JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2006-07-25-09
ID:	P-05-225-K
DATE:	JULY 25, 2006
DISPOSITION:	DENIED
TAX TYPE:	CIGARETTE EXCISE
APPEAL:	NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestant, PROTESTANT appears pro se. The Audit Division of the Tax Commission (hereinafter "Division") is represented by OTC ATTORNEY, Assistant General Counsel, General Counsel's Office of the Tax Commission.

STATEMENT OF THE CASE

An audit of cigarette purchases made by Protestant was initiated by the Division upon information provided by ONLINE STORE of ANY TOWN, New York. As a result of the audit, the Division by letter dated October 7, 2005, caused to be issued a proposed cigarette excise tax assessment against Protestant for the period ending July, 2005.[1] Protestant timely protested the proposed assessment by letter mailed November 3, 2005.

On December 27, 2005, the Division's file consisting of a cover sheet, the proposed assessment and the letter of protest was referred to the Office of the Administrative Law Judges ("ALJ's Office") for further proceeding consistent with the Uniform Tax Procedure Code[2] and the Rules of Practice and Procedure before the Oklahoma Tax Commission[3]. The case was docketed as Case No. P-05-225-K and assigned to ALJ, Administrative Law Judge.[4]

A pre-hearing conference was scheduled in this cause for February 15, 2006, by *Notice of Prehearing Conference* issued January 24, 2006.[5] Pursuant to the pre-hearing conference, a *Prehearing Conference Order* was issued setting forth the parties' agreement to have the protests submitted for decision by written presentation.[6]

The *Division's Verified Response* was filed March 28, 2006. Attached to the *Response* were Exhibits A through G. Protestant filed a reply to the verified response on April 17, 2006, whereupon the record in this cause was closed and the matter was submitted for decision.

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[1] Protestant also received a proposed assessment for the periods ending October and November, 2005 which was issued on January 17, 2006. Protestant protested this assessment on February 15, 2006, and requested that both protests be consolidated for purposes of further proceedings. By letter dated February 16, 2006, the Division was notified that a protest to the January 17, 2006 assessment had been lodged by the taxpayer and that the protest was consolidated with the existing protest docketed as Case No. P-05-225-K.

[2] 68 O.S. 2001, § 201 et seq.

[3] *OAC*, 710:1-5-20 through 710:1-5-47.

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

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

[6] *OAC*, 710:1-5-28(b). *See*, *OAC*, 710:1-5-38.

FINDINGS OF FACT

Upon review of the file and records, including the *Division's Verified Response*, the exhibits attached thereto and Protestant's reply, the undersigned finds:

1. That between April 11, 2005 and July 27, 2005, Protestant purchased sixteen (16) cartons of cigarettes from ONLINE STORE of ANY TOWN, New York and had those cartons shipped to his address in BIG CITY, Oklahoma. Exhibits B through E.

2. That during the periods of October and November, 2005, Protestant purchased twelve (12) cartons of cigarettes over the internet, by telephone or by mail and had those cartons shipped to his address in BIG CITY, Oklahoma. January 17, 2006 proposed assessment.[7]

3. That Protestant does not deny he purchased the cigarettes in question. Protestant's reply, paragraph 3.

4. That Protestant did not make application for nor procure a written license from the Tax Commission prior to purchasing the cigarettes. Exhibit F.

5. That Protestant did not purchase and affix the required amount of Oklahoma cigarette tax stamps to each package of cigarettes purchased and did not remit an amount equivalent to the same to the Tax Commission on the quantity of cigarettes purchased. Exhibits A and F.

6. That by letter dated October 7, 2005, the Division proposed the assessment of cigarette excise tax, interest and penalty against Protestant for the period ending July, 2005, in the aggregate amount of $194.05, consisting of tax of $164.80, interest accrued through December 7, 2005, of $12.77 and penalty of $16.48. Exhibits A and F.

