JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2011-06-28-03 / NON-PRECEDENTIAL**
ID: **P-10-123-K**
DATE: **JUNE 28, 2011**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestant, PROTESTANT appears pro se. The Compliance Division of the Oklahoma Tax Commission (hereinafter "Division") is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

A Convenience Store Gross Sales Computation (cost mark-up depletion audit) utilizing the National Association of Convenience Stores 2005 Annual Report of National Averages based on Protestant's beer purchases to determine Protestant's sales during the audit period of June 1, 2007 through September 30, 2009 was performed by the Division. The Auditor also disallowed the non-taxable sales deductions taken by Protestant on her combined sales tax reports for the periods inclusive of June, 2007 through May, 2008. The audit found that Protestant had under-reported her gross receipts. As a result, the Division by letter dated March 17, 2010 proposed the assessment of sales tax, interest and penalty against Protestant in the aggregate amount of $41,007.80. Protestant filed a timely written protest to the proposed assessment. Protestant did not request a hearing in the letter of protest.

On April 30, 2010, the Division referred the protest to the Office of the 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]. The protest was docketed as Case No. P-10-123-K and assigned to ALJ, Administrative Law Judge.[3]

A pre-hearing conference was scheduled for June 10, 2010, by *Prehearing Conference Notice* ("*Notice*") issued May 14, 2010.[4] Protestant neither appeared at the conference nor responded to the *Notice*. By *Prehearing Conference Order* ("*Order*") issued June 11, 2010, the Division was directed to file a verified response to protest no later than thirty (30) days from the date of the *Order* and Protestant was advised that a reply could be filed within thirty (30) days of the filing date of the verified response. The *Order* further directed that if an oral hearing was not

[1] 68 O.S. 2001, § 201 et seq., as amended.

[2] Rules 710:1-5-20 through 710:1-5-47 of the *Oklahoma Administrative Code* ("*OAC*").

[3] *OAC*, 710:1-5-22(b).

[4] *OAC*, 710:1-5-28(a).

requested, the record would be closed and the protest submitted for decision upon completion of the announced procedural schedule[5]. Protestant did not respond to the *Order*.

The *Division's Verified Response* was filed July 9, 2010. The *Division's Amended Verified Response* was filed July 13, 2010. Attached to the *Amended Verified Response* were Exhibits A through G. Protestant filed a reply to the *Verified Response* on July 22, 2010. On August 19, 2010, the record was closed and the protest was submitted for decision.[6]

FINDINGS OF FACT

Upon review of the file and records, including the *Amended Verified Response* and attached exhibits, and Protestant's reply and attachment, the undersigned finds:

1. Protestant operated two (2) businesses as sole proprietorships in CITY, Oklahoma; a "small convenience store" known as CONVENIENCE STORE during the entire audit period of June, 2007 through September, 2009, and an attached Mexican Food Restaurant known as RESTAURANT described as a "small café" during the period of June, 2007 through November, 2008. Exhibits A, B, C and G, and Field Audit Write Up[7].

2. It is noted in the Field Audit Write Up that "[t]he stores primary sales are 3.2 beers, pop & some food items" and "[t]hey also have a check cashing service and sell money transfers". It is further noted that beer was sold in both the convenience store and the restaurant and that Protestant filed consolidated sales tax reports during the period the restaurant was open.

3. A standard "records request" and a percentages mark-up sheet for the various items sold in the convenience store was served on Protestant. The records request indicates that the restaurant was closed November 23, 2008, and that Z tapes and deposit slips were provided to the Auditor. The Field Audit Write Up notes that the percentages mark-up sheet was not completed and returned to the Auditor. On February 9, 2010, sales tax computation sheets for the period inclusive of the months of June, 2008 through September, 2009[8], were forwarded to the Auditor. It was noted that the computation sheets for the periods of December, 2008 forward were for the convenience store only. It was further noted that the columns headed "1%" and "Other" for the convenience store reflect receipts from "cashing checks" and from issuing "money transfers", respectively. Prior to the period ended May, 2008, Protestant reported the commissions earned from cashing checks and issuing money transfers in her gross receipts and then deducted those amounts as non-taxable sales on her sales tax reports. A total of $130,200.00 was reported in this manner during the period inclusive of the months of June, 2007

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[5] *OAC*, 710:1-5-28(b).

