JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **98-11-19-004 / PRECEDENTIAL**
ID: **CR940018**
DATE: **11-19-98**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Claimant solicited offers to purchase its ANONYMOUS gas pipeline gathering system (hereinafter "ANONYMOUS SYSTEM"), at least a portion of which was physically located within the City of ANONYMOUS CITY ONE, Oklahoma.

2. Claimant's principal location of business is ANONYMOUS CITY TWO, Oklahoma.

3. By letter dated September 22, 1993, AN ANONYMOUS Fuel Corporation submitted a revised offer to purchase the assets and gas purchase contracts associated with the ANONYMOUS SYSTEM for $2,100,000.00 in cash.

4. ANONYMOUS FUEL CORPORATION'S principal location of business is ANONYMOUS CITY THREE, Oklahoma.

5. ANONYMOUS FUEL CORPORATION'S offer was contingent upon (1) an option to accept or reject the gas purchase agreements, (2) a due diligence examination of Claimant's books and records pertaining to the ANONYMOUS SYSTEM and related contracts, and of the physical assets of the ANONYMOUS SYSTEM, including an environmental assessment, (3) approval of ANONYMOUS FUEL CORPORATION'S Board of Directors, and (4) execution of a mutually agreeable purchase and sale agreement.

6. Claimant accepted ANONYMOUS FUEL CORPORATION'S offer on September 22, 1993.

7. The closing of the sale and purchase of the ANONYMOUS SYSTEM was held on October 15, 1993, at AN ANONYMOUS LOCATION near but outside the city of ANONYMOUS CITY FOUR in ANONYMOUS County, Oklahoma.

8. All negotiations for the sale and purchase of the ANONYMOUS SYSTEM prior to the closing were conducted by facsimile or mail.

9. The terms of the Purchase and Sale Agreement indicate that the location of the closing was chosen to minimize sales tax on the transaction.

10. At the closing, the parties executed the agreements effectuating the sale and purchase of the ANONYMOUS SYSTEM, including the Purchase and Sale Agreement, the Assignment and Assumption of Easements, the Bill of Sale and Agreement and the Assignment of Contracts.

11. The Purchase and Sale Agreement was dated September 22, 1993. The effective date for the sale of the facilities and the transfer of the contractual rights and responsibilities was October 1, 1993. Risk of loss to the facilities passed to ANONYMOUS FUEL CORPORATION on the closing date.

12. The Purchase and Sale Agreement was amended during the closing and prior to the execution thereof by the addition and deletion of certain language to the contract.

13. Upon execution of the Purchase and Sale Agreement, ANONYMOUS FUEL CORPORATION caused to be transferred, by wire, the consideration for the transaction.

14. Prior to the date of closing, ANONYMOUS FUEL CORPORATION conducted its due diligence examination of Claimant's books and records as they pertained to the ANONYMOUS SYSTEM and related contracts, and of the physical assets of the SYSTEM.

15. On October 14, 1993, Claimant reimbursed ANONYMOUS FUEL CORPORATION for the costs incurred to remediate certain surface contaminates which reimbursement represented "total compensation for any remedial work pertaining to the existing or future environmental conditions of the properties sold and assigned to ANONYMOUS FUEL CORPORATION effective October 1, 1993".

16. ANONYMOUS FUEL CORPORATION'S Board of Directors ratified the purchase of the ANONYMOUS SYSTEM during their November, 1993, Board meeting.

17. On August 25, 1994, the Division caused to be issued against Claimant an assessment of additional municipal sales tax on the sale of the ANONYMOUS SYSTEM.

18. The aggregate amount assessed against Claimant on the sale of the ANONYMOUS SYSTEM was $5,732.66, inclusive of municipal sales tax in the amount of $4,745.25, penalty in the amount of $474.53, and interest accrued through August 8, 1994, in the amount of $512.88.

19. Claimant, on August 3, 1994, remitted the amount of the proposed assessment under protest and filed a claim for refund of the same.

20. On September 20, 1994, Claimant filed a timely protest to the proposed assessment.

21. By letter dated September 20, 1994, the Division denied Claimant's claim for refund.

22. On October 17, 1994, Claimant timely filed a demand for hearing on the Division's denial of its claim for refund.

ISSUES AND CONTENTIONS

Two issues are presented for decision. The first issue is whether municipal sales tax for the City of ANONYMOUS CITY ONE was properly levied on the sale of the ANONYMOUS SYSTEM. This issue only concerns that portion of the tangible personal property of the ANONYMOUS SYSTEM which is physically located within the City of ANONYMOUS CITY ONE. Claimant does not challenge the value assigned to this portion of the tangible personal property.

The second issue is whether the Tax Commission, under the decisions of the Oklahoma Supreme Court in ***Kay Electric Cooperative v. Oklahoma Tax Commission***[1] and ***R.R. Tway, Inc. v. Oklahoma Tax Commission***[2], is authorized to refund the municipal sales tax without joinder of the City of ANONYMOUS CITY ONE. This issue was address, after a hearing and consideration of the arguments and evidence, in the *Order Denying Motion for Joinder of the Municipality of ANONYMOUS CITY ONE, Oklahoma as a Party* filed herein on May 6, 1996. In the *Order* it was determined that the Tax Commission pursuant to the contractual agreement between the City of ANONYMOUS CITY ONE and the Commission is authorized to pay the refund out of current collections and deduct the same from the amount due the municipality. The determination that the Tax Commission is authorized to make refunds of municipal sales taxes without joinder of the municipality has been upheld by the Commission. See, Oklahoma Tax Commission Order No. 97-09-18-003 (Prec.).