7. That by letter dated January 17, 2006, the Division proposed the assessment of cigarette excise tax, interest and penalty against Protestant for the periods ending October and November, 2005, in the aggregate amount of $144.06, consisting of tax of $123.60, interest accrued through March 17, 2006, of $8.10 and penalty of $12.36.[8]

8. That the assessment is based upon information provided by ONLINE STORE of ANY TOWN, New York pursuant to the Jenkins Act, 15 U.S.C.A., § 375 et seq. 68 O.S. 2001, § 221(A). Exhibits B through E.

9. That Protestant timely protested the proposed assessments.[9] Exhibit G.

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[7] Upon official notice. *OAC*, 710:1-5-36.

[8] See, note 7.

[9] On February 15, 2006, Protestant wrote on the reverse side of the January 17, 2006 proposed assessment "I protest this assessment in conjunction with my original protest." The protest was signed and dated. Official notice of the protest is taken. *OAC*, 710:1-5-36.

10. That without taking into consideration Protestant's request for a waiver of all the penalty and interest accrued and accruing with respect to the two (2) proposed assessments, the amount in controversy is $338.11, exclusive of any additional accrued and accruing interest.

ISSUE AND CONTENTIONS

The issue presented for decision poses a question of law, to-wit: may Oklahoma impose cigarette excise tax on cigarettes purchased via the internet or mail-order from outside the State of Oklahoma and imported into Oklahoma by the consumer/user of the cigarettes for his/her own personal use and consumption?

Protestant requests that any and all assessments of cigarette excise taxes made against him on purchases of cigarettes via the internet or by mail-order from outside the State of Oklahoma be voided and deemed invalid along with all penalty and interest. In support of this request, Protestant contends that federal law prohibits taxation of such internet purchases under The Internet Tax Freedom Act, 47 U.S.C. § 151. Protestant further contends that the Oklahoma Cigarette Stamp Tax Act, 68 O.S. 2001, § 301 et seq., as amended; is unconstitutional and unenforceable. In support of this contention, Protestant argues that the Act violates the Sovereignty Clause of the Oklahoma Constitution and the Commerce Clause of the United States Constitution.

Protestant requests a waiver of the penalty and interest assessed. Whether Protestant's waiver request should be granted is not addressed herein as the ALJ's Office is not authorized to waive penalty and interest. *See*, 68 O.S. 2001, §§ 219, 219.1 and 220. The authority to waive penalty and interest or any portion thereof ordinarily accruing by reason of a taxpayer's failure to pay a state tax within the statutory period allowed for its payment lies with the three (3) members of the Tax Commission or their designees. 68 O.S. 2001, § 220(A).

The Division contends that the protest should be denied on its merits and that the amount in controversy inclusive of any additional accrued and accruing interest should be fixed as the amount due and owing by Protestant. In support of these contentions, the Division argues that The Internet Tax Freedom Act does not prohibit the imposition of excise taxes by Oklahoma on the purchases of cigarettes by Protestant via the internet. The Division further argues that Protestant failed to provide any evidence refuting the data contained on the invoices used by the Division in assessing the tax and that the invoices show Protestant's name and address as the "bill to" name and address.

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. 2001, § 221(D).

2. The Cigarette Stamp Tax Act, 68 O.S. 2001, §§ 301 et seq., levies an excise tax on "the sale, use, gift, possession, or consumption of cigarettes within the State of Oklahoma". 68 O.S. 2001, §§ 302-302-4 and 68 O.S. Supp. 2004, § 302-5. The tax shall be paid only once on any cigarettes sold, used, received, possessed, or consumed in this state and shall be evidenced by stamps or an impression by use of a metering device. Id. The impact of the tax is on the vendee, user, consumer, or possessor of cigarettes in this state, and, when the tax is paid by any other person,

such payment shall be considered as an advance payment and shall thereafter be added to the price of the cigarettes and recovered from the ultimate consumer or user. Id.

