JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2001-01-23-010 / NOT PRECEDENTIAL**
ID: **P9600347 / P9600443**
DATE: **01-23-01**
DISPOSITION: **DISMISSED AS TO P9600347**
SUSTAINED IN PART / DENIED IN PART AS TO P9600443
TAX TYPE: **SALES / WITHHOLDING / USE**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Protestant is in the business of operating a processing plant in Oklahoma and qualifies as a manufacturer under the Oklahoma Sales Tax Code. PROTESTANT holds a manufacturers limited exemption certificate issued by the Oklahoma Tax Commission. PROTESTANT primarily sells its products to retailers for resale and occasionally makes sales to exempt entities and some taxable sales.

2. The Audit Division of the Oklahoma Tax Commission ("Division") conducted a field audit of the books and records of PROTESTANT and issued four separate assessments.

3. By letter dated January 12, 1996, the Division issued a proposed assessment of sales tax for the period July 1, 1992, through December 31, 1992, as follows:

Sales Tax	$36,633.46
Interest	16,951.77
Penalty	3,663.34
Total	$57,248.57

4. By letter dated January 12, 1996, the Division issued a proposed assessment of withholding tax for the period December 1, 1992 through July 31, 1995, as follows:

Withholding Tax	$ 78.97
Interest	36.40
Penalty	113.18
Total	$228.55

5. By letter dated January 29, 1996, Protestant requested an extension of time for filing a written protest. By letter dated February 8, 1996, the Division extended the time for Protestant to file a written protest until the date of May 13, 1996. Pursuant to 68 O.S. § 221 (f) the Tax Commission is granted discretion to extend the time for filing a protest for any period of time not to exceed ninety (90) days. Section 221 (e) requires that the protest,be filed within thirty (30) days unless an extension is granted within that time. The initial thirty-day filing period in addition to the maximum ninety-day extension expired on May 13, 1996.

6. By letter dated May 14, 1996, PROTESTANT filed a protest to the sales and withholding tax assessments issued by the Division on January 12, 1996. The protest to the withholding tax assessment was withdrawn by PROTESTANT at the hearing of this protest on January 29, 1997. The Division adjusted the sales tax assessment by removing certain items and revising the sales tax assessment as follows:

Sales Tax	$20,626.91
Interest	12,121.85
Penalty	2,062.69
Total	$34,811.45

This sales tax assessment is docketed herein as Case No. P-96-347.

7. By letter dated July 12, 1996, the Division issued a proposed assessment of sales tax for the period January 1, 1993, through July 31, 1995, as follows:

Sales Tax	$102,230.10
Interest	31,397.18
Penalty	10,223.01
Total	$143,850.29

8. By letter dated July 12, 1996, the Division issued a proposed assessment of use tax for the period January 1, 1993, through July 31, 1995 as follows:

Use Tax	$ 7,790.69
Interest	2,773.26
Penalty	779.10
Total	$11,343.05

9. By letter of August 2, 1996, PROTESTANT timely filed its protest to the sales and use taxes assessed on July 12, 1996. This protest is docketed as Case No. P-96-443. Upon further documentation provided by the Protestant, the Division removed certain portions of the sales tax audit assessed on July 12, 1996, which resulted in the following revised assessment:

Sales Tax	$ 98,589.36
Interest	34,919.98
Penalty	9,858.95
Total	$143,368.29

10. PROTESTANT sold its products mainly to retailers and restaurants but did not document the sales tax permit number for sales tax exemption on those sales. PROTESTANT also sold products to churches but did not collect documentation for those sales. Some sales of PROTESTANT'S PRODUCTS were made to taxable consumers. PROTESTANT introduced Protestant's Exhibits 1, 2, 3 and 4 to substantiate exemptions for some sales. PROTESTANT offered no further evidence regarding its sales to customers.

