JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2007-03-27-74 (Non-Precedential)
ID:	P-06-112-K
DATE:	MARCH 27, 2007
DISPOSITION:	SUSTAINED IN PART/DENIED IN PART
TAX TYPE:	SALES
APPEAL:	NONE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestant, OWNER, d/b/a BUSINESS is represented by ACCOUNTANT, Tax Consultant. The Audit Division of the Tax Commission ("Division") is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

As a result of a low-point beer (3.2 % or less) depletion audit, the Division on May 15, 2006, caused to be issued a proposed sales tax assessment against Protestant. The proposed assessment was timely protested by letter dated May 31, 2006.

On July 18, 2006, the Division referred its file, consisting of a cover memorandum, proposed assessment and protest letter, to the Office of the Administrative Law Judges ("ALJ's Office") for further proceedings consistent with the Uniform Tax Procedure Code[1] and the Rules of Practice and Procedure before the Oklahoma Tax Commission[2]. The protest was docketed as Case No. P-06-112-K and assigned to ALJ, Administrative Law Judge.[3]

A pre-hearing conference was scheduled for August 29, 2006, by *Prehearing Conference Notice* issued August 2, 2006.[4] The pre-hearing conference was held as scheduled. Pursuant to the conference and the parties' agreement, a *Prehearing Conference Order* was issued whereby this matter was scheduled to be submitted for decision upon the filing of briefs or position statements of the parties.[5]

Protestant's *Brief in Chief* was filed on October 3, 2006. The *Reply Brief of the Audit Division of the Oklahoma Tax Commission* was filed October 5, 2006. The record in this cause was closed and the protest was submitted for decision on November 2, 2006.[6]

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[1] 68 O.S. 2001, § 201 et seq.

[2] Rules 710:1-5-20 through 710:1-5-47of the Oklahoma Administrative Code ("*OAC*").

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

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

[5] OAC, 710:1-5-28(b) and 710:1-5-38.

[6] *See*, 68 O.S. Supp. 2002, § 221(D) and *OAC*, 710:1-5-39(a).

FINDINGS OF FACT

Upon review of the file and records, including the Protestant's *Brief in Chief*, the Division's *Reply Brief* and Exhibits attached thereto, the undersigned finds:

1. At all times relevant, Protestant owned, operated and did business as BUSINESS, a retail low-point beer establishment located in ANY TOWN, Oklahoma. Exhibit A.[7]

2. The Division examined and compared the gross receipts or sales reported by Protestant on his 2003 federal income tax return with those reported on his sales tax reports for the 2003 tax year and found a discrepancy of $51,279.00 between the return and reports. By letter dated January 5, 2006, the Division requested documentation to substantiate the difference in the reported gross receipts, a list of his wholesale suppliers and a statement verifying the retail markup of his inventory. Exhibit B.

3. By letter dated January 10, 2006, Protestant through his representative responded to the Division request by stating that the difference in reported gross receipts is attributable to the fact that "only * * * net taxable sales were reported on the sales tax reports." A work sheet showing Protestant's gross sales, the deduction of low-point beer sales and net taxable sales was provided along with a listing of Protestant's wholesale suppliers. Exhibit C.

4. The Division obtained from DISTRIBUTOR 1 *Year End Package Sales Tracking Reports* for 2003, 2004 and 2005 showing Protestant's low-point beer purchases. Exhibit D.

5. In performing the depletion audit, the Division applied the area average prices for low-point beer ($1.32 per 12 ounce cans or bottles and $.84 per 12 ounce draughts) and a five percent (5%) waste allowance to Protestant's annual purchases of low-point beer as reflected on the *Tracking Reports* to compute yearly gross sales amounts. Protestant's reported sales (annual) were subtracted from the computed yearly gross sales amounts to arrive at the Division's proposed underreported sales of $134,446.93 for the three year period, consisting of $47,858.65 for 2003, $41,590.52 for 2004 and $43,382.51 for 2005.[8] Exhibit E.

