JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2001-03-08-011 / NOT PRECEDENTIAL**
ID: **P9800085**
DATE: **03-08-01**
DISPOSITION: **SUSTAINED**
TAX TYPE: **SALES / USE**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. PROTESTANT is a manufacturer and a retailer of coffee. This case concerns retail sales of coffee and equipment by PROTESTANT to its customers. PROTESTANT employs salesmen to contact businesses in Oklahoma in order to sell coffee products. PROTESTANT will deliver coffee to a business place for use by that business as a courtesy to its employees and customers to provide coffee at that place of business. PROTESTANT will continue to provide coffee delivery to the place of business on a monthly basis until either the customer or PROTESTANT wishes to terminate the service. Although PROTESTANT advertises that no contract is required to receive the service, PROTESTANT does in fact enter into a month-to-month contract with its customer that can be terminated by either party at will. This contract is written and was admitted into evidence as Exhibit P-6. The contract can be terminated at will but the customer is still obligated to pay for the products that were delivered and consumed. PROTESTANT also operates the same business in ANOTHER STATE. However, this protest only concerns the sale or use of products in Oklahoma.

2. PROTESTANT will not only provide the coffee to a customer but will also provide a machine to brew the coffee as well. PROTESTANT has two different types of customers. One type of customer is called a "coffee only purchaser" or COP. This protest does not concern COP sales. The other type of customer will purchase coffee from PROTESTANT and for an additional charge, PROTESTANT will also provide a coffee machine for the customer's use. PROTESTANT submitted its price list for this service at hearing as Exhibit P-7. PROTESTANT prices its coffee per case depending on the quantity of cases purchased in a single transaction. Buyers of multiple cases receive a lower per case charge than buyers of a single case. Also, the COP price per case is approximately five to twenty dollars lower than the price per case charged to customers that are provided with coffee brewing machines. The price list in Exhibit P-7 provides price listing based on quantity of cases purchased for four different kinds of coffee brewing machines. The bigger machines cost more than the smaller machines. All payments are based on the number of cases of coffee purchased. PROTESTANT maintains ownership of all the machines and possession reverts to PROTESTANT at the end of the contract. The customer agrees to purchase its coffee exclusively from PROTESTANT in order to use the machines. PROTESTANT will terminate the contract and remove the machines if the customer buys coffee from another supplier.

PROTESTANT performs regular maintenance on the machines at its own expense but the customer must pay for the machine if its is stolen or damaged. Also, PROTESTANT will terminate the contract and remove the machines if the customer does not purchase at least one case of coffee per month. The sales tax is calculated on the total unit price charged for the coffee plus equipment as demonstrated by the PROTESTANT invoice in Exhibit P-9.

3. The coffee brewing equipment purchased by PROTESTANT is used to service accounts in Oklahoma and in ANOTHER STATE. PROTESTANT offered testimony and Exhibit P-12 which indicates that fifty percent (50%) of the equipment purchased in the audit period was used in ANOTHER STATE. PROTESTANT received the equipment in Oklahoma City, Oklahoma and then transferred the equipment to ITS OUT OF STATE office to be used for THAT STATE'S accounts. PROTESTANT also purchased repair parts for its equipment but the equipment from OUT OF STATE in need of repair was brought back to the Oklahoma City office where the repair was performed. Therefore most of the repair parts were used in Oklahoma. The inventory of equipment in ANOTHER STATE was taxed under THAT STATE'S law as indicated in Exhibit P14.

4. The Audit Division of the Oklahoma Tax Commission, "Division," conducted a field audit of PROTESTANT for sales and use tax for the audit period of July 1, 1994, through June 30, 1997. The Division determined that PROTESTANT did not pay sales or use tax on the equipment that it purchased for use by its customers. The Division concluded that the purchase of the equipment was not exempt from sales or use tax under any applicable exemption and issued proposed assessments for sales and use tax on November 21, 1997. The proposed assessments were timely protested by PROTESTANT on March 23, 1998, under extension of time to file the protest granted by the Division. The assessments were subsequently revised and stand as follows:

	Use Tax	Sales Tax
Tax	$55,905.58	$2,054.28
Interest	29,187.54	1,259.03
Penalty	5,590.63	205.43
TOTAL	$90,683.75	$3,518.74

ISSUES

1. Whether the coffee brewing equipment and repair parts purchased by PROTESTANT are exempt from sales and use taxes pursuant to the sale for resale exemption.

2. Whether the equipment and parts purchased by PROTESTANT and used out of state in its OUT-OF-STATE office are subject to Oklahoma sales and use taxes.

CONCLUSIONS OF LAW

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

A. Sale for Resale Exemption

2. The facts adduced at hearing show that PROTESTANT enters into a contract with its customers to sell coffee products to the customer and also to rent, or lease coffee brewing machines. The written contract provides a monthly fee upon which the equipment is leased. The lease price is quoted in terms of cases of coffee purchased by the customer. However, the price list demonstrates a distinct price differential per case for customers who rent equipment that can be identified as the lease payment.

