

JURISDICTION: OKLAHOMA TAX COMMISSION DECISION
CITE: 86-12-16-09 / NON-PRECEDENTIAL
ID: P-85-183
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 ADMINISTRATIVE LAW JUDGE, by the Oklahoma Tax Commission. A hearing was had, at which hearing Protestant appeared in person and by ATTORNEY, and the Sales and Use Tax Division of the Oklahoma Tax Commission appeared by attorney, ASSISTANT GENERAL COUNSEL 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. PRESIDENT of the PROTESTANT, testified on behalf of the Protestant, and ASSISTANT DIRECTOR for Audit in the Sales Tax Division of the Oklahoma Tax Commission, 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 Protestant 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 May 17, 1985 by the Sales and Use Tax Division of the Oklahoma Tax Commission to the Protestant in the amount of Nine Thousand Two Hundred Thirty-Seven Dollars and Fifty-Eight Cents (\$9,237.58), representing sales tax in the amount of Seven Thousand Two Hundred Sixteen Dollars and Eighty-Eight Cents (\$7,216.88), interest in the amount of One Thousand Two Hundred Ninety-Nine Dollars and Two Cents (\$1,299.02), and penalty in the amount of Seven Hundred Twenty-One Dollars and Sixty-Eight Cents (\$721.68).

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 June 17, 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 68 O.S.A. § 1358(A) and the fact that the Protestant has an explicit oral agreement with its customers that title to the sod passes to the customer when the sod is cut.

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.

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:

The Sales and Use Tax Division of the Oklahoma Tax Commission and the General Counsels 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; where does title to sod which is delivered to the customer pass.

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, investments 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. It was the Protestant’s uncontroverted testimony that “The customers call and order a certain amount. After a certain amount of time, we cut the sod and it’s specifically their sod, for them, cut to the amount they ordered.”

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; (Emphasis Added)

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.

(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 equivalent to delivery to the buyer, and title passes at that time, unless the seller is required to deliver to buyer at destination. (Emphasis Added)

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 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 granted 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).
- (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.