JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2001-01-23-011 / NOT PRECEDENTIAL**
ID: **P9700300**
DATE: **01-23-01**
DISPOSITION: **SUSTAINED IN PART / DENIED IN PART**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Protestant is engaged in the business of constructing signs for sale to third parties, installing signs sold to third parties or owned by third parties and servicing signs owned by third parties. Protestant also constructs signs from materials owned and supplied by third parties.

2. Protestant started business in 1979. Upon the advice of an auditor with the Tax Commission, Protestant secured a sales tax permit approximately three or four months after starting the business. According to Protestant, he was instructed to separately state labor and installation charges on his invoices and only charge sales tax on the materials as a finished product. He was also instructed to not charge sales tax on signs constructed from customer supplied materials and to note such on any applicable invoices.

3. In June, 1995, Protestant contacted A Tax Commission special projects auditor, concerning a compliance check of the deductions claimed on his February, 1994 sales tax report. According to both the auditor and Protestant, they discussed the charges for the use of Protestant's bucket truck in installing and servicing signs. According to the auditor, the discussion centered around the difference between utilizing the bucket truck for installing a sign as opposed to servicing a sign. The auditor testified that although he didn't agree to the deduction, after reading the law he thought the utilization of the bucket truck for the installation of signs might fall into a non-taxable situation. Protestant admitted that the auditor made him aware of the law and that he suggested he contact his legislator since Protestant believed the Tax Commission was misinterpreting the law.

4. In June, 1996, A SECOND auditor with the Tax Commission, audited Protestant's books and records for the period of September 1, 1993 through July 31, 1996. Protestant was presented with a set of audit workpapers in September, 1996, and was instructed to produce documentation as to any exempt sales. Protestant testified that he believed the audit was concluded. He also testified that he was aware the workpapers included installation charges and that the auditor was looking at the bucket truck.

5. The auditor testified that the workpapers presented to Protestant in September, 1996 were preliminary workpapers. She stated that there are two separate sets of workpapers because she had to adjust the audit period due to the fact that part of the audit period was expiring (more than three (3) years old). She further testified that during the preliminary examination she was aware the charges for labor to install signs and for the use of the bucket truck were subject to sales tax.

6. By letter dated April 17, 1997, the Division caused to be issued against Protestant a proposed assessment of sales tax, interest and penalty.

7. Protestant timely protested the proposed assessment.

8. The aggregate amount in controversy is $6,218.41, consisting of tax in the amount of $4,581.16, interest accrued through April 30, 1997, in the amount of $1,179.07 and penalty in the amount of $458.18.

ISSUES

Several issues are presented for decision.

The first issue is whether the Division should be estopped from assessing sales tax on the separately stated charges for the use of the bucket truck, the sale, installation and servicing of signs sold to ranches and the separately stated labor charges for the construction of signs from customer owned material.

The second issue is whether the separately stated charges for the use of the bucket truck in installing or servicing signs is subject to sales tax.

The third issue is whether the sale, installation and servicing of signs sold to ranches is subject to sales tax.

The fourth issue is whether the separately stated labor charges for the construction of signs from customer owned material is 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 "[A]dvertising of all kinds, types, and characters, including any and all devices used for advertising purposes and the servicing of any advertising devices except those specifically exempt pursuant to the provisions of Section 1357 of this title." 68 O.S. Supp. 1992, § 1354(1)(J)[1].

[1]Amended by Laws 1997, c. 252, §1, emerg. eff. May 23, 1997, to exclude the language "and the servicing of any advertising devices".

3. The terms "gross receipts" or "gross proceeds" are defined in part to mean the total amount of consideration for the transfer of tangible personal property or service taxable under this article, including any amounts charged for labor service performed. 68 O.S. Supp. 1993, § 1352(G).

4. 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.

5. 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).

6. Statutory provisions are to be construed in a manner as to ascertain and effectuate the intent and purpose of the Legislature. ***Hess v. Excise Board of McCurtain County***, 698 P.2d 930 (Okl. 1985). Such intent or purpose is to be determined primarily from the language of the statute. *Id.* Where statutory words or phrases are not otherwise defined and a contrary intention does not plainly appear, the words or phrases are to be understood in their ordinary and usual sense. 25 O.S. 1991, § 1. ***Loffland Bros. Equipment v. White***, 689 P.2d 311 (Okl. 1984).

