

**JURISDICTION:** OKLAHOMA TAX COMMISSION DECISION  
**CITE:** 87-10-28-06 / NON-PRECEDENTIAL  
**ID:** P-86-433  
**DATE:** OCTOBER 28, 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 by the Oklahoma Tax Commission to ALJ, Administrative Law Judge. A hearing was had, at which hearing, the Protestant appeared not, nor by counsel. The Sales Tax Section of the Business Tax Division appeared by OTC ATTORNEY, Attorney. Exhibits, not herein itemized, were received into evidence, and this case was submitted for a decision.

**STATEMENT OF FACTS**

The Sales Tax Section of the Business Tax Division conducted a field audit of Protestant for the period October 1, 1982 through September 30, 1985. As a result of the audit, the Sales Tax Section of the Business Tax Division issued a proposed assessment on July 25, 1986 in the following amount:

<u>Sales Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
\$35,480.89	\$13,644.69	\$3,574.95	\$52,700.53

Protestant is in the business of selling sand, fill dirt, topsoil and gravel to contractors and builders.

The Division Field Auditors, AUDITOR ONE and AUDITOR TWO, upon audit, examined all records and determined that Protestant had failed to remit sales tax on sales of sand, fill dirt, topsoil and gravel. Protestant filed a protest in a timely manner on August 22, 1986.

**ISSUES AND CONTENTIONS**

The sole issue herein is whether the Protestant has met its burden of proving that the sales tax assessment was incorrect.

Protestant, in its protest letter, contended that sales tax should not be charged on freight and that some of the items upon which tax was assessed were tax exempt. However, the Protestant failed to appear at the hearing and failed to file a brief or a position letter to support its position.

The Sales Tax Section of the Business Tax Division contends that tax is due from sales to persons who do not hold a valid sales tax permit. To support its contention, the Sales Tax Section of the Business Tax Division relies upon Title 68 O.S.1981, § 1352(L)(1), et seq.

**APPLICABLE LAW**

Title 68 O.S. § 1352(L)(1) provides:

(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...

Further, 68 O.S. § 1354 (1) (A) 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:

(A) Tangible personal property;

In the case at hand, Protestant made transfers of title and/or possession of tangible personal property (e.g., sand, fill dirt, topsoil, gravel, etc.), which were taxable transactions pursuant to the above cited statutory authority.

Protestant contends that sales tax should not be charged on that portion of its gross receipts which is attributable to freight costs. However, 68 O.S § 3152(F) defines gross receipts as follows:

(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, 1-125, 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. (Emphasis added.)

Clearly, under the above statute, “gross receipts” or “gross proceeds” includes the total amount of consideration paid for the taxable personal property, in this case, the sand, fill dirt, topsoil, gravel, etc.

There can be no deduction from the gross receipts or gross proceeds for freight costs. Unless the charge for such freight is stated separately from the charge for the personal property, the freight costs are merely incidental to the sale of the personal property.

In the case at hand, where Protestant separately stated the freight costs on its invoices, no sales tax was assessed on the freight portion. However, where the Protestant’s invoices did not separately state that portion which Protestant contends was attributable to freight costs, sales tax was assessed upon the gross receipts pursuant to 68 O.S. § 1354(1)(A), supra and 68 O.S. § 1352(F), supra.

With respect to Protestant’s additional contention that some of the items set up as taxable were in fact tax exempt sales, Protestant has failed to provide any documentation or other evidence to support such contention.

Rule 26 of the Rules of Practice and Procedure Before the Oklahoma Commission provides as follows:

In all proceedings, unless otherwise provided by law, the burden of proof shall be on the protestant to show in what respect the action or proposed action of Tax Commission is incorrect. If, upon hearing, the protestant fails to prove a prima facie case, the Administrative Law Judge may dismiss the case for lack of sufficient evidence and, thereafter, recommend that the Commission deny the protest solely upon the grounds of failure to prove sufficient facts which would entitle the protestant to the requested relief.

The Protestant has provided no statutory authority or case law to support its position, it has failed to file brief or position letter and failed to appear at the hearing. The Protestant has also failed to provide supporting documents. The Protestant has failed in its burden of proof.

**CONCLUSIONS OF LAW**

In view of the above and foregoing findings of fact and law applicable thereto, the undersigned Administrative Law Judge finds as follows:

(1) That the Oklahoma Tax Commission has jurisdiction in this matter.

(2) That the Protestant has failed to provide substantiating documentation to support its position, has failed to file a brief or position letter, and failed to appear at the bearing. The Protestant has failed to meet its burden of proof and the sales tax assessment should stand as a properly made assessment.

(3) That the sales tax protest of PROTESTANT be denied.

**DISPOSITION**

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the sales tax protest of PROTESTANT be denied. That the sales tax, penalty and interest assessed is due and owing plus any additional interest accrued and continuing to accrue 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.