

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2013-11-26-01 / NON-PRECEDENTIAL
ID: P-10-159-K
DATE: NOVEMBER 26, 2013
DISPOSITION: DENIED
TAX TYPE: SALES
APPEAL: NO APPEAL TAKEN

ORDER

Protestant, OWNER appears pro se. 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

Utilizing the Convenience Store Gross Sales Computation ("CSGS Computation"), the Division estimated Protestant's gross taxable sales for the period inclusive of the months of August, 2007 through December, 2009. It was determined by this methodology that Protestant had underreported his taxable sales. As a result the audit, the Division by letter dated August 13, 2010 proposed the assessment of sales tax, interest and penalty against Protestant. Protestant timely protested the proposed assessment. A hearing was not requested in the protest letter.

On November 16, 2010, the Division's file was referred to the Office of the Administrative Law Judges for further proceedings consistent with the Uniform Tax Procedure Code¹ and the Rules of Practice and Procedure before the Office of Administrative Law Judges². The protest was docketed as Case No. P-10-1599-K.³

A pre-hearing conference was scheduled for January 5, 2011, by a *Prehearing Conference Notice* issued December 10, 2010.⁴ Protestant did not appear at the conference or respond to the notice. A *Prehearing Conference Order* ("Order") was issued directing the Division to file a verified response to protest no later than thirty (30) days from the date of the *Order* and advising Protestant 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 requested, the record would be closed and the protest submitted for decision upon completion of the announced procedural schedule.⁵

¹ 68 O.S. 2011, § 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).

⁵ OAC 710:1-5-28(b) and (c).

A *Request for Extension of Time to File Division's Verified Response* was filed January 31, 2011. Pursuant to the request, the scheduling dates in the *Order* were cancelled and the parties were directed to file a status report. Several status updates were filed reflecting the discussions and exchanges of information between the parties.

A *Status Report and Request to Set the Matter for Hearing* was filed July 27, 2011. Pursuant to the request, a hearing was scheduled for September 26, 2011, by *Notice of Hearing* issued August 3, 2011. By letter dated September 22, 2011, the hearing was cancelled and the proceedings were stayed pending further notification.

An *Order Directing Audit Revision* was issued August 10, 2012, wherein the Division was directed to revise the proposed sales tax assessments "in a manner not inconsistent with the Orders of the Oklahoma Tax Commission in the 'convenience store' cases" and Protestant was granted sixty (60) days from the filing of the revision to file a response. The Division's *Notice of Sales Tax Revision* was filed October 8, 2012. Protestant did not file a response to the revision.

Pursuant to the *Division's Status Report* filed February 5, 2013, a hearing was scheduled for April 18, 2013, by *Notice of Hearing* issued February 15, 2013. On April 8, 2013, the Division filed an *Unopposed Motion to Strike Hearing*. By *Order Granting Unopposed Motion to Strike Hearing*, the hearing was cancelled and the Division was directed to revise the audit.

A *Notice of Second Sales Tax Revision* was filed May 24, 2013. By letter dated May 29, 2013, Protestant was directed to respond to the revision on or before June 24, 2013. Protestant did not file a response.

A hearing was scheduled for August 29, 2013, by *Notice of Hearing* issued June 15, 2013. The *Brief of the Compliance Division* was filed August 23, 2013.

Pursuant to Protestant's request filed August 26, 2013, the hearing scheduled for August 29, 2013 was stricken and rescheduled for October 2, 2103, by *Order Granting Request to Extend Hearing Date* issued August 27, 2013.

A *Notice of Third Sales Tax Revision* was filed September 13, 2013. By letter dated September 13, 2013, Protestant was directed to respond to the revision on or before September 20, 2013. Protestant did not file a response.

A closed hearing was held as scheduled.⁶ Protestant appeared and gave a statement regarding the operation of the business and the reasons for the lack of records to substantiate the tobacco purchases. AUDITOR, Auditor testified with respect to the records received from Protestant, the conduct of the original audit and the audits resulting in the revisions. Exhibits A through I were identified and admitted into evidence. Upon conclusion of the hearing, the record was closed and the protest was submitted for decision.⁷

⁶ Confidentiality was invoked. 68 O.S. 2011, § 205.

⁷ OAC 710:1-5-39(a).

