JURISDICTION:	OKLAHOMA TAX COMMISSION DECISION
CITE:	2008-07-08-03 / NON-PRECEDENTIAL
ID:	P-07-112-H
DATE:	JULY 8, 2008
DISPOSITION:	DENIED
TAX TYPE:	SALES / TOURISM
APPEAL:	NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

OWNER d/b/a RACE TRACK ("Protestant") appears pro se.[1] The Field Audit Section of the Compliance Division f/k/a the Audit Division ("Division"), Oklahoma Tax Commission, appears by and through OTC ATTORNEY 1, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On July 20, 2007, the protest file was received by this office for further proceedings consistent with the Uniform Tax Procedure Code[2] and the *Rules of Practice and Procedure Before the Oklahoma Tax Commission*.[3] On July 26, 2007, the undersigned sent a letter to Division's counsel stating it had come to the attention of the undersigned the Protestant had filed bankruptcy, and requested the Division to advise how it wished to proceed.[4]

On August 17, 2007, Division's counsel filed a Memorandum advising it is the Division's position the automatic stay provision found at 11 U.S.C. § 362, allows for audits and assessments to determine tax liability.[5]

On August 24, 2007, the Notice of Prehearing Conference was mailed to the last known address of the Protestant, setting the prehearing conference for September 17, 2007, at 11:00 a.m.[6] The prehearing conference was held by telephone as scheduled on September 17, 2007, at 11:00 a.m. The Protestant failed to appear at the prehearing conference. On

[1] "**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 (8th ed. 2004), available at *http://westlaw.com*. (March 16, 2006).

[2] OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

[3] OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

[4] The letter was also copied to the Protestant at his last known address.

[5] The Division copied the Protestant on its Memorandum.

[6] OKLA. STAT. ANN. tit. 68, § 208 (West 2001). The notice was mailed to the Protestant at ADDRESS 1. Counsel for the Division also mailed a letter to the Protestant advising him of the prehearing conference and requested the Protestant contact him prior to the prehearing conference.

September 17, 2007, the Prehearing Conference Order was mailed to the parties advising the record in this matter would be closed and submitted for decision upon the Division filing a verified response to the protest, which was due no later than thirty (30) days from the date of the order. (The letter of protest did not request an oral hearing.)

On October 17, 2007, the Division's Verified Response was filed, with attachments thereto. The verification attached to the response was duly sworn under oath, on behalf of the Division, by SUPERVISOR, Auditor Supervisor of the Field Audit Section, Compliance Division f/k/a the Audit Division, Oklahoma Tax Commission.[7] On October 18, 2007, the record in this matter was closed and the case was submitted for decision.

On November 5, 2007, the parties were contacted by phone to arrange a teleconference with the undersigned regarding the review of the record. The teleconference was set for November 6, 2007, at 1:30 p.m.

The teleconference was held as scheduled, but the Protestant failed to call in as agreed. The Division's counsel, OTC ATTORNEY 2, Assistant General Counsel, did appear as requested. It was explained to OTC ATTORNEY 2 that the record did not contain an "Audit Methodology Agreement" signed by the Protestant consenting to the use of an error rate projection method for the determination of the proposed sales and tourism tax assessments.

On November 29, 2007, OTC ATTORNEY 2 mailed the Protestant a letter requesting a "withdrawal of the pending protest" or for the Protestant to sign the "Audit Methodology Agreement" for the proposed sales and tourism tax assessments.

On December 14, 2007, OTC ATTORNEY 2 filed a "Motion to Stay Further Action Pending Reaudit by the Audit Division," based upon the November 6th teleconference, the lack of a response by the Protestant, and that sufficient records were filed in the Protestant's bankruptcy for the Division to conduct a "detail audit" for sales tax and tourism tax.

On December 17, 2007, an Order Granting Motion to Stay Further Action Pending Re-Audit was granted and mailed to the parties. Based upon the order, the record was reopened and the case was pulled from submission for decision.

On January 31, 2008, OTC ATTORNEY 1 filed a Notice of Substitution of Attorney for the Division.

On February 4, 2008, the Division filed a Notice of Sales and Tourism Tax Adjustment, with attachments thereto.

