JURIS: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **98-06-02-002 / NOT PRECEDENTIAL**
ID: **P9400292 / P9400292A**
DATE: **06-02-98**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **OKLA SUP CT 91,884 / OTC DECIS AFFIRMED**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes on for disposition of the protest of TAXPAYER CORPORATION and its principal officer, to a proposed assessment of sales tax on the value of sample products, display cases and advertising materials provided to salesmen, retailers and others for promotional purposes. An evidentiary hearing was conducted by one of the Commission's Administrative Law Judges, who filed findings of fact and conclusions of law herein with a recommendation that the protest be sustained. Objections were filed to those findings, and the Commission ordered and heard oral argument *en banc*. Now, having reviewed the record herein and the evidence presented, and having considered the argument of counsel, the Commission makes it Findings of Fact and Conclusions of Law and enters the following order, denying said protest.

FINDINGS OF FACT

1. TAXPAYER CORPORATION is organized under the laws of Oklahoma and doing business in this State. At all times material herein, PROTESTANT was its president.

2. Taxpayer manufactures rodeo and commemorative belt buckles and awards. Taxpayer sells its products primarily to retail vendors, approximately 95% of whom are located outside the State, utilizing a force of sales representatives who function as independent contractors, most of whom are also located out of the state. The out-of-state shipments of taxpayer's products to its customers are generally by United Parcel Service. All materials used in the making of taxpayer's products are purchased free of tax as materials used in the manufacture of products for sale.

3. Taxpayer also manufactured and/or contracted to have manufactured, display cases which are used by taxpayer's customers to display taxpayer's belt buckles. The cases are provided to taxpayer's customers with a bulk purchase of belt buckles of $2,500 or more. No additional charge is made for one of the cases, nor does taxpayer allow any reduction in the purchase price of the bulk order to a customer who does not want one of the cases.

4. The display cases are manufactured by the taxpayer or taxpayer's contractor in the State of Oklahoma, out of materials purchased by the taxpayer free of tax as materials to be used in the manufacturing of a product for sale. Taxpayer is not regularly engaged in the business of manufacturing display cases for any purpose other than providing them to its customers as stated above. The cases are provided to taxpayer's customers as part of a promotional package.

5. Taxpayer purchases silk screen banners which are used to advertise its products at rodeos and other sporting events. In exchange for donations to the rodeo or event organizer, taxpayer negotiates for space at the event in which to hang the advertising banners. The banners are purchased by taxpayer free of tax, ostensibly either because taxpayer is a manufacturer or is purchasing them for resale.

6. Finally, taxpayer furnished sample belt buckles to its sales representatives for use in promoting taxpayer's products, and to rodeos and other sporting events for use as prizes or other promotional purposes. No charge was made for the samples.

7. Taxpayer did not report or pay sales tax to the State of Oklahoma on the display cases, sample belt buckles or advertising banners. Taxpayer did not file sales tax reports or income tax returns in any states other than Oklahoma. During the audit, taxpayer's books did not reflect receipt of any value, benefit, income or money for the providing of the cases, samples or banners.

8. After a field audit, the Audit Division on July 25, 1994, proposed AN assessment of additional sales taxes, interest and penalty on the value of the display cases, sample products and advertising banners for the period January 1, 1991, through January 31, 1994, and taxpayer filed a timely protest. Based on additional information from the taxpayer, the Division subsequently revised and reduced the proposed assessment to the following amount, here at issue:

Sales tax	$XX,XXX.XX
Interest (thru 7-30-95)	XX,XXX.XX
Penalty	X,XXX.XX
Total	$XX,XXX.XX

The tax amounts were calculated using the taxpayer's invoice cost of materials as the taxable sales value for the display cases and the banners, and taxpayer's cost of materials and labor for the sample belt buckles.

CONCLUSIONS OF LAW

1. The Oklahoma Sales Tax Code imposes a sales tax on the gross receipts or gross proceeds from the sale of tangible personal property. 68 O.S. 1991, §1354(1)(A). Under the Code, "sale" means the transfer of either title or possession [within this state] of tangible personal property for a valuable consideration, 68 O.S. 1991, §1352(L), and includes "[t]he disposition for consumption or use in any business or by any person of all goods, wares, merchandise, or property which has been purchased for resale, manufacturing, or further processing." 68 O.S. 1991, §1352(L)(2). Where property is purchased for resale, manufacturing or further processing and such property is then withdrawn from stock in trade for use or consumption by the purchaser, sales tax is levied on the sales value of the property. 68 O.S. 1991, §1362(C).

2. Such is the case here. Taxpayer purchased the banners and the materials with which it made the sample products and display cases, free of tax under the exemption given for materials or property purchased for resale or manufacture of a product for sale. Taxpayer, however, did not sell the samples, cases or banners to its salesmen, customers or event organizers. Instead, taxpayer provided those items to the recipients without charge, for its own marketing, promotional and advertising purposes. The taxable use of the items was made by the taxpayer.

3. Taxpayer argues that the samples, cases and banners were "sold" to the recipients, the consideration for such sale being the intangible benefit taxpayer received (or hoped to receive) from being able to advertise its products. And, according to the taxpayer, since the items were sold to persons outside of the state, no sales tax is due.

4. We disagree. Taxpayer itself recorded no benefit, income or value received for the transfer of these items to the recipients. Nor can it be said that the recipients parted with anything of value to receive the items. While the benefits of advertising may have been taxpayer's motive for giving away samples and such, that motive does not translate into consideration, nor does the transaction turn into a sale. *See, e.g., Wallace Berrie & Co. v. State Bd. Of Equalization,* 707 P.2d 204 (Cal.1985) (Absent evidence of receipt of consideration, transfer of property from one party to another does not constitute a "sale" for sales tax purposes; wholesaler was liable for use tax on display racks furnished to its retail customers, where racks were transferred to customers without billing for racks or raising price of accompanying merchandise.)

5. We therefore conclude that the proposed assessment stated herein is correct and that the protest should be denied.

WAIVER OF INTEREST

Although we conclude that the protest should be denied, we also conclude that, under the facts and circumstances of this case, the interest ordinarily accruing during the pendency of these proceedings should be waived pursuant to 68 O.S. Supp. 1997, §220.

DISPOSITION

The protest of TAXPAYER CORPORATION and PROTESTANT OFFICER to the proposed assessment, as revised, is denied. It is further ordered that the interest ordinarily accruing herein from July 25, 1994, to the date of this order is hereby waived.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was **NOT** deemed precedential by the Commission. This means that the legal conclusions are not 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.