

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 86-07-07-07 / NON-PRECEDENTIAL
ID: P-85-032
DATE: JULY 7, 1986
DISPOSITION: DENIED
TAX TYPE: SALES
APPEAL: NO APPEAL TAKEN

ORDER

This matter coming on before the Oklahoma Tax Commission pursuant to regular assignment on the agenda. The Commission, having reviewed the facts and authorities presented therein, and being fully advised in the premises, finds and orders that the Application for Oral Hearing before the Oklahoma Tax Commission En Banc be denied and that the Findings, Conclusions and Recommendations of the Administrative Law Judge, filed herein on the 23rd day of May, 1986, marked as Exhibit "A", attached hereto and hereby incorporated by reference as though fully set out herein, by and the same are hereby adopted as the Order of the Commission.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Now on this 23rd day of May, 1986, the above styled cause comes on for consideration pursuant to assignment regularly made to ALJ, Administrative Law Judge, by the Oklahoma Tax Commission, and hearing had at which hearing the Protestant, OWNER, the owner of BUSINESS, appeared in person and represented by ATTORNEY 1 and ATTORNEY 2, attorneys at law. The Sales & Use Tax Division of the Oklahoma Tax Commission appeared by and through OTC ATTORNEY, attorney from the General Counsel's Office of the Oklahoma Tax Commission.

Opening statements were made by the respective parties and exhibits, not herein itemized, were received into evidence. OWNER and PREPARER testified on behalf of the Protestant and OTC WITNESS 1 and OTC WITNESS 2 testified on behalf of the Sales and Use Tax Division. Closing arguments were made by the respective parties and Proposed Findings of, Fact and Conclusions of Law were propounded and the case was submitted for a decision.

STATEMENT OF FACTS

A field audit of the records and files of BUSINESS, for the period November 1, 1981 through July 31, 1984, was conducted by the Sales and Use Tax Division. Based upon the field audit, an assessment of additional sales tax, penalty and interest was issued on October 26, 1984 for the period November 1, 1981 through July 31, 1984, for sales tax in the amount of Ninety-Three Thousand Three Hundred Twenty-One Dollars and Eight-Six Cents (\$93,321.86), interest of Eighteen Thousand Six Hundred Sixty-Four Dollars and Thirty-Seven Cents (\$18,664.37), and penalty of Nine Thousand Three Hundred Thirty-Two Dollars and Nineteen Cents (\$9,332.19) for a total aggregate of One Hundred Twenty-One Thousand Three Hundred Eighteen Dollars and Forty-Two Cents (\$121,318.42).

The assessment issued was based on the fact that during the audit period, Protestant made sales of bullion, coins and dental gold without collecting and remitting sales tax to the Sales and Use Tax Division.

The Protestant requested and was granted three (3) thirty (30) day extensions of time in which to respond to the Sales Tax Assessment, thereby extending the date to respond until February 22, 1985. Subsequent to the extensions, a protest of the assessment issued was timely filed and received by the General Counsel's Office of the Oklahoma Tax Commission on February 19, 1985.

Reviewing the protest of BUSINESS, the Sales and Use Tax Division determined that the portion of the assessment attributable to sales prior to April 1, 1982, needed to be removed. It was discovered that an improper city sales tax rate was applied to the original assessment. Protestant was notified of both changes and provided a copy of the corrected recap page in a letter dated May 29, 1985. The amount of the assessment was changed to the following:

Sales Tax	\$ 97,130.91
Interest	19,426.19
Penalty	<u>9,713.09</u>
TOTAL	\$126,270.19

On or about July 15, 1985, OTC ATTORNEY, Attorney for the Oklahoma Tax Commission, notified Protestant's attorney that credit for sales tax paid during the months of January, 1984 through July, 1984, would be given for sales tax paid during those months.

Testimony of OWNER, Protestant, and PREPARER, preparer of Protestant's sales tax reports, reflected that the sales of bullion on which the assessment was based were not included in the total gross sales for purposes of computation of sales tax due the Sales and Use Tax Division of the Oklahoma Tax Commission.

CONTENTIONS OF PROTESTANT

(1) The sales of bullion were not subject to sales tax until the Oklahoma Tax Commission entered Order #85-04-16-08 on April 16, 1984 which stated that the sales of bullion and other precious metals which are sold as a commodity are not intangible personal property within the meaning of Okla. Const. Article X, § 6A.

(2) The administrative order should not be applied prospectively.

(3) When Protestant obtained its Sales Tax Permit, representatives of the Division stated that sales of gold and silver constituted bullion sales which should be reported as "wholesale transactions". Protestant further contends that, at that time, uncertainty existed at the Oklahoma Tax Commission as to the taxability of such transactions.

(4) As recently as the date of the hearing herein, the accountant for Protestant contacted the Oklahoma Tax Commission concerning the taxability on sales of gold and silver and was told that such sales were not considered taxable.

(5) The administrative Order #85-04-16-08 indicates a change in the position of the Oklahoma Tax Commission regarding the taxability of sales of gold or silver bullion.

(6) If retroactive application of regulations affects existing rights, creates new obligations or imposes additional duties with respect to past actions, courts of equity will only apply regulations prospectively.

