

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2016-01-14-09 / NON-PRECEDENTIAL
ID: JM-14-005-K
DATE: JANUARY 14, 2016
DISPOSITION: DENIED
TAX TYPE: PERMIT REVOCATION
APPEAL: NONE TAKEN

ORDER

This comes on before the Oklahoma Tax Commission pursuant to regular assignment on the agenda. The Commission, having reviewed the facts and authorities presented and being fully advised in the premises, finds and orders that the Application for Oral Argument Before the Oklahoma Tax Commission en banc is hereby denied. Having reviewed the files and records herein, the Commission hereby adopts the Findings of Fact, Conclusion of Laws and Recommendation made and entered by the Administrative Law Judge on the 29th day of October, 2015. And the same appended hereto together, herewith shall constitute the order of the Commission.

SO ORDERED

FINDINGS OF FACT AND CONCLUSIONS OF LAW

NOW on this 29th day of October, 2015, 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. Respondent, RESPONDENT is represented by ATTORNEY 1, ATTORNEY 2 and ATTORNEY 3, Attorneys at Law, FIRM. Complainant, the Compliance Division of the Oklahoma Tax Commission is represented by OTC ATTORNEY 1, Interim General Counsel and OTC ATTORNEY 2, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

A Complaint for Revocation/Cancellation of the RESPONDENT'S Licenses/Permits: Sales Tax Permit; Low Point Beer: Off Premises License; Low Point Beer: Bottle & Can License; and Mixed Beverage Permit ("Complaint") was filed with the Office of the Administrative Law Judges on May 28, 2014. Attached to the *Complaint* were copies of Licenses/Permits issued to Respondent labeled Exhibits A-1 through A-5, copies of semi-annual Oklahoma Sales Tax Returns for the reporting periods inclusive of July through December, 2010 and July through December, 2013 labeled as Exhibits B-1 through B-7 and copies of an audit notification letter dated March 18, 2013 and domestic return receipt cumulatively labeled as Exhibit C. The *Complaint* was docketed as Case No. JM-14-005-K and assigned to ALJ, Administrative Law Judge.

A *Notice to Show Cause Why the RESPONDENT'S Following Licenses/Permits should not be Revoked/Canceled: Sales Tax Permits; Low Point Beer: Off Premises Licenses; Low Point Beer: Bottle & Can Licenses; and Mixed Beverage Permits* ("Notice") was issued May 28, 2014. The show cause hearing was scheduled for June 25, 2014. The *Notice* was served on Respondent on May 29, 2014.

On June 12, 2014, a *Motion for Continuance* of the show cause hearing was filed by Respondent. By *Order Granting Motion for Continuance*, the show cause hearing was rescheduled for July 23, 2014.

A closed¹ hearing was held as rescheduled. Upon the announcement of the parties and by *Order* issued July 23, 2014, the *Complaint* was submitted for decision via written presentation. It was further ordered by announcement that the record would consist of the *Factual Stipulation of the Parties* ("Stipulations") filed July 23, 2014; Exhibits A1 through A7, B, C1 through C5, D, E, F1 through F6, G, H, I and J; and the responsive pleadings of the parties.

The *Opening Brief of Complainant, Compliance Division, Oklahoma Tax Commission* was filed August 29, 2014. *Respondent's Brief in Support of Motion to Dismiss* was filed September 2, 2014. Attached to Respondent's brief were: (1) the Model Tribal Gaming Compact; (2) Affidavit of AFFIANT; and (3) Indian Gaming Regulatory Act.

The briefing schedule was amended and extended by continuance orders issued September 19, 2014 and October 6, 2014.

On October 27, 2014, Respondent filed a *Motion to Dismiss, or, in the Alternative, Stay the Administrative Proceedings Pending Arbitration* ("Motion to Dismiss"). By *Order Granting Unopposed Motion to Suspend Scheduling Order*: (1) the briefing schedule as amended by the *Order Granting Continuance* issued October 6, 2014, was suspended pending further order; (2) the Complainant was directed to file a response to the *Motion to Dismiss* on or before November 10, 2014; and, (3) the Respondent was advised that a reply to the response may be filed on or before November 20, 2014. The parties were further notified that a hearing may be scheduled to receive evidence with respect to any disputed facts.

