JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2006-07-11-13
ID:	P-05-188-H
DATE:	JULY 11, 2006
DISPOSITION:	DENIED
TAX TYPE:	WASTE TIRE
APPEAL:	NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BUSINESS ("Protestant") appears pro se[1] through OWNER ("Owner").[2] The In-House Audit 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 18, 2005, the protest file was received by this office for further proceedings consistent with the Uniform Tax Procedure Code[3] and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.[4] On November 22, 2005, a letter was mailed to the Protestant advising that this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-05-188-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 December 30, 2005, the Notice of Prehearing Conference was mailed to the last known address of the Protestant, setting the prehearing conference for January 17, 2006, at 2:00 p.m.[5]

The prehearing conference was held as scheduled on January 17, 2006, at 2:00 p.m. The Protestant did not appear, but had requested an oral hearing in its letter of protest. On January 19, 2006, a letter was mailed to the parties stating that this matter had been set for hearing on February 22, 2006, at 1:30 p.m.[6] The parties were directed to file position letters or briefs on or before February 15, 2006. On January 26, 2006, this office received a call from the Owner advising that the Notice of Prehearing Conference had not been received in time to call or

[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] OWNER was an owner/member of the Protestant.

[3] OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

[4] OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

[5] OKLA. STAT. ANN. tit. 68, § 208 (West 2001). The notice was mailed to the Protestant c/o Owner, 123 FAKE STREET, BIG CITY, Oklahoma 99999.

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

attend. There being no objection by the Division, the prehearing conference was reset for February 8, 2006, at 10:00 a.m. On January 30, 2006, a new Notice of Prehearing Conference was sent to the parties. On February 14, 2006, a Status Report was filed in lieu of the prehearing conference, which advised that the parties had spoken several times and had not been able to resolve this matter, nor had the Protestant provided the Division with any additional documentation. On February 15, 2006, the Division filed its *Position Letter of the Audit Division*.

On February 15, 2006, an *Entry of Appearance* and *Motion for Continuance of Hearing* were filed on behalf of the Protestant by ATTORNEY, LAW FIRM. On February 17, 2006, the parties were advised by letter that pursuant to the request of the Protestant's counsel, and there being no objection by the Division, this matter had been reset for hearing on March 28, 2006 at 9:30 a.m. The parties were directed to file position letters or briefs on or before March 21, 2006. No response was filed on behalf of the Protestant.

A closed hearing[7] was held on March 28, 2006, at 9:30 a.m. The Protestant appeared through the Owner.[8] The Division called one witness, AUDITOR, Auditor, In-House Audit Section, Audit Division, Oklahoma Tax Commission, who testified regarding the records of the Division. The Division's Exhibits A through E were identified, offered, and admitted into evidence. The Protestant did not offer any exhibits to be admitted into evidence. Upon conclusion of the hearing, the record was closed and the case was submitted for decision on March 28, 2006.

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 position letter, the undersigned finds:

1. On July 1, 2005, the Division mailed to the Protestant a letter[9] with the forms, on disc, required to be submitted beginning July 1, 2005, to comply with House Bill ("HB") 1606, as follows, to-wit:

- Requests submitted timely but containing errors or omissions will not be approved until the corrections are made. Requests for compensation must be

[7] The Protestant invoked its right to a confidential hearing as provided by OKLA. STAT. ANN. tit. 68, § 205 (West 2001).

[8] ALJ Exhibit 1. On March 28, 2006, at 9:24 a.m., ATTORNEY, counsel for Protestant, faxed this office a *Motion to Withdraw* as counsel for the Protestant, on the grounds that the Protestant no longer wished to be represented by ATTORNEY. At the beginning of the hearing the Owner confirmed that ATTORNEY no longer represented the Protestant. The motion was granted and the *Order Granting Motion to Withdraw* was filed and mailed March 29, 2006.

During the hearing the Owner advised that the Protestant had closed its doors in December 2005. The Protestant's new address is now c/o Owner, 9999 ANYROAD, SOMEWHERE, Oklahoma 99999.

[9] Division's Exhibit E. This letter was sent by the Division to all waste tire facilities due to the changes made by HB 1606.

correct by the 20th of the month to be eligible for disbursement that month. If corrections are received on the 21st of the month, the request for compensation will not be authorized for payment until the 20th of the following month.

