

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2013-11-13-03 / NON-PRECEDENTIAL
ID: P-11-379-H
DATE: NOVEMBER 13, 2013
DISPOSITION: DENIED
TAX TYPE: SALES
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

OWNER d/b/a STORE (“Protestant”) appears pro se.¹ The Field Audit Section, Compliance Division (“Division”) of the Oklahoma Tax Commission appears through OTC ATTORNEY, First Deputy General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On April 20, 2011, 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 April 22, 2011, the Court Clerk (“Clerk”)⁴ notified the parties that this matter had been assigned to ALJ, Administrative Law Judge (“ALJ”), and docketed as Case Number P-11-379-H.⁵ The Clerk also advised the parties that a Notice of Prehearing Conference would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*. On April 25, 2011, OTC ATTORNEY and OTC ATTORNEY 2, Assistant General Counsel filed an Entry of Appearance as Co-Counsel for the Division. On April 28, 2011, the Clerk mailed the Notice of Prehearing Conference to the last-known address of the Protestant’s Representative, REPRESENTATIVE, E.A., setting the prehearing conference for June 6, 2011, at 2:00 p.m.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 (9th ed. 2009), 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 OKLA. ADMIN. CODE § 710:1-5-10(c)(2) (June 25, 1999).

⁵ Unless otherwise noted, the ALJ notified the parties by letter.

⁶ OKLA. STAT. ANN. tit. 68, § 208 (West Supp. 2013). The Clerk mailed the notice to REPRESENTATIVE, E.A., REPRESENTATIVE ADDRESS.

On June 6, 2011, at 2:00 p.m. the ALJ held the prehearing conference as scheduled. The Division appeared via telephone. REPRESENTATIVE appeared in person on behalf of the Protestant. On June 7, 2011, the ALJ acknowledged that during the prehearing conference, REPRESENTATIVE advised of his pending withdrawal as the Protestant's Representative. On June 15, 2011, REPRESENTATIVE 2 filed a Power of Attorney signed by the Protestant appointing REPRESENTATIVE 2 as the Protestant's Representative. On June 16, 2011, REPRESENTATIVE filed a "Withdrawal as Protestant's Representative." On June 20, 2011, the Division filed a *Notice of Sales Tax Revision* ("*First Revision*"), with work papers attached thereto. On June 24, 2011, the ALJ acknowledged receipt of the *First Revision*, and advised the parties to file a status report on or before July 20, 2011.

On October 26, 2011, the ALJ stayed this matter pending the decision in another convenience store case. The ALJ also noted that REPRESENTATIVE 2 did not file a response to the *First Revision*.

On March 9, 2012, OTC ATTORNEY 3, Assistance General Counsel, filed a Notice of Substitution of Attorney and Entry of Appearance as Co-Counsel for the Division.⁷

On September 10, 2012, the ALJ issued the *Order to Revise Sales Tax Assessment in Conformance with OTC Order No. 2012-07-17-06* ("*Order to Revise*"), as more fully set forth therein. On September 28, 2012, the parties filed a Joint Motion for Order to Produce Discovery.

On October 3, 2012, the ALJ issued the Order to Produce Discovery, as more fully set forth therein.

On December 12, 2012, the Division filed a Status Report requesting additional time to review the discovery materials produced by the Protestant. The ALJ has omitted the Procedural History from December 13, 2012 to April 9, 2013.

On April 10, 2013, the Division filed the *Notice of Second Sales Tax Revision* ("*Second Revision*"), with work papers attached thereto. On April 11, 2013, the ALJ acknowledged the filing of the *Second Revision*, and directed the Protestant to respond to the *Second Revision* on or before June 10, 2013.

On May 23, 2013, OTC ATTORNEY 3 filed a Notice of Withdrawal as Co-Counsel of Record for the Division.

REPRESENTATIVE 2 did not file a response to the *Second Revision*. On June 11, 2013, the ALJ set this matter for hearing on July 29, 2013, at 1:30 p.m., with position letters and/or memorandum briefs due on or before July 22, 2013. On June 28, 2013, REPRESENTATIVE 2 filed a request to "Withdraw as Protestant's Representative."

