

JURISDICTION: OKLAHOMA TAX COMMISSION DECISION
CITE: 87-08-20-24 / NON-PRECEDENTIAL
ID: P-86-451
DATE: AUGUST 20, 1987
DISPOSITION: DENIED
TAX TYPE: SALES
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above styled cause comes on for consideration pursuant to assignment regularly made to ALJ, Administrative Law Judge, by the Oklahoma Tax Commission. A hearing was had, at which hearing Protestant appeared by ATTORNEY ONE, Attorney, and ATTORNEY TWO, Attorney. The Sales Tax Section of the Business Tax Division of the Oklahoma Tax Commission appeared by OTC ATTORNEY, Attorney, and SUPERVISOR, Field Audit Supervisor, Business Tax Division of the Oklahoma Tax Commission. Called to testify on behalf of Protestant were PARTNER ONE and PARTNER TWO, partners in the Protestant's business. Called to testify for the Business Tax Division was AUDITOR, auditor for the Sales Tax Section. Exhibits, not itemized herein, were submitted by the parties. Closing arguments were made, and the case was submitted for a decision.

STATEMENT OF FACTS

Protestants, PARTNER ONE and PARTNER TWO, are general partners in a repository of books, oil well logs and other geological information. The partnership operates a business enterprise known as PARTNERSHIP, located in CITY, Oklahoma. The partnership files a Partnership Return yearly with the Income Tax Division of the Oklahoma Tax Commission.

The PARTNERSHIP, hereinafter "PARTNERSHIP", is open to the public. For members of the public who wish to have access to the information, a fee is charged for the right to use such information. For the right to use such information on a daily basis, a daily rate is charged. For members of the public who wish to have continued access and use of the information, the fee charged by the PARTNERSHIP is based on a monthly fee, referred to by Protestant as a membership fee. The information may be taken outside the PARTNERSHIP or it may be examined inside the PARTNERSHIP itself.

The information contained in the PARTNERSHIP consists of electric logs, scout tickets, sample logs, oil and gas production reports, weekly drilling reports, topographical maps and other materials which are principally used in the process of exploration for and drilling of oil and gas wells. A subsidiary use of the information is made by high school and college students who have an interest in geology or petroleum engineering. Protestant states that such use is made available without charge.

A field audit of the records and files of Protestant for the period January 1, 1982 through July 31, 1986 was conducted by the Sales Tax Section of the Business Tax Division. The auditor determined that the rental of the information was in fact a taxable sale under the Oklahoma Sales

Tax Code. Thereafter, on September 3, 1986, a proposed assessment of sales tax, interest and penalty was made in the following amount:

Tax:	\$11,407.63
Interest:	3,848.35
Penalty:	<u>1,140.76</u>
Total:	\$16,396.74

Protestant timely protested the proposed assessment, which protest was received by the Sales Tax Section of the Business Tax Division on or about September 17, 1986. The protest of Protestant indicated the Protestant believed the business receipts for access to its information should be exempt from taxation.

CONTENTIONS OF PROTESTANT

Protestant first contends, in its protest, that the business receipts of the PARTNERSHIP should be exempt from taxation.

Protestant also contends, in its brief, that operation of the PARTNERSHIP does not fall within the definitional or levying sections of the Oklahoma Sales Tax Code, particularly, 68 O.S. 1981, §§ 1352(L) and 1354(A).

CONTENTIONS OF THE DIVISION

The Sales Tax Section of the Business Tax Division contends that 68 O.S. 1981, § 1354(A) levies an excise tax on the gross receipts or gross proceeds of each sale of tangible personal property without regard to time or manner of payment unless otherwise exempted.

The Sales Tax Section of the Business Tax Division further contends that the transactions engaged in by Protestant are not exempt under the Oklahoma Sales Tax Code.

ISSUES

(1) Whether the transactions of Protestant fall within the levying provisions of 68 O.S. 1981, § 1354(A).

(2) Whether the transactions of Protestant are exempt from taxation under the exemption provisions of 68 O.S. 1981, §§ 1355, 1357 or 1360.

APPLICABLE LAW

This action arises under the Oklahoma Sales Tax Code, as amended, 68 O.S. 1981, § 1350, et seq., and the Oklahoma Tax Commission has jurisdiction under Section 207 of the Uniform Tax Procedure Code, 68 O.S. 1981, § 207.

Section 1352(A) of Title 68 of the Oklahoma Statutes provides for the definition of a business, as follows, to-wit:

(A) “Business” shall mean and include any activity engaged in or caused to be engaged in by any person with the object of gain, benefit or advantage, either direct or indirect.

As it is being operated, the Protestant’s PARTNERSHIP falls within this statutory definition since it is operated for the direct benefit of its owners, and the transfer of the information to its members and to the public is done for consideration in the form of a fee. Protestant did not allege, nor was it proven, that Protestant operated the PARTNERSHIP on a non-profit basis, Protestant merely stated that the only way the owners maintain the PARTNERSHIP is by dues collected from its members. Although nothing in the PARTNERSHIP is for sale as such, the information transferred to its users is done for a fee which is paid either monthly or daily. The transaction, then, is in the nature of a rental for the use of such information.