- Properly completed weight tickets and manifests should accompany the Manifest Summary Report.
- Reports for materials sold should be accompanied by complete and correct weight tickets and bills of lading. Sales invoices for manufactured products should be remitted with manufacturers requests for compensation.
- Compensation is made when the facility documents the sale and movement of the processed tire material off-site to a third party and submits proof.
- The manifest summary report has been revised effective 7/1/05 to create a uniform reporting system.

2. On September 12, 2005, the Protestant submitted a "Waste Tire Facility Request for Compensation from the Waste Tire Recycling Indemnity Fund" ("Claim") for the period of August 1, 2005, through and including August 31, 2005.[10] The Protestant also submitted an "Affidavit of Waste Tire Facility and Request for Compensation."[11]

3. On September 21, 2005, the Division denied the Protestant's Claim (for processing activities) in the amount of $4,187.16.[12] The Division's basis for the denial was stated in the letter, as follows, to-wit:

> "There was not valid proof of a sale. Invoices dated 8/18/05 to four companies in Arkansas do not show how many tons were sold. Or the total amount paid by the company."[13]

4. On October 20, 2005, a timely letter of protest was received from the Protestant signed by the Owner.[14]

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[10] Division's Exhibit A. The Claim was signed on behalf of the Protestant by SECRETARY, as Secretary ("Secretary").

The claim for compensation consisted of two (2) parts:

(1) Collection and Transportation Activities for 280.94 tons of tires @ $53.00 per ton for a total claim of $14,889.82.
(2) Processing Activities for 77.54 tons of processed material @ $54.00 per ton for a total claim of $4,187.16.

[11] Division's Exhibit A. The Affidavit was signed by the Owner.

[12] Division's Exhibit C. The Protestant's claim for Collection and Transportation Activities in the amount of $14,889.92 was approved.

[13] *See* Division's Exhibit C. The Division requested that the Protestant "[p]lease send proof of the sale such as a cancelled check from the companies and information showing the tons sold and how much it sold per ton, and a copy of the Affidavit for proof of sale from the company that purchased the processed the material."

[14] Division's Exhibit D. The Protestant stated that it disagreed with the Division that it had not provided "proof of sale."

ADDITIONAL FINDINGS OF FACT

5. The invoices submitted with the Protestant's Claim were created by the Protestant's Secretary, subsequent to the purported sales, for the purpose of attaching to the Claim.[15] Each of the four (4) invoices[16] consists of the following information, as follows, to-wit:

INVOICE #	DATE	BILL TO	ITEM	DESCRIPTION	RATE	AMOUNT	TOTAL DUE
156[17]	08/18/05	CUSTOMER RANDOM PLACE, AR	CHIP SALE	MONEY AND OTHER GOOD AND VALUABLE CONSIDERATION	1.00	1.00	$1.00
157	08/18/05	CUSTOMER RANDOM PLACE, AR	CHIP SALE	MONEY AND OTHER GOOD AND VALUALBLE CONSIDERATION	1.00	1.00	$1.00
158	08/09/05	BUSINESS 830 W NEWHOUSE ANY TOWN, AR CUSTOMER CUSTOMER NAME	CHIP SALE	MONEY AND OTHER GOOD AND VALUABLE CONSIDERATION	1.00	1.00	$1.00
159	08/18/05	BUSINESS FAKE TOWN, AR 72770 CUSTOMER CUSTOMER	CHIP SALE	MONEY AND OTHER GOOD AND VALUABLE CONSIDERATION	1.00	1.00	$1.00

6. Attached to each invoice was a "weight ticket" from STEEL COMPANY[18] for the pick-up of processed material ("Tire Chips") from the Protestant and delivery off-site. Each of the "weight tickets"[19] reflects the following information, to-wit:

DATE	TRUCK WEIGHT EMPTY	LBS. OF TIRE CHIPS	TRUCK WEIGHT LOADED	CUSTOMER
08/18/05	29,660 LBS.	42,060 LBS.	71720 LBS.	CUSTOMER RANDOM TOWN, AR
08/18/05	28,440 LBS.	38,620 LBS.	67,060 LBS.	CUSTOMER RANDOM TOWN, AR
08/09/05	18,540 LBS.	29,440 LBS.	47,980 LBS.	BUSINESS, 123 FAKE STREET, ANYTOW , AR CUSTOMER
08/18/05	33,410 LBS.	44,960 LBS.	78,370 LBS.	COMPANY, ANYTOWN, AR CUSTOMERS

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[15] Before the changes made by HB 1606, it was not the business practice of the Protestant to use sales invoices. Prior to July 1, 2005, the Protestant relied on weight tickets for the claims filed with the Division.

