JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2007-03-06-03 (NON-PRECEDENTIAL)
ID:	P-06-068-K
DATE:	MARCH 6, 2007
DISPOSITION:	DENIED
TAX TYPE:	SALES
APPEAL:	NONE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestants, COMPANY, d/b/a CARPET BUSINESS a/k/a FLOORING BUSINESS, and OFFICER, as an Officer of COMPANY, and as an individual, are represented by SALES MANAGER, Protestants' Sales Manager. The Audit Division of the Tax Commission (hereinafter "Division") is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel of the Oklahoma Tax Commission.

STATEMENT OF THE CASE

A field audit of Protestants' books and records for the period of May, 2004 through June, 2005 was conducted by PRIVATE CONTRACTOR. As a result of the audit, the Division by letters dated January 3, 2006, proposed the assessments of additional city sales taxes, interest and penalty against Protestants. Protestants timely protested the proposed assessments by letter dated January 31, 2006. An oral hearing was not requested in the letter of protest.

On April 4, 2006, the Division referred its file, consisting of a cover memorandum, proposed assessments and protest letter, to the Office of the Administrative Law Judges ("ALJ's Office") for further proceedings consistent with the Uniform Tax Procedure Code[1] and the Rules of Practice and Procedure before the Oklahoma Tax Commission[2]. The protest was docketed as Case No. P-06-068-K and assigned to ALJ, Administrative Law Judge.[3]

A pre-hearing conference was scheduled for May 24, 2006, by *Prehearing Conference Notice* issued May 2, 2004.[4] The conference was held as scheduled. Pursuant to the conference, a *Prehearing Conference Order and Notice of Hearing* was issued setting forth dated for exchanging preliminary witness lists and documents, conducting discovery, exchanging final witness lists and documents, and filing factual stipulations and pre-trial briefs or position letters.[5] The *Order* scheduled the hearing for November 2, 2006.[6]

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[1] 68 O.S. 2001, § 201 et seq.

[2] Rules 710:1-5-20 through 710:1-5-47 of the *Oklahoma Administrative Code* ("*OAC*").

[3] *OAC*, 710:1-5-22(b).

[4] *OAC*, 710:1-5-28.

[5] *OAC*, 710:1-5-28(b).

[6] *OAC*, 710:1-5-29.

A closed hearing was held as scheduled.[7] Two witnesses testified: SALES MANAGER, Protestants' Sales Manager, regarding Protestants' business operations, and AUDITOR, PRIVATE CONTRACTOR, regarding the procedures utilized in conducting the audit. Division's Exhibits A through J, inclusive of Exhibits H-1 and H-2, were admitted into evidence without objection. Upon conclusion of the evidentiary portion of the hearing, the record was closed and the case was submitted for decision.[8]

FINDINGS OF FACT

Upon review of the file and records, including the recording of the hearing, the exhibits received into evidence and the pleadings of the parties, the undersigned finds:

1. COMPANY, an Oklahoma corporation, owns and operates a retail carpeting and other flooring outlet located in CITY 1, Oklahoma. Division's Exhibits A[9] and B[10]. At all times relevant, the principal officer of COMPANY was OFFICER, also known as OFFICER ALIAS, President. Division's Exhibit C.[11]

2. During the audit period, Protestants sold carpeting and other flooring material, and sometimes delivered and/or installed the material. Protestants' pleadings, testimony of SALES MANAGER and Division's Exhibit D[12].

3. In performing the audit, the auditor reviewed written documentation; primarily Protestants' invoices, and scheduled those items which appeared from the documentation to have been shipped outside of CITY 1 to a CITY 2 or CITY 3 address – PRIVATE CONTRACTOR'S two clients for the audit. Testimony of AUDITOR.

4. For purposes of these proceedings, Protestants' invoices may be categorized into three (3) different types. The first category of invoices is invoices which report a "sold to" address and "ship to" address without any additional comments or information on the face of the invoices. The second category of invoices is invoices which report "sold to" and "ship to" addresses with additional comments or information, including shipping and/or installation charges. The third category of invoices is invoices which do not report a "ship to" address. Division's Exhibit D.

5. Protestants' do not dispute the assessment of additional taxes on any invoices which show shipping and/or installation charges made on behalf of or which are attributable to them.

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[7] 68 O.S. Supp. 2005, § 205.

[8] OAC, 710:1-5-39(a).

[9] Business Registration Application and Certificate of Incorporation for COMPANY.

[10] Copies of FLOORING BUSINESS web pages, WWW.WEBADDRESS.COM.

[11] Oklahoma Minimum/Maximum Franchise Tax Return for July, 2004 through June, 2005; and Oklahoma Annual Franchise Tax Return for July, 2005 through June, 2006.