The *Response Brief of Complainant, Compliance Division, Oklahoma Tax Commission to Respondent's Motion to Dismiss or Stay* was filed November 10, 2014. A *Motion for Leave to File Notice of Supplemental Authority* and *Notice of Supplemental Authority* attached as Exhibit A thereto were filed by Complainant on November 14, 2014. By letter issued November 14, 2014, Respondent was notified that a response to the motion could be filed on or before November 20, 2014. On November 20, 2014, the *Response of the RESPONDENT to the Oklahoma Tax Commission's Motion for Leave to File Notice of Supplemental Authority and Reply of RESPONDENT to Response Brief of Complainant, Compliance Division of Oklahoma Tax Commission, to Respondent's Motion to Dismiss or Stay* were filed. An *Order Granting Motion for Leave to File Notice of Supplemental Authority* was issued November 21, 2014.

¹ Confidentiality was invoked. 68 O.S. 2011, § 205.

An *Order Denying Motion to Dismiss and Granting Stay Pending the Dispute-Resolution Procedures of the Compact* (“*Stay*”) was issued December 15, 2014. By letter dated December 16, 2014, the parties were directed to report the status of the *Application* on or before March 16, 2015. A *Certification of Issue for Determination by the Commission* was filed December 22, 2014, and eventually approved by *Order Approving Application for Certification of Issue* issued January 23, 2015. A *Joint Status Report* was filed March 16, 2015.

The *Stay* was lifted by *Oklahoma Tax Commission Order No. 2015 04 14 08*. The procedure for the submission of the *Application* for decision was reinstated by *Order Reinstating Scheduling Order* issued April 16, 2015. On April 20, 2015, the *RESPONDENT’S Correction to Stipulation and Demand for Evidentiary Hearing* was filed. By letter dated April 21, 2015, Complainant was directed to file a response to the demand and Respondent was advised that a reply to the response could be filed. The *Joint Motion to Suspend Scheduling Order* was granted by *Order Granting Joint Motion to Suspend Scheduling Order* issued April 23, 2015.

An *Order Denying Correction to Stipulation and Demand for Evidentiary Hearing* was issued May 8, 2015. On May 8, 2015, the parties filed opposing proposed scheduling orders. A *Scheduling Order* was issued May 11, 2015, which was superseded by *Corrected Scheduling Order* issued May 12, 2015.

On June 12, 2015, *Respondent’s Response in Opposition to Complainant’s Opening Brief* and *Response of Complainant, Oklahoma Tax Commission, to RESPONDENT’S Opening Brief* were filed. *Respondent’s Reply to Response of Complainant, Oklahoma Tax Commission, to RESPONDENT’S Opening Brief* and *Reply of Complainant, Oklahoma Tax Commission, to RESPONDENT’S Response in Opposition to Complainant’s Opening Brief* were filed June 26, 2015. On August 7, 2015, *Respondent’s Proposed Findings of Fact and Conclusions of Law* and *Complainant’s Proposed Findings of Fact and Conclusions of Law* were filed. By letter dated August 10, 2015, the parties were notified that the record was closed and the *Application* was submitted for decision.²

FINDINGS OF FACT

Upon review of the file and records, including the recording of the hearing, the exhibits received into evidence, the stipulations and pleadings of the parties, and the proposed findings of fact and conclusions of law, the undersigned finds:

A. The parties stipulated to the following³:

1. The *RESPONDENT* filed Oklahoma Sales Tax Returns for the reporting period 31 December 2010 through 31 December 2013[.]

² OAC 710:1-5-39(a).

³ References to exhibits are omitted.

2. On March 17, 2014, the Compliance Division-Sales & Use Tax Audit, Oklahoma Tax Commission (“OTC”) advised the RESPONDENT that Oklahoma Sales Tax Returns for periods ending 30 June 2011 through 31 December 2013 had been selected for office audit, and requested documentation supporting claimed exemptions, providing 30 days for response. The RESPONDENT received the letter on March 18, 2014[.]

