JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **92-06-04-015 / NON-PRECEDENTIAL**
ID: **P-88-416-K**
DATE: **JUNE 4, 1992**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **AFFIRMED; S.CT. 79,953**
CITE: **NOT A PUBLISHED DECISION**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A hearing was had, at which hearing Protestant, PROTESTANT was represented by ATTORNEY, Attorney at Law. The Business Tax Division of the Tax Commission was represented by OTC ATTORNEY 1 and OTC ATTORNEY 2, Assistant General Counsels, General Counsel's Office of the Tax Commission. Testimony was heard, exhibits were offered and admitted into evidence and upon hearing closing arguments, this matter was submitted for decision.

FINDINGS OF FACT

1. Protestant is an Oklahoma corporation doing business in COUNTY, Oklahoma. Protestant does tooling and pattern work and manufacturers production parts for COMPANY 1, COMPANY 2, COMPANY 3 and various other companies.

2. A sales tax audit of Protestant's books and records for the period of February 1, 1985 through January 31, 1988 was performed by the Business Tax Division. As a result of the audit, the Business Tax Division on June 9, 1988, issued a proposed assessment of sales tax, interest and penalty against Protestant in the total amount of $1,793.49.

3. On July 22, 1988, the Business Tax Division issued a revised proposed assessment of sales tax, interest and penalty for the audit period against Protestant in the total amount of $1,558.91. The revision resulted from the removal of certain sales to COMPANY 1 from the original audit. The removal was caused by additional information provided by Protestant which showed that the sales were exempt from sales tax under 68 O.S. Supp. 1985, §1356(B). AUDITOR, Auditor/Supervisor of the Business Tax Division testified that the COMPANY 1 sales were removed based on the wording of the contract.

4. The revised proposed assessment was timely protested by Protestant.

5. Protestant acknowledges that the one sale to COMPANY 3 is subject to Oklahoma sales tax and does not dispute the sales tax assessed thereon.

6. PRESIDENT, President of Protestant, testified that the sales to COMPANY 1 were made pursuant to a purchase order outlining what type tool or production part Protestant was required to build for them. He stated that prior to receiving a purchase order, COMPANY 1 would send out a packaged proposal to several companies for bids on building the production

parts or tooling parts and that Protestant would have to be the successful bidder to win the contract to produce the parts. He further stated that the purchase orders from COMPANY 1, in all cases, were designated as tax exempt and had an Oklahoma sales tax permit number printed thereon.

7. PRESIDENT identified four purchase orders from COMPANY 1 and testified that the purchase orders are representative of the purchase orders received from COMPANY 1 during the audit period. None of the purchase orders from COMPANY 1 identified by PRESIDENT are identified on the audit workpapers as being part of the audit.

8. PRESIDENT identified three purchase orders from COMPANY 2 and testified that these purchase orders are representative of the purchase orders received from COMPANY 2 during the audit period. None of the purchase orders from COMPANY 2 identified by PRESIDENT are identified on the audit workpapers as being part of the audit.

9. PRESIDENT testified that when Protestant started to work for COMPANY 1 and COMPANY 2, Protestant requested COMPANY 1 and COMPANY 2 to identify whether the sales were exempt from sales tax. He stated that upon completion of the audit, he requested letters from COMPANY 1 and COMPANY 2 to that effect.

10. PRESIDENT identified a letter and enclosed memorandum from COMPANY 2. The memorandum advises that of the purchase orders noted on the memorandum, COMPANY 2's legal department has determined that title to the tools described resides with the U.S. Government at the point of acceptance by COMPANY 2 and possibly even during the manufacturing cycle at the vendor. None of the purchase orders or part numbers noted on the memorandum are identified on the audit workpapers as being part of the audit.

11. PRESIDENT identified a letter and enclosures from COMPANY 1. The letter advises that the four COMPANY 1 purchase orders selected were issued for the fabrication and/or rework of tooling used exclusively for the Federal Government's B-l B program. The letter identifies the Government contract as noted on each purchase order and concludes that the title clause on each contract states that title to the tooling vests in the Government upon the date of the contract or when acquired. The Government contracts as listed on the letter are not identified on the audit workpapers as being part of the audit.

12. PRESIDENT testified that all of the sales items made under a COMPANY 2 purchase order were marked as property of the U.S. Government. He stated that other items may have been manufactured to help make a tool which were not so marked.

13. On cross-examination, PRESIDENT testified that Protestant manufactured and sold both patterns and parts to COMPANY 1 and COMPANY 2 and that all parts and patterns were stamped property of the United States. He states that there is no separate contract between Protestant and these companies and that there is just the purchase order.

14. AUDITOR testified that under the governmental exemption provided in Section 1356(B), the sale must be made so that title or possession passes immediately to the government. He stated that the Business Tax Division keys off the word "immediate."