[6] *OAC*, 710:1-5-39(a).

[7] The Field Audit Write Up was included as part of the file received from the Division. The Field Audit Write Up is received into evidence by official notice. *OAC*, 710:1-5-36.

[8] The computation sheets show daily sales for both the convenience store and the restaurant and are complete for the periods of June, 2008 through September, 2008. The October, 2008 and November, 2008, computation sheets only reflect daily sales for the restaurant through the fifth day of the month.

through May, 2008. The audit subjects the commissions to tax since Protestant did not provide any document to prove they were non-taxable sales. Exhibit C and Field Audit Write Up.

4. The audit also includes a Convenience Store Gross Sales Computation utilizing the National Association of Convenience Stores 2005 Annual Report of National Averages based on Protestant's beer purchases to determine Protestant's convenience store sales during the audit period. The information regarding Protestant's beer purchases was provided by the beer wholesalers. For purposes of the computation, all reported beer purchases were presumed sold by the convenience store since "no records indicating store sales from restaurant sales" were provided. The Computation determined that Protestant had under-reported her sales during the audit period by the amount of $273,848.22. Exhibit D and Field Audit Write Up.

5. The audited under-reported sales for the audit period total $404,048.22, consisting of disallowed non-taxable sales deductions of $130,200.00 and projected unreported sales of $273,848.22. Exhibit E and Field Audit Write Up.

6. As a result of the audit, the Division by letter dated March 17, 2010, proposed the assessment of sales tax, interest and penalty against Protestant in the aggregate amount of $41,007.80. Exhibit F.

7. Protestant filed a timely written protest to the proposed assessment. Protestant did not request a hearing in the letter of protest. Exhibit G.

ISSUE AND CONTENTIONS

The issues presented for decision are whether Protestant sustained her burden of proving that the sales tax assessment is incorrect, and in what respect; and whether the sales tax audit and assessment are supported by substantial evidence.

Protestant contends that the assessment is erroneous. In support of this contention, Protestant argues that the $130,200.00 is attributable to commissions earned from (a) cashing checks at a 1% discount, and (b) commissions received from various agencies for transferring money abroad which are for services only and are not subject to sale tax. Protestant also argues that the mark-up percentages are incorrect. In support of this argument, Protestant asserts that she prices her goods to bring in a very select clientele – low income Hispanics who living from paycheck to paycheck and who do not have banking facilities and need a "one stop shop" to provide for them.

The Division contends that the protest should be denied. In support of this contention, the Division argues that Protestant failed to prove in what respect the Division proposed assessment is incorrect. The Division further argues that Protestant failed to produce the records a vendor is required to keep and maintain.

CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter of law that:

1. Jurisdiction of the parties and the subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S. Supp. 2002, § 221(D).

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Code").[9] An excise tax is levied upon the gross receipts or gross proceeds of all sales, not otherwise exempted by the Code. 68 O.S. 2001, § 1354(A). Incorporated cities, towns, and counties are authorized to levy taxes as the Legislature may levy for purposes of state government, including a consumer sales tax. 68 O.S. 2001, §§ 2701 et seq. and 1370 et seq., as amended.

3. The sale of "tangible personal property"[10] is expressly made subject to sales tax. 68 O.S. 2001, § 1354(A)(1). "Sale" is defined to mean "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 * * *". 68 O.S. 2001, § 1352(15).[11] See *OAC*, 710:65-1-2. "The taxable event is the sale itself * * *." ***Pioneer Telephone Cooperative, Inc. v. Oklahoma Tax Commission***, 1992 OK 77, 832 P.2d 848; citing with approval, *Phillips v. Oklahoma Tax Commission*, 1978 OK 34, 577 P.2d 1278, 1282, ("In discussing sales tax, it must be emphasized that sales tax is imposed upon the sale itself * * *"); and *Liberty Steel Co. v. Oklahoma Tax Commission*, 1976 OK 83, 554 P.2d 8, 10, ("A sales tax, as opposed to a use tax, is imposed on the sale itself and is collectable from the seller"). "For the purpose of proper administration of the provisions of the sales and use tax laws, it is presumed that all gross receipts are subject to tax until they are shown to be tax exempt." *OAC*, 710:65-1-4(a).

