JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2000-11-16-022 / NOT PRECEDENTIAL**
ID: **P9500196 / P950196A**
DATE: **11-16-00**
DISPOSITION: **DENIED**
TAX TYPE: **SALES / USE / WITHHOLDING**
APPEAL: **OKLA SUP CT 95,683 / DISMISSED**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. THE PRESIDENT of ANONYMOUS Corporation, hereafter referred to as Protestant. Protestant is in the business of making signs for businesses. Protestant creates the logo design and also produces the signs used in outdoor advertising, store fronts, vehicles and other signs for business advertising.

2. The Audit Division of the Oklahoma Tax Commission, "Division" hereafter, conducted an audit of Protestant. AN AUDITOR for the Division, testified that the business records which were provided for the audit by Protestant were incomplete and unorganized. Protestant did not submit any additional records or documentary evidence at the hearing of this case. The Division audited Protestant for sales tax, and use tax for the Period June 1, 1992, through May 31, 1995, and also audited Protestant for withholding tax for the period January 1, 1993, to December 31, 1994. The Division issued proposed assessment letters to Protestant on July 19, 1995, for the following amounts;

	Sales Tax	**Use Tax**	**Withholding Tax**
Tax	$5,417.02	$3,998.43	$13,856.26
Interest	1,710.07	1,372.51	3,169.79
Penalty	541.77	399.87	3,464.22
TOTAL	$7,668.86	$5,770.81	$20,490.27

The Protestant timely filed a protest to these proposed assessments by letter of August 11, 1995.

3. At the hearing of this matter on March 23, 1998, PROTESTANT testified that some of the items on the use tax assessment were not purchased out of state but were purchased in Oklahoma. PROTESTANT did not supply any documentation concerning the items on the use tax assessment such as purchase invoices. PROTESTANT did not indicate whether any sales or use tax had been paid on those items. The Division auditor testified that he used the information that was made available to him by Protestant during the audit. His review of the available information indicated that the transactions assessed for use tax were out-of-state purchases of tangible personal property used in Protestant's business for which sales or use tax had not been paid.

The Protestant did not present any further evidence at the hearing. The Administrative Law Judge allowed the Protestant and the Division to file a supplemental brief concerning withholding taxes by May 15, 1998. The Division did submit a brief but the Protestant has not submitted anything further for review by the Administrative Law Judge. Thereafter, this case was submitted for decision on May 21, 1998.

ISSUE

Whether the sales tax, use tax and withholding tax assessments proposed by the Division in this case are incorrect.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission has jurisdiction of this protest, 68 O.S. §§ 207, 221.

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," see Oklahoma Tax Commission Order No. 91-10-17061. *Black's Law Dictionary*, 1064 (5th ed. 1979) defines "preponderance of evidence" as "[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. The Protestant has not carried its burden of proving that any adjustments to the audit should be made. The Protestant offered no probative evidence at the hearing of this matter to demonstrate in what respect the proposed assessments are incorrect. Under the Use Tax Code, 68 O.S. § 1402, use tax is due on out-of-state purchases of tangible personal property used in Oklahoma. The Protestant did not offer sufficient evidence at the hearing which could prove that the tangible personal property assessed was purchased in Oklahoma or that sales tax was paid on the purchase.

OAC 710:65-3-30 requires that all vendors shall keep records and books of all sales and all purchases of tangible personal property. Such books and records must clearly document all the information required for tax returns and shall be subject to audit by the Commission. It shall be presumed that all sales of tangible personal property are taxable, and the burden of proving that a transaction was not a taxable sale shall be upon the person who made the sale. The Protestant who fails to carry this burden of proof cannot avoid the assessment of sales or use tax by the simple expedient of failing to keep and maintain the minimum required records of those transactions.

5. The evidence presented ,in the hearing indicates that Protestant creates and sells signs for business advertising which is sales taxable pursuant to 68 O.S. § 1354(J). *OAC* 710:65-19-311 provides that vendors who engage in selling signs must collect, report and remit sales tax not withstanding the fact that the signs have use or value only to the purchaser. Under the facts adduced at hearing, the taxes assessed are properly owed.

6. The Protestant made no presentation of evidence or argument at law with regard to the withholding taxes assessed.

7. The Protestant's protest to the proposed assessment of sales tax, use tax and withholding tax should be denied.

DISPOSITION

It WAS the DETERMINED, based upon the specific facts and circumstances of this case, that the sales tax, use tax and withholding tax protest of ANONYMOUS CORPORATION and THE PROTESTANT, as President of ANONYMOUS CORPORATION and as an individual, 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.