Section 1352(L) provides:

(L) “Sale” shall mean 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, including but not limited to:

(1) The exchange, barter, lease or rental of tangible personal property resulting in the transfer of the title to or possession of the property;

(2) The disposition for consumption or use in any business or by any person of all goods, wares, merchandise or property which has been purchased for resale, manufacturing or further processing.

(3) 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; and

(4) The furnishing or rendering of services taxable under this article.

Section 1352(N) provides:

(N) “Tangible personal property” shall mean personal property which may be seen, weighed, measured, felt or touched or which is in any other manner perceptible to the senses.

Under the statutory definitions of “Sale”, which includes the transfer, by any manner, method, instrumentality or device, Protestant’s transfer of the information to its subscribers, for a

fee, is a sale. Moreover, even though it is the information which Protestant is transferring to its subscribers, information is within the statutory definition of tangible personal property, since it can be seen, and is in fact inseparable from the documents on which it is printed, rendering it in any manner perceptible to the sense of sight.

Section 1354(A) of the Sales Tax Code provides for the levy of the rate of sales tax, as follows, to-wit:

There is hereby levied upon all sales, not otherwise exempted in this article, an excise tax of two percent (2%) of the gross receipts or gross proceeds of each sale of the following:

(A) Tangible personal property.

The levying statute is meant to be interpreted with Sections 1352(L) and (N). The clear directive contained in the levying section is that all sales or transfers of title or possession of tangible personal property are taxable unless exempt. Here, Protestant did not show that it falls within any of the exemption sections of the Sales Tax Code (§§ 1355 through 1360).

Although Protestant, in its letter of protest, asserted that, it is exempt from the collection and remittance of sales tax, the material points of Protestant's protest are: 1. That the owners never believed their business fell within the purview of the levying statute, and, 2. That the levying statute does not encompass Protestant's operation, since the type of transaction in which it engages with its members is not that of a vendor transferring possession of tangible personal property to a vendee.

Protestant's first point, that the partners did not believe the PARTNERSHIP transactions were taxable, is contrary to a well settled rule of law. Taxpayers are presumed to have knowledge of applicable tax laws, Coates v. Hewgley, 581 P.2d 929 (Okl. App. 1976).

Protestant's second point is succinctly stated on Page Two of the Brief of Protestant as follows:

The statute in question deals primarily with sale of personal and tangible properties. The statute when it refers to services rendered seems to be in connection with the selling of tangible properties.

As support for this argument, Protestant states that the term "Vendor", as defined in Section 1352(R)(1) and (2), ties the making of sales to the provision of services of the items sold, such as the sale and alteration of clothing, or the sale and repair of bicycles. By Protestant's reasoning, then, only tangible personal property which is sold and serviced or repaired by the vendor is taxable.

Section 1352(R) states in pertinent part:

(R) "Vendor" shall mean and include:

(1) Any person making sales of tangible personal property or services in this state, the gross receipts or gross proceeds from which are taxed by this article;

(2) Any person maintaining a place of business in this state and making sales of tangible personal property or services, whether at the place of business or elsewhere, to persons within this state, the gross receipts or gross proceeds from which are taxed by this article; or

...

Protestant's reliance on the inseparability of the provision of services with the sale of tangible personal property fails in that a plain reading of Section 1352 does not so limit the taxability of those items of tangible personal property which are sold and also serviced by the vendor. This is a very narrow reading of the definitional statute and is contrary to a fundamental rule of statutory construction. In Affiliated Management Corporation v. Oklahoma Tax Commission, 570 P.2d 335, 337 (Okla. 1977), the Supreme Court of Oklahoma stated:

The general rule to be applied in the construction of tax statutes requires that the primary consideration be to ascertain and give effect to the intention of the Legislature. Tax statutes are to be given a reasonable construction with a view of carrying out the legislative purpose and intent, and such intention is to be determined from the language of the entire act.

The transactions which are subject to sales tax in the case at bar are in fact rentals of tangible personal property for a daily or monthly fee. Section 1352(L)(1) provides that a "sale" shall include the transfer of possession of tangible personal property, including the rental of such items. Section 1354(A) levies a sales tax on the transfer of possession of tangible personal property unless otherwise exempted. In Magnolia Petroleum Company v. Oklahoma Tax Commission, 326 P.2d 821, 823 (Okla. 1958), the Oklahoma Supreme Court stated:

The levying section of the Sales Tax Act, 68 O.S. 1951 § 1251c, reads in part as follows:

"There is hereby levied an excise tax of two percent (2%) upon the gross proceeds or gross receipts derived from all sales subsequent to May 31, 1941, to any person of the following:

"(a) Tangible personal property."

[2] The phrase "tangible personal property" as used in the above cited statute is all inclusive.

The Supreme Court went on to state that the levying section is only limited by the exemption provisions which followed.

