JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2000-09-21-006 / NOT PRECEDENTIAL**
ID: **P9600433**
DATE: **09-21-00**
DISPOSITION: **DENIED**
TAX TYPE: **SALES / TOURISM**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Division sent Protestant a letter of inquiry on the amount of deductions taken from gross receipts on Protestant's sales tax report for January, 1996. [Exhibit 1]

2. Protestant's response to Division's inquiry was received on or about March 26, 1996. [Exhibit 2]

3. The Division conducted a review of Protestant's sales tax reports for the period March 1, 1993 through February 29, 1996 ("Audit Period"). [Exhibit 3]

4. By letter dated April 15, 1996, the Division issued its proposed assessment of additional sales tax, together with interest and penalty thereon against COMPANY ONE, LOCATION "A", LOCATION "B" and LOCATION "C" for the audit period as follows:

Sales Tax:	$ 92,098.45	
Interest through 6/1/96:	21,779.42	
Penalty:	9,209.92	
TOTAL:	$123,087.79	[Exhibit 4]

5. The Division conducted a review of COMPANY ONE'S tourism tax record. The review disclosed that COMPANY ONE had not filed tourism tax reports for the audit period. [Exhibit 5]

6. By letter dated April 15, 1996, the Division issued its proposed assessment of tourism tax, together with interest and penalty thereon against COMPANY ONE for the period November 1, 1987 through February 29, 1996 as follows:

Tourism Tax:	$3,455.84	
Interest through 6/1/96:	1,824.99	
Penalty:	345.63	
TOTAL:	$5,626.46	[Exhibit 6]

7. By letter of May 13, 1996, Protestant requested a ninety (90) day extension of time in which to respond to the proposed sales and tourism tax assessments. [Exhibit 7]

8. By letter dated May 20, 1996, the Division granted Protestant's request for extension until August 13, 1996 at 4:30 p.m. [Exhibit 8]

9. Protestant timely protested the assessments issued by the Division on April 15, 1996. [Exhibit 9]

FACTS RELATING TO THE TRANSACTIONS

10. In January, 1990, COMPANY ONE filed a Business Registration listing its principal taxable product(s) or services(s) as "apartments offered as hotel suites." [Exhibit 10] (COMPANY ONE disputes the relevance of this stipulation.)

11. Sales tax permit XXXXXX was issued by the Commission. COMPANY ONE operated under this sales tax permit during the audit period.

12. On or about January 19, 1994, COMPANY ONE requested that the Commission change COMPANY ONE'S d/b/a from COMPANY ONE Apartments to COMPANY ONE Executive Suites. [Exhibit 10A] (COMPANY ONE disputes the relevance of this stipulation.)

13. COMPANY ONE Apartments consists of 240 one and two bedroom units.

14. During the Audit Period, 36 units of the 240 at COMPANY ONE units were set aside for short-term rentals which varied in term from several days to several months. These units are identified both internally and in COMPANY ONE'S advertising materials as "Executive Suites". The Executive Suite units have floor plans identical to all other similar units and have no external markings to identify them as "different" from other units. The Executive Suite units are scattered throughout the complex, and there is no physical separation of the furnished suite units from the unfurnished units. Units placed in the Executive Suite pool are completely fungible with other similar units in the complex. The number of units set aside as Executive units has varied from year to year, with some units removed from the Executive Suite pool and others added to it. [Exhibit 11]

15. During the Audit Period, COMPANY ONE advertised its Executive Suites in the hotel section of the ANONYMOUS CITY telephone directory and all other units in the apartment section of the ANONYMOUS CITY telephone yellow pages directory. [Exhibit 12]

16. A guest renting an Executive Suite apartment may use all facilities of the COMPANY ONE Apartments on the same basis as those living in the traditional apartment units. [Exhibit 11]

17. The primary difference between the Executive Suites and the apartment units is that the Executive Suites are furnished and provided with telephone service. In addition, COMPANY ONE provides housekeeping services for the Executive Suites.

18. If a unit is removed from the Executive Suite pool, the furniture in such unit is stored or moved to a replacement unit and the telephone disconnected. This happened only a couple of times during the Audit Period.

