JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2007-11-06-02 / NON-PRECEDENTIAL**
ID: **P-07-039-K**
DATE: **NOVEMBER 6, 2007**
DISPOSITION: **DENIED**
TAX TYPE: **SALES / WASTE TIRE**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

CORPORATION (hereafter "Corporation") and OFFICER, as an Officer of the Corporation and as an individual (collectively referred to as "Protestants"), are represented by ACCOUNTANT, Certified Public Accountant. The Audit Division of the Tax Commission (hereinafter "Division") is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

A projection methodology field audit of Protestants' sales invoices for the months of April and August, 2003, and January and June, 2004, was conducted by the Division. The Division also reviewed Protestants' sales invoices and compared the amount of sales tax shown collected on those invoices with the amount of sales tax Protestants reported on their estimated sales tax reports. As a result of the audit, the Division determined that sales taxes and waste tire recycling fees were either erroneously not charged and collected from customers or were collected and not reported and remitted during the audit period of January 1, 2003 through February 28, 2005, and by letters dated July 28, 2006, proposed the assessment of sales tax, interest and penalty against each of the Protestants and waste tire recycling fees, interest and penalty against the Corporation. Protestants timely protested the proposed assessments by letter dated August 9, 2006, and marked received August 14, 2006.

On March 13, 2007, the Division referred its file 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-07-039-K and assigned to ALJ, Administrative Law Judge.[3]

A pre-hearing conference was scheduled for April 25, 2007, by *Prehearing Conference Notice* issued March 29, 2007.[4] The conference was held as scheduled. Pursuant to the conference, a *Prehearing Conference Order and Notice of Hearing* was issued setting forth dated for exchanging preliminary witness lists and documents, conducting discovery, exchanging final

[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.

witness lists and documents, and filing factual stipulations and pre-trial briefs or position letters.[5] The *Order* scheduled the hearing for August 8, 2007.[6]

A closed hearing was held as scheduled.[7] Two witnesses testified: OFFICER, regarding certain letters he had received from the Tax Commission, and AUDITOR, field auditor, regarding the records of the Division and the procedures utilized in conducting the audit. Protestants' Exhibits 1 and 2 were offered and admitted into evidence without objection. Protestants' Exhibit 2 consisted of two (2) pages and after further inquiry regarding the relationship of the pages by the undersigned, the pages were separated and the second page was admitted as Protestants' Exhibit 3. Division's Exhibits A and B, D through I and K and L were offered and admitted into evidence without objection. Upon conclusion of the hearing, the record was closed and the case was submitted for decision.[8]

FINDINGS OF FACT

Upon review of the file and records, including the recording of the hearing and the exhibits received into evidence, the undersigned finds:

1. At all times relevant herein, Protestants retailed tires and wheels for motor vehicles at their business location in CITY, Oklahoma. CORPORATION was a domesticated Corporation. OFFICER was President of the Corporation. Division's Exhibits C and F.

2. Protestants' sold the business in March, 2005. Testimony of OFFICER.

3. On or about February 15, 2006, the Division commenced a field audit of Protestants' sales invoices for the period of January 1, 2003 through February 28, 2005. Division's Exhibits D, E and F. As part of the field audit, the Division performed a detailed review of Protestants' sales invoices for the audit period and compared the amount of sales tax shown collected on those invoices with the amount of sales tax Protestants reported on their estimated sales tax reports to determine whether Protestants were delinquent in the remittance of any sales tax for the audit period. Division's Exhibit A. The Division also performed a projection methodology audit of Protestants' sales invoices for the months of April and August, 2003, and January and June, 2004, to determine whether Protestants had any additional taxable sales during the audit period. Division's Exhibits A, E and G.

4. Prior to the field audit, Protestants' business was the subject of an internal audit. Pursuant to this audit, Protestants filed estimated sales tax and waste tire recycling fee reports for the audit period and upon selling the business remitted the amount due as shown on those reports, in addition to a delinquent withholding tax liability. Protestants' Exhibit 2. Protestants

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

[6] *OAC*, 710:1-5-29.

