JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **98-12-03-005 / NOT PRECEDENTIAL**
ID: **P9600416**
DATE: **12-03-98**
DISPOSITION: **SUSTAINED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. *The parties stipulate to the following:*

I. Statement of the Case

This protest arises out of the OTC's sales tax audit of Protestant for the sales tax periods from and including June 1, 1992, through and including May 31, 1995. The OTC determined after audit that Protestant owed an additional $1,424.86 in sales tax, $515.24 in interest through 2-29-96, and $142.52 in penalties for the audit period.

Protestant does not dispute the audit determination except with respect to one transaction, namely, Protestant's sale in August of 1993 of a perfume display case to an unrelated third party, MS. ANONYMOUS, for the sum of $6,500.00. Therefore, the portion of the proposed assessment in dispute is the sales tax, penalty and interest relating to that sale, namely, $487.50 in Oklahoma sales taxes, $48.40 in penalties, and approximately $290.00 in statutory interest accrued to [September 15, 1997].

The OTC determined that Protestant's sale of the perfume case was a taxable sale of tangible personal property under Oklahoma law. Protestant asserts, in opposition, that the sale of the perfume case was not a taxable sale of tangible personal property, but was, in fact, a non-taxable sale of a fixture to real estate.

II. Stipulated Facts

1. Protestant is engaged for profit in the manufacture and sale of custom-made furniture and fixtures.

2. On August 17, 1993, Protestant sold a custom-made perfume display case for the sum of $6,500.00 to MS. ANONYMOUS, the owner of a women's clothing and accessories retail shop located IN ANONYMOUS CITY, Oklahoma.

3. The case is used exclusively by MS. ANONYMOUS in her business for the display of retail merchandise offered for sale and as a customer-service counter area.

4. Protestant purchased and paid Oklahoma sales tax on the materials, primarily wood, glass, and marble tile, used to make the case for MS. ANONYMOUS.

5. Protestant assembled and manufactured the case on-site at MS. ANONYMOUS'S retail shop. The finished case weighs in excess of 800 lbs., stands 4' high, and is U-shaped, approximately 16' long and 12' wide. Protestant installed the case with metal bolts screwed into the concrete floor of the shop, and provided electricity to the case for lighting and outlet needs by directly wiring the case into the building's wiring system.

6. The case is assembled in place in such a manner that it cannot be disassembled without destroying the case itself. The case is too large to remove from the building in one piece and, therefore, would have to be disassembled and destroyed in order to remove it from the building. If removed, however, bolt holes in the floor and adjacent wall would require repair.

B. Additional findings:

1. Protestant did not have a sales tax permit during the audit period.

ISSUES AND CONTENTIONS

The issue presented for decision, as stipulated by the parties, is whether the perfume display case, under the facts of the case, constitutes under Oklahoma law, a "fixture" to real estate and, hence, not subject to Oklahoma sales tax, or an item of tangible personal property and, hence, subject to Oklahoma sales tax.

Protestant contends that the assessment of sales tax on the sale of the perfume display case is erroneous. In support of this contention, Protestant argues that the display case became a fixture and a part of the real property to which it is connected. In support of this argument, Protestant cites Rule 710:65-19-107(b) and (c) of the *Oklahoma Administrative Code* and asserts that the display case cannot be removed without either causing substantial damage to the real property or without destroying the display case itself.

The Division contends that the assessment of sales tax on the sale of the perfume display case should be sustained. In support of this contention, the Division argues that the perfume display case is tangible personal property. In support of this argument, the Division cites Rule 710:65-1-2 of the *Oklahoma Administrative Code* and asserts that the display case may be removed by disassembly without substantial damage to the real property.

APPLICABLE LAW

Sales tax is levied and imposed on the gross proceeds or gross receipts of each sale of tangible personal property. 68 O.S. 1991, § 1354(1)(A). The phrase "tangible personal property" is defined by the Oklahoma Sales Tax Code to mean "personal property which may be seen, weighed, measured, felt, or touched or which is in any other manner perceptible to the senses." 68 O.S. 1991, § 1352(N). See, Rule 710:65-1-2 of the Oklahoma Administrative Code.[1]

The phrase "tangible personal property" is all inclusive and is not limited except by specific exemption. ***Magnolia Petroleum Company v. Oklahoma Tax Commission***, 326 P.2d 821, 823 (Okl. 1985). In ***Magnolia***, the Court held, "[W]e are of the opinion that tangible personal property placed upon real estate under an oil and gas lease wherein it is provided that the lessee or his assigns may remove said property, and which property is capable of being removed, remains tangible personal property."

Whether an item of personal property has become a fixture and therefore part of the realty or is a chattel subject to sales tax is determined by a three part test. ***Waterford Energy, Inc. v. Oklahoma Tax Commission***, 845 P.2d 198, 200 (Okl. 1992).
The test is stated as follows:

1. The actual or constructive annexation of the item to realty or to something appurtenant to realty;

2. The appropriateness of the particular article's use to the purpose or actual use of the realty;

3. The intention of the party placing the article on the realty to make the article a permanent and integral part of that realty.