[16] Division's Exhibit B. The Owner testified that the Protestant's Secretary created the invoices using Quick Books for the purpose of attaching them to the Claim to document the sales. The customers were never billed and there were no records that the customers ever paid for the Tire Chips. The Owner testified that the rate on the invoice was $1.00 per truck load of tire chips. The number of pounds would vary from load to load. The Division's auditor testified that she did not help the Protestant's Secretary design the sale invoice.

[17] *See* Division's Exhibit B. Invoices # 156 and 157 appear to have been signed, but the signature is illegible. Invoice # 158 reflects a signature of SOME PERSON. Invoice # 159 is simply signed "NAME."

[18] The "weight ticket" reflects that STEEL COMPANY had locations 1111 FAUX ROAD, BIG CITY, OK and 99999 S Hwy. 99, SUBURB, OK.

[19] *See* Division's Exhibit B. The Owner explained during the course of the hearing that the Protestant did not have a weight scale on-site but that there was a weigh station nearby. STEEL COMPANY would weigh the truck when it was empty and weigh it again when the truck was loaded with tire chips. That is how the Protestant determined how many pounds of tire chips had been delivered off-site to a customer. There was no testimony as to who paid STEEL COMPANY for its services.

7. Immediately after the denial of the Claim, the Division provided the Protestant with "Affidavits for Proof of Sale" to be executed by its customers to verify the purported sales, the tons of Tire Chips sold, and the price paid per ton. The Protestant did not attempt to contact any of its customers to execute the affidavits and no further documentation was provided to the Division.[20]

8. The Protestant cannot verify that sales were made to the "customers" listed on the invoices attached to its Claim.[21]

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[22]

2. Beginning July 1, 2005, a Waste Tire Facility[23] located in the State of Oklahoma could make a claim for compensation to the Oklahoma Tax Commission for the processing of waste tires, by altering the form of the waste tires, at the rate of Fifty-four Dollars ($54.00) per ton of processed tire materials,[24] subject to the following conditions:

- Facilities that process waste tires by altering the form of the waste tires but do not produce crumb rubber *shall not receive compensation until the facility documents the sale*[25] and movement of the processed tire material off-site to a third party. (Emphasis added)

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[20] The Division's auditor also testified that she attempted to locate the customers listed on the invoices to verify the sales, but she could not locate any of the customers.

[21] The Owner testified that the Protestant could not provide proof of any sales. The customers were never billed and no records exist to prove that any sales were ever made, or even that the nominal charge of $1.00 per load of Tire Chips was ever collected.

[22] OKLA. STAT. ANN. tit. 68, § 221(D) (West 2001).

[23] OKLA. STAT. ANN. tit. 27A, § 2-11-401.1(15) (West 2001):

> "Waste tire facility" means any place which is permitted as a solid waste disposal site, in accordance with the Oklahoma Solid Waste Management Act, at which waste tires are processed; . . . .

[24] OKLA. STAT. ANN. tit. 27A, § 2-11-401.1(16) (West 2001):

> "Waste tire processing" means altering the form of whole waste tires by shredding, chipping, or other method approved by the Department, except baling.

[25] Sale is not defined in the Act, but pursuant to OKLA. STAT. ANN. tit. 68, § 1352(21) (West Supp. 2006) defines sale:

> As used in the Sales Tax Code:

- Facilities shall report and certify tire processing activity in terms of weight. The facility shall by sworn affidavit provide to the Commission sufficient information to verify that the facility has processed tires and sold processed tires for actual recycling or reuse in accordance with the purposes of the Oklahoma Waste Tire Recycling Act ("Act").[26]
- To be eligible for compensation, a facility shall not have accumulated more processed material than the amount for which the facility has provided financial assurance under its solid waste permit or the amount accumulated from three (3) years of operation, whichever is less.[27]

