

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2018-09-13-04 / NON-PRECEDENTIAL
ID: P-17-109-H
DATE: SEPTEMBER 13, 2018
DISPOSITION: DENIED
TAX TYPE: SALES AND USE
APPEAL: NONE TAKEN

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, the Commission hereby adopts the Findings of Fact, Conclusions of Law and Recommendation made and entered by the Administrative Law Judge on the 14th day of August, 2018, as amended by Errata Sheet on the 10th day September, 2018, appended hereto, together herewith shall constitute the Order of the Commission.

SO ORDERED

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

NOW on this 14th day of August 2018, the above-styled and numbered cause comes on for consideration under assignment regularly made by the Oklahoma Tax Commission to ALJ, Administrative Law Judge. LLC (“Protestant”) appears through, CPA, CPA. The Compliance Division (“Division”), Oklahoma Tax Commission, appears through, AGC, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On July 10, 2017, the protest file was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*¹ and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.² On July 11, 2017, the Court Clerk (“Clerk”) mailed the Introductory Letter to the Protestant that ALJ, Administrative Law

¹ OKLA. STAT. ANN. tit. 68, § 201 *et seq.* (West 2014).

² OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-49.

Judge (“ALJ”) had been assigned to this matter, and docketed as Case Number P-17-109-H. On July 17, 2017, the Clerk mailed the Prehearing Teleconference Notice to the last-known address of the Protestant’s Representative, setting the Prehearing Teleconference for September 7, 2017, at 10:00 a.m.³

On January 2, 2018, the ALJ issued a Revised Scheduling Order setting this matter for hearing on March 20, 2018, at 9:30 a.m., with Position Letters and/or Pretrial Briefs due by February 17, 2018. On January 4, 2018, the ALJ issued an Amended Revised Scheduling Order for Position Letters and/or Pretrial Briefs due by February 19, 2018. On January 16, 2018, the parties filed Partial Stipulation of Facts and Issues, with Stipulated Exhibits A through F attached.

On February 16, 2018, the Division filed its Position Letter. On February 20, 2018, the Protestant filed its Position Letter.

On March 20, 2018, at 9:30 a.m. the ALJ convened a closed hearing.⁴ The parties announced this would be a hearing limited to the testimony of the Protestant’s Member on the remaining two (2) issues: (1) annual registration fees, and (2) birthday parties. The Protestant, called MEMBER, Member,⁵ who testified concerning the two (2) remaining issues, and the conduct of the Protestant’s business. At the conclusion, the ALJ kept the record open fifteen (15) days for the Division to provide copies of birthday parties invoices in any of the three (3) categories stipulated by the parties. On March 26, 2018, the Division filed a Status Report advising that the

³ OKLA. STAT. ANN. tit. 68, § 208 (West 2014). The Clerk mailed the notice to the Protestant’s Representative at ADDRESS.

⁴ When the ALJ asked the Protestant’s Representative if she wished to invoke confidentiality or waive it, the Representative responded that she did not understand the question. As a precautionary measure, the ALJ invoked confidentiality. *See* OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2018).

⁵ The ALJ is taking judicial notice of the materials contained in the court file to complete the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (July 11, 2013).

Division did not receive or review any invoices for birthday parties during the audit and that the Division's records did not contain copies of invoices for birthday parties. On March 26, 2018, the ALJ closed the record and submitted this matter for decision.

PARTIAL STIPULATION OF FACTS AND ISSUES

STIPULATED STATEMENT OF ISSUES

1. Whether the Protestant's annual registration fees are subject to sales tax.
2. Whether the Protestant's charges for birthday parties are subject to sales tax.

STIPULATED STATEMENT OF FACTS

On January 16, 2018, the parties filed Partial Stipulation of Facts and Issues, with Stipulated Exhibits A through F, attached:

1. During the audit period, the Protestant charged its customers an annual fee of \$30.00 for individuals and \$45.00 for families. All of the Protestant's customers pay the fee upon initial enrollment in its facility and once per year thereafter.
2. The Protestant provides three levels of birthday parties to its customers for a fee:
 - a. Package A
\$150 for a one and one-half hour party up to 10 children and (\$10 for each additional child); forty-five minutes in the Party Gym (for gymnastics) and forty-five minutes in the Party Area (for cake and presents).
 - b. Package B is \$175 for a 2 hour party up to 10 children and (\$10 for each additional child); one hour and fifteen minutes in the Party Gym (for gymnastics) and forty-five minutes in the Party Area (for cake and presents).
 - c. Exclusive Full Gym Party is \$300 for a 2 hour party up to 10 children and (\$10 for each additional child); one hour and fifteen minutes in the entire gymnastics facility and not just the Party Gym area (for gymnastics) and forty-five minutes in the Party Area (for cake and presents).

