

JURISDICTION: OKLAHOMA TAX COMMISSION DECISION
CITE: 87-10-29-03 / NON-PRECEDENTIAL
ID: P-86-173
DATE: OCTOBER 29, 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 ALJ, Administrative Law Judge, by the Oklahoma Tax Commission. A hearing was had, at which hearing Protestant appeared not, nor by counsel. The Sales Tax Section of the Business Tax Division of the Oklahoma Tax Commission appeared by OTC ATTORNEY, Attorney. Exhibits, not herein itemized, were received into evidence, and this case was submitted for a decision.

STATEMENT OF FACTS

During a use tax audit of SUPERMARKET of CITY, Oklahoma, FIELD AUDITOR, a field auditor for the Sales Tax Section, discovered a sales invoice from the Protestant to SUPERMARKET. The invoice was dated July 31, 1984 and numbered XXXX. It showed that the numerous items of tangible personal property listed thereon were shipped to SUPERMARKET of CITY, Oklahoma via "SHIPPER." The invoice showed a total sales price of Fifty-Three Thousand Five Hundred Fifty-Two Dollars and Eighty-Four Cents (\$53,552.84). Sales tax, penalty and interest was assessed on the sale in the amount of Four Thousand Four Hundred Ninety Dollars (\$4,490.00).

Upon the audit lead, the Sales Tax Section, by letter dated October 18, 1985, informed the Protestant that it had been selected for a sales and use tax audit and that it had the opportunity to select the location where the audit would be conducted. Referring to a telephone conversation, the Protestant, by letter dated October 21, 1985, reiterated that its business consisted of installing bakeries and deli's in supermarkets. It stated that this was done through wholesale grocery brokers, who in turn sold the equipment to their customer (store). The letter concluded that since the Protestant does not have any dealings in the State of Oklahoma except those mentioned, there was no justification for an audit.

The Sales Tax Section responded to the Protestant's letter on January 10, 1986. The Sales Tax Section advised the Protestant that information in our office (the invoices) indicated that the Protestant was making sales which were subject to Oklahoma sales tax. It stated that by making deliveries of the tangible personal property sold in its own trucks to Oklahoma customers, there was sufficient nexus with the State of Oklahoma to justify an audit. In conclusion, the Sales Tax Section's letter informed the Protestant that if it did not respond by February 1, 1986 as to where an audit may be conducted, the Sales Tax Section would make an assessment based upon the information it had.

No response was received by February 1, 1986, and on April 30, 1986, the Sales Tax Section issued an assessment for sales tax for the period of July 1, 1984 through July 30, 1984 against the Protestant and PRESIDENT, President, based upon the information obtained by the Sales Tax Section. The assessment was in the total aggregate amount of Four Thousand Four Hundred Ninety Dollars (\$4,490.00), consisting of city and state sales tax in the amount of Three Thousand Two Hundred Thirteen Dollars and Eighteen Cents (\$3,213.18), interest in the amount of Nine Hundred Fifty-Five Dollars and Fifty Cents (\$955.50), and penalty in the amount of Three Hundred Twenty-One Dollars and Thirty-Two Cents (\$321.32).

On May 6, 1986, the Protestant forwarded a verified written protest to the assessment dated April 30, 1986. The protest stated that the items sold to SUPERMARKET were shipped directly from factories in various states, other than Oklahoma, by common carrier. Four items were attached to the protest which at first glance showed the truth to the allegation made. The four items were: a list of items sold to SUPERMARKET, along with their origin of purchase; a notarized statement attesting to the facts pertaining to the sale of merchandise to SUPERMARKET; invoices showing items returned by SUPERMARKET and being deducted from the original invoice; and, an affidavit from the independent truck contractor that delivered the items to SUPERMARKET.

Upon receipt of the protest letter, AUDITOR, auditor for the Sales Tax Section, called the Interstate Prorate Division and the Corporation Commission of the State of Kansas to verify the allegation in item four attached to the Protest. AUDITOR found in his investigation that according to the Interstate Prorate Division and the Corporation Commission of the State of Kansas, the independent truck contractor, INDEPENDENT TRUCK CONTRACTOR, was not registered as a common carrier.

Pursuant to the above information, the Sales Tax Section forwarded the file to the Administrative Proceedings Section of the Oklahoma Tax Commission for a hearing. The Administrative Proceedings Section attempted twice to have a pre-hearing conference in this matter. The first notice of a pre-hearing conference for January 20, 1987 was sent by certified mail dated November 14, 1986. The notice was returned unclaimed. The second notice of a pre-hearing conference for June 3, 1987 was sent by certified mail dated March 20, 1987. This notice was returned, refused.

Upon the second notice being returned, refused, the Administrative Law Judge of the Oklahoma Tax Commission determined that any further attempt to conduct a pre-hearing conference would be fruitless and thereupon scheduled a hearing for May 28, 1987.

ISSUES AND CONTENTIONS

The sole issue herein is whether the State of Oklahoma has sufficient nexus to tax the sale of tangible personal property by the Protestant to SUPERMARKET.

The Protestant contends that the sales tax assessment is completely without merit. Protestant asserts that certain items were shipped directly from factories in various states, other than Oklahoma. To support this contention, Protestant attached to its protest a list of items sold

to SUPERMARKET, along with their origin of purchase from various states; a notarized statement by the President of PROTESTANT, attesting to the facts pertaining to the sale of merchandise to SUPERMARKET; invoices showing items returned by SUPERMARKET and deducted from the original invoice; and, an affidavit from an independent truck contractor that delivered items to Oklahoma, along with a sample check showing payments in the normal course of business.

