JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2008-03-20-02 / NON-PRECEDENTIAL**
ID: **P-04-153-K**
DATE: **MARCH 20, 2008**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **PENDING OK S.CT. 105,779**

SUPPLEMENTAL
FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPANY ("Corporation"), and HUSBAND AND WIFE (hereinafter collectively referred to as "Protestants") are represented by ATTORNEY 1 and ATTORNEY 2, Attorneys at Law, LAW FIRM. The Compliance Division of the Oklahoma Tax Commission (hereinafter "Division") is represented by OTC ATTORNEY, First Deputy General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

On September 23, 2005, *Findings, Conclusions and Recommendations* ("*Findings*") were issued in this matter sustaining in part and denying in part Protestants' protest to the proposed sales tax assessment issued against Protestants for the audit period of July 1, 2001 through October 31, 2003.[1] The Division was directed to revise the proposed assessment in accordance with the *Findings*.

On October 17, 2005, the Division in accordance with the granting of its extension request filed a *Motion for Rehearing, Reconsideration and/or Clarification*.[2] The directive to revise the proposed assessment was cancelled by letter dated October 18, 2005. On October 31, 2005, Protestants filed *Protestants' Response to Audit Division's Motion for Rehearing, Reconsideration and/or Clarification*.[3] An *Order Denying Motion for Rehearing, Reconsideration and/or Clarification* was issued November 15, 2005, and by letter dated November 17, 2005, the Division was directed to revise the proposed assessment and file a certified copy of the revision to the assessment on or before December 15, 2005.[4]

On December 9, 2005, the Division in accordance with the Order granting its extension request filed the *Audit Division's Application for En Banc Hearing*.[5] Protestant filed *Protestants' Response to Audit Division's Application for En Banc Hearing* on January 13, 2006, in accordance with its unopposed extension request. On February 23, 2006, the Commission

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

[2] *OAC*, 710:1-5-40(1).

[3] Id.

[4] *OAC*, 710:1-5-40(2).

[5] *OAC*, 710:1-5-40(3).

issued Order No. 2006 02 23 02 denying the Division's request for oral argument, but concluding that the undersigned's decision to deny the Division's evidentiary request because it was outside the scope of the proposed assessment and would constitute a new assessment was erroneous and remanded the matter for further proceedings not inconsistent therewith.

Pursuant to the *Order* of the Commission, Protestants by *Order Compelling Production* issued March 1, 2006, were ordered to submit to the Division on or before May 1, 2006, documentation of the "sales value" of all items of tangible personal property and taxable services used and consumed by Protestants during the audit period in its sales of in-ground swimming pools, above-ground swimming pools and hot tubs/spas in which Protestants acted as contractors. On April 26, 2006, Protestants submitted "a schedule of the 'sales value' of all items of tangible personal property and taxable services used and consumed by [Protestants] during the audit period." By letter dated June 6, 2006, the Division asserted that the documentation as submitted did not comply with the *Order Compelling Production* and requested purchase invoices/receipts for all purchases made during the months of December 2001, January 2002, July 2002, and October, 2003. On June 14, 2006, Protestants submitted the invoices for the test periods.

On August 25, 2006, the Division filed a *Notification that Audit Division is Unable to Comply with the Directive to Revise Assessment and Request for Further Guidance*. *Protestants' Response to Notification that the Audit Division is Unable to Comply with the Directive to Revise Assessment and Request for Further Guidance* was filed September 1, 2006. Pursuant to the *Notification* and *Response*, a hearing "to receive evidence and arguments with respect to the methodology to be used to determine the sales value of all items of tangible personal property and taxable services used and consumed by Protestants during the audit period in its sales of in-ground swimming pools, above-ground swimming pools, and hot tubs/spas in which Protestants acted as contractors" was scheduled for March 1, 2007, by *Notice of Hearing* issued January 12, 2007.

On March 1, 2007, a Status Conference with the parties was held and by letter on even date, the hearing was cancelled and Protestants were directed to "provide the Division, on or before April 2, 2007, alternative methodologies as to sales value and cost of goods sold." On March 30, 2007, Protestants submitted for consideration its alternative methodologies. By *Memorandum* filed May 8, 2007, the Division advised that it could not reconcile the information submitted and that the parties were unable to resolve the case. Pursuant to the Division's notification and a status teleconference held June 5, 2007, a hearing was scheduled for June 27, 2007, by *Notice of Hearing* issued June 8, 2007.

