JURISDICTION: **OKLAHOMA TAX COMMISSION – DECISION**
CITE: **2008-03-20-03 / NON-PRECEDENTIAL**
ID: **P-07-093-K**
DATE: **MARCH 20, 2008**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPANY (hereinafter "Corporation") and PRESIDENT (hereinafter collectively referred to as "Protestants") appear pro se. 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

A cost mark-up depletion audit of the inventory Protestants had available for sale during the period of April 1, 2004 through December 31, 2006 was performed by the Division. As a result of the audit, Protestants were determined to have under-reported their gross sales for the audit period, and by letters dated April 30, 2007, the Division proposed the assessment of sales tax, interest and penalty against each of the Protestants. Protestants timely protested the assessments by letter dated May 1, 2007.

On June 12, 2007, the protest was referred 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-07-093-K and assigned to ALJ, Administrative Law Judge.[3]

A pre-hearing conference was scheduled for August 7, 2007, by *Prehearing Conference Notice* issued July 3, 2007.[4] The conference was held as scheduled. Pursuant to the conference, the parties were directed to file a status report on or before October 8, 2007. By *Status Report* filed October 8, 2007, it was advised that the audit had been revised based on information submitted by Protestants, that Protestants did not agree with the revision and that settlement of the protest was not probable.

A hearing was scheduled for November 6, 2007, by *Notice of Hearing* issued October 10, 2007.[5] An open hearing[6] was held as scheduled with the parties in attendance. The Division

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[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(a).

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

called two witnesses: SUPERVISOR, Audit Supervisor, and AUDITOR, Special Projects Auditor, who testified regarding the performance of the audit and the records of the Division. Division's Exhibits A-2 through J were identified, offered and admitted into evidence. Protestant, PRESIDENT made a statement under oath and offered Protestant's Exhibits A-1 and A-2 through H which except for Exhibit G were admitted into evidence. Upon conclusion of the hearing, the record was closed and the protest was submitted for decision.[7]

FINDINGS OF FACT

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

1. Protestants owned and operated a gas station/convenience store known as STORE located at STREET ADDRESS in CITY, Oklahoma under sales tax permit number XXX during the audit period. Division's Exhibits G and H.

2. Protestants also owned and operated a gas station/convenience store known as STORE 2 located at BUSINESS ADDRESS under sales tax permit number XXX from the start of the audit period through December, 2005. Protestants' Exhibit A-2 and testimony of PRESIDENT.

3. Protestant, PRESIDENT is and was during the audit period, the President of the Corporation. Division's Exhibit B.

4. Protestant, PRESIDENT does not dispute that he was the principal officer of the Corporation. Division's Exhibit B.

5. Although Protestants transferred the second convenience store known as STORE 2 in December, 2005 to a new owner, Protestants admit they allowed the new owner to use their sales tax permit up and through March, 2006 and do not dispute that they are responsible for the sales taxes of this business; if any, through March, 2006. Protestants' Exhibit F and testimony of PRESIDENT.

6. During the audit period, excluding cigarettes Protestants purchased for resale stock or inventory from eight (8) wholesale distributors. Division's Exhibit D and E.

7. Except for Protestants' low-point (3.2%) beer retail inventory, the auditor performed an initial depletion audit utilizing approximately eighty (80) purchase invoices provided by Protestants for 2006 which were separated by vendor, added and using Protestants' restocking schedule averaged to approximate Protestants' retail inventory. Protestants' low-point beer inventory was obtained directly from the wholesale distributors. Division's Exhibits C, D and E.

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[6] 68 O.S. 2001, § 205. See, *OAC*, 710:1-5-27(d).

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

8. Subsequent to the initial audit, issuance of assessment letters and a timely protest thereto, the auditor received information which caused a revision to the audit. Division's Exhibits E through I. In particular, the auditor revised the amount of BEER VENDOR 1 inventory for sale for 2006, SOFT DRINK VENDOR 1 resale inventory for each of the years and removed the resale inventory attributable to MAGAZINE VENDOR which distributes magazines only. Division's Exhibit J.

9. The categories of inventory available for sale were multiplied by the mark-up percentage for each of the category provided by Protestants to arrive at Protestants' expected sales for the audit period. Protestants' reported gross receipts were subtracted from the expected sales to arrive at under-reported sales for the audit period of $204,306.79. Division's Exhibit J.

