JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2006-07-25-10
ID:	P-05-207-K
DATE:	JULY 25, 2006
DISPOSITION:	DENIED
TAX TYPE:	CIGARETTE EXCISE
APPEAL:	N ONE 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. As a result of the audit, the Division by letter dated October 7, 2005, proposed the assessment of Cigarette excise tax, interest and penalty against Protestant for the period ending July, 2005. Protestant timely protested the proposed assessment. Protestant did not request a hearing in the letter of protest.

On December 15, 2005, the Division's file was referred to the Office of the Administrative Law Judges ("ALJ's Office") for further proceeding in accordance with the Uniform Tax Procedure Code[1] and the Rules of Practice and Procedure before the Oklahoma Tax Commission[2]. The case was docketed as Case No. P-05-207-K and assigned to ALJ, Administrative Law Judge.[3]

A pre-hearing conference was scheduled in this cause for January 30, 2006, by *Notice of Prehearing Conference* issued January 18, 2006.[4] Protestant neither appeared at the pre-hearing conference nor responded to the *Notice*.

By letter dated January 31, 2006, the Division was directed to file a verified response to protest.[5] The *Division's Verified Response* was filed March 15, 2006. The Division attached thereto documents marked Exhibits A through D. Protestant did not respond to the notice or the verified response. On May 1, 2006, the record in this cause was closed and the matter submitted for decision.

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[1] 68 O.S. 2001, § 201 et seq.

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

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

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

[5] 68 O.S. 2001, § 221(D) and *OAC*, 710:1-5-28(c).

FINDINGS OF FACT

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

1. That during the period of February, 2003 to May, 2003, Protestant purchased a total of twenty-seven (27) cartons of cigarettes from ONLINE STORE and had those cartons shipped to an address in BIG CITY, Oklahoma. Exhibit B.

2. That Protestant admits she purchased the aforementioned cigarettes for her personal use and consumption. Exhibit D.

3. That Protestant did not make application for nor procure a written license from the Tax Commission prior to purchasing the cigarettes. Exhibits A through D.

4. That Protestant did not purchased and affixed 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 through C.

5. That by letter dated October 7, 2005, the Division proposed the assessment of cigarette excise tax, interest and penalty against Protestant in the aggregate amount of $93.24, consisting of tax of $62.10, interest accrued through December 7, 2005, of $24.93 and penalty of $6.21. Exhibit A.

6. That the assessment is based upon information provided by the out-of-state retailer of the cigarettes pursuant to the Jenkins Act, 15 U.S.C.A., § 375 et seq. 68 O.S. 2001, § 221(A). Exhibit B.

7. That Protestant timely protested the proposed assessment by letter received October 31, 2005. Exhibit D.

8. That the amount in controversy, exclusive of any additional interest, is $93.24.

ISSUE AND CONTENTIONS

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

Protestant does not dispute that she purchased the cigarettes at issue and caused those cigarettes to be shipped to an address in the State of Oklahoma. Protestant argues that she was not aware that appropriate taxes were not being charged and paid on her purchases.

Protestant requests a waiver of the charges assessed against her, stating that she thought the taxes were included in the purchase price of the cigarettes. In the alternative, Protestant requests a waiver of the penalty and interest assessed.

Whether Protestant's request for abatement of the tax liability and interest and penalty accruing thereto or her request for a waiver of penalty and interest should be granted is not addressed herein as the ALJ's Office is not authorized to abate a tax liability or waive penalty and interest. *See*, 68 O.S. 2001, §§ 219, 219.1 and 220. The exclusive jurisdiction to abate all or any portion of a tax liability and interest and penalties accruing thereto lies with the three (3) members of the Tax Commission. 68 O.S. 2001, § 219.1(D). *See also, OAC*, 710:1-5-86(a). 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 Protestant failed to provide any evidence refuting the data contained on the invoice used by the Division in assessing the tax and that the invoice shows 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. 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.

8. Ignorance of the law, standing alone, is no defense. The rule, long-standing and well-known, is found in *Campbell v. Newman*, 1915 OK 538, ¶3, 151 P. 602, 603 which cites *Utermehle v. Norment*, 197 U.S. 40, 25 S.Ct. 291, 49 L.Ed. 655 (1905), "We know of no case where mere ignorance of the law, standing alone, constitutes any excuse or defense against its enforcement. It would be impossible to administer the law if ignorance of its provisions were a defense thereto."

9. Here, Protestant on nine (9) separate occasions purchased and caused to be shipped into the State for her 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. Further, no evidence has been presented to show sufficient stamp purchases to cover the unstamped cigarettes purchased.

10. Protestant, the unlicensed consumer of the cigarettes at issue, is the party liable for the cigarette excise taxes on those cigarettes. 68 O.S. 2001, §§ 305(C) and 307. Accordingly, Protestant's protest to the proposed cigarette excise tax assessment 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.