

JURISDICTION: OKLAHOMA TAX COMMISSION DECISION
CITE: 86-12-16-08 / NON-PRECEDENTIAL
ID: P-85-312
DATE: DECEMBER 16, 1986
DISPOSITION: SUSTAINED
TAX TYPE: SALES
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above styled cause comes on for consideration pursuant to assignment regularly made to ALJ, Administrative Law Judge, by the Oklahoma Tax Commission. A hearing was had, at which hearing Protestant appeared in person and by attorney, NAME, and the Sales and Use Tax Division of the Oklahoma Tax Commission appeared by attorneys, OTC ATTORNEY A and OTC ATTORNEY B, of the General Counsel's Office of the Oklahoma Tax Commission.

Opening statements were made by the respective parties and exhibits, not itemized herein, were admitted into evidence. WITNESS ONE testified on behalf of the Protestant, as did WITNESS TWO. OTC WITNESS testified on behalf of the Sales and Use Tax Division of the Oklahoma Tax Commission. Closing arguments were made by the respective parties, proposed Findings of Fact and Conclusions of Law were filed on behalf of the Sales and Use Tax Division of the Oklahoma Tax Commission and the case was submitted for a decision.

STATEMENT OF FACTS

A field audit was conducted by the Sales and Use Tax Division of the Oklahoma Tax Commission concerning the books and records of the Protestant. Based upon the information obtained, a sales tax assessment was issued August 16, 1985 by the Sales and Use Tax Division of the Oklahoma Tax Commission to the Protestant in the amount of Fifty-Six Thousand Two Hundred Fifty-Eight Dollars and Fifteen Cents (\$56,258.15), representing sales tax in the amount of Forty-Two Thousand Two Hundred Ninety-Nine Dollars and Thirty-Seven Cents (\$42,299.37), interest in the amount of Nine Thousand Seven Hundred Twenty-Eight Dollars and Eighty-Five Cents (\$9,728.85) and penalty in the amount of Four Thousand Two Hundred Twenty-Nine Dollars and Ninety-Three Cents (\$4,229.93). The Protestant's business is a sod farm, and the proposed assessment was based upon the sale of sod by the Protestant to customers in which the "delivery" of the sod was made by the Protestant to its customers, the customers paying no sales tax. The Protestant protested the assessment in a timely manner on October 25, 1985.

ISSUES AND CONTENTIONS

The sole issue herein is whether sales of sod made by the Protestant are exempt under the agricultural exemption provision in Section 1358(A)(1) of Title 68 of the Oklahoma Statutes.

The Protestant contends that once the sod is cut, risk of loss and title pass to the buyer of the sod at the sod farm, thereby making all sales occur “at or from a farm.” To support this contention, the Protestant relies on provisions of the Uniform Commercial Code, Title 12A § 2-401 et seq. of the Oklahoma Statutes.

The Sales and Use Tax Division of the Oklahoma Tax Commission contends that the exemption contained in Section 1358(A)(1), supra, exempts only sales which are actually made at or from a farm and that, therefore, the sales of the sod by the Protestant in which the product was “delivered” would be subject to sales tax. The Sales and Use Tax Division of the Oklahoma Tax Commission also contends that Protestant’s reliance on the provisions of the Uniform Commercial Code is misplaced.

The contentions of the respective parties concerning the exemption claimed by the Protestant finds its inception in a letter of response to an inquiry to the Sales and Use Tax Division of the Oklahoma Tax Commission, said letter being issued sometime after January 31, 1984, which advised that the growing of grass sod would in fact be recognized as a farm operation and that those sales made and picked up at the farm would in fact be exempt from sales tax. (Exhibit No. 2)

The General Counsel’s Office, as per its position letter, contends that a sod farm is a nursery and not a farming operation and therefore, the sod farm would not qualify for the exemption under Section 1358(A)(1), supra. For the audit period in question, however, the Protestant was allowed to claim this exemption.

APPLICABLE LAW

Section 1358(A) of Title 68 of the Oklahoma Statutes exempts from sales tax:

(A) Sales of agricultural products produced in this state by the producer thereof directly to the consumer or user when such articles are sold at or from a farm and not from some other place of business, as follows:

(3) The provisions of this subsection shall not be construed as exempting sales by florists, nurserymen or chicken hatcheries, or sales of dairy products by any other business except as set out herein. (Emphasis Added)

The Sales and Use Tax Division of the Oklahoma Tax Commission and the General Counsel’s Office have agreed to treat PROTESTANT as a farm for the purpose of this audit only. Although neither the Sales and Use Tax Division of the Oklahoma Tax Commission nor the General Counsel’s Office has the authority to bind the Oklahoma Tax Commission to mistaken interpretations, the issue as to where title passed is the only issue which has been seriously considered by the parties to be relevant. Both parties have agreed from the beginning to treat Protestant as a farm. Although the Protestant is possibly both a farm and a nursery, or is either a farm or a nursery, the character of Protestant’s business operation is not relevant to this case.

