

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2006-08-22-06 (Non-Precedential)
ID: P-05-206-H
DATE: AUGUST 22, 2006
DISPOSITION: SUSTAINED IN PART/DENIED IN PART
TAX TYPE: CIGARETTE EXCISE
APPEAL: NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROTESTANT (“Protestant”) appears pro se.¹ The Excise Tax Section, Audit Division (“Division”), Oklahoma Tax Commission, appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On December 15, 2005, the protest file was received by this office for further proceedings consistent with the Uniform Tax Procedure Code² and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.³ On December 29, 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-05-206-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 January 20, 2006, the Notice of Prehearing Conference was mailed to the last known address of the Protestant, setting the prehearing conference for February 16, 2006, at 10:30 a.m.⁴

On February 16, 2006, at 10:30 a.m. the prehearing conference was held as scheduled. The Protestant did not appear at the prehearing conference and the Protestant did not request an oral hearing. On February 17, 2006, notice was served upon the parties that this cause would be closed and the matter submitted for decision upon the filing of a verified response to the protest by the Division.⁵ The Division filed its Verified Response to the protest on March 17, 2006. The verification attached to the response was duly sworn under oath, on behalf of the Division, by AUDITOR, Auditor Supervisor, Excise Tax Section, Audit Division, Oklahoma Tax

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

³ OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

⁴ OKLA. STAT. ANN. tit. 68, § 208 (West 2001). The notice was mailed to ADDRESS.

⁵ OKLA. ADMIN. CODE § 710:1-5-28(c).

Commission.⁶ No response was received from the Protestant. On March 22, 2006, the record was closed and this matter was submitted for decision.

On March 27, 2006, the undersigned issued an “Order Withdrawing Case from Submission for Decision.” The Division’s Verified Response was timely filed, but the “Certificate of Mailing” reflected that the verified response had been mailed to an old address of the Protestant. The service of the Division’s Verified Response was insufficient. The Protestant was given fifteen (15) days from the date of the Division’s re-mailing to file a response.

On March 28, 2006, counsel for the Division filed a “Notice of Amended Certificate of Mailing” stating that the Division’s Verified Response had been re-mailed to the current address of the Protestant, 123 FAKE STREET, BIG CITY, OK 12345. No response was received from the Protestant. On April 18, 2006, the record was closed and this matter was resubmitted for decision.

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 Verified Response, the undersigned finds:

1. The Protestant purchased cigarettes from ONLINE STORE, an out-of-state internet/mail order cigarette retailer, as follows, to-wit:

Invoice No.	Invoice Date	Brand	No. of Cartons
SS000409437 ⁷	04/15/05	NY SENECA FF 100 BX	7
SS000409437 ⁸	04/15/05	NY SENECA FF 100 BX	(7)
SS000442255 ⁹	05/03/05	NY SENECA FF 100 BX	7
SS000461591 ¹⁰	05/16/05	NY SENECA FF 100 SP	7
Total			21

2. Oklahoma Cigarette Tax Stamps¹¹ were not purchased and affixed to the cigarettes by ONLINE STORE, and Cigarette Stamp Excise Tax (“ACX”) was not collected by ONLINE

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

⁷ Division’s Exhibit B.

⁸ See Division’s Exhibit B. See also Division’s Exhibit E, the audit work papers. This is an obvious duplication of the April 15, 2005, invoice and is incorrect. According to the record, the Protestant purchased twenty-one (21) cartons of cigarettes, not twenty-eight (28).

⁹ Division’s Exhibit C.

¹⁰ Division’s Exhibit D.

¹¹ OKLA. STAT. ANN. tit. 68, § 301(8) (West Supp. 2006):

The term “stamp” as herein used shall mean the stamp or stamps by use of which:

STORE or remitted by the Protestant at the time the purchases took place.¹² The Protestant did not possess an Oklahoma Cigarette License at the time of the purchases.

3. The Protestant purchased the cigarettes from ONLINE STORE by Electronic Funds Transfer (“EFT”) and the cigarettes were delivered to the Protestant via the United States Postal Service (“USPS”) at Route 9, Box 999, SMALL TOWN, OK 12345.¹³

4. On October 7, 2005, the Division issued a proposed ACX assessment¹⁴ against the Protestant for the purchase of cigarettes from ONLINE STORE on April 15, 2005; May 3, 2005; and May 16, 2005 (“Audit Period”); as follows, to-wit:

ACX Due	\$288.40
Interest through 12/07/05	26.46
Tax & Interest due within 60 Days:	\$314.86
Penalty @ 10%	28.84
Tax, Interest & Penalty due after 60 Days:	\$343.70

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- a. the tax levied pursuant to the provisions of Section 301 et seq. of this title is paid,
 - b. the tax levied pursuant to the provisions of Section 349 of this title is paid, or
 - c. the payment in lieu of tax authorized pursuant to a compact entered into by the State of Oklahoma and a federally recognized Indian tribe or nation pursuant to the provisions of subsection C of Section 346 of this title is paid.

