

JURISDICTION: OKLAHOMA TAX COMMISSION  
CITE: 2006-10-17-04 (Non-Precedential)  
ID: P-06-067-H  
DATE: October 17, 2006  
DISPOSITION: DENIED  
TAX TYPE: SALES  
APPEAL: NONE

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROTESTANT d/b/a LIQUOR STORE (“Protestant”) appears pro se.<sup>1</sup> The Field Audit Section of the Audit Division (“Division”), Oklahoma Tax Commission, appears through OTC ATTORNEY 1, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

#### PROCEDURAL HISTORY

On April 4, 2006, the protest file was received by this office for further proceedings consistent with the Uniform Tax Procedure Code<sup>2</sup> and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.<sup>3</sup> On April 19, 2006, a letter was mailed to the Protestant stating that this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-06-067-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 April 26, 2006, the Notice of Prehearing Conference was mailed to the last known address of the Protestant, setting the prehearing conference for May 8, 2006, at 9:30 a.m.<sup>4</sup>

The prehearing conference was held as scheduled. The Protestant appeared in person. The Division, through OTC ATTORNEY 2, Assistant General Counsel, appeared by telephone. Pursuant to the prehearing conference the parties were directed to file a status report on or before June 7, 2006. On June 6, 2006, the Protestant filed the Status Report advising that the parties had been unable to resolve the pending matter. On June 8, 2006, the Division filed its Status Report requesting that this matter be set for hearing.

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<sup>1</sup> “**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 (8<sup>th</sup> ed. 2004), available at <http://westlaw.com>. (March 16, 2006).

<sup>2</sup> OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

<sup>3</sup> OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47 (June 11, 2005).

<sup>4</sup> OKLA. STAT. ANN. tit. 68, § 208 (West 2001). The notice was mailed to the Protestant at LAST KNOWN ADDRESS and ALTERNATE ADDRESS.

On June 22, 2006, the parties were notified by letter that this matter had been set for hearing on July 18, 2006, at 9:30 a.m., with position letters or memorandum briefs due on or before July 11, 2006.

On July 10, 2006, the Division filed another Status Report advising that the Protestant wanted to try and contact potential witnesses to either testify or produce affidavits. On July 11, 2006, the parties were advised by letter that the hearing set for July 18, 2006, at 9:30 a.m. had been stricken and reset for August 22, 2006, at 9:30 a.m., with position letters or memorandums briefs due on or before August 15, 2006. On July 26, 2006, OTC ATTORNEY 1, Assistant General Counsel, filed a Notice of Substitution of Attorney, on behalf of the Division. On August 8, 2006, the Division filed its Brief.

A closed hearing<sup>5</sup> was held on August 22, 2006, at approximately 9:30 a.m. The Division called one witness, AUDITOR, Field Auditor, Field Audit Section of the Audit Division, Oklahoma Tax Commission, who testified regarding the records of the Division. The Division's Exhibits A through F were identified, offered, and admitted into evidence. The Protestant testified on her own behalf. The Protestant's Exhibits 1 and 2 were identified, offered, and admitted into evidence. Upon conclusion of the hearing the record was closed and this case was submitted for decision on August 22, 2006.

### 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 Brief, the undersigned finds:

1. The Protestant operates a retail liquor store (Sales Tax Permit No. XXX) located at BUSINESS ADDRESS, SMALL TOWN, Oklahoma.<sup>6</sup>

2. On October 28, 2005, the Division faxed the Protestant a "Records and Information Request," which advised the Protestant that an audit was going to be conducted "to determine if the proper amount of retail sales has been reported on your monthly Sales Tax Returns" and set out in detail the information and records needed to conduct the field audit.<sup>7</sup>

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<sup>5</sup> The Protestant invoked her right to a confidential hearing as provided by OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2006).

<sup>6</sup> Division's Exhibit B. The liquor store does not open until 3:00 p.m. and 5:00 p.m. See Division's Exhibit F.