This proposed decision will confine itself to the issue which both parties have treated as the only relevant issue in this case from the beginning, that being where title to the sod passes under the provisions of the Uniform Commercial Code.

Where title passes from the Protestant, seller, to a buyer of Protestant's sod is governed by the Uniform Commercial Code which is codified in Title 12A of the Oklahoma Statutes and which pertains to the sale of goods. Section 2-105 of Title 12A defines goods as:

(1) “Goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. “Goods” also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

(2) Goods must be both existing and identified before any interest in them can pass. (Emphasis Added)

It is Protestant's uncontroverted testimony that when a customer calls to order sod, Protestant cuts the sod. Upon being cut at the farm and identified to the contract, title to the sod passes to the buyer. One of Protestant's customers testified that it was the agreement between herself and the Protestant that title to the sod passed when she called and ordered it.

Under the provisions of Title 12A of the Oklahoma Statutes, title to goods passes in the absence of an explicit agreement upon the “identification” of the goods to the contract. Section 2-501(1) of Title 12A defines the moment in time in which identification to a contract occurs:

... Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs

(a) when the contract is made if it is for the sale of goods already existing and identified;

Section 2-401 of Title 12A explains the connection between identification of goods to a contract and passage of title under that contract:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the Article on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading

(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment. (Emphasis Added)

(b) if the contract requires delivery at destination, title passes on tender there. (Emphasis Added)

The comments to Section 2-401(2)(a) state as follows:

“...title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery etc.” This sentence, in substance, provides that when the seller is required to deliver the goods, title passes upon delivery, and any reservation of title is for security only. Paragraphs (a) and (b) then state rules for shipment by common carrier. As already discussed in reference to F.O.B. shipments under Section 2-319, previous Oklahoma law is in accord with the proposition that delivery to a carrier is destination. (Emphasis Added)

Section 2-401(3) provides as follows:

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

(a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

(b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting. (Emphasis Added)

It was the uncontroverted testimony of the Protestant that usually no bill, invoice or statement was delivered to customers along with sod because most of the time, the customers weren't even there. He explained that most of their deliveries were made at night because of traffic problems. The, sod is either picked up at the farm by the customer, delivered by the Protestant to the customer or given by the Protestant to a common carrier for delivery to the customer. The Sales and Use Tax Division of the Oklahoma Tax Commission concedes that sales picked up by customers at the farm are not subject to sales tax, but contends that title to the

sod passes at a place of business other than the farm when the sod is delivered by a common carrier or by the Protestant.

The Uniform Commercial Code, however, states that the explicit agreement between the parties governs where the passage of title occurs and if there is no agreement between the parties then title passes upon identification of the goods to the contract. (See 12A O.S.A. § 2-401, supra) Title 12A O.S.A. § 2-401(3) also states that if the goods at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

In the cause herein, the risk of loss passes to the buyer at the farm upon identification of the sod to the contract, which occurs upon the severance of the sod at the farm.

It is evident from the uncontroverted testimony that the Protestant has an explicit agreement with his customers that title to the sod passes at the farm when a customer calls to place an order. Even in the absence of an explicit agreement between the Protestant and his customers, 12A O.S.A. 2-401(3) states that for goods already identified to a contract for which no documents are to be delivered, title passes at the time and place of contracting. Under the provisions of Section 2-401(3), supra, title again passes at the farm. Since customers call the farm to order the sod and no documents of title must be delivered at another time and place, the farm is the place of contracting and, even in the absence of an explicit agreement, would be the place where title passes.

CONCLUSIONS OF LAW

In view of the above and foregoing factual situation and applicable law thereto, the Administrative Law Judge concludes as follows:

- (1) That the Oklahoma Tax Commission has jurisdiction in this matter.
- (2) That the Protestant is being treated as a farm for the purposes of this audit period only. Henceforth, Protestant will have the burden of proving that it in fact is a farm and, as such, is entitled to the exemption pursuant to Section 1358(A)(1) of Title 68 of the Oklahoma Statutes.
- (3) That Protestant and his customers had explicit agreements that title and risk of loss passed to the customers at the time and place of contracting. Under the Uniform Commercial Code, therefore, under Section 2-401(2) of Title 12A, title passed according to the parties' agreement, at the farm.
- (4) That even if Protestant and its customers were found to have no specific agreement, title would still pass at the farm under the provisions of Section 2-401(2)(a), supra.
- (5) That the protest of PROTESTANT should be sustained.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION that the protest of PROTESTANT 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.