JURISDICTION: **OKLAHOMA TAX COMMISSION DECISION**
CITE: **2009-03-19-05 / NON-PRECEDENTIAL**
ID: **P-08-090-H**
DATE: **MARCH 19, 2009**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

LLC d/b/a HOTEL and MEMBER COMPANY, as a Member of LLC, d/b/a HOTEL ("Protestants") appears through ACCOUNTANT, CPA.[1] 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 August 13, 2008, the protest file was received by the Office of Administrative Law Judges 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 August 14, 2008, a letter was mailed to the Protestants' representative stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-08-090-H. The letter also advised the Protestants' representative a Notice of Prehearing Conference would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Oklahoma Tax Commission.*[4]

On August 18, 2008, OTC ATTORNEY filed an Entry of Appearance as counsel of record for the Division. On August 27, 2008, the Notice of Prehearing Conference was mailed to the last-known address of the Protestants' representative, setting the prehearing conference for September 15, 2008, at 2:00 p.m.[5]

On September 15, 2008, at 2:00 p.m. the prehearing conference was held as scheduled by telephone. On September 18, 2008, pursuant to the prehearing conference, a letter was mailed to the parties' representatives directing a status report be filed on or before October 15, 2008.

---

[1] ACCOUNTANT is the Director of Sales and Use Tax at FIRM, which is the attorney-in-fact of the Protestants.

[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] Id.

[5] OKLA. STAT. ANN. tit. 68, § 208 (West 2001).

On October 15, 2008, the Division filed a Status Memo advising the Protestants were still gathering information to submit to the Division for review, and requested an additional sixty (60) days. On October 16, 2008, the parties' representatives were informed by letter a status report was to be filed on or before December 15, 2008.

On November 5, 2008, the Division filed a Notice of Use Tax Adjustment.

On December 15, 2008, the Division filed the Status Report advising the Protestants were still protesting the proposed sales tax assessments, but they had agreed to pay the proposed adjusted use tax and tourism tax assessments, and requested this matter be set for hearing. On December 15, 2008, a Notice of Hearing was mailed to the parties' representatives setting a hearing on this matter for January 22, 2009, at 9:30 a.m., with the position letters or memorandum briefs due on or before January 15, 2009.

On January 20, 2009, the Memorandum Brief of the Compliance Division of the Oklahoma Tax Commission was filed out-of-time (with permission of the Administrative Law Judge) with the clerk of the court ("Clerk"). The Protestants did not file a position letter or memorandum brief with the Clerk.

On January 22, 2009, at approximately 9:30 a.m. the hearing was held as scheduled. The Protestants and their representative did not attend the hearing.[6] The Division called one (1) witness, AUDITOR, Field Auditor, Field Audit Section of the Compliance Division, Oklahoma Tax Commission, who testified about the audit, the audit methodology, and as custodian of the Division's records. The Division's Exhibits A through J and L through M were identified, offered, and admitted into evidence. At the conclusion of the hearing, the record was held open for ten (10) days for the Division to submit copies of the audit work papers, reflecting the Division's calculations of the "Sample Audit." Upon receipt of the information, the record in this matter would be closed and the case submitted for decision.

On January 29, 2009, the Division filed a memorandum with copies of the information requested, the record was closed, and this matter was submitted for decision on February 3, 2009.

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 brief, the undersigned finds:

1. LLC d/b/a HOTEL ("LLC") owns and operates a hotel located at HOTEL ADDRESS. MEMBER COMPANY is a member of the LLC ("Member").[7]

[6] It was noted for the record the Protestants or their representative did not contact the Division or the Clerk about the hearing.

[7] Division's Exhibits A and L.