10. The revised audit proposes the assessment of state, city and county sales taxes in the aggregate amount of $17,936.03 on the audited under-reported sales, interest at fifteen percent (15%) through November 1, 2007 of $5,754.61, and penalty at ten percent (10%) of $1,793.61, for a total of tax, interest and penalty due of $25,484.25. Division's Exhibit J.

11. At the hearing, Protestants produced Exhibits A-1, A-2 and B which according to Protestants represents their beer purchases from BEER VENDOR 2 during 2005 and 2006 and BEER VENDOR 1 for each of the years. The auditor testified that he would not recommend a revision to the audit based on this information because he received Protestants low-point beer purchases directly from the wholesale distributors, neither Exhibits A-1 or A-2 are totaled, Exhibit A-2 shows purchases of "cases" only and Exhibit B only shows purchases for the STORE location in 2004 and 2005.

12. Protestants also produced Exhibit C which according to Protestants represents their purchases from DISTRIBUTOR during the audit period. Exhibit C reflects purchases of snack items in the total amount of $117.13. Division's Exhibit C shows purchases from DISTRIBUTOR for STORE only and only during 2006 in the amount of $281.64.

13. Protestants admit that they do not have any information to dispute the amounts reflected in the revised audit for SOFT DRINK VENDOR 2, CHIPS VENDOR or MAGAZINE VENDOR. Further, the amounts reflected for SOFT DRINK VENDOR 1 in the revised audit, except for 2004 which amount was merely reduced by 25% to account for the first quarter of 2004 are the same as submitted by Protestants.

ISSUE AND CONTENTIONS

The issue presented for decision is whether Protestants sustained their burden of proving that the revised audit is incorrect, and in what respect.

Protestants contend that the purchase information used by the auditor is incorrect. Protestants further contend that they are being charged for purchases made by STORE 2 subsequent to March, 2006. Protestants also contend that the mark-up percentages are incorrect.

The Division contends that Protestants have failed to sustain their burden of proving by a preponderance of evidence that the revised audit is incorrect. In support of this contention, the Division argues that not only is Protestants information from the beer distributors incomplete, but the Division obtained Protestants actual purchases of low-point beer from the wholesale distributors. The Division further argues that the snack purchase information of Protestants is inaccurate citing the compilation of invoices for DISTRIBUTOR for 2006 only in Division's Exhibit C. The Division further contends that only the purchases by STORE during 2006 are included in the audit. The Division also contends that the mark-up percentages used in the audit are the percentages provided by Protestants.

CONCLUSIONS OF LAW

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

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

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Code").[8] An excise tax is levied upon the gross receipts or gross proceeds[9] of all sales, not otherwise exempted by the Code. 68 O.S. 2001, § 1354(A). Incorporated cities, towns, and

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[8] 68 O.S. 2001, § 1350 et seq.

[9] The terms "gross receipts", "gross proceeds" or "sales price" mean the total amount of consideration, including cash, credit, property and services, for which personal property or services are sold, leased or rented, valued in money, whether received in money or otherwise, without any deduction for the following:

(1) the seller's cost of the property sold,
(2) the cost of materials used, labor or service cost,
(3) interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller,
(4) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges,
(5) delivery charges and installation charges, unless separately stated on the invoice, billing or similar document given to the purchaser, and
(6) the value of exempt personal property given to the purchaser where taxable and exempt personal property have been bundled together and sold by the seller as a single product or piece of merchandise.

b. Such term shall not include:

(1) discounts, including cash, term, or coupons that are not reimbursed by a third party that are allowed by a seller and taken by a purchaser on a sale,
(2) interest, financing, and carrying charges from credit extended on the sale of personal property or services, if the amount is separately stated on the invoice, bill of sale or similar document given to the purchaser, and
(3) any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale or similar document given to the purchaser.

68 O.S. Supp. 2004, 1352(12)(a). See, *OAC*, 710:65-1-2. Amended at 21 Ok Reg 2581, eff 6-25-04. See also, *OAC*, 710:65-1-9. Amended at 21 Ok Reg 2581, eff 6-25-04.

