JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2001-02-12-004 / NOT PRECEDENTIAL**
ID: **P9900063**
DATE: **02-12-01**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. PROTESTANT A was President of PROTESTANT COMPANY at all times relevant to this proceeding.

2. PROTESTANT B was Vice President of PROTESTANT COMPANY at all times relevant to this proceeding.

3. PROTESTANT C was Vice President of PROTESTANT COMPANY at all times relevant to this proceeding.

4. PROTESTANT D was Vice President of PROTESTANT COMPANY at all times relevant to this proceeding.

5. PROTESTANT E was Secretary of PROTESTANT COMPANY at all times relevant to this proceeding.

6. That after conducting a field audit, the Oklahoma Tax Commission (the "Commission") issued its proposed assessment against Protestant for sales tax, interest and penalty by letter dated November 23, 1998.

7. That pursuant to its request, Protestant was granted a ninety-day extension by the Commission to file a response to the proposed assessment.

8. That Protestants filed a protest letter dated February 12, 1999 and such protest was timely received by the Commission.

9. That the Commission amended its assessment and issued a letter dated February 19, 1999 proposing to assess sales tax in the amount of $73,985.54 consisting of a tax due of $49,639.87, penalty in the amount of $5,122.91 and accrued interest through April 3, 1999 in the amount of $19,222.76 for the period of April 1, 1995 through March 31, 1998 to PROTESTANT COMPANY, THE CORPORATE OFFICERS, and EACH as individuals.

10. That a hearing was held on this matter on September 23, 1999, at which time the matter was submitted for decision.

11. That the office of the Administrative Law Judge received revised work papers in this matter dated November 21, 2000. The revised work papers reflect a sales tax due in the amount of $668.20, interest to December 31, 1999 in the amount of $411.27, penalty in the amount of $66.83 and additional interest to December 31, 2000 in the amount of $100.23 for a total amount due of $1,246.53.

ISSUE

The sole issue is whether transportation or delivery charges are included in the gross proceeds of a sale of merchandise that is specially ordered.

CONTENTIONS

Protestant contends that when an item is specially ordered, since it would not ordinarily be an item on hand in inventory, then Protestant is merely arranging for the delivery and is being reimbursed by the customer. Such delivery is, Protestant contends, a separate service charge, separately contracted for and tax exempt.

The Division contends that the cost of freight is generally incorporated in the sale price and is a cost of doing business and no deduction for transportation and delivery can be taken from the gross receipts. Therefore, sales tax must be collected on the total sale.

CONCLUSIONS OF LAW

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

2. Sales tax is levied on the gross receipts or gross proceeds from the sale of tangible personal property. 68 O.S. Supp. 2000, Section 1354.

3. Gross receipts or gross proceeds are defined as the total amount of consideration for the sale of any tangible personal property or service taxable under the Oklahoma Sales Tax Code. 68 O.S. Supp. 2000, Section 1352. The statute goes on to explain:

> There shall not be any deduction from the gross receipts or gross proceeds on account of cost of the property sold, labor service performed, interest paid, or losses, or of any expenses whatsoever, whether or not the tangible personal property sold was produced, constructed, fabricated, processed, or otherwise assembled for or at the request of the consumer as part of the sale. 68 O.S. Supp. 2000, Section 1352(7).

4. *Oklahoma Administrative Code* 710:65-19-70 further explains the above statute and states:

(a) Transportation and delivery charges are considered to be freight, express, mail, truck or other carrier, conveyance or delivery expenses. If such transportation or delivery charges are included in the selling price of the tangible personal property which is sold, the transportation or delivery expense is an element of cost to the seller and is sales taxable, unless the transportation or delivery charges are separately stated on the invoice.

(b) Where the seller and the buyer agree upon the transportation or delivery charges separately from the selling price of the tangible personal property which is sold, the cost of the transportation or delivery service is not a part of the "selling price" of the tangible personal property which is sold, but instead is a service charge, separately contracted for and is tax exempt for sales tax purposes.

(c) Transportation or delivery charges paid by a seller in acquiring property for sale are merely cost of doing business to the seller and may not be deducted by such seller in computing tax liability, even though he passes such costs on to his customers by quoting and billing such costs separately from the selling price of tangible personal property which he sells....

5. Protestant argues that this rule is ambiguous in that subsection (a) seems to contradict subsection (c). However, Protestant's interpretation of the rule would violate two rules in statutory construction which should be applied to construction of administrative rules: the rule must be read as a whole and when two provisions of a rule apply, the specific provision will overrule the general one.

