

JURISDICTION: OKLAHOMA TAX COMMISSION DECISION
CITE: 2009-03-05-02 / NON-PRECEDENTIAL
ID: P-07-086-H
DATE: MARCH 5, 2009
DISPOSITION: DENIED
TAX TYPE: MOTION FOR ATTORNEY FEES
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Now comes on for consideration the Protestant's *Motion and Brief for the Award of a Reasonable Attorney Fee Associated With the Successful Prosecution of this Action* ("Motion") pursuant to assignment regularly made by the Oklahoma Tax Commission to ALJ, Administrative Law Judge. PROTESTANT d/b/a LIQUOR STORE ("Protestant") appears through ATTORNEY, Attorney-at-Law. The Field Audit Section of the Compliance Division ("Division"), Oklahoma Tax Commission, appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On December 2, 2008, OTC Order No. 2008-12-02-02 (December 2, 2008) was issued by the Tax Commission adopting the Findings of Fact, Conclusions of Law and Recommendations issued by the Administrative Law Judge on October 16, 2008, sustaining the protest to the Division's proposed sales tax assessment (5th Work Papers).

On December 15, 2008, the Protestant's *Motion* was filed with the clerk of the court ("Clerk"). On December 17, 2008, the parties was advised by letter the Division could file a response on or before December 31, 2008, and upon receipt of the Division's Response, the Clerk would contact Counsel to set a teleconference on the *Motion*.

On December 19, 2008, the Division's Response to Protestant's Motion and Brief for the Award of Attorney Fees ("Response") was filed with the Clerk. On December 22, 2008, a letter was mailed to Counsel setting the teleconference for January 8, 2009, at 2:00 p.m.

The teleconference was held as scheduled. The *Motion* was discussed and Counsel were requested to submit a mutually agreeable date and time for the hearing on the *Motion*.

On January 9, 2009, the Division filed a Motion to Submit Protestant's Motion for the Award of Attorney Fees on the Protestant's Brief and Division's Response ("Motion to Submit on Briefs"). On January 14, 2009, ATTORNEY filed a letter with the Clerk stating there was no objection to the Division's Motion to Submit on Briefs.

On January 15, 2009, an Order Granting Division's Motion to Submit on Briefs was issued, which also informed Counsel the *Motion* 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 briefs, the undersigned finds:

1. On December 15, 2008, Protestant's *Motion* was filed with the Clerk requesting an attorney's fee of \$10,200.00. Attached to the *Motion* is a sworn Affidavit from ATTORNEY, which states as follows, to-wit:

1). That Affiant is the attorney of record for the Protestant in this proceeding. I have personal knowledge of the matters herein referred to, and make this Affidavit in support of the request for the an [sic] award of attorney fees and costs incurred herein.

2). As the attorney for the Protestant, I kept daily time records and all time so recorded is reflected on monthly computer printouts, which are generated in the regular course of business of the Affiant, copies of which are attached hereto.

3). The total fee for legal services rendered during the representation of Protestant, and which have been billed to the client is: attorney fees - \$10,200.00, which sum includes \$675.00 for preparation and filing of the Protestant's *Motion*. In support of the fee request, Affiant would inform the Court of the following:

- a). I have extensive experience in litigation matters for services of the type which were rendered herein with approximately 32 years of experience.
- b). The hours expended by me in my representation of the Protestant are reasonable and necessary and in accordance with standards in the legal community for similar work under similar circumstances, in the opinion of Affiant. The hourly rates utilized are reasonable for services of a similar nature under the facts and circumstances of this case, if not low.
- c). In view of the factors set forth above, Affiant believes the total fee stated and sought in this case is reasonable under the circumstances.
- d). Attached hereto are the time and expense records involved in this case.¹

¹ Attached to the *Motion* is the Affidavit and a copy of an invoice to the Protestant dated December 15, 2008, which is a summary of charges by date, nature of the work performed, time expended, hourly rate, and amount charged. Copies of the actual time records are not attached.

4). Affiant has reviewed the statement of time expended and the same is true and correct.

2. On January 9, 2009, the Division filed its Motion to Submit on Briefs, which states in pertinent parts, as follows, to-wit:

1. The Division stands on the arguments and authority, in its response, filed on December 19, 2008.

2. The Protestant's Motion and Brief set out the Protestant's arguments and authority. A hearing is repetitive, cumulative and a waste of judicial economy.

3. There is no need to present evidence on the reasonableness of the \$10,200.00 attorney fees because the Division has not challenged the reasonableness of the fee requested. The Division only challenges the request and the authority to award of the attorney fees.

