

JURISDICTION: OKLAHOMA TAX COMMISSION DECISION
CITE: 87-01-20-02 / NON-PRECEDENTIAL
ID: P-85-152
DATE: JANUARY 20, 1987
DISPOSITION: DENIED
TAX TYPE: SALES
APPEAL: AFFIRMED / S.CT. 68,274
DECISION NOT PUBLISHED

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATEMENT OF FACTS

A field audit of the records of Protestant for the period April 1, 1981 through February 29, 1984 was conducted by the Sales and Use Tax Division of the Oklahoma Tax Commission. Protestant was notified by letter dated July 30, 1984 that the Sales and Use Tax Division of the Oklahoma Tax Commission proposed an assessment of additional sales and use tax for the period April 1, 1981 through February 29, 1984, interest and penalty in the following amounts:

Sales Tax:	\$276,924.87	Use Tax:	\$40,054.59
Interest:	59,638.89	Interest:	8,445.12
Penalty:	<u>27,692.49</u>	Penalty:	<u>4,005.46</u>
Total:	\$364,256.25	Total:	\$52,505.17

Protestant was granted an extension of time until October 1, 1984, in which to file its protest. Protest to the proposed assessment was received by the Sales and Use Tax Division of the Oklahoma Tax Commission on September 26, 1984.

Following informal meetings held on January 9, 1985 and February 28, 1985, attended by representatives of the Sales and Use Tax Division of the Oklahoma Tax Commission and the Protestant, the Protestant was notified by letter dated June 19, 1985, that corrections to the proposed assessment had been made, resulting in the following adjusted amounts:

Sales Tax:	\$200,158.25	Use Tax:	\$40,054.59
Interest:	83,747.73	Interest:	15,654.95
Penalty:	<u>20,015.83</u>	Penalty:	<u>4,005.46</u>
Total:	\$303,921.81	Total:	\$59,715.00

Following an informal meeting held on January 30, 1986 attended by representatives of the Sales and Use Tax Division of the Oklahoma Tax Commission and the Protestant, the Protestant was notified by letter dated February 25, 1986, that corrections to the proposed assessment had been made resulting in a proposed assessment of sales and use tax, interest and penalty in the following adjusted amounts:

Sales Tax:	\$178,111.67	Use Tax:	\$40,054.59
Interest:	74,456.67	Interest:	15,654.95
Penalty:	<u>17,811.17</u>	Penalty:	<u>4,005.46</u>
Total:	\$270,379.51	Total:	\$59,715.00

At an informal meeting held on March 27, 1986 attended by representatives of the Sales and Use Tax Division of the Oklahoma Tax Commission and the Protestant, the Sales and Use Tax Division of the Oklahoma Tax Commission agreed to delete the proposed assessment of sales tax on the transaction described as Item No. 1 on Page 37 of the Sales and Use Tax Division's Sales Tax Field Audit Work Papers (sales to STORE No. 3 of inventory items having a value of \$10,976.40). No amended proposed assessment has been received by the Protestant as of this date.

Prior to the hearing before the Commission on May 15, 1986, the Protestant agreed that the proposed assessments of use tax on the transaction described as Item No. 18 on Page 1 of the Sales and Use Tax Division's Use Tax Field Audit Work Papers (purchases from CUSTOMER 1 of inventory items having a value of \$166,963.25) and sales tax on the transaction described as Item No. 2 on Page 41 of the Sales and Use Tax Division's Field Audit Work Papers (sales to CUSTOMER 2 of inventory items having a value of \$785,762.76) were correct. Protestant further agreed to assessments on sales made to CUSTOMER 2.

CONTENTIONS OF PROTESTANT

Protestant's first contention is that the assessment of sales and use tax is barred by the statute of limitations. Protestant further contends that the assessment of sales and use tax is preempted by the assessment of Oklahoma gross production tax. Finally, Protestant contends that the tax on gross receipts obtained through barter should be based on a formula which values the product bartered at its fair market value rather than amounts entered by Protestant on its books after an exchange.

CONTENTIONS OF THE SALES AND USE TAX DIVISION

The Sales and Use Tax Division of the Oklahoma Tax Commission contends that Protestant's assessments were not without the period of limitation provided in 68 O.S.1981, § 223, since the proposed assessment was made properly under 68 O.S.1981, § 221. The Sales and Use Tax Division of the Oklahoma Tax Commission further contends that payment of gross production tax (68 O.S.1981, § 1001 et seq.) is not in lieu of sales or use tax which may be due on the sale or exchange of machinery, appliances or equipment used in and around a well which produces petroleum products. Finally, the Sales and Use Tax Division of the Oklahoma Tax Commission contends that, under 68 O.S. §§ 1352, 1354 and 1365, the Sales and Use Tax Division of the Oklahoma Tax Commission properly assessed sales and use tax based on the values stated in Protestant's business records.

