JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2000-09-19-042 / NOT PRECEDENTIAL**
ID: **P9900172**
DATE: **09-19-00**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Protestant admits that he is a commercial photographer.

2. Protestant also admits that he is not an advertising agency and does not operate an advertising agency.

3. Protestant's business consists of portrait/personal relations photography and photography for advertising or promotional programs.

4. The Division audited Protestant's books and records for the period of February 1, 1996 through January 31, 1999.

5. Additional sales tax was assessed on two types of transactions.

6. The first type of transaction consists of additional taxable sales wherein Protestant did not charge, collect, report or remit sales tax on the gross receipts or gross proceeds of Protestant's charges for his photography services.

7. The second type of transaction consists of withdrawals from inventory wherein Protestant withdrew negative films from his inventory, used the film for taking photographs and retained the film.

8. In regard to the second type of transaction, during the audit period Protestant had a sales tax permit whereby he purchased materials and supplies, in particular negative films, tax exempt on the basis of a purchase for resale. Protestant testified that after his first audit, he was told to apply for a sales tax permit so that he could purchase his film and processing tax exempt.

9. Protestant admits that he retains the negative films and that he does not have any evidence to show the films subjected to sales tax on the withdrawal from inventory basis were anything other than negative films.

10. The amount in controversy concerning the withdrawal from inventory transactions is $813.13, inclusive of sales tax in the amount of $591.27, interest accrued through April 30, 1999, in the amount of $162.68, and penalty in the amount of $59.18.

11. In regard to the first type of transaction subjected to sales tax, Protestant separated the transactions into two categories.

12. The first category consists of basic portrait/public relations photography which photographs are not used in any promotional materials, but are retained by the client for personal reasons.

13. Protestant admits that he owes the sales tax assessed on the gross receipts or gross proceeds for his photography services from this category of photography.

14. The second category consists of Protestant's photography services for advertising or promotional programs which photographs are used in brochures or advertising pieces and are intended to advertise, market and promote a product or service.

15. The amount in controversy under this category is $3,370.88, consisting of sales tax in the amount of $2,361.82, interest accrued through April 30, 1999, in the amount of $772.86, and penalty in the amount of $236.20.

16. Under this category of transactions, Protestant's client is either an advertising agency or the company requesting the advertising or promotional material.

17. According to Protestant, he is hired to scout a location, product or service either alone or in collaboration with his client, determine what to photograph and how either alone, in collaboration with his client or at the direction of or within the parameter given by his client and photograph the subject so that it helps in the promotion or marketing of the subject.

18. According to AN ANONYMOUS OWNER OF AN ANONYMOUS Advertising Agency, a good photographer adds more than photographs to an advertising project. He stated that a good photographer helps in the formulation of ideas and programs for advertising purposes by the presentation of photographs which promote a product or service and which are appropriate for the advertising or promotional purpose. He further stated that a photographer participates in an advertising agency's program or campaign by taking photographs.

19. Protestant admits that generally the client decides which type of film is to be used. Protestant also admits that he takes several or numerous photographs of a subject, all of the photographs are given to his client and the client decides which photographs are to be used. Protestant also admits that he does not participate in formulating what the brochure or advertising piece should look like, in the writing of the text or in the placement of the photographs. Protestant further admits that he does not review or participate in the approval of the brochure or advertising piece before it is printed.

20. Protestant admits that he does not maintain a separate invoicing system for advertising work as opposed to portrait/PR work. He stated that the job description appearing on the invoices is the only difference between the invoices. He further stated that a client may request and receive the same article, a print, in either instance.

21. Protestant made an offer of proof regarding Protestant's Exhibit No. 9, which was denied admission into evidence in this cause because the Court was not advised in this matter of the facts and circumstances concerning the taxpayer in that cause. The Court ruled that the Exhibit stands for the proposition that the Commission has accepted, in certain circumstances, that a photographer may, in fact, be an advertising agency.

ISSUES AND CONTENTIONS

Two issues are presented for decision. The first issue is whether the evidence proves Protestant is acting in the capacity of an advertising agency when Protestant's business consists of photography for advertising or promotional programs, thus making the gross receipts from the sale of Protestant's photography services exempt from sales tax under Rule 710:65-19-2 of the *Oklahoma Administrative Code* (December 30, 1991).

The second issue is whether the Tax Commission is estopped from assessing sales tax on the sales value of the negative films which Protestant purchased tax exempt on the basis of a purchase for resale, withdrew from his inventory for use and retained.

Protestant contends that the assessment of sales tax on the gross receipts for his photography services when his business consists of photography for advertising or promotional programs is erroneous. In support of this contention, Protestant argues that the gross receipts from this work are for advertising services which are not subject to sales tax under *OAC*, Rule 710:65-19-2. Protestant asserts that he participates in the creation of the advertising work - in formulating ideas and programs for advertising purposes - and, therefore, his services in performing this work are not subject to sales tax.

Protestant further contends that he should not be liable for the sales tax assessed on the sales value of the negative film or, at the least, the penalty and interest associated therewith. In support of this contention, Protestant would show that he was told to apply for a sales tax permit so that he could purchase his film and processing tax free.

The Division contends that the assessment should be sustained in all particulars. In support of this contention, the Division cites Protestant's admission that he is not an advertising agency, but a commercial photographer. The Division asserts that in addition the evidence proves that Protestant is not an advertising agency and does not act in that capacity, therefore, the gross receipts from his photography services are subject to sales tax. The Division further contends that Protestant has failed to prove the sales value of the negative films is not subject to 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 tax is required to be charged, collected and remitted on the gross receipts or gross proceeds of each sale of tangible personal property. 68 O.S. 1991, § 1354(1)(A).

