JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2003-03-18-005 / NOT PRECEDENTIAL**
ID: **P9700075**
DATE: **03-18-03**
DISPOSITION: **SUSTAINED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties stipulate to the following:

1. Protestant is an Oklahoma corporation primarily engaged in retail convenience store operation and field sales.

2. Protestant does business under FEI# XX-XXXXXXX and Sales Permit No. 999999.

3. An audit of the records and files of the Protestant for the period April 1, 1993, through March 31, 1996, was conducted by the Division.

4. Protestant keeps a daily balance sheet of sales summary, monetary summary, paid-outs, inside sales, register readings, console readings and fuel inventory.

5. A monthly report is prepared by Taxpayer. The method of reporting varies concerning deductions of employee use, store use and over-under rings from month to month.

6. A letter of assessment was mailed to Protestant reporting a sales tax liability for the period of April 1, 1993, through March 31, 1996, totaling $5,039.83 inclusive of tax, interest and penalty.

ADDITIONAL FACTS

7. The assessment was based on sales tax not remitted on items purchased exempt for resale which were subsequently withdrawn from inventory for use by Protestant and sales tax collected but not remitted to the Tax Commission.

8. A timely protest was filed by Protestant.

ISSUES AND CONTENTIONS

The sole issue to be decided is whether sales tax is properly calculated on the retail value or food cost of meals furnished to employees free of charge.

Protestant contends that food cost should be the correct value in determining sales tax on food consumed by employees.

Division contends that Protestant owes sales tax on food provided to employees and other products used by the store based on the retail price of such items. Division further contends that Protestant has failed to present any evidence in support of its assertion that food cost rather than retail price is the appropriate value that should have been used to calculate the sales tax due on food transferred to employees at no charge.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission has jurisdiction of the protest. 68 O.S. ϗ 221.

2. Sales tax is levied and imposed upon the gross receipts from the sale of foods, confections and drinks sold or dispensed by hotels, restaurants or other dispensers for immediate consumption upon the premises or carried away from the premises for consumption elsewhere. 68 O.S. ϗ 1354.1(I).

3. ASale≅ is defined by the Oklahoma Sales Tax Code to mean "the transfer of either title or possession of tangible personal property for a valuable consideration . . . including 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." 68 O.S. ϗ 1352(M).

4. Where property is purchased for resale, manufacturing or further processing, and such property is withdrawn from stock in trade for use or consumption, sales tax is levied on the sales value of the property. 68 O.S. ϗ 1362(C).

5. Although sales value is not defined in the Sales Tax Code, the term is defined in *Oklahoma Administrative Code* 710:65-19-109, which specifically addresses the treatment of employee meals for sales tax purposes. However, the version of *Oklahoma Administrative Code* 710:65-19-109 in effect during the period at issue contained contradictory language regarding the definition of sales value. Pursuant to subsection (b) sales value is the cost of the material withdrawn from inventory to provide the meals. Conversely, subsection (d) provides that for purposes of calculating sales tax liability, the sales value of meals provided free to employees is presumed to be the regular, ordinary or menu price charged for the sale of the meal in the normal course of business. Further, the vendor may rebut this presumption by demonstrating that less benefit than the menu price was received. If no benefit was received, sales value of the free meal is the cost of the food included in the meal.

6. Based on the inconsistent and ambiguous language of 710:65-19-109 regarding the definition of sales value, the dispute must be resolved in favor of Protestant. *C. H. Leavell v. Oklahoma Tax Commission*, 450 P.2d 211 (Okl. 1968). *Accord*, Attorney General Opinion No. 83-97 citing *State v. Burke*, 598 P.2d 395 (Wash. 1979). However, as of this date, no documentation establishing the cost of the food used to provide meals to its employees free of charge has been submitted. Hence, in order to properly calculate the sales tax due on the employee meals, additional evidence is required.

RECOMMENDATION

Based upon Conclusion of Law No. 6, Protestant is given an additional thirty (30) days from the date of issuance of these *Findings, Conclusions and Recommendations* to submit documentation to the Division as to the cost of food used to provide employee meals. The Division is to revise the assessment after receipt and review of the documentation. A copy of the revised sales tax liability for the years at issue shall be mailed to Protestant simultaneously with filing of the revised sales tax amounts with the undersigned. Upon receipt of the revision, Supplemental Findings,
Conclusions and Recommendations will be issued.

SUPPLEMENTAL FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

NOW on this 14th day of February, 2003, the *Findings, Conclusions and Recommendations* issued on March 31, 2000, in the above styled and numbered cause, comes on for supplementation as to the cost of food used to provide employee meals.

The Division, as directed by the *Findings*, revised the proposed assessment and provided notice of the revision to Protestant by memorandum dated May 9, 2002. By letter dated June 9, 2002, Protestant protested the revisions proposed by the Division, and later requested a hearing be set. A hearing for the limited purpose of addressing the cost of food used by Protestant to provide free meals to its employees for the period at issue was held on November 7, 2002.

Upon consideration of the *Findings, Conclusions and Recommendations*, the November 2002 hearing and exhibits received into evidence and the revision to the assessment, the undersigned finds that the following additional facts and conclusions should be added to and incorporated in the *Findings, Conclusions and Recommendations*:

1. Notice of the revisions to the assessment was filed of record in this cause on May 9, 2002.

2. The Division revised the sales tax assessment to an amount of $7,592.86, consisting of tax in the amount of $3,423.47, interest through May 31, 2002, in the amount of $3,827.01, and penalty in the amount of $342.38.

3. Protestant was provided notice of the revisions.

4. By letter of June 9, 2002, Protestant protested the revisions proposed by the Division associated with the cost of food to provide meals to its employees free of charge, and later requested a hearing.

5. A hearing was held for the limited purpose of addressing the cost of food used by Protestant to provide meals to its employees free of charge for the period at issue. Protestant submitted documentation that the determination by the Division that the cost of food was 42.2% of the retail sales amount was approximately 10% too high. The information submitted by Protestant set forth food products, items in unit and unit price. On a worksheet, Protestant outlined certain of the food products and the retail price of the products, and computed the price per item and the food cost.

6. Protestant's documentation was sufficient to show that the cost of food provided free of charge to its employees was an average of 31% of the retail sales price.

7. Subsequent to adjustment to reflect a food cost of 31%, the revised amount in controversy consists of tax in the amount of $3,360.27, interest calculated through October 16, 2002, in the amount of $3,946.89, and penalty in the amount of $336.02, for a total amount due of $7,643.18.

The undersigned further finds that the following recommendation should be added to and incorporated in the *Findings, Conclusions and Recommendations*:

> It is recommended that the amount to be fixed as the deficiency due and owing by PROTESTANT for sales tax, interest and penalty is $7,643.18, plus any additional accrued and accruing interest.

DISPOSITION

THEREFORE, the *Findings, Conclusions and Recommendations* issued on March 31, 2000, are amended to include and incorporate the above and foregoing findings of fact, conclusions of law and recommendation. 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.