3. On September 30, 2016, the Division mailed an audit notification letter to the Protestant for the period October [31], 2013 through September 30, 2016. *See* Exhibit A.
4. On April 24, 2017, the Division mailed an assessment to the Protestant for Sales Tax due. *See* Exhibit B.
5. On April 24, 2017, the Division mailed an assessment to the Protestant for Use Tax due. *See* Exhibit C.
6. On May 15, 2017, the Protestant paid the Sales Tax Assessment and interest in full. *See* Exhibit D.
7. On May 15, 2017, the Protestant paid the Use Tax Assessment and interest in full. *See* Exhibit E.
8. On May 26, 2017, the Protestant mailed the Division a protest letter to the Division protesting the determination that its annual registration fees and charges for birthday parties are subject to sales tax. *See* Exhibit F.

ADDITIONAL FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, the ALJ finds:

1. The Protestant is a domestic corporation formed on December 12, 2012.
2. The Protestant operates a gymnastics center and offers classes from beginner level to competitive level.
3. The Protestant also operates a pro shop that sells gymnastics clothing, tape, grips, and other such items.
4. The Protestant offers additional activities such as birthday parties, parent's night out, and summer camp.

5. On April 25, 2017, the Division assessed MEMBER, as a Member of Protestant, and as an Individual, for sales tax from October 31, 2013 through September 30, 2016.⁶

6. The Protestant does not provide birthday cakes, soft drinks, decorations, etc. for Birthday Parties. Birthday Parties comprise a coach setting up gymnastic drills and stations.⁷

7. The Protestant is not contesting the Use Tax Assessment.

8. The Protestant is only contesting a portion of the Sales Tax Assessment, specifically, that the annual registration fees and birthday party charges are subject to sales tax.

9. The contested sales tax is \$3,441.16 exclusive of interest.

10. There is no penalty due because the Protestant paid both assessments in full within 30 days.

CONCLUSIONS OF LAW

1. The Legislature vested the Oklahoma Tax Commission with jurisdiction over the parties and subject matter of this proceeding.⁸

2. The Oklahoma Sales Tax Code (“Sales Tax Code”) governs the collection and remittance of sales tax.⁹ The Sales Tax Code levies “upon all sales,¹⁰ not otherwise exempted . . . an excise tax of four and one-half percent (4.5%) of the gross receipts¹¹ or gross proceeds of each sale of . . . tangible personal property¹²” Oklahoma Statutes authorize incorporated cities,

⁶ CPA filed the protest on behalf of the Protestant only.

⁷ Testimony of Member.

⁸ OKLA. STAT. ANN. tit. 68, § 221(C) (West 2014).

⁹ See OKLA. STAT. ANN. tit. 68, § 1350 *et seq.* (West 2017).

¹⁰ See OKLA. ADMIN. CODE § 710:65-1-2 (July 11, 2010).

¹¹ OKLA. STAT. tit. 68, § 1352(12)(a) (West 2017).

¹² OKLA. STAT. ANN. tit. 68, § 1354(A)(1) and (A)(13)-(15) (West 2017).

towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.¹³

3. “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:

...

c. the sale, gift, exchange, or other disposition of admission, dues, or fees to clubs, places of amusement, or recreational or athletic events or for the privilege of having access to or the use of amusement, recreational, athletic or entertainment facilities,¹⁴

4. “Vendor” means, any person making sales of tangible personal property or services in this state, the gross receipts or gross proceeds from which are taxed by the Sales Tax Code.¹⁵

5. The Sales Tax Code levies an excise tax upon the gross receipts or gross proceeds of all sales, not otherwise exempted, of:

12. Dues or fees to clubs including free or complimentary dues or fees which have a value equivalent to the charge that would have otherwise been made, including any fees paid for the use of facilities or services rendered at a health spa or club or any similar facility or business;¹⁶

6. The rules promulgated under the Administrative Procedures Act are presumed to be valid and binding on the persons they affect and have the force of law.¹⁷

¹³ OKLA. STAT. ANN. tit. 68, § 1370 *et seq.* (West 2017) and OKLA. STAT. ANN. tit. 68, § 2701 (West 2013).

¹⁴ OKLA. STAT. ANN. tit. 68, § 1352(22)(c) (West 2017).

