

JURISDICTION: OKLAHOMA TAX COMMISSION  
CITE: 2004-09-23-03  
ID: P-03-014-K  
DATE: SEPTEMBER 23, 2004  
DISPOSITION: SUSTAINED  
TAX TYPE: FRANCHISE  
APPEAL: NONE TAKEN

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Division by letter dated July 12, 2002, issued a proposed franchise tax assessment against Protestant for the years inclusive of 1996 through 2003. Protestant timely protest the assessment by letter dated July 19, 2002. Protestant did not request an oral hearing in the letter of protest.

On January 23, 2003, the Division forwarded its file to the Office of the Administrative Law Judges (ALJ's Office) for further proceedings consistent with the Uniform Tax Procedure Code<sup>1</sup> and the Rules of Practice and Procedure Before the Oklahoma Tax Commission<sup>2</sup>. The case was docketed as Case No. P-03-014-K and assigned to ALJ, Administrative Law Judge.<sup>3</sup>

A pre-hearing conference was scheduled in this cause for March 24, 2003, by *Notice of Prehearing Conference* issued February 20, 2003.<sup>4</sup> The conference was held by telephone with the representatives of the parties in attendance. By letter dated March 25, 2003, the Division was directed to forward to Protestant's representative legal authority for its position by April 23, 2003, and the parties were directed to file a status report by May 27, 2003.

The Division, by *Status Report* filed May 27, 2003, advised that it had provided Protestant's representative with the requested authority on April 24, 2003, but had not received a reply from Protestant. On May 28, 2003, a *Scheduling Order and Notice of Hearing* was issued by the ALJ's Office, scheduling the hearing for September 4, 2003. By *Status Report in lieu of Position Statement* filed August 27, 2003, by the Division and letter dated August 28, 2003, from Protestant's representative, the parties requested a continuance of the scheduled hearing, representing to the ALJ's Office that although Protestant did not wish to withdraw its protest to the proposed assessment, it did not wish to pursue the protest, but instead wanted additional time to pursue adjustments to the amount of franchise tax assessed.

By letter dated August 29, 2003, the parties were notified that the hearing scheduled for September 4, 2003, was canceled and that a status reported was to be filed by October 6, 2003. Between October 6, 2003 and May 6, 2004, several *Status Reports* were filed indicating that the

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<sup>1</sup>68 O.S. 2001, § 201 et seq.

<sup>2</sup>Rules 710:1-5-20 through 710:1-5-47 of the Oklahoma Administrative Code ("OAC").

<sup>3</sup>See, OAC, 710:1-5-22 and 710:1-5-30.

<sup>4</sup>See, OAC, 710:1-5-28.

Division was reviewing documentation provided by Protestant and Protestant intended to file franchise tax returns for the years at issue. On May 6, 2004, a *Notice of Hearing* was issued scheduling a hearing in this cause for June 2, 2004, with position statements due May 26, 2004.

The Division filed its *Position Statement* on May 26, 2004, and the hearing was held on June 2, 2004. At the hearing, it was noted for the record that neither Protestant nor Protestant's representative appeared at the hearing nor had Protestant or Protestant's representative contacted the ALJ's Office or the Division's representative concerning the hearing. No witnesses were called to testify. The Division presented its case by offering Exhibits A through G which were admitted into evidence. Thereafter, the hearing was concluded and the record was closed.

By letter dated June 23, 2004, the parties were notified that the record was reopened by motion of ALJ to allow the parties to submit on or before July 5, 2004, a detailed explanation of how the amount of franchise tax assessed for each year was determined. Several correspondences were exchanged between the parties between the dates of June 28, 2004 through July 16, 2004. By *Status Report* filed August 2, 2004, the Division advised the ALJ's Office how the amount of franchise tax assessed was determined.

#### FINDINGS OF FACT

Upon review of the file and records, including the record of the hearing of June 2, 2004, and the exhibits received into evidence, the undersigned finds:

1. Protestant is a foreign corporation doing business in Oklahoma.<sup>5</sup>
2. On March 4, 1996, Protestant filed a Business Registration form with the Tax Commission and obtained a sales tax permit upon payment of the required fees.<sup>6</sup>
3. The Business Registration form indicated the reason for filing the form was to "obtain permit to do business in OK."<sup>7</sup>
4. The Business Registration form also reported that Protestant's principal product(s) or service(s) was "retail interior store design and installation (not a contractor)" and that although Protestant had no physical location or inventory within Oklahoma, deliveries were to be made in Protestant's own vehicles.<sup>8</sup>

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<sup>5</sup>Exhibits B and D.

