

JURISDICTION: OKLAHOMA TAX COMMISSION DECISION
CITE: 87-01-27-18 / NON-PRECEDENTIAL
ID: P-86-042
DATE: JANUARY 27, 1987
DISPOSITION: DENIED
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 the undersigned Administrative Law Judge by the Oklahoma Tax Commission, and hearing had, at which hearing Protestant appeared by TREASURER, Treasurer of PROTESTANT. The Sales and Use Tax Division of the Oklahoma Tax Commission appeared by OTC ATTORNEY, Attorney, of the General Counsel’s Office of the Oklahoma Tax Commission.

Opening statements were made and exhibits, not itemized herein, were introduced. TREASURER testified for PROTESTANT and AUDITOR, Field Auditor, testified for the Sales and Use Tax Division. Closing arguments were made by the respective parties, and the matter was submitted for a decision.

STATEMENT OF FACTS

The Sales and Use Tax Division conducted a field audit of the Protestant for the period October 1, 1980 through August 31, 1985. Additional sales tax, interest and penalty was assessed on October 11, 1985 for this audit period, and extended to September 30, 1985. The adjusted audit figures are as follows:

	<u>Sales Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
Per audit	\$48,931.95	18,349.48	4,893.19	72,174.62
Adjustments	<u>3,096.73</u>	<u>1,660.11</u>	<u>309.68</u>	<u>1,746.30</u>
Adjusted audit	52,028.68	16,689.37	5,202.87	3,920.92
Paid – 1/22/86	(31,538.90)			(31,538.90)
2/14/86	<u>(16,734.05)</u>			<u>(16,734.05)</u>
Balance	\$ 3,755.73	16,689.37	5,202.87	25,647.97

Protestant’s business consists of sales and leasing of computer software and hardware.

Sales and Use Tax Division Field Auditor, AUDITOR, upon audit, examined all records and determined that Protestant had failed to remit sales tax on sales and leases of computer hardware and software. On November 7, 1985, Protestant requested and was given a thirty (30) day extension of time within which to protest the proposed assessment. Protestant filed its protest in a timely manner on December 5, 1985.

CONTENTIONS OF PROTESTANT

Protestant contends that a portion of the gross receipts from the sale or lease of computer software and hardware should be exempt from sales tax in that this portion was in fact a provision of services under 68 O.S. 1981, § 1352(L)(1) and § 1354(1)(H).

CONTENTIONS OF DIVISION

The Sales and Use Tax Division contends that, since the charges for services in connection with the sale or lease of computer hardware and software are not stated separately on Protestant's invoices, the gross receipts are taxable under 68 O.S. 1981, § 1352(F) and § 1354(1)(H).

APPLICABLE LAW

Section 1352(L)(1) of Title 68 provides in pertinent part:

(L) "Sales" means 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 in this state, including but not limited to:

(1) The exchange, barter, lease, or rental of tangible personal property resulting in the transfer of the title to or possession of the property; and...

In addition, 68 O.S. § 1354(1) (H) provides:

1. There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code, an excise tax of three and one-fourth percent (3¼%) of the gross receipts or gross proceeds of each sale of the following:

(H) Computer hardware, software, coding sheets, cards or magnetic tapes on which prewritten programs have been coded, punched, or otherwise recorded;...

Under the provisions of the above statutes, Protestant should have collected sales tax based on the gross receipts from the sale or lease of computer hardware and software.

Section 1352(F) of Title 68 provides:

(F) "Gross receipts" or "gross proceeds" means 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, and

(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, and

(3) Any amount for which credit or a discount is allowed by the vendor, and

(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, except for used or trade-in parts excluding tires or batteries for a motor vehicle, bus, motorcycle, truck-tractor, trailer, semitrailer or implement of husbandry, as defined in Sections 1-105, 1-25, 1-134, 1-135, 1-162, 1-180 and 1-183 of Title 47 of the Oklahoma Statutes, if the used or trade-in parts are taken in trade as exchange on the sale of new or rebuilt parts.

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, or losses, or of 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.

Under the above provisions, the “gross receipts” terminology refers to total consideration paid for the taxable property; in this case computer hardware and software. There may not be a deduction for labor services performed as stated in the final paragraph.

The evidence reflects Protestant’s failure to separate charges for services as indicated on the invoices to its customers and the sales and lease agreements, the latter of which provide that an additional fee would be charged should such service in fact be required.

CONCLUSIONS

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 sale or lease of computer hardware and software is a taxable event under 68 O.S. 1981, § 1354(1)(H).

(3) Protestant is liable for the balance of the assessment of sales tax, including penalty and interest, since failure to collect the tax was not due to an error of fact or misinterpretation of law.

(4) The total amount of the balance of the assessment as stated, including penalty and interest, in the amount of Twenty-five Thousand Six Hundred Forty-seven Dollars and Ninety-seven Cents (\$25,647.97) should be upheld.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION that the protest of PROTESTANT be denied, and that the balance of the assessment, including penalty and interest, in the amount of Twenty-five Thousand Six Hundred Forty-seven Dollars and Ninety-seven Cents (\$25,647.97) plus any accrued interest is proper and owing.

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.