FINDINGS OF FACT

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

1. At all times relevant⁸, Protestant owned and operated under sales tax permit number 195431, a convenience store known as STORE, at a location of STORE ADDRESS in Oklahoma City. Exhibit A and Protestant's testimony.
2. An audit notification letter, records request, mark-up percentage statement and statute of limitation waiver agreement were mailed to Protestant on June 10, 2010. Exhibit A.
3. No records were provided pursuant to the records request. Auditor's testimony.
4. Because no records were provided the CSGS Computation was utilized to estimate Protestant's gross sales for the audit period. Auditor's testimony.
5. The CSGS Computation calculates a convenience store's expected gross taxable sales in various categories based on the dollar amount of 3.2 beer purchases. The national average sales margins and product mixes from the National Association of Convenience Stores ("NACS") State of the Industry Report were utilized in the computation. Field Audit Write Up prepared July 26, 2010, pp. 2-3.⁹
6. Protestant purchased 3.2 beer from Premium Beers of Oklahoma and Capital Distributing LLC during the audit period. These wholesalers reported the dollar amount of their 3.2 beer sales to Protestant for August 2007 through December 2009. *Id.*
7. Utilizing this methodology, the Division determined Protestant had unreported taxable sales for the audit period in the total amount of \$3,274,981.29. *Id.*
8. As a result of the audit, the Division by letter dated August 13, 2010, proposed the assessment of sales tax, interest and penalty against Protestant as follows:

Sales Tax:	\$ 274,279.69
Interest @ 15% to 10/31/10:	65,097.46
Tax & Interest due within 30 days:	<u>339,377.15</u>
30 day delinquent penalty:	<u>27,427.96</u>
Total:	\$ 366,805.11

⁸ The audit period includes the months of August, 2007 through December, 2009. Exhibit B.

⁹ Evidence by official notice. OAC 710:1-5-36(a).

Exhibit B.

9. Protestant timely protested the proposed assessment by letter post marked October 6, 2010. Exhibit C.
10. On January 7, 2010, Protestant submitted monthly break-outs of his purchases by vendors, mark-up per vendor and total sales by vendor. Protestant also submitted a monthly calculation of his food stamp sales. Exhibit D.
11. Because no invoices were provided and the mark-up was not established by a price list and other records, the audit was not revised based on Protestant's submission. Auditor's testimony.
12. By letters dated January 31, 2011 and September 21, 2012, the Division requested records to revise the audit. Exhibits E and F.
13. Pursuant to these requests, Protestant provided invoices from several vendors, all of which sold cigarettes/OTP (other tobacco products) along with items subject to sales tax, and Z-tapes for October 2009 through January 2010. No bank statements, financial statements and income tax returns were provided. Exhibit G, pp. 5.
14. A *Notice of Sales Tax Revision* ("First Revision") was filed October 8, 2012, inclusive of an *Addendum to Field Audit Write Up* ("Addendum"), schedules of Protestant's records and audit work papers. The notice advises that the audit was revised based on the records provided by Protestant. Exhibit G.
15. The Z-tapes for the months of October through December, 2009¹⁰ were utilized to estimate Protestant's monthly gross sales for the remaining months of the audit period. Protestant's monthly gross sales were estimated at \$60,590.26. Credits against the estimated gross sales were allowed for estimated tobacco sales (cost plus six percent (6%¹¹)) and reported taxable sales. Exhibit G, pp. 5.
16. The *First Revision* determined that Protestant had unreported taxable sales for the audit period in the total amount of \$1,361,568.67. Exhibit G, pp. 16.
17. The *First Revision* proposed an aggregate amount due of \$185,318.66, consisting of State and City of Oklahoma City sales taxes in the amount of \$114,031.37, interest accrued through December 31, 2012, in the amount of \$59,884.16, and penalty in the amount of \$11,403.66. Exhibit G.

¹⁰ The Z-tapes for January, 2010 were omitted from the calculation since they were outside the audit period. Exhibit G, pp. 5 and testimony of the Auditor.

¹¹ Minimum mark-up allowed by law. Testimony of the Auditor.