2. On June 28, 2007, the Division mailed the LLC an audit notification letter for the period of July 1, 2004, through June 30, 2007 ("Audit Period").[8]

3. On July 13, 2007, the Division received a Power of Attorney appointing FIRM, ACCOUNTANT, and REPRESENTATIVE, as the attorneys-in-fact for the LLC.[9]

4. On August 8, 2007, the Division e-mailed the LLC, through ACCOUNTANT, a records request for the pending audit.[10] The records provided consisted of monthly hotel room tax reports, tax-exempt reports, MTD and YTD revenue summary reports, general ledgers, and invoices. Attached to a few invoices were copies of tax-exempt letters from the Tax Commission, some purchase order documents related to tax exempt organizations, and some invoices which reflected proof of payment.[11]

5. On August 8, 2007, the LLC, through ACCOUNTANT, signed a Statute of Limitation Waiver Agreement covering the Audit Period, which extended the time to assess additional sales tax to March 31, 2008.[12]

6. On January 14, 2008, the LLC, through ACCOUNTANT, signed a Statute of Limitation Waiver Agreement covering the Audit Period, which extended the time to assess additional sales tax to July 31, 2008.[13]

7. On January 16, 2008, an Audit Methodology Agreement consenting to the use of an error rate projection method ("Sample Audit") was executed by ACCOUNTANT. The sample periods selected for the audit were March 2006, July 2006, February 2007, and April 2007 ("Sample Months").[14]

8. AUDITOR reviewed the deductions taken by the LLC for the exempt sales during the Sample Months and found that many of the exemptions were not valid. Many of the deductions were for customers who stayed at the hotel for extended periods of time, duplicate deductions, no

---

[8] Testimony of AUDITOR.

[9] Division's Exhibit B. On July 13, 2007, a Vice-President for the Member of the LLC signed the Power of Attorney.

[10] Division's Exhibit D. Testimony of AUDITOR.

[11] Testimony of AUDITOR.

[12] Division's Exhibit J.

[13] Division's Exhibit I.

[14] Division's Exhibit E. AUDITOR testified that ACCOUNTANT requested a Sample Audit, instead of a detail audit, due to the volume of records and the months originally selected to conduct the Sample Audit were unsatisfactory, so AUDITOR and ACCOUNTANT agreed on the Sample Months on the Audit Methodology Agreement.

proof of exemption, or unverified method of payment. All of these unsubstantiated deductions were disallowed and included as Sample Errors for the Sample Months.[15]

9. The sales tax Audit Work Papers[16] for the Audit Period reflected additional sales tax, which was calculated as follows, to-wit:

Sample Months	Year	Reported Sales
March	2006	$ 17,032.00
July	2006	$ 9,775.00
February	2007	$ 15,380.00
April	2007	$ 68,537.00
		$110,724.00

Sample Errors	$106,598.00
Divided By Sample Months	$110,724.00
Equals Error Rate	0.962736173
Audit Period Projection Using Error Rate	$474,910.06

Total Under-Reported Sales on Audit Work Papers	
Sample Errors	$106,598.00
Projection	474,910.06
Total Under-Reported Sales	$581,508.06

10. On April 24, 2008, the Division issued proposed sales tax assessments[17] against the LLC and Member for the Audit Period, as follows, to-wit:

Tax Due:	$48,701.28
Interest @ 15% through 05/31/08:	14,366.52
Tax & Interest Due Within 30 Days:	$63,067.80
30 Day Delinquent Penalty @ 10%:	4,870.10
Tax, Interest & Penalty Due After 30 Days:	$67,937.90

11. On May 8, 2008, the Division received a Corporate Officer Service Agent Authorization from the LLC, through CFO, and Vice-President of Member, appointing ACCOUNTANT as its service agent.[18]

---

[15] Division's Exhibit M. Testimony of AUDITOR.

[16] Division's Exhibit F.

[17] Division's Exhibits G. A copy of the proposed sales tax assessment against the Member is contained in the court file. The Administrative Law Judge is taking judicial notice of the assessment to complete the factual details of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999).

[18] Exhibit C.

12. On June 23, 2008, the Division received a timely filed letter of protest[19] to the proposed sales tax assessments. The basis of the protest is stated as follows, to-wit:

> 1. The hotel just had a major fire in 2/2008 and it took us considerable efforts to even partially recreate the documents requested by the auditor, AUDITOR.
> 2. On the sales tax assessment, the auditor had disallowed most of the exemptions due to missing proofs of direct payment despite our submission of valid exemption certificates. The credit card security act makes it difficult and sometimes impossible for the hotel to collect or even make copy of the credit cards without the consent of the hotel guests. That had created an insurmountable burden to the hotel. We tried to address the Issue by calling the state compliance center and were advised to act on good faith, which is not taken into consideration in the assessment.
> 3. The sampling months selected by the auditor do not fairly represent the entire audit period because those months coincided with the brief and unusual period when there was a changing of personnel filing the returns. The exemption for the city was incorrectly claimed on the state returns and vice versa, which created excess tax collected. The auditor refused to give us credit on turning over the excess money to the state.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and the 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 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

[19] Division's Exhibit H.