11. PROTESTANT is a manufacturer pursuant to the Oklahoma Sales Tax Code. The items purchased by PROTESTANT which are a part of the manufacturing process are specialty items designed for processing and required by law according to the United States Department of Agriculture and are necessary to produce a safe, wholesome product. These items are gloves, boots, aprons, sleeve guards, bouffants (hair net), shovels, sanitizers and denaturants. PROTESTANT also purchased items not used in manufacturing such as paper towels, office supplies, calendars, and janitorial supplies.

12. The PROTESTANT facility in Oklahoma was also charged with items from its parent corporation wherein items of corporate expense were allocated to the Oklahoma plant. These items included computer time and personnel time charged to the Oklahoma plant from the corporate headquarters. The allocation of corporate expenses did not include use of products purchased by PROTESTANT in this or another state.

ISSUES

1. Whether PROTESTANT is entitled to claim a sales tax exemption for sales to its customers.

2. Whether certain purchases made by PROTESTANT are exempt from sales and use taxes pursuant to the manufacturing exemption.

CONCLUSIONS OF LAW

I. JURISDICTION

1. Title 68 O.S. § 223(A) prevents the assessment of any tax after the expiration of three years from the date the return was required to be filed. In this case PROTESTANT filed semiannual sales tax reports pursuant to 68 O.S. § 1365(B). In Case No. P96-347, PROTESTANT timely filed its sales tax report for the period July 1, 1992, through December 31, 1992, on or before the due date of January 15, 1993, pursuant to Section 1365(B). The Division issued its assessment in Case No. P96-347 of sales taxes for the six-month period of July 1, 1997, through December 31, 1992, on January 12, 1996, which is within the three-year limitation period of Section 223(A) from the date the return was required to be filed ON January 15, 1993. Because PROTESTANT filed its sales tax returns on a semiannual basis pursuant to Section 1365(B), all of the assessments issued in Case No's. P96-347 and P96-443 were timely issued within three years from the date the return was required to be filed.

2. Title 68 O.S. § 221(c) requires that a taxpayer must file a written protest with the Tax Commission within thirty (30) days of the mailing of the proposed assessment. Section 221(f) allows the taxpayer to request a ninety-day extension in which to file its protest to be granted at the Tax Commission's discretion. Any protest against a tax assessment must be made within the time period allowed in Section 221 or the assessment becomes final and absolute, *Matter of Phillips Petroleum Co.*, 652 P.2d 283, 1982 OK 112. Section 221(e) provides that a proposed assessment shall become final and absolute if the taxpayer fails to file a written protest within thirty (30) days of the assessment letter or in cases in which an extension has been granted for filing a protest, at the expiration of the period as extended by the Tax Commission. If it is determined that no timely protest was filed, no further inquiry as to the validity of the assessment can be made, *Matter of Hamm Production Co.*, 671 P.2d 50, 1983, OK 92. In Case No. P-96-347, the Division mailed proposed assessments to PROTESTANT for sales tax and withholding tax on January 12, 1996. The Division granted PROTESTANT an extension of time in which to file its protest which expired on May 13, 1996. PROTESTANT filed its protest on May 14, 1996. The taxpayer's failure to file a timely protest divests the Commission of jurisdiction to review the proposed assessment. The proposed assessments issued on January 12, 1996, to PROTESTANT for sales tax and withholding tax are final and absolute. The protest filed in Case No. P-96-347 is untimely and must be dismissed for lack of jurisdiction.

3. The Division issued two more assessments to PROTESTANT for sales tax and use tax on July 12; 1996. These assessments were timely protested by letter of August 2, 1996, pursuant to Section 221, and were docketed herein as Case No. P96-443. The Oklahoma Tax Commission has jurisdiction of this protest, 68 O.S. § 207.

II. SALES TAX EXEMPTIONS

4. 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).

5. 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.