4. The excise tax levied by the Code is required to be paid by the consumer or user to the vendor, who is required to collect from the consumer or user the full amount of the tax levied or an amount equal as nearly as possible or practicable to the average equivalent thereof, 68 O.S. 2001, § 1361(A); and remit the same to the Tax Commission, 68 O.S. 2001, § 1362(A). The amount to be collected by the vendor on each sale is the applicable percentage of the gross receipts or gross proceeds thereof as provided by § 1354 of the Code which applicable percentage shall equal the combination of the state and any applicable municipal and county sales tax rates rounded to a whole cent. 68 O.S. 2001, § 1362(B). A vendor may elect to compute the tax due on transactions on an item or invoice basis. Id. The tax levied by the Code shall be added to the gross receipts not included in the gross receipts. ***Duncan Medical Services v. Oklahoma Tax Commission***, 1994 OK 91, 911 P.2d 247, at 253.

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[9] 68 O.S. 2001, § 1350 et seq., as amended.

[10] Defined by the Code to mean "personal property which may be seen, weighed, measured, felt, or touched or which is in any other manner perceptible to the senses". 68 O.S. 2001, § 1352(17). Amended and renumbered by Laws 2003, c. 413, § 1, eff. Nov. 1, 2003, to include within the meaning "electricity, water, gas, steam and prewritten computer software" and to provided that "[t]his definition shall be applicable only for purposes of the Oklahoma Sales Tax Code". *See*, 68 O.S. Supp. 2004, § 1352(23). *See also*, *OAC*, 710:65-1-2. Amended at 21 Ok Reg 2581, eff 6-25-04.

[11] Renumbered as § 1352(21) by Laws 2003, c. 413, § 1, eff. Nov. 1, 2003.

5. Vendors are required to keep records and books of all sales and all purchases of tangible personal property *OAC*, 710:65-3-30(a). See 68 O.S. 2001, § 1365(F)[12]. The records and books shall cover receipts from all sales and distinguish taxable from nontaxable receipts, and must clearly document all the information (deductions as well as gross receipts) required for the sales tax report. *OAC*, 710:65-3-30(a)(1). See *OAC*, 710:65-3-4(a)(1) and (3).[13]

6. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect, and in what respect. OAC, 710:1-5-47. See ***Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission***, 1988 OK 91, 768 P.2d 359. 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." 68 O.S. 2001, § 1365(E). See ***Dunn v. State ex rel. Oklahoma Tax Commission***, 1993 OK CIV APP 105, 862 P.2d 1285 and ***Kifer v. Oklahoma Tax Commission***, 1998 OK CIV APP 34, 956 P.2d 162.

7. In administrative proceedings, the burden of proof standard is "preponderance of evidence." 2 Am.Jur.2d *Administrative Law* § 357. See, Oklahoma Tax Commission Order No. 91-10-17-061. "Preponderance of evidence" means "[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary 1064 (5th ed. 1979). It is also defined to mean "evidence which is more credible and convincing to the mind * * * [T]hat which best accords with reason and probability." Id.

8. An order of the Tax Commission must be supported by substantial evidence. ***Dugger v. State ex rel. Oklahoma Tax Commission***, 1992 OK 105, 834 P.2d 964. Likewise, the audit upon which a portion of the record is formed and order issued, must be supported by substantial evidence. Oklahoma Tax Commission Order No. 2003-07-22-09, 2003 WL 2347117.

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

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[12] This subsection provides in pertinent part:

> It shall be the duty of every tax remitter required to make a sales tax report and pay any tax under [the Code] to keep and preserve suitable records of the gross daily sales together with invoices of purchases and sales, bills of lading, bills of sale and other pertinent records and documents which may be necessary to determine the amount of tax due hereunder and such other records of goods, wares and merchandise, and other subjects of taxation under [the Code] as will substantiate and prove the accuracy of such returns. * * * All such records shall remain in Oklahoma and be preserved for a period of three (3) years, unless the Tax Commission, in writing, has authorized their destruction or disposal at an earlier date, and shall be open to examination at any time by the Tax Commission or by any of its duly authorized agents. The burden of proving that a sale was not a taxable sale shall be upon the person who made the sale.

