

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 2001-04-24-004 / NOT PRECEDENTIAL
ID: P9700310
DATE: 04-24-01
DISPOSITION: DENIED
TAX TYPE: SALES / USE
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Protestant is in the general construction business, with a part of his business consisting of the sale and erection of metal buildings. The vast majority of Protestant's sales of metal buildings involve Protestant providing the service of erecting the building. At issue in this protest are a limited number of transactions. Protestant testified that to the best of his knowledge, each of the parties in the subject transactions purchased buildings from him with the intention of selling the real estate to which the buildings were affixed. In each of the transactions at issue, Protestant provided his construction services as a part of the contract. In most of the sales, the purchaser intended to utilize the buildings as multi-unit rental storage facilities. Protestant did not collect sales tax on the relevant sales.

2. Protestant purchased the metal buildings and supplies he used to fulfill his contracts from vendors outside Oklahoma and paid no tax at the time of purchase. Protestant testified that each of his out-of-state purchases of metal buildings was to fulfill a contract. Protestant did not report or pay use tax on these purchases.

3. Each of the parties to whom metal buildings were sold tax exempt provided Protestant a copy of a valid sales tax permit. None of the parties provided Protestant with a signed statement certifying that they were in the business of reselling the items purchased and that the specific items being purchased were for resale.

4. Protestant made a limited number of out-of-state purchases of items other than metal buildings or metal building components, including sod, a cutting blade, a folding gate and insulation tape. Protestant admits use tax is due on these items.

5. Protestant was the holder of a sales tax permit for the period of August 1, 1995 through June 30, 1996, when the permit was cancelled by the Tax Commission based on Protestant's status as a contractor.

6. The Division conducted a sales and use tax audit of Protestant for the period of April 1, 1994 through March 31, 1997. On May 15, 1997, the Division issued proposed assessments against Protestant as follows:

Sales tax	\$17,465.72
Interest thru 5-15-97	3,337.99
Penalty	<u>1,746.58</u>
Total	\$22,550.29
Use tax	\$12,959.47
Interest thru 5-15-97	3,918.59
Penalty	<u>1,295.97</u>
Total	\$18,174.03

7. On June 12, 1997, Protestant timely filed his protest to the proposed assessments of the Division.

ISSUES

1. Whether Protestant acted as a contractor in the transactions at issue, thereby resulting in his purchases being subject to sales or use tax.

2. Whether sales of metal buildings to persons who develop multi-unit storage facilities with the intention of selling the completed facilities are subject to sales tax. If such sales are subject to sales tax, the secondary issue is whether Protestant acted in compliance with Oklahoma law such that he may be relieved of the sales tax liability.

CONTENTIONS

1. Protestant contends he should be relieved of liability for sales tax assessed. The basis of Protestant's contention is that he acted in compliance with Oklahoma law in obtaining a copy the sales tax permit of each purchaser allegedly purchasing items for resale, and as such, is relieved of liability. Alternatively, Protestant contends the majority of the sales at issue were exempt from sales tax as valid sales for resale to persons in the business of reselling the items purchased.

2. Protestant contends the majority of his out-of-state purchases are exempt from use tax. The basis of Protestant's contention is his assertion that most of the items he purchased were sold to persons in the business of reselling the items purchased. Protestant admits use tax is due on a limited number of items he purchased out-of-state and used in his business.

3. The Division contends Protestant may not be relieved of the sales tax liability at issue for the reason that he did not comply with the requirements under Oklahoma law for such relief. The Division additionally asserts the sales Protestant maintains were exempt were sales to persons in the business of developing real estate, and as such were subject to sales tax.

4. The Division contends Protestant purchased items out-of-state tax exempt, used the items purchased in the operation of his business and failed to properly report and remit use tax on those purchases.

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S.1991, § 207.

2. The burden of proof in this matter is upon the Protestant to show in what respect the proposed assessments of the Division are erroneous.

3. All sales of tangible personal property are subject to sales tax unless specifically exempted by the Oklahoma Sales Tax Code. 68 O.S.1991, § 1354. The burden of proving that a sale is not taxable is upon the vendor. 68 O.S.1991, § 1365(C).

4. Tangible personal property purchased outside Oklahoma, in such a way that the seller does not collect sales tax, and brought into Oklahoma by an Oklahoma consumer or user is subject to use tax. 68 O.S.1991, § 1402. Items purchased outside Oklahoma for resale are exempt in the same manner as items purchased inside Oklahoma for resale. 68 O.S.1991, § 1404.

5. In general, sales for resale to persons engaged in the business of reselling the articles purchased are exempt from sales tax. 68 O.S.1991, § 1357. However, "sale for resale" is specifically defined in the Sales Tax Code and excludes sales of tangible personal property for the purpose of renting or leasing such property if incidental to the renting or leasing of real estate. 68 O.S.Supp.1994, § 1352(N). Additionally, sales of tangible personal property to contractors for the purpose of developing real estate are subject to sales tax, even where the real estate is intended to be resold. 68 O.S.1991, § 1354(T).

6. A consumer or user under the Sales Tax Code is a person to whom a taxable sale is made, and specifically includes contractors. 68 O.S.1991, § 1352(C). A contractor is defined as a person who performs an improvement upon real property, and as a part of that performance integrates tangible personal property belonging to or purchased by said person into the real property being improved. 68 O.S.1991, § 1352(D).

7. The record reflects Protestant was a contractor in each of the transactions at issue. Construction services and the integration of tangible personal property were a part of each contract at issue, and each contract resulted in improvements to real property. Therefore, Protestant's purchases of metal buildings and supplies were subject to taxation at the time he made his purchases. Since Protestant purchased his metal buildings and supplies outside Oklahoma, each purchase was subject to use tax.