¹⁵ OKLA. STAT. ANN. tit. 68, § 1352(28)(a) (West 2017). *See* OKLA. STAT. tit. 68, § 1363(1) (West 2017).

¹⁶ OKLA. STAT. ANN. tit. 68, § 1354(A)(12) and (15) (West 2017).

¹⁷ *See* OKLA. STAT. ANN. tit. 75, § 250 *et seq.* (West 2018). *See also Toxic Waste Impact Group, Inc. v. Leavitt*, 1988 OK 20, 755 P.2d 626.

7. The rules and regulations of an administrative agency, which implement the provisions of a statute, are valid unless they are beyond the scope of the statute, are in conflict with the statute, or are unreasonable.¹⁸ Generally, it is presumed that administrative rules and regulations are fair and reasonable and that the complaining party has the burden of proving the contrary by competent and convincing evidence.¹⁹

8. The Tax Commission Rule for Dues and Fees states:

- (a) **General provisions.** Dues, fees, or any charge, payment, or contribution required as a condition precedent to membership in a club; or for access to the club establishment; or for access to or use of facilities, equipment, services, or privileges are subject to sales tax.
- (b) **Definitions.** For purposes of this Section, “dues” and “fees” are used synonymously. “Dues” means, but is not limited to, payments made to support and maintain clubs, associations, or other membership organizations, or to acquire and retain membership therein. “Dues” includes free or complimentary dues or fees. In transactions where no monetary consideration is stated, “dues” means that value equivalent to the charge that would have otherwise been made.
- (c) Exemptions and exclusions. Examples of transactions which are excluded from the application of this Section or are specifically exempt by statute are:
 - (1) Fees for instructional services at locations where no membership dues are charged, and there is no member/non-member difference in fees, are considered fees for the provision of nontaxable services.²⁰

¹⁸ See *Boydston v. State*, 1954 OK 327, 277 P.2d 138.

¹⁹ See Note 17, *supra*. See also *State ex rel. Hart v. Parham*, 1966 OK 9, 412 P.2d 142. (Citations omitted.)

²⁰ OKLA. ADMIN. CODE § 710:65-19-77 (June 25, 2006).

9. When the Tax Commission issues a proposed assessment against a limited liability company for unpaid sales taxes, the Tax Commission shall file such proposed assessments against the individuals personally liable for the tax.²¹ MEMBER was the sole member of the Protestant during the Audit Period.²² The Division correctly assessed MEMBER, as a Member, and as an Individual.

10. The goal of any inquiry into the meaning of a legislative act is to ascertain and give effect to the intent of the legislature. The law-making body is presumed to have expressed its intent in a statute's language and to have intended what the text expresses. Hence, where a statute is plain and unambiguous, it will not be subject to judicial construction, but will be given the effect its language dictates. Only where the intent cannot be ascertained from a statute's text, as occurs when ambiguity or conflict (with other statutes) is shown to exist, may rules of statutory construction be employed.²³

11. The legislature will not be presumed to have intended a vain or absurd result.²⁴

12. Tax statutes are penal in nature. Where there is reasonable doubt about the taxing act's meaning, all ambiguity must be resolved in favor of the taxpayer. Legislative intention ascertained from a general consideration of the entire act must be given effect. Nonetheless, courts cannot enlarge the taxing act's ambit to make its provision's applicable to cases not clearly within the

²¹ OKLA. STAT. tit. 68, § 253 (West Supp. 2018).

²² The court file contains the Division form filled out by MEMBER reflecting that she is the sole member of the Protestant.

²³ *Blitz U.S.A., Inc. v. Oklahoma Tax Com'n*, 2003 OK 50, 75 P.3d 883. (Citations omitted).

²⁴ *Strelecki v. Oklahoma Tax Com'n*, 1993 OK 122, 872 P.2d 910. (Citations omitted.)

Legislature's contemplation or to fill lacunae in the revenue law in a manner that would distort the enactment's plain language.²⁵

13. An exemption statute is strictly construed against the person asserting an exemption.²⁶

14. Tax exemptions, deductions, and credits depend entirely on legislative grace and are strictly construed against the exemption, deduction, or credit.²⁷

15. Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears, and except also that the words hereinafter explained are to be understood as thus explained.²⁸

16. Whenever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.²⁹

17. In the absence of a contrary definition, regulatory words are to have the same meaning as that attributed to them in ordinary and usual parlance.³⁰

18. In sales tax matters, "[t]he burden of proving a sale was not a taxable sale shall be upon the person who made the sale."³¹

²⁵ *Globe Life and Acc. Ins. Co. v. Oklahoma Tax Commission*, 1996 OK 39, ¶¶ 11-14, 913 P.2d 1322. (Citations omitted).

