

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 88-09-29-24 / NON-PRECEDENTIAL
ID: P-88-323-P / P-88-325-P
DATE: SEPTEMBER 29, 1988
DISPOSITION: SUSTAINED
TAX TYPE: SALES / MIXED BEVERAGE
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties agreed to present this case through written submissions without oral hearing. Protestant represented himself and OTC ATTORNEY, Assistant General Counsel, represented the Business Tax Division.

STATEMENT OF FACTS

On May 6, 1988, the Business Tax Division of the Oklahoma Tax Commission issued proposed assessments of additional sales taxes and mixed beverage taxes to PROTESTANT doing business as BUSINESS for the audit period of July 1, 1985, through June 30, 1987, in the following amounts:

	<u>Sales</u>	<u>Mixed Beverage</u>
Tax	\$2,004.19	\$ 6,725.44
Interest	300.31	879.58
Penalty	<u>200.42</u>	<u>4,728.36</u>
TOTAL	\$2,504.92	\$12,333.38

The taxes actually accrued between April 1, 1986, and June 30, 1987. A protest was filed by PROTESTANT in a timely manner.

The facts in this protest were adduced primarily from affidavits by the Protestant and WITNESS, the Protestant's witness, which were provided to the Division during a meeting with Division representatives earlier this year and at a pre-hearing conference held in this matter. The first meeting on February 23, 1988, occurred after the BUSINESS was closed by order of the Tax Commission for failure to remit sales taxes and mixed beverage taxes. Tax warrants had been issued against PROTESTANT. PROTESTANT and WITNESS came to Oklahoma City and met with Business Tax Division representatives in an attempt to straighten out the issue of liability for the taxes.

The affidavit of PROTESTANT on February 23, 1988, reflected that on April 1, 1986, Protestant turned over all operations of the BUSINESS to WITNESS and that the Protestant had nothing further to do with the BUSINESS. WITNESS signed an affidavit conceding that he owed all taxes on the BUSINESS from April 1, 1986, to July 1, 1987.

Accepting these representations as true, the Business Tax Division withdrew tax warrants previously issued against PROTESTANT and reissued them against WITNESS. At that point

Protestant believed that the issue of the liability for unpaid taxes had been resolved. The tax warrants against WITNESS are still outstanding.

The Business Tax Division proceeded to conduct a field audit of the BUSINESS, however, and issued a proposed assessment for sales taxes and mixed beverage taxes to Protestant once again. A pre-hearing conference for the protested assessment was held and again PROTESTANT appeared accompanied by WITNESS. At the pre-hearing conference, WITNESS provided another affidavit swearing as follows:

I, WITNESS, used tax forms pre-signed by PROTESTANT (sic) to file my taxes owed from the operation of the BUSINESS. PROTESTANT (sic) was not the owner of the Club. I was the owner of the Club but I used PROTESTANT'S (sic) permits and filed tax returns using his name without PROTESTANT'S (sic) knowledge. PROTESTANT had operated the BUSINESS for a number of years before experiencing financial difficulties ending in bankruptcy which precipitated his turning over the BUSINESS to WITNESS and leaving the state to take another job. PROTESTANT had no intention of returning to the BUSINESS. He contended that there was not an actual sale of the business because there were no fixtures, equipment or inventory left in the business following the bankruptcy that could be sold. He was released from his lease on the building space where the BUSINESS was located and WITNESS negotiated a new lease with the building owner. He did not, however, send his sales tax permit and mixed beverage tax permit back to the Tax Commission when he left his business.

This protest results from the fact that PROTESTANT did not return his permits to the Tax Commission in a timely manner.

ISSUES AND CONTENTIONS

The issue presented is whether PROTESTANT is liable for the sales taxes and mixed beverage taxes that accrued and are owing from the operation of the BUSINESS during the period April 1, 1986, to June 30, 1987.

Protestant contends that he is not liable for the assessed taxes because he ceased doing business as the BUSINESS and therefore no tax liability can accrue to him. WITNESS claims he was doing business as the BUSINESS and admits that he owes the taxes accrued during the period he operated the business.

The Business Tax Division contends that the permits were maintained for the business in PROTESTANT'S name and there was no further indication that his interest in the business ceased because the permits were not returned to the Tax Commission and no other business records were kept to evidence a sale of the business.

APPLICABLE LAW

This action arises under the Oklahoma Sales Tax Code, 68 O.S. §1351 et seq., and the Oklahoma Alcoholic Beverage Control Act, 37 O.S. §502 et seq., and the Oklahoma Tax Commission has jurisdiction to hear this protest under the Uniform Tax Procedure Code, 68 O.S. §207.

This case presents the question of law of whether a taxpayer may be held liable for the sales and mixed beverage taxes due from a subsequent business operated by another when the former owner has ceased doing business or operating under permits obtained from the Tax Commission.