19. There is no distinction in ownership between the Executive Suite units and other units in the COMPANY ONE Complex. The entire complex is owned directly by COMPANY ONE. Although there is separate internal accounting for the Executive Suite units, funds are commingled and used to support the business of the entire complex. The Executive Suite units are simply treated as a separate profit center within the overall operation of the complex as a whole. (The Division disputes the relevance of this stipulation.)

20. During the Audit Period, COMPANY ONE had only one general operating bank account. All funds received from the rentals of the 240 COMPANY ONE units, including the 36 Executive Suites units, were paid by checks drawn on such account.

21. During the Audit Period, COMPANY ONE had a total of ten employees.

22. Of those ten COMPANY ONE employees, three employees had duties which were primarily limited to the operation of the Executive Suites. Those three employees were one administrative employee and two housekeeping employees. The salary and benefits of those three employees were paid out of the commingled funds of COMPANY ONE. The other seven employees of COMPANY ONE occasionally performed services for the Executive Suites as needed.

23. During the Audit Period, the entire COMPANY ONE complex was encumbered by a first mortgage and assignment of rents granted by COMPANY ONE in favor of its lender, ANONYMOUS LENDER. No separate security or collateral arrangements or agreements existed for the Executive Suites units only. Similar secondary financing existed for the complex. (The Division disputes the relevance of this stipulation.) [Exhibit 13]

24. During the Audit Period, COMPANY ONE prepared monthly and annual financial statements for the entire COMPANY ONE complex. COMPANY ONE also prepared and filed state and federal income tax returns for the entire COMPANY ONE complex.

No separate financial statements or income tax returns were made or filed for the Executive Suites units only.

25. During the Audit Period, the total income, the total rental revenues of the entire COMPANY ONE complex, including the Executive Suites, and Executive Suites units only were as follows:

	Total Gross Income	Total Rental Revenues from All Units	Rental Revenues from Executive Executive Suites
1993	$ 1,775,862.26	$ 1,748,891.64	$ 555,929.42
1995	1,814,667.80	1,790,875.61	585,049.24
1995	1,790,842.10	1,774,696.47	543,018.03
1/1/96-2/29/96	307,593.00	302,005.22	83,319.29

26. During the Audit Period, the direct expenses of the entire COMPANY ONE complex, including the Executive Suites, and Executive Suites units only were as follows:

	Total Expenses for Entire Complex	Direct Expenses for Executive Suites
1993	$1,637,156.09	$212,311.16
1994	1,818,602.17	212,169.13
1995	1,816,088.27	191,276.59
1/1/96-2/29/96	224,357.74	31,290.89

27. During the Audit Period, COMPANY ONE did not allocate property taxes, insurance or maintenance expenses to the Executive Suites.

28. For ease of reference, the parties have presented revenue and expense information hereinabove for all of 1993 instead of only March 1, 1993 through December 31, 1993.

29. During the Audit period, COMPANY ONE collected and remitted the ANONYMOUS CITY municipal hotel tax with respect to rentals of Executive Suites apartment units for thirty (30) days or less. [Exhibit 14] COMPANY ONE also collected and remitted Oklahoma sales taxes with respect to rentals of Executive Suites units for thirty (30) days or less. The proposed sales tax assessments by the Division arise out of rentals of Executive Suite units which involved stays of more than thirty (30) days, for which COMPANY ONE did not collect or remit Oklahoma sales taxes.

ISSUE

The sole issue to be decided is whether the rentals of "executive suites" are subject to sales tax when the length of stay exceeds thirty (30) days.

CONTENTIONS

Protestant contends that the taxpayer's rental of "executive suites" is not the service of furnishing rooms by a hotel and is therefore non-taxable. In the alternative, Protestant claims that the Oklahoma Tax Commission should follow the construction and interpretation of the sales tax statute as used by the city of ANONYMOUS CITY and various other states.

The Division contends that COMPANY ONE Executive Suites is a hotel and as such must collect, report and remit sales tax and report and remit tourism tax on the rental of executive suites because the Sales Tax Code and the Tourism Tax Code provide no exemption from the tax for stays exceeding thirty (30) days.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission has jurisdiction of this protest. 68 O.S. 1991 § 207.