On July 1, 2013, the ALJ granted REPRESENTATIVE 2'S request to withdraw and confirmed that the hearing on July 29, 2013, at 1:30 p.m., would proceed as scheduled.⁸ On July

⁷ This notice serves as OTC ATTORNEY 2'S "Withdrawal as Co-Counsel" for the Division. The U.S. Postal Service did not return the notice.

5, 2013, the Clerk re-mailed the letter to the Protestant at ADDRESS.⁹ On July 22, 2013, the Division filed its Brief with the Clerk.¹⁰ The Protestant did not file a position letter and/or memorandum brief. On July 29, 2013, at 2:00 p.m., the ALJ convened the hearing as scheduled. The Protestant did not appear at the hearing.¹¹ OTC ATTORNEY appeared on behalf of the Division. The Division called two (2) witnesses, AUDITOR, Field Auditor,¹² Field Audit Section, Compliance Division of the Oklahoma Tax Commission, who testified about the conduct of the audit, the audit methodology, and as custodian of the Division's records. The Division's second witness, ADMINISTRATOR, Administrator, Compliance Division, testified about how the Division determined the mark-up for tobacco. The Division identified and offered Exhibits A through J, which the ALJ admitted into evidence. Before the admission of Exhibit K, OTC ATTORNEY announced that Exhibit K contained **Federal Tax Information ("FTI")**. The Division identified and offered **FTI** Exhibit K, which the ALJ admitted into evidence. The Office of Administrative Law Judges did not make copies of **FTI** Exhibit K and the originals are contained in a sealed Tax Commission manila envelope with a stamp and sticker, respectively stating as follows, to-wit:

**CONTAINS IRS FTI INFORMATION
DO NOT DUPLICATE CONTENTS
MUST BE DESTROYED IN ACCORD
WITH IRS PUB. 1075 GUIDELINES
Inspection or Disclosure Limitations**

Unauthorized inspection or disclosure, printing, or publishing of any Federal return or return information, or any information therefrom, may be punishable by fine or imprisonment and in the case of Federal officers or employees, dismissal from office or employment. See section 7213 and 7213A of the Internal Revenue Code and 18 U.S.C. section 1905. In addition, Code section 7431 provides for civil damages for unauthorized inspection or disclosure of such information. Tapes should be degaussed after they have served their purpose, disposed of in accordance with Publication 1075 disposition guidelines or returned to the IRS.

*Department of the Treasury
Internal Revenue Service*

*Notice 129A (Rev. 12-97)
Cat No. 45547W*

⁸ The Clerk mailed to REPRESENTATIVE 2 , OTC ATTORNEY, and the Protestant at his last-known address of STORE ADDRESS. See Note 6, *supra*.

⁹ OTC ATTORNEY advised the Clerk this is the Protestant's home address.

¹⁰ The Division did not attach exhibits to its Brief.

¹¹ The ALJ noted for the record that the Protestant did not contact the Clerk regarding the hearing. OTC ATTORNEY announced that she had spoken with the Protestant the previous week, and that the Protestant was aware of the hearing.

¹² The Tax Commission has employed AUDITOR as an auditor for approximately twenty-five (25) years. Testimony of Field Auditor.

When this case is closed, the Clerk hand-delivers **FTI** Exhibit K to OTC ATTORNEY or a designated representative from the Office of General Counsel. At the conclusion of the hearing, the ALJ closed the record and submitted this case for decision on July 30, 2013.

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. The Protestant operated a convenience store located at STORE ADDRESS. According to the Protestant, the convenience store did not sell gasoline or accept food stamps.¹³

2. On September 13, 2010, the Division mailed an Audit Notification to the Protestant, which listed documents and forms the Protestant was to return and/or complete on or before October 13, 2010.¹⁴

3. On October 11, 2010, the Protestant provided folders containing some information for June, July, and August 2010.¹⁵

4. On October 11, 2011, the Division granted the Protestant an extension to provide the remaining records to November 9, 2010.¹⁶

¹³ Testimony of Field Auditor. The Protestant's bank statements do not reflect "food stamp deposits."

¹⁴ *Id.* Division's Exhibit A. The Division attached the standard Records Request Form to Establish Markup Percentages for Use in Sales Tax Audit, Statute of Limitation Waiver Agreement, Taxpayer's List of Principal Officers, Partners or Members (LLC), and Power of Attorney.