8. The sales at issue by Protestant are not subject to sales tax since Protestant, as a contractor, is the consumer-user and required to pay sales tax on his purchases.¹ However, the developers of multi-unit storage facilities may not be classified as purchasers for resale in the transactions at issue, as such transactions are specifically excluded from the statutory definition of a sale for resale.

9. While it is not necessary to reach a conclusion regarding whether Protestant acted in a manner such that he could be relieved of liability had the undersigned determined sales tax is owing, the issue will be briefly addressed. Protestant would not be relieved of liability due to his failure to obtain and maintain records as required by Oklahoma law.²

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, the Division is directed to make adjustments to the assessments in accordance with these findings and conclusions within 30 days of the date of service of the findings. The Division is further directed to file notice of those adjustments in the Office of the Administrative Law Judge and to serve a copy of the same on counsel for the Protestant. Protestant shall be given 30 days to file a response to the calculations contained in those adjustments. Upon expiration of the time periods described, an Addendum to these findings will be issued.

¹ This decision applies only to the sales at issue. The testimony of Protestant revealed he also sells metal buildings in which his services as a contractor are not a part of the contract. In such cases, the sales would be subject to sales tax.

² Vendors making sales for resale are required to obtain and maintain certain documentation supporting any sale for resale. At the time of the sale, the purchaser must provide the vendor with his sales tax permit number along with written certification that he is engaged in the business of reselling the articles purchased. The written certification must contain the name and address of the purchaser, the sales tax permit of the purchaser, a statement that the purchaser is in the business of reselling the articles purchased, a statement that the articles are being purchased for resale, and the signature of the purchaser or a person legally authorized to bind the purchaser. 68 O.S.1991, § 1365(C) and (D). If a vendor, in good faith, timely accepts from a consumer properly completed documentation certified by the Oklahoma Tax Commission evidencing that such consumer is exempt from sales tax, the vendor will be relieved of any liability from the failure to collect sales tax with respect to the relevant sale. 68 O.S.1991, § 1361.1. The law further provides that if a purchaser improperly presents documentation to a vendor and purchases property exempt from tax that does not qualify for exemption, the Tax Commission may pursue collection from the purchaser and the vendor will be relieved of liability for the sales tax with respect to the sale. 68 O.S.1991, § 1361(A). In order to give meaning to Sections 1361(A), 1361.1, 1365(C) and 1365(D), these statutes must be read together to ascertain the statutory scheme. In interpreting these statutes to reconcile their operation, one must conclude that a vendor cannot have acted in good faith unless he has obtained the documentation required by Section 1365(D). If a vendor obtains and maintains the required documentation, and the consumer has improperly presented all or a portion of that documentation, the vendor will be relieved of liability.

**AMENDMENT AND ADDENDUM TO FINDINGS,
CONCLUSIONS AND RECOMMENDATIONS**

Now on this 26th day of March, 2001, the above-styled and numbered cause comes on for consideration of an addendum and requested amendments to the Findings, Conclusions and Recommendations ("Findings") issued on October 27, 2000. Upon review of the pleadings filed subsequent to the issuance of the Findings, the undersigned supplements and amends the Findings as follows:

1. On January 18, 2001, in response to the recommendation of the undersigned for revisions to the audit, the Audit Division ("Division") filed a Motion requesting to be allowed to file its Response to Findings beyond the date set. The Motion reflects it was properly served on counsel for Protestant. No objection to the Response was filed, and therefore, the Motion is deemed confessed, and the Response of the Division filed on January 18, 2001 is considered herein.

2. In its Response, the Division asserts Protestant made a limited number of purchases of tangible personal property from vendors within Oklahoma. The Division further attached copies of invoices evidencing such purchases within Oklahoma. Therefore, amendments to the Findings are appropriate and the Findings are amended in the following manner:

Finding of Fact Number 2 is deleted and replaced with the following:

2. Protestant purchased the majority of the metal buildings and supplies he used to fulfill his contracts from vendors outside Oklahoma and paid no tax at the time of purchase. Protestant testified that each of his out-of-state purchases of metal buildings was to fulfill a contract. Protestant did not report or pay use tax on these purchases. Protestant purchased a limited portion of the items he used to fulfill his contracts from vendors inside Oklahoma and paid no sales tax at the time of purchase.

Conclusion of Law Number 7 is deleted and replaced with the following:

7. The record reflects Protestant was a contractor in each of the transactions at issue. Construction services and the integration of tangible personal property were a part of each contract at issue, and each contract resulted in improvements to real property. Therefore, Protestant's purchases of metal buildings and supplies were subject to taxation at the time he made his purchases. The metal buildings and supplies purchased by Protestant from outside Oklahoma were subject to use tax. Any metal buildings and supplies purchased within Oklahoma were subject to sales tax.

3. The Division, as directed by the Findings, revised the proposed sales and use tax assessments and provided notice of the revisions in its Response. Protestant has not challenged the revisions proposed by the Division. The Division revised the sales tax assessment to an amount of \$852.67, consisting of tax in the amount of \$475.67, penalty in the amount of \$47.59, and interest accrued through January 31, 2001 in the amount of \$329.41. The Division revised the use tax assessment to an amount of \$56,408.40, consisting of tax in the amount of \$29,918.32, penalty in the amount of \$2,991.85, and interest accrued through January 31, 2001 in the amount of \$23,498.23.

4. The above-referenced revisions are in conformity with the Findings and the amendments to the Findings set forth above. The undersigned therefore finds the revised amounts, inclusive of any additional accrued and accruing interest, are appropriately fixed as the deficiency due and owing.

THEREFORE, the Findings, Conclusions and Recommendations issued on October 27, 2000 are amended to include and incorporate the above and foregoing findings, conclusions and recommendations.

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.