JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2011-08-02-19 / NON-PRECEDENTIAL**
ID: **P-10-146-K**
DATE: **AUGUST 2, 2011**
DISPOSITION: **DENIED**
TAX TYPE: **TOBACCO**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestant, PROTESTANT d/b/a BUSINESS is represented by ATTORNEY, Attorney at Law, FIRM. The Compliance Division of the Oklahoma Tax Commission ("Division") is represented by OTC ATTORNEY, First Deputy General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

Based upon an investigation of other tobacco product sales by COMPANY 1, the Division by letter dated September 22, 2009, proposed the assessment of tobacco excise tax, interest and penalty against Protestant for the period inclusive of August, 2008 through May, 2009, in the aggregate amount of $1,773,938.70. By letter dated November 18, 2009, Protestant timely protested the proposed assessment.

On May 7, 2010, the protest and Division's file were referred to the Office of the Administrative Law Judges for further proceeding 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 Nos. P-10-146-K and assigned to ALJ, Administrative Law Judge.[3]

A pre-hearing conference was scheduled for June 10, 2010, by *Prehearing Conference Notice* issued May 14, 2010.[4] A *Subpoena Duces Tecum* was issued to Protestant on June 4, 2010. Pursuant to the *Status Report in Lieu of Prehearing Conference* filed June 9, 2010, the parties were directed by letter issued June 10, 2010, to file a status report on or before July 15, 2010. Pursuant to the *Status Report* filed July 15, 2010, a hearing was scheduled for August 12, 2010, by *Notice of Hearing* issued July 16, 2010.

An open hearing[5] was held as scheduled. As a preliminary matter, the parties stipulated to the admission of Division's Exhibits A through I. Protestant initially questioned MANAGER, DIVISION, who testified with respect to the Division's records, the Division's audit procedures and a prior cigarette excise tax audit of and assessment issued against Protestant. Protestant's Exhibit B

[1] 68 O.S. 2001, § 201 et seq.

[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.

[5] See, 68 O.S. 2001, § 205, as amended.

was identified as an undated/unsigned assessment letter issued against Protestant which was offered and admitted into evidence. EMPLOYEE, Protestant's current girlfriend and former employee testified with respect to the disposition of the other tobacco product in question. Protestant's Exhibit A and Division's Exhibit N were identified, offered and admitted into evidence. Protestant also testified with respect to the disposition of the other tobacco product. Division's Exhibits J through L were identified, offered and admitted into evidence. The Division called one witness: MANAGER who testified with respect to his findings regarding the audit and the reasons for the assessment.

At the close of the hearing, the parties were instructed to file proposed findings of facts and conclusions of law. The *Compliance Division's Proposed Findings of Fact and Conclusions of Law* was filed May 2, 2011. [Protestant's] *Proposed Findings of Fact and Conclusions of Law* was filed May 4, 2011. On May 6, 2011, the record was closed and the protest to the proposed tobacco excise tax assessment was submitted for decision.[6]

FINDINGS OF FACT

Upon review of the file and records, including the transcript of the hearing, the exhibits and records received into evidence and the pleadings of the Division, the undersigned finds:

1. Protestant is a resident of CITY A, Oklahoma. Tr. 31; 61-62.

2. Protestant has never been issued an unstamped other tobacco products license by the State of Oklahoma. Tr. 12; 106.

3. At one point in time, Protestant held a retail cigarette license issued by the State of Oklahoma. Tr. 14.

4. During the audit period, Protestant held a STATE 1 tobacco products license. Tr. 68.

5. Protestant's business location in STATE 1 consists of a post office box. Tr. 68; Division's Exhibit H.

6. Protestant admits that at one point in time he purchased untaxed cigarettes from COMPANY 1 of CITY B, STATE 2 ("COMPANY 1") and sold those cigarettes in Oklahoma as a wholesaler. Tr. 69-70.

7. There was no evidence in the prior cigarette excise tax audit of Protestant of sales of cigarettes by Protestant to COMPANY 2 of CITY C, STATE 3 ("COMPANY 2"). Tr. 7.

8. Protestant denies ever purchasing other tobacco products from COMPANY 1 and bringing those tobacco products into Oklahoma. Tr. 69.

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

9. The other tobacco products audit of Protestant was initiated by information received from the STATE 2 which indicated sales of other tobacco products to Protestant. Tr. 9-10.