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. The sale of "tangible personal property"[10] is expressly made subject to sales tax. 68 O.S. 2001, § 1354(A)(1). "Sale" is 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).[11] *See, OAC*, 710:65-1-2. "The taxable event is the sale itself * * *." ***Pioneer Telephone Cooperative, Inc. v. Oklahoma Tax Commission***, 1992 OK 77, 832 P.2d 848; citing with approval, *Phillips v. Oklahoma Tax Commission*, 1978 OK 34, 577 P.2d 1278, 1282, ("In discussing sales tax, it must be emphasized that sales tax is imposed upon the sale itself * * *"); and *Liberty Steel Co. v. Oklahoma Tax Commission*, 1976 OK 83, 554 P.2d 8, 10, ("A sales tax, as opposed to a use tax, is imposed on the sale itself and is collectable from the seller"). "For the purpose of proper administration of the provisions of the sales and use tax laws, it is presumed that all gross receipts are subject to tax until they are shown to be tax exempt." *OAC*, 710:65-1-4(a).

4. The excise tax levied by the Code is required to be paid by the consumer or user to the vendor, who is required to collect from the consumer or user the full amount of the tax levied or an amount equal as nearly as possible or practicable to the average equivalent thereof, 68 O.S. 2001, § 1361(A); and remit the same to the Tax Commission, 68 O.S. 2001, § 1362(A). The amount to be collected by the vendor on each sale is the applicable percentage of the gross receipts or gross proceeds thereof as provided by § 1354 of the Code which applicable percentage shall equal the combination of the state and any applicable municipal and county sales tax rates rounded to a whole cent. 68 O.S. 2001, § 1362(B). A vendor may elect to compute the tax due on transactions on an item or invoice basis. *Id*. The tax levied by the Code shall be added to the gross receipts not included in the gross receipts. ***Duncan Medical Services v. Oklahoma Tax Commission***, 1994 OK 91, 911 P.2d 247, at 253.

5. In ***Pioneer Telephone***, *supra.*, Pioneer sought a refund of sales taxes on the receipts from its telephone services which it determined were in excess of that necessary to provide the services and which were credited on a pro-rata basis to its customers' capital accounts in accordance with its end-of-year accounting. In denying the refund, the Supreme Court of Oklahoma held:

> The taxable event is the sale itself, and not the cost of operations determined by an accounting method at a future date. The taxable event, the sale of the service, occurs when the cooperative member receives the

[10] Defined by the Code to mean "personal property which may be seen, weighed, measured, felt, or touched or which is in any other manner perceptible to the senses". 68 O.S. 2001, § 1352(17). Amended and renumbered by Laws 2003, c. 413, § 1, eff. Nov. 1, 2003, to include within the meaning "electricity, water, gas, steam and prewritten computer software" and to provided that "[t]his definition shall be applicable only for purposes of the Oklahoma Sales Tax Code". *See*, 68 O.S. Supp. 2004, § 1352(23). *See also, OAC*, 710:65-1-2. Amended at 21 Ok Reg 2581, eff 6-25-04.

[11] Renumbered as § 1352(21) by Laws 2003, c. 413, § 1, eff. Nov. 1, 2003.

> service and incurs the obligation to pay consideration, the monthly charge, for telephone service.

Id., at 851. In so holding, the Court construed the meaning of "gross receipts" as defined by the Code and according to its plain meaning, and found that "gross receipts includes the consideration for the sale of the service" which includes the cost of the service and any amount allowed as a credit by the seller[12] and that "[t]hus gross receipts refers to the total amount of money or the value of other considerations received from selling property or performing services", citing *County of Sacramento v. Pacific Gas and Electric Co.*, 193 Cal.App.3d 300, 238 Cal.Rptr. 305, 311 (3 Dist.1987). *See*, ***Duncan Medical***, *supra.* at 251, wherein the Supreme Court of Oklahoma concluded that "[t]he plain meaning of gross receipts or gross proceeds upon which the sales tax shall be calculated is the total consideration received by the seller or the total obligation incurred by the purchaser at the time of the transaction, if greater than the monetary consideration received by the seller", citing *Pioneer Telephone, supra*. *Id.*

6. 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. 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 other pertinent records and documents which may be necessary to determine the amount of tax due hereunder 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.

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

7. 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

[12] It should be noted that as of November 1, 2003, discounts are excluded from "gross receipts" or "gross proceeds" if they are not reimbursed by a third party. *See*, Note 12.

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.*

8. Protestants failed to sustain their burden of proving the audit is incorrect. The purchase information presented by Protestants is inaccurate by being incomplete. None of the audited purchases have been shown to be attributable to STORE 2. And, no evidence of mark-up percentages different than the percentages originally provided by Protestants has been presented.

9. Protestants' protest should be and the same is hereby denied.

DISPOSITION

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

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.