¹² Division’s Exhibits B through D. At the bottom of each ONLINE STORE invoice appears the following:

As part of the TRIBAL NATION, we are currently not required to collect state sales tax for product 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.* (Emphasis added.)

¹³ Division’s Exhibits B through D.

¹⁴ Division’s Exhibit A. *See* Division’s Exhibits B through D. *See also* Division’s Exhibit E, the Division’s audit work papers for the proposed ACX assessment. Each of the cartons purchased by the Protestant was taxed at the rate of \$10.30 per carton in accordance with the Act, but the number of cartons purchased is incorrect. *See* Note 8.

See OKLA. STAT. ANN. tit. 68, § 1355(11) (West Supp. 2006):

Effective January 1, 2005, sales of cigarettes on which the tax levied in Section 301 et seq. of this title or tobacco products on which the tax levied in Section 401 et seq. of this title has been paid.

See also OKLA. STAT. ANN. tit. 68, § 1404(4) (West 2001):

The provisions of Section 1401 et seq. of this title shall not apply:

...

4. In respect to the use of tangible personal property now specifically exempted from taxation under Oklahoma Sales Tax Code;

5. The Division's proposed assessment is incorrect. The Protestant purchased twenty-one (21) cartons of cigarettes from ONLINE STORE, not twenty-eight. The correct amount of ACX due is \$216.30.¹⁵

6. The proposed ACX assessment is based upon information provided to the Division pursuant to the provisions of the "Jenkins Act."¹⁶

7. On October 18, 2005, the Tax Commission received a timely filed letter of protest to the proposed ACX assessment for the Audit Period.¹⁷

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.¹⁸

2. The Oklahoma Cigarette Tax Stamp Act¹⁹ ("Act") imposes an excise²⁰ tax upon any unlicensed consumer²¹ who buys directly from any distributor, jobber, manufacturer, warehouseman, or wholesaler, or other person, within or without the State of Oklahoma, any cigarettes in excess of forty (40), at any one time to which are not affixed the stamps required by

¹⁵ See Note 8. See also Division's Exhibits A through E.

¹⁶ 15 U.S.C.A. § 375 et seq.

¹⁷ Division's Exhibit F. The letter of protest was returned with the "Payment Copy" of the proposed assessment, which was received by the Tax Commission on October 18, 2005. See Division's Exhibit A. The letter of protest was received by the Division on November 1, 2005, according to the date stamp. The letter articulates several bases for the protest of the proposed ACX assessment including, but not exclusive of the following, to-wit:

- The Protestant was unaware that any additional payment of taxes was due to the State of Oklahoma on the purchase of the cigarettes.
- Financial hardship. Protestant states that she is on disability.

The Protestant also advises that she has a new address of ADDRESS.

¹⁸ OKLA. STAT. ANN. tit. 68, § 221 (West Supp. 2006).

¹⁹ OKLA. STAT. ANN. tit. 68, § 301 et seq. (West 2001). The purpose of the tax is to provide revenue for the expense of the state government. See OKLA. STAT. ANN. tit. 68, § 303 (West 2001).

²⁰ "excise", *n.* A tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee). – Also termed *excise tax*. Cf. *income tax, property tax* under TAX. BLACK'S LAW DICTIONARY (8th ed. 2004), available at <http://westlaw.com>. (April 12, 2006).

²¹ OKLA. STAT. ANN. tit. 68, § 301(5) (West Supp. 2006) states:

The term "consumer" is defined to be 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.

the Act.²² The Protestant purchased in excess of forty (40) cigarettes from ONLINE STORE which were unstamped.

3. For purposes of the Act, any sale of cigarettes to an individual in Oklahoma shall be treated as a sale to a consumer unless such individual is licensed as a distributor or retailer of cigarettes by the Tax Commission.²³ The Protestant did not hold a license at the time of the purchases.