3. The Protestant has not presented any evidence which reflects an accounting fee or costs in this matter.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding pursuant to Section 941(B) of Title 12,² which states as follows, to-wit:

B. The respondent in any proceeding brought before any state administrative tribunal by any state agency, board, commission, department, authority or bureau authorized to make rules or formulate orders shall be entitled to recover against such state entity court costs, witness fees and reasonable attorney fees if the tribunal or a court of proper jurisdiction determines that the proceeding was brought without reasonable basis or is frivolous; provided, however, if the tribunal is required by law to act upon complaints and determines that the complaint had no reasonable basis or is frivolous, the tribunal may assess the respondent's costs, witness fees and reasonable attorney fees against the complainant. This subsection shall apply to any proceeding before any state administrative tribunal commenced on or after November 1, 1987.

2. Attorney fees ordinarily are not recoverable in absence of a statutory authority or enforceable contract.³ In action in which it is a party in its own courts, State is not liable for costs unless expressly provided by statute.⁴

² OKLA. STAT. tit. 12, § 941(B) (West 2001).

3. Statute stating that respondent in any proceeding brought before state administrative tribunal by state agency shall be entitled to recover against such state entity attorney fees if tribunal determines that proceeding was brought without reasonable basis is intended to be a check on the power of state agencies to commence civil or administrative proceedings against private parties.⁵

4. Statute dealing with attorney fees in actions by state entities applies only to action by state.⁶

5. The burden of proof to show the requested attorney fees are authorized is upon the moving party.⁷

DISCUSSION

The Protestant cites Section 941(B) of Title 12 as the authority for awarding attorney fees as the “Prevailing Party”⁸ in this matter. The Protestant states in the *Motion*, “When seeking such an award from a governmental entity, Oklahoma law provides that a party must first satisfy the threshold test contained in Title 42 [sic] OS §941B. If the party is able to meet the threshold requirement, Oklahoma law provides that any such award must be determined reasonable as governed by the standards set forth in *State ex rel Burk v. Oklahoma City*, 1979 OK 115, 598 P.2d 659....”⁹

The Protestant asserts an award of attorney fees and costs are appropriate in this matter because, “The proceeding was brought without a ‘reasonable basis’ and thus satisfies the threshold for imposition of attorney fees and costs pursuant to Title 42 [sic] O.S. §941B.”¹⁰

In its Response, the Division states, “Protestant has not cited any applicable statute or enforceable contract, and the request for attorney fees should be denied. There are no statutory

³ See “American rule.” 1. The general policy that all litigants, even the prevailing one, must bear their own attorney’s fees. The rule is subject to bad-faith and other statutory and contractual exceptions.... (BLACK’S LAW DICTIONARY (8th ed. 2004), available at <http://westlaw.com>. (February 2, 2009).

⁴ *State ex rel. Oklahoma Dept. of Public Safety v. Five Thousand Eight Hundred Nine Dollars (\$5,809.00) in U.S. Currency*, 1991 OK CIV APP 82, 817 P.2d 750.

⁵ *Shackelford v. Oklahoma Military Department*, 1996 OK CIV APP 13, 919, P.2d 448.

⁶ *State ex rel Dept. of Human Services on Behalf of Michael Aaron by McBride v. Perkins*, 1995 OK CIV APP 42, 893 P.2d 1019.

⁷ *Cory v. City of Norman*, 1988 OK CIV APP 7, 757 P.2d 851.

⁸ See OKLA. STAT. ANN. tit. 23, § 103 (West 2008), which is not applicable to this matter.

⁹ *Motion* at 2.

¹⁰ *Motion* at 3.

provisions to authorize the award of attorney fees to taxpayers who prevail in protests of assessments issued by the Commission.”¹¹

The Protestant’s reliance on Section 941 for the award of attorney fees in this matter is misplaced. Section 941 is a “Statute dealing with attorney fees in actions by state entities applies only to action by state.”¹²

In *Shackleford*,¹³ the court held Section 941(B) “...is intended to be a check on the power of state agencies to commence civil or administrative proceedings against private parties,” which is not the situation in this matter.

In this matter, the Division issued a proposed sales tax assessment. The Protestant filed a protest commencing this action against the Division.

As stated in the Division’s Response, “...the Commission [found] that a protest is brought by the filing of a timely protest by the Protestant (Taxpayer) to the proposed assessment, rather than the issuance of the assessment.”¹⁴

There is ample Oklahoma authority which supports the Division’s position that Section 941(B) is not applicable to an administrative action brought by the taxpayer against the Division.

The Protestant had failed to meet its burden of proof an award of attorney fees is authorized pursuant to Section 941(B) of Title 12.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, the Protestant’s *Motion* should be denied.

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.

¹¹ Response at 1.

¹² See Note 6.

¹³ See Note 5.

¹⁴ Response at 2, citing OTC Order No. 94-07-07-024 (July 7, 1994).