JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2000-10-17-023 / NOT PRECEDENTIAL**
ID: **P9800052**
DATE: **10-17-00**
DISPOSITION: **DENIED**
TAX TYPE: **SALES / USE**
APPEAL: **OK SUP CT NO. 95,508 / REVERSED AND REMANDED**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATEMENT OF THE ISSUE

Whether Protestant is liable for sales tax on tangible personal property transferred to owners or lessors of equipment pursuant to maintenance contracts related to its Direct Sales Contracts, Outside Lease Contacts, Vendor Contracts, and Other Dealer Contracts (as those terms are defined below).

STATEMENT OF THE CASE

This protest arises out of the Division's sales and use tax audit of Protestant for the period beginning January 1, 1994 and ending December 31, 1996. At the conclusion of the audit, the Division issued a proposed assessment of sales tax against the Protestant in the amount of $152,961.93, together with $56,697.60 in interest through December 31, 1997, and $15,297.94 in penalties. The Division also issued a proposed assessment of use tax against the Protestant in the amount of $7,687.37, together with $2,565.81 in interest through December 31, 1997, and $768.74 in penalties.

STIPULATED FACTS

1. Protestant is an Oklahoma corporation primarily engaged in the sale and leasing of copiers and other office equipment. As an adjunct to such primary business, Protestant also enters into contracts pursuant to which it provides maintenance, supplies, and replacement parts for copies and office equipment in Protestant's product lines.

2. Protestant transacts business under FEI #XX-XXXXXXX and Oklahoma Sales Tax Permit No. ZZZZZZ.

3. An audit of the records and files of the Protestant for the period January 1, 1994 through December 31, 1996, was conducted by the Division.

4. In its letter dated November 26, 1997, the Division proposed an assessment of additional sales tax, interest, and penalty against the Protestant for the above-stated period totaling $224,957.47.

5. In its letter dated November 26, 1997, the Division proposed an assessment of additional use tax, interest, and penalty against the Protestant for the above-stated period totaling $11,021.92.

6. In its letter dated December 22, 1997, the Protestant requested an extension of time in which to protest the above-referenced assessments.

7. In its letter dated December 26, 1997, the Division granted Protestant a 90-day extension of time within which to respond to the assessments described in paragraphs 4 and 5 above.

8. In its letter dated February 18, 1998, Protestant protested all of the proposed assessments of sales tax, use tax, interest, and penalties described above.

9. Protestant maintains a valid Oklahoma resale permit and purchases supplies and equipment on a sales tax-exempt basis.

10. In connection with a portion of its sales and leases of copiers and equipment, Protestant enters into maintenance contracts with the owner or lessor of the equipment. When supplies or replacement parts are withdrawn from Protestant's inventory and used by Protestant to fulfill Protestant's maintenance contract obligation, an invoice is prepared listing the items provided, but the customer is not charged for such items, other than the basic charge for the maintenance contract.

11. Protestant purchases replacement parts for copying equipment sales tax-exempt.

12. Under its maintenance contracts with its customers, replacement parts for equipment are provided, as needed, by Protestant at no charge, other than the basic charge for the maintenance contract.

13. Specifically at issue in this case are the maintenance contracts entered into by Protestant in connection with four distinct types of transactions.

14. "Direct Sales Contracts" arise where customers who have purchased equipment directly from Protestant execute an optional maintenance contract obligating Protestant to provide, as needed, a specified level of service, parts, and supplies throughout the term of the lease.

15. "Outside Lease Contracts" are maintenance contracts which arise in connection with leases which Protestant has transferred to a financing entity. The maintenance contract on the equipment is transferred to the financing entity along with the lease.

16. "Vendor Contracts" are maintenance contracts provided for maintenance on machines which have been leased by end users from vendor companies.

17. "Other Dealer Contracts" are maintenance contracts covering equipment owned or leased by the customers of other dealers.

18. Each of Protestant's customers who are included within the Outside Lease Contracts, Vendor Contracts, and other Dealer Contracts categories (as defined above) are entities which possess valid Oklahoma sales tax resale permits, and are regularly and continuously engaged in the business of selling or leasing copies and office equipment of the type at issue in this case.

19. Based upon information requested by the Division and obtained and provided by Protestant following completion of the audit, all but one of the customers described in the preceding paragraph have collected and remitted sales tax to the State of Oklahoma on charges attributable to the subject maintenance contracts (i.e., both the portion attributable to the personal property withdrawn from inventory by the Protestant and the remaining portion which is attributable to service provided and/or profit margins).

