

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2014-09-16-04 / NON-PRECEDENTIAL
ID: P-13-157-K
DATE: SEPTEMBER 16, 2014
DISPOSITION: DENIED
TAX TYPE: SALES
APPEAL: NONE

ORDER

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, the Commission hereby adopts the Findings of Fact, Conclusions of Law and Recommendation made and entered by the Administrative Law Judge on the 20th day of June, 2014, appended hereto, together herewith shall constitute the Order of the Commission.

SO ORDERED

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

NOW on this 20th day of June, 2014, the above styled and numbered cause comes on for decision pursuant to assignment regularly made by the Oklahoma Tax Commission to ALJ, Administrative Law Judge. PROTESTANT (Deceased) is represented by SPOUSE, the personal representative of the Estate of PROTESTANT. The Compliance Division of the Oklahoma Tax Commission ("Division") is represented by OTC ATTORNEY 1, Assistant General Counsel, and OTC ATTORNEY 2, Deputy General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

The Division audited the sales tax account of the General Partnership of PROTESTANT and SPOUSE ("Partnership") for the periods inclusive of the months of July, 2009, November, 2009 through December, 2010, and February and March, 2011. By letter dated March 21, 2013, the Division proposed the assessment of sales tax, interest and penalty against Protestant for the audit period. The assessment included not only the unpaid admitted tax balances of the Partnership, but additional sales taxes based on the disallowance of undocumented deductions from gross receipts reported on the monthly sales tax returns of the Partnership. Protestant timely protested the proposed assessment by letter dated May 15, 2013. The letter of protest was not verified.

On October 21, 2013, the Division referred the protest to this office for further proceedings consistent with the Uniform Tax Procedure Code¹ and the Rules of Practice and Procedure before

¹ 68 O.S. 2001, § 201 et seq.

the Oklahoma Tax Commission². The case was docketed as Case No. P-13-157-K.³ The documents received from the Division included a cover memorandum, a copy of the proposed assessment and worksheet, a copy of an Oklahoma Tax Commission Billing Coupon, the letter of protest and another worksheet, a copy of the Your Business Registration Application of the Partnership and a copy of the Registration/Liable Party Report of the Oklahoma Tax Commission.

A pre-hearing teleconference was scheduled for December 17, 2013, by *Prehearing Teleconference Notice* issued October 24, 2013.⁴ A *Status Report in Lieu of Prehearing Conference* was filed December 17, 2013, advising that the former representative of the Division had spoken with SPOUSE, "taxpayer's wife" and had been informed that Protestant was deceased. Pursuant to the parties request as set forth in the status report, the parties were directed to file a proposed scheduling order on or before January 31, 2014.

A status report was filed on January 29, 2014, indicating that the Division's representative had spoken with SPOUSE, the personal representative of the Estate of PROTESTANT ("Estate"), that PROTESTANT had passed away prior to the filing of the protest in this matter and that SPOUSE, as the personal representative of the estate had communicated her intention to withdraw the protest filed on behalf of PROTESTANT. A request for additional time to secure and file the withdrawal of protest was made. By letter dated January 30, 2014, the parties were directed to file a status report on or before February 28, 2014.

A status report was filed on February 26, 2014, basically reporting the same information as previously reported and indicating that an additional attempt to secure the withdrawal of protest was being made. By letter dated February 27, 2014, the parties were directed to file an additional status report on or before March 28, 2014.

A *Notice of Substitution of Attorney and Entry of Appearance* of the Division's current representatives was filed March 4, 2014. The *Compliance Division's Status Report* was filed March 28, 2014, indicating that the withdrawal of protest was never received and that further attempts to contact the personal representative of the Estate were unsuccessful. Pursuant to the Division's request, a hearing was scheduled for June 5, 2014, by *Notice of Hearing* mailed April 1, 2014.

The *Compliance Division's Notice of Revision* was filed May 28, 2014, which purportedly corrects a miscalculation of the penalty and interest originally assessed. The amount of sales tax as originally assessed was not changed. The *Brief of the Compliance Division* was filed May 29, 2014, as directed by the *Notice of Hearing*. A position letter or memorandum brief was not filed on behalf of Protestant.