[12] Sampling of Protestants' invoices.

Protestants' pleading and statement of SALES MANAGER. Protestants' admit that they owe the additional taxes assessed on approximately $188,000.00 of the sales scheduled for assessment. Statement of SALES MANAGER.

6. The invoices that reported a "ship to" address for CITY 2 or CITY 3 were included in the assessment. Any invoices where the "ship to" block of the invoice was left blank and any invoices where the additional information or comments noted that the customer picked up the carpet and/or other flooring material at Protestants' store location were not included in the assessment. Testimony of AUDITOR.

7. Of the four (4) invoices reviewed during the hearing, SALES MANAGER agreed that Protestants owe additional tax on one (1) of the invoices. With respect to this invoice, the additional information or comments note that Protestants delivered the carpet. SALES MANAGER stated that of the invoices scheduled for assessment only one or two show delivery by Protestants. He further stated that either he installed the carpet or other flooring material, to which he agrees Protestants owe additional tax, or he didn't have installation. Of the remaining three (3) invoices, SALES MANAGER admitted that with respect to the first invoice he does not know where the customer received the carpet, with respect to the second invoice he does not know if the independent carpet installer picked up the carpet at Protestants' store location and with respect to the third invoice he does not know who picked up the carpet. Division's Exhibit D.

8. SALES MANAGER denies that he informed the auditor during the performance of the audit that Protestants delivered carpeting and/or other flooring material. He stated that only a handful of invoices mention anything regarding delivery, that Protestants don't deliver for free and that Protestants don't deliver, never have delivered.

9. In performing the audit, the auditor determined that $234,980.51 of Protestants' taxable sales had been incorrectly sourced to CITY 1. Protestants were given credit for the collection and remittance of CITY 1 tax rate of two percent (2%) on the amount of the taxable sales. CITY 2 or CITY 3 taxes were then applied to the amount of the taxable sales sourced to those cities at their respective tax rates. Division's Exhibit G[13] and testimony of AUDITOR.

10. As a result of the audit, the Division by letters dated January 3, 2006, proposed the assessment of additional city sales taxes, interest and penalty against Protestants in the aggregate amount of $11,387.31, consisting of taxes of $8,987.05, interest at fifteen percent (15%) through February 28, 2006, of $1,501.55, for a total of tax and interest due within thirty (30) days of $10,488.60, and a delinquent penalty at ten percent (10%) of $898.71, for a total of tax, interest and penalty due after thirty (30) days of $11,387.31. Division's Exhibits H-1[14] and H-2[15].

[13] Audit work papers.

[14] Proposed assessment letter (Corporation).

[15] Proposed assessment letter (Officer).

11. Protestants' timely protested the proposed assessments by letter dated January 31, 2006. Division's Exhibit I.[16]

ISSUE AND CONTENTIONS

The issue presented for decision is whether Protestants sustained their burden of proving that with respect to the sales at issue, the purchaser or the purchaser's agent (independent flooring installer) took possession of the carpeting or other flooring material at Protestants' store location in CITY 1.

Protestants contend that they do not owe any additional city sales taxes on approximately $47,000.00 of the taxable sales scheduled for assessment. In support of this contention, Protestants argue that the vast majority of its sales are cash and carry notwithstanding that its customers' addresses are recorded in the "ship to" box on its invoices. Protestants further contend that only in those limited instances where a shipping and/or installation charge appears on the face of the invoice was the carpeting or other flooring material shipped to the customer.

The Division contends that with respect to the disputed taxable sales, Protestants failed to sustain their burden of proving that their customers received the carpeting or other flooring material at their place of business in CITY 1. The Division further contends that since Protestants failed to prove the carpet or other flooring material was received by the purchasers at Protestants' business location, under the Streamlined Sales and Use Tax Administration Act, the sales are sourced to the location where receipt by the purchaser occurs.

CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter of law:

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. 2001, § 221(D).

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Code").[17] An excise tax is levied upon the gross receipts or gross proceeds of all sales not otherwise exempted by the Code. 68 O.S. 2001, § 1354(A). The sale of "tangible personal property"[18] is expressly made subject to sales tax. 68 O.S. 2001, § 1354(A)(1). Incorporated cities, towns, and counties are authorized to levy taxes as the Legislature may levy for purposes of state government, including a consumer sales tax. 68 O.S. 2001, §§ 2701 et seq. and 1370 et seq., as amended.

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[16] Protest letter.

[17] 68 O.S. 2001, § 1350 et seq.