18. Protestant's fuel distributor provided records of Protestant's fuel purchases during the audit period. Exhibit H, pp. 3.
19. A *Notice of Second Sales Tax Revision* ("Second Revision") was filed May 24, 2013, inclusive of an *Addendum to Field Audit Write Up* prepared on April 19, 2013 and audit work papers. The *Second Revision* allowed credit for estimated fuel sales at cost plus six percent (6%). The addendum notes that the mark-up on tobacco was changed to 18.1%¹² to reflect current policy. Exhibit H and Auditor's testimony.
20. The *Second Revision* determined that Protestant had unreported taxable sales for the audit period in the total amount of \$835,348.49. Exhibit H.
21. The *Second Revision* proposed an aggregate amount due of \$116,539.42, consisting of State and City of Oklahoma City sales taxes in the amount of \$69,960.44, interest accrued through May 31, 2013, in the amount of \$39,582.94, and penalty in the amount of \$6,996.04. Exhibit H.
22. According to the Auditor, Protestant did not provide any information to determine his mark-up for gas, cigarettes and other tobacco products.
23. A *Notice of Third Sales Tax Revision* ("Third Revision") was filed September 13, 2013, inclusive of an *Addendum to Field Audit Write Up* prepared on September 12, 2013 and audit work papers. The *Third Revision* allows credit for exempt food stamp sales. Exhibit I.
24. The *Third Revision* determined that Protestant had unreported taxable sales for the audit period in the total amount of \$818,784.66. Exhibit I.
25. The amount in controversy as proposed by the *Third Revision* is \$118,584.48, consisting of State and City of Oklahoma City sales taxes in the amount of \$68,573.22, interest accrued through October 31, 2013, in the amount of \$43,153.93, and penalty in the amount of \$6,857.33. Exhibit I.

ISSUE AND CONTENTIONS

The issue presented for decision is whether Protestant has shown by a preponderance of evidence that the proposed amount due as reflected by the *Third Revision* is incorrect, and in what respect.

Protestant does not dispute that the amounts allowed by the Division in the *Third Revision* as deductions from gross receipts for gasoline and food stamp sales are correct. Protestant also admits that he does not have any further evidence to support any additional

¹² The combined average national mark-up for cigarettes and OTP as reported by NACS, 2008 State of the Industry Report. Auditor's testimony.

deductions. However, Protestant challenges the estimates of his monthly gross receipts and tobacco sales.

In general, Protestant states that he has been in business for ten (10) years and was never made aware that he had to make or keep the records the Division seeks to conduct the audit. Protestant contends that he operates a small family business which could not generate the amount of receipts the Division has used as the monthly estimate. In support of this contention, Protestant argues that his sales during the fall months of the year are much higher than any other time of the year. Protestant also contends that eighty percent (80%) of his business consists of tobacco sales. In support of this contention, Protestant asserts that if he sells \$2.00 worth of gas, he sells a pack of cigarettes and that if he sells \$10.00 worth of gas, he sells \$20.00 worth of tobacco. He asserts that his tobacco sales are double his gas sales.

The Division contends that the protest should be denied because Protestant has failed to provide any evidence to show the proposed amount due as reflected by the *Third Revision* is clearly erroneous. The Division further contends that the revisions are supported by substantial evidence since they are based solely on Protestant's records.

CONCLUSIONS OF LAW

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

1. Jurisdiction of the parties and the subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S. 2011, § 221(D).
2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Code").¹³ An excise tax is levied upon the gross receipts or gross proceeds of all sales, not otherwise exempted by the Code. 68 O.S. 2011, § 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. 2011, §§ 2701 et seq. and 1370 et seq., as amended.
3. The sale of "tangible personal property"¹⁴ is expressly made subject to sales tax. 68 O.S. 2011, § 1354(A)(1). It is presumed for purposes of the proper administration of the provisions of the Code that "all gross receipts are subject to tax until they are shown to be tax exempt", *OAC 710:65-1-4(A)*; and all sales of tangible personal property are subject to tax until the contrary is established, *OAC 710:65-3-30(b)*. The burden of proving that a sale is not a taxable sale is on the person who made the sale. 68 O.S. 2011, § 1365(F).

¹³ 68 O.S. 2011, § 1350 et seq., as amended.

¹⁴ Defined by the Code to mean "personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses" and "includes electricity, water, gas, steam and prewritten computer software." 68 O.S. 2011, § 1352(24).