The Records Request included:

1. **Complete the Retail/Product Cost Form and all other forms included, sign the forms, and return them with the documents requested.**
2. A list of **ALL** vendors and suppliers.
3. Copies of **ALL** purchases for 3 years for **ALL products**.
4. Daily sales sheets for 3 years.
5. **Daily cash register tapes for 3 years.**
6. Monthly P&L statements (profit/loss statements).
7. **Provide the Product Mix (p-mix) of items sold.**
8. Bank statements, deposits, and check stubs for all bank accounts.
9. Federal and State Income Tax Returns.
10. Payroll records, including daily/monthly payroll, 941's, OESC, OTC reports, W2's, W4's.
11. General Ledgers.
12. Provide information on free or complimentary items given to customers.
13. Provide copies of OTC reports filed for this business.
14. Police reports or Insurance claims filed during the period listed above.
15. PROVIDE COPIES OF ANY LETTER RULINGS, OPINIONS, OR ORDER'S FROM THE OTC RECEIVED DURING THE AUDIT PERIOD.

Additional records may be requested as needed. (Emphasis original.)

¹⁵ *Id.* Division's Exhibit B.

5. On December 20, 2010, the Division returned the Protestant's records.¹⁷

6. On January 26, 2011, the Division issued a proposed sales tax assessment against the Protestant for January 1, 2008 to October 31, 2010 ("FA Period"),¹⁸ as follows, to-wit:

Tax Due:	\$384,455.45
Interest @ 15% through 02/28/2011:	70,913.17
Tax & Interest due within 30 Days:	\$455,368.62
30 day delinquent Penalty @ 10%:	38,445.54
Tax, Interest & Penalty due after 30 Days:	\$493,814.16

7. On March 23, 2011, the Division received a timely filed protest.¹⁹

8. On June 16, 2011, by facsimile, the Division received a Power of Attorney from the Protestant to REPRESENTATIVE 2.²⁰

9. On June 20, 2011, the Division filed a *Notice of Sales Tax Revision* ("First Revision"), with work papers attached hereto, as follows, to-wit:

Sales Tax:	\$271,466.95
Interest to 08/31/2011:	70,724.98
Penalty:	<u>27,146.69</u>
Total:	\$369,338.62

10. On September 28, 2012, the parties filed a Joint Motion for Order to Produce Discovery, as more fully set forth therein.²¹

11. On October 3, 2012, the ALJ issued an Order to Produce Discovery, as more fully set forth therein.²²

¹⁶ *Id.* Division's Exhibit C. The Protestant provided a price list and vendor list, but no additional records.

¹⁷ *Id.* Division's Exhibit D.

¹⁸ *Id.* Division's Exhibit E. The Division based the proposed sales tax assessment on the Protestant's 3.2 beer purchases coupled with the National Association of Convenience Stores ("NACS") figures.

¹⁹ *Id.* Division's Exhibit F. The protest mail date is March 21, 2011. REPRESENTATIVE attached a copy of the Power of Attorney from the Protestant.

²⁰ *Id.* Division's Exhibit G.

²¹ Division's Exhibit H.

²² Division's Exhibit I.

12. On November 19, 2012, OTC ATTORNEY 3 sent REPRESENTATIVE 2 a letter advising that the Division had not received records pursuant to the October 3rd Order to Produce Discovery, and that if OTC ATTORNEY had not been contacted on or before November 21, 2012, the Division would construct the revision on the limited amount of records in its possession.²³

13. The Protestant produced one (1) box of records, which included copies of sales tax reports for the FA Period, bank statements, including operating and lottery, for January 2008 through May 2010, and purchase invoices from Boaz (wholesaler).²⁴

14. Based upon the various sources of revenue, the Division determined that the Bank Deposit records for 2008 and 2009, and the Protestant's Federal Income Tax Return for the 2010 Tax Year represented the most comprehensive accounting of sales for the FA Period, "summarized" as follows,²⁵ to-wit:

YEAR	GROSS SALES TAX	BANK DEPOSITS	GROSS SALES INCOME TAX	TOBACCO PURCHASES	TOBACCO SALES (18.1% MARK-UP) ²⁶	REPORTED TAXABLE	SALES TAX PAID	UNREPORTED SALES
2008	\$ 351,953.00	\$ 387,025.09	\$ 358,984.00	\$ 37,157.90	\$ 43,989.46	\$ 72,770.00	\$ 6,094.49	\$264,171.14
2009	\$ 353,319.00	\$ 486,921.28	\$ 353,319.00	\$193,132.00	\$228,639.75	\$ 77,062.00	\$ 6,453.94	\$174,765.58
2010	\$ 303,514.00	\$ 146,161.21	\$ 305,462.50 ²⁷	\$ 94,703.85	\$112,115.37	\$ 94,285.00	\$ 7,896.37	\$ 91,165.76
TOTAL	\$1,008,786.00	\$1,020,107.58	\$1,017,765.50	\$324,993.75	\$384,744.58	\$244,117.00	\$20,444.80	\$530,102.48

15. On April 10, 2013, the Division filed the *Notice of Second Sales Tax Revision* ("Second Revision"), with work papers attached thereto,²⁸ as follows, to-wit:

Sales Tax:	\$44,396.08
Interest @ 15% through 04/30/2013:	24,149.38
Penalty:	<u>4,439.61</u>
Total:	\$72,985.08

CONCLUSIONS OF LAW

²³ Division's Exhibit J.

²⁴ Testimony of Field Auditor.

²⁵ *Id.* Division's Exhibit K.

²⁶ Testimony of Administrator. The Division determined the mark-up for tobacco using the NACS 2008 Annual Report.

²⁷ Testimony of Field Auditor. This number represents gross sales from January through October 2010.

²⁸ *Id.* See Note 25, *supra*. The Division's calculation was off by \$0.01 due to rounding and/or a mathematical error.

1. The Legislature vested the Oklahoma Tax Commission with jurisdiction over the parties and subject matter of this proceeding.²⁹

2. The Oklahoma Sales Tax Code (“Sales Tax Code”) governs the collection and remittance of sales tax.³⁰ The Sales Tax Code³¹ levies “upon all sales, not otherwise exempted...an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds³² of each sale of...tangible personal property...,” and specifically, the sale of “[n]atural or artificial gas,...”³³ Oklahoma Statutes authorize incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.³⁴

3. It shall be the duty of every tax remitter required to make a sales tax report and pay any tax under the Oklahoma Sales Tax Code³⁵ 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 Oklahoma Sales Tax Code³⁶ as will substantiate and prove the accuracy of

²⁹ OKLA. STAT. tit. 68, § 221(D) (West Supp. 2013).

³⁰ OKLA. STAT. ANN. tit. 68, § 1350 *et seq.* (West 2008).

³¹ OKLA. STAT. ANN. tit. 68, § 1352(22)(a) and (b) (West 2008):

“Sale” means 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, or other transactions as provided by this paragraph, including but not limited to:

a. the exchange, barter, lease, or rental of tangible personal property resulting in the transfer of the title to or possession of the property,

b. the disposition for consumption or use in any business or by any person of all goods, wares, merchandise, or property which has been purchased for resale, manufacturing, or further processing,

...

³² OKLA. STAT. ANN. tit. 68, § 1352(12) (West 2008).

³³ OKLA. STAT. ANN. tit. 68, § 1354(A)(1) and (2) (West 2008). See OKLA. ADMIN. CODE § 710:65-13-120.

³⁴ OKLA. STAT. ANN. tit. 68, § 1370 *et seq.* (West 2008). See OKLA. STAT. tit. 68, § 2701 (West 2013).

³⁵ See Note 30, *supra*.

³⁶ *Id.*

such returns. It shall also be the duty of every person who makes sales for resale to keep records of such sales, which shall be subject to examination by the Tax Commission or any authorized employee thereof while engaged in checking, or auditing the records of any person required to make a report under the terms of the Oklahoma Sales Tax Code.³⁷ 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.*³⁸ (Emphasis added.)

