

JURISDICTION: OKLAHOMA TAX COMMISSION DECISION
CITE: 86-05-08-06 / NON-PRECEDENTIAL
ID: P-85-154
DATE: MAY 8, 1986
DISPOSITION: DENIED
TAX TYPE: SALES
APPEAL: AFFIRMED / S.CT. 66,708
1988 OK 91, 768 P.2D 359

ORDER

This matter came on for hearing before the Oklahoma Tax Commission en banc on the 21st day of April, 1986, upon the Application for Oral Argument of PROTESTANT, after a hearing before the ADMINISTRATIVE LAW JUDGE and the issuance of her Findings, Conclusions and Recommendations. The Protestant was represented by Attorneys, ATTORNEY ONE and ATTORNEY TWO, and the Sales Tax Division was represented by Attorneys, ASSISTANT GENERAL COUNSEL and GENERAL COUNSEL.

The Attorneys for each party presented facts and arguments in support of their respective positions. Exhibits, not herein itemized, were received into evidence, and the case was submitted for a decision.

STATEMENT OF FACTS

PROTESTANT and its officers, entered into an agreement with the INDIAN TRIBE of Oklahoma which is described by them as follows:

“2. Appointment. PRINCIPAL (Tribe) hereby appoints AGENT (PROTESTANT), as PRINCIPAL’S sole and exclusive AGENT, to manage, as a business enterprise, for an on behalf of PRINCIPAL, a Bingo Game and Food Concession Operation on the hereinafter described Tribal Lands.”
(Parentheses Added)

Protestant Corporation is a corporation duly organized under the laws of the State of Oklahoma with its principle place of business in CITY, Oklahoma. The bingo hall, which Protestant operates, is known as INDIAN TRIBE BINGO and is located on a tract of land in the CITY, Oklahoma. The land was originally conveyed to the Tribe in 1960 pursuant to Public Law 86-701, 74 Stat. 903. In 1976, the land was conveyed to the United States in Trust for the Tribe pursuant to Public Law 93-591, 88 Stat. 1922. The bingo games conducted on this land are open to the general public and are operated seven days a week.

In March, 1985 a field audit of the books and records of Protestant was conducted by the Sales Tax Division for the period, November 11, 1983, to February 28, 1985. On April 23, 1985, the Division issued a proposed assessment to Protestant and its officers in the following amounts:

SALES TAX:	\$135,933.25
INTEREST:	13,084.91
PENALTY:	13,593.32
TOTAL:	\$162,611.48

A timely protest to the proposed assessment was filed by Protestant on May 25, 1985.

ISSUES AND CONTENTIONS

The sole issue is whether Protestant corporation, which operates the INDIAN TRIBE BINGO hall on land held in trust for the Tribe by the United States Government by virtue of a written agreement with the INDIAN TRIBE of Oklahoma, is subject to the collection and remittance of sales tax to the Oklahoma Tax Commission for sales made at the bingo hall under the provisions of the Oklahoma Sales Tax Code.

The Protestant contends that the bingo operation was and is being operated by the INDIAN TRIBE of Oklahoma, and that the State of Oklahoma is precluded from imposing a sales tax on the receipts therefrom by the doctrine of Federal preemption. Protestant relies on McClanahan v. Arizona State Tax Commission, 411 U.S. 164, and Mescalero Apache Tribe v. Jones, 411 U.S. 165, to support its position.

Protestant also contends that the proposed assessment is directed to the wrong party because Protestant is merely an agent of the Tribe in the management of the bingo operation and, therefore, cannot be liable for sales tax as proposed for the games and concessions. Protestant also contends that since the Tribe is exempt from state taxation under the preemption doctrine, there is no basis for the proposed assessment.

The Division contends that the gross receipts from the bingo and food sales are subject to Oklahoma sales tax and that Protestant as vendor is the party required by Oklahoma law to collect and remit sales tax from the bingo and food operations in question to the Oklahoma Tax Commission. The Division asserts further that neither the Tribe nor the commercial activities of the Tribe on the land involved are exempt from Oklahoma Sales tax laws.