The hearing was held as scheduled. The personal representative of the Estate did not appear or respond to the notice. The Division was permitted to present its case for the denial of the protest;

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.

whereupon, AUDITOR, Auditor III testified with respect to the records reviewed in performing the audit and the audit methodology. Exhibits A through F2 were identified and admitted into evidence. The record was held open for the Division to supplement the record with a copy of the proposed assessment issued against the Partnership; if any, for the sales tax assessed in addition to the admitted liability of the Partnership and if necessary, to brief the issue whether a partner of a partnership could be held liable for taxes not assessed against the Partnership. On June 6, 2014, the *Compliance Division's Status Report* and *Compliance Division's Second Notice of Revision* ("Second Revision") were filed. The status report indicated that a search of the Division's records did not show the issuance of a proposed assessment against the Partnership for the additional sales taxes assessed. The *Second Revision* purports to revise the assessment against Protestant to reflect the amount of sales tax admitted and established by the Partnership's sales tax reports for the audit period. On June 9, 2014, the record was closed and the protest was submitted for decision.⁵

FINDINGS OF FACT

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

1. At all times relevant, STORE, a retail clothing store located in CITY, Oklahoma was owned and operated by PROTESTANT and SPOUSE, a general partnership. Exhibits D⁶ and E.
2. The partners of the general partnership were listed as Protestant and Protestant's widow. Exhibit D.
3. The business operated by the Partnership was started on March 1, 2009. *Id.*
4. The audit period consists of the months of July, 2009, November, 2009 through December, 2010, and February and March, 2011. Exhibits A, B, and F1 and F2. *See*, Exhibit A to the *Second Revision*.⁷
5. The sales tax reports for the months of July, 2009, and November, 2009 through September, 2010 were filed October 22, 2010 in anticipation of a show cause proceeding instituted against the Partnership. Testimony of AUDITOR.
6. The Partnership had remitted payments for the periods of July and November, 2009 on August 20, 2009 and December 22, 2009, respectively, but had failed to file sales tax reports for those periods until doing the same for the show cause proceeding. The payments were treated as credits by the Division until the reports were filed. *Id.*

⁵ OAC 710:1-5-39(a).

⁶ The application reports the new business was changing its form of ownership from a sole proprietorship to a general partnership.

⁷ Officially noticed. OAC 710:1-5-36.

7. The show cause proceeding was scheduled for November 17, 2010.
8. The sales tax report for the month of October, 2010 was timely filed and the reported amount of tax due timely remitted. Testimony of AUDITOR.
9. The remaining sales tax reports for the periods of November and December, 2010, and February and March, 2011 were filed on various dates after the show cause file was transferred to the legal division for collection. *Id.*
10. The Division audited the sales tax reports of the Partnership for the periods inclusive of the months of July, 2009, November, 2009 through December, 2010, and February and March, 2011. Exhibit A.
11. As a result of the audit, the Division by letter dated March 21, 2013, proposed the assessment of sales tax, interest and penalty against Protestant for the audit period in the total amount of \$7,074.60. Exhibit A.
12. The assessment included not only the unpaid admitted tax balances of the Partnership, but additional sales taxes based on the disallowance of undocumented deductions from gross receipts reported on the monthly sales tax returns of the Partnership. Testimony of AUDITOR.
13. Protestant timely protested the proposed assessment by letter dated May 15, 2013. The letter of protest was not verified. Exhibit C.
14. The calculation of penalty and interest for three months of the audit period was incorrect in the original proposed assessment. Testimony of AUDITOR.
15. Exhibit B represents the correct amount due under the original proposed assessment. Testimony of AUDITOR.
16. An assessment of the additional sales taxes based on the disallowance of undocumented deductions from gross receipts reported on the monthly sales tax returns of the Partnership was not issued against the Partnership. *Compliance Division's Status Report* filed June 6, 2014.⁸
17. The Division revised the assessment against Protestant to remove the additional sales taxes or to reflect the amount of sales tax due as reported by the Partnership on the sales tax reports filed for the audit period. *Second Revision*.
18. The total amount assessed against Protestant as proposed by the *Second Revision* is \$6,830.57, consisting of sales tax in the amount of \$4,077.88, a remittance of \$200.00 received

⁸ See, note 7.

