JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2007-09-06-04 / NON-PRECEDENTIAL**
ID: **P-07-062-H**
DATE: **SEPTEMBER 6, 2007**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

COMMISSION ORDER

The above matter comes on for entry of a final order of disposition by the Oklahoma Tax Commission. Having reviewed the files and records herein, including the Findings of Fact, Conclusions of Law and Recommendations made and entered by the Administrative Law Judge on the 2nd day of August, 2007, the Commission makes the following Findings of Fact and Conclusions of Law and enters the following order.

PROCEDURAL HISTORY

On April 18, 2007, the protest file was received by the office of the Administrative Law Judge for further proceedings consistent with the Uniform Tax Procedure Code[1] and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.[2] On April 30, 2007, a letter was mailed to the Protestant stating that this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-07-062-H. The letter also advised the Protestant that a Notice of Prehearing Conference would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Oklahoma Tax Commission.* On May 11, 2007, the Notice of Prehearing Conference was mailed to the last known address of the Protestant, setting the prehearing conference for June 11, 2007, at 2:00 p.m.[3] The letter also advised the Protestant that the prehearing conference could be held by teleconference, if desired.

The prehearing conference was held as scheduled on June 11, 2007, at 2:00 p.m. The Protestant failed to appear. On June 12, 2007, the Prehearing Conference Order was issued directing the Audit Division of the Oklahoma Tax Commission to file a verified response no later than thirty (30) days from the date of the order.[4]

The Division's Verified Response was filed on July 5, 2007. The verification attached to the response was duly sworn under oath, on behalf of the Division, by ADMINISTRATOR, Administrator, Audit Division, Oklahoma Tax Commission.[5] The Protestant did not respond to

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[1] OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

[2] OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

[3] OKLA. STAT. ANN. tit. 68, § 208 (West 2001). The notice was mailed to the Protestant at PROTESTANT'S ADDRESS.

[4] OKLA. ADMIN. RULE § 710:1-5-28 (c) (June 25, 1999).

[5] *See* OKLA. ADMIN. CODE § 710:1-5-28(c).

the Division's Verified Response. On July 17, 2007, the record in this matter was closed and the case was submitted for decision.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, and the Division's Verified Response, the Commission finds:

1. The Protestant operates an agricultural and ranching business in TOWN, Oklahoma, primarily growing wheat and alfalfa; and a livestock business, which does business under the name LIVESTOCK COMPANY. The records of the Tax Commission indicate that the Protestant does not have a sales tax permit, but that the Protestant had an Agriculture Exemption Permit (XXX XXXX) originally issued on March 10, 1994, with a renewal date effective August 8, 2002, and expiration date of June 30, 2005.[6]

2. The Division performed a field audit (FA 0511073) of the Protestant's business for the periods of July 1, 2002, through June 30, 2005 ("Audit Period").

3. The Protestant owns a Peterbilt truck that is used to haul agricultural products and livestock out-of-state for sale.[7]

4. The Protestant, through his accountant, was provided a copy of the Division's "Records Request," along with a listing of specific transactions from the Protestant's General Ledger, for which invoices had not been provided by the Protestant.[8]

5. With the exception of a few copies of the Protestant's invoices for 2004 and 2005 and a General Ledger, no other records were provided by the Protestant.[9]

6. The Division's auditor reviewed the Protestant's documentation and did not include any invoice that reflected that the Protestant paid sales tax "upfront" for an item or any purchase that was eligible for the "Agricultural Exemption."

7. The audit results reflect items that do not qualify for the "Agricultural Exemption" and items for which the Protestant could not provide copies of invoices.[10]

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[6] Division's Exhibit A.

[7] Division's Exhibit B.

[8] Division's Exhibit C.

[9] Division's Exhibit D.

[10] Division's Exhibit E.

8. On December 12, 2006, the Division issued a proposed sales tax assessment[11] as follows, to-wit:

Tax Due:	$ 948.37
Interest @ 15% through 02/28/07:	455.66
Tax & Interest due within 30 Days:	1,404.03
30 Day Delinquent Penalty:	94.84
Tax, Interest & Penalty due after 30 Days:	$1,498.87

9. On February 1, 2007, the Division received a timely filed letter of protest.[12] The protest objects to the inclusion of specific line items which the Protestant asserts were purchased out-of-state, and on which the "Agricultural Exemption" was not claimed.[13] The Protestant also objected to the inclusion of other specific items without stating a basis for the objection. The Protestant did not request an oral hearing.