2. Sales tax is levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code, an excise tax of four and one-half percent (4.5 %) of the gross receipts or gross proceeds of each sale of the following: service of furnishing room by hotel, apartment hotel, public rooming house, motel, public lodging house, or tourist camp. 68 O.S. 1991 § 1354(F) (now renumbered as 68 O.S. Supp. 1999, § 1354(6)).

3. Tourism tax is levied upon gross receipts in the amount of one-tenth of one percent (1/10 of 1%) on the gross receipts from the sales of the following: (1) Service for the furnishing of rooms by a hotel, apartment hotel, public rooming house or motel and for the furnishing of any other facility for public lodging, except camp sites. 68 O.S. 1991 § 50012.

4. *Oklahoma Administrative Code* 710:65-19-143(a) was promulgated to facilitate the administration, enforcement and collection of sales taxes regarding the above statute and reads as follows:

> The furnishing of rooms, except meeting rooms, by a hotel, apartment-hotel, cottage camp, or lodging house open to the public is subject to sales tax. Should a hotel operate apartments in connection with and as a part of their hotel business, the rentals on such apartments are subject to the tax. The tax will always apply so long as the place of business retains its identity as a hotel, apartment-hotel, cottage camp or lodging house, without regard to the length of stay of the guest.

5. For the purpose of proper administration of the provisions of the sales and use tax laws, it is presumed that all gross receipts are subject to tax until they are shown to be tax exempt. The burden of proving that a sale of tangible personal property or enumerated service is an exempt sale is upon the vendor. *Oklahoma Administrative Code* 710:65-1-4.

6. In the instant matter, Protestant did not collect and remit sales and subsequently tourism tax for stays in its executive suites exceeding thirty (30) days based on its "mirror image" interpretation of *Oklahoma Administrative Code* 710:65-19-143(a) and the exemption granted by the city of ANONYMOUS CITY. It is undisputed that COMPANY ONE collected and remitted sales tax with respect to rentals of executive suites for thirty (30) days or less.

7. Protestant contends for purposes of stays that exceed thirty (30) days that they were in the apartment business and maintain their business identity as an apartment and therefore, the negative interpretation of the rule would dictate that such rentals would not be subject to sales and tourism tax. Protestant does not dispute the identity of its business, that of a hotel, for stays less than thirty (30) days. From these transactions, it would be logical to conclude that Protestant's dual identity would be classified as an "apartment-hotel" as contemplated by the rule.

8. The "mirror image" interpretation of the rule used by Protestant is not applicable because of the dual nature of Protestant's business identity. Protestant argues that essentially the identity of the business is that of an apartment complex and provides information detailing the assets, revenues and expenses of the complex and fungible nature of the apartments within the complex emphasizing that only one identity exists for the business. However, it is clear that Protestant views itself in dual capacities. Protestant, as a hotel, charged sales tax for stays of less than thirty (30) days because such a transaction clearly falls within the ambit of a hotel.

9. It is conceivable and probable that a single business may both lease and sell and that the applicable taxation on each transaction may be distinct. In a case in which a contractor tried to use an exemption for manufacturing purposes based on its concurrent identity as both a contractor and a manufacturer, the Court said,

> We do not believe it was the intent of the Legislature that a contractor could avoid paying sales tax on an expensive piece of road construction equipment by merely making casual and isolated sales of the product produced and used. *Bert Smith Road Mach. Co. v. Okl. Tax Com'n*, 563 P.2d 641, 643 (Okl. 1977).

When the apartment-hotel acts as a hotel, then it must collect, report and remit sales and tourism tax; when the apartment-hotel acts as an apartment, that transaction does not fall within the sales tax code. Clearly, the Protestant acknowledges its identity as that of a hotel since it advertised as such (see Findings of Fact #15), collected and remitted sales tax for stays of less than thirty (30) days (see Findings of Fact #29) and provided services that a hotel would provide (see Findings of Fact #16, #17 and #22).

10. Protestant argues that COMPANY ONE primarily operates an apartment business and only incidentally rents Executive Suite units. However, upon a review of the total gross income, total

rental revenues from all units and rental revenues from executive suites, (see Findings of Fact #25), it appears this is not the case. Rental revenues from executive suites consisted of thirty percent (30%) or more of the total gross income for 1993, 1994 and 1995. For the first two months listed in 1996, it appears that figure is slightly lower. Although the number of units may appear to be incidental, the revenue generated from those units is disproportionately higher, which would seem to negate Protestant's claim that the executive suites are an incidental part of COMPANY ONE'S business.

