

**JURISDICTION:** OKLAHOMA TAX COMMISSION - DECISION  
**CITE:** 99-07-27-006 / NOT PRECEDENTIAL  
**ID:** P9500153  
**DATE:** 07-27-99  
**DISPOSITION:** DENIED  
**TAX TYPE:** SALES  
**APPEAL:** NO APPEAL TAKEN

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### STIPULATION OF FACTS

1. PROTESTANT Corporation ("ABC") is a foreign corporation authorized to do business in Oklahoma. Messrs. A, B, C and D (collectively "Officers") were officers of ABC during the period from June, 1990, through May 31, 1993 ("Relevant Period").
2. The Commission is an agency of the State of Oklahoma created pursuant to 68 Okla. Stat. Section 102.
3. ABC is engaged in, among other businesses, the sale of computer equipment and accessories.
4. A field audit of the books and records of ABC was conducted by the Division.<sup>1</sup>
5. By letter dated March 20, 1995, the Division proposed to assess ABC and the Officers additional sales taxes for the Relevant Period. Exhibit A is a copy of the proposed assessment.
6. By letter dated June 13, 1995, ABC timely filed a protest to such proposed assessment. Exhibit B is a copy of the protest.
7. By letter dated June 15, 1995, the Officers timely filed a protest to such proposed assessment. Exhibit C is a copy of the protest.
8. On October 16, 1996, the Division issued revised work papers, which reflect adjustments made to the proposed assessment. Exhibit D is a copy of the revised work papers.

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<sup>1</sup> The Audit Division, formed August 1, 1995, includes the field audit section of the Business Tax Division, which conducted the audit at issue.

9. On September 4, 1990, ABC sold computer equipment and accessories to ANONYMOUS GROUP<sup>2</sup>. Exhibit E is a copy of the invoice.

10. ANONYMOUS GROUP, INC. was awarded Contract XXX by A GOVERNMENTAL ENTITY on July 16, 1990, with respect to such computer equipment and such accessories. Exhibit F is a copy of the contract between the GOVERNMENTAL ENTITY and ANONYMOUS GROUP, INC.

11. By letter dated December 2, 1993, ABC advised ANONYMOUS GROUP, INC. that the Division auditor had questioned ABC's billing without sales tax to ANONYMOUS GROUP, INC. Subsequently, ANONYMOUS GROUP, INC. provided to ABC a copy of Sales Tax Permit ZZZ with an effective date of February 22, 1994, issued by the Commission to ANONYMOUS GROUP, INC. Exhibit G is a copy of the letter and the sales tax permit.

### **STIPULATION OF LEGAL ISSUES**

The remaining issues covered by the protest filed by ABC and the protest filed by the Officers are:

1. Whether the sales made by ABC to ANONYMOUS GROUP, INC. are exempt from sales tax under 68 Okla. Stat. Section 1356(B);
2. Whether the sales made by ABC to ANONYMOUS GROUP, INC. are exempt from sales tax under 68 Okla. Stat. Section 1357(C); and
3. Whether all of the accrued interest and penalty in connection with the proposed assessment should be abated by the Commission.

### **CONTENTIONS**

Protestant contends that the sales are exempt from sales tax. In support of this contention, Protestant argues that the sale of computer equipment and accessories at issue herein is exempt from sales tax under Section 1356(B) because, pursuant to the contract, ANONYMOUS GROUP, INC. acted as agent on behalf of the GOVERNMENTAL ENTITY and ownership and possession passed to the GOVERNMENTAL ENTITY as indicated by the contract, which permitted the GOVERNMENTAL ENTITY to enjoy the exclusive benefits of the contract. In the alternative, Protestant argues that the transaction at issue meets the requirements of the "sale for resale" exemption since ANONYMOUS GROUP, INC. was in the business of reselling the computer equipment and Protestant believed that the Tax Commission had issued ANONYMOUS GROUP, INC. a sales tax permit.

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<sup>2</sup> For clarity, the stipulated issues have been separately stated herein, and ANONYMOUS GROUP in this instance and hereafter refers to ANONYMOUS GROUP, INC.

Finally, in the event the protest is denied, Protestant requests a waiver of all penalty and interest assessed. Protestant alleges that it proceeded diligently and in good faith in connection with its protest of the proposed assessment; that it submitted reams of written evidence in support of the protest, which resulted in numerous transactions being deleted from the assessment; and that a considerable period of time has elapsed in the resolution of the protest because of a variety of factors, many of which were beyond the control of Protestant.

