JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2003-04-22-05 / NOT PRECEDENTIAL**
ID: **P9700189**
DATE: **04-22-03**
DISPOSITION: **SUSTAINED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Division conducted an audit of Protestant's available records for the period of January 1, 1992, through September 30, 1995. The audit resulted in the issuance of a sales tax assessment.

2. On February 25, 1997, the Division proposed the assessment of sales tax, interest and penalty in the aggregate amount of $143,007.05, consisting of tax in the amount of $87,480.71, interest accrued through April 16, 1997, in the amount of $46,778.25 and penalty in the amount of $8,748.09.

3. By letter dated March 26, 1997, Protestant filed a timely protest to the Division's proposed assessment of sales tax.

4. Based on documentation provided by Protestant, the audit was amended to reflect an aggregate amount due of $147,494.61, consisting of tax in the amount of $82,477.75, interest accrued through April 16, 1998, in the amount of $56,769.00 and penalty in the amount of $8,247.86.

5. During the audit period, Protestant owned illegal gambling devices in the form of coin-operated machines.

6. Protestant's machines were placed in a number of business establishments in Oklahoma with the business owner's agreement.

7. A patron of the establishment wishing to play the machine would put a coin in the machine, play the particular game, depending on the type of machine, and attempt to win credits. Patrons redeemed the credits for cash from the establishment owners or employees.

8. Periodically, Protestant or one of Protestant's employees met with the business owner or an employee of the business to divide the profits from the machines.

9. Protestant split 50/50 with the business owners the money left over after payment to the machine players.

10. The machines were electronically programmed to pay out at a rate of 50% of the monies paid into the machines by the players.

11. During the audit period, Protestant did not report or remit sales tax on the gross receipts from the gambling machines.

12. Initially, the auditor contacted Protestant by telephone in regard to the audit and made an appointment to see him the next day. At the meeting, the auditor explained the audit procedure and advised Protestant of the types of records that would need to be provided. Protestant provided the auditor with his bank statements for the months of January 1992 through December 1995, with the exception of statements for November 1993 and December 1993.

13. To determine the tax due, the auditor calculated the total deposits to Protestant's bank accounts during the audit period, deducted amounts attributable to a sale of machines, insurance proceeds, interest income and other items and arrived at the net income for Protestant. Taking into account the 50% payout and the 50/50 distribution between Protestant and the business owners, the auditor multiplied the net income amount by four to arrive at the total gross receipts from the machines. The auditor distributed the gross receipts among the five business locations known to have had these machines on premises in order to allocate the tax to the appropriate cities and counties where these establishments are located.

14. Based on the fact that one of the establishments was located outside the city limits and additional documentation submitted by Protestant, which identified bank deposits to sources other than receipts from the gambling machines, the sales tax assessment was amended.

15. The revised proposed assessment for sale tax is as follows:

Sales Tax	$ 79,940.88
Interest through 12/16/98	62,844.88
Penalty	7,994.18
Total	$150,779.94

ISSUES

I. Whether gross receipts from coin-operated gambling machines are subject to sales tax under Oklahoma law.

II. If subject to sales tax, whether the Division correctly calculated the amount of tax due.

CONTENTIONS

Protestant contends that the imposition of sales tax on the gross receipts from the coin-operated gambling machines is not constitutional or authorized by State statute. Specifically, Protestant contends that revenues generated from the devices at the locations in question are subject to other provisions of the Tax Code than the sales tax provisions of the state statute and that all revenue received from business with federally recognized tribes is not subject to sales tax. In addition, should a determination be made that sales tax is due, Protestant contends that the method used to arrive at the assessment is flawed and the Tax Commission should be estopped from asserting sums different than the tax returns of the facilities where the devices were located.

The Division contends that the proposed assessment as revised is correct. In support, the Division argues that Protestant's gross receipts from sales from the gambling machines, without any deduction for rental to locate the vending machine on the premises of another, are subject to sales tax pursuant to Section 1354(P). In the alternative, the Division contends that Protestant leased the coin-operated gambling machines and did not remit sales tax on the funds collected from the rental of the machines. Further, Division contends that since Protestant has not provided any records to establish an exact and documented figure upon which to base the assessment, the Division must assume that any and all of Protestant's undocumented and unaccounted for funds are attributable to gross receipts from Protestant's illegal gambling.

CONCLUSIONS OF LAW

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

2. Sales from coin-operated devices on which the fee imposed by Sections 1501 through 1513 of Title 68 has been paid are exempt from sales tax. 68 O.S. 1991, ‡ 1355(E).

3. Protestant's coin-operated devices did not meet the non-gambling requirement set forth in Section 1501(4) of Title 68 and are not exempt from sales tax pursuant to Section 1355 of Title 68.

4. Sales tax is levied on the "gross receipts from sales from any vending machine without any deduction for rental to locate the vending machine on the premises of a person who is not the owner or any other deductions therefrom." 68 O.S. 1991, ‡ 1354(P).

5. "Gross receipts" is defined to mean "the total amount of consideration for the sale . . . whether the consideration is in money or otherwise." 68 O.S. 1991, ϶ 1352(F).

6. The term "sale", as used in Section 1354, is defined by Section 1352(M) of Title 68 as follows:

> "Sale" means the transfer of either title or possession of tangible personal property for a valuable consideration regardless of the manner, method, instrumentality, or device by which the transfer is accomplished in this state, or other transactions as provided by this subsection, including but not limited to:
>
> (1) The exchange, barter, lease, or rental of tangible personal property resulting in the transfer of the title to or possession of the property;
> (2) The disposition for consumption or use in any business or by any person of all goods, wares, merchandise, or property which has been purchased for resale, manufacturing, or further processing;
> (3) The sale, gift, exchange, or other disposition of admission, dues, or fees to clubs, places of amusement, or recreational or athletic events or for the privilege of having access to or the use of amusement, recreational, athletic or entertainment facilities;
> (4) The furnishing or rendering of services taxable under this article; and
> (5) Any use of motor fuel or diesel fuel by a licensed distributor, as defined in Section 501 of this title, upon which sales tax has not previously been paid, for purposes other than to propel motor vehicles over the public highways of this state. Motor fuel or diesel fuel purchased outside the state and used for purposes other than to propel motor vehicles over the public highways of this state shall not constitute a sale within the meaning of this paragraph.

68 O.S. Supp. 1992, ϶ 1352(M).

Charges to play a gambling device in an attempt to win money is not a transaction which falls within the definition of sale.

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. ϶ 1; *Loffland Brothers Equipment v. White*, 689 P.2d 311 (Okl. 1984). "Vending machine" means a coin-operated machine for vending merchandise. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1987). Here, the coin-operated gambling devices do not fall within the definition of vending machine. Therefore, the transactions at issue are not subject to sales tax under Section 1354(P) of Title 68.

7. The Division makes the alternative argument that sales tax is due on the lease of the machines from Protestant to the various business owners. Sales tax is imposed on the gross receipts or gross proceeds from the rental or lease of tangible personal property, and there is not sufficient evidence in the record to support a finding that Protestant leased or rented the coin-operated gambling machines to the business owners. 68 O.S. 1991, э 1354(Q).

8. Protestant's protest should be sustained.

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 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.