

JURISDICTION: OKLAHOMA TAX COMMISSION DECISION
CITE: 87-01-06-02 / NON-PRECEDENTIAL
ID: P-85-221
DATE: JANUARY 6, 1987
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 and hearing had, at which hearing Protestant appeared by and through its counsel, ATTORNEY. The Sales and Use Tax Division (now the Business Tax Division, Audit Section) appeared by and through OTC ATTORNEY for the Legal Division of the Oklahoma Tax Commission. Opening statements were made and exhibits, not herein itemized, were received into evidence. PRESIDENT of PROTESTANT, VICE-PRESIDENT of AN Oklahoma AIRCRAFT SERVICING COMPANY, and FORMER MANAGER of PROTESTANT, testified on behalf of Protestant. FIELD AUDITOR of the Sales and Use Tax Division, testified on behalf of the Division. Closing arguments were made by the respective parties and post-hearing briefs were submitted, whereupon the case was submitted for a decision.

STATEMENT OF FACTS

By letters dated December 26, 1984 from ASSISTANT DIRECTOR-Audit, Sales Tax Division, Oklahoma Tax Commission, PROTESTANT was notified of proposed deficiencies in sales and use tax for the Period October 1, 1981 through September 30, 1984 as follows (See Exhibits A-1 and A-2):

	<u>Sales Tax</u>	<u>Use Tax</u>
Tax	134,732.82	1,297.99
Interest	35,946.79	392.15
Penalty	13,473.32	129.80
	184,152.93	1,819.94

On February 26, 1985, Protestant paid the use tax deficiency of One Thousand Two Hundred Ninety-Seven Dollars and Ninety-Nine Cents (\$1,297.99), and also paid Twenty-One Thousand Three Hundred Thirteen Dollars and Forty-Five Cents (\$21,313.45) of the proposed sales tax deficiency. On April 11, 1985, Protestant paid an additional Four Thousand Six Hundred Seventy Dollars and Thirteen Cents (\$4,670.13) of the proposed sales tax deficiency, leaving proposed deficiency of One Hundred Eight Thousand Seven Hundred Forty-Nine Dollars and Twenty-Four Cents (\$108,749.24) plus the amount of interest and penalty as originally assessed. Protestant disputes this amount because Protestant believes it represents taxes assessed on the sale of parts used in the repair of foreign planes or placed on foreign planes for shipment overseas, and should therefore be exempt from sales tax.

On April 26, 1985, Protestant filed its application in protest of the proposed deficiencies. On June 12, 1986, Protestant filed a proposed settlement, and on June 26, 1986, Protestant filed an amended proposed settlement. The proposed settlements were rejected by the Sales and Use Tax Division of the Oklahoma Tax Commission.

The portion of the proposed assessment due, after the above payments of the respective taxes were recorded, is as follows:

Sales Tax	\$108,749.24	Use Tax	\$ 0.00
Interest	35,946.79	Interest	392.15
Penalty	<u>13,473.32</u>	Penalty	<u>129.80</u>
Total	\$158,169.35	Total	\$521.95

CONTENTIONS OF PROTESTANT

Protestant contends that the Sales and Use Tax Division of the Oklahoma Tax Commission may not modify its longstanding interpretation of the Oklahoma sales tax statutes, which had been communicated to Protestant and upon which Protestant relied, and now impose a sales tax on the sale of parts installed by Protestant in the repair of aircraft of foreign ownership. Protestant also contends that the sale of aircraft parts which are placed on aircraft of foreign ownership for shipment to a foreign destination are likewise exempt from state sales tax because the imposition of such tax violates the Import-Export Clause of the United States Constitution, U.S. Const., Art. I., § 10, c1. 2. Finally, Protestant contends that, should the proposed assessment be correct as issued, the interest and penalty attributable to such tax should be waived because, in failing to collect the tax, the Protestant was relying on a ruling of the Sales Tax Division of the Oklahoma Tax Commission which was adhered to by the Sales Tax Division for over twenty (20) years.

CONTENTIONS OF THE DIVISION

The Sales and Use Tax Division of the Oklahoma Tax Commission contends that the imposition of sales tax is correct in that the point of sale of the transactions in question was within the State of Oklahoma, and as a result, state and municipal sales tax is due and owing. The Sales and Use Tax Division of the Oklahoma Tax Commission further contends that none of the exemption provisions of the Oklahoma Sales Tax Code, 68 O.S. 1981, § 1355 et seq. provide an exemption for sales to persons maintaining an address outside the United States.

