

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2020-04-28-05 / NON-PRECEDENTIAL
ID: P-19-195-K
DATE: APRIL 28, 2020
DISPOSITION: DENIED
TAX TYPE: SALES
APPEAL: NONE TAKEN

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 24th day of February, 2020, appended hereto, together herewith shall constitute the Order of the Commission.

SO ORDERED

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

Now on this 24th day of February, 2020, the above styled and numbered cause comes on for decision under assignment regularly made by the Oklahoma Tax Commission to ALJ, Administrative Law Judge. Protestants, COMPANY (“Company”) and MEMBER 1 and MEMBER 2 (“Members”) are represented by CPA, CPA. The Compliance Division (“Division”), Oklahoma Tax Commission is represented by AGC, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

In 2013 and 2014, the Company sold certain equipment used in its trade or business as reflected on Forms 4797 filed with its 2013 and 2014 Federal Income Tax Returns. By letters dated November 14, 2017, the Division proposed the assessment of sales tax, interest and penalty against the Protestants on the sale of the equipment. Protestants timely protested the proposed assessments by letter dated December 4, 2017. The protest letter was unverified and no hearing was requested.

On September 23, 2019, the protest and Division’s audit file were referred to the Office of the Administrative Law Judges for further proceedings in accordance 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-19-195-K and assigned to the undersigned.

A pre-hearing teleconference was scheduled for November 13, 2019.³ Neither Protestants nor Protestants' representative appeared at the conference or responded to the notice of the same. By *Prehearing Conference Order* ("Order"), the Division was directed to file a verified response to protest and Protestants were advised that a reply to the response could be filed.⁴ The *Order* further directed that if an oral hearing was not requested, the record would close and the protest submit for decision upon completion of the procedural schedule. Protestants did not respond to the *Order*.

The *Division's Verified Response to Protest* filed December 9, 2019 with Exhibits A through G attached thereto. Protestants filed no reply. On January 15, 2020, the record closed and the protest submitted for decision.⁵

FINDINGS OF FACT

Upon review of the file and records, including the *Verified Response* and exhibits, the undersigned finds:

A. The FACTUAL BASIS FOR ASSESSMENT, *Verified Response* provides:⁶

1. On November 14, 2017, the Division mailed its proposed assessment of sales tax, penalties, and interest to Protestant[s] ("Proposed Assessment Letter[s]").

2. The Division's Field Audit Write Up ("Write Up") states that an inquiry letter was mailed to Protestant[s] on October 9, 2017 regarding sales of assets listed on the [C]ompany's 2013 and 2014 IRS Form 4797. Protestant[s] did not provide [sic] sales tax exemption information for the sales and the Division proposed to assess sales tax due in the amount of \$12,655.91.

3. On December 4, 2017, Protestants mailed a letter protesting the Division's proposed assessment ("Protest Letter").

¹ 68 O.S.2011, § 201 et seq., as amended.

² Rules 710:1-5-20 through 710:1-5-49 of the *Oklahoma Administrative Code* ("OAC").

³ OAC 710:1-5-28(a).

⁴ OAC 710:1-5-28(c).

⁵ OAC 710:1-5-39.

⁶ References to the exhibits submitted in support of the statements are omitted.

4. On October 24, 2018, the Division mailed a revised proposed assessment of sales tax, penalties, and interest to Protestant[s] (“Revised Assessment Letter[s]”).

5. The Division’s Addendum to Audit Write Up (“Addendum”) states that Division discovered that Protestant[s] had received insurance proceeds on a backhoe that had been included in the original assessment. The Division also discovered that a purchaser of a different backhoe, included in the original assessment, had a valid agriculture permit at the time of the sale. Both sales were exempt from sales tax, and the assessment was reduced to \$9,683.63 plus penalty and interest.

6. On September 25, 2019, the Office of Administrative Law Judges transmitted to the General Counsel’s Office the above-referenced matter docketed as a protest to the assessment of sales tax for the periods of March 1, 2013 through August 31, 2014.

7. In its Prehearing Teleconference Notice dated October 3, 2019, the Court informed Protestant[s] that a prehearing teleconference was scheduled for November 13, 2019 at 10:30 A.M.

8. Protestant[s] failed to appear at the November 13, 2019 prehearing conference, and on November 14, 2019, the Court ordered the Division to prepare and file a *Verified Response* in this matter. (Emphasis original).

9. This matter is properly before this Court.

B. Additional findings of fact:

1. The Division’s audit file contains true and correct copies of the original and revised assessment letters issued against the Members of the Company. The assessment letters are marked ALJ Exhibits 1 through 4 and admitted into evidence by official notice. *OAC 710:1-5-36(a)*.

2. As of November 30, 2018, the amount in controversy was \$18,154.94, inclusive of state, city and county sales taxes of \$9,683.63, interest of \$7,502.94 and penalty of \$968.37. Exhibit D.

CONCLUSIONS OF LAW

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

I. JURISDICTION AND BURDEN OF PROOF

1. Jurisdiction of the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S.2011, § 221(D); *OAC 710:1-5-28(c)*.

2. The taxpayer has the burden of proof to show the action or proposed action of the Tax Commission is incorrect, and in what respect. *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. 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*; *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission*, 1988 OK 91, 768 P.2d 359, 362, citing *Continental Oil Co. v. Oklahoma State Bd. of Equalization*, 1976 OK 23, 570 P.2d 315, 317.