CONTENTIONS OF THE DIVISION

(1) The tax is levied on tangible personal property under 68 O.S. 1981, § 1351 et seq.

(2) Protestant made sales of tangible personal property and failed to collect, report and remit the sales tax.

(3) Protestant has the burden of proving that the assessment issued against it was in error and should be withdrawn.

(4) The administrative Order which Protestant refers to did not impose a new obligation as to the collection of sales tax, but merely clarified the policy of the Sales and Use Tax Division of the Oklahoma Tax Commission for those who had been refusing or neglecting to collect the tax (Exhibit 14).

ISSUE PRESENTED

Whether the sales of bullion, precious metal and gold and silver coins are subject to sales tax under Okla. Const. Article X, § 6A and 68 O.S. 1981, § 1351 et seq.

APPLICABLE LAW

Okla. Const. Article X, § 6A provides in pertinent part:

§ 6A. Intangible personal property exempt from ad valorem or other tax.

Intangible personal property as below defined shall not be subject to ad valorem tax or to any other tax in lieu of ad valorem tax within this State:

(a) Money and cash on hand, including currency, gold, silver, and other coin, bank drafts, certified checks, and cashier's checks.

(b) Money on deposit in any bank, trust company, or other depository of money, within or without the State of Oklahoma, including certificates of deposit.

* * *

The burden of proving an exemption from taxation is on the individual seeking the exemption, and constitutional provisions are strictly construed against those claiming the exemption. Austin Nichols & Co., Inc. v. Oklahoma County Bd. of Tax-Role Corrections, 578 P.2d 1200 (Okla. 1978).

Since the Oklahoma Supreme Court has not held that sales of gold and silver bullion and coins sold as an investment commodity are exempt within the provisions of § 6A, we must look to Oklahoma statutes as well as rules of statutory construction in search of a correct interpretation of § 6A. The inescapable conclusion is that the position of the Division must be upheld first because the items enumerated in subsections (a) and (b) refer to a class of property which is used as a medium of exchange rather than collected, traded or sold based on its intrinsic market value, such as gold and silver bullion or other precious metals. The act must be construed as a whole, and the meaning to be ascribed must be taken in context with consideration given to the intention of the body which enacted the statute or constitution. Sutherland, Stat. Const., (4th ed.) Vol. 2A § 46,05. Furthermore, it is a principle of statutory construction that a tax exemption must be explicit, and cannot be left to implication or conjecture, Independent School Dist. No. 9 of Tulsa County v. Glass, 639 P.2d 1233 (Okla. 1982).

Protestant contends that 68 O.S. 1981, § 1352(N) defines “Tangible personal property” as follows:

“ . . . property which may be seen, weighed, measured, felt or touched or which is in any manner perceptible to the senses.”

Protestant then contends that the list enumerated in § 1352 (N) does not list gold, silver, coins or other precious metals. However, a plain reading of § 1352(N) indicates that it is meant to be all inclusive and is general in nature. Indeed, this subsection does not list any specific items to be taxed. One could not therefore reasonably conclude that the items not listed are all exempt from sales tax.

The issue as to whether the sale of bullion or gold and silver coins is subject to sales tax is a question of State law to be decided on principles applicable to each state. However, it is instructive that numerous other jurisdictions, cited in the Oklahoma Tax Commission Order #85-04-16-08 and the Division’s brief, have considered this issue and held for the sales taxability of bullion and gold and silver coins.

Protestant also contends that it is not clear from the Order that there is a specific intention by the Oklahoma Tax Commission that the Order should be applied retroactively. Protestant further contends that State administrative regulations must operate prospectively unless intent is

clearly indicated, citing Jones v. Grain Club, 605 P.2d 142 (Kan. 1980); Community County Day School v. Commonwealth Dept. of Education, 414 A.2d 428 (Pa. 1980). However, Protestant's argument fails in that the requirement that bullion and gold and silver coins has been considered subject to sales tax since at least January, 1979, which is prior to this assessment period. Moreover, Protestant has not submitted evidence to show that the policy of the Division was not to collect sales tax in these instances.

CONCLUSIONS

- (1) The Oklahoma Tax Commission has jurisdiction in this matter.
- (2) The exemption provisions of Okla. Const. Article X, § 6A and 68 O.S. 1981 § 1351 et seq. are to be strictly construed.
- (3) The sale of gold or silver bullion or other precious metals or the sale of coins made from precious metals are sales of tangible personal property and are therefore subject to sales tax under 68 O.S. 1981 § 1354.
- (4) The amount of the assessment as follows, tax in the amount of Ninety-Seven Thousand One Hundred Thirty Dollars and Ninety-One Cents (\$97,130.91), interest in the amount of Nineteen Thousand Four Hundred Twenty-Six Dollars and Nineteen Cents (\$19,426.19), plus accrued interest, and penalty in the amount of Nine Thousand Seven Hundred Thirteen Dollars and Nine Cents (\$9,713.09), should be upheld.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION that the protest of BUSINESS be denied, and that the assessment as corrected in the amount of One Hundred Twenty-Six Thousand Two Hundred Seventy Dollars and Nineteen Cents (\$126,270.19) representing sales tax, penalty and interest, is correct and proper and that interest continue to accrue thereon from the date of the date of the corrected assessment 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.