JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2011-04-26-02 / NON-PRECEDENTIAL**
ID: **JM-10-008-H**
DATE: **APRIL 26, 2011**
DISPOSITION: **SUSTAINED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above matter comes on for entry of a final order of disposition by the Oklahoma Tax Commission. Having reviewed the files and records herein, including the Findings of Fact, Conclusions of Law and Recommendations made and entered by the Administrative Law Judge on the 11th day of March, 2011, the Commission makes the following Findings of Fact and Conclusions of Law and enters the following order.

PROCEDURAL HISTORY

On October 19, 2010, the Compliance Division of the Oklahoma Tax Commission filed its *Complaint Seeking Revocation and Cancellation of Retail Sales Tax Permit, and Low Point Beer and Cigarette/Tobacco Licenses* ("*Complaint*") with the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*[1] and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.[2] On October 20, 2010, a *Notice to Show Cause Why the [Complaint for] Revocation and Cancellation of Your Retail Sales Tax Permit and Low Point Beer and Cigarette/Tobacco Licenses Should Not Be Ordered* ("*Notice*") was mailed to the Licensee at his last-known address[3] by certified mail return receipt requested (7009 1410 0000 0832 7536), along with a copy of the Division's *Complaint*, advising that a show cause hearing had been set for November 16, 2010, at 1:30 p.m., at which time the Licensee could appear and show cause why the Division's request for relief should not be granted.[4]

On November 16, 2010, at approximately 1:30 p.m., the Show Cause Hearing was held as scheduled with the parties appearing. Counsel for the Division invoked the Sequestration Rule,[5] with PREVIOUS OWNER, the previous owner of BAR, being duly instructed by the Administrative law Judge. The Division called two (2) witnesses to testify. The Division's first witness, LICENSEE, the Licensee, testified concerning his acquisition of the business and his

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

[2] OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47 (June 11. 2005).

[3] OKLA. STAT. ANN. tit. 68, § 208 (West Supp. 2011).

[4] The notice was mailed to the last-known address of the Licensee, ADDRESS. On October 20, 2010, the return receipt was signed by the Licensee.

[5] OKLA. STAT. ANN. tit. 12, § 2615 (West 2009).

Business Registration Application. The Division's second witness, FIELD AGENT, Field Agent, Compliance Division, Oklahoma Tax Commission, testified concerning PREVIOUS OWNER'S ownership and operation of BAR, service of a close order on PREVIOUS OWNER, and the confiscation of PREVIOUS OWNER'S sales tax permit. The Licensee testified on his own behalf and called PREVIOUS OWNER to testify about her ownership and operation of BAR. The Division's Exhibits A through C were identified, offered, and admitted into evidence. The Licensee did not identify and offer any exhibits to be admitted into evidence. Upon conclusion of the hearing, the record was held open for PREVIOUS OWNER to prepare and file all delinquent sales tax reports. The Division was directed to advise whether the Licensee was current on the filing of his sales tax reports and remittances. The Division was also directed to advise if the Licensee had entered into a pay plan covering PREVIOUS OWNER'S liability, if desired. On November 19, 2010, a letter was mailed to the parties confirming the announcements made by the Administrative Law Judge. The status report was due on or before December 16, 2010.

On December 16, 2010, the Division filed the Status Report advising that on December 14, 2010, sales tax reports were received from PREVIOUS OWNER for January 2009 through January 2010 and sales tax reports from the Licensee for July 2010 through November 2010, with the notation, "I noticed this morning Returns must be amended and I will do it ASAP wrong county and city." On December 21, 2010, the Division filed another Status Report that "amended" sales tax reports had been received from the Licensee for July 2010 through November 2010, with no remittances. Neither the Licensee nor PREVIOUS OWNER contacted the Division about entering into pay plan(s).

On January 13, 2011, a letter was mailed to the parties requesting the Division to provide a breakdown of liability for the Licensee and PREVIOUS OWNER. The Division was directed to clarify whether the Licensee's sales tax permit was probationary (six (6) months) or permanent (three (3) years). On January 14, 2011, the Division filed a Status Report stating that PREVIOUS OWNER'S "actual" sales tax liability was $21,546.31 and the Licensee's "amended" sales tax liability was $3,306.35. The Division also advised that the Licensee's sale tax permit was not probationary, but for three (3) years. On January 19, 2011, the Court Clerk[6] contacted OTC ATTORNEY and requested a breakdown of the sales tax liability for the Licensee and PREVIOUS OWNER. On January 19, 2011, the Division filed a Status Report providing a breakdown of the sales tax liability as requested. The record in this matter was closed and this case was submitted for decision on January 21, 2011. On February 14, 2011, the record was reopened to receive the Division's Status Report, which has the Division's work papers for PREVIOUS OWNER'S sales tax liability attached thereto. The record in this matter was closed and this matter resubmitted for decision on February 15, 2011.

