

JURISDICTION: OKLAHOMA TAX COMMISSION DECISION
CITE: 2006-08-22-05 / NOT PRECEDENTIAL
ID: P-05-221-K
DATE: AUGUST 22, 2006
DISPOSITION: DENIED
TAX TYPE: CIGARETTE EXCISE TAX
APPEAL: NO APPEAL TAKEN

The above matter comes on for entry of a final order of disposition by the Oklahoma Tax Commission. Having reviewed the files and records herein, including the Findings of Fact, Conclusions of Law and Recommendations made and entered by the Administrative Law Judge on the 14th day of April, 2006, and amended on the 14th day of July, 2006, the Commission makes the following Findings of Fact and Conclusions of Law and enters the following order.

FINDINGS OF FACT

1. That between June 9, 2005, and August 12, 2005, Protestant purchased at least thirty-four (34) and possibly as many as forty-two (42) cartons of cigarettes from OrderSmokesDirect.com of Salamanca, New York and had those cartons shipped to her address in SMALL TOWN, Oklahoma. Division's Exhibits C¹, D² and E³.

2. That Protestant and/or her friends were the users and consumers of the aforementioned cigarettes. Division's Exhibit H.

3. That Protestant did not make application for nor procure a written license from the Tax Commission prior to purchasing the cigarettes. Division's Exhibit H.

4. 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. Division's Exhibits C through H.

5. That by letter dated September 29, 2005, the Audit Division of the Oklahoma Tax Commission proposed the assessment of cigarette excise tax, interest and penalty against Protestant for the period ending July, 2005, in the aggregate amount of \$239.62, consisting of tax in the amount of \$206.00, interest accrued through November 30, 2005, in the amount of \$13.02 and penalty in the amount of \$20.60.⁴ Division's Exhibits A and F.

6. That by letter dated October 21, 2005, the Division proposed the assessment of cigarette excise tax, interest and penalty against Protestant for the period ending August, 2005, in the aggregate amount of \$142.60, consisting of tax in the amount of \$123.60, interest accrued through December 21, 2005, in the amount of \$6.64 and penalty in the amount of \$12.36. Division's Exhibits B and G.

7. That the assessment is based upon information provided by OrderSmokesDirect.com of Salamanca, New York pursuant to the Jenkins Act, 15 U.S.C.A., § 375 et seq. 68 O.S. 2001, §221(A). Division's Exhibits C through G.

8. That Protestant timely protested the proposed assessment by letter dated November 4, 2005. Division's Exhibit H.

9. That the amount in controversy is \$382.22, 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?

Although Protestant states that she not only purchased the cigarettes for herself, but also her friends, she does not dispute that she purchased the cigarettes and had them shipped into Oklahoma for her and her friends' personal use. The only argument against the proposed assessments as set forth in the letter of protest is that she did not know OrderSmokesDirect.com did not include the taxes in the price of the cigarettes purchased and was not remitting the taxes on the cigarettes.

Protestant requests a waiver of the charges assessed against her, stating that she receives disability of \$633.00 per month, is housebound and cannot drive and is 74 years old, legally blind with MS.

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 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).⁵

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.

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 three (3) separate occasions Protestant purchased or caused to be purchased and shipped into the State for the personal use and consumption of herself or her friends,

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.

ORDER

Based on the above and foregoing findings of fact and conclusions of law, the protest of PROTESTANT to the proposed cigarette excise tax assessments is hereby denied.

¹ Invoice Number OT000145301 dated June 9, 2005 shows ten (10) cartons of Tucson LT 100 SP were billed to and shipped to Protestant at ADDRESS, SMALL TOWN, Oklahoma 7##### on June 9, 2005 via UPS. The Division's work-papers (Division's Exhibit F) report that by Invoice number OT000145403 dated June 9, 2005, eight (8) cartons of Seneca were billed to and shipped to Protestant.

² Invoice Number OT000158430 dated July 12, 2005 shows three (3) cartons of NY Seneca LT 100 SP and nine (9) cartons of Desert Sun LT 100 SP were billed to and shipped to Protestant at ADDRESS, SMALL TOWN, Oklahoma 7##### on July 12, 2005 via UPS. The Division's work-papers (Division's Exhibit F) report the same.

³ Invoice Number OT000169813 dated August 12, 2005 shows two (2) cartons of Primo LT 100 SP and ten (10) cartons of NY Seneca LT 100 SP were billed to and shipped to Protestant at ADDRESS, SMALL TOWN, Oklahoma 7##### on August 12, 2005 via UPS. The Division's work-papers (Division's Exhibit G) report the same.

⁴ The assessment is based on the purchase of twenty (20) cartons of cigarettes, as opposed to the purchase of twenty-two (22) cartons of cigarettes as reflected on the June 9 and July 12, 2005 invoices. Division's Exhibits A and F. *See*, Notes 1 and 2. The June 9, 2005 invoice reports the purchase of ten (10) cartons of cigarettes. Division's Exhibit C. The Division's audit work-papers only reflect the purchase of eight (8) cartons of cigarettes on June 9, 2005. Division's Exhibit F. The July 12, 2005 invoice reports the purchase of twelve (12) cartons of cigarettes. Division's Exhibit D. The Division's audit work-papers reflect the same. Division's Exhibit F.

⁵ This subsection provides in pertinent part: "[I]n the event an oral hearing is not requested, the Tax Commission shall proceed without further notice to examine into the merits of the protest and enter an order in accordance with its findings."

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.