Although the Business Tax Division contended that factual documentation of the sale of the business from the Protestant to WITNESS was not provided, and thus Protestant had not proven that Protestant's business ceased operations, satisfactory explanation for the lack of business records in this specific situation has been made. Financial problems had caused Protestant to lose the usual furnishings of a club that might be transferred in a sale situation. But a transfer of the business occurred between the two men, to which both have sworn, and WITNESS has admitted ownership of the business during the audit period. The manner involved in turning the business over from Protestant to WITNESS may not be typical but the transfer nevertheless occurred.

When Protestant turned over the business to WITNESS, he did so without assigning his sales tax permit to WITNESS. This conclusion is drawn from the provision of 68 O.S. Supp. 1987, §1364(D) which provides:

(D) A permit is not assignable and shall be valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. The permit shall at all times be conspicuously displayed at the place of business for which issued in a position where it can be easily seen. Said permit shall be in addition to all other permits required by the Statutes of Oklahoma.

Despite the statutory prohibition, WITNESS operated his business using Protestant's sales tax permit number to report the taxes, but failed to remit the taxes to the state.

At the time of discontinuance of the business, Protestant should have returned his sales tax permit to the Tax Commission as required by 68 O.S. Supp. 1987, §1364(F).

Section 1364(F) provides as follows:

(F) Any person operating under a permit as provided in this article shall, upon discontinuance of business by sale or otherwise, return such permit to the Tax Commission for cancellation, together with a remittance for any unpaid or accrued taxes. Failure to surrender a permit and pay any and all accrued taxes will be sufficient cause for the Tax Commission to refuse to issue a permit

subsequently to such person to engage in or transact any other business in this state. In the case of a sale of any business, the tax shall be deemed to be due on the sale of the fixtures and equipment, and the Tax Commission shall not issue a permit to continue or conduct said business to the purchaser until all tax claims due the State of Oklahoma have been settled.

Although Protestant did not comply with the directive of 68 O.S. §1364(F), the sanction for failure to surrender the permit is that the Tax Commission may refuse to issue a subsequent permit to Protestant to engage in business in the state.

The proposed assessment is for a period after which Protestant had discontinued his business operations. By operation of law, the sales tax permit was cancelled when the business was discontinued. There is no Oklahoma statutory authority for holding a taxpayer liable for unremitted taxes of another who illegally operates a business without securing a sales tax permit.

The proposed assessment was also issued for mixed beverage taxes. As with the sales tax permit, Protestant failed to return his mixed beverage tax permit to the Tax Commission. The applicable provision of the Oklahoma Alcoholic Beverage Control Act is Section 577. Subsections C and E provide:

C. A mixed beverage tax permit is not assignable and shall be valid only for the person in whose name it is issued and for the transaction of business at the place designated in the permit.

* * * * *

E. Any person operating under a mixed beverage tax permit as provided in this section shall, upon discontinuance of business by sale or otherwise, return such permit to the Tax Commission for cancellation, together with payment of any unpaid or accrued taxes. Failure to surrender a mixed beverage tax permit and pay any and all accrued taxes will be sufficient cause for the Tax Commission to refuse to issue a mixed beverage tax permit subsequently to such person to engage in or transact any business in this state subject to the provisions of this section.

37 O.S. Supp. 1987, §577.

Discussion above of the liability for sales taxes that accrued following the discontinuance of the business by Protestant is also pertinent to an analysis of the mixed beverage tax liability. The sales tax and mixed beverage tax provisions are obviously similar in that the permit is non-assignable and thus, WITNESS could not operate under Protestant's permit. Also, the penalty attaching to Protestant for failure to surrender the permit is that Protestant may be refused issuance of another permit. No provision exists to hold Protestant liable for taxes that WITNESS did not remit during the period that he operated without a permit. Protestant's mixed beverage tax permit was cancelled by operation of law when he discontinued his business.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission has jurisdiction to hear this protest. 68 O.S. 1981, §207.
2. By operation of law the sales tax permit issued to Protestant was cancelled when Protestant ceased to operate his business. 68 O.S. Supp. 1987, §1364(F).
3. Sales tax permits and mixed beverage tax permits are valid only for the person in whose name they are issued. The permits issued to Protestant could not be assigned to any other person. 68 O.S. Supp. 1987, §1364(D); 37 O.S. Supp. 1987, §577 C.
4. Failure to surrender a sales tax permit or mixed beverage tax permit following the cessation of business operations does not create an imposition of liability on the taxpayer for unremitted taxes of a subsequent owner who illegally operates a business under the former permit holder's permits without the former permit holder's knowledge.
5. Protestant's sales tax protest and mixed beverage tax protest should be sustained.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the protest of PROTESTANT d/b/a BUSINESS be sustained.

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.