10. A *Subpoena Duces Tecum* issued to COMPANY 1 by the Division confirmed the sales of other tobacco products to Protestant during the period of August, 2008 through May, 2009. Tr. 9; Division's Exhibits A and B.

11. COMPANY 1 issued two (2) separate invoices on a weekly basis beginning August 4, 2008 and ending May 11, 2009, on its sales of other tobacco products to Protestant. Division's Exhibit B.

12. According to EMPLOYEE, the sales were divided by COMPANY 1 for the sake of time to Protestant and the ease of delivery to REPRESENTATIVE, the representative of COMPANY 2. Tr. 27-29.

13. Protestant did not attempt to obtain phone records of calls to and/or from REPRESENTATIVE and can no longer contact him. Tr. 27-29.

14. Concerning the trip to deliver the other tobacco products to the representative of COMPANY 2, EMPLOYEE initially testified: "we'd go up on Sunday night to CITY B and, if possible, and stay overnight. Either that or we would have to be there first thing Monday morning." Tr. 17. In describing the typical trip, EMPLOYEE testified: "ideally, we'd go up on Sunday night, but more than likely we would leave at four o'clock in the morning on Monday morning to get there by 7:00, in CITY B." Tr. 21.

15. EMPLOYEE testified that COMPANY 1 would receive their tobacco deliveries, particularly Copenhagen at approximately 7:00 a.m. on Monday mornings. At this point the order would be checked off and loaded, and they would drive to CITY D, STATE 4, via STATE 2 Highway NUMBER. Tr. 17.

16. The testimony was that Protestant would meet the representative of COMPANY 2 at the designated place and time of 1:00 p.m. at the COMPANY 3 parking lot in CITY D. They would deliver the tobacco and invoice for the order to him and "he would go ahead and hand me the order" and cash for the upcoming delivery of other tobacco products. Tr. 18; Division's Exhibit E.

17. Protestant did not mark up the price of the other tobacco product he sold to COMPANY 2, but charged a delivery fee of 1.5% of the total cost of the other tobacco product. Tr. 19 and 30; Division's Exhibit E. Protestant made approximately $700.00 to $1,000.00 per week under the arrangement. Tr. 41.

18. Protestant's invoices for the sale of the other tobacco products do not contain an itemization of the types and amounts of other tobacco products sold, or a ship to or delivery address and do not contain an acknowledgement of delivery or in any way reflect where, or to whom the products were delivered. Division's Exhibit E.

19. As proof of the delivery of the other tobacco products to a representative of COMPANY 2 in CITY D, Protestant presented receipts for expenses EMPLOYEE could salvage, consisting of: a receipt for the purchase of diesel fuel in CITY E, Oklahoma; a receipt for fuel purchased in CITY F, Oklahoma; a receipt for gas purchased in CITY G, Oklahoma; three receipts for gas or fuel purchased in CITY D, STATE 4; three TURNPIKE toll receipts; four hotel/motel receipts for rooms in CITY D, STATE 4; and one motel receipt for a room in CITY G, Oklahoma. Tr. 21 and 23; Protestant's Exhibit A.

20. EMPLOYEE testified that all of Protestant's purchases of other tobacco products from COMPANY 1 were delivered to COMPANY 2 in the manner described and none of the other tobacco product was sold in Oklahoma or ever entered Oklahoma. Tr. 20; 23. Protestant testified that none of the other tobacco product was sold in Oklahoma. Tr.43.

21. As justification for COMPANY 2 to enter into the arrangement with Protestant, EMPLOYEE testified that COMPANY 2 could get the tobacco on a timely basis, saved COMPANY 2 approximately 7 hours of travel time and that the manufacturers of tobacco are selective in who they sell to. Tr. 17; 39 and 112.

22. Protestant testified that he met the representative of COMPANY 2 at an CITY H tobacco trade show in approximately February, 2008. Tr. 40; 73. EMPLOYEE testified that COMPANY 2 was in business when Protestant first met them as verified through a search of the internet and "someone" she spoke with whom had dealings with COMPANY 2. Tr. 20-21. She further stated that the relationship between COMPANY 2 and Protestant was not created in August, 2008, but had been going on for quite some time before the audit period. Tr. 21.

23. The Division presented evidence showing COMPANY 2 closed its business location at ADDRESS in CITY C, STATE 3 on or about June 10, 2008. Division's Exhibits F and I.