3. 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.

4. 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.

5. An audit is supported by substantial evidence when an evidentiary foundation for the audit has been established. Usually the evidentiary foundation will be established by the records reviewed by the auditor. Where an evidentiary foundation has been established, the taxpayer must prove the action of the Tax Commission in assessing the tax is incorrect, and in what respect. *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 establish no basis for

assessing a tax, the audit and assessment in the initial instance cannot be sustained as supported by substantial evidence. *Dugger, supra*.

II. SALES TAX

1. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code (“Code”).⁷ Sales tax is levied on the gross receipts or gross proceeds of all sales not otherwise exempted by the Code. 68 O.S.2011, § 1354(A). The sale of “tangible personal property”⁸ is expressly made subject to sales tax. 68 O.S.2011, § 1354(A)(1).

2. The “gross receipts” or “gross proceeds” subject to sales tax is the “total amount of consideration, including cash, credit, property and services, for which personal property or services are sold, leased or rented, valued in money, whether received in money or otherwise”. 68 O.S.2011, § 1352(12)(a). The phrases “gross receipts”, “gross proceeds” and “sales price” are further define as with no deduction for the (1) seller’s cost of the property sold, (2) the cost of materials used, labor or service cost, (3) interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expenses of the seller, and (4) charges by the seller for any services necessary to complete the sale, including delivery and installation charges unless separately stated on the invoice, billing or similar documentation given to the purchaser. *Id*.

III. EQUITY

1. “Although the principle is harsh, there is no room for equitable considerations in the administration of tax laws.” *Duncan Medical Services v. Oklahoma Tax Commission*, 1994 OK 91, 911 P.2d 247, 250, (citing *Western Auto Supply Company v. Oklahoma Tax Commission*, 1958 OK 144, 328 P.2d 414, 420). Ignorance of the law, standing alone, is no defense. The rule, long-standing and well-known, is found in *Campbell v. Newman*, 1915 OK 538, ¶3, 151 P. 602, 603 which cites *Utermehle v. Norment*, 197 U.S. 40, 25 S.Ct. 291, 49 L.Ed. 655 (1905), “We know of no case where mere ignorance of the law, standing alone, constitutes

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

⁸ 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.2011, § 1352(24).

any excuse or defense against its enforcement. It would be impossible to administer the law if ignorance of its provisions were a defense thereto.” The levying of taxes is purely statutory, and tax statutes must be administered as written. *Western Auto*, *supra* 420, (citing 58 Am.Jur., page 615, note 19).

IV. MEMBER LIABILITY FOR SALES TAX

1. The tax levied by the Code is paid by the consumer or user to the vendor⁹ as trustee for and on account of this state and every vendor must collect from the consumer or user the full amount of the tax or an amount equal nearly as possible or practicable to the average equivalent thereof. 68 O.S.Supp.2014, § 1361(A).

2. Every person required to collect any tax imposed by the Code is personally liable for the tax. *Id.* “Any sum or sums collected or accrued or required to be collected or accrued under the Code shall be 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.2014, § 1361(F).

3. 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.2011, § 1352(28)(a). A "person" under the Code includes "any individual, company, partnership, joint venture, joint agreement, association, mutual or otherwise, limited liability company, corporation". 68 O.S.2011, § 1352(18).

4. When a proposed assessment is filed against a corporation, limited liability company or other legal entity for unpaid sales taxes, a proposed assessment must be filed against the individuals personally liable for the tax. 68 O.S.Supp.2014, § 253(A). An individual is personally liable for the tax if, during the time for which the assessment was made, the individual was responsible for collection and remittance of taxes or had direct control, supervision or responsibility for filing returns

⁹ Defined in part to mean “any person making sales of tangible personal property or services in this state, the gross receipts or gross proceeds from which are taxed by the [Code]”. 68 O.S.2011, § 1352(28)(a).

and making payments of the tax due. 68 O.S.Supp.2014, § 253(B). Personal liability is determined under the Internal Revenue Code standards for determining liability for the payment of federal withholding tax. 68 O.S.Supp.2014, § 253(C).

ANALYSIS

1. Protestants request mercy from the assessment, arguing they were unaware sales tax should have been charged, collected and remitted on the sale of the equipment. The Code plainly and clearly levies an excise tax on the sale of any tangible personal property not otherwise exempted by the Code. Protestants have not shown the sales of the equipment remaining in the revised assessment are exempt from sales tax.

2. Protestants argue that the sales tax assessed against them must be subtracted from the gross amount derived from the sale of the equipment since they are responsible for paying the taxes. The definition of “gross receipts”, “gross proceeds” or “sales price” is plain and unambiguous. No provision of the Code allows for a reduction to the sales price by the sales tax the seller becomes responsible for by not charging and collecting sales taxes on a sale of tangible personal property.

RECOMMENDATIONS

The protest should be denied. The amount in controversy, inclusive of any additional accrued and accruing interest, should be fixed jointly and severally 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 2014) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002).