

**JURISDICTION:** OKLAHOMA TAX COMMISSION DECISION  
**CITE:** 87-12-22-48 / NON-PRECEDENTIAL  
**ID:** P-86-443  
**DATE:** DECEMBER 22, 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 held, at which hearing Protestant appeared on his own behalf. The Sales Tax Section of the Business Tax Division of the Oklahoma Tax Commission appeared by OTC ATTORNEY, Attorney, of the General Counsel's Office of the Oklahoma Tax Commission. Exhibits, not itemized herein, were received into evidence and the case was submitted for a decision.

### **STATEMENT OF FACTS**

Protestant, a wholesaler primarily engaged in the business of selling eyeglass frames and accessories to optometrists and opticians, was the subject of a sales tax field audit for the period of June 1, 1983 through April 30, 1986. The audit resulted in the issuance of an assessment of additional sales tax, penalty and interest, on August 7, 1986, in the total amount of Thirteen Thousand Two Hundred Seventy-One Dollars and Eighty Cents (\$13,271.80). Adjustments to the assessment have subsequently been made.

The additional sales tax consists of sales taxes due to municipalities. Protestant had consistently through the years properly reported and remitted state sales taxes and municipal sales taxes for CITY, the city in which his business was located. When the sales tax laws regarding the "point of sale" were codified in 1981, Protestant, who was unaware of the change in the law, failed to collect sales taxes for sales he made in municipalities other than CITY. These sales of tangible personal property are the basis of the assessment.

When the field audit was conducted, the Division was provided with records for approximately one-half of the audit period. The Division utilized an error-rate projection method of determining taxable sales for the months for which Protestant had failed to retain records. Additional sales taxes were assessed based upon the error-rate projection method.

According to Protestant at the hearing, the months for which records were available for projecting sales were months in which sales were increased because of the employment of four sales representatives. However, this was unsupported by evidence.

Protestant also maintained at the hearing that the proposed additional sales taxes were based upon sales that were exempt from the sales tax levy as "sales for resale", but offered no evidence at this hearing in this regard.

**ISSUES AND CONTENTIONS**

Whether the sales of tangible personal property by Protestant were “sales for resale” under 68 O.S. Supp. 1983, § 1357(D); and exempt from the sales tax levy of 68 O.S. Supp. 1986, § 1354 1.(A)?

Whether Protestant can be held liable for additional sales taxes for those months of the audit period for which no records of Protestant were available for actual audit?

Whether Protestant can be held liable for sales taxes due for a three year period immediately preceding the August 7, 1986 proposed assessment, when it failed to collect the tax because Protestant was unaware of a change in the law?

Protestant maintains that since he was engaged in a wholesale business which sold to persons in the business of reselling the property, the transactions were exempt from the sales tax levy provision of 68 O.S. § 1354. He further maintains that the Business Tax Division should not be permitted to audit his books and records for the previous three years after having accepted reports and remittances for that period that had not included sales taxes due municipalities other than CITY. Finally, Protestant objects to the Division’s utilization of an error-rate projection rate for determining the additional tax liability for those months of the audit period for which no records were available for actual audit, since his sales were increased in those months for which he had records, because of the hiring of four sales representatives.

The Division’s position is that the revised assessment is comprised of taxes due on sales to persons or entities not holding valid sales tax permits, and thus, are not exempt “sales for resale” under 68 O.S. Supp. 1983, § 1357(D). The portion of the assessment relating to sales Protestant made to persons holding valid sales tax permits, and who are in the business of reselling the articles, was adjusted from the assessed taxes.

**APPLICABLE LAW**

The sale of tangible personal property is subject to the sales tax levy of 68 O.S. Supp. 1985, § 1354 1.(A):

1. There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code, an excise tax of three and one-fourth percent (3¼%) of the gross receipts or gross proceeds of each sale of the following:

(A) Tangible personal property.

(Note: The sales tax levy increased from two percent (2%) to three percent (3%) to three and one-quarter percent (3¼%) during the audit period.)

Sales made by Protestant of eyeglass frames and other accessories are subject to the sales tax levy unless otherwise exempted by statute. The exemption from the sales tax levy that

Protestant believed was applicable to the sales in which he engaged is found in paragraph (D) of Section 1357 of Title 68 of the Oklahoma Statutes. That provision is as follows:

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

(D) Sales for resale to persons engaged in the business of reselling the articles purchased, whether within or without the state, provided that such sales to residents of this state are made to persons to whom sales tax permits have been issued as provided in this article. This exemption shall not apply to the sales of articles made to persons holding permits when such persons purchase items for their use and which they are not regularly engaged in the business of reselling; neither shall this exemption apply to sales of tangible personal property to peddlers, solicitors and other salesmen who do not have an established place of business and a sales tax permit.

