

**JURISDICTION:** OKLAHOMA TAX COMMISSION DECISION  
**CITE:** 87-03-03 / NON-PRECEDENTIAL  
**ID:** P-84-099 / P-86-035  
**DATE:** MARCH 3, 1987  
**DISPOSITION:** DENIED  
**TAX TYPE:** SALES  
**APPEAL:** AFFIRMED / OK S.CT. 68,516  
 1988 OK CIV APP 5, 762 P.2D 287, 59 OBJ 3060

**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 NAME, Attorney, and the Sales and Use Tax Section of the Business Tax Division of the Oklahoma Tax Commission appeared by OTC ATTORNEY, Attorney. Testifying on behalf of Protestant company were WITNESS ONE, WITNESS TWO and WITNESS THREE. Exhibits, not herein itemized, were received into evidence. Closing arguments were heard and the case was submitted for a decision.

**STATEMENT OF FACTS**

The Sales and Use Tax Section of the Business Tax Division audited the records of Protestant company for the period January 1, 1980 through December 31, 1982 and January 1, 1983 through June 30, 1985. As a result of this audit, the Sales and Use Tax Section of the Business Tax Division assessed Protestant company for sales tax, interest and penalty in the following amounts:

	<u>October 7, 1983</u>		<u>December 9, 1985</u>
Tax:	\$122,489.40	Tax:	\$ 77,162.11
Interest:	22,221.02	Interest:	16,975.66
Penalty:	<u>12,248.94</u>	Penalty:	<u>7,716.22</u>
Total:	\$156,959.36	Total:	\$101,853.99

Protestant filed a timely protest to the second assessment, but a question exists as to whether Protestant filed a timely protest to the first assessment. Since both assessments were based on the same factual situation, the cases are consolidated herein.

Both assessments were a result of Protestant company’s failure to remit sales tax on “exchange charges” which Protestant company added to the sales price of the equipment it sold. The “exchange charge” is an additional twelve and a half percent (12½%) of the published list price of the equipment sold which is added in order to expedite delivery of the needed oil field equipment. The “exchange charge” is added for all equipment which must be delivered within fourteen (14) days of the order. According to the testimony of Protestant’s witness, most equipment is needed in twenty-four (24) to forty-eight (48) hours, and the “exchange charge” is applied to approximately eighty percent (80%) of Protestant’s total sales.

**ISSUES AND CONTENTIONS**

The sole issue herein is whether “exchange charges”, fixed at twelve and a half percent (12½%) of the published list price, charged by Protestant in approximately eighty percent (80%) of its total sales, are subject to sales tax.

The Protestant contends that the “exchange charge” is not subject to sales tax because the “exchange charge” is for a service and because sales tax is imposed on “tangible personal property.” Protestant further contends that the “exchange charge” is a separately bargained for, separately billed for charge for an extraordinary service. Protestant contends that the “exchange charge” is added to cover the cost of the additional inventory, overhead and overtime which Protestant must maintain in order to make expedited deliveries.

The Sales and Use Tax Section of the Business Tax Division contends that the “exchange charge”, being a flat rate, is not directly correlated with any extraordinary service provided by Protestant. The Sales and Use Tax Section further asserts that maintaining an inventory, and incurring expenses such as overhead and overtime, are costs of doing business that create the ability to offer any tangible item for sale. The Sales and Use Tax Section also contends that it is quite apparent that the services that go into expediting a particular delivery are not the basis for the “exchange charge” since the “exchange charge” is discretionary and is waived for new customers, as well as in other circumstances, and since, regardless of the cost to Protestant, the exchange charge is always twelve and a half percent (12½%).

The Sales and Use Tax Section of the Business Tax Division contends that sales tax is due upon the total sales price. To support its position, the Sales and Use Tax Section relies on 68 O.S.A. § 1354(A) which levies an excise tax on the “gross receipts or gross proceeds” of each sale of tangible personal property, and on 68 O.S.A. § 1352(F) which defines gross proceeds.

**APPLICABLE LAW**

Title 68 O.S.A. § 1354(A) levies an excise tax on:

1. There is hereby levied upon 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. (Emphasis Added)

Title 68 O.S.A. § 1352(F) defines “gross receipts or gross proceeds” as “the total amount of consideration for the sale of any tangible personal property or service taxable under this article, whether the consideration is in money or otherwise...” Title 68 O.S.A. § 1352(F) also states:

There shall not be any deduction from the gross receipts or gross proceeds on account of cost of the property sold, labor service performed, interest paid, or losses, or of any expenses whatsoever, whether or not the tangible personal

property sold was produced, constructed, fabricated, processed, or otherwise assembled for at the request of the consumer as part of the sale. (Emphasis Added)

Protestant contends it is only the gross receipts or gross proceeds of sale of tangible personal property which is taxable. However, much that is of an intangible nature goes into the making of any tangible personal property and this fact makes the final product no less tangible. Consider the purchase of any item. Part of the cost of the tangible item is the labor that went into manufacturing it, the cost of keeping it in inventory, and the expense of paying someone to sell it. Many costs, some for intangible services, make up the price of any tangible object. Sales tax is paid on the sales price or the cost to the consumer which is referred to by 68 O.S.A. § 1354(A) as “the gross proceeds or gross receipts.” In buying and selling any type of goods, it is commonly understood that sales tax is due, not only on that which is tangible, but also on the expense of that which is intangible such as molding the raw materials of the item into sellable form, maintaining an inventory, and of hiring someone to sell the goods.

Protestant’s overhead, overtime and other costs of doing business are no less excludable as intangibles as the services which go into the production and selling of any other tangible object. Sales tax on tangible personal property is levied on the “gross receipts or gross proceeds” of each sale. Only when the “exchange charge” is not a part of the sales price is it not taxable.

### **CONCLUSIONS**

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

- (1) The Oklahoma Tax Commission has jurisdiction in this matter.
- (2) That due to exhibits which were received into evidence which indicated a high degree of confusion caused by clerical errors and lack of communication, the undersigned views both protests as being timely filed.
- (3) That sales tax is levied upon the gross receipts or gross proceeds of sales of tangible personal property.
- (4) That much that is intangible goes into the production and selling of all goods. Sales tax is nevertheless levied on the “gross proceeds or gross receipts” of those goods with no exclusion for all of the intangible services and costs of doing business which go into the making or selling of the tangible property.
- (5) That overhead, overtime and other costs of doing business are common examples of intangibles which go into the selling of any tangible personal property.
- (6) That the sales tax protest of the PROTESTANT, should be denied.

### **DISPOSITION**

It is the ORDER of the OKLAHOMA TAX COMMISSION that the sales tax protest of the PROTESTANT be denied, and that the Protestant be required to pay the tax as assessed, plus penalty and interest as accrued from the due date until paid.

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.