JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2002-02-12-003 / NOT PRECEDENTIAL**
ID: **P9700091**
DATE: **02-12-02**
DISPOSITION: **DENIED**
TAX TYPE: **SALES / USE / MOTOR FUELS**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Division conducted an audit of Protestant's books and records for the period of April 1, 1993, through March 31, 1996. The audit resulted in the issuance of sales tax, use tax, motor fuel special tax (propane) and motor fuel diesel tax assessments.

2. On February 28, 1997, the Division proposed the assessment of sales tax, interest and penalty against Protestant as follows:

Tax	$ 25,876.55
Interest	9,199.68
Penalty	2,588.41
Total	$ 37,664.64

3. The Division proposed the assessment of use tax, interest and penalty against Protestant as follows:

Tax	$ 2,556.64
Interest	742.47
Penalty	255.71
Total	$ 3,554.82

4. The Division proposed the assessment of motor fuel special tax (propane), interest and penalty against Protestant as follows:

Tax	$ 1,905.92
Interest	890.51
Penalty	3,342.54
Total	$ 6,138.97

5. The Division proposed the assessment of interest and penalty related to the late payment of motor fuel diesel tax as follows:

Tax	<$ 2,267.76>
Interest	847.40
Penalty	422.38
Total	<$ 997.98>

6. Protestant filed a timely protest to the proposed assessments.

7. At the hearing held in this matter the parties made preliminary announcements regarding the assessments at issue.

○ The Division advised regarding the use tax which was assessed on computer maintenance agreements, that the transaction involving ABC CORP and XYZ COMPANY were not subject to use tax and would be removed from the audit and that the transaction involving ZZZ was use taxable and Protestant agreed to pay the tax thereon.

○ Based on information provided by Protestant that only 2% of the propane at issue was for road use, the Division agreed to revise the motor fuel special tax (propane) assessment and provide the amended amounts after the hearing.

○ In regard to the motor fuel diesel tax, it was announced that Protestant is due a refund of approximately $74,000.00; however, a small amount of interest and penalty is still outstanding, for which Protestant intends to request a waiver.

8. The only matter remaining at issue for the hearing was the sales tax assessment.

9. During the audit period, Protestant made cash sales of propane and failed to collect and remit sales tax on these transactions. Additionally, Protestant purchased auto parts exempt from sales tax.

10. PROTESTANT'S CPA provided and explained a letter dated April 16, 1997, which set forth the Protestant's position regarding the imposition of sales tax on the automotive parts purchased. The letter indicated that the total amount of automotive parts purchased during the audit period was $35,040.17; that the total parts sales for this period were $137,102.71, which includes a profit of 40%; and that after deducting the 40% profit, the cost of parts sales equals $82,261.63. PROTESTANT'S CPA explained that 70% of this total represented propane tank parts sold; that the remaining 30%, or $24,678.49, represents the cost of automotive parts which were resold; that sales tax has been remitted thereon; and therefore Protestant owes sales tax to be calculated on the remaining auto parts in the amount of $10,361.68.

11. The parties filed a Joint Stipulations on Assessment advising of the amended assessments as follows:

Use Tax

Tax	$ 2,070.85
Interest	1,061.99
Penalty	207.12
Total	$ 3,339.96

Motor Fuel Special Tax (Propane)

Tax	<$ 510.40>
Interest	5.50
Penalty	73.17
Total	<$ 431.73>

12. Pursuant to the joint stipulation, Protestant intends to request a waiver of the aforementioned penalty and interest.

ISSUE AND CONTENTIONS

Whether Protestant has met its burden of showing in what respect the proposed action of the Tax Commission is incorrect.

Protestant contends that the cash sales of propane were for home use and are exempt from sales tax. Further, Protestant argues that it was not required by Commission Rules to obtain the name and address of the purchasers in order to document the exemption. Protestant further contends that during the audit period, it was in the business of reselling auto parts, that it properly collected and remitted sales tax on parts and that it does owe sales tax on the auto parts purchased exempt for resale which were withdrawn for its own use and consumption.

The Division contends that Protestant has not furnished proper records to document that propane was sold for home use or that sales tax has been paid on the sale of the automobile parts.

CONCLUSIONS OF LAW

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

2. Sales of tangible personal property are subject to sales tax levy in Section 1354 of the Oklahoma Sales Tax Code, unless otherwise exempt. 68 O.S. 1991, § 1354(1)(A).

3. Sales of natural gas are subject to the sales tax levy in Section 1354 of Title 68 unless otherwise exempted. 68 O.S. 1991, § 1354(1)(B).

4. By statute, 68 O.S. 1991, § 1361(A), the legislature placed on the seller of tangible personal property the burden of collecting and remitting sales tax. See Wal-Mart Stores, Inc. v. Oklahoma Tax Commission, 817 P.2d 1281 (Okl. 1991). The seller must collect the tax from the consumer[1], hold the sums collected in trust for the state[2], and remit those sums in a timely manner.[3]

The seller is also required to maintain specific records for the purpose of examination by the Tax Commission and determination of the amount of tax due. The statute addressing the record keeping requirements is 68 O.S. 1991, § 1365(C), which provides:

> (C) It shall be the duty of every vendor required to make a sales tax report and pay any tax under this article to keep and preserve suitable records of the gross daily sales together with invoices of purchases and sales, bills of lading, bills of sale and other pertinent records and documents which may be necessary to determine the amount of tax due hereunder and such other records of goods, wares and merchandise, and other subjects of taxation under this article as will substantiate and prove the accuracy of such returns. It shall also be the duty of every person who makes sales for resale to keep records of such sales which shall be subject to examination by the Tax Commission or any authorized employee thereof while engaged in checking or auditing the records of any person required to make a report under the terms of this article. All such records shall remain in Oklahoma and be preserved for a period of three (3) years, unless the Tax Commission, in writing, has authorized their destruction or disposal at an earlier date, and shall be open to examination at any time by the Tax Commission or by any of its duly authorized agents. <u>The burden of proving that a sale was not a taxable sale shall be upon the person who made the sale</u>. [Emphasis added].