January 13, 2014, which was applied to the tax, interest accrued through June 5, 2014, in the amount of \$2,416.18 and penalty in the amount of \$536.51. *Id.*

ISSUES AND CONTENTIONS

The issue presented for decision is whether Protestant is liable for the amounts assessed as proposed by the *Second Revision*.

Protestant did not articulate a reason for the protest. In the letter of protest, he wrote that he received a letter informing him of “unpaid tax balances” and that he disagreed with “this assessment[.]”

The Division contends that the protest should be denied because Protestant has failed to carry the burden of proving the assessment is erroneous. In support of this contention, the Division argues that Protestant has failed to offer any evidence or present any arguments to support the protest to the assessment. The Division further argues that the evidence shows “Protestant has affirmed the legitimacy of the sales tax liability by self-reporting sales tax due for each of the delinquent periods.” *Brief of the Compliance Division*, pp. 5.

CONCLUSIONS OF LAW

1. Jurisdiction of the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S. 2011, § 221. *See*, Oklahoma Tax Commission Order No. 96-02-13-017 (Prec.).⁹

2. The tax levied by the Oklahoma Sales Tax Code (“Code”)¹⁰ shall be paid by the consumer or user to the vendor as trustee for and on account of this state and each and every vendor shall collect from the consumer or user the full amount of the tax or an amount equal as nearly as possible or practicable to the average equivalent thereof. 68 O.S. Supp. 2007, § 1361(A). Included in the definition of “Vendor” is “any person making sales of tangible personal property or services in this state, the gross receipt or gross proceeds from which are taxed by the * * * Code[.]” 68 O.S. Supp. 2007, § 1352(28)(a). All sales of “tangible personal property” unless otherwise specifically exempted are subject to sales tax. 68 O.S. 2001, § 1354(A)(1). Tangible personal property for purposes of the Code is defined to mean “personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses.” 68 O.S. Supp. 2007, § 1352(24). A “person” under the Code includes “any individual” or “partnership, joint venture, joint agreement, association, mutual or otherwise”. 68 O.S. Supp. 2007, § 1352(18).

3. “Every person required to collect any tax imposed by [the Code], * * * shall be personally liable for the tax.” 68 O.S. 2001, § 1361(A). “Any sum or sums collected * * * shall be

⁹ The case sets forth the procedures to be followed for the survival or abatement of actions and the substitution of parties in matters brought before the Oklahoma Tax Commission

¹⁰ 68 O.S. 2001, § 1350 et seq., as amended.

deemed to be held in trust for the State of Oklahoma, and, as trustee, the collecting vendor * * * shall have a fiduciary duty to the State of Oklahoma in regards to such sums and shall be subject to the trust laws of this state.” 68 O.S. Supp. 2007, § 1361(F).

4. All partners of a general partnership are jointly and severally liable for all obligations of the partnership. 54 O.S. Supp. 1997, § 1-306(a). *Gonzalez v. Sessom*, 2006 OK CIV APP 61, ¶ 17, 137 P.3d 1245, 1249.

5. A proposed tax assessment is presumed correct. *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission*, 1998 OK 91, 768 P.2d 359. A protesting taxpayer has the burden of proof to show the tax assessment is erroneous, and in what respect. OAC 710:1-5-47. The general standard of proof for administrative hearings is by preponderance; i.e., each element of the claim must be supported by reliable, probative, and substantial evidence of such 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.

6. Protestant failed to come forward with any evidence to show the assessed amounts as proposed by the *Second Revision* are incorrect. As a partner of the general partnership, Protestant is jointly and severally liable for the obligations of the partnership. Accordingly, the protest should be denied.

RECOMMENDATIONS

Based on the above and foregoing findings of fact and conclusions of law, it is recommended that the protest of Protestant, PROTESTANT be denied. It is further recommended that the amount due as proposed by the *Second 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. 2014) 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.”