6. As a result of the audit, the Division by letter dated May 15, 2006 proposed the assessment of state, city and county sales taxes in the aggregate amount of $12,100.25, interest on the proposed un-remitted sales taxes at fifteen percent (15%) through June 15, 2006 of $3,396.84 for a total tax and interest due within sixty (60) days of $15,497.09, and a thirty (30) day delinquent penalty at ten percent (10%) for a total tax, interest and penalty due after sixty (60) days of $16,707.07. Exhibit F.

7. Protestant timely protested the proposed assessment. Exhibit G.

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[7] Business Registration filed with the Tax Commission on or about April 30, 2001.

[8] The computed underreported sales (yearly) total $132,831.68. No information has been provided to explain the mathematical error between the two amounts. In addition, the monthly breakdown of taxable sales reflects $3,988.22 for each month in 2003 except November which reflects $2,988.22 and $3,615.21 for each month in 2005 except March which reflects $2,615.21. The monthly breakdown of taxable sales totals $130,831.72. *See*, Exhibit E.

ISSUE AND CONTENTIONS

The issue presented for decision is whether the retail sale of low-point beer in the State of Oklahoma by a licensed retailer is exempt from taxation under Oklahoma Sales Tax Code by reason of 37 O.S. 2001, § 163.3.[9]

Protestant contends that retail sales of low-point beer taxed under the provisions of 37 O.S. 2001, § 163.3 are exempt from sales tax.

The Division contends that Protestant is liable for the sales tax for the assessed periods, based on the assessment of the Division. In support of this contention, the Division argues that Protestant can not produce sufficient evidence to overcome his burden of proving the assessment is incorrect, and in what respect. The Division further argues that § 163.3 very clearly and specifically only exempts low-point beer manufactured in this state for export and specifically taxes low-point beer which is manufactured and sold, or removed for consumption or sale, within this state.

CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter of law that:

1. The Tax Commission is vested with jurisdiction over the parties and the subject matter of this action. 68 O.S. Supp. 2002, § 221(D).

2. The collection, reporting and remittance of sales taxes are governed by the Oklahoma Sales Tax Code ("Code").[10] An excise tax is levied upon the gross receipts or gross proceeds of all sales[11], not otherwise exempted by the Code. 68 O.S. 2001, § 1354(A).

3. The sale of "[f]ood, confections, and <u>all drinks</u> sold or dispensed by hotels, restaurants, or other dispensers, and sold for immediate consumption upon the premises or delivered or carried away from the premises for consumption elsewhere is expressly made subject to sales tax, (emphasis added). 68 O.S. 2001, § 1354(A)(9).

4. Protestant asserts that retail sales of low-point beer are exempt from sales taxation by virtue of 37 O.S. 2001, § 163.3 which section provides:

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[9] Amended by Laws 2003, c. 484, § 1, eff. Nov. 1, 2003 by addition of the last sentence to the first paragraph which provides: "Provided, any low-point beer manufactured in this state for export shall not be taxed under this section." The 2003 amending language is not relevant to these proceedings and substantively, the section is otherwise unchanged since the 1984 amendment. *See*, Laws 1984, c. 153, § 1, emerg. eff. April 21, 1984.

[10] 68 O.S. 2001, § 1350 et seq.

[11] Defined to mean "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". 68 O.S. 2001, § 1352(15); renumbered § 1352(21) by Laws 2003, c. 413, § 1, eff. Nov. 1, 2003.

> There is hereby levied on all low-point beer[12] containing more than one-half of one percent (1/2 of 1%) of alcohol measured by volume and not more than three and two-tenths percent (3.2%) of alcohol measured by weight which are manufactured and sold, or removed for consumption or sale, within this state a tax of Eleven Dollars and twenty-five cents ($11.25) for every barrel containing not more than thirty-one (31) gallons, and at a like rate of tax for any other quantities or for a fractional part of a barrel.
>
> Each wholesaler making reports and remittances to the Tax Commission shall be allowed the sum of one percent (1%) of the tax remittances collected for maintaining and collecting said tax for the benefit of this state.
>
> Machinery and equipment directly used in the manufacture within this state of low-point beer taxed pursuant to the provisions of this section shall be exempt from taxation under any other law of this state levying a sales or consumers or use tax.