15. On cross-examination, AUDITOR testified that he did not personally see or review any invoices or purchase orders regarding Protestant's sales to COMPANY 1 or COMPANY 2. He stated that the sales which were removed from the audit were the sales to COMPANY 1 which occurred after Section 1356(B) became law. He further stated that the sales made to COMPANY 1 after January 1, 1986 are not subject to sales tax. In regard to the sales to COMPANY 2, AUDITOR testified that the sales are not exempt under Section 1356(B) because title or possession of the property did not pass to the government immediately upon the sale to COMPANY 2. He stated that the auditor determined that the sale took place at COMPANY 2's location of business since no city sales tax was assessed and COMPANY 2's location of business is outside of the city limits of BIG CITY.

16. On redirect, AUDITOR testified that the sales for resale exemption would not apply to the patterns in this case, however, it may apply to the parts if the parts were resold. On recross, AUDITOR testified that if the purchase orders were for parts for the B-lB Bomber, the sale was a sale for resale. He stated that if the part was stamped property of the United States, the sale was potentially a sale for resale.

ISSUES AND CONTENTIONS

The issue presented herein for decision is whether the sales made by Protestant to COMPANY 1 and COMPANY 2 are exempt from sales tax pursuant to 68 O.S. Supp 1985, §1356(A) or (B) or, in the alternative, 68 O.S. Supp. 1985, §1357(D).

Protestant contends that the sales are exempt from sales tax. In support of this contention, Protestant argues that the sales are exempt from sales tax under 68 O.S. Supp. 1985, §1356(A) or (B) because title and/or possession of the property vests in the U.S. Government at the time the manufactured item is accepted or during the manufacturing process. In the alternative, Protestant argues that any sales not exempt under 68 O.S. Supp. 1985, §1356(A) or (B) are exempt under 68 O.S. Supp. 1985, §1357(D) because the items were sold for resale.

The Business Tax Division contends that the sales are not exempt from sales tax under either 68 O.S. Supp. 1985, §1356(A) or (B) or 68 O.S. Supp. 1985, §1357(D). In support of this contention, the Business Tax Division argues that Section 1356(B) did not become law until January 1, 1986 and, therefore, all sales prior to such date are not exempt. The Business Tax Division further argues that any sales after such date are not exempt under Section 1356(8) because title and/or possession of the manufactured item did not vest immediately in the U.S. Government. In regard to the alternative argument, the Business Tax Division argues that the sales are not exempt under Section 1357(D) because either the items were not sold for resale or COMPANY 1 and COMPANY 2 were not regularly engaged in the business of reselling the items purchased.

CONCLUSIONS OF LAW

1. The Tax Commission has jurisdiction to entertain Protestant's protest. 68 O.S. 1981, §207.

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

> (A) Sale of tangible personal property or services to the United States government or to the State of Oklahoma, any political subdivision of this state or any agency of a political subdivision of this state; provided, all sales to contractors in connection with the performance of any contract with the United States government, State of Oklahoma or any of its political subdivisions shall not be exempted from the tax levied by this article, except as hereinafter provided;[1]
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> (B) Sales of property to agents appointed or contracted with by agencies or instrumentalities of the United States government if ownership and possession of such property transfers immediately to the United States government;[2]

3. As a general rule, exemption statutes are to be strictly construed against the person claiming the exemption. Bert Smith Road Machinery Company, Inc. v. Oklahoma Tax Commission, 563 P.2d 641, 643 (Okl. 1977). The language of an exemption statute may not be construed so as to give it an effect which is not intended. Protests of Hyde, 188 Okl. 413, 110 P.2d 292 (1941). The intent or purpose of a statutory provision is to be determined primarily from the language of the statute. Hess v. Excise Board of McCurtain County, 698 P.2d 930 (Okl. 1985). Where statutory words or phrases are not otherwise defined, the words or phrases are to be understood in their ordinary and usual sense unless a contrary intention plainly appears. 25 O.S. 1981, §1. Loffland Bros. Equipment v. White, 689 P.2d 311 (Okl. 1984).

4. Regulations 13-32 and 13-33 of the Sales Tax Rules and Regulations adopted by Oklahoma Tax Commission Order No. 86-05-19-03 construed the provisions of Section 1356(A) and (B) as follows:

> Regulation 13-32 EXEMPTION—SALES TO GOVERNMENTAL ENTITIES
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> The gross proceeds from sales to the United States Government, the State of Oklahoma, or any of its political subdivisions are not subject to sales tax. Sales made directly to employees of any governmental entity are subject to sales tax.

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[1] Added by Laws 1981, c. 313, §2, emerg. eff. June 29, 1981. Prior to 1981, "Sales to the United States government, State of Oklahoma, or any of its political subdivisions" were exempted from the levy of sales tax by 68 O.S. 1971, §1305(i).

[2] Added by Laws 1985, c.l77, §1, eff. Jan. 1, 1986.