10. On June 11, 2007, at 2:00 p.m., the Protestant did not appear at the prehearing conference.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[14]

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Sales Tax Code").[15] The Sales Tax Code levies "upon all sales,[16] not otherwise exempted[17] . . . an excise tax of four and one-half percent (4.5%) of the gross receipts or gross

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[11] Division's Exhibit F. With interest updated to April 26, 2007, the balance is $1,521.08.

[12] Division's Exhibit G.

[13] *See* Note 12.

[14] OKLA. STAT. ANN. tit. 68, § 221(D) (West Supp. 2007).

[15] OKLA. STAT. ANN. tit. 68, § 1350 et seq. (West 2001).

[16] OKLA. STAT. ANN. tit. 68, § 1352(15)(a) (West 2001) and (as amended) OKLA. STAT. ANN. tit. 68, § 1352(21)(a) (West Supp. 2006):

> "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 paragraph, including but not limited to:
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> a. the exchange, barter, lease, or rental of tangible personal property resulting in the transfer of the title to or possession of the property, …

[17] *See* OKLA. STAT. ANN. tit. 68, § 1358 (West 2001) for "Agricultural Exemptions."

proceeds[18] of each sale of . . . tangible personal property. . . ."[19] Oklahoma Statutes authorize incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.[20]

3. The "Agricultural Exemption" provided in Section 1358(A)(6) of Title 68 "shall not apply to motor vehicles."[21]

4. The Oklahoma Sales Tax Code provides "… if the Oklahoma Tax Commission finds that a consumer or user improperly presented a sales tax permit or other certification or used the property purchased exempt from tax in a manner that would not have qualified for exemption, the purchaser shall be liable for the remittance of the tax, interest and penalty due thereon and the Tax Commission shall pursue collection thereof from the purchaser in any manner in which sales tax may be collected from a vendor."[22]

5. The rules promulgated pursuant to the Administrative Procedures Act are presumed to be valid and binding on the persons they affect and have the force of law.[23]

6. The Tax Commission has promulgated rules as provided by law to facilitate the administration, enforcement, and collection of taxes under the Oklahoma Sales and Use Tax Codes.[24]

7. The Protestant objects to the inclusion of the following items in the assessment:

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[18] OKLA. STAT. ANN. tit. 68, § 1352(7) (West 2001) and (as amended) OKLA. STAT. ANN. tit 68, § 1352(11) (West Supp. 2006).

[19] OKLA. STAT. ANN. tit. 68, § 1354(A)(1) (West Supp. 2006).

[20] OKLA. STAT. ANN. tit. 68, § 1370 et seq. (West Supp. 2006) and OKLA. STAT. ANN. tit. 68, § 2701 (West Supp. 2006).

[21] *See* Note 17. *See also* OKLA. ADMIN. CODE § 710:65-13-15(g)(2): "'Farm machinery' does not include any motor vehicle licensed for highway use," such as the Peterbilt truck.

[22] OKLA. STAT. ANN. tit. 68, § 1361(A) (West Supp. 2007).

[23] OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2001).

[24] OKLA. ADMIN. CODE § 710:65-1-1.

Date	Invoice/Check#	Vendor	Items	Item Value	General Info.
01/16/03	6810	PARTS STORE	TX Truck Parts	$3,000.00	No Invoice
01/22/03	6974	PARTS STORE	TX Truck Parts	$ 377.18	No Invoice
02/03/03	118	GROCERY STORE[25]	No Records	$ 136.72	No Records
01/01/04	382	BODY SHOP	No Records	$ 730.06	No Invoice
01/01/04	7154	PARTS STORE 2	No Records	$ 31.13	No Invoice
01/01/04	7252	PARTS STORE 3	FL Truck Part	$ 136.72	No Invoice
07/05/04	58290	EQUIPMENT STORE	Air Compressor	$ 867.65	Not Exempt

In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[26] A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[27]

8. Sales taxes and use taxes were meant to be complementary and supplementary, but not overlapping.[28] While the sales tax and the use tax codes are complementary and supplementary to one another, they are neither identical nor coterminous.[29]

9. Use tax is an excise tax which the State of Oklahoma is authorized to exact, in connection with sales tax, for the primary purpose of raising revenue for state purposes, and is designed to prevent consumers from escaping sales tax by going outside the state and purchasing property and bringing it into the State of Oklahoma for use or consumption.[30]

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[25] The Protestant claimed this purchase was for groceries, but in the Protestant's General Ledger, the transaction is listed under the category "Supplies," Code 730. GROCERY STORE is a grocery store located at OKLAHOMA ADDRESS, but the Protestant could not produce a receipt to reflect what was purchased and whether sales tax was paid or not.