The Audit Division contends that the sales are not exempt under Section 1356(B). In support of this contention, the Audit Division argues that the requirements of Section 1356(B) were not satisfied because the contract at issue lacked a provision delineating ANONYMOUS GROUP, INC. as an "agent under contract" with the GOVERNMENTAL ENTITY and title did not pass to the GOVERNMENTAL ENTITY because the purchase price of the computer equipment was never paid.

In regard to the alternative argument, the Audit Division argues that the sale is not exempt under 68 O.S. Section 1357(C) because at the time of the transaction at issue ANONYMOUS GROUP, INC. did not possess a sales tax permit.

Finally, the Division contends that ABC is not entitled to a waiver of all penalty and interest for the reason that Protestant did not keep records to demonstrate that the sales upon which Protestant was assessed additional sales tax were exempt as required by Section 1365(C) of Title 68.

### CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission has jurisdiction of this protest. 68 O.S. Section 207.
2. Sales of tangible personal property, unless otherwise specifically exempted by the provisions of the Oklahoma Sales Tax Code, are subject to the levy of sales tax. 68 O.S. Section 1354(1)(A).
3. Section 1356 of Title 68 provides, in pertinent part:

There are hereby specifically exempted from the tax levied by this article:

\* \* \*

(B) Sales of property to agents appointed or contracted with by agencies or instrumentalities of the United States government if ownership and possession of such property transfers immediately to the United States government.

4. As a general rule, exemption statutes are to be strictly construed against the person claiming the exemption. *Bert Smith Road Machinery Company v. Oklahoma Tax Commission*, 563 P.2d 641, 643 (Okl. 1977). The language of an exemption statute may not be construed so as to give it an effect which is not intended. *Protest of Hyde*, 188 Okl. 413, 110 P.2d 292 (1941). The intent or purpose of a statutory provision is to be determined primarily from the language of the statute. *Hess v. Excise Board of McCurtain County*, 698 P.2d 930 (Okl. 1985).

5. Rule 710:65-13-130 (formerly 13.013.06) of the *Oklahoma Tax Commission Permanent Rules* construes the provisions of 68 O.S. Section 1356(B) as follows:

Sales to contractors in connection with the performance of any contract with the United States government, State of Oklahoma, of any of its political subdivisions are not exempt unless the ownership and possession of the property purchased by the contractor or agent transfers immediately to the United States government, State of Oklahoma, or Political Subdivision.

6. ANONYMOUS GROUP, INC. purchased computer equipment and accessories from Protestant on September 4, 1990, pursuant to contract XXX awarded ANONYMOUS GROUP, INC. on July 16, 1990, by the GOVERNMENTAL ENTITY. Under the contract the GOVERNMENTAL ENTITY acquired the equipment under a "36-month Lease-To-Ownership-Plan". The equipment was delivered directly to the GOVERNMENTAL ENTITY at AN ANONYMOUS LOCATION.

7. The facts demonstrate that the sale of equipment at issue was made to a contractor under contract with an instrumentality of the U.S. government and that possession transferred immediately to that governmental entity. The only question remaining in order to determine if the subject transaction is exempt under Section 1356 is whether ownership of the equipment passed immediately to the GOVERNMENTAL ENTITY.

8. Ownership is not defined in the Sales Tax Code. Where statutory words or phrases are not otherwise defined and a contrary intention does not plainly appear, the words or phrases are to be understood in their ordinary and usual sense. 25 O.S. Section 1. *Loffland Brothers Equipment v. White*, 689 P. 2d 311 (Okl. 1984).

9. The Protestant cites to *Random House Unabridged Dictionary* as defining ownership as "the state or fact of being an owner" and "the legal right of possession; proprietorship". The Protestant also cites Section 2101 of the Vehicle Excise Tax Code, which states:

The terms "legal ownership" and "legally owned" mean the right to possession, whether acquired by purchase, barter, exchange, assignment, gift, operation of law, or in another manner.

10. The Audit Division of the Oklahoma Tax Commission cites to *Black's Law Dictionary*, which defines "ownership", in part, as:

Collection of rights to use and enjoy property, including right to transmit it to others. [Cite omitted.] The complete dominion, title, or proprietary right in a thing or claim. The entirety of the powers of use and disposal allowed by law.

The right of one or more persons to possess and use a thing to the exclusion of others. The right by which a thing belongs to some one in particular, to the exclusion of all other persons. The exclusive right of possession, enjoyment, and disposal; involving as an essential attribute the right to control, handle, and dispose.

*Black's Law Dictionary*, 997 (5th ed. 1979).

11. An examination of the Contract and the other documents attached to the *Stipulations of Fact* do not support the proposition that ownership of the computer equipment, as the term is understood in a common, everyday sense, passed to the GOVERNMENTAL ENTITY.