[7] 68 O.S. Supp. 2005, § 205.

[8] *OAC*, 710:1-5-39(a).

were of the understanding that this absolved them from any further tax liabilities for the business. Protestants' Exhibit 3 and Division's Exhibit L.

5. The field audit detailed review of Protestants' sales invoices found that Protestants had underestimated their gross receipts for the audit period by an amount of $398,454.32. This amount was determined by scheduling those invoices which reflected sales tax was charged and collected, subtracting the amount of estimated sales tax remitted pursuant to the internal audit and dividing the remainder by the combined city of CITY and state sales tax rates. Division's Exhibit A.

6. The projection methodology portion of the field audit found that Protestants had additional taxable sales during the audit period of $117,813.67. This amount was determined by scheduling those invoices for the four (4) sample months which reflected sales tax was not charged, but for which no sales tax permit number was on the invoice and no sales tax permit for the customer was provided to the auditor, dividing by four and spreading this amount over the remaining months by using a weighted average based on the gross receipts calculated from the detailed audit. Division's Exhibits A and G.

7. Utilizing a projection methodology, the Division also determined Protestants had understated their waste tire recycling fee liability for the audit period by a total amount of $2,170.00. This amount was determined by the detailed review of Protestants' sales invoices for the four (4) sample months of April and August, 2003 and January and June, 2004, dividing the total of those months by four (4) to come to an average of $170.00 per month, spreading the average amount over the remaining twenty-two (22) months of the audit period plus the actual amount for the four (4) sample months and subtracting the estimated waste tire recycling fee amount remitted pursuant to the internal audit. Division's Exhibit B.

8. As a result of the field audit, the Division by letters dated July 28, 2006, proposed the assessment of sales taxes, interest and penalty against Protestants in the aggregate amount of $58,550.26, consisting of taxes of $40,010.78, interest at fifteen percent (15%) through August 31, 2006, of $14,538.37, for a total of tax and interest due within thirty (30) days of $54,549.15, and a thirty (30) day delinquent penalty at ten percent (10%) of $4,001.11. Division's Exhibits H and K.

9. The Division also by letter dated July 28, 2006, proposed the assessment of waste tire recycling fees, interest and penalty against the Corporation in the aggregate amount of $3,199.53, consisting of fees of $2,170.00, interest at fifteen percent (15%) through August 31, 2006, of $812.53, for a total of fees and interest due within thirty (30) days of $2,982.53, and a thirty (30) day delinquent penalty at ten percent (10%) of $217.00. Division's Exhibit I.

10. Protestants timely protested the proposed assessments by letter dated August 9, 2006, and marked received August 14, 2006. Division's Exhibit L and Protestants' Exhibit 3.

ISSUE AND CONTENTIONS

The issue submitted for decision is whether Protestants sustained their burden of proving that the proposed assessments are in any respect incorrect.

Protestants do not challenge the audit methodology or the results of the audits. Protestants contend they were of the understanding that payment of the delinquent taxes pursuant to the internal audit was payment in full of all tax liabilities for the business. In support of this contention, Protestants cite Protestants' Exhibits 1 and 2. Protestants further aver that they are without any ways or means to pay the amounts assessed.

The Division contends that Protestants' protest must be denied since Protestants failed to show the proposed assessments are incorrect.

CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter 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 collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Code").[9] An excise tax is levied upon the gross receipts or gross proceeds of all sales not otherwise exempted by the Code. 68 O.S. 2001, § 1354(A). The sale of "tangible personal property"[10] is expressly made subject to sales tax. 68 O.S. 2001, § 1354(A)(1)[11]. Incorporated cities, towns, and counties are authorized to levy taxes as the Legislature may levy for purposes of state government, including a consumer sales tax. 68 O.S. 2001, §§ 2701 et seq. and 1370 et seq., as amended.

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[9] 68 O.S. 2001, § 1350 et seq.