6. Protestant contends that his situation falls under subsection (b) and that the analysis should end there. However to disregard subsection (c) would be to disregard the effect of the rule as a whole. Protestant's analysis negates the operation and spirit of the rule. These provisions must be read together to effectuate a full meaning of the rule, the purpose of which can only be discerned from the full context, not isolated provisions. *Community Bankers Ass'n v. Okl. Banking Bd.*, 979 P.2d 751 (Okla. 1999); *PSO v. State ex rel. Corp. Com'n*, 842 P.2d 750 (Okla. 1992).

7. Further, the rules of statutory construction dictate that when there are two provisions which arguably could govern, the more specific must prevail. *Kolberg v. State*, 925 P.2d 66 (Okl. Cr. 1996). The facts of the case could fit under subsection (a) or subsection (c) because the property is acquired for the consumer, however, the acquisition is separately stated on the invoice. When the entirety of the rule is examined, subsection (c) must govern because it specifically addresses the practice Protestant uses in his businesses and governs the taxability of the transportation and delivery charge. The fact that the charge is separately stated on the invoice does not in and of itself automatically classify the transaction as one that fits under subsection (a) or (b).

8. Protestant has cited Attorney General's Opinion No. 76-306 for the proposition that when a vendor sells and has a separate charge for hauling, the hauling is not a sale and therefore not taxable. The facts in that case are quite inapposite from those in the present case. In that opinion, the hauling of sand to a particular place was deemed to be a separately negotiated transaction from the price of a per ton charge for the sand sold and was tax exempt.

Those same circumstances were examined in another jurisdiction which found that customers who purchased sand and gravel pay the same price whether they use their own vehicle to carry the product away from the company's premises or utilize the company's trucking service to have the product delivered for them. *Natural Aggregates v. Dept. of Treasury,* 350 N.W.2d 272 (Mich.App. 1984). That Court also went on to hold that in these circumstances, the trucking charges were not a cost figured in calculating the gross price of the product itself and moreover, the delivery charge was not incidental to the purchase price. The delivery of sand was held to be a separate conceptual and temporal transaction from the sand and was not taxable. *Id.* at 275.

Although this case is not binding, it is useful for a possible expansion and clarification of the Attorney General's Opinion. Therefore, Protestant's reliance on Attorney General's Opinion No. 76-306 is distinguishable and the opinion is not binding on the particular circumstances of Protestant's case.

9. This Court has visited this exact issue and has previously issued its ruling in Oklahoma Tax Commission Order No. 92-05-21-045. The business practice in that case is virtually the same as Protestant's: (A) Protestant solicits orders from his customers; (B) Protestant secures the best price for the product from the suppliers; and (C) Goods are shipped to Protestant or shipped directly to customers. This Court previously held that *Oklahoma Administrative Code* 710:65-19-70(c) specifically addressed the practice Protestant used in his business and governs the taxability of the shipping charge.

10. The slight difference in the instant case is that the customer orders an item not in inventory and may desire the product to arrive faster than a normal stock purchase. This added service does not change the nature of the transaction in relation to taxation. It is still a cost of doing business which should be added to the purchase price and as such, sales tax must be collected as a part of the gross
receipts for the sale of the product. Although Protestant views this difference as the basis for a protest, this alone does not change the nature of the transaction to define it as a separate transaction, a service charge under subsection (b) of the rule rather than a cost of doing business under subsection (c) of the rule. This Court is not persuaded by Protestant's arguments to reverse its prior ruling by finding that subsection (c) is inapplicable in the instant case.

11. Subsequent to the submission of this case, the Commission revised *Oklahoma Administrative Code* 710:65-19-70 to clearly distinguish which delivery charges are to be included in the gross receipts by labeling the charges as either "outbound freight" and "inbound freight". This revision arguably removes any ambiguity if the provisions were read separately and clearly specifies which charges are to be included in gross receipts. However, since the revised rule was adopted subsequent to the submission of the case, the analysis of Protestant's case must be reviewed under the prior rule.

12. Based upon the foregoing facts and legal authorities, Protestant has not met the burden of

DISPOSITION

It is the DETERMINATION of the OKLAHOMA TAX COMMISSION, based on the specific facts and circumstances of this case that the protest of PROTESTANT CORPORATION, and THE CORPORATE OFFICERS, and as individuals be denied. It is further DETERMINED that the amount in controversy based upon the revised field audit, 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.