The burden of proving to the Commission that the persons purchasing the eyeglass frames and accessories were engaged in the business of reselling the articles and had been issued sales tax permits, was upon Protestant. Rule 26 of the Rules of Practice and Procedure Before the Oklahoma Tax Commission. Protestant, however, offered no evidence at the hearing that the sales were made to persons engaged in the business of reselling the articles. Without evidence to prove the sales were exempt from the sales tax levy, there is no basis for sustaining Protestant's protest in this regard. Furthermore, those sales which Protestant could establish were made to persons engaged in the business of reselling the articles, were accepted by the Division prior to the hearing and served as the basis for the adjustments that were made to the assessment.

Taxpayers are mandated by 68 O.S. 1981, § 1365(C) to maintain records from which an audit can be conducted to determine the amount of tax due under the provisions of the Sales Tax Code. That mandate, which requires the retention of records for a period of three (3) years, unless the Tax Commission has authorized their destruction, provides:

(C) It shall be duty of every vendor required to make a sales tax report and pay any tax under this article 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 this article as will substantiate and prove the accuracy of such returns. It shall also be the duty of every person who makes sales for resale to keep records of such sales which shall be subject to examination by the Tax Commission or any authorized employee thereof while engaged in checking or auditing the records of any person required to make a report under the terms of this article. 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. The

burden of proving that a sale was not a taxable sale shall be upon the person who made the sale.

Protestant failed to preserve records for the three year period prior to the audit period. Based upon the records Protestant had retained, the Division projected additional taxes for those months of the three year period for which no records were available for the audit. Protestant offered no evidence at the hearing toward proving that the projected sales were not taxable sales during those months for which no records were retained. Consequently, the assessment of the additional taxes for those months must be sustained.

Title 68 O.S. 1981, § 223 provides a limitation of time for assessing taxes. The applicable portion of Section 223 to this protest is paragraph (a):

(a) No assessment of any tax levied under the provisions of any state tax law except as provided in the following paragraphs of this Section, shall be made after the expiration of three (3) years from the date the return was required to be filed or the date the return was filed, whichever period expires the later, and no proceedings by tax warrant or in Court without the previous assessment for the collection of such tax shall be begun after the expiration of such period.

The audit of Protestant's books and records resulted in the issuance of a written proposed assessment on August 7, 1986, for taxes due to this state for the period of June 1, 1983 through April 30, 1986. Although Protestant may have been unaware of the changes in the law, which resulted in the additional sales tax liability, it is neither a requirement nor a condition to the assessment of taxes that notice be given to a taxpayer of changes in the law which could affect tax liabilities.

### **CONCLUSIONS OF LAW**

In view of the above and foregoing factual situation and applicable law relevant thereto, the undersigned Administrative Law Judge concludes as follows:

- (1) The Oklahoma Tax Commission has jurisdiction in this matter. 68 O.S. 1981, § 203.
- (2) Sales of tangible personal property are subject to the sales tax levy of 68 O.S. Supp. 1986, § 1354 1.(A). Protestant's sales of eyeglasses and accessories were sales of tangible personal property and subject to the sales tax levy.
- (3) Sales of tangible personal property are exempt from taxation under 68 O.S. 1981, § 1357(D), when made to persons engaged in the business of reselling the articles purchased, who have been issued valid sales tax permits. Protestant's sales of eyeglasses and accessories were not exempt from the sales tax levy as "sales for resale."
- (4) Pursuant to 68 O.S. 1981, § 1365(C), Protestant was required to retain records, which might be necessary to determine the amount of sales tax due, for three (3) years. Protestant, in

violation of Section 1365(C), did not retain records for the three (3) year period preceding the audit, and failed to meet the burden of proving that the taxes assessed for those months, based upon the error-rate projection method, were not due.

(5) The assessment of additional taxes was within the three (3) year limitation of 68 O.S. 1981, § 223.

(6) The assessment of the Sales Tax Section of the Business Tax Division of the Oklahoma Tax Commission for the period of June 1, 1983 through April 30, 1986 for additional sales taxes, interest and penalty, plus any accrued interest, is due and payable.

### **DISPOSITION**

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the protest of PROTESTANT to the proposed assessment of sales taxes, interest and penalty for June 1, 1983 through April 30, 1986, 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.