiver of penalty and interest if the protest is denied. The undersigned does not have the authority to waive penalty and interest. The authority to waive penalty and interest rests exclusively with the Commissioners or their designee, pursuant to OKLA. STAT. ANN. tit. 68, § 220 (West 2001).

²⁰ See the Division’s Verified Response, Fact No. 10.

²¹ OKLA. STAT. ANN. tit. 68, § 221 (West 2001).

²² OKLA. STAT. ANN. tit. 68, § 301 et seq. (West 2001). The purpose of the tax is to provide revenue for the expense of the state government. See OKLA. STAT. ANN. tit. 68, § 303 (West 2001).

²³ OKLA. STAT. ANN. tit. 68, § 301 (5) (West 2001) states:

The term “consumer” is defined to be a person who receives or who in any way comes into possession of cigarettes for the purpose of consuming them, giving them away, or disposing of them in a way other than by sale, barter or exchange.

forty (40), at any one time to which are not affixed the stamps required by the Act.²⁴ The cigarettes purchased by the Protestant from ONLINE STORE were unstamped.

3. For purposes of the Act, any sale of cigarettes to an individual in Oklahoma shall be treated as a sale to a consumer unless such individual is licensed as a distributor or retailer of cigarettes by the Tax Commission.²⁵ The Protestant did not hold a license at the time of the purchases.

4. In cases where no monthly reports are filed as required by the Act, the Tax Commission may, by using any information available to it, determine the amount of tax due and propose to assess it against the person liable.²⁶ There were no monthly reports filed on the purchases made by the Protestant from ONLINE STORE.

5. The Act imposes a tax on a carton of cigarettes at the rate Ten Dollars and Thirty Cents (\$10.30).²⁷ The Protestant purchased twenty-three (23) cartons of cigarettes from

²⁴ OKLA. STAT. ANN. tit. 68, § 305 (C) (West 2001), states:

Any unlicensed consumer who buys direct from any distributor, jobber, manufacturer, warehouseman, or wholesaler, or other person, within or without this state, any cigarettes in excess of forty, at any one time to which are not affixed the stamps required by Section 301 et seq. of this title shall, before purchasing such cigarettes, secure from the Tax Commission a written license and shall pay therefor an annual fee of Twenty-five Dollars (\$25.00), and shall immediately, upon the receipt of any unstamped cigarettes, report the same to the Tax Commission on such forms as the Tax Commission may prescribe, and immediately purchase from the Tax Commission proper stamps and attach the same to all such cigarettes received. It shall be unlawful for any person to sell or consume cigarettes on which the tax, as levied by Section 301 et seq. of this title, has not been paid, and which are not contained in packages to which are securely affixed the stamps evidencing payment of the tax imposed by Section 301 et seq. of this title.

²⁵ OKLA. STAT. ANN. tit. 68, § 301 (13) (West 2001), in pertinent part states:

- a. The term “delivery sale” means any sale of cigarettes to a consumer in Oklahoma where either:
 - (1) the purchaser submits the order for such sale by means of a telephonic or other method of voice transmission, the mails or any other delivery service, or the Internet or other online service, or
 - (2) the cigarettes are delivered by use of the mails or other delivery service.
- d. For purposes of this paragraph, any sale of cigarettes to an individual in Oklahoma shall be treated as a sale to a consumer unless such individual is licensed as a distributor or retailer of cigarettes by the Tax Commission;

OKLA. STAT. ANN. tit. 68, § 301 (14) (West 2001) states that “[t]he term ‘delivery service’ means any person, including but not limited to the United States Postal Service, that is engaged in the commercial delivery of letters, packages, or other containers;”

²⁶ OKLA. STAT. ANN. tit. 68, § 221 (A) (West 2001).

²⁷ The Administrative Law Judge is taking judicial notice that a “mill” is equal to \$0.001 for the purpose of completing the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (2004).

ONLINE STORE on June 22, 2005, July 11, 2005, August 8, 2005, September 8, 2005, and September 30, 2005 (“Audit Periods”), resulting in the proposed assessment of cigarette tax in the total amount of \$236.90, excluding penalty and interest.²⁸

6. If any tax imposed by Oklahoma Law is not paid before the tax becomes delinquent, interest at the rate of one and one-quarter percent (1¼ %) per month or fifteen percent (15%) per annum shall be collected from the date of the delinquency until paid.²⁹

7. If the tax and interest proposed by an assessment is not paid within sixty (60) days of the mailing of the proposed assessment, a penalty of ten percent (10%) shall be added thereto and collected and paid.³⁰

8. If, upon examination of invoices or from other investigations, the Tax Commission finds that cigarettes have been sold without stamps affixed as required by the Act, and the Protestant is unable to furnish evidence of sufficient stamp purchases to cover unstamped cigarettes purchased, the prima facie presumption shall arise that such cigarettes were sold without proper stamps being affixed thereto.³¹

9. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.³²

10. The Protestant has failed to produce any evidence and has cited no authority that the proposed ACX assessments for the purchases of cigarettes during the Audit Periods are incorrect, or that the sums are not due and owing.

See OKLA. STAT. ANN. tit. 68, §§ 302 (4 mills per cigarette), 302-1 (2.5 mills per cigarette), 302-2 (2.5 mills per cigarette), 302-4 (2.5 mills per cigarette), and 302-5 (40 mills per cigarette) (West 2001), for a total of Fifty-one and One-half (51.5) mills per cigarette or \$0.0515 per cigarette. A pack of cigarettes contains 20 cigarettes and a carton contains 10 packs. 200 cigarettes times \$0.0515 equals \$10.30 in cigarette tax per carton.

²⁸ *See* Division’s Exhibits A through C. *See also* Division’s Exhibits I through K.

²⁹ OKLA. STAT. ANN. tit. 68, § 217 (A) (West 2001).

³⁰ OKLA. STAT. ANN. tit. 68, § 217 (D) (West 2001).

³¹ OKLA. STAT. ANN. tit. 68, § 305 (D) (West 2001):

If, upon examination of invoices or from other investigations, the Tax Commission finds that cigarettes have been sold without stamps affixed as required by Section 301 et seq. of this title, the Tax Commission shall have the power to require such person to pay to the Tax Commission a sum equal to twice the amount of the tax due. If under the same circumstances, a person is unable to furnish evidence to the Tax Commission of sufficient stamp purchases to cover unstamped cigarettes purchased, the prima facie presumption shall arise that such cigarettes were sold without proper stamps being affixed thereto.

³² *See Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com'n*, 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 to the proposed ACX assessments during the Audit Periods should be denied.

It is further ordered that the total amount of ACX and penalty assessed for the Audit Periods be fixed as the Protestant's deficiency and that those amounts be determined as due and owing, including interest, accrued and accruing.

OKLAHOMA TAX COMMISSION