[13] This rule in general provides that every vendor shall file a monthly report for sales made the preceding month disclosing among other things: (1) total gross receipts for the preceding month from sales, both taxable and non-taxable, and (2) deductions allow by law. Deductions not specifically delineated on the face of the report must be fully explained in the space provided.

the Tax Commission in assessing the tax is incorrect. *OAC*, 710:1-5-47; ***Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission***, 1988 OK 91, 768 P.2d 359. However, where 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. ***Dugger***, supra.

9. First, the record contains sufficient corroborating and independent evidence to overcome Protestant's burden of proving the allegation that the $130,200.00 relates to commissions for cashing checks and issuing wire transfers.[14] Second, by attributing the sale of all the beer purchases to the convenience store, the Convenience Store Gross Sales Computation is skewed.

DISPOSITION

THEREFORE, based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestant, PROTESTANT, be sustained.

ORDER GRANTING MOTION TO RECONSIDER

It is noted for the record that Protestant, PROTESTANT did not file a response to the *Motion*. Upon review of the file and records, including the *Motion* and the **Findings, Conclusions and Recommendations** ("**Findings**") issued September 9, 2010, the undersigned finds:

That in respect of the **Findings**, the Division removed the fees charged for cashing checks and issuing wire transfers in the amount of $130,200.00 from the audited unreported gross receipts in the revision to the proposed assessment.

That in consideration of the **Findings**, the Division removed the beer purchases that were attributable to the restaurant during the audit period from the total beer purchases.

That a breakdown of the reported sales attributable to the restaurant and the convenience store was determined from Protestant's records.

That with the removal of the restaurant beer purchases and commission fees, the revision increases the audited unreported sales attributable to the convenience store from $273,848.22 to $372,746.62.

That the revised assessment proposes a total amount due and owing of $39,827.05, consisting of sales tax in the amount of $31,746.83, interest accrued through October 31, 2010, in the amount of $4,905.54, and penalty in the amount of $3,174.68.

That the revisions correct the issues identified in the original proposed assessment.

[14] Exhibit C, in particular the letter dated January 18, 2008 from Protestant's accountant which was written prior to the Auditors first contact with Protestant.

That notice of the *Motion* and revisions to the proposed assessment has been provided to Protestant and Protestant has not filed a response.

That good cause exists for granting the *Motion*.

THEREFORE, IT IS ORDERED that the *Motion* is hereby granted. IT IS FURTHER ORDERED that this Order and the **Findings** to the extent the same are not inconsistent herewith are hereby ACCEPTED BY the Commissioners of the Oklahoma Tax Commission for consideration as a final order.

ORDER OF RESUBMISSION OF DECISION

The remand of the above styled and numbered cause by Oklahoma Tax Commission Order No. 2011-01-11-12 comes on for consideration. In accordance with the Order of the Commission, the Division was directed to provide evidence and/or explain "how it was able to separate purchases of beer for the convenience store from purchases of beer for the restaurant in the revised audit when it was unable to separate such purchases in the initial audit." On February 16, 2011, the *Amended Division's Verified Response* ("*Verified Response*") was filed. Protestant did not file a reply to the *Verified Response*. Upon review of the file and records, including the *Verified Response*, the *Order Granting Motion to Reconsider* ("*Order*") issued October 28, 2010 and the ***Findings, Conclusions and Recommendations*** ("***Findings***") issued September 9, 2010, the undersigned finds:

1. That upon separate review of the beer wholesaler's report of sales to Protestant, the auditor supervisor found that the report separated the beer sales to the convenience store and the restaurant by physical location.

2. That the Division has submitted sufficient information to show how it was able to separate the beer purchases.

3. That the beer purchases attributable to the restaurant have been removed from the Convenience Store Gross Sales Computation.

4. That Protestant was given notice of the opportunity to file a reply to the Division's response.

5. That Protestant did not file a reply.

THEREFORE, IT IS ORDERED that the *Order Granting Motion to Reconsider* and the ***Findings, Conclusions and Recommendations*** to the extent the same are not inconsistent herewith are hereby ACCEPTED BY the Commissioners of the Oklahoma Tax Commission for consideration as a final order.

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."