APPLICABLE LAW

Assessment of any tax under the Uniform Tax Procedures provisions are found at 68 O.S. 1981, § 221, which provides as follows:

§ 221. Reports or returns by taxpayer.

(a) If any taxpayer shall fail to make any report or return as required by any state tax law, the Tax Commission, from any information in its possession or obtainable by it, may determine the correct amount of tax for the taxable period. If a report or return has been filed, the Tax Commission shall examine such report or return and make such audit or investigation as it may deem necessary. If, in cases where no report or return has been filed, the Tax Commission determines that there is a tax due for the taxable period, or if, in cases where a report or return has been filed, the Tax Commission shall determine that the tax disclosed by such report or return is less than the tax disclosed by its examination, it shall in writing propose the assessment of taxes or additional taxes, as the case may be, and shall mail a copy of the proposed assessment to the taxpayer at his last-known address. Proposed assessments made in the name of the "Oklahoma Tax Commission" by its authorized agents shall be considered as the action of the Tax Commission.

(b) Any assessment, correction or adjustment made as a result of an office audit shall be presumed to be the result of an audit of the report or return only, and such office audit shall not be deemed a verification of any item in said report or return unless said item shall have been made the subject of a hearing before the Tax Commission, and the correctness and amount of such item determined at such hearing; and such office audit shall not preclude the Tax Commission from subsequently making further adjustment, correction or assessment as a result of a field audit of the books and records of the taxpayer, wherever located, or upon disclosures, from any source other than the return. In cases where no report or return has been filed, the assessment of the tax on any information available shall in no event preclude the assessment at any time on subsequently disclosed information.

(c) Within thirty (30) days after the mailing of the aforesaid proposed assessment, the taxpayer may file with the Tax Commission a written protest under oath, signed by himself or his duly-authorized agent, setting out therein:

(1) A statement of the amount of deficiency as determined by the Tax Commission, the nature of the tax and the amount thereof in controversy;

(2) A clear and concise assignment of each error alleged to have been committed by the Tax Commission;

(3) The argument and legal authority upon which each assignment of error is made; provided, that the applicant shall not be bound or restricted in such hearing, or on appeal, to the arguments and legal authorities contained and cited in said application;

(4) A statement of relief sought by the taxpayer; and

(5) A verification by the taxpayer or his duly authorized agent that the statements and facts contained therein are true.

(d) If in such written protest the taxpayer shall request an oral hearing, the Tax Commission shall grant such hearing, and shall, by written notice, advise the taxpayer of a date, which shall not be less than ten (10) days from the date of mailing of such written notice, when such taxpayer may appear before the Tax Commission and present arguments and evidence, oral or written, in support of his protest. Hearings shall be held as soon as practicable. In the event an oral hearing is not requested, the Tax Commission shall proceed without further notice to examine into the merits of the protest and enter an order in accordance with its findings.

(e) If the taxpayer fails to file a written protest within the thirty-day period herein provided for or within the period as extended by the Commission, then the proposed assessment, without further action of the Tax Commission, shall become final and absolute at the expiration of thirty (30) days from the date same is mailed to the taxpayer or at the expiration of the period as extended by the Tax Commission.

(f) The Tax Commission may in its discretion extend the time for filing a protest for any period of time not to exceed an additional ninety (90) days.

(g) Within a reasonable time after the hearing herein provided for, the Tax Commission shall make and enter an order in writing in which it shall set forth the disposition made of the protest and a copy of such order shall forthwith be mailed to the taxpayer. The taxpayer may within the time and in the manner provided for by Section 225 of this Code, appeal to the Supreme Court, but in the event he fails to so proceed, the order shall within thirty (30) days from the date a certified copy thereof is mailed to the taxpayer, become final. The provisions of Section 226 of this Code, shall not apply where a proposed assessment or an assessment of taxes has been permitted to become final.

(h) In all instances where the proposed assessment or the assessment of taxes or additional taxes has been permitted to become final, a certified copy of the assessment may be filed in the Office of the court clerk of any county in this state, and upon being so filed, the court clerk shall enter same upon the judgment docket in the same manner as provided for in connection with judgments of district courts. When an assessment is so filed and docketed, it

shall have the same force and be subject to the same law as a judgment of the district court, and accordingly it shall constitute a lien on any real estate of the taxpayer located in the county wherein filed; and execution may issue and proceedings in aid of execution may be had the same as on judgment of district courts. The remedies provided in this paragraph shall be in addition to other remedies provided by law.

The period of time within which the Tax Commission has to assess taxes is governed by 68 O.S. § 223, which provides:

§ 223. Limitation of time for assessment of taxes—Extension agreements—False or fraudulent or failure to file report or return

(a) No assessment of any, tax levied under the provisions of any state tax law except as provided in the following paragraphs of this section, shall be made after the expiration of three (3) years from the date the return was required to be filed or the date the return was filed, whichever period expires the later, and no proceedings by tax warrant or in court without the previous assessment for the collection of such tax shall be begun after the expiration of such period.