The Division's Exhibit A consists of "Business Registration Forms" for "RESTAURANT" a/k/a "RESTAURANT/STORE" signed by PROTESTANT. This business reflects the Sales Tax Permit No. ZZZ. This business is not the subject of the Division's Field Audit.

<sup>7</sup> Division's Exhibit B. The records request also included, but not exclusive of, forms to be filled out by the Protestant for "Markup Percentages" for different sales categories and the "Beginning and Ending Inventory." The Division also requested "[i]nformation as to any removals from inventory not represented as a sale (for example, inventory draws, exempt sales, documented loss from theft or fire)."

3. The Division conducted a field audit utilizing the depletion method on the Protestant's available purchases and reported sales for the period of January 1, 2003, through December 31, 2004 ("Audit Period").<sup>8</sup>

4. The Protestant did not provide the Division with a "Beginning and Ending Inventory" for the Audit Period. The Protestant did complete and return the "Liquor Store Markup by Category" form as requested,<sup>9</sup> along with un-filed copies of her 2003 and 2004 State and Federal Income Tax Returns and bank deposit information for the Audit Period.<sup>10</sup> The Protestant did not maintain detailed records of sales during the Audit Period.<sup>11</sup>

5. The Division obtained records of purchases made by the Protestant during the Audit Period<sup>12</sup> from the following wholesalers:

- (a) XYZ WHOLESALER., CITY, Oklahoma
- (b) ABC WHOLESALER., CITY, Oklahoma

6. The Protestant purchased products *on a cash basis*<sup>13</sup> from BOTH WHOLESALERS in the amount of \$107,011.00 and during 2004 in the amount of \$128,440.00, for Total Purchases made during the Audit Period in the amount of \$235,451.00.<sup>14</sup>

7. The Division allowed a straight average markup of twenty percent (20%) for all products sold during the Audit Period.<sup>15</sup>

8. The records of the Division reflect that the Protestant filed Sales Tax Reports reflecting sales of \$81,225.00 for 2003 and sales of \$85,968.00 for 2004, for a total amount of \$167,193.00 (Total Reported Sales)<sup>16</sup> during the Audit Period. The Division compared the Protestant's Total Purchases during the Audit Period from BOTH WHOLESALERS (\$235,451.00), multiplied by the Average Markup of twenty percent (\$235,451.00 times 20% Average Markup equals \$282,541.20), and determined that the Protestant had Total Under-

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<sup>8</sup> Division's Exhibit C and D.

<sup>9</sup> See Note 8.

<sup>10</sup> Division's Exhibit C. See Protestant's Exhibits 1 and 2.

<sup>11</sup> Testimony of Protestant.

<sup>12</sup> Division's Exhibit C.

<sup>13</sup> See Attachment to Division's Exhibit F.

<sup>14</sup> Division's Exhibit C and D. The Protestant does not dispute the amount of purchases as reflected by the records of BOTH WHOLESALERS during the Audit Period.

<sup>15</sup> See Note 8. The Protestant does not dispute the twenty percent (20%) markup.

<sup>16</sup> Division's Exhibits C and D.

Reported Sales in the amount of \$115,348.20 (Total Purchases of \$282,541.20 minus Total Reported Sales of \$167,193.00).<sup>17</sup>

9. During the Audit Period the Combined State (4.5%), City (SMALL TOWN- 4.0%), and County (COUNTY- 1.25%) Sales Tax Rate was nine and three-quarters percent (9.75%).<sup>18</sup>

10. On February 17, 2006, the Division issued a proposed assessment of additional sales tax (Total Under-Reported Sales of \$115,348.20 times the Combined Sales Tax Rate of 9.75%)<sup>19</sup> against the Protestant as follows, to-wit:

Tax Due	\$11,246.45
Interest @ 15% through 04/15/06	<u>2,771.84</u>
Tax & Interest due within 30 days	\$14,018.29
30 day delinquent Penalty	<u>1,124.65</u>
Tax, Interest & Penalty due after 30 Days	\$15,142.94

11. On March 7, 2006, the Division received a timely filed letter of protest to the proposed assessment of additional sales tax on the basis that the Division had not allowed any deductions on the proposed assessment.<sup>20</sup>

12. In a handwritten attachment to the protest, the Protestant states that her markup is twenty percent (20%), that the business is a discount store (bottles are discounted at the register<sup>21</sup>), and estimates that her inventory on hand is from \$7,000.00 to \$12,000.00 monthly and year end is less.<sup>22</sup> The Protestant also states that the Division did not allow any deductions (using 2003 as an example), as follows, to-wit:

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<sup>17</sup> See Note 15.