24. Protestant agreed with EMPLOYEE'S testimony. Tr. 40.

25. The Division presented one (1) invoice showing that during the audit period other tobacco products, pop and "Bag in Box" was sold to COMPANY 4 and the check remitted in payment of the delivery was written to Protestant and deposited in Protestant's account. INITIALS appears on the memo line of the check which is a reference to COMPANY 5 operated by NAME. Division's Exhibit K. Protestant testified that he sold pop to NAME and NAME would pay him back with the checks which Protestant would cash. Tr. 82-83. EMPLOYEE testified that Protestant was owed money for the pop he sold NAME, NAME would give Protestant the checks, Protestant would cash the checks, take the money owed for the pop and give the remainder to NAME. Tr. 93.

26. MANAGER testified that he called the manager of COMPANY 3 who stated that although they were receiving their deliveries of product around the same time and would have notice something, he never saw any deliveries being made in their parking lot. Tr. 10.

27. MANAGER also stated that he does not have any information showing the other tobacco products in question were sold in Oklahoma. Tr. 10.

28. Official notice is taken that one or more tobacco wholesalers were operating in CITY D, STATE 4 during part or all of the audit period, to-wit: WHOLESALER 1 and WHOLESALER 2. *OAC*, 710:1-5-36.[7]

29. Official notice is taken that COMPANY 6 located in CITY I, STATE 4 is a COMPANY 7 direct buyer and sells the COMPANY 7 smokeless products like the other tobacco products Protestant was purchasing from COMPANY 1. *OAC*, 710:1-5-36.

30. MANAGER testified that COMPANY 7 only sells to a select group of wholesalers and that every wholesaler pays the same price for tobacco. Tr. 102-104.

31. By letter dated September 22, 2009, the Division proposed the assessment of tobacco excise tax, interest and penalty against Protestant for the period inclusive of August, 2008 through May, 2009, in the aggregate amount of $1,773,938.70, inclusive of taxes in the amount of $1,560,329.58, interest accrued through October 31, 2009, in the amount of $57,576.16 and penalty in the amount of $156,032.96. Attached to the assessment letter are work papers showing COMPANY 1'S sales invoice number and date, the type and dollar amount of product sold and the excise tax due on the purchase. Division's Exhibit C.

32. Protestant timely protested the proposed assessment. Division's Exhibit D.

ISSUE AND CONTENTIONS

The issue presented for decision is whether Protestant sustained his burden of proving that the tobacco product in question was delivered and sold as alleged.

Protestant contends that none of the tobacco product at issue ever entered the State of Oklahoma much less sold in the State. In support of this contention, Protestant offers his testimony, his girlfriend's testimony, copies of sales invoices to COMPANY 2 and expense receipts showing trips to CITY D, STATE 4. Protestant argues that the Division admits it does not have any information to support the claim that any of this tobacco was sold in Oklahoma. Protestant further argues that he has put in the unenviable position of attempting to prove a negative – that the product was not sold in Oklahoma.

The Division contends that Protestant failed to meet his burden of proof and persuasion. In support of this contention, the Division would show that the business Protestant allegedly sold the tobacco product to was closed or out-of-business prior to such sales taking place, that Protestant's sales invoices to COMPANY 2 do not contain a delivery address or an acknowledgement of

[7] This rule provides:

> The Administrative Law Judge in an administrative proceeding may, regardless of whether requested by the parties, take official notice of matters which the judges of district courts of Oklahoma can judicially notice and of facts within the scope of personal knowledge or within the specialized knowledge of the Tax Commission. Such official notice must be stated on the record, and the parties must have an opportunity to contest the material noticed. A party requesting the official notice must state upon the record sufficient information to enable the Administrative Law Judge to comply with the request.

delivery, that Protestant did not report the sales to COMPANY 2 to the State of STATE 4, that other tobacco wholesalers were operating in and around CITY D, STATE 4 during part or all of the audit period, and that the evidence Protestant did produce is scant at best.

CONCLUSIONS OF LAW

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

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

2. The Tax Commission pursuant to § 403.1 of the Tobacco Act abolished the practice of purchasing and affixing stamps to tobacco products[8] as evidence of the payment of the excise tax levied on the sale, distribution, use, exchange, barter or possession of tobacco products within this State and instead requires the payment of the excise taxes through monthly tobacco product tax reports by the licensed manufacturer, wholesaler, warehouseman, distributor, or jobber first possessing, selling, using, distributing, exchanging, bartering, or in any manner dealing with such tobacco products in this State. *OAC*, 710:70-5-1(a) and (b); and 710:70-5-2.