4. In cases where no monthly reports are filed as required by the Act, the Tax Commission may, by using any information available to it, determine the amount of tax due and

²² OKLA. STAT. ANN. tit. 68, § 305(C) (West Supp. 2006):

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, at any one time to which are not affixed the stamps required by Section 301 et seq. of this title shall, before purchasing such cigarettes, secure from the Tax Commission a written license and shall pay therefor an annual fee of Twenty-five Dollars (\$25.00), and shall immediately, upon the receipt of any unstamped cigarettes, report the same to the Tax Commission on such forms as the Tax Commission may prescribe, and immediately purchase from the Tax Commission proper stamps and attach the same to all such cigarettes received. It shall be unlawful for any person to sell or consume cigarettes on which the tax, as levied by Section 301 et seq. of this title, has not been paid, and which are not contained in packages to which are securely affixed the stamps evidencing payment of the tax imposed by Section 301 et seq. of this title.

See OKLA. STAT. ANN. tit. 68, § 307 (West 2001):

A consumer who secures cigarettes from without the State and has same brought into the State by a common carrier or otherwise shall be held to be a retailer, and its, his or her place of business shall be deemed the point within the State at which the cigarettes are received. Such person holding himself out as consumer and purchasing cigarettes in a larger quantity than forty (40) shall be subject to the same provisions, rules and regulations with respect to cigarettes as are by this Article imposed upon retailers. (Emphasis added.)

²³ OKLA. STAT. ANN. tit. 68, § 301(13) (West Supp. 2006), in pertinent part states:

- a. The term “delivery sale” means any sale of cigarettes to a consumer in Oklahoma where either:
 - (1) the purchaser submits the order for such sale by means of a telephonic or other method of voice transmission, the mails or any other delivery service, or the Internet or other online service, or
 - (2) the cigarettes are delivered by use of the mails or other delivery service.
- ...
- d. For purposes of this paragraph, any sale of cigarettes to an individual in Oklahoma shall be treated as a sale to a consumer unless such individual is licensed as a distributor or retailer of cigarettes by the Tax Commission;

OKLA. STAT. ANN. tit. 68, § 301(14) (West Supp. 2006) states that “[t]he term ‘delivery service’ means any person, including but not limited to the United States Postal Service, that is engaged in the commercial delivery of letters, packages, or other containers;”

propose to assess it against the person liable.²⁴ There were no monthly reports filed on the purchases made by the Protestant from ONLINE STORE.

5. The Act imposes an excise tax on a carton of cigarettes at the rate of Ten Dollars and Thirty Cents (\$10.30).²⁵ The Protestant purchased twenty-one (21) cartons of cigarettes from ONLINE STORE during the Audit Period resulting in the proposed excise tax in the amount of \$216.30 (to be *revised*), excluding penalty and interest.²⁶

6. If any tax imposed by Oklahoma Law is not paid before the tax becomes delinquent, interest at the rate of one and one-quarter percent (1¼ %) per month or fifteen percent (15%) per annum shall be collected from the date of the delinquency until paid.²⁷

7. If the tax and interest proposed by an assessment is not paid within sixty (60) days of the mailing of the proposed assessment, a penalty of ten percent (10%) shall be added thereto and collected and paid.²⁸

8. If, upon examination of invoices or from other investigations, the Tax Commission finds that cigarettes have been sold without stamps affixed as required by the Act, and the Protestant is unable to furnish evidence of sufficient stamp purchases to cover unstamped cigarettes purchased, the prima facie presumption shall arise that such cigarettes were sold without proper stamps being affixed thereto.²⁹

²⁴ OKLA. STAT. ANN. tit. 68, § 221(A) (West Supp. 2006).

²⁵ The Administrative Law Judge is taking judicial notice that a “mill” is equal to \$0.001 for the purpose of completing the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36.

See OKLA. STAT. ANN. tit. 68, §§ 302 (4 mills per cigarette), 302-1 (2.5 mills per cigarette), 302-2 (2.5 mills per cigarette), 302-4 (2.5 mills per cigarette), and 302-5 (40 mills per cigarette) (West Supp. 2006), for a total of Fifty-one and One-half (51.5) mills per cigarette or \$0.0515 per cigarette. A pack of cigarettes contains 20 cigarettes and a carton contains 10 packs. 200 cigarettes times \$0.0515 equals \$10.30 in cigarette tax per carton. Twenty-one (21) cartons of cigarettes times \$10.30 equals \$216.30.

²⁶ *See* Division’s Exhibits A through E.

²⁷ OKLA. STAT. ANN. tit. 68, § 217(A) (West Supp. 2006).