6. PROTESTANT sold its product to distributors, retail stores and restaurants under the "sale for resale" exemption pursuant to 68 O.S. § 1357(c). PROTESTANT did not obtain documentation of the exemption from its customers at the time of sale and did not receive any exemption certificates from its customers. At the hearing of this matter, MR. X, a distributor of PROTESTANT'S products to retail stores, testified that he did not have a sales tax permit because all of his sales were to retailers for resale and therefore exempt from tax. As a distributor, Mr. X is a Group One vendor pursuant to 68 O.S. § 1363 and is required to hold a sales tax permit under 68 O.S. § 1364. In order to purchase items exempt under the sale for resale exemption, Section 1357(C) requires the reseller to hold a sales tax permit. In order to claim the exemption, the purchaser must provide the seller with his sales tax permit number at the time of sale. OAC 710:65-13-200 requires that in addition to the permit number, the purchaser must certify in writing that he is in the business of reselling the articles purchased. This certification may be made on the bill or with an exemption certificate. OAC 710:65-7-6 provides that a sale is presumed to be subject to sales tax unless specifically exempted. The vendor is relieved from liability for the tax if the vendor, in good faith, timely accepts from a consumer properly completed documentation required to claim the exemption. OAC 710:65-7-6(d) lists the required items necessary to claim the sales tax emption which is:

(1) Sale for Resale. In the case of sales for resale, items out in this paragraph are required:

(A) A copy of the purchaser's sales tax permit, or if unavailable, the purchaser's name, address, sales tax permit number, and its date of expiration. If a copy of the sales tax permit is unavailable, and if the information provided has not been previously verified, it must be verified by either calling the Taxpayer Assistance Division or by reference to the sales tax permit list obtain pursuant to OAC 710:65-9-6;

(B) A statement that the articles purchased are purchased for resale:

(C) The signature of the purchaser or a person authorized to legally bind the purchaser:

(D) Certification on the face of the invoice, bill or sales slip or by a separate document, that says the purchaser is engaged in reselling the articles purchased; and

(E) In cases where purchases are made on regular basis, and the certification indicates that all purchases are for resale, then subsequent purchases may be made without further certification until the expiration date of the permit.

At the hearing of this case, PROTESTANT entered into evidence Protestant's exhibit 1, 2 and 3 which were copies of multi-jurisdiction uniform sales and use tax certificates which were signed after the audit period and do not indicate that their purchases were exempt at the time made and cannot be adjusted.

Protestant's Exhibit 4 is a copy of Permit Number 999999 issued to ABC STORE which indicates that it was effective during the audit period. The Protestant's witness at hearing testified that this customer resold the products purchased from PROTESTANT and therefore, PROTESTANT has proven its exemption for sales to ABC STORE. Since no further sales for resale are properly documented, no further adjustment can be made, *Dunn v. Oklahoma Tax Commission*, 862 P.2d 1285, 1993 OK CIV APP 105.

7. PROTESTANT also claims that it made sales to church groups exempt pursuant to 68 O.S. § 1366(F). OAC 710:65-13-40(b) provides that, "Only sales purchased by the church, invoiced to the church and paid for by funds or check directly from the church will qualify for the exemption. A vendor wishing to be relieved of liability to collect the tax should follow the requirements of OAC 710:65-7-6."

OAC 710:65-7-6 requires the vendor to document the exempt sale with a copy of an exemption letter from the Oklahoma Tax Commission to the exempt organization or a signed statement that the purchase is authorized by, and being made by, the exempt entity. There was no documentary evidence presented at the hearing that would substantiate the exemption for sales to churches. Therefore, PROTESTANT failed to carry its burden of proof on this issue and no adjustments to the audit can be made.

III. USE TAX

8. Included in the use tax audit were items of intra-company transfers or accounting entries for expense allocation whereby PROTESTANT was being allocated expense for computer time or corporate overhead. The use tax at 68 O.S. § 1402 is levied on the storage, transfer or use of tangible personal property brought into this state. The items of expense allocation which do not relate to the use of tangible personal property in this state must be removed from the audit.