The terms of the lease provide that coffee products must be purchased every month exclusively from PROTESTANT at the scheduled rate for the particular machine leased. If these terms are breached, PROTESTANT terminates the contract and recovers possession of the machine to be used for another customer.

Sales tax was collected and remitted on the total scheduled rate charged by PROTESTANT for the coffee products plus rental fee, which is the gross proceeds from the sale of coffee plus equipment rental fee. The Tax Commission defines "rental" or "lease" in OAC 710:651-11(b) as follows:

> "Rental" or "lease" means the agreement by the owner to give exclusive use of property to another for a consideration and for any period of time under any one agreement.

The substance of the transaction in the case at bar comes within this definition. PROTESTANT is the owner of the equipment and agrees to give exclusive use of the equipment to a customer for as long as coffee products are purchased every month exclusively from PROTESTANT at their scheduled rate. This is a valid and enforceable lease contract and PROTESTANT collected and remitted sales taxes on the lease payment.

3. PROTESTANT is in the business of leasing coffee brewing machines, among other things. The purchase of equipment by PROTESTANT for this purpose is a sale for resale as defined at 68 O.S. § 1352(16)(b) as being:

> A sale of tangible personal property to a purchaser, for the sole purpose of the renting or leasing, within the geographical limits of the United States of America or its territories or possessions, of the tangible personal property to another person by the purchaser.

Section 1357(3) specifically exempts from the tax on sales, all sales for resale to persons engaged in the business of reselling the articles purchased. PROTESTANT purchases the coffee brewing equipment for resale and is entitled to the exemption from sales tax provided in Section 1357(3) and OAC 710:65-13-200. However, the lease of equipment by PROTESTANT to its customers is subject to sales tax pursuant to 68 O.S. § 1354(17). The evidence in this case shows that the sales taxes collected on the gross amount of the lease payment as required by OAC 710:65-1-11.

4. Title 68 O.S. § 1402 imposes the excise tax on the use or consumption of tangible personal property brought into this state. However, the term "use" as defined in Section 1401(8) does not include the sale of property in the regular course of business. Also, Section 1404(2) exempts property purchased for resale from the use tax. Pursuant to these applicable statutes, the equipment purchased by PROTESTANT for lease to its customers is exempt from the use tax.

5. PROTESTANT also purchased repair parts for the purpose of maintaining the equipment. Under the lease agreement, PROTESTANT was responsible for maintaining the equipment in working order. Periodically, PROTESTANT will remove equipment from a customer in exchange for another machine so that PROTESTANT can perform this repair or maintenance. The repair parts purchased by PROTESTANT were incorporated into the coffee brewing equipment that it leases to its customers for the purpose of maintaining that equipment. Such repair part purchases are exempt from Oklahoma sales and use taxes pursuant to the provisions of OAC 710:65-1-11(h).

B. Out of State Sales

6. PROTESTANT has an office in ANOTHER STATE, from which it provides the same goods and services to customers in THE OTHER STATE as it does from its home office in Oklahoma City, Oklahoma. In Exhibit P-14, PROTESTANT demonstrated that it is paying the applicable taxes for its leased equipment in ANOTHER STATE.

PROTESTANT presented evidence that approximately fifty percent (50%) of the equipment purchased by PROTESTANT for lease to its customers was transferred to its OUT OF STATE office for lease to customers in THAT STATE. The Oklahoma sales and use tax is only applicable to the sale or use of tangible personal property occurring within this state. The transactions taking place in ANOTHER STATE are subject to applicable taxes in THAT STATE and not subject to Oklahoma sales and use tax because the point of sale for these transactions is outside the State of Oklahoma, OAC 710:65-15-1.

7. PROTESTANT used its repair parts inventory in Oklahoma City to service the equipment from the OUT OF STATE office. Testimony from PROTESTANT indicated that the usual course of business for PROTESTANT in THE OTHER STATE was to return equipment in need of repair to the Oklahoma City office. The repairs would be performed in Oklahoma City and the equipment would then be returned to THE OUT OF STATE OFFICE.

The evidence presented at hearing was insufficient to conclude that the repair parts were used outside of Oklahoma. The repair parts were stored in Oklahoma and used in Oklahoma to repair the equipment from THE OUT OF STATE OFFICE. The use of the repair parts in Oklahoma is exempt from sales or use tax because PROTESTANT incorporates those repair parts into the equipment that it leases and therefore the parts are exempt pursuant to OAC 710:65-1-11(h).

8. The protest of should be sustained in full.

DISPOSITION

It is the DETERMINATION of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the sales tax and use tax protest of PROTESTANT and THE OFFICERS, as Chairman/Secretary/Treasurer, as President, and as Vice-President, and as individuals be sustained.

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.