To support its position, the Division relies on 68 O.S. § 1350, which imposes a tax on the consumer of the sale of tangible personal property and services not otherwise exempt. The Division also relies on Attorney General Opinion No. 76-392 and on Pan American Petroleum v. Board of Tax Roll Corrections of Tulsa County, 510 P.2d 680 (Ok. 1973), and State v. District Court of Tulsa County, 440 P.2d 700 (Ok. 1966).

Both the Division and the Protestant rely on the agreement between Protestant and the Tribe to support their respective positions.

APPLICABLE LAW

68 O.S. § 1354 levies a sales tax upon

“...(I) Foods, confections, and all drinks sold or dispensed by hotels, restaurants, or other dispensers, and sold for immediate consumption upon the premises or delivered or carried away from the premises for consumption elsewhere;”

Section 1354(E) levies a sales tax upon printed matter of all types, kinds and characters, and sections (L), (M), (N), and (O) further levy sales tax upon tickets for admission to places of amusement, charges for the engaging in any kind of activity when spectators are charged no admission fee, charges for using items for amusement and the rental of equipment for amusement.

68 O.S. § 1361 designates the vendor as the person responsible for paying this tax to the Oklahoma Tax Commission by the following language:

“(A) The tax levied by this article shall be paid by the consumer or user to the vendor as trustee for and on account of this state. Each and every vendor in this state shall collect from the consumer or user the full amount of the tax levied by this article, or an amount equal as nearly as possible or practicable to the average equivalent thereof. Every person required to collect any tax imposed by this article, and in the case of a corporation, each principal officer thereof, shall be personally liable for said tax.” (Emphasis added)

Bingo games are events which are subject to the Oklahoma Sales Tax Code. In Attorney General Opinion No. 76-390, the Attorney General ruled that sales taxes are to be collected and remitted by those operating bingo games where the cards are sold or admission charged so long as players pay to play. Said opinion also states that sales tax is levied on sales of “tangible personal property” and on “printed matter of all types, kinds and characters.” The Attorney General concluded that under the definition of sale in 68 O.S. § 1302(c) (now 68 O.S. § 1352) almost any transfer of a bingo card is a “sale” if the player pays to play with a card. This is true if the player retains the card, returns the card, is charged admission and is given a card, and almost any other arrangement where a player pays to play.

The Oklahoma Supreme Court has held that Attorney General opinions are binding upon the state officials affected by them and that it is their duty to follow these opinions. See Rasure v. Sparks, 75 Okla. 181, 183 P. 495 (1919). This duty continues until a judgment of a court of competent jurisdiction relieves the public official of the burden of compliance. See Pan American Petroleum Co. v. Board of Tax Roll Corrections of Tulsa Cty., supra.; State v. District Court of Mayes Cty., 440 P.2d 700 (Okla. 1968).

Protestant corporation has contended that as agent for an Indian tribe on land which is a part of Indian Country, it is not subject to state taxation for bingo games conducted for tribal benefit. However, land held in trust by the United States for the use and benefit of an Indian tribe is not necessarily Indian Country as that term is defined by federal law. Mescalero Apache Tribe v. Jones, supra. Furthermore, in Mescalero, the United States Supreme Court upheld a gross receipts tax levied directly on the tribal income. Sales taxes levied on the consumer to be

collected and remitted by Protestant this case are an even more indirect burden on the Tribe than the burden in Mescalero, supra.

In addition, Protestant has not shown that the Tribe is the party responsible for remitting sales tax to the Oklahoma Tax Commission. In fact, the agreement between Protestant and the Tribe indicates that since the Tribe does not participate in the revenues of the food and bingo operations until after sales taxes are subtracted, Protestant must be the party responsible for remitting the sales tax. The agreement reads as follows:

“(1) Profit to PRINCIPAL’. PRINCIPAL (tribe) shall be entitled to thirty-five percent (35%) of Gross Profits from Game Sales and fifteen percent (15%) of Gross Profits from Food Concession Sales.