11. Protestant has also cited the ANONYMOUS CITY Ordinance and statutes from several states granting exemptions. It should be noted that each statute is explicit and specifically defines the meaning of a sale or stay in relation to a hotel and sets a specific term to which the exemption will apply.

ANONYMOUS CITY ...No tax shall be imposed hereunder upon a permanent resident. Title 44 T.R.O. § 101(B)

A permanent resident shall mean any occupant who has or shall have the right of occupancy of any room or rooms in the same hotel for at least thirty (30) consecutive days during the current calendar year or preceding year. Title 44 T.R.O. § 100(H)

ANONYMOUS STATE 1...The term "sale" or "sales" shall not mean the sale or the use of any tangible personal property used as a dwelling by way of a lease or rental thereof for a term of more than 28 consecutive days. K.S.A. Supp. 1999 §79-3602(c)

ANONYMOUS STATE 2...The tax shall not apply, however, to rooms, lodgings, or accommodations supplied for a continuous period of thirty (30) days or more to an individual. K.R.S.A. Supp. 1998 §139.100(2)(a)

ANONYMOUS STATE 3...the gross receipts from the leasing or renting of a hotel or motel room or tourist court accommodations occupied by the same person or persons for residential housing for periods of thirty or more consecutive days. Title 11 N.D.C.C.A. 2000 § 57-39.2-04(22).

ANONYMOUS STATE 4... A "sale" and a "purchase" includes, but is not limited to, each of the following transactions: The furnishing for a consideration of lodging and related services by a hotel, rooming house, tourist court, motel or trailer camp and the granting of any similar license to use real property other than the renting or leasing thereof for a continuous period of 30 days or more." M.S.A. 2000 § 297A.01(3)(e)

Each of these exemption or definition statutes clearly defines the taxing event and the term of

the stay. Protestant established its own parameters and ignored the last phrase of the Rule, "without regard to the length of the stay of the guest", which modifies the whole Rule by making no distinction on the length of the term and thereby clearly implying an intent to make all such transactions taxable. Title 68 O.S. Supp. 1999, Section 1354(6) has not defined, exempted, or set out a term of days, which supports a conclusion that the Legislature's intent was for sales tax to be charged on stays exceeding thirty (30) days.

12. Protestant argues that it is unfair for the Commission and legally unsupportable for the Commission to ignore its previous rulings. For this proposition, Protestant cites *Oral Roberts University v. Okl. Tax Com'n*., 714 P.2d 1013 (Okl. 1985). In that case, Oral Roberts University requested an opinion from the Commission as to whether an exemption, based on its status as a non-profit educational institution, would be granted to it as had previously been granted to similar universities. By letter, the Commission advised that it would be granted such an exemption. Then, in a later order, the Commission determined its previous position to be in error and reversed its position. The Court found no cogent reason expressed or implied from the attempted change of construction. Additionally, the court reasoned that the Commission's original construction so firmly entrenched after thirty-seven (37) years may not be undone by the stroke of a pen. *Id*. at 1017. In the instant case, there is no evidence to support Protestant's argument that the Commission is reversing its own interpretation. In fact, it is only Protestant's own interpretation, not a previous Commission ruling or opinion, which Protestant claims the Commission is trying to reverse. This argument is simply without merit.

13. Finally, it is a long established rule of law that exemption statutes are to be strictly construed against exemptions. *McDonald's Corp. v. Okl. Tax Com'n*, 563 P.2d 635 (Okl. 1977); *London Square Village v. Okl. Cty. E. & E. Bd*., 559 P.2d 1224 (Okl. 1976); and *Dairy Queen of Oklahoma v. Okl. Tax Com'n*, 205 Okl. 473, 238 P.2d 800 (1951). Accordingly, no exemption should be granted in the instant case and therefore, Protestant has not met its burden of proving that a service of furnishing a room exceeding thirty (30) days is exempt from sales tax.

14. Based on the foregoing facts and the applicable law, the protest should be denied.

DISPOSITION

It WAS DETERMINED, based upon the specific facts and circumstances of this case, that the sales and tourism tax protest of COMPANY ONE d/b/a COMPANY ONE Executive Suites 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.