APPLICABLE LAW

The threshold question in this matter is quite different from the question whether the Sales and Use Tax Division of the Oklahoma Tax Commission may properly impose a sales tax under the applicable statutes. The instant case involves the current interpretation of the Sales Tax Code which is at variance with the policy and practice of past Sales and Use Tax Division administrators and auditors. The taxpayer has been relying on the ruling of former administrators/auditors of the Sales and Use Tax Division of the Oklahoma Tax Commission. The evidence is unrefuted that taxpayers in Oklahoma who repair foreign owned aircraft brought

into Oklahoma for that purpose on the advice of the Sales and Use Tax Division of the Oklahoma Tax Commission have not been previously required to report or collect sales tax on the parts used in such repairs, nor have they been collecting sales tax on the sale of parts, upholstery, paint and radios to owners of the said aircraft. This practice has been in effect at least since 1964, as per the Deposition of TAX COMMISSION EMPLOYEE (Exhibit No. P-2). The sales tax liability concerning those type of sales was not questioned until 1984, when the Sales and Use Tax Division's longstanding policy changed, and the Sales and Use Tax Division began assessing sales of this type contrary to previous audit procedures.

The test in Oklahoma for whether the Oklahoma Tax Commission may depart from its longstanding interpretation of a sales tax statute it is charged to enforce is most recently stated in Oral Roberts University v. Oklahoma Tax Commission, 714 P.2d 1013 (Okla. 1985). The Court stated that the Commission could depart from its position only if (1) the specific applicable provisions were subject to more than one interpretation, or (2) if the Commission reversed its previous interpretation for "cogent" reasons.

In discussing the first prong of the test, the Supreme Court, in Oral Roberts University, found that the application of the Sales Tax Code to churches is subject to more than one interpretation in the context of the applicable section of the statute, and therefore, the longstanding construction given it by the Oklahoma Tax Commission must be given great weight. As to the second prong of the test, the Supreme Court stated that the Legislature adopts an administrative construction of a statute when, subsequent to such construction, it amends the statute or re-enacts it without overriding such construction. In Peterson v. Oklahoma Tax Commission, 395 P.2d 388 (Okla. 1964), which the Oral Roberts University court cited for this proposition, stated:

“...[W]here the legislature convened many times during this period of administrative construction without expressing its disapproval, such silence may be regarded as acquiescence in or approval of the administrative construction.”

Whether it is a written policy or not is immaterial in the instant case. The taxpayer necessarily relied on the practice of the Sales and Use Tax Division of the Oklahoma Tax Commission as established in 1963 or 1964, when the liability for service of aircraft of foreign ownership was initially deemed not subject to tax by the Sales Tax Division of the Oklahoma Tax Commission. The fact that the policy was not conveyed to the taxpayer in writing in this context is of no dispositive effect. In Oklahoma Tax Commission v. Liberty National Bank and Trust Company, 289 P.2d 388 (Okla. 1955), the question was whether the Tax Commission acquiesced, thereby approving, in taxpayer's method of writing off bad debts. The following narrative in Oral Roberts University, 714 P.2d 1013 (Okla. 1985), described the sequence of events: In 1943, Liberty asked the Commission, in writing, if using this method would be proper. The Commission asked Liberty if it had been cleared to do so by the Internal Revenue Service. Liberty replied, "Yes", the Commission did not reply, and Liberty went ahead and started such a system. Four years later, a Commission field auditor, in reviewing Liberty's 1944 return, commented verbally that he thought Liberty was using "an improper method", but did not correct the tax return in question. Not until three years later did the Commission formally

question the method used, assessing back taxes against Liberty. This Court held in favor of Liberty, saying:

“We are of the opinion that Commission’s own consistent administrative interpretation of the tax statute for a period of over 20 years must prevail over a contrary interpretation now suggested by it for the first time.” Liberty National Bank and Trust Co., 289 P.2d at 392

The application of the Sales Tax Code to sales of aircraft parts and the service provided in repairing aircraft of foreign ownership has been subject to the longstanding interpretation by the Sales and Use Tax Division of the Oklahoma Tax Commission. Moreover, there were no compelling reasons given for the Sales and Use Tax Division’s change in the interpretation of the Sales Tax Code. That is not to say that, where a court of competent jurisdiction fundamentally changes the permissible activities under a statute, a governmental agency may not adjust its interpretation of the statute accordingly, since estoppel, where the public revenues are involved, will not generally be applied. Crane Co. v. Arizona State Tax Commission, 63 Ariz. 426, 163 P.2d 656 (1945), overruled on other grounds Duhamel v. State Tax Commission, 65 Ariz. 268, 179 P.2d 252 (1947).

