

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2011-04-19-20 / NON-PRECEDENTIAL
ID: P-10-963-H
DATE: APRIL 19, 2011
DISPOSITION: MOTION GRANTED
TAX TYPE: SALES / COIN OPERATED DEVICES
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROTESTANT d/b/a COMPANY (“Protestant”) appears pro se.¹ The Account Maintenance Division (“Division”), Oklahoma Tax Commission, appears through OTC ATTORNEY 1, Assistant General Counsel, and OTC ATTORNEY 2, First Deputy General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On September 1, 2010, 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 Office of Administrative Law Judges*.³ On September 10, 2010, a letter was mailed to the Protestant stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-10-963-H. The letter also advised the Protestant that 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 October 8, 2010, the Division’s *Motion for Summary Disposition* (“*Motion*”) was filed by OTC ATTORNEY 1 with Exhibit A, attached thereto.⁵ The Verification attached to the Division’s *Motion* was duly sworn under oath, on behalf of the Division, by SUPERVISOR, Supervisor, Case Management Section, Account Maintenance Division, Oklahoma Tax Commission.⁶

¹ “[P]ro 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>.

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 The Division’s Certificate of Mailing and Service reflects that the *Motion* was mailed on October 8, 2010, to the Protestant at ADDRESS.

⁶ See OKLA. ADMIN. CODE § 710:1-5-28(c) (June 25, 1999).

On November 2, 2010, OTC ATTORNEY 1 and OTC ATTORNEY 2 filed an Entry of Appearance as Co-Counsel of record for the Division. On November 23, 2010, a letter was mailed to the parties acknowledging the filing of the Division's *Motion*, and advising the Protestant that he could file a response on or before December 8, 2010, at which time the Division's *Motion* would be submitted for ruling.⁷ The Protestant did not file a response to the Division's *Motion*.

The record in this matter was closed and the Division's *Motion* was submitted for ruling on January 21, 2011.

**FINDINGS OF MATERIAL FACTS
AS TO WHICH THERE IS NO CONTROVERSY**

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, the Protest Letter, and the Division's *Motion*, the undersigned finds:

1. "Coin Operated Device" ("COD") decals are issued for the fiscal year beginning July 1st and ending June 30th.⁸
2. Effective July 1, 2010, Type A Decals for CODs increased from Fifty Dollars (\$50.00) to One Hundred Fifty Dollars (\$150.00).⁹
3. On or about sixty (60) days prior to June 30, 2010, the Tax Commission mailed out renewal notices to decal customers. The renewal notice, Over the Counter Purchase of Coin Device Decal(s) ("Form BT-144-C") listed the Type A Decal price at Fifty Dollars (\$50.00) per decal.¹⁰
4. On or about July 1, 2010, Protestant traveled to the Tax Commission's CITY Office to purchase Type A Decals. The Protestant was informed that Type A Decals had increased in price effective July 1, 2010.¹¹
5. The Protestant left the Tax Commission's CITY Office without purchasing decals.¹²

⁷ OKLA. STAT. ANN. tit. 68, § 208 (West Supp. 2011). The letter was mailed to the Protestant at his last-known address, ADDRESS.

⁸ See 27, *infra*.

⁹ See 25, *infra*.

¹⁰ Division's Exhibit A.

¹¹ The court file contains a packet, which was forwarded by the Division as part of the protest file on this matter. The Administrative Law Judge is taking judicial notice of the Protest Letter contained in the court file to complete the factual details and background of this matter. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999).

¹² *Id.*

6. On July 30, 2010, the Division received a protest to the "...handling of the sale of coin operated device decals for the period of July 11, 2010 to June 30, 2011." The letter is not a protest to the increase of the decals from Fifty Dollars (\$50.00) to One Hundred Fifty Dollars (\$150.00), but the failure of the Tax Commission to inform the Protestant that the increase would take effect on July 1, 2010. The Protestant states, "If I had been notified, which I feel would be the State of Oklahoma's responsibility to notify customers, then I would have purchased them earlier. However, no notification was sent with the Renewal Application Form."¹³

7. Tax Commission Form (BT-144-C) "Over the Counter Purchase of Coin-Operated Device Decal(s)"¹⁴ contains the following notice, to-wit:

The Oklahoma Tax Commission is not required to give actual notice to taxpayers of changes in any state law.

