

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 2008-02-05-01 / NON-PRECEDENTIAL
ID: P-07-121-K
DATE: FEBRUARY 5, 2008
DISPOSITION: DENIED
TAX TYPE: SALES
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestant, TRUCKING COMPANY, is represented by PRESIDENT, President of Protestant. The Compliance 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

On March 21, 2005, August 19, 2005, May 3, 2007 and by warrants issued March 30, 2005, August 23, 2005 and May 16, 2007, Protestant applied for and received a refund of motor fuel taxes paid for fuel used off-highway during the periods of January 1, 2004 through December 31, 2004, January 1, 2005 through June 30, 2005 and January 2, 2006 through December 16, 2006 in the aggregate amount of \$599.85. Upon audit of the refund requests, the Division by letter dated June 21, 2007, proposed the assessment of sales taxes against Protestant in the amount of \$742.33 which assessment was limited in scope to only sales of diesel fuel for reefer use. Protestant timely protested the proposed assessment by letter marked received July 6, 2007.

On August 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 Code¹ and the Rules of Practice and Procedure before the Oklahoma Tax Commission². The protest was docketed as Case No. P-07-121-K and assigned to ALJ, Administrative Law Judge.³

A pre-hearing conference was scheduled for October 9, 2007, by *Prehearing Conference Notice* issued September 12, 2007.⁴ On or about September 17, 2007, the request of Protestant's representative to have the conference held via telephone was granted. Protestant did not make an appearance at the conference, and by letter dated October 10, 2007, the parties were notified that the record in this cause would be closed and the protest submitted for decision upon the filing of a verified response to protest by the Division.⁵

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.

⁵ OAC, 710:1-5-28(c).

By letter dated November 1, 2007, Protestant's representative responded to the letter of October 10, by stating that she did not call during the pre-hearing conference because the parties were engaged in settlement negotiations. By Memorandum dated November 2, 2007, the Division responded to Protestant's letter and advised that unless otherwise directed a verified response to protest would be filed as previously directed.

The *Division's Verified Response to Protest* was filed November 9, 2007. Attached thereto were Exhibits A through G. Protestant did not file a reply to the *Response*. On November 30, 2007, the record was closed and Protestant's protest was submitted for decision.⁶

FINDINGS OF FACT

Upon review of the file and records, including the *Division's Verified Response to Protest* and attached exhibits, the undersigned finds:

1. Protestant is a trucking company headquartered in Minnesota. During the periods at issue, Protestant bought diesel fuel from fueling stations located in Oklahoma and paid Oklahoma motor fuel taxes on said fuel at the time of purchase. A portion of the diesel fuel purchased by Protestant in Oklahoma was used off-highway to run its refrigerator motors on the refrigerated trailers, a/k/a reefers.

2. On March 21, 2005, Protestant applied to the Commission for a refund of motor fuel tax paid for diesel fuel used non-highway for the period of January 1, 2004 through December 31, 2004, in the amount of \$176.02. Exhibit A.

3. On March 30, 2005, the Commission refunded Protestant the motor fuel tax paid for diesel fuel used non-highway for the period of January 1, 2004 through December 31, 2004, in the amount of \$176.02. Exhibit B.

4. On August 19, 2005, Protestant applied to the Commission for a refund of motor fuel tax paid for diesel fuel used non-highway for the period of January 1, 2005 through June 30, 2005, in the amount of \$175.89. Exhibit C.

5. On August 23, 2005, the Commission refunded Protestant the motor fuel tax paid for diesel fuel used non-highway for the period of January 1, 2005 through June 30, 2005, in the amount of \$175.89. Exhibit B.

6. On May 3, 2007, Protestant applied to the Commission for a refund of motor fuel tax paid for diesel fuel used non-highway for the period of January 2, 2006 through December 16, 2006, in the amount of \$247.94. Exhibit D.

⁶ OAC, 710:1-5-39(a).

7. On May 16, 2007, the Commission refunded Protestant the motor fuel tax paid for diesel fuel used non-highway for the period of January 2, 2006 through December 16, 2006, in the amount of \$247.94. Exhibit B.