The issue of whether the Import-Export Clause of the United States Constitution prohibits assessment of state sales tax on the sale of parts and materials used in the repair of foreign owned aircraft, as well as the assessment of sales tax on goods placed aboard a foreign destination, is not a case of first impression before the Oklahoma Tax Commission. In fact, prior administrators of the Oklahoma Tax Commission apparently chose not to tax such sales, believing them to be barred by the Import-Export Clause, which states:

No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. Unite[D] States Constitution, Art. I, § 10, cl.2.

The focus of Protestant’s argument is that the sale of goods with a foreign destination are, per se, not subject to state sales tax. Protestant bases its position principally on the decision of the U.S. Supreme Court in Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, 67 St.Ct. 156, 91 L.Ed 80 (1946). In Richfield, the court held unconstitutional the state excise tax imposed on the sale of oil in the state to the country of New Zealand. The dispositive issue was whether the goods being taxed had already entered the export stream. In other words, where the delivery of the goods “[M]arked the commencement of the movement of the oil abroad”, such goods were said to be free of state taxation. This was the rule until a later case decided by the Court measured the validity of state taxes on imports and exports in a different way. The new standard was announced in Michelin Tire Corp. v. Wages, 423 U.S. 276, 96 S.Ct. 535, 461 L.Ed2d 495 (1976).

In Michelin, the Court stated that the Import-Export Clause did not bar all taxes, but only imports or duties. *Id.* at 290, 96 S.Ct. at 543, 46 L.Ed2d at 506. The tax imposed in Michelin by the State of Georgia was an ad valorem property tax on petitioner’s inventory held in a warehouse in the State.

The Court said one purpose of the Import-Export Clause was to prevent exactions by states which were directed at imports or commercial activity as such, and which could be used by the states to regulate interstate and foreign commerce. Id. at 291, 292, 96 S.Ct. 543, 46 L.Ed2d 506, 507. To this function the Court addressed the following comment:

The terminology employed in the Clause - "Imposts or Duties" - is sufficiently ambiguous that we decline to presume it was intended to embrace taxation that does not create the evils the clause was specifically intended to eliminate. Id at 294, 96 S.Ct. 544, 46 L.Ed2d 508.

From this statement, it is concluded that a non-discriminatory state tax on imports or exports is not prohibited by the Import-Export Clause if the tax does not violate the underlying policies state by the Court in Michelin. Those policies are: 1. Preservation of uniform federal regulation of foreign relations; 2. Protection of federal revenue derived from imports; and 3. Maintenance of harmony among the inland States and the seaboard States. Washington Department of Revenue v. Association of Washington Stevedoring Companies, et al., 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed2d 682 (1978) (Powell, J. concurring). These policy considerations were extended to exports in Washington Stevedoring, Id at 758, 98 S.Ct. at 1403, 55 L.Ed2d at 702.

In holding that the export tax ban under the Import-Export Clause vindicates two of the above mentioned policies, the Court, in Washington Stevedoring, stated that that ban does not serve to protect federal revenues because the Constitution forbids federal taxation of imports. Id at 758, 98 S.Ct. at 1403, 55 L.Ed2d at 702. Therefore, based upon these decisions, the Oklahoma sales tax is an excise tax upon goods sold intrastate to purchasers of foreign origin and does not interfere with the ability of the Federal Government to conduct foreign policy, and does not exact a special tariff on those purchases, and further, the effect of the Oklahoma sales tax on federal import or export revenues is nil. The tax on goods purchased in the open market is merely for the purpose of sharing the burden of government along with all other intrastate purchases. Finally, the Oklahoma sales tax does not interfere with maintenance of harmony among the inland states and seaboard states.

CONCLUSIONS OF LAW

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

(1) The Oklahoma Tax Commission has jurisdiction in this matter under 68 O.S. 1981 § 207.

(2) The taxation provisions of Title 68 O.S. § 1301 et seq. imposing a sales tax on goods sold or provision of services to owners of foreign aircraft brought into the State of Oklahoma for servicing does not violate the Import-Export Clause of the United States Constitution, (U.S. Constitution, Art. I, 10, cl. 2), but must be applied prospectively and in accordance with the Oklahoma Supreme Court's directive in Oral Roberts.

(3) The Tax Commission's consistent administrative interpretation for approximately twenty (20) years of the sales tax statute as applied to sale of parts and provision of services in connection with the repair of airplanes of foreign ownership is no longer applicable due to a fundamental change in the law. Michelin Tire Corp. v. Wages, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed2d 495 (1976).

(4) The assessment, in the amount of One Hundred Fifty-Eight Thousand One Hundred Sixty-Nine Dollars and Thirty-Five Cents (\$158,169.35) plus interest in the amount of Three Hundred Ninety-Two Dollars and Fifteen Cents (\$392.15) and penalty in the amount of One Hundred Twenty-Nine Dollars and Eighty Cents (\$129.80) should be withdrawn.

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.