On February 5, 2008, a letter was mailed to the parties advising a *Notice of Sales and Tourism Tax Adjustment* had been filed in this office on February 4th by the Division (copy

[7] *See* OKLA. ADMIN. CODE § 710:1-5-28(c).

enclosed). The Protestant was also advised a response to the adjustments could be filed on or before March 5, 2008. At that time, a prehearing conference date would be set.[8]

On March 12, 2008, a Notice of Prehearing Conference was mailed to the parties advising the prehearing conference was set for April 8, 2008, at 1:30 p.m.[9]

The prehearing conference was held as scheduled on April 8th, but the Protestant failed to appear. On April 9, 2008, the Prehearing Conference Order was mailed to the parties advising the record in this matter would be closed and submitted for decision upon the Division filing a verified response to the protest, which was due no later than thirty (30) days from the date of the order.

On April 23, 2008, the Division's Supplemental Verified Response was filed, with attachments thereto. The verification attached to the response was duly sworn under oath, on behalf of the Division, by AUDITOR, Compliance Division f/k/a the Audit Division, Oklahoma Tax Commission.[10] The Protestant did not respond to the Division's Supplemental Verified Response. On May 12, 2008, the record in this matter was closed and the case was submitted for decision.

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 Verified Response and Supplemental Verified Response, the undersigned finds:

1. On or about April 1, 2003, the Protestant, a sole proprietorship, began operating a motor speedway located approximately eight (8) miles south of CITY, Oklahoma and approximately eleven (11) miles north of LOCATION.[11]

2. In November 2003, the Protestant filed a Chapter 11 Bankruptcy in the Eastern District of Oklahoma, Case No. XXX.[12]

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[8] The letter was mailed to the Protestant at the following addresses:

ADDRESS 1 ADDRESS 2 ADDRESS 3

The mailing to ADDRESS 2 was returned as Not Deliverable as Addressed/Unable to Forward.

[9] *See* Note 8. The notice was mailed to the two (2) remaining addresses.

[10] *See* OKLA. ADMIN. CODE § 710:1-5-28(c).

[11] Division's Exhibit A.

[12] The Protestant also filed a Chapter 11 Bankruptcy in the Eastern District of Oklahoma as an officer of ROOFING COMPANY, Case No. XXX. The two (2) bankruptcy cases were consolidated by an Order of the Bankruptcy Court under Case No. YYY.

3. Prior to June 28, 2005, the Protestant had not filed any reports for sales tax, tourism tax, or withholding tax.

4. The Bankruptcy Court appointed ACCOUNTANT, CPA to file the missing reports.[13]

5. On June 28, 2005, the Protestant, through ACCOUNTANT, filed sales tax, tourism tax, and withholding tax reports for the period of April 2003 through May 2005.[14]

6. The "Monthly Operating Reports" filed by the Protestant in the bankruptcy differed greatly from the actual sales tax reports filed on June 28, 2005. Because the difference was not easily reconciled, an audit was requested and performed.

7. On August 3, 2005, the Division mailed the Protestant an audit notification letter. On September 15, 2005, the initial on-site review was conducted. During the audit, the Protestant was the Division's primary contact, but the Division also worked with ACCOUNTANT.

8. On April 27, 2007, the Division issued a proposed sales tax assessment[15] against the Protestant for the period of April 1, 2003, through July 31, 2005 ("Audit Period"), as follows, to-wit:

Tax Due:	$28,696.42
Interest @ 15% through 04/30/07:	6,954.20
Penalty through 04/30/07:	3,377.42
Total:	$39,028.04

9. On April 27, 2007, the Division issued a proposed tourism tax assessment[16] against the Protestant for the Audit Period, as follows, to-wit:

Tax Due:	$ 802.04
Interest @ 15% through 04/30/07:	346.72
Penalty through 04/30/07:	80.20
Total:	$1,228.96

10. On May 16, 2007, the Division received a timely filed letter of protest. No basis for the protest is contained in the letter, which states, "We are protesting this assessment for taxes assessed to RACE TRACK. Audit number ZZZ."[17]

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[13] *See* Division's Exhibit A.

[14] *See* Division's Exhibit A.

[15] Exhibit B. The underreported sales included general admissions and concession sales.

[16] Exhibit C.

[17] Exhibits C and D.

11. The first ("1st") audit work papers used the error rate projection method. The Protestant did not sign an "Audit Methodology Agreement" consenting to the use of this method prior to the Division conducting the audit and issuing the proposed sales and tourism tax assessments.