> Sales by government agencies or political subdivisions are taxable, and it is the duty of each agency or political subdivision to collect and remit the applicable city and state sales tax. This position has been reaffirmed by Attorney General's Opinion No. 77-107 written March 31, 1977.
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> Taxable sales by all government agencies are to include police sales, sheriff sales, surplus property sales and all other similar sales to the public.
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> Donations in the form of tangible personal property of items purchased exempt for resale to fraternal, religious, civic, charitable or educational societies or organizations are taxable to the donor as a consumer user.
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> Regulation 13-33 EXEMPTION-SALES TO GOVERNMENT CONTRACTORS
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> Sales of tangible personal property to agents of the United States government are exempt from sales tax if ownership and possession of such property transfers immediately to the United States government. Sales to contractors who are improving real property for the United States government are not considered to be sales in which ownership transfers immediately to the United States government and are therefore taxable.

On March 10, 1989, Rules 13.013.06 and 13.013.07 of the Oklahoma Tax Commission Permanent Rules became effective. Rule 13.013.07 is merely a restatement of Regulation 13-33. Rule 13.013.06 construes the provisions of section 1356(A) and (B) as follows:

> RULE 13.013.06: SALES TO GOVERNMENT
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> Sales of tangible personal property or services to this State, its institutions or political subdivisions, and to the United States, including agencies of federal, state or local governments are exempt from taxation.
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> The books and records of the vendor must show that the purchase was billed to and paid by the government agency.
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> Sales to individuals who are employees of this State, its institutions and subdivisions, or of the United States government, are not exempt from tax unless the sale is billed directly to the appropriate government agency or the purchase is by means of properly completed government purchase order.
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> Sales to contractors in connection with the performance of any contract with the United States government, State of Oklahoma, or any of its political subdivisions are not exempt unless the ownership and possession of the property purchased by the contractor or agent transfers immediately to the United States government, State of Oklahoma, or political subdivision.

5. In this matter, Protestant failed to present any evidence to prove that the sales which were assessed were made to the United States government or that ownership and possession of the property which was the subject of such sales was transferred immediately to the United States government. Protestant submitted certain purchase orders as representative of the sales during the audit period. Protestant also submitted two letters which addressed certain sales. The purchase orders submitted into evidence were not included in the assessment and the letters addressed certain sales which were not included in the assessment. At most, these purchase orders and the sales addressed by the letters represent the purchase orders and sales which were not picked up as taxable by the Business Tax Division.

Protestant has the burden of proof to show in what respect the action or proposed action of the Tax Commission is incorrect. Rule 2.026.00 of the Rules of Practice and Procedure Before the Oklahoma Tax Commission. Protestant failed to present any evidence to prove that the sales which were assessed are exempt from sales tax under 68 O.S. Supp. 1985, §1356(A) or (B). Accordingly, Protestant's contention that the sales are exempt under section 1356(A) or (B) cannot be sustained.

6. Section 1357 of Title 68 of the Oklahoma Statutes provides in pertinent part:

> There are hereby specifically exempted from the tax levied by this article:
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> * * *
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> (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;

Regulation 13-41 of the Sales Tax Rules and Regulations adopted by Oklahoma Tax Commission Order No. 86-05-19-03 construed the provisions of section 1357(D) as follows:

> Regulation 13-41 EXEMPTION—SALES FOR RESALE
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> The gross proceeds derived from sales of goods, wares and merchandise by vendors for resale to persons having a valid sales tax permit who are regularly engaged in reselling the articles purchased are exempt from sales tax. If the purchaser is an Oklahoma resident, he must provide the vendor with his Oklahoma sales tax permit number if the sale is made in Oklahoma. In addition to furnishing his sales tax permit number to the vendor, the purchaser must certify in writing to the vendor that said purchaser is engaged in the business of reselling the articles purchased. Failure to so certify with the knowledge that the items purchased are not for resale, shall be sufficient

> grounds upon which the Tax Commission may cause the purchaser's sales tax permit to be canceled. The seller will be held liable for sales tax due on any sales where an exemption certificate is found to be invalid, for whatever reason.
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> The required certification may be made on the bill, invoice or sales slip retained by the vendor or by furnishing a certification letter to the seller. The Multi-State Tax Commission Certificate, an Oklahoma Exemption Certification as shown below or a reasonable facsimile may be used.

Rule 13.013.12 of the Oklahoma Tax Commission Permanent Rules is a restatement of Regulation 13-41. Rule 13.013.12 became effective March 10, 1989.

7. Protestant failed to present any evidence to show that the items which were assessed by the Business Tax Division were purchased by COMPANY 1 and COMPANY 2 for resale. It is undisputed that COMPANY 1 and COMPANY 2, as one part of their business, perform government contracts and that they purchase items for use in performing these contracts. This evidence, however, does not prove that the items which were assessed were purchased for resale or use in performing the government contracts.

Protestant has the burden of proof to show in what respect the action or proposed action of the Tax Commission is incorrect. Rule 2.026.00. Protestant has failed to prove that the items which were assessed were sold for resale and, accordingly, Protestant's contention that the sales are exempt from sales tax under 68 O.S. Supp. 1985, §1357(D) cannot be sustained.

8. Protestant's protest to the proposed assessment of sales tax, interest and penalty should be denied.

DISPOSITION

Based on the above and foregoing Findings of Fact and Conclusions of Law it is ORDERED that the protest of Protestant, PROTESTANT, 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.