3. The RESPONDENT did not respond to the March 17 office audit documentation request, and has advised that [sic] does not intend to comply with the request for documentation of claimed exemptions.

4. The RESPONDENT holds permits from the OTC for sales tax, low point beer and/or mixed beverage at various locations of RESPONDENT enterprises[.]

5. [As of July 23, 2014, the content of the RESPONDENT website is accurately depicted by a series of screenshots.]

6. [Whether the various RESPONDENT enterprises are holders of permits for sales tax, and/or low point beer: bottle or can license and/or off premises license and/or mixed beverage permits is correctly summarized.]

7. The following RESPONDENT enterprises are engaged in the sale of tangible personal property and/or services subject to Oklahoma sales tax, and are regularly and continuously engaged in business at an established place of business: TRAVEL STOP, BOWLING CENTER, ARENA, BALL FIELDS, GOLF COURSE, GIFT SHOP, MINI GOLF COURSE and STORE. The OTC maintains that these enterprises are required to have a sales tax permit, and to collect, report and remit sales tax. RESPONDENT advises that it does not intend to obtain Oklahoma sales tax permits for the listed enterprises, nor collect, report and remit sales tax pursuant to Oklahoma law. The business of these enterprises is described on the RESPONDENT website[.]

8. The following RESPONDENT enterprises are engaged in the sale of low point beer to the public: TRAVEL STOP, BOWLING CENTER and ARENA. The OTC maintains that these enterprises are required to have the appropriate low point beer permit, bottle or can and/or off premises. RESPONDENT advises that it does not intend to obtain low point beer permits for these enterprises.

9. RESPONDENT did obtain County beer permits for ARENA, and for BOWLING CENTER. [Included] are true copies of the records of the District Court, Pottawatomie County, Oklahoma.

10. If called to testify, VICE-CHAIRMAN, Vice-Chairman for RESPONDENT, would state that on or about year 2001, at a specific time unrecalled, an OTC representative advised the RESPONDENT to report taxable sales as zero. The records of the OTC neither confirm nor deny any such conversation took place.

ISSUES

The issues presented for decision are whether the Oklahoma Tax Commission is statutorily authorized to revoke the licenses and/or permits it grants for the purposes of doing business and whether grounds for the revocation of Respondent's permits and licenses have been shown?

CONCLUSIONS OF LAW

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

1. Jurisdiction of the parties and subject matter of these proceedings is vested in the Oklahoma Tax Commission. 68 O.S. 2011, §§ 212(A) and 1364(J); 37 O.S. 2011, § 577(F); OAC 710:20-2-13(b)(3) and (4).

2. The Tax Commission in general may cancel or refuse the issuance, extension or reinstatement of any license or permit under any state tax law or other law of any person, firm or corporation. 68 O.S. 2011, § 212(A). The cancellation or refusal to issue is condition on the licensee's or permittee's violation of any of the provisions of the Uniform Tax Procedure Code, 68 O.S. 2011, § 201 et seq.; violation of the provisions of any state tax law, violation of the rules and regulations promulgated by the Tax Commission for the administration and enforcement of any state tax law, failure to observe or fulfill the conditions upon which the license or permit was issued, or nonpayment of any delinquent tax or penalty. *Id.*, at 1-4.

3. A sales tax permit may be revoked "[w]henever a holder of a permit fails to comply with any provision of [the Oklahoma Sales Tax Code]". 68 O.S. 2011, § 1364(J).

4. A mixed beverage tax permit may be revoked "whenever a holder of a mixed beverage tax permit fails to comply with any provisions of any state alcoholic beverage laws or tax laws". 37 O.S. 2011, § 577(F).