5. The goal of any inquiry into the meaning of a legislative act is to ascertain and give effect to the intent of the legislature. ***Blitz U.S.A., Inc. Oklahoma Tax Commission***, 2003 OK 50, ¶14, n.17, 75 P.3d 883, 888; ***Cooper v. State ex rel. Dep't of Public Safety***, 1996 OK 49, ¶10, 917 P.2d 466, 468. The law-making body is presumed to have expressed its intent in a statute's language and to have intended what the text expresses. *Id*., n.18; ***Nealis v. Baird***, 1999 OK 98, ¶55, 996 P.2d 438, 460; ***TXO Production Corp. v. Okla. Corp. Comm'n***, 1992 OK 39, ¶7. 829 P.2d 964, 969. Hence, where a statute is plain and unambiguous, it will not be subject to judicial construction, but will be given the effect its language dictates. *Id*., n.19; ***Ross v. Peters***, 1993 OK 8, ¶9, n.17, 846 P.2d 1107, 1119, n.17; ***TRW/Reda Pump v. Brewington***, 1992 OK 31, ¶5, 829 P.2d 15, 20; ***Forston v. Heisler***, 1961 OK 198, ¶11, 363 P.2d 949, 9512. Only where the intent cannot be ascertained from a statute's text, as occurs when ambiguity or conflict (with other statutes) is shown to exist, may rules of statutory construction be employed. *Id*., n.20; ***Cooper***, *supra* note 17 at ¶10, at 468; ***TXO***, *supra* note 18 at ¶7, at 969; ***Cox v. Dawson***, 1996 OK 11, ¶6, 911 P.2d 272, 276. Statutes that provide an exemption from taxation are to be strictly

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[12] Defined as and including "beverages containing more than one-half of one percent (1/2 of 1%) alcohol by volume, and not more than three and two-tenths percent (3.2%) alcohol by weight, including but not limited to beer or cereal malt beverages obtained by the alcoholic fermentation of an infusion of barley or other grain, malt or similar products". 37 O.S. 2001, § 163.2. *See*, 37 O.S. 2001, § 163.1 which provides:

> All beverages containing more than three and two-tenths percent (3.2%) alcohol by weight and all mixed beverage coolers, as defined in Section 506 of this title, regardless of percent of alcoholic content, are hereby declared to be intoxicating. All beverages containing more than one-half of one percent (1/2 of 1%) alcohol by volume and not more than three and two-tenths percent (3.2%) alcohol by weight are hereby declared to be low-point beer. Wherever the term 'nonintoxicating beverage' or 'nonintoxicating malt beverage' appears in the Oklahoma Statutes, such term shall be construed to mean low-point beer. The manufacture, distribution and sale of low-point beer, including but not limited to beer or cereal malt beverages, are hereby declared subject to the provisions of Section 163.1 et seq. of this title.

construed against the claimant. *Id*., n.21; ***R.R. Tway, Inc. v. Okla. Tax Comm'n***, 1995 OK 129, ¶26, 910 P.2d 972, 978; ***Bert Smith Road Mach. Co., Inc. v. Okla. Tax Comm'n***, 1977 OK 75, ¶9, 563 P.2d 641, 643; ***Phillips Petroleum Co. v. Okla. Tax Comm'n***, 1975 OK 146, ¶10, 542 P.2d 1303, 1305; ***Dairy Queen of Okla., Inc. v. Okla. Tax Comm'n***, 1951 OK 356, ¶4, 238 P.2d 800, 801-02; ***Magnolia Petroleum Co. v. Okla. Tax Comm'n***, 1958 OK 124, ¶20, 326 P.2d 821, 825; ***Forston v. Heisler***, *supra* note 19 at ¶11, at 951.