4. If any taxpayer shall fail to make any report or return as required by any state tax law, the Oklahoma Tax Commission, from any information in its possession or obtainable by it, may determine the correct amount of tax for the taxable period. If a report or return has been filed, the Tax Commission shall examine such report or return and make such audit or investigation as it may deem necessary. If, in cases where no report or return has been filed, the Tax Commission determines that there is a tax due for the taxable period, or if, in cases where a report or return has been filed, the Tax Commission shall determine that the tax disclosed by such report or return is less than the tax disclosed by its examination, it shall in writing propose the assessment of taxes or additional taxes, as the case may be, and shall mail a copy of the proposed assessment to the taxpayer at the taxpayer's last-known address. Proposed assessments made in the name of the "Oklahoma Tax Commission" by its authorized agents shall be considered as the action of the Tax Commission.³⁹

5. The Tax Commission shall also collect interest at the rate of one and one-quarter percent (1¼%) per month from the date prescribed by state law.⁴⁰

6. If any tax due under any state tax law is not paid within thirty (30) days after such tax becomes delinquent, a penalty of ten percent (10%) on the total amount of tax due and delinquent shall be added thereto, collected and paid.⁴¹

7. The rules promulgated pursuant to the Administrative Procedures Act⁴² are presumed to be valid and binding on the persons they affect and have the force of law.⁴³

³⁷ *Id.*

³⁸ OKLA. STAT. ANN. tit. 68, § 1365(F) (West 2008).

³⁹ OKLA. STAT. tit. 68, § 221(A) (West Supp. 2013).

⁴⁰ OKLA. STAT. ANN. tit. 68, § 217(B) (West Supp. 2013).

⁴¹ OKLA. STAT. ANN. tit. 68, § 217(D) (West Supp. 2013).

⁴² OKLA. STAT. ANN. tit. 75, § 250 *et seq.* (West 2002).

⁴³ *See Toxic Waste Impact Group, Inc. v. Leavitt*, 1988 OK 20, 755 P.2d 626.

8. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.⁴⁴
9. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.⁴⁵
10. In sales tax matters, “[t]he burden of proving a sale was not a taxable sale shall be upon the person who made the sale.”⁴⁶

DISCUSSION

An order of the Tax Commission must be supported by substantial evidence.⁴⁷ Likewise, the audit upon which a portion of the record is formed and order issued, must be supported by substantial evidence.⁴⁸ The Division’s choice of audit methodology was not arbitrary; it was necessitated because the Protestant did not maintain the statutorily required records necessary to conduct a field audit using any other audit methodology, such as “line-item,” “sampling,” “projection,” etc.⁴⁹

⁴⁴ OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999):

In all administrative proceedings, unless otherwise provided by law, the burden of proof shall be upon the protestant to show in what respect the action or proposed action of the Tax Commission is incorrect. If, upon hearing, the protestant fails to prove a prima facie case, the Administrative Law Judge may recommend that the Commission deny the protest solely upon the grounds of failure to prove sufficient facts which would entitle the protestant to the requested relief.

OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999), provides in pertinent part:

. . . “preponderance of the evidence” means the evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which as a whole shows that the fact sought to be proved is more probable than not.

⁴⁵ See *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com’n*, 1988 OK 91, 768 P.2d 359.

⁴⁶ See Note 38, *supra*.

⁴⁷ *Dugger v. State ex rel. Oklahoma Tax Com’n*, 1992 OK 105, 834 P.2d 964.

⁴⁸ Tax Commission Order No. 2003-07-22-09 (July 22, 2003), 2003 WL 2347117 (Okl. Tax Com.), available at <http://westlaw.com>.

⁴⁹ See Note 38, *supra*.

Based upon the various sources of revenue, the Division determined that the Bank Deposit records for 2008 and 2009, and the Protestant's Federal Income Tax Return for the 2010 Tax Year, represented the most comprehensive accounting of sales for the FA Period. The Division's choice of methodology is an acceptable "indirect" approach when the taxpayer's records are incomplete, unavailable, or non-existent. A detailed examination of the methodology supports the conclusion that the Division has laid an evidentiary foundation for the basis of the audit and the proposed sales tax assessment ("*Second Revision*") for the FA Period is supported by substantial evidence.

CONCLUSION

The Protestant has failed to meet his burden of proof, by preponderance of the evidence, that the Division's proposed sales tax assessment ("*Second Revision*") for the FA Period is incorrect and in what respects.

DISPOSITION

The OKLAHOMA TAX COMMISSION ORDERS denial of the protest based upon the facts and circumstances of this case, as set forth herein.

The OKLAHOMA TAX COMMISSION further ORDERS that the proposed sales tax assessment (“*Second Revision*”) for the FA Period against the Protestant, inclusive of accrued interest and penalty, 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.

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.”