7. The phrase "servicing of any advertising devices" was not defined by the Oklahoma Sales Tax Code[2]. The Tax Commission from at least as early as 1953 construed the phrase as including "the servicing of advertising equipment by any means whatsoever, including repairs, both labor and materials, electric service and any and all charges made for installation." Reg. 1., 1953 Sales Tax Rules and Regulations. Similar language construing the phrase was included in Regulation 13-18, 1986 Sales Tax Rules and Regulations[3].

[2]68 O.S. 1991, § 1350 et seq.

[3]The 1986 Sales Tax Rules and Regulations were adopted by the Tax Commission in Order No. 86-05-19-03 and were published in accordance with 75 O.S. 1981, § 251. Regulation 13-18 substitutes the word "devices" for the word "equipment".

The language of the 1953 and 1986 regulations was not carried forward to the Oklahoma Tax Commission Permanent Rules[4]. See, Rule 13.018.10, Oklahoma Tax Commission Permanent Rules[5].

8. In the context of Section 1354(1)(J), "Servicing" is defined to mean: to perform "useful labor that does not produce a tangible commodity"; "to repair or provide maintenance"; or, "to perform any of the business functions auxiliary to production or distribution". Webster's New Collegiate Dictionary, 1051 (1979). See, Oklahoma Tax Commission Order No. 92-04-28-099.

9. The agricultural exemption extends to "[S]ales of items to be and in fact used in the production of agricultural products", 68 O.S. Supp. 1992, § 1358(E); "[S]ale of farm machinery, repair parts thereto or fuel, oil, lubricants and other substances used for operation and maintenance of the farm machinery", 68 O.S. Supp. 1992, § 1358(F); and "[S]ales of supplies, machinery and equipment to persons regularly engaged in the business of raising evergreen trees . . . when the items in fact are used in the raising of such evergreen trees", 68 O.S. Supp. 1992, § 1358(G).

10. Protestant failed to establish the essential elements of an equitable estoppel. See, Rule 710:1-5-47 of the *Oklahoma Administrative Code*. Therefore, the Division is not estopped from asserting that sales tax is due on the separately stated charges for the use of the bucket truck in installing or servicing signs, the sale, installation and servicing of signs sold to ranches and the separately stated labor charges for the construction of signs from customer owned material.

11. The separately stated charges for the use of the bucket truck in installing or servicing signs is subject to sales tax. See, Regulation 13-18 of the 1986 Sales Tax Rules and Regulations and Oklahoma Tax Commission Order No. 91-08-06-019.

12. The gross receipts or gross proceeds from the sale, installation and servicing of signs sold to ranches is subject to sales tax. See, 68 O.S. 1991, § 1365(C) and 68 O.S. Supp. 1992, § 1358.

13. The separately stated labor charges for the construction of signs from customer owned material are **not** subject to sales tax. See, 68 O.S. Supp. 1993, § 1352(G).

14. Protestant's protest to the proposed assessment should be sustained in part and denied in part.

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[4]Adopted March 10, 1989. The Permanent Rules, including Rule 13.018.10, were amended May 13, 1991.

[5]Currently codified as Rule 710:65-19-311 of the *Oklahoma Administrative Code*.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is DETERMINED that the protest be sustained in part and denied in part. It is further DETERMINED that the amount in controversy be revised in accordance herewith and that the resultant amount of sales tax, inclusive of any additional accrued and accruing interest, be fixed as the deficiency due and owing.

OKLAHOMA TAX COMMISSION

ADDENDUM

NOW on this 13th day of July, 2000, the ***Order Granting Reconsideration and Amending Findings, Conclusions and Recommendations*** issued on December 2, 1999, in the above styled and numbered cause, comes on for consideration 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 ***Order***, revised the proposed sales tax assessment and provided notice of the revision to Protestant. Protestant has not challenged the revision proposed by the Division.

Upon consideration of the ***Order*** and the revision to the assessment, the undersigned finds that the following findings should be added to and incorporated in the ***Order***:

1. That notice of the revision to the assessment was filed of record in this cause on May 10, 2000.
2. That the Division revised the sales tax assessment to an amount of $5,070.59, consisting of tax in the amount of $2,739.96, penalty in the amount of $274.01, and interest accrued through May 31, 2000, in the amount of $2,056.62.
3. That the revision complies with the recommendation set forth in the ***Order***.
4. That Protestant was provided notice of the revision.
5. That Protestant did not file a response to the revision.

The undersigned further finds that the following should be added to and incorporated in the ***Order***:

> It is further DETERMINED that the amount in controversy, inclusive of any additional accrued and accruing interest, be fixed as the deficiency 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.