3. "Tangible personal property" is defined to mean "personal property which may be seen, weighed, measured, felt, or touched or which is in any other manner perceptible to the senses." 68 O.S. 1991, § 1352(N). The phrase "tangible personal property" is all inclusive, and is not limited except by specific exemption. ***Magnolia Petroleum Co. v. Oklahoma Tax Commission***, 326 P.2d 821 (Okl. 1958). As defined, prints, negatives and transparencies are tangible personal property within the Oklahoma Sales Tax Code[1].

4. The terms "gross receipts" or "gross proceeds" are defined in part to mean "the total amount of consideration for the sale of any tangible personal property or service taxable under this article, whether the consideration is in money or otherwise." 68 O.S. 1991, § 1352(F). Section 1352(F) further provides:

> There shall not be any deduction from the gross receipts or gross proceeds on account of cost of the property sold, labor service performed, interest paid, or losses, or of any expenses whatsoever, whether or not the tangible personal property sold was produced, constructed, fabricated, processed, or otherwise assembled for or at the request of the consumer as part of the sale. (Emphasis Added).

5. Commercial photographers and others providing photographic services are required to charge, collect, report and remit sales tax on the gross receipts or gross proceeds from: (1) taking, reproducing and selling photographs; (2) processing, developing, printing and enlarging film; (3) enlarging, retouching, tinting or coloring photographs; (4) processing exposed film into color transparencies, mounted or unmounted; (5) reproducing copies of documents, drawings, photographs, or prints by mechanical and chemical reproduction machines, blue printing and process camera equipment; and (6) sales of photographs to students through schools, even though school personnel may participate by collecting payments from students. *OAC*, Rule 710:65-19-260.

6. Rules complying with the Administrative Procedures Act[2] are valid and binding on persons they affect and have the force and effect of law until a court of competent jurisdiction determines otherwise. 75 O.S. 1991, § 308.2(B).

---

[1] 68 O.S. 1991, §§ 1350 et seq.

[2] 75 O.S. 1991, § 301 et seq.

7. The plain and unambiguous language of an enactment cannot be ignored. ***State v. Sims***, 690 P.2d 1052 (Okl. 1984); ***Allgood v. Allgood***, 626 P.2d 1323 (Okl. 1981). The language of *OAC*, Rule 710:65-19-2[3] clearly indicates that it is applicable solely to advertising agencies. Further, the Rule specifically provides that an advertising agency is the consumer/user of the materials and services it purchases to perform its services and, as such, must pay sales or use tax on those materials and services at the time of purchase. *OAC*, Rule 710:65-19-2(a).

8. Here, Protestant admits that he is neither an advertising agency nor acts in the capacity of an advertising agency, but is a commercial photographer. Further, the evidence presented in this cause does not show Protestant was an advertising agency or acting in the capacity of an advertising agency when he was engage in photography for advertising or promotional programs. As with his other client, Protestant was merely acting in the capacity of a commercial photographer.

In addition, in most of the disputed transactions, Protestant's client was an advertising agency. Accordingly, the tangible personal property and services Protestant sold to the advertising agencies were, under Rule 710:65-19-2, subject to tax at the time of purchase by the advertising agency.

9. Vendors of tangible personal property are required to report and remit sales tax on the sales value of all tangible personal property which has been purchased for resale and withdrawn from stock in trade for use or consumption. 68 O.S. 1991, § 1362(C).

10. The essential elements of an equitable estoppel are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the knowledge, actual or constructive, of the real facts; (3) the intention, or at least the expectation, that such conduct will be acted upon by, or influence, the other party; (4) lack of knowledge and the means of knowledge of the truth as to the facts in question by the party to whom the conduct is made; (5) reliance, in good faith, upon the conduct; and (6) action or inaction based thereon of such a character as to change the position or status of the party to his injury, detriment, or prejudice. See, ***Board of County Commissioners of Marshall County v. Snellgrove***, 428 P.2d 272 (Okl. 1967). See, generally, 28 Am Jur 2d ***Estoppel and Waiver*** § 35.

---

[3]Rule was renumbered and reformatted to comply with the codification requirements of the APA (75 O.S. 1991, §§ 250 et seq.) and the rules of the Director of the Oklahoma Department of Libraries. Former rule, prior to codification, from which this rule was derived was Rule 13.014.02 of the Oklahoma Tax Commission Permanent Rules. The administrative record does not show that the rule has been revised or amended.

11. As a general rule, estoppel does not apply against the state acting in its sovereign capacity, and the Tax Commission as an agency of the state is not bound by the unauthorized acts of its officers; ***State ex rel. Cartwright v. Dunbar***, 618 P.2d 900, 911 (Okl. 1980), or because of the mistakes or errors of its employees, ***State ex rel. Oklahoma Tax Commission v. Emery***, 645 P.2d 1048, 1051 (Okl. 1982). An exception is applicable, however, where the facts and circumstances show the interposition of estoppel will further some prevailing principle of public policy or interest; ***Burdick v. Independent School District***, 702 P.2d 48 (Okl. 1985), or where the officers and employees act within their authority, ***State ex rel. Commissioners of Land Office v. Lamascus***, 263 P.2d 426 (Okl. 1953).

12. 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 sufficient to show an adjustment to a 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).

13. Here, Protestant failed to establish the essential elements of an equitable estoppel. Accordingly, Tax Commission is not estopped from assessing sales tax on the sales value of the negative films.

14. Protestant's protest to the disputed portions of 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 Protestant d/b/a COMPANY ONE, be denied. It WAS further DETERMINED that the amounts in controversy be fixed as the deficiencies 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.