6. Here, the undersigned finds that Protestant's proposition is incorrect. First, the Code specifically provides that the sale of "all drinks sold or dispensed by * * * other dispensers, and sold for immediate consumption upon the premises or delivered or carried away from the premises for consumption elsewhere" is subject to sales tax. 68 O.S. 2001, § 1354(A)(9). Section 1354(A)(9) is sufficiently broad to encompass sales of low-point beer by a retail low-point beer establishment for immediate consumption upon the premises or delivered or carried away from the premises for consumption elsewhere. Second, in 1984 the legislature amended Section 163.3 by removing the language "nonintoxicating beverages[13] taxed in this Act" from the third paragraph which allowed the "exempt[ion] from taxation under any other law of this state levying a sales or consumers or use tax." *See*, Laws 1984, c. 153, § 1, emerg. eff. April 21, 1984. Section 163.3, paragraph 3, prior to this amendment provided:

> Nonintoxicating beverages[14] taxed in this Act, and machinery and equipment directly used in the manufacture of such nonintoxicating beverages within this State, shall be exempt from taxation under any other law of this State levying a sales or consumers or use tax.

When construing a statute which has been amended, the legislature either intended to (a) effect a change in the existing law, or (b) clarify that which previously appeared doubtful. ***Blitz***, *supra* at ¶19, at 889. *See*, ***Haney v. State***, 1993 OK 41, ¶12, 850 P.2d 1087; ***Magnolia Pipe Line Co. v. Okla. Tax Comm'n***, 1946 OK 113, ¶11, 167 P.2d 884, 888. The third paragraph of Section 163.3 prior to the amendment appeared to be plain and unambiguous. Further, the record as submitted does not provide any proof that doubt had arisen with respect to the law as it existed prior to 1984. Accordingly, the undersigned finds that in 1984 the legislature effectuated a change to the existing law by eliminating the sales, consumers or use tax exempt for sales of "nonintoxicating beverages" or "low-point beer".

7. While Protestant's protest with respect to its legal proposition is not sustainable, patent errors exist within the audit work papers which must be addressed or corrected by the Division. First, the Division shall explain how it calculated the proposed underreported sales of $134,446.93 for the three year audit period or correct the amount to $132,831.68. Second, the undersigned is aware of other low-point beer depletion audits which have permitted a fourteen percent (14%) waste allowance for draught beer. The Division is directed to apply a fourteen percent (14%) waste allowance for draught beer in this cause.

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[13] The phrase "low-point beer" was substituted for the term "nonintoxicating beverages" by Laws 1995, c. 274, § 9, eff. Nov. 1, 1995.

[14] *See*, note 13.

8. Based on the record submitted, Protestant's protest to the proposed sales tax assessment should be and the same is hereby sustained in part and denied in part.

DISPOSITION

THEREFORE, based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestant, OWNER, d/b/a BUSINESS, be sustained in part and denied in part. It is further ORDERED that the audit and assessment be revised in accordance herewith, and that the resultant amount, inclusive of any additional accrued and accruing penalty and interest, be fixed as the deficiency due and owing.

ADDENDUM TO FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

NOW on this _____ day of March, 2007, the *Findings, Conclusions and Recommendations* issued on November 20, 2006, in the above styled and numbered cause, comes on for consideration of a recommendation as to the amount of the deficiency which should be confirmed by an order of the Tax Commission.

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

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

1. That notice of the revision to the assessment was filed of record in this cause on February 6, 2007.

2. That the Division revised the sales tax assessment to an amount of $17,516.52, consisting of tax in the amount of $11,826.59, penalty in the amount of $1,182.60, and interest accrued through February 7, 2007, in the amount of $4,507.33.

3. That the revision complies with the recommendation set forth in the *Findings, Conclusions and Recommendations*.

4. That Protestant was provided notice of the revision.

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

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

> It is further ordered that the amount in controversy, as revised, inclusive of any additional accrued and accruing interest, be fixed as the deficiency due and owing.

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

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.