An open hearing was held as scheduled with all parties present.[6] ADMINISTRATOR, Administrator, testified with respect to her attempt to determine the cost of goods sold from the information provided by Protestants. Also testifying were Protestants, HUSBAND AND WIFE, with respect to their business operations and ACCOUNTANT, CPA, who testified with respect to her cost allocation percentages schedules and tax result proposals. Protestants' Exhibits 62 through 74 were identified, offered and admitted into evidence. Upon conclusion of the hearing,

[6] Protestants had waived their right to a confidential hearing during the first hearing held in this cause on May 27, 2005, and reaffirmed such waiver for this hearing. 68 O.S. 2001, § 205.

the parties were directed to file proposed findings, conclusions and recommendations. On October 1, 2007, the parties filed proposed findings of fact and conclusions of law, whereupon the record was closed and the supplemental issue of the revision to the proposed sales tax assessment; if any, was submitted for decision.[7]

QUESTIONS AND ISSUES

The Division poses three (3) questions to be answered in order for it to be able to revise the proposed sales tax assessment. The first question is what is the percentage of above-ground swimming pools sold without an installation agreement during the audit period? The second question is what is the percentage of hot tubs/spas sold without an installation agreement during the audit period? The third question concerns in-ground swimming pool sales and how these sales can be factored into an equation when the sales only occurred in five (5) months of the twenty-seven (27) month audit period.

Protestants raise three (3) issues which can be addressed by this decision. The first issue is whether the statute of limitations on assessments prevents the assessment of use tax against Protestants on their purchases of in-ground pools, above-ground pools and hot tubs/spas from out-of-state vendors. The second issue is tied to the first issue and is whether Protestants maintained an inventory or stock in trade of in-ground pools, above-ground pools and hot tubs/spas during the audit period. The third issue is what was Protestants' cost of goods sold during the audit period?

Because Protestants failed to sustain their burden of proving the "sales value" of components used and consumed by them in their sales of in-ground swimming pools, above-ground swimming pools, and hot tubs/spas in which they acted as contractors, the undersigned finds and concludes that a revision to the proposed assessment is no longer required. Therefore, the Division's questions are not answered.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon review of the files and records, including the transcripts of the proceedings, the exhibits received into evidence and the pleadings of the parties, the undersigned supplements the *Findings* by the following findings of fact and/or conclusions of law:

1. 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. 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:

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

> 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.

See, *OAC*, 710:65-3-30[8] and 65-3-31[9].

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.

2. Although Protestant, HUSBAND testified that they didn't maintain an inventory of in-ground pools, above-ground pools and hot tubs/spas during the audit period, the evidence proves otherwise. HUSBAND in corroborating the testimony of WITNESS during the first hearing stated that above-ground pools may come in as many as nine boxes, however they are all the same essentially with the same kit parts, just different sizes and styles. Tr. 84. During the first hearing, HUSBAND testified that the major components of an above-ground pool were pretty much the same as an in-ground pool; steel wall, vinyl liner, pump, motor, filtration system and plumbing. Tr. 13. HUSBAND testified that he ordered above-ground pools by the truckload at the first of the season; started ordering pools in January – orders would come in during March, and then he would order at the first of the month during the season for what had been sold. Tr. 31. HUSBAND further testified that he doesn't have an inventory, but has a small surplus of everything. Tr. 76. He further stated that he orders a truckload of 200 vinyl liners and that not all liners are sold when ordered. Tr. 75-76. Further, the invoices in Protestants' Exhibit 65 reflect numerous purchases of up to several hundred of the same parts or supplies, above-ground pools and spas. Numerous invoices also show a notation of "early buy", or the customer as "Al" or "stock". Finally, HUSBAND agreed that he ordered some spas before they were sold. Tr. 79.

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[8] Provides that "[v]endors shall keep records and books of all sales and all purchases of tangible personal property."

[9] Provides what records constitute the minimum requirement for vendors and lists "[a] record of the amount of merchandise purchased" which means "copies of all vendors' invoices and taxpayers' copies of purchase orders retained serially and in sequence as to date."

3. The evidence shows Protestants purchased tangible personal property tax exempt for resale and thereafter withdrew a majority of that property from its inventory for its own use or consumption as a contractor. Accordingly, the value of the property withdrawn is taxable at its sales value and Protestant should have include the sales value of such property in gross receipts or gross proceeds on its sales tax reports for the audit period. 68 O.S. 2001, § 1362(C) and *OAC*, 710:65-1-7(2). "Sales value" is defined in pertinent part to mean:

> (E) Otherwise, 'sales value' means the larger of either the vendor's cost at the time the exempt purchase of goods was made, or the price at which it would be sold to the vendor's best customer in the ordinary course of business.

OAC, 710:65-1-2.

4. Here, Protestants failed to sustain their burden of proving the "sales value" of the components used and consumed by them in their sales of in-ground swimming pools, above-ground swimming pools, and hot tubs/spas in which they acted as contractors. The only price listed for the components is recorded on Protestants' sales invoices which except for certain items reflect a lump sum for construction or installation of the pools and hot tubs/spas. Under these circumstances, the "limited scope audit" in which the auditor simple applied the CITY city sales tax rate to Protestants' gross receipts is proper.

5. Protestants' protest to the proposed CITY city sales tax assessment should be and the same is hereby denied.

DISPOSITION

Based on the *Findings* as supplemented hereby, it is ORDERED that the protest of Protestants, COMPANY and HUSBAND AND WIFE, be denied. It is further ORDERED that the amount in controversy, inclusive of any additional accrued and accruing interest be fixed as the deficiency due and owing.

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.