

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2006-08-01-05
ID: P-06-048-K
DATE: AUGUST 1, 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 February 21, 2006, caused to be issued against Protestant a proposed assessment of Cigarette excise tax, interest and penalty for the period ending December, 2005. Protestant timely protested the proposed assessment. Protestant did not request a hearing in the letter of protest.

On March 13, 2006, the Division's file was referred to the Office of the Administrative Law Judges ("ALJ's Office") for purposes of instituting further proceeding in accordance with the Uniform Tax Procedure Code¹ and the Rules of Practice and Procedure before the Oklahoma Tax Commission². The case was docketed as Case No. P-06-048-K and was assigned to ALJ, Administrative Law Judge.³

A pre-hearing conference was scheduled in this cause for May 4, 2006, by Prehearing Conference Notice issued March 24, 2006.⁴ Protestant neither appeared at the pre-hearing conference nor responded to the Notice. By letter dated May 5, 2006, the parties were notified 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.⁵ Protestant did not respond to this notice.

The Division's Verified Response was filed May 17, 2006. Attached to the Response were Exhibits A through E. Protestant did not respond to the Division's Verified Response. The record was closed and the protest submitted for decision on March 23, 2006.⁶

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.

⁵ OAC, 710:1-5-28(c).

⁶ OAC, 710:1-5-39(a).

FINDINGS OF FACT

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

1. That on or about October 25 and December 6, 2005, Protestant purchased six (6) cartons of cigarettes from ONLINE STORE of ANY TOWN, New York and had those cartons shipped to her address in FAKE CITY, Oklahoma. Exhibits B and C.
2. That Protestant was the user and/or consumer of the aforementioned cigarettes. Exhibit E.
3. That Protestant did not make application for nor procure a written license from the Tax Commission prior to purchasing the cigarettes. Exhibits A and D.
4. That Protestant did not purchase 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, D and E.
5. That by letter dated February 21, 2006, the Division proposed the assessment of cigarette excise tax, interest and penalty against Protestant in the aggregate amount of \$71.96, consisting of tax in the amount of \$61.80, interest accrued through April 21, 2006, in the amount of \$3.98 and penalty in the amount of \$6.18. Exhibit A.
6. 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 and C.
7. That Protestant timely protested the proposed assessment by letter mailed February 24, 2006. Exhibit E.

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 writes in the letter of protest:

I'm 82 & on the welfare rolls. I received a flyer in mail and thought I could have a cigarette once in a while since I'm not able to do much else and I am handicapped. Don't understand the taxes and also that anyway taxes [are] only like a few dollars being what I paid for the cigarettes I ordered. My income for a year is around 6,500.00 so I don't have hardly any extra money and only get \$10.00 a month in

food stamps. I'm on social security and supplemental income and Medicaid & Medicare. Maybe I could pay \$2.00 or \$3.00 a month.

The Division contends that the protest should be denied on the merits and that the amount in controversy inclusive of any additional accrued and accruing interest should be fixed as the amount due. In support of these contentions, the Division 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 violate 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).

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, on two (2) separate occasions Protestant purchased or caused to be purchased and shipped into the State for her own 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 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.