5. The low-point beer license of any retail dealer may be revoked for: (1) the nonpayment of delinquent tax, license fee or permit fees or penalties; (2) possession or display

for sale by any retail dealer of low-point beer upon which the tax has not been paid; (3) failure on the part of any retail dealer to comply with all laws or Commission rules relating to the enforcement duties imposed upon the Commission; or (4) failure to comply with any of the tax laws of this state or the rules pertaining thereto. OAC 710:20-2-13(b). A retail dealer's low-point beer license may also be revoke if the county permit is refused issuance or cancelled. OAC 710:20-2-13(c).

6. Sales tax permits, mixed beverage tax permits and low-point beer licenses are not perpetual, but must be renew every three (3) years, 68 O.S. 2011, § 1364(A), 37 O.S. 2011, § 577(A) and OAC 710:20-2-6(c)(1), (2) and (5); and are subject to cancellation, Conclusions of Law, *supra* at ¶¶ 2-5.

7. The holder of a license or permit issued by the Oklahoma Tax Commission is required to comply with the tax laws applicable to the permit or license, 68 O.S. 2011, §§ 212(A)(2) and (4), and 1364(J); and the provisions of the Uniform Tax Procedure Code, 68 O.S. 2011, § 212(A)(1).

8. All tax remitters⁴ are required under the Oklahoma Sales Tax Code to deliver to the Tax Commission, on or before the twentieth day of each month, sales tax reports signed under oath, showing the gross receipts or gross proceeds arising from all sales taxable or nontaxable during the preceding calendar month for purposes of ascertaining the amount of tax payable. 68 O.S. 2011, § 1365(A). "Such reports shall show such further information as the Tax Commission may require to enable it to compute correctly and collect the tax levied" and the Tax Commission, in addition to the information required on reports, may request and the taxpayer must furnish any information deemed necessary for a correct computation of the tax levied. *Id.* The tax remitter is also required to compute the required tax due for the preceding calendar month and remit the same to the Tax Commission with the report. *Id.*

9. Every tax remitter is required 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 under the Oklahoma Sale Tax Code and such other records of goods, wares and merchandise, and other subjects of taxation as will substantiate and prove the accuracy of the sales tax reports. 68 O.S. 2011, § 1365(F). All 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. *Id.*

10. A separate sales tax permit is required for each location of business of a permittee. 68 O.S. 2011, § 1364(E). It is unlawful for any person coming within the class designated as Group One or Group Three vendors⁵ to engage in or transact a business of

⁴ Defined to mean "any person required to collect, report or remit the tax imposed by the Oklahoma Sales Tax Code." 68O.S. 2011, § 1352(27).

⁵ Defined at 68 O.S. 2011, § 1363(1) and (3), respectively.

reselling tangible personal property or services within this state unless a written permit or permits shall have been issued to such person. 68 O.S. 2011, § 1364(G).

11. Every retail dealer of low-point beer is required to obtain from the Oklahoma Tax Commission a permit to engage in such sales prior to offering low-point beer for sale to the public. 37 O.S. 2011, § 163.7(3) and *OAC* 710:20-2-6(c). A low-point beer permit is required for each place of business at which low-point beer is sold, inclusive of each room, bar or other service unit from which low-point beer is served, delivered or otherwise furnished. 37 O.S. 2011, § 163.8 and *OAC* 710:20-2-6(c).

12. Every mixed beverage tax permit holder is required to file with the Oklahoma Tax Commission a monthly report for each place or location of business, on or before the twentieth day of the month immediately following the month of receipt. 37 O.S. 2011, § 579(A). The monthly report shall include among other information the gross receipts for the sale, preparation or service of mixed beverages, ice and nonalcoholic beverages mixed with alcoholic beverages, the gross receipts from charges for the privilege of admission to a mixed beverage establishment which entitle a person to complimentary mixed beverages or discounted prices for mixed beverages, the total retail value of complimentary or discounted alcoholic beverages served and such other information as may be required by the Tax Commission to enable it to collect taxes imposed by law. *Id.*

13. The Tax Commission is authorized to audit any mixed beverage licensee to determine if the correct amount of tax payable under § 576 of the Oklahoma Alcoholic Beverage Control Act has been collected. 37 O.S. 2011, § 579(G).