[20] OKLA. STAT. tit. 68, § 221(D) (West Supp. 2002).

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

[22] OKLA. STAT. tit. 68, § 1352(21) (West Supp. 2004).

[23] OKLA. STAT. tit. 68, § 1352(11) (West Supp. 2004).

[24] OKLA. STAT. tit. 68, § 1354(A)(1) and (A)(6) (West Supp. 2004).

incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.[25]

3. Rules promulgated pursuant to the Administrative Procedures Act[26] are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court.[27] Rules are valid and binding on the persons they affect, have the force of law, and are prima facie evidence of the proper interpretation of the matter to which they refer.[28]

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

5. 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 tax exempt.[30]

6. The gross receipts from the furnishing of rooms, except meeting rooms, by a hotel…open to the public is subject to sales tax. Should a hotel operate apartments in connection with and as a part of their hotel business, the rentals on such apartments are subject to the tax. The tax will always apply so long as the place of business retains its identity as a hotel… without regard to the length of stay of the guest.[31]

7. Vendors[32] 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.[33]

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.

---

[25] OKLA. STAT. tit. 68, § 1370 (West Supp. 2004) and OKLA. STAT. tit. 68, § 2701 (West Supp. 2003).

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

[27] OKLA. STAT. ANN. tit. 75, § 306(C) (West 2001).

[28] OKLA. STAT. ANN. tit. 75, § 308.2(C) (West 2001).

[29] OKLA. ADMIN. CODE § 710:65-1-1.

[30] OKLA. STAT. tit. 68, § 1365(F) (West Supp. 2004). *See* OKLA. ADMIN. CODE § 710:65-7-15 (June 25, 2006). *See also* OKLA. ADMIN. CODE § 710:65-13-130 (June 11, 2005).

[31] OKLA. ADMIN. CODE § 710:65-19-143(a) (June 25, 2007).

[32] OKLA. STAT. tit. 68, § 1352(27) (West Supp. 2004).

[33] OKLA. STAT. tit. 68 1365(F) (West Supp. 2004).

(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.[34]

9. An auditor for the Tax Commission may suggest a sample sales/use 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]

10. "Every person required to collect any tax imposed by [the Oklahoma Sales Tax Code], and . . . in the case of a limited liability company, all managers and members under a duty to collect and remit taxes for the limited liability company shall be liable for the tax. If no managers or members have been specified to be under the duty of withholding and remitting taxes, then all managers and members shall be liable for the tax."[37]

11. When the Tax Commission issues a proposed assessment against a limited liability company for unpaid sales tax, the Commission shall file assessments against the members or managers of the limited liability company personally liable for the tax. The members or managers of the limited liability company shall be liable for the payment of sales tax during the period of time for which the assessment is made.[38]

12. The Member of the LLC during the Audit Period is responsible for the collection and remittance of sales tax.

13. Oklahoma Statutes provide for the collection of interest and penalty on delinquent tax.[39] "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…."[40]

14. All sales are presumed to be subject to sales tax unless specifically exempted by the Sales Tax Code. Vendors are liable for the sale tax collected as well as for tax that should have

---

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

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

[36] Id.

[37] OKLA. STAT. tit. 68, § 1361(A) (West Supp. 2002). *See also* OKLA. STAT. ANN. tit. 68, § 253 (West 2001) and OKLA. ADMIN. CODE § 710:65-5-5(d) (May 15, 2006).

[38] Id.

[39] OKLA. STAT. tit. 68, § 217 (West Supp. 2003).

[40] Id.

been collected.[41] 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."[42]

15. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[43]

16. The Protestants have failed to meet their burden of proof that the proposed sales tax assessments are incorrect and in what respects.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, the protest to the proposed sales tax assessments against the LLC and the Member should be denied.

It is further ORDERED the sales tax and penalty, inclusive of interest accrued and accruing, should be fixed as the amounts 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.

[41] Okla. Admin. Code § 710:65-7-6 (June 13, 2002).

[42] OKLA. STAT. tit. 68, § 1365(F) (West Supp. 2004).

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