(b) Where before the expiration of the time prescribed in the preceding paragraph for the assessment of the tax, both the Tax Commission and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon, and the period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. In those instances where the time to file a claim for a refund has not expired at the date the extension agreement is entered into, the entering into such an agreement shall automatically extend the period in which a refund may be allowed or a claim for a refund may be filed to the final date of such agreement.

(c) In the case of either a false or a fraudulent report or return, or failure to file a report or return, as required under any state tax law, the Tax Commission is authorized to compute, determine and assess the estimated amount of tax due from any information in its possession, or a proceeding in court may be begun for the collection of such tax without assessment at any time.

The proposed assessments in this case were issued prior to the expiration of three (3) years from the date the return was required to be filed or the date the return was filed as required by Section 223. Protestant essentially contends that there was no issuance of an assessment in this case within the period of limitation provided by the Legislature as clearly stated in the wording of Section 223.

Protestant’s argument fails for two reasons. First, to construe Section 221 as Protestant has urged would require the Oklahoma Tax Commission to anticipate whether or not a defense would be interposed to a proposed assessment in the form of a protest. The Oklahoma Tax Commission would also be required to estimate how long the appeal process involved in any protest would take if the protest extended beyond the period allowed for a “final” assessment. In most cases this would result in the forfeiture by the Oklahoma Tax Commission of taxes due. Such a statutory construction is unreasonable and unworkable.

Secondly, Protestant’s construction of Section 223 would render that section at times superfluous, again as when a protest is filed and the hearing on the merits extends beyond the limitation of time within which to make a final assessment. Under a clear reading of Section 223, an assessment, either proposed or final, is in this case, within the requirements of the period of limitation set forth in that section. It is a well settled rule of statutory construction that statutes must be interpreted so as to give meaning to each portion thereof and not so that a statute is rendered superfluous. Anderson v. O’Donoghue, 677 P.2d 648, 651 (Okla. 1983).

Section 1001 of Title 68 of the Oklahoma Statutes is relied on by Protestant for the proposition that the sales and use tax portion of the Oklahoma Tax Code is preempted by the gross production tax as far as any taxes imposed on machinery, appliances and equipment used in and around a well producing petroleum products.

Section 1001 states in pertinent part:

§ 1001. Gross production tax on minerals, oil and gas

...

(g) The payment of the taxes herein levied shall be in full, and in lieu of all taxes by the state, counties, cities, towns, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon producing leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper, or for petroleum or other crude oil or other mineral oil, or for natural gas and/or casinghead gas, upon the mineral rights and privileges for the minerals aforesaid belonging or appertaining to land upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil, or natural gas and/or casinghead gas, or any mine producing asphalt or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt or ores bearing minerals herein before mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or other property hereinbefore in this paragraph mentioned or described; and any interest in the land, other than that herein enumerated, and oil in storage, asphalt and ores bearing minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation for

any subsequent tax year, shall be assessed and taxed as other property within the taxing district in which such property is situated at the time.

(h) No equipment, material or property shall be exempt from the payment of ad valorem tax by reason of the payment of the gross production tax as herein provided except such equipment, machinery, tools, material or property as is actually necessary and being used and in use in the production of asphalt or of ores bearing lead, zinc, jack, gold, silver or copper or of petroleum or other crude oil, or other mineral oil or of natural gas and casinghead gas; and it is expressly declared that no ice plants, hospitals, office buildings, garages, residences, gasoline extraction or absorption plants, water systems, fuel systems, rooming houses and other buildings, nor any equipment or material used in connection therewith, shall be exempt from ad valorem tax.

The clear meaning of Subsection (g) as it relates to other subjects of taxation is found in the Syllabus by the Court of a recent Oklahoma Supreme Court case which stated:

2. The gross production tax . . . , is levied on the occupation or business of producing the commodities therein designated, and is in lieu of a property tax.

Apache Gas Products Corp. v. Oklahoma Tax Commission, 509 P.2d 109, 110 (Okla. 1973).

Such a reading of the gross production tax indicates that the states highest court does not believe the tax is in lieu of any other taxes, such as sales or use tax. We are bound to follow the decisions of the Oklahoma Supreme Court. Moreover, it was also stated in Apache, 509 P.2d at 116 (Okla. 1973):

We have, held that: “The long-continued construction of statutory provisions by a department of government charged with their execution is entitled to great weight and should not be overturned without cogent reasons; and where the Legislature has 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.” D. L. Peterson v. Oklahoma Tax Commission, 395 P.2d 388 (Okla. 1964).