<sup>18</sup> See the website of the Oklahoma Tax Commission, <http://www.oktax.state.ok.us> (last visited August 22, 2006).

<sup>19</sup> Division's Exhibit E.

<sup>20</sup> Division's Exhibit F.

<sup>21</sup> The Protestant used a 2006 purchase as an example. Purchase of \$25.61, times Combine Sales Tax Rate of 10.5%, equals \$2.69 in sales tax, for a total of \$28.30, minus a \$1.00 discount, equals \$27.30. The Protestant has a discount chart posted in the store.

<sup>22</sup> Division's Exhibit F. The Protestant did not provide any documentation to support the amounts estimated for the Beginning and Ending Inventory, Expenses for 2003, Theft (30%), Usage (3%), and Breakage (10%). No police reports or insurance claims were ever filed on thefts from the Protestant. The Protestant's Exhibits 1 and 2 do not contain figures for the beginning and ending inventories during the Audit Period and do not support the percentages claimed by the Protestant for theft, usage, and breakage.

Total Purchases	\$107,011.00
Thirty Percent (30%) for Theft	\$ 32,103.30
Three Percent (3%) for Usage	\$ 3,210.33
Ten Percent (10%) for Breakage	\$ 10,701.10
Stock in Store	\$ 7,203.14
Taxes & License	\$ 8,488.00
Expenses	\$ 14,569.12
Profit Before Expenses (20% markup)	\$ 21,402.20

### CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.<sup>23</sup>

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code (“Sales Tax Code”).<sup>24</sup> The Sales Tax Code levies “upon all sales,<sup>25</sup> not otherwise exempted . . . an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds<sup>26</sup> of each sale of . . . tangible personal property. . . .”<sup>27</sup> Oklahoma Statutes authorize incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.<sup>28</sup> There is no dispute that the Combined Sales Tax Rate during the Audit Period is nine and three quarters percent (9.75%).

3. The sale<sup>29</sup> of “[f]ood, confections, and all drinks sold or dispensed by hotels, restaurants, or other dispensers, and sold for immediate consumption upon the premises or

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<sup>23</sup> OKLA. STAT. ANN. tit. 68, § 221(D) (West Supp. 2006).

<sup>24</sup> OKLA. STAT. ANN. tit. 68, § 1350 et seq. (West 2001).

<sup>25</sup> OKLA. STAT. ANN. tit. 68, § 1352(15)(a) (West 2001) and (as amended) OKLA. STAT. ANN. tit. 68, § 1352(21)(a) (West Supp. 2006):

“Sale” means the transfer of either title or possession of tangible personal property for a valuable consideration regardless of the manner, method, instrumentality, or device by which the transfer is accomplished in this state, or other transactions as provided by this paragraph, including but not limited to:

a. the exchange, barter, lease, or rental of tangible personal property resulting in the transfer of the title to or possession of the property,

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<sup>26</sup> OKLA. STAT. ANN. tit. 68, § 1352(7) (West 2001) and (as amended) OKLA. STAT. ANN. tit. 68, § 1352(11) (West Supp. 2006).

<sup>27</sup> OKLA. STAT. ANN. tit. 68, § 1354(A)(1) (West Supp. 2006).

<sup>28</sup> OKLA. STAT. ANN. tit. 68, § 1370 et seq. (West Supp. 2006) and OKLA. STAT. ANN. tit. 68, § 2701 (West Supp. 2006).