8. As of October 1, 2010, the Protestant had not purchased Type A Decals for his "Coin Operated Devices."

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.¹⁵

2. The Tax Commission shall inform taxpayers that the Tax Commission is not required to give actual notice to taxpayers of changes in any state tax law. Such information shall be printed on all tax return or report forms prescribed by the Tax Commission and on any Tax Commission publications for general distribution as the Commission may prescribe.¹⁶

3. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Sales Tax Code").¹⁷ The Sales Tax Code levies "upon all sales,¹⁸ not otherwise exempted . . . an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds¹⁹ of each sale of . . . tangible personal property. . . ."²⁰

¹³ *Id.*

¹⁴ Division's Exhibit A. The Administrative Law Judge is taking judicial notice of the Tax Commission website at <http://www.oktax.state.ok.us> to complete the background of this matter. OKLA. ADMIN. CODE § 1-5-36 (June 25, 1999). According to the Tax Commission website Form BT-144-C was not revised to reflect the price change until January 2011.

¹⁵ OKLA. STAT. ANN. tit. 68, § 207 (West 2001). *See* Note 37, *infra*.

¹⁶ OKLA. STAT. ANN. tit. 68, § 257 (West 2001).

¹⁷ OKLA. STAT. ANN. tit. 68, § 1350 *et seq.* (West 2008).

¹⁸ OKLA. STAT. ANN. tit. 68, § 1352(15)(a) (West 2008).

¹⁹ OKLA. STAT. ANN. tit. 68, § 1352(7) (West 2008).

4. Sales from CODS on which the fee imposed by the Coin-Operated Music and Amusement Devices Code (“CODS Code”)²¹ has been paid are exempt from sales tax imposed by the Sales Tax Code.²²

5. The fee herein levied is the exclusive fee to be imposed by the state, and is in lieu of all taxes upon coin-operated devices, except ad valorem taxes and municipal license fees except as otherwise provided by Sections 1509.1 through 1509.4 of Title 68.²³

6. “Coin-operated devices” means coin-operated devices, coin-operated amusement devices, coin-operated vending devices, and coin-operated bulk vending devices.²⁴

7. Every person who owns and has available to any of the public for operation, or who permits to be operated in or on his place of business, coin-operated devices shall pay for such privilege an annual fee (Type A Decal/\$150.00). The price for Type A Decals was raised from Fifty Dollars (\$50.00) to One Hundred Fifty Dollars (\$150.00) effective July 1, 2010.²⁵

8. Any person owning CODS or operating the premises where the same is to be operated or exposed to the public, shall apply to the Tax Commission for decal for such device and shall, at the same time, pay to the Tax Commission the annual fee of One Hundred Fifty Dollars (\$150.00).²⁶

9. STC Decals are issued for a one (1) year period, which begins the first day of July and ends the last day of June (“Fee Year”).²⁷

10. Any owner of CODS who places such device in operation or in a place available to the public for operation, and any person who permits CODS to be in operation or accessible to the public for operation in his place of business, without a decal affixed as required by Section 1504 of Title 68, shall be liable for the fee on such device at the full annual rate and shall be liable for penalty, in addition to the amount of the fee, in the amount of One Hundred Dollars (\$100.00).²⁸

²⁰ OKLA. STAT. ANN. tit. 68, § 1354(A)(1) (West 2008).

²¹ OKLA. STAT. ANN. tit. 68, § 1501 et seq. (West 2008).

²² OKLA. STAT. ANN. tit. 68, § 1355(5) (West 2008).

²³ OKLA. STAT. ANN. tit. 68, § 1511 (West 2008).

²⁴ OKLA. STAT. ANN. tit. 68, § 1501(7) (West 2008). *See* OKLA. STAT. ANN. tit. 68, §§ 1501(2) through 1501(6) (West 2008). *See also* OKLA. ADMIN. CODE § 710:25-1-4 (June 11, 1998).

²⁵ OKLA. STAT. tit. 68, § 1503(A)(1) (West Supp. 2010).

²⁶ *Id.* *See* OKLA. STAT. ANN. tit. 68, § 1504 (West 2008). *See also* OKLA. ADMIN. CODE § 710:25-1-9 (June 11, 2007).