[6] OKLA. ADMIN. CODE § 710:1-5-10(c)(2) (June 25, 1999).

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, the Division's *Complaint*, the *Notice*, and the information requested from the Division subsequent to the hearing, the undersigned finds:

1. On or about February 2007, PREVIOUS OWNER, as sole proprietor, filed a Business Registration Application for BAR, which was located at BUSINESS ADDRESS ("Business Location"). The application requested a sales tax permit, a retail cigarette license, and retail low point beer (3.2 beer) license. On or about February 13, 2007, the Tax Commission issued Sales Tax Permit #### to PREVIOUS OWNER.[7]

2. PREVIOUS OWNER received a letter stating that a Notice to Show Cause Hearing had been set for January 8, 2011, due to her failure to file sales tax reports and remit sales tax. However, she had arrived late for the hearing and was not permitted to appear by the Division.[8]

3. On and after January 8, 2010, PREVIOUS OWNER continued to operate BAR under Sales Tax Permit ####.[9]

4. On January 14, 2010, the Tax Commission issued Tax Commission Order No. 2010-01-14-11 cancelling and revoking PREVIOUS OWNER'S Sales Tax Permit #### for failure to file sales tax reports and remit sales tax.[10]

5. On January 20, 2010, a letter[11] was mailed to PREVIOUS OWNER by certified mail return receipt requested (7002 3150 0004 0748 5150) advising that Sales Tax Permit #### had been revoked by Tax Commission Order No. 2010-01-14-11 (January 14, 2010), a copy of which was enclosed. The letter states in pertinent parts as follows, to-wit:

> You are to discontinue the sale of any tangible personal property and service upon which any tax is levied by the laws of the State of Oklahoma. If you continue to sell or offer for sale such property you may be enjoined by the

[7] Division's Exhibit B. Testimony of FIELD AGENT. Only PREVIOUS OWNER'S sales tax permit number is reflected on the application.

[8] Testimony of PREVIOUS OWNER. PREVIOUS OWNER testified that on January 8, 2011, she informed her landlord, LANDLORD, that the Tax Commission was about to close her business because of her delinquent sales tax and that she intended to close the business that weekend, but at the request of her landlord, she continued to keep the business open and operating under her sales tax permit.

[9] *Id.*

[10] Division's Exhibit C.

[11] *Id.* The Administrative Law Judge is taking judicial notice of the United States Postal website "Track & Confirm" at http://trkcnfrm1.smi.usps.com to complete the factual details and background of this matter. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999). According to the United States Postal website, the certified letter (7002 3150 0004 0748 5150) was delivered on February 9, 2010.

> District Court of your county in an action instituted against you by the State of Oklahoma through the Oklahoma Tax Commission, and you may be subject to criminal prosecution for operating without a permit.
>
> If you wish to retain your permits and continue the operation of your business, you must 1) complete and file all delinquent reports; 2) pay all tax, penalty and interest in full. If unable to pay in full, you may request a hearing before the Commission to make other arrangements for payment. To do this you must provide a written proposal for payment before your hearing can be scheduled.

6. On January 26, 2010, LICENSEE ("Licensee"), as sole proprietor, filed a Business Registration Application ("Application") for SIMILARLY NAMED BAR , which is located at BUSINESS ADDRESS ("Business Location"). The Application requested a sales tax permit, a retail cigarette license, and retail low point beer (3.2 beer) license. The answer to question nineteen (19) on the Application is blank.[12] On or about January 27, 2010, the Tax Commission issued to the Licensee Sales Permit #XXX, a Retail Cigarette License #XXX,[13] and Retail Low Point Beer License (# not known).[14]

7. The Licensee acquired SIMILARLY NAMED BAR to keep it open and operating because of the sales taxes owed to the Tax Commission by PREVIOUS OWNER. The Licensee employs PREVIOUS OWNER as the Manager of SIMILARLY NAMED BAR.[15] According to the signage, SIMILARLY NAMED BAR continues to operate as BAR.[16]

8. On February 10, 2010, FIELD AGENT served a copy of Tax Commission Order No. 2010-01-14-11 (January 14, 2011) upon PREVIOUS OWNER at the Business Location and confiscated Sales Tax Permit ####.[17] PREVIOUS OWNER informed FIELD AGENT that a friend [Licensee] had a sale tax permit and was going to operate the business. FIELD AGENT informed PREVIOUS OWNER of the rule against "Successor Businesses." FIELD AGENT posted a Notice of Revocation upon the front door at the Business Location, which was open and

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[12] Division's Exhibit A. Question Nineteen (19) is, "Was there a previous business at this location?" The Licensee testified that a Tax Commission employee at the counter asked him the questions and wrote down his answers on the Application and then he signed it, but that his answer at the time to question nineteen (19) was "No" because the business was already closed and his answer was still "No" for the same reason. The Licensee testified that he was not around when the business was closed.