“(2) Gross Profit from Game Sales’, as used herein, means all revenues derived from the sale of bingo cards, as well as all revenue derived from any other game or games of chance, less and subtracting therefrom payouts, taxes and bank.

“(3) Gross Profit from Food Concession Sales’, as used herein, means all revenue derived from the sale of food items, beverages, souvenirs or of any other merchandise, less and subtracting taxes.

“(4) Taxes’, as used herein, means any tax imposed on game or food concession sales or both, including without limitation license fees, permit fees, sales tax, excise tax or any other tax imposed on said operation or the realty by the government of the United States of America, the State of Oklahoma, the CITY or COUNTY; but specifically excluding income taxes.” (Emphasis Added)

In Oklahoma, the burden of proving a lesser tax burden is on the one seeking it. In Board of Equalization of Tulsa County v. Indian Territory Illumination Oil Co., 159 Okla. 15, 13 P.2d 585 (1932), the Oklahoma Supreme Court stated:

‘In Trimble v. City of Seattle, 64 Wash. 102, 116 P. 647, that court held:

“ ‘Since taxation is necessary to the existence and continuance of government, there are no implied exemptions from its burdens, and a relinquishment of such right by the state will not be presumed unless a deliberate purpose to relinquish it appears.’

“That is a correct statement of the rule applicable in Oklahoma. . . .”

In Austin, Nichols and Company, Inc. v. Oklahoma Board of Tax-Roll Corrections, 578 P.2d 1200 (1978), the Oklahoma Supreme Court held that a constitutional amendment should be construed in light of its purpose and that the burden of proving a deduction was on one seeking an exemption. Protestant has not sustained this burden of proof.

Protestant is not the agent of the Tribe, as they claim, because of the lack of control by the Tribe of the conduct of Protestant. Also, it is the PROTESTANT which holds itself out to the public as the operator of the bingo games in the advertisements which have been circulated. Furthermore, regardless of the percentage of business done with tribal members, the tribe only benefits by being entitled to thirty-five percent (35%) of the gross profits from game sales and fifteen percent (15%) from food concession sales. The "Gross Profit" percentage the Tribe is entitled to is defined as revenue less taxes. This means that Protestant benefits by receiving sixty-five percent (65%) of the gross profits from game sales and eighty-five percent (85%) of gross profits from food concession sales. With the profits divided as they are, it becomes questionable who is acting as whose agent.

In conclusion, bingo games are subject to sales tax. This tax is imposed on the consumer, to be collected by the vendor. In this case, Protestant is the vendor. It is the Protestant's agreement with the Tribe to divide the profits after Protestant pays the taxes. The Tribe does benefit economically from these games and from the concessions sold at the games. However, the larger percentage of profit goes to Protestant, thereby making it obvious that this is not a tribal activity.

CONCLUSIONS

In view of the above and foregoing findings, the Oklahoma Tax Commission concludes as follows:

- (1) That the Oklahoma Tax Commission has jurisdiction in this matter.
- (2) That bingo games are taxable events. 68 O.S. § 1361 levies the sales tax on the consumer and charges the vendor with the responsibility of collecting the tax from the consumer and remitting such sales tax to the Oklahoma Tax Commission.
- (3) That the Protestant Corporation is the vendor and is therefore, the party responsible for the collection and remittance of the sales tax.
- (4) That the Protestant Corporation is not an agent of the Tribe.
- (5) That Protestant corporation is liable for the sales tax herein as is each principal officer of the corporation pursuant to the provisions of 68 O.S. § 1361.
- (6) That the sales tax protest of Protestant herein should be denied.

IT IS THEREFORE ORDERED by the Oklahoma Tax Commission that the protest of PROTESTANT is hereby denied, and that Protestant corporation and/or each of its principal officers are required to pay the tax as assessed, plus penalty and interest, from the due date until paid.

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.