<sup>6</sup>Exhibits B and C. Protestant remitted \$120.00 consisting of basic fees of \$20.00 for a sales tax permit and \$100.00 for a franchise tax registered agent's fee (foreign corporation).

<sup>7</sup>Exhibit B.

<sup>8</sup>See, Note 3.

5. The date of first sales subject to sales/use tax in Oklahoma was reported as January 22, 1996.<sup>9</sup>

6. Protestant filed sales tax reports with the Tax Commission for the periods of June, 2001 and September, 2001 reporting total sales subject to sales tax in the State of Oklahoma of \$82,080.00, total net taxable sales of \$68,680.00 and sales tax due of \$3,091.00.<sup>10</sup>

7. By letter dated July 12, 2002, the Division issued a proposed assessment of franchise tax, interest, and penalty against Protestant for the years 1996 through 2003 in the amount of \$22,713.94, inclusive of tax in the estimated amount of \$14,000.00, interest accrued through October 25, 2002, in the amount of \$6,613.94, penalty in the amount of \$1,400.00, and registered agent fees in the amount of \$700.00.<sup>11</sup>

8. Protestant timely protested the proposed assessment by letter dated July 19, 2002.<sup>12</sup>

9. In the letter of protest it is stated: "that COMPANY is a Texas corporation and does not now nor has ever had a presence in Oklahoma - - They have no employees, no property, and no sales location in Oklahoma, which would subject our company to franchise tax."<sup>13</sup>

10. By letter dated August 28, 2003, Protestant's representative advised that Protestant did not wish to proceed with its protest but was not withdrawing the protest until the parties had an opportunity to resolve the issue of possible adjustments to the assessment.<sup>14</sup>

11. According to AUDITOR, Auditor with the Division, the estimated amount assessed of \$2,000.00 per year was determined from the sales tax reports filed by Protestant.<sup>15</sup>

12. The amount in controversy is \$23,438.86, inclusive of interest accrued through February 28, 2003.<sup>16</sup>

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<sup>9</sup>See, Note 3.

<sup>10</sup>Exhibit D. Protestant did not claim a deduction against the tax reported due for keeping records, filing reports and remitting tax when due as permit by 68 O.S. 2001, § 1367.1(A) since the reports were filed after the due date.

<sup>11</sup>Exhibit A.

<sup>12</sup>Exhibit E.

<sup>13</sup>See, Note 12. The statements in the letter are verified by PRESIDENT, President/C.E.O of Protestant.

<sup>14</sup>Exhibit F.

<sup>15</sup>E-mail attachment to the *Status Report* filed August 2, 2004.

<sup>16</sup>Exhibit G.

## ISSUE

Protestant does not challenge whether it is subject to the tax levied by the Franchise Tax Code, 68 O.S. 1991, § 1201 et seq.<sup>17</sup> The issue presented for decision is whether the estimate of franchise tax due should be adjusted.

## CONCLUSIONS OF LAW

1. The Tax Commission is vested with jurisdiction over the parties and subject matter of this action. 68 O.S. 2001, § 221(D).

2. Every corporation organized under the laws of this state, or qualified to do, or doing business in Oklahoma in a corporate or organized capacity by virtue of creation or organization under the laws of this or any other state, territory or district, or a foreign country is subject to the terms of the Franchise Tax Code. 68 O.S. 1991, §1201. *See, Great Lakes Pipe Line Co. v. Oklahoma Tax Commission*, 204 Okla. 518, 1951 OK 123, 231 P.2d 655.

3. A "franchise or excise tax" is imposed upon every corporation or other business organization "equal to One Dollar and twenty-five cents (\$1.25) for each One Thousand Dollars (\$1,000.00) or fraction thereof of the amount of capital [or its equivalent] used, invested or employed" within Oklahoma. 68 O.S. 1991, § 1204. The amount of capital involved is not the subject of the tax but is the yardstick by which the amount of tax is measured. *Scott-Rice Co. v. Oklahoma Tax Commission*, 1972 OK 75, 503 P.2d 208.

4. The amount of capital employed in Oklahoma is determined by a ratio, the numerator of which is "total property owned, or total property owned and total business done" and the denominator of which is "property owned, or property owned and business done, in Oklahoma". 68 O.S. 1991, § 1209(c).