3. The subject of the cigarette stamp tax is "[t]he sale, gift, barter, or exchange of cigarettes, or the having possession of cigarettes for consumption". 68 O.S. 2001 § 303.

4. 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 (40), at any one time to which are not affixed the required stamps shall immediately report the same to the Tax Commission and purchase from the Tax Commission proper stamps and attach the same to all such cigarettes received. 68 O.S. 2001, § 305(C). A "consumer" is defined for purposes of the Act to mean "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." 68 O.S. 2001, § 302 (e).

5. A consumer who secures cigarettes from without the State and has the same brought into the State by a common carrier or otherwise is deemed to be a retailer, and in the event such person purchases cigarettes in a quantity larger than forty (40), he/she is subject to the same provisions, rule and regulations with respect to cigarettes as are by the Act imposed upon retailers. 68 O.S. 2001, § 307.

6. If any taxpayer shall fail to make any report or return as required by any state tax law, the Tax Commission, from any information in its possession or obtainable by it, may determine the correct amount of tax for the taxable period and shall in writing propose the assessment of taxes and mail a copy of the proposed assessment to the taxpayer at the taxpayer's last-known address. 68 O.S. 2001, § 221(A). If upon examination of invoices or from other investigations, the Tax Commission finds that cigarettes have been sold without stamps affixed and a person is unable to furnish evidence of sufficient stamp purchases to cover the unstamped cigarettes purchased, a prima facie presumption arises that such cigarettes were sold without proper stamps being affixed thereto. 68 O.S. 2001, § 305(D).

7. Every statute is deemed constitutionally valid until a court of competent jurisdiction declares otherwise. *See, State ex rel. York v. Turpen*, 1984 OK 26, 681 P.2d 763, 767. The Tax Commission as an administrative agency is not empowered to decide the constitutional validity of a taxing statute. *See, Dow Jones & Company, Inc. v. Oklahoma Tax Commission*, 1990 OK 6, 787 P.2d 843, 845. Notwithstanding, the undersigned finds that because the excise tax is imposed on the "possession or consumption of cigarettes within the State of Oklahoma" the Oklahoma Cigarette Stamp Tax Act does not violates the Commerce Clause of the United States Constitution, *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 115 S.Ct. 1331, 131 L.Ed. 2d 261 (1995); and because the Internet Tax Freedom Act does not contain an express grant of preemption with respect to the subject matter of this protest, but instead expressly preserves existing and permissible state and local taxing authority, the Oklahoma Cigarette Stamp Tax Act does not violate the Sovereignty Clause of the Oklahoma Constitution. *See, White Buffalo Ventures, LLC, v. University of Texas at Austin*, 420 F.3d 366 (2005).

8. The Internet Tax Freedom Act is inapplicable to these proceedings. This Act prohibits states from imposing taxes on internet access and multiple or discriminatory taxes on electronic commerce. § 1101, 47 U.S.C. § 151. The Cigarette Stamp Tax Act imposes neither taxes on internet access nor multiple or discriminatory taxes on electronic commerce.

9. Here, not including those cigarettes for which the January 17, 2006 proposed assessment was issued, Protestant on four (4) separate occasions purchased or caused to be purchased and shipped into the State for his personal use and consumption, cigarettes in quantities greater than two (2) packs. The invoices do not show that stamps equal to the amount of excise tax levied by the Act were affixed to the individual packages of cigarettes. In fact the invoices report:

> As part of the Seneca Nation of Indians and the Iroquois Confederacy, we are currently not required to collect state sales tax for products 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.

Additionally in this matter, Protestant has not presented any evidence to show sufficient stamp purchases to cover the unstamped cigarettes purchased.

10. Protestant's protests to the proposed cigarette excise 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, PROTESTANT, be denied. It is further ORDERED that the amount in controversy, inclusive of any additional accrued and accruing interest, be fixed as the deficiency 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.