Claimant contends that municipal sales tax was erroneously levied on the sale of the ANONYMOUS SYSTEM. In support of this contention, Claimant argues that municipal sales tax attaches at the "point of sale" which is where the physical transfer of the property takes place. Claimant argues that the physical transfer of the property occurred on October 15, 1993, at the ANONYMOUS LOCATION and to suggest otherwise is to misunderstand the transaction.

[1] 815 P.2d 175 (Okl. 1991).

[2] 910 P.2d 972 (Okl. 1995).

The Division contends that municipal sales tax was properly levied on the sale of the ANONYMOUS SYSTEM. In support of this contention, the Division argues that the purpose of the "point of sale" provision of the Oklahoma Sale Tax Code is to determine between competing taxing jurisdictions where the sale occurred and which is entitled to the tax. The Division argues that ANONYMOUS LOCATION did not figure into the transaction except to minimize the taxes attributable to the sale. The Division argues that the transfer occurred on October 1, 1993, as evidence by the payment made to ANONYMOUS FUEL CORPORATION and the fact that from October 1, 1993, Claimant was operating the system for the benefit of ANONYMOUS FUEL CORPORATION. The Division further argues that the terms of the contract reflect that the system was sold "as is, where is" and, therefore, the transfer of that portion of the ANONYMOUS SYSTEM located within the City of ANONYMOUS CITY ONE is subject to municipal sales tax.

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. 1991, § 207.

2. Sales of tangible personal property, unless specifically exempted, are subject to the levy of sales tax. 68 O.S. 1991, § 1354(1)(A). Such sales may also be subject to the levy of county and municipal sales taxes. 68 O.S. 1991, § 1370 and 68 O.S. 1991, § 2701.

3. The issue here turns on an interpretation of the statute defining "point of sale" for municipal sales taxes. See, ***Matter of Sales Tax Protest of LTV Energy Products Co.***, 883 P.2d 1287 (Okl.App. 1994). "Point of sale" is defined in Section 1352(K) wherein it provides in pertinent part:

   `Point of sale' means, for purposes of administration of any municipal or county sales tax levied in this state, the physical location at which a sale of tangible personal property or services taxable under this article is made in the course of the vendor's business, to be determined by one of the following:

   (1) If the consumer identifies tangible personal property or services and pays the sale price, in cash or otherwise, at a place of business maintained by the vendor, the point of sale shall be the location of such place of business, regardless of the place of delivery;

   (2) If a consumer, from a location outside the jurisdiction in which the vendor is engaged in business, orders or requests, by mail or telephonic or telegraphic device, to buy tangible personal property or services, the point of sale shall be the place of delivery, regardless of the manner of transportation;

(3) If the sale is made through solicitation at a place other than the place of business of the vendor, either by an employee, representative, or any other agent of the vendor, the point of sale shall be the place where the solicited offer to buy was accepted or approved by the vendor if the consumer does not have a right to accept or reject delivery;

(4) If the sale is made through solicitation at a place other than the place of business of the vendor, either by an employee, representative, or any other agent of the vendor, and the consumer has a right to accept or reject delivery, the point of sale shall be the place of delivery;

4. The Division's reliance on the terms of the Purchase and Sale Agreement to determine where the sale occurred is misplaced. The Court of Appeals in ***LTV**, supra*, at 1289, held that the point of sale shall be determined in accordance with subsections (1) through (4) of Section 1352(K), citing the express language of the provision. The Court reasoned that the 1987 amendment to the provision reflected an intent "to prevent the [contracting] parties from fixing point of sale by agreement, and to ignore technical rules on passage of title or possession found in the [Uniform Commercial Code]". Id.

5. Here, the evidence indicates, as argued by the Division, that the provisions of Section 1352(K)(2) or (K)(4) more closely resemble the transaction at issue. ANONYMOUS FUEL CORPORATION offered to purchase the ANONYMOUS SYSTEM by mail or facsimile from a location outside the jurisdiction in which Claimant was engaged in business. This offer was subject to ANONYMOUS FUEL CORPORATION'S right to accept or reject delivery based on certain stated conditions. In either instance, the statute provides that the "point of sale" shall be the place of delivery.

6. "Delivery" is the act by which a thing is placed within the actual or constructive possession or control of another. ***LTV**, supra*, at 1289, citing *Black's Law Dictionary* 428 (6th ed. 1990). "`Possession' clearly refers to him who has actual physical control of a thing". ***Ford v. Oklahoma Tax Commission***, 285 P.2d 436, 437-38 (Okl. 1955). Where the sale of tangible personal property does not contemplate the displacement of the property or is silent as to the delivery thereof, possession is acquired at the location of the property. See, ***Lodwick Lumber Co. v. E.A. Butt Lumber Co.***, 35 Okl. 797, 131 P. 917 (1913).

Here, a portion of the ANONYMOUS SYSTEM was located within the City of ANONYMOUS CITY ONE, Oklahoma. The Purchase and Sale Agreement did not contemplate the displacement of the property nor the delivery thereof. Accordingly, municipal sales tax was properly levied on the sale of that portion of the ANONYMOUS SYSTEM located within the City of ANONYMOUS CITY ONE.

7. Claimant's protest to the denial of the claim for refund of municipal sales tax should be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is DETERMINED that the protest to the denial of the claim for refund of Claimant be denied.

OKLAHOMA TAX COMMISSION