The Sales Tax Section contends that the facts surrounding the sales transaction between the Protestant and SUPERMARKET indicate sufficient nexus within the State of Oklahoma for the application of sales tax. To support this contention, the Sales Tax Section relies on Title 68 O.S. 1981, § 1407 and on Liberty Steel Company v. Oklahoma Tax Commission, 554 P.2d 8 (Okla. 1976). The Sales Tax Section also asserts that the Protestant has inadequately supported its position and has not sustained its burden of proof. To support this contention, the Sales Tax Section relies on Rule 26 of the Rules of Practice and Procedure Before the Oklahoma Tax Commission.

APPLICABLE LAW

Title 68 O.S. 1981, § 1407 provides as follows:

The Tax Commission may in its discretion, upon application, authorize the collection of the tax herein levied by any retailer or vendor not maintaining a place of business within this state but who makes sales of tangible personal property for use in this state and by the out-of-state place of business of any retailer or vendor maintaining places of business both within and without Oklahoma and making sales of tangible personal property at such out-of-state place of business for use in this state. Such retailer or vendor shall be issued, without charge, a permit to collect such taxes, in such manner and subject to such regulations and agreements as the Tax Commission shall prescribe. When so authorized, it shall be the duty of such retailer or vendor to collect the tax upon all tangible personal property sold to his knowledge for use with this state. Such authority and permit may be cancelled when at any time the Tax Commission considers that such tax can more effectively be collected from the person using such property in this state. Provided, however, that in all instances where such sales are made or completed by delivery to the purchaser within this state by the retailer or vendor in such retailer's or vendor's vehicle, whether owned or leased (not by common carrier), such sales or transactions shall continue to be subject to applicable state and any local sales tax at the point of delivery and the tax shall be collected and reported under taxpayer's sales tax permit number accordingly. (Emphasis Added)

In Liberty Steel Company v. Oklahoma Tax Commission, 554 P.2d 8 (Okla. 1976), the Supreme Court of Oklahoma reviewed the above emphasized language of Section 1407 and held that Section 1407, under the facts and circumstances surrounding the sales made by Liberty, did not create a constitutionally impermissible tax burden.

The Sales Tax Section contends that Liberty, supra is directly on point with the present protest and must be followed. The facts surrounding the sales transactions in Liberty are practically identical to the facts surrounding the sales transaction in this protest.

Liberty purchased and resold metal beams, angles and strips, etc. to users, contractors and manufacturers for use in construction projects, but not to retailers for resale. It had never maintained an office in Oklahoma, advertised in Oklahoma or had any employees who resided in Oklahoma. It accepted orders in its Dallas office by phone or mail and through outside salesmen who called on customers in Oklahoma. Deliveries were made by trucks owned by Liberty and were F.O.B. origin. During the year of 1974, twenty-five percent (25%) of Liberty's total sales volume was to residents of Oklahoma.

The facts of this protest indicate that the Protestant's business consisted of installing bakeries and deli's in supermarkets. In the particular sales transaction at issue, the certain items sold to SUPERMARKET were purchased from various states and either used in the construction of the bakery or deli or used in the bakery or deli. None of the items were sold for resale. It appears that the Protestant does not maintain an office in Oklahoma, advertise in Oklahoma or have any employees who reside in Oklahoma. There is nothing in the record which indicates how the Protestant gets its jobs; whether by phone, mail order or outside salesmen, however, the Protestant acknowledged in a letter dated October 21, 1985 that its business consisted of installation of bakeries and deli's in supermarkets.

The crucial fact is the form of delivery. Items sold to SUPERMARKET were delivered to SUPERMARKET in CITY, Oklahoma in trucks owned by the Protestant and were F.O.B. origin. This fact is evidenced by the invoice for the sales transaction and was attested to by the President of the Protestant corporation and INDEPENDENT TRUCK CONTRACTOR in affidavits attached to its protest.

The facts surrounding the sales transaction in this protest are practically identical to the facts surrounding the sales transaction in Liberty, supra, and therefore, the opinion of the Supreme Court of Oklahoma in Liberty is controlling and must be followed.

The fact that INDEPENDENT TRUCK CONTRACTOR is an independent hauling contractor does not distinguish Liberty, supra from this protest. INDEPENDENT TRUCK CONTRACTOR is not registered as a Common Carrier in the State of Kansas. Therefore, as to the State of Oklahoma, his act of hauling the items sold to SUPERMARKET was that of an agent of the Protestant and under the accepted general rules of the law of agency, was the act of the Protestant.

The Protestant, having failed to accept notice of the pre-hearing conference and having failed to appear at the hearing or to write a brief or position letter to support its position, has failed in its burden of proof. Rule 26 of the Rules of Practice and Procedure Before the Oklahoma Tax Commission provides as follows:

In all proceedings, unless otherwise provided by law, the burden of proof shall be upon the protestant to show in what respect the action or proposed

action of the 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. (Emphasis Added)

CONCLUSIONS OF LAW

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

- (1) That the Oklahoma Tax Commission has jurisdiction in this matter.
- (2) That the opinion of the Supreme Court of Oklahoma in Liberty Steel Company v. Oklahoma Tax Commission, 554 P.2d 8 (Okla. 1976) is controlling.
- (3) That the proposed assessment is correct and proper and in accordance with the statutes and that additional city and state sales tax, interest and penalty is due and owing by the Protestant to the State of Oklahoma in the amount of Four Thousand Four Hundred Ninety Dollars (\$4,490.00), plus penalty and interest accruing thereon until paid.
- (4) That Protestant has failed to meet its burden of proving that the sales tax assessment was incorrect. See Rule 26, Rules of Practice and Procedure Before the Oklahoma Tax Commission.
- (5) 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 protest of PROTESTANT be denied, and that PROTESTANT be required to pay the sales tax as assessed, plus penalty and interest accruing thereon from the due date until paid.

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.