[1] Defines **"tangible personal property"** to mean "all goods, wares, merchandise, products and commodities, and all tangible or corporeal things and substances which are dealt in, capable of being possessed and exchanged. The term does not include real property, such as land and buildings, tangible personal property that loses its identity when it becomes an integral and inseparable part of the realty, or tangible personal property which is removable only with substantial damage to the premises. Property severed from real estate becomes tangible personal property. **"Tangible personal property"** does not include intangible personal property constituting mere rights of action and having no intrinsic value, such as contracts, deeds, mortgages, stocks, bonds, certificates of deposit, or uncancelled United States postage or revenue stamps sold for postage or revenue purposes.

Id. at 200, citing ***In re K & A Servicing, Inc.***, 47 B.R. 807 (Bankr.N.D.Texas 1985); *Accord,* ***United Benefit Life Ins. Co. v. Norman Lumber Co.***, 484 P.2d 527 (Okla. 1971); ***Hartford Fire Ins. Co. v. Balch***, 350 P.2d 514 (Okla. 1960). See, Rule 710:65-19-107 of the *Oklahoma Administrative Code*[2].

The intention of the party affixing the item to the land is the controlling consideration and chief test. ***Waterford***, supra at 200, citing ***Kay County Gas Co. v. Bryant***, 135 Okl. 135, 276 P. 218 (1928). In ***Kay County***, the Court after discussing the three part test found at pages 222-223:

> [T]he test of intention is to be given a broad and comprehensive signification. It does not merely imply the secret action of the mind of the owner of the property, nor need it be expressed in words, but is to be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made; which obviously, suggests that the other tests are really part of this comprehensive test of intention and that they derive their chief value as conspicuous evidence of such intention.

The three part test is basically a test of intent and that test is further condensed in part by an analysis of whether the item to be classified has directly enhanced the realty. ***K & A Servicing***, *supra*, at 811. Neither the manner of attachment nor existence of an easement is solely determinative in classifying an article as a fixture. ***Kay County***, *supra*, at 223. The attendant circumstances, however, must clearly show an intent to affix the article permanently to realty. *Id.*, at 222. Any uncertainty regarding that intent would warrant denomination as chattel. *Id.*

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[2] This rule provides:

(a) The term `materials for the purpose of developing and improving real property' as used in the Sales and Use Tax Codes, means all tangible personal property, including any device or appliance used by builders, contractors, or landowners in making improvements, additions, alterations or repairs to real property in such a way that such tangible personal property becomes identified with a part of realty.

(b) A device or appliance becomes a fixture and a part of the real property to which it is connected when it is built into or is attached to a structure in such a way that its removal would substantially damage or deface such structure.

(c) Where the removal of the device or appliance would not substantially damage or deface the structure to which it is connected the following factors shall be considered:

(1) Actual connection with or attachment to real property. To become a part of real property, the device or appliance must have some physical connections such as: by bolts, screws, nails, cement piping, or cable; by contact, where by reason of great weight or bulk, no additional attachment is required; by contact, where the device or appliance is necessary to make complete or usable something which is real property; by attachment to another device or appliance which has become a part of real property.

(2) Appropriateness to the use or purpose of the real property to which connected. The use or purpose of the device or appliance must become an element of the use or purpose of the real property to which it is connected.

(d) This Section is not intended to apply to cook stoves, refrigerators, dishwashers, washing machines, dryers, curtains, draperies, and portable heaters, acquired for the personal use of householders or tenants which may be removed without material damage to the buildings in which they are used.

The test for determining whether an item affixed to real property has become a fixture does not focus on whether the item can be removed. ***Waterford***, *supra*, at 200. The test focuses on "conspicuous evidence" of an intent to permanently place the article on the realty and make it an integral part of the realty. ***Kay County***, *supra*, at 222-223.

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. 1991, § 207.

2. The sale of tangible personal property is subject to the levy of sales tax. 68 O.S. 1991, § 1354(1)(A).

3. The phrase "tangible personal property" includes "personal property which may be seen, weighed, measured, felt, or touched or which is in any other manner perceptible to the senses." 68 O.S. 1991, § 1352(N). See, Rule 710:65-1-2 of the *Oklahoma Administrative Code*.

4. Whether an article of personal property has become a fixture and therefore part of the realty or is a chattel subject to sales tax is determined by a three part test. ***Waterford Energy, Inc. v. Oklahoma Tax Commission***, 845 P.2d 198, 200 (Okl. 1992).
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5. The three part test is basically a test of intent and that test is further condensed in part by an analysis of whether the item to be classified has directly enhanced the realty. ***K & A Servicing***, *supra*, at 811. Neither the manner of attachment nor existence of an easement is solely determinative in classifying an article as a fixture. ***Kay County Gas Co. v. Bryant***, 135 Okl. 135, 276 P. 218 (1928). The attendant circumstances, however, must clearly show an intent to affix the article permanently to realty. *Id.*, at 222. Any uncertainty regarding that intent would warrant denomination as chattel. *Id.*

6. Here, the evidence proves an intent to permanently affix the perfume display case to the realty. This conclusion is drawn from the following facts: (1) the shear size and bulk of the display case; (2) that it was built on-site; (3) that it is attached to the realty by bolts and electrical wiring; (4) that it was not built in a way that it could be easily disassembled; and (5) that it is appropriate for the purpose and actual use of the space.

7. Protestant's protests to the sales tax assessed on the sale of the perfume display case should be sustained.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it WAS DETERMINED that the protest to the disputed portion of the proposed assessment of PROTESTANT, be sustained.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was **NOT** deemed precedential by the Commission. This means that the legal conclusions are not 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.