4. Every tax remitter¹⁵ required to make a sales tax report and pay any tax under the Code has the duty to keep and preserve for a period of three (3) years 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 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. 68 O.S. 2011, § 1365(F). See, *OAC 710:65-3-31(a)*¹⁶. 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)*.¹⁷
5. Every person required to collect any tax imposed by the Code is personally liable for the tax. 68 O.S. 2011, § 1361(A)(1).
6. Rules promulgated pursuant to the Administrative Procedures Act¹⁸ are presumed to be valid until declared otherwise by a court of competent jurisdiction. 75 O.S. 2011, § 306(C). They are valid and binding on the persons they affect, have the force of law and are prima facie evidence of the proper interpretation of the matter to which they refer. 75 O.S. 2011, § 308.2(C). The legislature is deemed to have adopted an administrative construction of a statute when, subsequent to such construction, it amends the statute or reenacts it without overriding such

¹⁵ Defined to mean “any person required to collect, report or remit the tax imposed by the [Code]. A tax remitter who fails, for any reason, to collect, report, or remit the tax shall be considered a taxpayer for purposes of assessment, collection, and enforcement of the tax imposed by the [Code]”. 68 O.S. 2011, § 1352(27)

¹⁶ This rule provides:

Required records. The following records constitute a minimum requirement for the purposes of the Sales Tax Code for vendors selling tangible personal property:

- (1) Sales journal or log of daily sales in addition to cash register tapes and other data which will provide a daily record of the gross amount of sales.
- (2) A record of the amount of merchandise purchased. To fulfill this requirement, copies of all vendors’ invoices and taxpayers’ copies of purchase orders must be retained serially and in sequence as to date.
- (3) A true and complete inventory of the value of stock on hand taken at least once each year.

¹⁷ 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 allowed by law. Deductions not specifically delineated on the face of the report must be fully explained in the space provided.

¹⁸ 75 O.S. 2011, § 250 et seq., § 301 et seq.

construction. *Branch Trucking Co. v. Oklahoma Tax Commission*, 1990 OK 41, 801 P.2d 686.

The rules and regulations of an administrative agency which implement the provisions of a statute are valid unless they are beyond the scope of the statute, are in conflict with the statute or are unreasonable. See, *Arkansas Louisiana Gas Co. v. Travis*, 1984 OK 33, 682 P.2d 225; *Boydston v. State*, 1954 OK 327, 277 P.2d 138. Agency rules need not be specifically authorized by statute, but must generally reflect the intent of the Legislature as expressed in the statute. *Jarboe Sales Company v. Oklahoma Alcoholic Beverage Laws Enforcement Commission*, 2003 OK CIV APP 23, 65 P.3d 289. As a general rule, it is presumed that administrative rules and regulations are fair and reasonable, and that the complaining party has the burden of proving the contrary by competent and convincing evidence. *State ex rel. Hart v. Parham*, 1966 OK 9, 412 P.2d 142.

7. In administrative proceedings, the burden of proof is on the taxpayer to show in what respect the action or proposed action of the Tax Commission is incorrect. *OAC 710:1-5-47. In re Adway Properties, Inc.*, 2006 OK CIV APP 14, 130 P.3d 302; *Geoffrey, Inc. v. Oklahoma Tax Commission*, 2006 OK CIV APP 27, 132 P.3d 632. 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.
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 has been established, the taxpayer has the burden of proving in what respect the action of the Tax Commission in assessing the tax is incorrect. *OAC 710:1-5-47; Enterprise Management Consultants, Inc.*, supra. 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.

ANALYSIS

First, the records requested by the Division to perform the audit are not atypical of the records that should be kept by anyone doing business. The records are required by statute and rule to support and verify a taxpayer's reporting obligations.

Second, Protestant admits that he does not have any evidence to prove any additional deductions or to show the estimated gross receipts are incorrect. Self-serving declarations, without more are insufficient to carry the burden of proof. *Sorrentino v. Internal Revenue Service*, 383 F.3d 1187, 1195 (10th Cir. 2004); *Crook v. Commissioner of Internal Revenue Service*, 173 Fed.Appx. 653, 657, 2006 WL 766759 (C.A. 10).

Third, the audit is supported by substantial evidence. No evidence has been presented to show an estimate of monthly gross receipts based on a three month sampling period is inherently erroneous.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestant, OWNER be denied. It is further ORDERED that the amount in controversy as proposed by the *Third Revision*, 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."