5. In determining the amount of a franchise tax or license fee which a corporation (unitary business enterprise) shall pay for the privilege of doing business within this state, the proportion of capital employed within the state may be calculated by the percentage of sales within the state without offense to the Federal Constitution. *Ford Motor Co. v. Oklahoma Tax Commission*, 188 Okla. 78, 1940 OK 433, 106 P.2d 803. In that case, Ford computed capital employed in Oklahoma using the factor - property owned in Oklahoma to total property owned and ignored the other factor - business done in Oklahoma to total business done.<sup>18</sup> The Tax Commission recalculated the amount of capital employed in Oklahoma by not only taking into account the property owned factor, but the business done factor which had a greater ratio and assessed additional franchise tax. In upholding the assessment, the Oklahoma Supreme Court cited

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<sup>17</sup>Letter of August 28, 2003, from Protestant's representative.

<sup>18</sup>The Oklahoma statute at that time provided that the value of capital stock employed in Oklahoma shall be determined by the proportion of which "property owned and business done in Oklahoma bears to the total property owned and business done by the corporation". See, Chapter 155, Session Laws 1933, Art. 6, Ch. 66, §§ 3 and 5.

as controlling the United States Supreme Court's decision in *Ford Motor Co. v. Beauchamp*<sup>19</sup>, wherein Ford challenged a comparable Texas statute upon the same complaints.

6. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect, and in what respect. *OAC*, 710:1-5-47. See, ***Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission***, 1988 OK 91, 768 P.2d 359. The burden of proof never shifts, ***Owens v. Sun Oil Company***, 482 F.2d 564 (10th Cir. 1973); although the burden of going forward with the evidence to counteract the proofs of the other party, may shift from side to side during the progress of a proceeding, See generally, 31A C.J.S. *Evidence* §§ 120-129 (1996). That said, the Tax Commission may not apply a formula without statutory authority or Commission rule or regulation which does not take into consideration the actual facts of a case. ***Fort Howard Paper Company v. Oklahoma Tax Commission***, 1989 OK CIV APP 101, 792 P.2d 87, 90, citing *Oklahoma Tax Commission v. First National Bank & Trust Co.*, 178 Okla. 260, 1936 OK 751, 62 P.2d 1220. The proper action to be taken by the Tax Commission is the audit of taxpayer's books and records. ***First National Bank***, *supra*. An adjudicatory order will be affirmed if the record contains substantial evidence in support of the facts upon which the decision is based. ***Dugger v. Oklahoma Tax Commission***, 1992 OK 105, 834 P.2d 964, 968.

7. Here, the problem that is confronted is Protestant's failure to file franchise tax returns although more than enough time has been allowed for Protestant to do just that. The Division compounded the problem by assessing an arbitrary amount which in all actuality appears to be an exaction of a penalty for Protestant's failure to file such returns.

To arrive at the estimated amount of franchise assessed each year of \$2,000.00, Protestant would have had to have had capital employed in Oklahoma of approximately \$1,350,000.00 per year. The facts in the record before the ALJ does not bear this out. The Division asserts its assessment is based on the two (2) sales tax reports filed by Protestant in 2001. Protestant states that it did not have any presence in Oklahoma nor any employees, property or sales locations in Oklahoma.<sup>20</sup> Accordingly, although Protestant may be liable for some franchise tax during the years at issue, the undersigned cannot sustain the assessment as made.

8. The Tax Commission may enter an order of cancellation or forfeiture of any license obtained to do business in this state of any foreign corporation who fails to file a franchise tax return and pay the tax levied within the time provided by 68 O.S. 1991, § 1210(A). 68 O.S. 2001, § 1212(a) and (b). Any person who does or attempts to do any business in the state in behalf of any foreign corporation, without first obtaining a license therefor, or after any such license so obtained is canceled, forfeited, or expired, shall be guilty of a misdemeanor. 68 O.S. 2001, § 1212(b).

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<sup>19</sup>308 U.S. 331, 60 S.Ct. 273, 84 L.Ed 304 (1939).

<sup>20</sup>While the statements regarding Protestant's presence and employees in Oklahoma are refuted by the record in this cause, no evidence has been presented to show Protestant had property or a sales location in Oklahoma during the years at issue. The evidence which refutes Protestant's statements regarding its presence and employees in Oklahoma is the sales tax reports filed by Protestant in 2001, which sales tax reports claim a deduction against total sales for non-taxable sales and Protestant's business registration form which shows its sales involve "retail interior store design and installation" and its products are delivered in its own vehicles.

9. Protestant's protest to the assessment of franchise tax, interest and penalty, as made, should be sustained.

10. Protestant's license to do business in this state should be canceled until the franchise tax returns for the years at issue are filed and the tax shown due by those returns, if any, is paid.

**DISPOSITION**

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestant, COMPANY be sustained. It is further ORDERED that the license to do business in Oklahoma of Protestant, COMPANY, be canceled pending full compliance with the Oklahoma Franchise Tax Code.

**OKLAHOMA TAX COMMISSION**

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are 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.