3. The provisions of the Tobacco Act "relating to unstamped tobacco products shall be interpreted to include and shall be applicable to all tobacco products for which the tax required by law has not been paid"; 68 O.S. 2001, § 403.1(1), and "[n]o person, dealer, distributing agent or wholesaler, * * * shall possess, sell, use, exchange, barter, give away or in any manner deal with any tobacco products within this state upon which such tax is levied and unpaid, unless such person, dealer, retailer, distributing agent or wholesaler holds a valid tobacco license * * *; 68 O.S. 2001, § 403.1(2).

4. "Any consumer who purchases or brings into this State unstamped cigars or tobacco products whereon the tax would be more than twenty-five cents ($.25) is subject to the tax thereon." 68 O.S. 2001, § 412(b). "Consumer" is defined by the Tobacco Act to mean "a person who comes into possession of tobacco for the purpose of consuming it, giving it away, or disposing of it in a way by sale, barter or exchange." 68 O.S. 2001, § 401(e).

5. Interest and penalty shall be collected as part of the tobacco products excise tax if the tax is not timely paid. *OAC*, 710:70-5-7. Interest shall be calculated at a rate of one and one-fourth percent (1 1/4%) per month from the date the tax becomes delinquent ("due date") until payment of the tax. *OAC*, 710:70-5-7(a), citing 68 O.S., § 217(a). Penalty shall be calculated at a rate of ten percent (10%) of the total amount of delinquent tax and shall be collected if the tax is not paid within thirty (30) calendar days after the tax becomes delinquent. *OAC*, 710:70-5-7(b), citing 68 O.S., § 217(c).

[8] "Tobacco products" is defined by the Tobacco Act to "mean any cigars, cheroots, stogies, smoking tobacco (including granulated, plug cut, crimp cut, ready rubbed and any other kinds and forms of tobacco suitable for smoking in a pipe or cigarette), chewing tobacco (including cavendish, twist, plug, scrap and any other kinds and forms of tobacco suitable for chewing), however prepared; and shall include any other articles or products made of tobacco or any substitute therefor." 68 O.S. 2001, § 401(g).

6. Protestant has the burden of proof to show the action or proposed action of the Division is incorrect, and in what respect. *OAC*, 710:1-5-47. *See*, ***Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission***, 1988 OK 91, 768 P.2d 359. The burden of proof standard is "preponderance of evidence." 2 Am.Jur.2d *Administrative Law* § 357. "Preponderance of evidence" means "[e]vidence which is of greater weight or more convincing than the evidence offered in opposition to it; that is, evidence which as a whole shows the fact sought to be proved is more probable than not * * * evidence which is more credible and convincing to the mind * * * that which best accords with reason and probability." Black's Law Dictionary 1064 (5th ed. 1979). Each element of the claim must be supported by reliable, probative, and substantial evidence of sufficient quality and quantity as to show the existence of the facts supporting the claim are more probable than their nonexistence. 2 Am.Jur.2d *Administrative Law* § 357. If the taxpayer fails to prove a prima facie case, the protest may be denied solely on the grounds of failure to prove sufficient facts which would entitle the taxpayer to the requested relief. *OAC*, 710:1-5-47; ***Continental Oil Company v. Oklahoma Tax Commission***, 1976 OK 23, 570 P.2d 315.

7. Protestant failed to sustain his burden of proof. The most damaging piece of testimony and lack of evidence involves EMPLOYEE'S testimony that REPRESENTATIVE would "hand me the [purchase] order", however Protestant did not come forward with even one purchase order or any sales invoice containing a signature acknowledging delivery of the other tobacco product. Further, this is not a case as argued by Protestant of proving a negative, but the failure to prove the only scenario offered in defense to the documented purchases of a vast amount of untaxed other tobacco products. It is concluded that Protestant as a resident of Oklahoma was the consumer of those products and is liable for the excise taxes thereon. Protestant's protest to the proposed tobacco products excise tax assessment should be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestant, PROTESTANT d/b/a BUSINESS be denied. It is further ORDERED that the amount of the proposed assessment, inclusive of any additional accrued and accruing interest, be fixed as the deficiency 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.

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."