²⁶ *Magnolia Petroleum Co. v. Oklahoma Tax Com'n*, 1958 OK 124, 326 P.2d 821.

²⁷ *TPQ Inv. Corp. v. State ex rel. Oklahoma Tax Com'n*, 1998 OK 13, ¶8, 954 P.2d 139.

²⁸ OKLA. STAT. ANN. tit. 25, § 1 (West 2008).

²⁹ OKLA. STAT. ANN. tit. 25, § 2 (West 2008).

³⁰ *Matter of Income Tax Protest of Ashland Exploration, Inc.*, 1988 OK 23, 751 P.2d 1070.

³¹ OKLA. STAT. ANN. tit. 68, § 1365(F) (West 2014).

19. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.³² A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.³³

DISCUSSION

ISSUES ONE AND TWO

1. Whether the Protestant's annual registration fees are subject to sales tax?
2. Whether the Protestant's charges for birthday parties are subject to sales tax?

The Protestant contends that the annual registration fees are exempt from sales tax pursuant to Tax Commission Rule § 710:65-19-77(c). In support, Protestant asserts that the annual fee is charged as compensation for general paperwork, computer data entry, gymnast evaluations, competitive gymnast paperwork, and other administrative costs and is not a requirement of membership in a club or for access to the establishment or use of equipment, services or privileges that are subject to sales tax under Ok Reg 710:65-19-77(a). Protestant further argues that the fees charged in connection with birthday parties would also fall under the exemption as all birthday parties require a gymnastics coach present for the entire party and all parties have instructional components.

The Division contends that the annual fee is a prerequisite to use the facility, which subjects it to sales tax under 68 O.S. § 1354(A)(12). The Division argues the annual fee is not a fee for instructional service, but a service fee that all customers are charged at their initial sign up and then once per year thereafter.

³² OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999). *See also* OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999).

³³ *See Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

The Protestant claims that its activities involve instructional services/classes, and that there are no member/non-member differences in fees, and that its fees are not for acquiring or retaining membership, but the fees are to cover the cost of preparing the paperwork that gymnast are required to do annually to be able to compete.

The Division argues that the Protestant charges this annual fee for all its members including members that are not participating at a competitive level; all members must pay the fee initially and annually thereafter, and the fees are required to access the facility.

The Protestant's reliance on Tax Commission Rule 710:65-19-77(c) is misplaced. The parties stipulated that Protestant charged customers an annual fee, and that the customers paid the fee upon initial enrollment in its facility.³⁴ The annual fee is a prerequisite to use the facility, which subjects it to sales tax.³⁵ Further, § 1352(22)(c) taxes admission, dues, or fees to clubs, places of amusement, or recreational or athletic events or for the privilege of having access to or the use of amusement, recreational, athletic or entertainment facilities. The annual fee is subject to sales tax, under Section 1354(A)(12) or Section 1352(22)(c).

The parties stipulated that the Protestant provided three levels of birthday parties to its customers. Although, the Protestant sells no Tangible Personal Property, such as birthday cakes, decorations, soft drinks, etc.,³⁶ the charge for a Birthday Party Package falls squarely within the language of Section 1354(12) of Title 68. The Birthday Party Packages total price allows for time in the gymnasium and time in the party area for cake and presents. The Protestant does not separate the cost between the gymnasium time and party area time. Even though an adult is present for

³⁴ See Stipulation 1.

³⁵ See Division's Position Letter at 4-5.

³⁶ Testimony of Member.

these parties, it is evident that the entire time spent is not devoted to gymnastics instruction. The Birthday Party Packages allow the customers to have access and use of the facilities subjecting the total cost to sales tax.

CONCLUSION

The Protestant has failed to meet its burden of proof, by preponderance of the evidence, that the Division's proposed sales tax assessment is incorrect, and in what respects.

RECOMMENDATIONS

The ALJ recommends denial of the protest as more fully set forth.

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.

NOTE: The distinction between a Commission Order designated as "Precedential" or "Non-Precedential" has been blurred because all OTC Orders resulting from cases heard by the Office of Administrative Law Judges are now published, not just "Precedential" Orders. *See* OKLA. STAT. ANN. tit.68, § 221(G) (West 2014) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002).