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[1] Title 68 O.S. 1991, § 1361(A) provides:

> (A) The tax levied by this article shall be paid by the consumer or user to the vendor as trustee for and on account of this state. Each and every vendor in this state shall collect from the consumer or user the full amount of the tax levied by this article, or an amount equal as nearly as possible or practicable to the average equivalent thereof . . . .

[2] Title 68 O.S. 1991, § 1361(E) provides:

> (E) Any sum or sums collected or required to be collected in this article shall be deemed to be held in trust for the State of Oklahoma, and, as trustee, the collecting vendor shall have a fiduciary duty to the State of Oklahoma in regards to such sums and shall be subject to the trust laws of this state . . . .

[3] Title 68 O.S. 1991, § 1365(A) provides:

> (A) The tax levied hereunder shall be due and payable on the first day of each month, except as herein provided, by any person liable to remit or pay any tax due under this article. For the purpose of ascertaining the amount of the tax payable under this article, it shall be the duty of all tax remitters, on or before the 15th day of each month, to deliver to the Tax Commission, upon forms prescribed and furnished by it, sales tax reports signed under oath, showing the gross receipts or gross proceeds arising from all sales taxable or nontaxable under this article during the preceding calendar month . . . .

> If the seller has not collected sales taxes on the sales, the statute expressly places the burden upon the seller to prove that the sale was not a taxable sale.

Sales of Natural Gas for Residential Use

In the case at hand, Protestant's records indicate that sales tax was not collected on a number of cash sales of propane made by Protestant. The auditor proposed assessing additional sales taxes on the transactions where he was not satisfied that the sales were exempt from taxation. Protestant believes its records and supporting documentation show that the transactions were tax exempt sales.

An exemption from sales tax for natural gas sold for residential use is provided in 68 O.S. Supp. 1993, § 1357(6). "The term 'residential use' means the use of gas or electricity by the individual customer exclusively for domestic purposes such as lighting, refrigeration, cooking, water, heating, space heating and air conditioning, in a private home or individual living unit served through a single meter or a master metered multi-unit apartment, condominium, or townhouse used exclusively for domestic purposes." Oklahoma Administrative Code 710:65-13-120(a).

Although there are no specific requirements to document the exemption in Section 1357(6), Oklahoma Administrative Code 710:65-3-33(b) outlines the documentation required to support deductions claimed as follows:

> (b) Complete and detailed records required. To support deductions made on the tax return, such as sales for resale, sales within the protection of the Commerce Clause of the Constitution of the United States, sales made to churches, or sales made to any governmental body, the vendor's records for each transaction for which exemption is claimed shall be in detail sufficient to show:
>
> (1) The name and address of the customer,
> (2) The character of the transaction,
> (3) The date,
> (4) The amount of gross receipts or gross proceeds; and
> (5) Such other information as may be necessary to establish the nontaxable character of such transaction under the Sales Tax Code.

Protestant contends that since sales of natural gas for residential use were not specifically listed in the rule, it was not required to obtain the name and address of its customers to document the exempt nature of the sales.

The list of exempt sales contained in Subsection (b) merely constitutes examples of exempt sales contained in the Sales Tax Code and is not a recitation of the only exempt sales which are required, among other things, to be documented by the name and address of the vendor's customers.

Even if Oklahoma Administrative Code 710:65-3-33 does not apply to these transactions, Protestant is still subject to the record keeping requirements outlined above and to the burden of proof as established in Section 1365 of Title 68 and Oklahoma Administrative Code 710:1-5-47. In documenting this claimed exemption, Protestant has provided invoices which reflect the date of the transaction, an amount of propane sold and the notation "cash" or "cash sales". Along with the aforementioned, a number of the invoices also contained the notation "home heat". The invoices did not contain names and addresses or signatures of Protestant's customers. Without the names and addresses of the customers, the records are insufficient to determine the amount of tax due as required by Section 1365(C) and Protestant has not met its burden of proof because the lack of this information makes it impossible to verify the claimed exemption.

Sales of Automobile Parts

During the audit period, Protestant purchased automobile parts exempt from sales tax. Protestant admits that a portion of the automobile parts purchased were withdrawn from inventory for their own use and consumption and that tax is due thereon. However, Protestant contends that the remaining auto parts were resold and that tax was collected and remitted to the Tax Commission on those sales. The Division contends that Protestant purchased automotive parts under the sale for resale exemption, but did not maintain records delineating which parts, if any, were resold and that tax was collected and remitted on the automobile parts purchased.

The burden of proof in all administrative proceedings is on the Protestant to show in what respect the action or proposed action of the Tax Commission is incorrect. Oklahoma Administrative Code 710:1-5-47. The denial of a protest to a proposed assessment is appropriate where the party opposing the proposed action fails to provide evidence which is sufficient to entitle the party to the requested relief. Continental Oil Company v. Oklahoma State Board of Equalization, 570 P.2d 315 (Okl. 1977).

Here, Protestant failed to maintain the records required by Section 1365(C) and cannot demonstrate that the automobile parts purchased at issue herein were resold and that tax was collected and remitted to the Tax Commission. Therefore, Protestant failed to meet its burden of proof and its protest to the assessment of sales tax on the automobile parts should be denied.

DISPOSITION

It is the DETERMINATION of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the sales tax protest of PROTESTANT be denied. Further, it is DETERMINED that the use tax, motor fuel diesel tax and special fuel tax assessments be settled in accordance with the agreement of the parties.

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.