[13] *See* Note 12, *supra*. According to the Tax Commission website at http://oktax.state.ok.us the Licensee Retail Cigarette License was issued on January 26, 2010, with an expiration date of January 26, 2013.

[14] Division's Exhibit B.

[15] Testimony of Licensee and PREVIOUS OWNER.

[16] Testimony of FIELD AGENT.

[17] Division's Exhibit C. FIELD AGENT testified that PREVIOUS OWNER'S sales tax permit was the only permit posted on the wall at the time the permit was confiscated.

operating, but within minutes the Notice of Revocation had been removed and the business continued to operate.[18]

9. On October 19, 2010, the Division filed its *Complaint*[19] which states in pertinent parts as follows, to-wit:

> (A)(1). Licensee holds a permit and licenses issued by the State of Oklahoma pursuant to 68 O.S. § 1364. The effective date of the permit and licenses is January 26th, 2010.
>
> (A)(2). The [Application] prepared by Licensee and filed on January 26th, 2010 was left blank in the pertinent section(s), and thus contained false information regarding whether a previous business existed at the [A]pplicant's physical location.
>
> (A)(3). Licensee, a Sole Proprietor, currently operates his business at BUSINESS ADDRESS.
>
> (A)(4). Licensee is a "successor in business," as that term is defined, used, and applied in OAC 710:65-9-4, to a business that was ordered to cease doing business at the same physical location on or about January 14th, 2010. The former business was known as BAR and owned as a Sole Proprietorship by PREVIOUS OWNER. BAR held Sale Tax Permit #XXX.
>
> (A)(5). Before BAR ceased doing business, it accumulated a sales tax liability of which total the sum of approximately $35,315.93 [estimated] remains unpaid as of this date.
>
> (A)(6). Had Licensee not provided false or erroneous information on the Oklahoma Business Registration Application, the sales tax permit and low point beer and cigarette/tobacco licenses would not have been issued without further inquiry by the Oklahoma Tax Commission.
>
> B. Violations Asserted by Division
>
> Licensee violated 68 O.S. § 241 and OAC 710:1-1-1 et seq., when he provided false information on the Oklahoma Business Registration Application filed on January 26, 2010. The Division asserts that said violation vitiates the granting of a sales tax permit rendering it a nullity and subjecting it to immediate cancellation and revocation as being void ab initio.

[18] *Id.*

[19] *See Complaint* filed herein.

10. On December 14, 2010, the Division received "Actual" Sales Tax Reports from PREVIOUS OWNER for January 2009 through January 2010. PREVIOUS OWNER'S delinquent sales tax liability from May 2008 to January 2010, is as follows, to-wit:

Sales Tax:	$14,885.64
Interest through 10/30/10:	4,094.07
Penalty:	2,340.60
Warrant Penalty:	200.00
Filing Fee:	26.00
Total	$21,546.31[20]

11. On December 21, 2010, the Licensee submitted copies of "Amended" Sales Tax Reports[21] from July 2010 through November 2010, which reflect the following delinquencies, to-wit:

Sales Tax:	$ 2,972.03
Interest through 01/15/11:	83.79
Penalty:	297.20
Total	$ 3,353.02[22]

12. As of January 19, 2011, PREVIOUS OWNER had not remitted the delinquent sales tax due. As of January 19, 2011, the Licensee had not entered into a pay plan for PREVIOUS OWNER'S sales tax due from May 2008 through January 2010, or for the Licensee's delinquent sales tax due for July 2010 through November 2010.[23]

[20] *See* Status Report filed with the Court Clerk on February 14, 2011. According to the Division's work papers all months are based upon "actual" sales tax reports, except October and November 2008, which are "estimated." The Division's work papers indicate that PREVIOUS OWNER has paid a total of $8,520.38, of which $178.48 has been applied to penalty and interest, which is not reflected on the work papers. The Division should move the $178.48 to pay in full the tax balances for May 2008, July 2008, and September 2008, with the remainder applied to the tax portion of October 2008. The tax balance of $14,885.64 reflects the adjustments.

[21] *See* Procedural History herein. *See also* Status Reports filed with the Court Clerk herein.