20. Protestant has engaged in maintenance contract sales and service for many years, and has always reported such activities in a manner consistent with Protestant's sales tax reporting during the audit period.

21. During the audit period, Protestant purchased supplies, tools, and fixed assets from certain vendors located outside the State of Oklahoma who do not collect or remit Oklahoma sales tax. Protestant paid no use tax on said items.

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. The sale of tangible personal property, unless otherwise exempted by the provisions of the Sales Tax Code, is subject to sales tax, 68 O.S. 1991, §1354(A).

3. Sales of taxable services or tangible personal property to persons who are primarily engaged in selling their services are subject to sales tax, 68 O.S. 1991, §1354(A)(21).

4. As a general rule, statutes exempting property from taxation are to be applied circumspectly and are to be construed against the allowance of an exemption. *Bert Smith Road Machinery Co. v. Oklahoma Tax Commission*, 563 P.2d 641 (Okl. 1977).

5. 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).

6. 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.

7. The facts of this case indicate that Protestant agreed to maintain equipment which was either purchased or leased by the equipment end user from Protestant or other companies. Protestant performed the maintenance pursuant to written contracts with the equipment end users or the lessors or vendors of the equipment and received a fee. These maintenance contracts came in four categories, namely; 1. direct sales contracts, 2. outside lease contracts, 3. vendor contracts and 4. other dealer contracts. Although.each contract category originates from different circumstances, Protestants duties under the maintenance agreement within each category is the same. For an agreed upon fee paid to Protestant, the Protestant would maintain the equipment in working order for the end user. In order to fulfill this duty, Protestant used repair parts, supplies and other tangible personal property withdrawn from its inventory, which the Protestant had purchased tax exempt for resale.

8. Under these facts and circumstances, the Protestant is liable for sales tax on tangible personal property transferred to owners or lessors of equipment pursuant to Protestants duties under its maintenance contracts when Protestant withdraws the tangible personal property from stock for its own use to fulfill its contractual duties. Protestant purchased its inventory tax exempt under the sale for resale exemption at 68 O.S. §1357(3). The resale exemption does not apply to items purchased for Protestants use. Pursuant to OAC 710:65-1-7(2) Withdrawals from Stock, if any business purchases tangible personal property for resale and that business withdraws tangible personal property from its inventory for its own use, that business has made a taxable sale and the value of the property withdrawn is taxable at its "sales value" as defined in OAC 710-65-1-2.

9. The Protestant urges that the sales tax assessed in this case is an inequitable double taxation because the vendors, dealers and financing entities involved in outside lease contracts, vendor contracts and other dealer contracts all hold Oklahoma sales tax permits and have collected and remitted sales tax. The record in this case does not reflect what tax payments have been made by other taxpayers on taxable transactions they may have made, nor should it reflect those payments. The single issue in this case involves the taxation of tangible personal property which Protestant withdrew from its own inventory for its own use. That is a taxable transaction under the Sales Tax Code. No other taxpayer besides Protestant is responsible for that tax and no other taxpayer has remitted that tax. Other taxpayers who lease or sell tangible personal property are required to collect and remit sales taxes on the gross receipts from the lease or sales contracts. That is a separate transaction from the taxable withdrawals from stock that Protestant is responsible for.

10. The Protestant further argues that the Division improperly modified its long-standing interpretation of a statute without a cogent reason when the Division assessed Protestant for sales tax on its withdrawals from stock, citing *Oral Roberts University v. Oklahoma Tax Commission*, 714 P. 2d 1013, 1985 OK 97. Protestant also contends that the assessment is a violation of equal protection guaranteed to all Americans by the United States Constitution, citing Amendment Fourteen, Section One. These two issues are outside of the scope of the issue contained in the stipulation and the record contains insufficient factual material to support the Protestant's claim, OAC 710:1-5-47, *Shop and Swap Advertiser v. Oklahoma Tax Commission*, 774 P.2d 1058, 1989 OK 81. The Protestant has failed to prove sufficient facts which would entitle the Protestant to the requested relief.

11. Protestant's protest to the assessment of sales and use tax should be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it WAS DETERMINED that the protest of Protestants, THE CORPORATION, OFFICER ONE, and OFFICER TWO, 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.