[26] OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999):

> In all administrative proceedings, unless otherwise provided by law, the burden of proof shall be upon the protestant to show in what respect the action or proposed action of the Tax Commission is incorrect. If, upon hearing, the protestant fails to prove a prima facie case, the Administrative Law Judge may recommend that the Commission deny the protest solely upon the grounds of failure to prove sufficient facts which would entitle the protestant to the requested relief.

OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999), provides in pertinent part:

> …"preponderance of the evidence" means the evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which as a whole shows that the fact sought to be proved is more probable than not.

[27] *See Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

[28] *Phillips. v. Oklahoma Tax Commission*, 1978 OK 34, 577 P.2d 1278.

[29] *Globe Life and Accident Insurance Company v. Oklahoma Tax Commission*, 1996 OK 39, 913 P.2d 1322.

[30] *Southeastern, Inc. v. Oklahoma Tax Commission*, 1960 OK 97, 351 P.2d 739.

10. The Oklahoma Use Tax Code imposes tax solely on tangible personal property purchased outside the State of Oklahoma and brought into the State of Oklahoma. Neither intangible personal property nor services fall within the scope of the Oklahoma Use Tax Code.[31]

11. A tax of four and one-half percent (4.5%) is imposed and shall be paid by every person "storing, using, or otherwise consuming within this state, tangible personal property purchased or brought into this state. . . ."[32] An additional tax may be levied by a county levying a county sales tax or a municipality levying a municipal sales tax, at a rate that equals the county or municipal sales tax of such county or municipality.[33]

12. The provisions of the Oklahoma Use Tax Code[34] shall not apply to the use of tangible personal property[35] specifically exempted from taxation under the Oklahoma Sales Tax Code.[36] The items included in the audit work papers are tangible personal property, and are subject to the imposition of sales/use tax.

The Protestant's position is that the "Agricultural Exemption" was not used to purchase the out of state items specified on the copy of the Division's work papers attached to the protest. The Protestant also asserts that tax was paid to the states these items were purchased in, but the Protestant has not come forward with any documentation to substantiate his claim and meet his burden of proof. The protestant has not submitted any evidence or citation of authority as to why the other items to which he has objected should not be included in the assessment and has not met his burden of proof on these items.

DISPOSITION

Protestant's protest should be and the same is hereby denied. Pursuant to Section 220 of Title 68 of the Oklahoma Statutes the penalty and interest assessed herein are ordered waived upon payment of the tax assessed in this matter.

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[31] *Globe Life and Accident Insurance Company v. Oklahoma Tax Commission*, 1996 OK 39, 913 P.2d 1322.

[32] *See* OKLA. STAT. ANN. tit. 68, § 1401 (West 2001) and OKLA. STAT. ANN. tit. 68, § 1402 (West 2001). *See also* OKLA. ADMIN. CODE § 710:65-21-2, OKLA. ADMIN. CODE § 710:65-21-3, and OKLA. ADMIN. CODE § 710:65-21-4.

[33] OKLA. STAT. ANN. tit. 68, § 1411 (West 2001). *See also* OKLA. ADMIN. CODE § 710:65-1-3.

[34] OKLA. STAT. ANN. tit. 68, § 1401 et seq. (West 2001).

[35] OKLA. STAT. ANN. tit. 68, § 1352(23) (West 2001), in pertinent part states:

> "Tangible personal property" means personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses.

See also OKLA. ADMIN. CODE § 710:65-1-2.

[36] *See* OKLA. STAT. ANN. tit. 68, § 1350 et seq. (West 2001) for the Oklahoma Sales Tax Code. OKLA. STAT. ANN. tit. 68, § 1404(4) (West 2001).

SO ORDERED September 6, 2007.

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.