14. Every taxpayer is required to exhibit to the Tax Commission, or its employees or agents, the place of business, the tangible personal property, equipment and facilities, and the books, records, papers, vouchers, accounts and documents of such taxpayer. 68 O.S. 2011, § 206(a). [U]pon request or demand for production of information by the Tax Commission, or its duly authorized agent, “a state taxpayer shall furnish any information deemed necessary to determine the amount of state tax liability.” 68 O.S. 2011, § 248.

15. Rules promulgated pursuant to the Administrative Procedures Act⁶ 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 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

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

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.

16. 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.

17. Every statute is deemed constitutionally valid until a court of competent jurisdiction declares otherwise. *State ex rel York v. Turpen*, 1984 OK 26, 681 P.2d 763, 767. The Tax Commission is not empowered to decide the constitutional validity of a taxing statute. *Dow Jones & Company, Inc. v. Oklahoma Tax Commission*, 1990 OK 6, 787 P.2d 843, 845.

ANALYSIS

1. Respondent objects to these proceedings on several grounds, including sovereign immunity and federal preemption. Respondent argues that it is neither a taxpayer nor person within the meaning of the tax laws and that it was erroneously induced into applying for the permits as a mere formality.

Respondent's objection and arguments notwithstanding, Respondent is the holder of the tax permits and licenses in question which were issued by the Oklahoma Tax Commission. The Oklahoma Tax Commission is the administrative agency of the State tasked with the administration and enforcement of "each and every provision of any state tax law". 68 O.S. 2011, § 203. The Tax Commission is authorized to revoke the permits and licenses in question. 68 O.S. 2011, §§ 212(A) and 1364(J); 37 O.S. 2011, § 577(F); *OAC 710:20-2-13(b)(3)* and (4). Accordingly, jurisdiction to determine whether Respondent's permits and licenses should be revoke is necessarily vested in the Tax Commission.

2. Respondent contends that the Commission lacks jurisdiction to unilaterally revoke its mixed beverage tax permits for its Class III gaming facilities citing the Model Tribal Gaming Compact. In support, Respondent argues that the Compact mandates compliance with state laws associated with the licensing and sale of alcoholic beverages, that revocation of its mixed beverage tax permits compromises said compliance and that such action raises a dispute under the Compact which is subject to arbitration and not within the Commission's administrative jurisdiction.

This argument was considered and rejected by the Commission. Oklahoma Tax Commission Order No. 2015 04 14 08 reversing the *Order Denying Motion to Dismiss and Granting Stay Pending the Dispute-Resolution Procedures of the Compact* issued December 15, 2014.

3. Respondent contends that the its sales are not subject to Oklahoma sales tax and the Complainant has not established any facts necessary to satisfy the interest-balancing preemption analysis set forth in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In support of the first contention, Respondent argues that Oklahoma's sales tax only applies to sales made within the State and that Respondent's sales do not occur within Oklahoma, but within its own sovereign territory. In support of the second contention, Respondent argues that Complainant has not demonstrated that the State's interest in subjecting the transactions at issue to Oklahoma sales tax outweighs Respondent's interest in exercising its sovereign functions or the federal interest in safe guarding tribal self-government.

Whether Respondent's sales of tangible personal property, services, low-point beer or alcoholic beverages are subject to Oklahoma's taxes is not at issue in this matter. The Commission has not issued an assessment against Respondent. The issue is whether the Commission is authorized to regulate and enforce the provisions of the state tax laws against the holder of a state tax permit. The *Bracker* decision is inapposite to the question presented.

4. The Complainant has shown that Respondent is in violation of the Uniform Tax Procedure Code, the state tax law under which the permits and licenses were issued and the rules promulgated for the administration and enforcement of the state tax laws. Respondent has not offered any evidence to show the violations have been removed. As the holder of state tax permits, Respondent is required to comply with the state tax laws.

RECOMMENDATION

Based on the above and foregoing findings of fact and conclusions of law, it is recommended that Respondent's sales tax permits, and/or low-point beer: bottle & can licenses or low-point beer: off premise licenses and/or mixed beverage permits be revoked.

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."