In order to substantiate its claim that the definitional and levying provisions of the Oklahoma Sales Tax Code are of doubtful application to the transactions of Protestant, Protestant must point to some exemption for which the transactions qualify. Bert Smith Machinery Co. v. Oklahoma Tax Commission, 563 P.2d 641 (Okl. 1977). There are no provisions specifically exempting Protestant’s rental of the materials contained in its PARTNERSHIP.

As additional support for its proposition that the Oklahoma Legislature did not intend to tax transactions of this type, Protestant offers the fact that House Bill No. 1349 (an act relating to revenue and taxation) was introduced during the current session, was passed by the State House of Representatives, and was sent to the Oklahoma Senate, where it was pending at the time of hearing this protest. House Bill No. 1349 would have amended Section 1354(E) of Title 68 of the Oklahoma Statutes.

Section 1354(E) of Title 68 of the Oklahoma Statutes provides:

§ 1354. Tax Levy-Rate-Sales subject to tax

There is hereby levied upon all sales, not otherwise exempted in this article, an excise tax of two percent (2%) of the gross receipts or gross proceeds of each sale of the following:

...

(E) Printing or printed matter of all types, kinds or character and any service of printing or overprinting, including the copying of information by mimeograph or multigraph or by otherwise duplicating written or printed matter in any manner, or the production of microfiche containing information on magnetic tapes furnished by customers.

If amended, Section 1354(E) would have added the following language:

“...EXCEPT FOR SERVICES OF PRINTING, COPYING OR PHOTOCOPYING PERFORMED BY A PRIVATELY OWNED SCIENTIFIC AND EDUCATIONAL LIBRARY SUSTAINED BY MONTHLY OR ANNUAL DUES PAID BY MEMBERS SHARING THE USE OF SUCH SERVICES WITH STUDENTS INTERESTED IN THE STUDY OF GEOLOGY, PETROLEUM ENGINEERING OR RELATED SUBJECTS...”

House Bill NO. 1349 would have amended Section 1356(D) of Title 68 as well. Section 1356(D) provides:

§ 1356. Exemptions - Governmental and non-profit entities

There are hereby specifically exempted from the tax levied by this article:

...

(D) Dues paid to fraternal, religious, civic, charitable or educational societies or organizations by regular members thereof, provided, such societies or organizations operate under what is commonly termed the lodge plan or system, and provided such societies or organizations do not operate for a profit which inures to the benefit of any individual member or members thereof to the exclusion of other members.

If amended, Section 1356(D) would have contained the following language:

“...AND DUES PAID MONTHLY OR ANNUALLY TO PRIVATELY OWNED SCIENTIFIC AND EDUCATIONAL LIBRARIES BY MEMBERS SHARING THE USE OF SERVICES RENDERED BY SUCH LIBRARIES WITH STUDENTS INTERESTED IN THE STUDY OF GEOLOGY, PETROLEUM ENGINEERING OR RELATED SUBJECTS.”

As to its probative value, such amendments to the existing statutes by the 1987 Oklahoma Legislature would reflect the will of the Legislature as to prospective application of the statutes in question, but would not be applied retrospectively to the instant protest. Notwithstanding the effect such amendments might have, however, the question is moot since the proposed amendments remained dormant in the Oklahoma Senate Finance Committee past the deadline required for the amendments to be reported to the Oklahoma Senate for its consideration during the 1987 legislative session.

CONCLUSIONS

In view of the above and foregoing findings of fact and applicable law thereto, the undersigned Administrative Law Judge concludes as follows:

(1) The Oklahoma Tax Commission has jurisdiction in this matter under 68 O.S. 1981, § 207.

(2) Protestant is engaged in the business of renting information in the form of electric logs, scout tickets, oil and gas production reports, weekly drilling reports, topographical reports and other geological data to geologists, petroleum engineers and others interested in the production of oil and gas for a fee payable daily or monthly.

(3) The levying section of the Oklahoma Sales Tax Code is all inclusive and the transactions involved in the rental of Protestant's information constitute the transfer of possession of tangible personal property under 68 O.S. 1981, § 1354(A). Magnolia Petroleum Co. v. Oklahoma Tax Commission, 326 P.2d 821, 823 (Okl. 1958).

(4) Protestant did not meet its burden of showing that its transactions are exempt from the collection and remittance of sales tax.

(5) The sales tax protest of PARTNERSHIP, PARTNER ONE and PARTNER TWO, partners, should be denied.

(6) For the above cited reasons, the Protestant should be required to pay the proposed assessment of sales tax in the amount of Eleven Thousand Four Hundred Seven Dollars and Sixty-Three Cents (\$11,407.63), penalty in the amount of One Thousand One Hundred Forty Dollars and Seventy-Six Cents (\$1,140.76), and interest in the amount of Three Thousand Eight Hundred Forty-Eight Dollars and Thirty-Five Cents (\$3,848.35), plus interest accrued until date of payment.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the protest of PARTNERSHIP, PARTNER ONE and PARTNER TWO, partners, be denied.

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.