²⁷ OKLA. STAT. ANN. tit. 68, § 1505 (West 2008). *See* OKLA. ADMIN. CODE § 710:25-1-8.

²⁸ OKLA. STAT. ANN. tit. 68, § 1506 (West 2008). *See* OKLA. ADMIN. CODE § 710:25-1-10.

11. Where any coin-operated device as hereinbefore defined is placed on location, or, after having been placed on location is there left without the decal affixed thereon as herein provided, the device, including all cash in the receptacle thereof, shall be considered forfeited to the State of Oklahoma, and may be sealed until released by the Tax Commission or seized by any authorized agent of the Oklahoma Tax Commission, or any sheriff, constable, or other peace officer of this state, and upon so being seized shall, together with the cash, if any, contained in the receptacle of such device, forthwith, be delivered to the Oklahoma Tax Commission. The Oklahoma Tax Commission shall then proceed to hear and determine the matter of whether or not the device and cash, if any, should, in fact, be forfeited to the State of Oklahoma. The owner of the device shall be given at least ten (10) days' notice of the date of the hearing. In the event said Commission finds that the device including the cash contents, if any, should be forfeited to the State of Oklahoma, it shall make an order forfeiting the same to the State of Oklahoma, and directing the sale of such device. The device shall be sold in the county where seized or in Oklahoma County, at the discretion of the Commission, after ten (10) days' notice, which notice shall be by posting five notices in conspicuous places in the county where the sale is to be made, one of which notices shall be posted on the bulletin board at the county courthouse of said county. The sale shall be for cash, and the proceeds thereof shall be applied as follows: (1) To the payment of the costs incident to the seizure and sale; (2) To the payment of any taxes, including penalties, that may have accrued against the device; and (3) The balance, if any, shall be remitted to the owner. The cash contained in any device and forfeited under the provisions of this section shall be forfeited as an additional tax penalty and shall be in addition to all other penalties provided for in Sections 1501 through 1512 of Title 68. The order of the Tax Commission, declaring a forfeiture of the device including the cash contents thereof, if any, and directing the sale of such device shall be a final order and may be appealed from as provided for in the *Uniform Tax Procedure Act*.²⁹ It shall be the duty of all sheriffs, constables and other peace officers to cooperate with the Oklahoma Tax Commission in the enforcement of the seizure and forfeiture provisions of this section.³⁰

12. The legislative purpose of the CODS Code is to provide revenues for general government functions of the state government.³¹

13. The rules promulgated pursuant to the Administrative Procedures Act³² are presumed to be valid and binding on the persons they affect and have the force of law.

14. Estoppel generally does not apply against the state acting in its sovereign capacity because of the unauthorized acts of its officers,³³ or because of mistakes or errors of its

²⁹ See Note 2, *supra*.

³⁰ OKLA. STAT. ANN. tit. 68, § 1507 (West 2008).

³¹ OKLA. STAT. ANN. tit. 68, § 1510 (West 2008).

³² OKLA. STAT. ANN. tit. 75, § 250 *et seq.* (West 2002).

³³ *State ex rel. Cartwright v. Dunbar*, 1980 Ok 15, 618 P.2d 900.

employees.³⁴ Application of estoppel is not allowed against state, political subdivisions, or agencies, unless the interposition of estoppel would further some principal of public policy or interest.³⁵ Where there is no power to act, a public official cannot bind a government entity even if he or she mistakenly or falsely asserts such authority.³⁶

DISCUSSION

DIVISION'S MOTION

A party may file a motion for summary disposition on any or all issues on the ground that there is no substantial controversy as to any material fact.³⁷ The procedures for such motion are as follows:

(1) The motion for summary disposition shall be accompanied by a concise written statement of the material facts as to which the movant contends no genuine issue exists and a statement of argument and authority demonstrating that summary disposition of any or all issues should be granted. The moving party shall verify the facts to which such party contends no genuine controversy exists with affidavits and evidentiary material attached to the statement of material facts.

(2) If the protest has been set for hearing, the motion shall be served at least twenty (20) days before the hearing date unless an applicable scheduling order issued by the Administrative Law Judge establishes an earlier deadline. The motion shall be served on all parties and filed with the Office of the Administrative Law Judges.