[22] *Id.*

[23] *Id.*

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[24] On October 20, 2010, the statutory notice was mailed to the Licensee by certified mail, with return receipt requested (7009 1410 0000 0832 7536), giving the Licensee twenty (20) days notice of the hearing held on November 16, 2010, at 1:30 p.m.

2. Pursuant to Section 212(a) of Title 68,[25] the violation of any provision of the *Uniform Tax Procedure Act*,[26] the violation of any state tax law, or violation of the rules and regulations promulgated for the administration and enforcement of any state tax law is grounds for the cancellation of any license issued under any state tax law or other state law.

3. 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.[27]

4. Pursuant to Tax Commission Rule 710:65-9-4[28]:

> (a) The successor in business of any person who sells out a business or stock of goods, or ceases doing business, shall not be issued a sales tax permit to continue or conduct said business until all liability of the seller, i.e. payment of tax, adjustments to tax, penalties and interest has been paid. The term **"successor"** refers to any person who directly or indirectly purchases, acquires, or succeeds to the business or the stock of goods of any person quitting, selling, or otherwise disposing of a business or stock of goods. The purchase or acquisition of a business may give rise to the denial of permit to the successor whether the consideration is money, property, assumption of liabilities or cancellation of indebtedness. (Emphasis original.)
>
> > (1) A person who purchases or acquires a portion of a business or stock of goods may be denied a sales tax permit as a successor where he purchases or acquires substantially all of the business assets or stock of goods. The business assets include the assets of a business pertaining directly to the conduct of the business. Business assets include real property or any interest therein; tangible personal property, including fixtures, equipment and vehicles; and intangible property, including accounts receivable,

[24] OKLA. STAT. ANN. tit. 68, § 212 (West 2001).

[25] *See* Note 30, *infra.*

[26] *See* Note 2, *supra.*

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

[28] OKLA. ADMIN. CODE § 710:65-9-4. *See* OKLA. STAT. ANN. tit. 68, § 1364 (West 2008).

contracts, business name, business goodwill, customer lists, delivery routes, patents, trademarks or copyrights.

(2) If any taxpayer operates more than one business at separate locations, each business location is a separate business and has a separate stock of goods for purposes of obtaining a sales tax permit. A successor of the business or stock of goods of any business location is subject to denial of a sales tax permit as a successor with respect to the tax attributable to that location even if he does not purchase the business or stock of goods of all the locations.

(3) The change in the form of a business will generally give rise to the possibility of denial of a sales tax permit, such as the incorporation of a sole proprietorship or partnership, the voluntary or involuntary dissolution of a corporation, the merger or consolidation of two or more corporations, the formation of a partnership from one or more sole proprietorships or corporations; or change in the name of a corporation.

(b) Denial of a sales tax permit to a successor will not arise in connection with sales or transfers pursuant to assignments for the benefit of creditors, deeds of trust, or security interest, statutory liens, judgment liens unless the previous owner receives purchase money from the transfer or sale.

(c) A successor may assume the predecessors liability and a permit may be issued when satisfactory arrangements to pay the liability of the seller have been made with the Commission.

5. Pursuant to Section 212 of Title 68,[29] the Tax Commission is authorized to cancel licenses and/or permits under the provisions of any state tax law or other law, to any person who shall be guilty of the following, to-wit:

(1) Violation of any of the provisions of this article;
(2) Violation of the provisions of any state tax law;
(3) Violation of the rules and regulations promulgated by the Tax Commission for the administration and enforcement of any state tax law, or
(4) Failure to observe or fulfill the conditions upon which the license or permit was issued, or
(5) Nonpayment of any delinquent tax or penalty.

6. The Licensee is required to file his sales tax report with the Tax Commission on or before the 20th day of each month covering sales for the previous calendar month and remit the required tax due for the preceding calendar month with the report. If the sales tax report is not filed on or before the twentieth day of the month, the tax shall be delinquent from such date.[30]

[29] OKLA. STAT. ANN. tit. 68, § 212(a) (West 2001).

[30] OKLA. STAT. ANN. tit. 68, § 1365 (West 2008). *See* OKLA. ADMIN. CODE § 710:65-3-1 (June 25, 2007).

7. In all proceedings before the Tax Commission, the taxpayer has the burden of proof unless otherwise provided by law. In this matter, the Division filed the *Complaint* seeking the revocation/cancellation of the Licensee's sales tax permit, low point beer license, and cigarette/tobacco licenses, shifting the burden of proof to the Division.