[10] Defined as "personal property which may be seen, weighed, measured, felt, or touched or which is in any other manner perceptible to the senses" and "includes electricity, water, gas, steam and prewritten computer software." 68 O.S. Supp. 2003, 1352(23).

[11] *See OAC*, 710:65-19-11 which provides in pertinent part:

> (b) **Automobile repairers**. Automobile repairmen or service centers, including body shops, are vendors of repair parts for motor vehicles if they purchase parts, mark them up and itemize parts by article and price. They should segregate on the invoices to their customers and in their records, the marked-up selling price of the parts, the charges for repair labor, and the charges for installation labor and other services. If the labor and other services are not thus shown separately from the selling price of the parts it will be presumed that the entire charge represents the sale price of the parts.

See also OAC, 710:65-19-11(e) and (f).

3. The collection and remittance of the waste tire recycling fee is governed by the Oklahoma Waste Tire Recycling Act ("Act").[12] The Act requires any "tire dealer"[13] to charge, collect, report and remit the recycling fee at the same time and in the same manner as sales tax under the Code. 27A O.S. 2001, § 2-11-403(C)(1). If the fee is not remitted at the time of filing the report, the fee becomes delinquent and the tire dealer forfeits any claim to the discount. 27A O.S. 2001, § 2-11-403(C)(3).[14]

4. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect, and in what respect. *OAC*, 710:1-5-47. *See*, ***Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission***, 1988 OK 91, 768 P.2d 359, 362, citing *Continental Oil Co. v. Oklahoma State Bd. of Equalization*, 1976 OK 23, 570 P.2d 315, 317. 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." 68 O.S. 2001, § 1365(E). *See*, ***Dunn v. State ex rel. Oklahoma Tax Commission***, 1993 OK CIV APP 105, 862 P.2d 1285. Section 1365(E) further provides in pertinent part:

> It shall be the duty of every tax remitter required to make a sales tax report and pay any tax under [the 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 <u>other pertinent records and documents which may be necessary to determine the amount of tax due hereunder</u> and such other records of goods, wares and merchandise, and other subjects of taxation under [the Code] as will substantiate and prove the accuracy of such returns. * * * All such records shall remain in Oklahoma and be preserved for a period of three (3) years, unless the Tax Commission, in writing, has authorized their destruction or disposal at an earlier date, and shall be open to examination at any time by the Tax Commission or by any of its duly authorized agents.

(Emphasis added). *See*, ***Kifer v. Oklahoma Tax Commission***, 1998 OK CIV APP 34, 956 P.2d 162.

5. In administrative proceedings, the burden of proof standard is "preponderance of evidence." 2 Am.Jur.2d *Administrative Law* § 357. *See*, Oklahoma Tax Commission Order No. 91-10-17-061. "Preponderance of evidence" means "[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law

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[12] 27A O.S. 2001, § 2-11-401 et seq. *See OAC*, 710:95-5-3 which provides that the fee is assessed on "[a]ll sales of tires for motor vehicles, whether used on or off road, except 'implements of husbandry'" and "[a]ll first registrations of motor vehicles required to be registered, except those registered under a proportional registration plan". *See also OAC*, 710:95-5-9.

[13] Defined as "any person engaged in the business of selling new and used tires to final consumers, not for resale". 27A O.S. 2001, § 2-11-402(4).

[14] "Tire sales must be reported and the fees remitted * * * by the 15th of the month following the month in which the sales are made." *OAC*, 710:95-5-11.

Dictionary 1064 (5th ed. 1979). It is also defined to mean "evidence which is more credible and convincing to the mind * * * [T]hat which best accords with reason and probability." *Id.*

5. Protestants failed to sustain their burden of proving that the proposed sales tax and waste tire recycling fee assessments are incorrect. Accordingly, Protestants' protest should be and the same is hereby denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestants, CORPORATION and OFFICER, be denied. It is further ORDERED that the amount in controversy, inclusive of any additional accrued and accruing interest, be fixed as the deficiencies due and owing by Protestants, respectively.

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.