12. On December 14, 2007, the Division filed a Motion to Stay Further Action Pending Re-audit. On December 17, 2007, an Order granting the Division's motion was issued, and this matter was stayed pending the re-audit.

13. The Division performed a detail audit of sales and tourism tax based upon the best information available, the Monthly Operating Reports filed in the Protestant's bankruptcy case.

14. On February 4, 2008, the Division filed a Notice of Sales and Tourism Tax Adjustment, which was mailed to the Protestant.

15. The Division's second ("2nd") work papers adjusted the proposed sales and tourism tax assessments based upon the detail audit[18] performed by the Division for April 1, 2003, through June 30, 2005 ("Revised Audit Period"),[19] as follows, to-wit:

Sales Tax:	$52,957.17
Interest through 03/31/08:	28,753.08
Penalty:	5,295.70
Total:	$87,005.95
Tourism Tax:	$ 1,176.83
Interest through 03/31/08:	638.96
Penalty:	117.68
Total:	$ 1,933.47

16. The Protestant did not respond to the Division's 2nd work papers adjusting the proposed sales and tourism tax assessments.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[20]

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Sales Tax Code").[21] The Sales Tax Code levies "upon all sales,[22] not otherwise

[18] Division's Exhibit 1.

[19] The Division dropped July 2005 from the Audit Period because there was no information available for that month.

[20] OKLA. STAT. ANN. tit. 68, § 221(D) (West Supp. 2008).

[21] OKLA. STAT. ANN. tit. 68, § 1350 et seq. (West 2001).

exempted . . . an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds[23] of each sale of . . . tangible personal property. . . ."[24] Oklahoma Statutes authorize incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.[25]

3. For the purpose of proper administration of the provisions of the sales tax laws, it is presumed that all gross receipts are subject to tax until they are shown to be exempt. The burden of proving that a sale of tangible personal property or enumerated service is an exempt sale is upon the vendor.[26]

4. Private tourist attraction[27] admissions and sales of any service or property related to the attraction are subject to tourism tax (1/10 of 1%).[28]

5. The Tax Commission has promulgated rules as provided by law to facilitate the administration, enforcement, and collection of taxes under the Oklahoma Sales Tax Code.[29]

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.[30]

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[22] 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,
>
> …

[23] OKLA. STAT. ANN. tit. 68, § 1352(7) (West 2001) and (as amended) OKLA. STAT. ANN. tit 68, § 1352(11) (West Supp. 2006).

[24] OKLA. STAT. ANN. tit. 68, § 1354(A)(1) (West Supp. 2006).

[25] OKLA. STAT. ANN. tit. 68, § 1370 et seq. (West Supp. 2006) and OKLA. STAT. ANN. tit. 68, § 2701 (West Supp. 2006).

[26] OKLA. STAT. ANN. tit. 68, § 1365(E) (West Supp. 2007).

[27] OKLA. STAT. ANN. tit. 68, § 50011(6) (West 2001).

[28] OKLA. STAT. ANN. tit. 68, § 50012 (West 2001).

[29] OKLA. ADMIN. CODE § 710:65-1-1.

[30] OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2001).

7. Vendors shall keep records and books of all sales and all purchases of tangible personal property and must maintain complete books and records covering receipts from all sales and distinguishing taxable from nontaxable receipts.[31]

8. At minimum, the following records constitute a minimum requirement for the purposes of the Sales Tax Code for vendors selling tangible personal property:

(1) Sales journal or log of daily sales in addition to cash register tapes and other data which will provide a daily record of the gross amount of sales.
(2) A record of the amount of merchandise purchased. To fulfill this requirement, copies of all vendors' invoices and taxpayers' copies of purchase orders must be retained serially and in sequence as to date.
(3) A true and complete inventory of the value of stock on hand taken at least once each year.[32]

9. Oklahoma Statutes provide for the collection of interest and penalty on delinquent tax.[33] "All penalties or interest imposed by [Title 68], or any state tax law, shall be recoverable by the Tax Commission as a part of the tax with respect to which they are imposed…."[34]

10. An auditor for the Tax Commission may suggest a sample sales tax audit rather than a detailed audit. The auditor shall select the periods to sample and apply the results to all the periods of the audit. The auditor shall prepare forms to be signed by the taxpayer stating they agree with the periods and method chosen for the sample.[35] The Audit Methodology Agreements are binding on the Tax Commission and the Protestants.[36]

11. "No assessment of any tax levied under the provisions of any state tax law…shall be made after the expiration of three (3) years from the date the return was required to be filed or the date the return was filed, whichever period expires the later…."[37]

12. An order of the Tax Commission must be supported by substantial evidence.[38] Likewise, the audit upon which a portion of the record is formed and order issued, must be supported by substantial evidence.[39]

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[31] OKLA. ADMIN. CODE § 710:65-3-30 (June 26, 2003).