IV. PROPERTY USED OR CONSUMED IN MANUFACTURING

9. PROTESTANT holds a manufacturers limited exemption certificate and is engaged in manufacturing products. PROTESTANT purchased several items for use directly in the manufacturing process which are required by law to be used in order to process under the authority of the United States Department of Agriculture. The witness for PROTESTANT identified several items in his testimony that are required in their manufacturing process including specialized gloves, boots, aprons, sleeve guards, bouffants (hair net), shovels, sanitizers and denaturants. Title 68 O.S. § 1359(A) exempts property used or consumed in the process of manufacturing. Items which are an integral part of the manufacturing process come within this exemption, *Oklahoma Tax Commission v. Oklahoma Coca Cola Bottling Co.*, 494 P.2d 312, 1972 OK 20. The Oklahoma Supreme Court has ruled in *Shulte Oil Co. v. Oklahoma Tax Commission*, 882 P.2d 65, 1994 OK 103, that:

> The Section 1359 sales tax exemption should receive a practical construction-one that would not allow a manufacturing operation that is in fact but one continuous and integrated production process to be chopped up into district and discrete segments. To confine the tax exemption to equipment which actually causes some physical change in the manufactured product would impose a restriction not warranted by the language of the statute. We hence hold that within the meaning of Section 1359 machinery which is synchronized into the manufacturing operation in a manner that makes it necessary to the production of the finished product is "directly used in" the manufacturing process.

Since the items listed are a necessary part of production, those items qualify for the manufacturing exemption and should be removed from the sales and use tax audits. Other items such as office supplies and janitorial supplies which are not used in manufacturing are not exempt.

10. The protest asserted in Case No. P-96-347 should be dismissed for lack of jurisdiction as untimely filed.

11. The protest asserted in Case No. P-96-443 should be denied in part and sustained in part as stated above.

DISPOSITION

It is the DETERMINATION of the OKLAHOMA TAX COMMISSION, based on the specific facts and circumstances of this case, that the protest filed in Case No. P-96-347 should be dismissed for lack of jurisdiction and the protest filed in Case No. P-96-443 should be denied in part and sustained in part as stated above.

ADDENDUM TO FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

NOW on this 19th day of December, 2000, the Findings, Conclusions and Recommendations ("Findings") issued in the above styled and numbered cause on October 2, 2000, come on for reconsideration of additional findings of fact and a recommendation as to the amount of the deficiency which should be confirmed by an Order of the Tax Commission.

The Division, as directed by the Findings, adjusted the sales and use tax assessment and provided notice to Protestant. Protestant has not challenged the adjustment proposed by the Division.

Upon consideration of the Findings and the adjustment to the assessment, the undersigned finds that the following Findings of Fact should be added to and incorporated in the Findings:

1. That notice of the adjustment to the assessments was filed of record in this cause on November 29, 2000.

2. That the Division revised the sales tax assessment to an amount of $198,525.29, consisting of tax in the amount of $98,886.25, interest accrued through November 30, 2000, in the amount of $91,950.39, and penalty in the amount of $9,688.65.

3. That the Division revised the use tax assessment to an amount of $4,854.49, consisting of tax in the amount of $2,257.58, interest accrued through November 30, 2000, in the amount of $2,371.11, and penalty in the amount of 225.80.

4. That the aggregate amount in controversy for sales tax is $198,525.29, and for use tax is $4,854.49.

5. That the adjustment complies with the recommendations set forth in the findings.

6. That the Protestant was provided notice of the adjustment.

7. That the attorney for Protestant responded to the adjustments by letter of November 7, 2000, and advised that Protestant agreed with the adjustments.

The undersigned further finds that the following Recommendation should be added to and incorporated in the Findings:

It is further recommended that the aggregate amount in controversy be fixed as the deficiency.

THEREFORE, the Findings, Conclusions and Recommendations issued on October 2, 2000, are amended to include and incorporate the above and foregoing findings of fact and recommendation.

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.