JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2000-08-29-006 / NOT PRECEDENTIAL**
ID: **P9800320**
DATE: **08-29-00**
DISPOSITION: **SUSTAINED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon review of the file and records, including the record of the trial and the exhibits received into evidence, the undersigned finds:

1. During the audit period of January 1, 1994 through December 31, 1996, PROTESTANT INC. was in the business of automotive repair and the selling of automobiles. According to MR. OFFICER, the majority of PROTESTANT INC.'S income during this period was from the selling of automobiles. The most expensive automobile sold by PROTESTANT INC. was $5,000.00. Generally, PROTESTANT INC. sold automobile for less than $2,000.00.

2. PROTESTANT INC.'S business was located at 123 CAR STREET in AN ANONYMOUS City. The business was affected by A DISASTER to the point that it was practically shut down. According to MR. OFFICER, he could not get to his shop shortly after the DISASTER and he did not have any customers.

3. MR. OFFICER also worked in the home remodeling business during the audit period. According to MR. OFFICER, he only dabbled in home remodeling "once every couple of years." He does not advertise his home remodeling business on a continuous basis, but only when he has no other choice to make money. Any income from the home remodeling business is put in the PROTESTANT INC. business account. During the audit period, MR. OFFICER'S income tax returns did not reflect any income from his home remodeling business.

4. The crux of the protest to the proposed assessment involves a single transaction. The transaction is listed on the audit workpapers as item number XX in the amount of $14,000.00. The auditor testified that he subjected the transaction to sales tax as a sale of tangible personal property because of the lack of business records to identify the transaction. The only records available for audit were PROTESTANT INC.'S bank statements along with cancelled checks and deposit slips.

5. A copy of check number XXX dated September 25, 1996, was identified as item number XX on the audit workpapers. The payor on the check is listed as MR. "A" or MR. "B" of ANYCITY, Oklahoma. The check is made out to "PROTESTANT Construction Remodel Co." The amount of the check is $14,000.00. The memo on the check reflects 111 ANONYMOUS STREET.

6. MR. OFFICER testified that the check represents payment on a contract to remodel a house. According to MR. OFFICER, the remodeling job involved putting in cabinets, 48 feet of countertop, a bar, a closet, ceramic tile, carpet and paint. He stated he deposited the funds in PROTESTANT INC.'S account because he needed money for PROTESTANT INC. to survive and pay its bills.

7. MR. OFFICER testified that he could not remember ever having a single transaction involving $14,000.00 at PROTESTANT INC. According to the auditor, the $14,000.00 transaction was out of line with the kind of sales PROTESTANT INC. was making.

8. The aggregate amount assessed against Protestants, as revised, was $3,609.95, inclusive of sales tax in the amount of $2,402.26, interest accrued through April 26, 1999, in the amount of $967.45 and penalty in the amount of $240.24.

9. The amount in controversy in this cause is the sales tax, interest and penalty attributable to the $14,000.00 transaction.

ISSUES AND CONTENTIONS

The issue presented for decision is whether Protestants sustained their burden of proving that the assessment of sales tax on the $14,000.00 transaction is erroneous.

Protestants contend that the assessment of sales tax on the $14,000.00 transaction is erroneous. In support of this contention, Protestants argue that the evidence proves the transaction at issue was not a sale of tangible personal property by PROTESTANT INC., but represents a payment MR. OFFICER received for remodeling a home.

The Division contends that Protestants did not sustain their burden of proof and therefore, the assessment should be sustained. In support of this contention, the Division argues that the assessment is based on the best information available since Protestants did not maintain records in accordance with the Oklahoma Sales Tax Code, that the documentation submitted is not sufficient to remove the transaction and that it is just as likely, if not more likely, that the transaction represents payment for automotive repairs combined with automobile sales.

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. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect, and in what respect. ***Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission***, 768 P.2d 359 (Okl. 1988). Failure to provide evidence which is sufficient to show an adjustment to the proposed assessment is warranted will result in the denial of the protest. ***Continental Oil Company v. Oklahoma Tax Commission***, 570 P.2d 315 (Okl. 1977). The burden of proving a sale is not a taxable sale is on the person who made the sale. 68 O.S. 1991, § 1365(C).

3. The standard burden of proof in administrative proceedings is "preponderance of evidence." Black's Law Dictionary, 1064 (5th ed. 1979). See, *Oklahoma Tax Commission Order No.* 91-10-17-061. "Preponderance of evidence" means "[E]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Id. It is also defined to mean "evidence which is more credible and convincing to the mind ... [T]hat which best accords with reason and probability." Id.

4. Here, the undersigned finds that Protestants sustained their burden of proving by a preponderance of the evidence that the $14,000.00 transaction is not subject to sales tax.

5. Protestants' protest to the assessment of sales tax on the $14,000.00 transaction should be sustained.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it WAS DETERMINED that the protest to the assessment of sales tax on the $14,000.00 transaction of PROTESTANT INC. and MR. OFFICER, be sustained. It WAS further DETERMINED that the revised sales tax assessment be further revised to remove the $14,000.00 transaction and that the resultant amount of such revision, inclusive of any additional accrued and accruing interest, be fixed as the deficiency due and owing.

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.