[32] OKLA. ADMIN. CODE § 710:65-3-31(a) (June 26, 1994).

[33] OKLA. STAT. ANN. tit. 68, § 217 (West 2001).

[34] OKLA. STAT. ANN. tit. 68, § 217(G) (West 2001).

[35] OKLA. ADMIN. CODE § 710:65-5-2. *See* OKLA. STAT. ANN. tit. 68, § 206 (West 2001).

[36] *See* Note 35.

[37] OKLA. STAT. ANN. tit. 68, § 223 (West 2001).

[38] *Dugger v. State ex rel. Oklahoma Tax Com'n*, 1992 OK 105, 834 P.2d 964.

An audit is supported by substantial evidence when an evidentiary foundation for the audit has been established. In a majority of cases, the evidentiary foundation will be established by the records reviewed by the auditor. In those cases where an evidentiary foundation for the audit has been established, the taxpayer has the burden of proving in what respect the action of the Tax Commission in assessing the tax is incorrect. Where, however, an evidentiary foundation has not been laid or the records upon which the audit is based do not establish a basis for assessing a tax, the audit, and assessment, in the initial instance, cannot be sustained as being supported by substantial evidence.[40] A sufficient evidentiary foundation has been laid for the detail audit and "adjusted" sales and tourism tax assessments.

13. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[41]

14. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[42]

DISCUSSION

Initially, the Division failed to obtain a signed Audit Methodology Agreement before proceeding with a sample sales tax audit, rather than a detail audit. The Division attempted to contact the Protestant to discuss this matter, but the Protestant failed or refused to respond to the Division's numerous inquiries.

However, the Division remedied this oversight by conducting a detail audit based on the best information available, the Monthly Operating Reports filed in the Protestant's bankruptcy. The sales and tourism tax reports filed for the "Revised Audit Period" do not account for a large amount of unreported sales, which are reflected on the Monthly Operating Reports. The

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[39] *See* OTC Order No. 2003-07-22-09 (July 22, 2003), 2003 WL 2347117 (Okl. Tax Com.), available at *http://westlaw.com*. (August 10, 2006).

[40] *See* Notes 38 and 39.

[41] OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999):

> 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 the 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.

[42] *See Enterprise Management Consultants, Inc. v. State ex re.l Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

Protestant has not attempted to prove that the "adjusted" sales and tourism tax assessments are incorrect and in what respects the actions of the Division are incorrect. The Protestant has failed to meet his burden of proof in this matter.

The Division's "adjusted" sales and tourism tax assessments are not tantamount to a new proceeding, but an amended proceeding, so that the statutory period for assessment is tolled.[43]

In the *Bancorporation* case, the Court of Civil Appeals of Oklahoma, Division No. 1, found as follows, to-wit:

> Assuming that the Commission by its second proposal did adopt a plan or method of assessment wholly unlike that pursued in the first proposal, both proposals related to the same income, and the last thereof can be considered in no other manner than a mere amendment of the first. The mere change in the process or plan of calculation cannot give to the last proposal the character of a new proceeding.[44]

It is common for the Division to revise or adjust assessments during the course of a protest. Both sets of work papers utilize the Monthly Operating Reports filed in the Protestant's bankruptcy and the sales and tourism reports filed June 28, 2005.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case that the protest to the Division's "adjusted" sales and tourism tax assessments should be denied.

It is further ORDERED that the "adjusted" sales and tourism taxes and penalties be fixed as the deficiency due and owing, including interest, accrued and accruing.

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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[43] *In re Income Tax Protest of F & M Bancorporation and Subsidiaries*, 2005 OK CIV APP 6, 105 P.3d 837.

However, since the Protestant had not filed any reports until June 2005, the statute of limitations does not present a problem in this matter.

[44] Id.