JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **98-06-02-011 / NOT PRECEDENTIAL**
ID: **P9400030**
DATE: **06-02-98**
DISPOSITION: **SUSTAINED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Taxpayer moves to have the burden of proof shifted to the Division to show a reasonable basis for the inclusion of the items in the audit and proposed assessment. In support of the Motion, Taxpayer argues that it has complied with the Division's requests for documentation and/or information to substantiate the exempt status of the items.

The Division opposes the Motion and urges its denial. In support thereof, the Division argues that the burden of proving the sale of the items is exempt from sales tax is borne by the Taxpayer, citing 68 O.S. 1991, §§ 1354(1) and 1365(C), ***Bert Smith Road Machinery Co. v. Oklahoma Tax Commission***, 563 P.2d 641 (Okl. 1977) and Rule 710:1-5-47 of the Oklahoma Administrative Code. Further, the Division argues that the burden of proof rests with the party attempting to show the affirmative and never shifts, citing ***Owens v. Sun Oil Company***, 482 F.2d 564 (1973) and ***Rudnicki v. Town of Valley Brook***, 424 P.2d 973 (Okl. 1967).

The parties to this proceeding acknowledge that whether the sale of the item is exempt from sales tax is dependant upon the use of the item by the purchaser. The issue presented by the Motion is which party should have the burden of presenting evidence to show how the items are used by the purchaser.

The crux of the matter is that Taxpayer is a highly specialized custom manufacturer of stainless steel parts and accessories. Although each item manufactured by Taxpayer is described on a purchase invoice and/or a job work order, the description of the items is not indicative of how the item is used by the purchaser and is in most cases based on what the item most closely resembles. The Division does not challenge the manner in which Taxpayer keeps its books and records.

Initially, the undersigned finds that the Division's reliance on the decision of the Oklahoma Supreme Court in ***Bert Smith****, supra*. is misplaced. In ***Bert Smith***, the Supreme Court at page 643 held, "[taxpayer] had the burden of showing that [the purchaser of the mobile asphalt plant] was not primarily a contractor, but primarily a manufacturer". Here, the Division does not dispute that the majority of Taxpayer's sales were made to manufacturers and that the Manufacturers Limited Exemption Certificate ("MLEC") number of the manufacturer appeared on the purchase invoices. Additionally, the Taxpayer sought and received secondary certification of the claim for exemption from each of the manufacturers.

The Division asserts that it is unable to remove any further items from the audit without additional information as to how the items are used by the purchasers or additional certification as to each specific item purchased. Taxpayer claims that it has already lost one customer because of its attempts to obtain certification and any further attempts will adversely affect it business.

The Legislature in 1991 amended Section 1361(A) of the Oklahoma Sales Tax Code[1] to provide that the purchaser shall be liable for the remittance of tax, penalty and interest due on any sale where the Tax Commission finds that the purchaser improperly presented a sales tax permit or other certification or used the property purchased exempt from tax in a manner that would not have qualified for exemption. 68 O.S. 1991, § 1361(A). All but a very few of the transactions which remain at issue occurred subsequent to the effective date of the amendment to Section 1361(A).

The Division argues that the provisions of Section 1361(A) are not applicable to these proceedings. The Division asserts that having the purchaser's MLEC number on file does not constitute a claim for exemption on any particular purchase nor does the MLEC number appearing on the purchase invoice constitute a claim for exemption. The evidence in this proceeding, however, indicates that the claim for exemption was presented by the purchaser at the time of purchasing each item. Taxpayer testified that in each instance at the time of invoicing the purchaser, the purchaser was contacted to determine whether an exemption from tax was claimed and that in all cases where an exemption was claimed, Taxpayer wrote the purchaser's MLEC number on the invoice and didn't charge tax. Whether the MLEC was improperly presented is not at issue, however, it is safe to say that the Division believes the claim was improperly made otherwise the transaction would not be included in the audit. Accordingly, the undersigned finds that the provisions of Section 1361(A) as amended in 1991 are applicable to all but the very few transactions remaining at issue which occurred prior to the effective date of the amendment.

The Division contends that the Taxpayer has the burden of proving that the sale of each item is exempt from sales tax citing Section 1365(C) wherein it provides "[T]he burden of proving that a sale was not a taxable sale shall be upon the person who made the sale." Reconciling this provision of Section 1365(C) with the provisions of Section 1361(A) as amended, the undersigned finds that the vendor has the burden of proving a sale is not a taxable sale in those cases where a sales tax permit or other certification of exemption is not presented by the purchaser at the time of the sale. In all other cases, the vendor has the burden of proving that a sales tax permit or other certification of exemption was presented by the purchaser at the time of the sale.

Here, Taxpayer has sustained its burden of proving that a claim for exemption was

[1] 68 O.S. 1991, § 1351 et seq.

accepted from each of the purchasers at the time of the sale of each of the items remaining at issue. Accordingly, the undersigned finds that the burden of proof is shifted to the Division to present reasonable evidence for the inclusion of the items in the audit and proposed assessment.

DISPOSITION

THEREFORE, IT IS ORDERED that the Motion to Shift Burden of Proof should be and the same is hereby sustained.

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.