[18] Defined as "personal property which may be seen, weighed, measured, felt, or touched or which is in any other manner perceptible to the senses" and "includes electricity, water, gas, steam and prewritten computer software." 68 O.S. Supp. 2003, 1352(23).

3. The location at which a retail sale of a product, excluding lease or rental, is subject to the sales or use taxes levied by a county and/or a municipality of this state ("sourced"[19]), is governed by Section 1354.27(A) of the Code. This section provides in pertinent part:

> 1. When the product is received by the purchaser at a business location of the seller, the sale is sourced to that business location;
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> 2. When the product is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser, or the purchaser's donee, designated as such by the purchaser, occurs, including the location indicated by instructions for delivery to the purchaser or donee, known to the seller. * * *;
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> 3. When the provisions of paragraphs 1 and 2 of this subsection do not apply, the sale is sourced to the location indicated by an address for the purchaser that is available from the business records of the seller that are maintained in the ordinary course of the seller's business when use of this address does not constitute bad faith;
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> 4. When the provisions of paragraphs 1, 2 and 3 of this subsection do not apply, the sale is sourced to the location indicated by an address for the purchaser obtained during the consummation of the sale, including the address of a purchaser's payment instrument, if no other address is available, when use of this address does not constitute bad faith; and
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> 5. When none of the previous rules of paragraphs 1, 2, 3 and 4 of this subsection apply, including the circumstance in which the seller is without sufficient information to apply the previous rules, then the location will be determined by the address from which tangible personal property was shipped, * * * .

The terms "received" and "receipt" for purposes of Section 1354.27 mean "[t]aking possession of tangible personal property", but does not include "possession by a shipping company on behalf of the purchaser". 68 O.S. Supp. 2003, § 1354.27(E).

4. 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. State ex rel. Oklahoma Tax Commission***, 1988 OK 91, 768 P.2d 359, 362, citing *Continental Oil Co. v. Oklahoma State Bd. of Equalization*, 1976 OK 23, 570 P.2d 315, 317. In sales tax matters, "[t]he burden of proving that a sale was not a taxable sale shall be upon the person who made the sale." 68 O.S. 2001, § 1365(E). *See*, ***Dunn v. State ex rel. Oklahoma Tax Commission***, 1993 OK CIV APP 105, 862 P.2d 1285. Section 1365(E) further provides in pertinent part:

[19] *OAC*, 710:65-18-2 which defines "sourced" to mean "the location for which local sales and use taxes are to be applied."

> It shall be the duty of every tax remitter required to make a sales tax report and pay any tax under [the Code] 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 [the Code] as will substantiate and prove the accuracy of such returns. * * * 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.

(Emphasis added). *See*, ***Kifer v. Oklahoma Tax Commission***, 1998 OK CIV APP 34, 956 P.2d 162.

5. In administrative proceedings, the burden of proof standard is "preponderance of evidence." 2 Am.Jur.2d *Administrative Law* § 357. *See*, Oklahoma Tax Commission Order No. 91-10-17-061. "Preponderance of evidence" means "[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary 1064 (5th ed. 1979). It is also defined to mean "evidence which is more credible and convincing to the mind * * * [T]hat which best accords with reason and probability." *Id.*

6. Basically, what we have in this case are invoices and not much else. The invoices have a "sold to" box, a "ship to" box and a box for other information or comments. Protestants state that in certain instances the "ship to" box is filled out simply by a "copy" key function of its computer system and in other instances as a convenience for their customer's accounting of the purchase. Protestants also state that the inclusion of labor on certain invoices beginning in December, 2004, was instituted as a convenience to the customers who wanted to pay for their purchase in one lump sum. The crux of Protestants' case, however, as stated by SALES MANAGER is that they do not know where the purchasers received the carpet or other flooring material, nor who picked up the carpet or other flooring material and have no other pertinent records or documents to support their contention that the purchasers received the items at their business location.

Section 1354.27(A)(2) provides that a sale is sourced to the location of receipt of the product by the purchaser, including the location indicated by instructions for delivery to the purchaser when the purchaser does not receive the product at the seller's business location. In this matter, the auditor scheduled for assessment invoices reporting a "ship to" address unless the invoice reflected the purchaser received the product at Protestants' business location. The auditor did not schedule for assessment invoices which did not report a "ship to" address. The audit theory is clearly supported by the statute and is proper.

7. Protestants failed to sustain their burden of proving that the proposed assessment of the disputed taxable sales is incorrect. Accordingly, Protestants' protest should be and the same is hereby denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestants, COMPANY and OFFICER, be denied. It is further ORDERED that the amount in controversy, inclusive of any additional accrued and accruing interest, be fixed as the deficiencies due and owing by Protestants, respectively.

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.