8. Protestant requested and the Commission refunded a total of \$599.95 of motor fuel taxes.

9. By letter dated June 21, 2007, the Division proposed the assessment of sales tax against Protestant on its purchases of diesel fuel for reefer use and for which Protestant had received a refund of the motor fuel taxes. Exhibit E. The amount assessed inclusive of penalty and interest accrued through July 27, 2007, totaled \$936.53, consisting of the following, to-wit:

| | |
|----------------------------|---------------|
| Sales Tax: | \$742.33 |
| Interest: | <u>119.91</u> |
| Subtotal (within 30 days): | \$862.24 |
| 30 day delinquent penalty: | <u>74.29</u> |
| Total (after 30 days): | \$936.53 |

10. A Note on the proposed assessment provides:

[y]ou are better off NOT applying for the refund when the fuel price is higher than \$1.60/gallon. Sales tax is based on price. It will be higher than the thirteen cents (\$.13) per gallon fuel tax.

11. By letter marked received July 6, 2007, Protestant timely protested the proposed sales tax assessment. Exhibit F.

ISSUE AND CONTENTIONS

The issue presented for decision is whether Protestant is liable for the sales tax assessed against it on the diesel fuel purchased in Oklahoma for non-highway use and for which Protestant has received a refund of the motor fuel taxes paid at the time of purchasing the diesel fuel.

Protestant contends that sales tax cannot be charged against them since the motor fuel tax refund form did not mention that sales tax would be assessed against them if they applied for a refund. Protestant also requests that any late fees or penalties be withdrawn.

The Division contends that the protest should be denied on its merits and the amount in controversy be fixed as the amount due and owing by Protestant. In support of this contention, the Division argues that Protestant is charged with knowledge of the laws that affect them. The Division further argues that the assessment of penalty and interest is statutory and that any waiver of such amounts should not be made without Protestant's application therefor.

CONCLUSIONS OF LAW

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

1. Jurisdiction of the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. Supp. 2002, § 221(D).

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code (“Code”).⁷ 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”⁸ is expressly made subject to sales tax. 68 O.S. 2001, § 1354(A)(1)⁹. 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.

3. Specifically exempted from the levy of sales tax is:

The sale of gasoline, motor fuel, methanol, “M-85” * * * compressed natural gas, liquefied natural gas, or liquefied petroleum gas on which the Motor Fuel Tax, Gasoline Excise Tax, Special Fuels Tax or the fee in lieu of Special Fuels Tax levied in Section 500.1 et seq., Section 601 et seq. or Section 701 et seq. of this title *has been, or will be paid.*

(Emphasis added).

4. A tax is imposed on all diesel fuel used or consumed in Oklahoma at the rate of thirteen cents (\$.13) per gallon. 68 O.S. 2001, § 500.4(A)(2). The tax is a direct tax on the retail or ultimate consumer pre-collected for the purpose of convenience and facility to the consumer. 68 O.S. 2001, § 500.4(D).

5. Upon proper submission of a claim and subject to determination by the Commission, that portion of diesel fuel “used to operate equipment attached to a motor vehicle, if the diesel fuel was placed into the fuel supply tank of a motor vehicle that has a common fuel reservoir for travel on a highway and for the operation of equipment, or” “consumed by the vehicle while the vehicle is parked off the highways of this state” is exempt from the tax imposed by § 500.4. 68 O.S. 2001, § 500.10(11)(a) and (b). The exemption for use pursuant to § 500.10(11) shall be

⁷ 68 O.S. 2001, § 1350 et seq.

⁸ 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).

⁹ Gasoline and other motor fuels are tangible personal property. Oklahoma Tax Commission Order No. 90-06-07-028 (Prec.). See OAC, 710:65-13-180.

perfected by a refund claim filed by the consumer who shall provide evidence of an allocation of use satisfactory to the Oklahoma Tax Commission. 68 O.S. Supp. 2004, § 500.14(A)(1).

6. The consumer/user of tangible personal property is liable for the tax levied by the Code on said property. 68 O.S. 2001, § 1361(A)(1).

7. 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.

8. Taxpayers are charged with knowledge of the laws that affect them. Oklahoma Tax Commission Order No. 2006-03-23-07 (Prec.), citing *Ponder v. Ebey*, 1944 OK 271, 194 Okla. 407, 152 P.2d 268; *Anderson Nat'l Bank v. Lueckett*, 321 U.S. 233, 64 S.Ct. 599 (1994). 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. Protestant failed to sustain its burden of proving that the proposed sales tax assessment is incorrect. Accordingly, Protestant's 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 Protestant, TRUCKING COMPANY, 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.

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.