12. Title to the computer equipment never passed to the GOVERNMENTAL ENTITY. Under the contract, "Title of each machine, including special features installed thereon, will pass to the Government when the purchase price is paid." By letter dated September 12, 1991, the GOVERNMENTAL ENTITY notified ANONYMOUS GROUP, INC. of its intent to extend the contract for the period of October 1, 1991, through September 30, 1992. However, by letter dated July 16, 1992, the GOVERNMENTAL ENTITY notified ANONYMOUS GROUP, INC. that it did not intend to renew the contract for the remaining option year. Further, in the letter, the GOVERNMENTAL ENTITY requested ANONYMOUS GROUP, INC. to submit a plan for de-installation and removal of the equipment. On November 30, 1992, the equipment was removed from the ANONYMOUS LOCATION. The purchase price was not paid. The GOVERNMENTAL ENTITY did not own the equipment and thus did not possess the authority to transfer or sell the equipment to another party.

13. Further, the contract provided at Part 1, Section C.5.2.1 that the "Government personnel shall not perform maintenance or attempt repair while equipment is under the purview of the contract unless agreed to by the contractor." The contract also provided at Part I, Section C.5.11.1 that all parts replaced become the property of the contractor. Although the contract, Part I, Section F.5.1, permits the Government "upon 30 days written notice" to make alterations or install attachments to the equipment, the language of this section specifically refers to the equipment as belonging to the contractor.

14. Protestant offers the case of *Imaging Services, Inc. v. Oklahoma Tax Commission*, 866 P.2d 1204 (Okl. 1993), as "instructive" in this matter. Protestant also offers Commission Order No. 97-05-08-11 in support of the broad argument that ownership transferred to the government in this instance, but admits that the case is "not instructive with respect to the present case."<sup>3</sup> *Imaging* and Commission Order No. 97-05-08-11 deal with whether there was a transfer of "legal ownership" as defined by Section 2101 of Title 68 for the purpose of imposing the Oklahoma Aircraft Excise Tax. Neither case involves a transaction under the Oklahoma Sales Tax Code. The referenced cases are simply not applicable to the determination of whether the subject transaction is exempt from sales tax.

15. Protestant also references 12A O.S. Section 1-201(37), which outlines a lengthy test to determine whether a transaction was intended as lease or as a security. However, Protestant fails to analyze the facts in this matter in light of the test and illustrate in what manner the result of the analysis would impact the outcome of this case.

16. The burden of proving that a sale was not a taxable sale is upon the person who made the sale. 68 O.S. Section 1365(C). Protestant failed to present sufficient evidence to prove that the sale of computer equipment assessed is exempt from sales tax under 68 O.S. Section 1356(B). Accordingly, Protestant's contention that the sale is exempt under 68 O.S. Section 1356(B) cannot be sustained.

17. Section 1357 of Title 68 provides, in pertinent part:

There are hereby specifically exempted from the tax levied by this article:

\* \* \*

(C) Sales for resale to persons engaged in the business of reselling the articles purchased, whether within or without the state, provided that such sales to residents of this state are made to persons to whom sales tax permits have been issued as provided in this article . . . .

18. In this matter, Protestant failed to sustain its burden of proving that the transaction at issue falls squarely within the provisions of the sale for resale exemption. The sale for resale exemption is conditioned upon the purchaser having a valid sales tax permit issued by the Tax Commission. 68 O.S. Section 1357(C).

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<sup>3</sup> Note 6 of Protestant's *Position Statement* filed with the Office of the Administrative Law Judge on December 8, 1997.

Protestant has failed to provide evidence to show that the purchaser of the computer equipment, ANONYMOUS GROUP, INC. had a sales tax permit on or before September 4, 1990, the date of the sale from Protestant to ANONYMOUS GROUP, INC. Further, the records of the Oklahoma Tax Commission indicate that ANONYMOUS GROUP, INC. was not issued a sales tax permit until February 22, 1994. Accordingly, the sale of the computer equipment and accessories from Protestant to ANONYMOUS GROUP, INC. is not exempt from the levy of sales tax pursuant to Section 1357(C) of Title 68.

19. The discretionary authority to waive penalty and interest or any portion thereof by the Tax Commission under 68 O.S. Section 220 is within the exclusive power of the Commissioners of the Tax Commission. This authority has not been delegated to the Administrative Law Judges of the Tax Commission. Accordingly, Protestant's request for a waive of penalty and interest is not addressed herein.

20. The protest to the proposed sales tax assessment should be denied.

### DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it WAS DETERMINED that the protest OF ABC CORPORATION AND ITS CORPORATE OFFICERS be denied.

**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.