The final issue is whether the Sales and Use Tax Division of the Oklahoma Tax Commission was correct in valuing items bartered or exchanged by Protestant for sales tax purposes based on the value given those items on Protestant’s books of account. Under § 1352(L) of the Oklahoma Sales Tax Code, a “[S]ale shall mean the transfer of either title or possession of tangible personal property for a valuable consideration regardless of the manner, method, instrumentality or device by which the transfer . . . is accomplished . . . including the barter, lease, or rental . . . of such property, . . .”

Protestant contends that the value should be based on fair market value rather than the value given these items on Protestant’s books of account. The Sales and Use Tax Division of the

Oklahoma Tax Commission based its assessment on the value given by Protestant on its books of account.

Protestant traded its inventory items for inventory items of another, and Protestant testified at hearing that certain entities with which it traded valued items from inventory at the value stated on the invoices provided by Protestant. Protestant did not present any evidence that the values placed upon its inventory were erroneous, but did, subsequent to hearing, present documents asserting the fair market value of the items assessed.

Section 1365(C) of Title 68 provides:

(C) It shall be the duty of every vendor required to make a sales tax report and pay any tax under this article to keep and preserve suitable records of the gross daily sales together with invoices of purchases and sales, bills of lading, bills of sale and other pertinent records and documents which may be necessary to determine the amount of tax due hereunder and such other records of goods, wares and merchandise, and other subjects of taxation under this article as will substantiate and prove the accuracy of such returns. It shall also be the duty of every person who makes sales for resale to keep records of such sales which shall be subject to examination by the Tax Commission or any authorized employee thereof while engaged in checking or auditing the records of any person required to make a report under the terms of this article. All such records shall remain in Oklahoma and be preserved for a period of three (3) years, unless the Tax Commission, in writing, has authorized their destruction or disposal at an earlier date, and shall be open to examination at any time by the Tax Commission or by any of its duly-authorized agents. The burden of proving that a sale was not a taxable sale shall be upon the person who made the sale.

Protestant made taxable sales and contemporaneously recorded the value of the items. Section 1352(F) of Title 68 provides:

(F) "Gross receipts" or "gross proceeds" shall mean the total amount of consideration for the sale of any tangible personal property or service taxable under this article, whether the consideration is in money or otherwise. "Gross receipts" or "gross proceeds" shall include, but not be limited to:

- (1) Cash paid,
- (2) Any amount for which payment is charged, deferred or otherwise to be made in the future, regardless of the time or manner of payment,
- (3) Any amount for which credit or a discount is allowed by the vendor,
- (4) Any amount of deposit paid for transfer of possession, and

(5) Any value of a trade-in or other property accepted by the vendor as consideration.

There shall not be any deduction from the "gross receipts" or "gross proceeds" on account of cost of the property sold, labor service performed, interest paid, losses or any expenses whatsoever, whether or not the tangible personal property sold was produced, constructed, fabricated, processed or otherwise assembled for or at the request of the consumer as part of the sale.

It is not doubted that the actual cash value or fair market value may be different than the value placed on the items here. But for purposes of assessment, the Oklahoma Tax Commission will value the items traded at the amount of consideration recorded, assuming that value is determined to be reasonable. As a general economic principle, moreover, when items are traded in a business context, they are traded for a value equal to what is given up.

CONCLUSIONS

Based upon the above and foregoing findings of fact and applicable law, the undersigned Administrative Law Judge concludes as follows:

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

(2) The assessments of sales and use tax issued under 68 O.S. 1981, § 1354 were within the period of limitation provided by 68 O.S. 1981, § 223.

(3) The provisions of the Gross Production Tax Code relating to exemption of, inter alia, machinery and equipment from assessment of a tax on the property rights inherent in those items is not an exemption of such equipment from payment of sales and use tax.

(4) The value of the gross receipts recorded on the business records of Protestant contemporaneous with the barter, trade or exchange of equipment or machinery was properly based on the amount of consideration attributable to those items as recorded on Protestant's books and records.

(5) The assessment by the Sales and Use Tax Division of the Oklahoma Tax Commission of sales tax, interest and penalty in the amount of Two Hundred Seventy Thousand Three Hundred Seventy-nine Dollars and Fifty-one Cents (\$270,379.51), and Use tax, penalty and interest in the amount of Fifty-nine Thousand Seven Hundred Fifteen Dollars (\$59,715.00) is correct and proper and said amounts, with any additional interest accruing, should be deemed due and owing until paid.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION that the protest of PROTESTANT be denied and that the assessments dated February 25, 1985 in the amount of

Two Hundred Seventy Thousand Three Hundred Seventy-nine Dollars and Fifty-one Cents (\$270,379.51) for sales tax, penalty and interest and Fifty-nine Thousand Seven Hundred Fifteen Dollars (\$59,715.00) for use tax, penalty and interest, be deemed due and owing and interest is to continue to accrue thereon from the date of assessment until paid in full.

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.