3. The Oklahoma Tax Commission shall promulgate rules[28] to carry out the provisions of the Act which pertain to the remittance of fees and to the allocation of monies accruing to the Waste Tire Indemnity Fund.[29]

4. The Oklahoma Tax Commission shall prescribe forms, containing documentation as required by the Act, to be used by a waste tire facility authorized to receive reimbursement.[30]

5. Rules promulgated pursuant to the Administrative Procedures Act[31] are presumed to be valid until declared otherwise by a district court of this State or the Supreme Court.[32] They

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21. "Sale" means the transfer of either title or possession of tangible personal property for a valuable consideration regardless of the manner, method, instrumentality, or device by which the transfer is accomplished in this state, or other transactions as provided by this paragraph, including but not limited to:

a. the exchange, barter, lease, or rental of tangible personal property resulting in the transfer of the title to or possession of the property,
b. the disposition for consumption or use in any business or by any person of all goods, wares, merchandise, or property which has been purchased for resale, manufacturing, or further processing,
c. the sale, gift, exchange, or other disposition of admission, dues, or fees to clubs, places of amusement, or recreational or athletic events or for the privilege of having access to or the use of amusement, recreational, athletic or entertainment facilities,
d. the furnishing or rendering of services taxable under the Oklahoma Sales Tax Code, and
e. any use of motor fuel or diesel fuel by a supplier, as defined in Section 500.3 of this title, upon which sales tax has not previously been paid, for purposes other than to propel motor vehicles over the public highways of this state. Motor fuel or diesel fuel purchased outside the state and used for purposes other than to propel motor vehicles over the public highways of this state shall not constitute a sale within the meaning of this paragraph;

[26] OKLA. STAT. ANN. tit. 27A, § 2-11-401 et seq. (West 2001).

[27] OKLA. STAT. ANN. tit. 27A, § 2-11-401.4 (West Supp. 2006). Prior to the enactment of HB 1606, the Protestant did not have to *document the sale and movement of the processed tire material off-site to a third party*.

[28] *See* OKLA. ADMIN. CODE § 710:95-5-13 et seq.

[29] OKLA. STAT. ANN. tit. 27A, § 2-11-406.6 (A)(1) (West Supp. 2006).

[30] OKLA. STAT. ANN. tit. 27A, § 2-11-406.6 (A)(2) (West Supp. 2006).

are valid and binding on the persons they affect, have the force of law, and are prima facie evidence of the proper interpretation of the matter to which they refer.[33]

6. In order for a protest to be considered timely, it must be filed in writing within thirty (30) days, pursuant to the Oklahoma Administrative Code. Otherwise, without further action of the Commission, the denial becomes final and no appeal will be entertained.[34]

7. The protest was filed within thirty (30) days of the Division's denial of the Protestant's claim for compensation.[35]

8. In all proceedings before the Tax Commission, the burden of proof is on the taxpayer[36] to show in what respect the action or proposed action of the Division is incorrect.[37]

9. The Protestant has failed to provide sufficient information, as required by the Act, to document the *sale* of the processed tire material to a third party.

10. In this matter the Protestant has failed to meet its burden of proof that the Division's denial of its Claim was incorrect.

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[31] OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2001).

[32] OKLA. STAT. ANN. tit. 75, § 306 (C) (West 2001).

[33] OKLA. STAT. ANN. tit. 75, § 308.2 (C) (West 2001).

[34] OKLA. ADMIN. CODE § 710:95-5-15(c).

[35] *See* Division's Exhibits C and D. The Division's denial is dated September 21, 2005, and the protest was received by the Division on October 20, 2005.

[36] OKLA. ADMIN. CODE § 710:1-5-47 (2004), which states:

> In all administrative proceedings, unless otherwise provided by law, the burden of proof shall be upon the protestant to show in what respect the action or proposed action of the Tax Commission is incorrect. If, upon hearing, the protestant fails to prove a prima facie case, the Administrative Law Judge may recommend that the Commission deny the protest solely upon grounds of failure to prove sufficient facts which would entitle the protestant to the requested relief.

OKLA. ADMIN. CODE § 710:1-5-77(b) (2004), provides in pertinent part:

> . . . "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.

[37] *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 should be denied.

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.