²⁸ OKLA. STAT. ANN. tit. 68, § 217(D) (West Supp. 2006).

²⁹ OKLA. STAT. ANN. tit. 68, § 305(D) (West Supp. 2006):

If, upon examination of invoices or from other investigations, the Tax Commission finds that cigarettes have been sold without stamps affixed as required by Section 301 et seq. of this title, the Tax Commission shall have the power to require such person to pay to the Tax Commission a sum equal to twice the amount of the tax due. If under the same circumstances, a person is unable to furnish evidence to the Tax Commission of sufficient stamp purchases to cover unstamped cigarettes purchased, the prima facie presumption shall arise that such cigarettes were sold without proper stamps being affixed thereto.

9. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.³⁰

10. In this matter the Division's proposed ACX assessment is incorrect. The invoice for the Protestant's purchase of unstamped cigarettes from ONLINE STORE on April 15, 2005, was duplicated on the Division's audit work papers. The Protestant purchased twenty-one (21) cartons of unstamped cigarettes during the Audit Period, not twenty-eight (28) cartons.

11. The Protestant has failed to produce any evidence and has cited no authority that the twenty-one (21) cartons of cigarettes purchased from ONLINE STORE during the Audit Period were unstamped, or that the sums are not due and owing.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION based upon the specific facts and circumstances of this case, that the protest to the proposed ACX assessment during the Audit Period should be sustained in part and denied in part.

It is further ORDERED that the proposed ACX assessment against the Protestant for the Audit Period should be *revised* to correct the duplication of ONLINE STORE Invoice No. SS000409437 on the audit work papers, resulting in the incorrect number of unstamped cartons of cigarettes purchased by the Protestant during the Audit Period.

It is further ORDERED that the *revised* total amount of ACX and penalty assessed for the Audit Period be fixed as the Protestant's deficiency and that those amounts be determined as due and owing, including interest, accrued and accruing.

ADDENDUM TO FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

The Division, as directed by the *Findings, Conclusions and Recommendations*, revised the proposed ACX assessment and provided notice of the revision to the Protestant. The Protestant has not challenged the revision proposed by the Division.

Upon consideration of the *Findings, Conclusions and Recommendations* and the revision to the proposed ACX assessment, the undersigned finds that the following findings should be added to and incorporated in the *Findings, Conclusions and Recommendations*:

1. On April 27, 2006, the Division filed a "Notice of Revision of Assessment" submitting the revised ACX assessment dated April 25, 2006, along with the Division's revised work papers.

³⁰ See *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

2. The proposed ACX assessment was revised as follows:

Tax	\$216.30
Interest through 12/07/05	19.48
Penalty @ 10%	<u>21.63</u>
Tax, Interest & Penalty Due	\$257.41

3. The revisions comply with the recommendations set forth in the *Findings, Conclusions and Recommendations* issued on April 20, 2006.

4. On April 28, 2006, a notice was mailed to the parties advising that the Protestant could file a response to the Division's revision on or before May 10, 2006, at which time an addendum to the *Findings, Conclusions and Recommendations* would be issued.

5. The Protestant did not file a response to the revision.

The undersigned further finds that the following recommendation should be added to and incorporated in the *Findings, Conclusions and Recommendations*:

It is further ORDERED that the revised ACX assessment and penalty, inclusive of interest accrued and accruing should be fixed as the amount due and owing.

THEREFORE, the *Findings, Conclusions and Recommendations* issued on April 20, 2006, are amended to include and incorporate the above and foregoing findings of fact and recommendation.

SECOND ADDENDUM TO FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

Conclusion of Law No. 11 incorrectly states, "The Protestant has failed to produce any evidence and has cited no authority that the twenty-one (21) cartons of cigarettes purchased from ONLINE STORE during the Audit Period were unstamped, or that the sums are not due and owing."

Upon consideration of the *Findings, Conclusions and Recommendations* and the correction to Conclusion of Law No. 11, the undersigned finds that Conclusion of Law No. 11 should be corrected and incorporated in the *Findings, Conclusions and Recommendations*, as follows, to-wit:

The Protestant has failed to produce any evidence and has cited no authority that the twenty-one (21) cartons of cigarettes purchased from ONLINE STORE during the Audit Period were properly stamped, or that the sums are not due and owing.

THEREFORE, the *Findings, Conclusions and Recommendations* issued on April 20, 2006, are amended to incorporate the corrected Conclusion of Law No. 11, as set out above.

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.