<sup>29</sup> “sale” means the transfer of either title or possession of tangible personal property for a valuable consideration regardless of the manner, method, instrumentality, or device by which the transfer is accomplished in

delivered or carried away from the premises for consumption elsewhere” is expressly made subject to sales tax.<sup>30</sup>

4. Persons selling alcoholic beverages to purchasers for use or consumption are required to remit sales tax to the Commission upon the total retail value from such sales, notwithstanding the fact that manufacturers and importing distributors of alcoholic beverages are required to pay certain taxes.<sup>31</sup>

5. The Tax Commission has promulgated rules as provided by law to facilitate the administration, enforcement, and collection of sales tax pursuant to the Sales Tax Code.<sup>32</sup>

6. The rules promulgated pursuant to the Administrative Procedures Act are presumed to be valid and binding on the persons they affect and have the force of law.<sup>33</sup>

7. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.<sup>34</sup> A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.<sup>35</sup>

8. In sales tax matters, “[t]he burden of proving that a sale was not a taxable sale shall be upon the person who made the sale.”<sup>36</sup> Further, It shall be the duty of every tax remitter

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this state. OKLA. STAT. ANN. tit. 68, § 1352(15) (West 2001); renumbered §1352(21) by Laws 2003, c. 413, § 1, eff. Nov. 1, 2003.

<sup>30</sup> OKLA. STAT. ANN. tit. 68, § 1354(A)(9) (West 2001).

<sup>31</sup> OKLA. ADMIN. CODE § 710:65-19-5.

<sup>32</sup> OKLA. STAT. ANN. tit. 68, §§ 1350 et seq. (West 2001).

<sup>33</sup> OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2001).

<sup>34</sup> OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999), which states:

In all administrative proceedings, unless otherwise provided by law, the burden of proof shall be upon the protestant to show in what respect the action or proposed action of the Tax Commission is incorrect. If, upon hearing, the protestant fails to prove a prima facie case, the Administrative Law Judge may recommend that the Commission deny the protest solely upon grounds of failure to prove sufficient facts which would entitle the protestant to the requested relief.

OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999), provides in pertinent part:

... “preponderance of the evidence” means the evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which as a whole shows that the fact sought to be proved is more probable than not.

<sup>35</sup> See *Enterprise Management Consultants, Inc. v. State ex rel Oklahoma Tax Com’n*, 1988 OK 91, 768 P.2d 359.

<sup>36</sup> OKLA. STAT. ANN. tit. 68, § 1365(D) (West 2001); renumbered § 1365(F) by Laws 2003, c. 376, §2, eff. July 1, 2003. See *Dunn v. State ex rel. Oklahoma Tax Com’n*, 1993 OK CIV APP 105, 862 P.2d 1285.

required to make a sales tax report and pay any tax under the Sales Tax Code to keep and preserve suitable records of the gross daily sales together with invoices of purchases and sales, bills of lading, bills of sale, and other pertinent records and documents which may be necessary to determine the amount of tax due and such other records of goods, wares and merchandise, and other subjects of taxation under the Sales Tax Code as will substantiate and prove the accuracy of such returns.<sup>37</sup>

9. The Protestant failed to keep and preserve suitable records which were necessary to determine the amount of tax due, particularly the records to document the amounts claimed for theft and breakage.

10. In this matter the Protestant has failed to meet her burden of proof that the proposed sales tax assessment for the Audit Period is incorrect, and in what respects.

The Protestant asserts that the Division has not allowed deductions during the Audit Period for Theft (30%), Usage (3%), Breakage (10%), and Expenses. The Sales Tax Code does not provide that the Protestant is entitled to the same deductions for sales tax purposes that according to the un-filed copies of the Protestant's Federal Income Tax Returns have been claimed on her Federal Income Tax Returns for the Audit Period.

#### **DISPOSITION**

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the protest should be denied.

It is further ORDERED that the proposed sales tax and penalty, inclusive of accrued interest, accrued and accruing, should be fixed as the amounts 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.

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<sup>37</sup> See Note 36.