(3) Any party opposing summary disposition of issues shall file with the Administrative Law Judge within fifteen (15) days after service of the motion a concise written statement of the material facts as to which a genuine issue exists and the reasons for denying the motion. The adverse party shall attach to the statement evidentiary material justifying the opposition to the motion,

³⁴ *Id.* See *State, ex rel. Oklahoma Tax Com'n v. Emery*, 1982 OK CIV APP 13, 645 P.2d 1048.

³⁵ OTC Order No. 2003-12-16-06 (December 16, 2006). See *Burdick v. Independent School Dist. No. 52 of Oklahoma County*, 1985 OK 49, ¶5, 702 P.2d 48:

Generally, Oklahoma jurisprudence does not allow the application of estoppel against the state, the political subdivisions or agencies, unless its interposition would further some principle of public policy or interest. The rationale for recognizing a government shield from estoppel is to enable the state to protect public policies and interests from being jeopardized by judicial orders preventing full performance of legally-imposed duties.

³⁶ *Hiland Dairy Foods Co., LLC v. Oklahoma Tax Com'n*, 2006 OK CIV App 68, ¶ 11, 136 P.3d 1072, citing *Indiana Nat'l Bank v. State Dept. of Human Services*, 1993 OK 101, 857 P.2d 53.

³⁷ OKLA. ADMIN. CODE § 710:1-5-38(b) (June 25, 2009).

but may incorporate by reference material attached to the papers of the moving party. All material facts set forth in the statement of the movant which are supported by acceptable evidentiary material shall be deemed admitted for the purpose of summary disposition unless specifically controverted by the statement of the adverse party which is supported by acceptable evidentiary material.

(4) The affidavits that are filed by either party shall be made on personal knowledge, shall show that the affiant is competent to testify as to the matters stated therein, and shall set forth matters that would be admissible in evidence at a hearing. A party challenging the admissibility of any evidentiary material submitted by another party may raise the issue expressly by written objection or motion to strike such material.

(5) If the taxpayer has requested a hearing, the Administrative Law Judge will issue a notice to the parties scheduling the motion for a hearing limited to oral argument. If the taxpayer has not requested a hearing, the Administrative Law Judge will rule on the motion based on the submission of the parties, including the motion, opposition to the motion, and attachments thereto.

(6) If the Administrative Law Judge finds that there is no substantial controversy as to the material facts and that one of the parties is entitled to a decision in its favor as a matter of law, the Judge will grant summary disposition by issuing Findings of Fact, Conclusions of Law, and Recommendations. Such Findings of Fact, Conclusions of Law and Recommendations are subject to review by the Commission pursuant to *OAC* 710:1-5-10, 710:1-5-40 and 710:1-5-41. If a motion for summary disposition is denied, the Administrative Law Judge will issue an order denying such motion.

(7) If the Administrative Law Judge finds that there is no substantial controversy as to certain facts or issues, the Judge may grant partial summary disposition by issuing an order which specifies the facts or issues which are not in controversy and directing that the action proceed for a determination of the remaining facts or issues. If a hearing of factual issues is required, evidentiary rulings in the context of the summary procedure shall be treated as rulings in limine. Any ruling on partial summary disposition shall be incorporated into the Findings of Fact, Conclusions of Law, and Recommendations issued at the conclusion of the proceedings before the Administrative Law Judge.

The basis of the Divisions' *Motion* is that there is no genuine issue of fact that the Tax Commission's Form BT-144-C complies with the law and properly states, "The Oklahoma Tax Commission is not required to give actual notice to taxpayers of changes in any state law."³⁸ Pursuant to the provisions of Section 257 of Title 68,³⁹ the Division's assertion is correct.

³⁸ *Id.* See Notes 10 and 16, *supra*.

There is no substantial controversy as to the material facts and the Division is entitled to a decision in its favor as a matter of law.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case that the Divisions' *Motion* should be granted.

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.

NOTE: The distinction between a Commission Order designated as "Precedential" or "Non-Precedential" has been blurred because all OTC Orders resulting from cases heard by the Office of Administrative Law Judges are now published, not just "Precedential" Orders. *See* OKLA. STAT. ANN. tit.68, § 221(G) (West Supp. 2009) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002). *See also* OTC Orders 2009-06-23-02 and 2009-06-23-03 (June 23, 2009), which also conclude the language of the Statute is "clear and unambiguous."

³⁹ *See* Note 16, *supra*.