8. Procedural due process of law contemplates a fair and open hearing before a legally constituted court or other authority with notice and an opportunity to present evidence and argument, representation by counsel, if desired, and information concerning the claims of the opposing party with reasonable opportunity to controvert them. Failure to provide notice of the specific issues in administrative hearings violates procedural due process.[31]

DISCUSSION

The Division filed a *Complaint* which seeks revocation of protestant's sales tax permit as well as his low point beer and cigarette/tobacco licenses based on an asserted violation of Section 241 of title 68 by the protestant. Section 241 prohibits making a false application pursuant to the provision of any state tax law with the intent to defeat or evade the payment of tax.[32] The action of the protestant which the Division asserts constitutes a violation of Section 241 was the filing of an Oklahoma Business Registration Application (in order to obtain a sales tax permit) and failing to answer the question on the application which asked "Was there a previous business at this location?" There is no other violation of any tax law asserted in the Complaint or in the Notice to Show Cause filed in this matter.

Even though the protestant's failure to file returns and pay sales taxes for several months is clearly grounds for revocation of the permits and licenses, these violations were not alleged in the Complaint or the Notice to Show Cause. A fundamental principle of due process is the right to notice and a hearing. In a recent decision by the Oklahoma Court of Civil Appeals, *In the Matter of the Income Tax Protest of Joseph F. Grasso and Margaret J. Grasso v. The Oklahoma Tax Commission*, Case No. 107,613, (Okla. Ct. of Civ. App. 2011), the Court found that a taxpayer's due process rights under the Constitution were violated when the Tax Commission issued an order denying a protest to an income tax assessment when the order was based on a legal issue which was raised for the first time at the hearing on the protest. The Court of Civil

[31] *In the Matter of the Income Tax Protest of Joseph F. Grasso and Margaret J. Grasso v. The Oklahoma Tax Commission*, Case No. 107,613, (Okla. Ct. of Civ. App. 2011)

[32] A. Any person required to make, render, sign or verify any report, return, statement, claim, application, or other instrument, pursuant to the provisions of this title or of any state tax law who, with intent to defeat or evade the payment of the tax, shall make a false or fraudulent return, statement, report, claim, invoice, application, or other instrument, or any person who shall aid or abet another in filing with the Tax Commission such a false or fraudulent report or statement, shall be guilty, upon conviction, of a felony and shall be punished by the imposition of a fine of not less than One Thousand Dollars ($1,000.00) and not more than Fifty Thousand Dollars ($50,000.00), or shall be imprisoned in the State Penitentiary for not less than two (2) years and not more than five (5) years, or shall be punished by both said fine and imprisonment.

B. The venue of prosecutions arising pursuant to the provisions of this section shall be in the district court of any county where such return or report was verified.

Appeals had the following to say about the requirement to provide notice of the issues upon which an order may be issued.

> "Procedural due process of law contemplates a fair and open hearing before a legally constituted court or other authority with notice and an opportunity to present evidence and argument, representation by counsel, if desired, and information concerning the claims of the opposing party with reasonable opportunity to controvert them." *Jackson v. Independent School District No. 16 of Payne County*, 1982 OK 74, ¶10, 648 P.2d 26, 30. Failure to provide notice of the specific issues in administrative hearings violates procedural due process. *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 122 (1968); *Morgan v. U.S.*, 304 U.S. 1, 58 S.Ct. 773 (1938); *Navato v. Sletten*, 560 F.2d 340 (C.A.8 Mo.); *Camacho v. Bowling*, 562 F.Supp. 1012 (U.S. Dst. Ct. N.D.Ill. 1983) and *Wilson v. Labor and Industrial Relations Commission of Missouri*, 693 S.W.2d 328 (Mo.App. W.D. 1985).

The Complaint and Notice to Show Cause did not give notice to the protestant that his permits and licenses might be revoked for any cause other than a violation of Section 241.

In a proceeding requesting revocation of a permit or license, the burden of proof is on the Division. In order to prove a violation of Section 241, the Division would have to show, by a preponderance of the evidence, that the failure of the protestant to answer the question on the Business Registration Application made the application false and that the failure to answer the question was done to defeat or avoid the payment of tax. The Division presented no evidence to show why the failure to answer a question on the Business Registration Application is the functional equivalent of a false answer to the question. There is no evidence in the record that the failure to answer the question was done to defeat or evade the payment of tax. At the time the Application was made, the record indicates that the protestant did not have any sales tax liability. While an Application that showed that there was a previous business at that location might have prevented the protestant from receiving a sales tax permit, it would not have imposed any tax liability on the protestant. The Division has failed to meet its burden of proof in this matter.

ORDER

The Oklahoma Tax Commission orders that this protest be sustained

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."