**JURISDICTION:** **OKLAHOMA TAX COMMISSION - DECISION**
**CITE:** **2004-02-10-04 / NOT PRECEDENTIAL**
**ID:** **P0300012**
**DATE:** **02-10-04**
**DISPOSITION:** **DENIED**
**TAX TYPE:** **SALES**
**APPEAL:** **NO APPEAL TAKEN**

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties stipulate to the following:

1. PROTESTANT CORPORATION is an Oklahoma Corporation located in LITTLE TOWN, OK. PROTESTANT's mailing address is P.O. Box 9999, LITTLE TOWN, OK. PROTESTANT's federal employer identification number is XX-XXXXXXX.

2. OFFICER A is the President and sole officer of PROTESTANT.

3. PROTESTANT is primarily a provider of pest control services. In addition, PROTESTANT sells steel, commonly called "rebar", to new construction homebuilders. PROTESTANT earns a profit on these sales.

4. PROTESTANT has never sought or obtained a sales tax permit as required by 68 O.S. § 1364 and OAC 710:65-9-1.

5. The Audit Division ("Division"), Oklahoma Tax Commission, conducted an audit of PROTESTANT for the period January 1, 1998 through July 31, 2002 and determined that PROTESTANT's sales of rebar were subject to the sales tax levied by the provisions of 68 O.S. § 1350 et seq.

6. The original audit resulted in the assessment of the following taxes, interest and penalty:

| | STATE | CITY | COUNTY | TOTAL |
|---|---|---|---|---|
| Tax | 23,133.90 | 13,345.71 | 3,132.99 | 39,612.60 |
| Interest Thru 12/31/02 | 13,254.47 | 8,640.32 | 1,323.11 | 23,217.90 |
| Penalty | 3,093.53 | 2,017.15 | 313.69 | 5,424.37 |
| TOTALS | 39,481.90 | 24,003.18 | 4,769.79 | 68,254.87 |

7. PROTESTANT requested the Division compute the amount of tax and interest assessed to reflect the provisions of the OTC Amnesty Program, OAC 710:1-8-1(Expired). The Division recomputed the assessment to reflect waiver of the assessed penalty and one-half of the interest due through November 14, 2002 of $11,096.36. Through November 14, 2002, the assessed tax of $39,612.60 together with interest of $11,096.36 totaled $50,708.96.

8. By cashier's check dated November 15, 2002, PROTESTANT paid the OTC $51,221.45 under protest. PROTESTANT's payment resulted in a credit balance of $512.49.

9. If the court determines that the gross proceeds of PROTESTANT's sales of rebar are subject to the levy of sales tax under the provisions of 68 O.S. § 1350 et seq., the assessed tax of $39,612.60 accurately reflects the sales tax due.

**Additional findings:**

1. Protestants paid sales tax to the vendors who sold the rebar to Protestants, except for one vendor who did not charge and collect sales tax from Protestants on the sale of the rebar for a portion of the audit period. Page 2, Protestants' letter of protest.

## ISSUE AND CONTENTIONS

The issue stipulated to by the parties and presented for decision is "[w]hether PROTESTANT CORPORATION is required to collect and remit sales tax on the gross receipts of its sales of steel to new construction homebuilders as required by 68 O.S. § 1350 et seq."

Protestants contend that the Division erred by failing to recognize that they are acting as a "contractor" rather than a "vendor" with regard to their sales of rebar to new construction homebuilders for use in the concrete slab and footing which Protestants treat for termites and other pests.

The Division contends that the evidence submitted demonstrates that Protestants were acting as a vendor with respect to the sale of the rebar, not a contractor, and therefore, the Division correctly assessed sales tax against Protestants on their sales of rebar to the new construction homebuilders.

## CONCLUSIONS OF LAW

1. Jurisdiction over the parties and of the subject matter of this proceeding is vested in the Tax Commission. 68 O.S. 2001, § 221(D).

2. The sale of tangible personal property, unless otherwise exempted by the provisions of the Oklahoma Sales Tax Code ("Code")[1], is subject to the levy of sales tax on the gross receipts or gross proceeds of each sale. 68 O.S. 1991, § 1354(A)(1). The phrase "tangible personal property" is all inclusive, and is not limited except by specific exemption. Magnolia Petroleum Co. v. Oklahoma Tax Commission, 326 P.2d 821 (Okla. 1958). See, 68 O.S. Supp. 1998, § 1352(17).

3. Protestants do not dispute that rebar is "tangible personal property" or that the sales of the rebar in the instances subject to the audit are subject to sales tax. See, Additional finding No. 1. See also, OAC, 710:65-7-6(d)(7)(A).

4. The consumer or user is required to pay and the vendor is required to charge and collect a sales tax on each sale of tangible personal property subject to the levy of sales tax by the Oklahoma Sales Tax Code. 68 O.S. Supp. 1996, § 1361(A). Sales tax when added to the sales price, charge, consideration, gross receipts or gross proceeds of the sale of tangible personal property shall constitute a part of such price or charge, shall be a debt from the consumer or user to the vendor until paid, and shall be recoverable at law in the same manner as other debts. 68 O.S. Supp. 1996, § 1361(B).

5. A "consumer" or "user" is defined by the Code to mean "a person to whom a taxable sale of tangible personal property is made or to whom a taxable service is furnished" and includes "all contractors to whom a taxable sale of materials, supplies, equipment, or other tangible personal property is made or to whom a taxable service is furnished to be used or consumed in the performance of any contract". 68 O.S. Supp. 1998, § 1352(3). See, OAC, 710:65-1-7. A "contractor" is defined to mean "any person who performs any improvement upon real property and who, as a necessary and incidental part of performing such improvement, incorporates tangible personal property belonging to or purchased by the person into the real property being improved". 68 O.S. Supp. 1998, § 1352(4).

6. A "vendor" is defined in relevant part by the Code to mean "any person making sales of tangible personal property or services in this state, the gross receipts or gross proceeds from which are taxed by the Oklahoma Sales Tax Code". 68 O.S. Supp. 1998, § 1352(21)(a).

[1] 68 O.S. 1991, § 1350 et seq.

7. The burden of proof in all proceedings, unless otherwise provided by law, is on the taxpayer to show in what respect the action or proposed action of the Tax Commission is incorrect. OAC, 710:1-5-47. The denial of a protest to a proposed assessment is appropriate where the party opposing the proposed action fails to provide evidence which is sufficient to entitle the party to the relief requested. See, Continental Oil Company v. Oklahoma Tax Commission, 570 P.2d 315 (Okl. 1977). "The burden of proving that a sale was not a taxable sale shall be upon the person who made the sale". 68 O.S. Supp. 1996, § 1365(D).

8. Here, Protestants admit that they sold the rebar, Protestants' sales of which are the subject of the audit, to new construction homebuilders. No evidence has been presented to show Protestants used or consumed the rebar in the performance of a contract for the improvement upon real property. By definition, Protestants were vendors, not contractors, with respect to Protestants' sales of the rebar to the new construction homebuilders. Accordingly, the assessment of sales tax against Protestants on the sales of rebar was not erroneous.

9. Protestants' protest to the proposed sales tax assessment should be denied.

## DISPOSITION

Based on the above and foregoing Findings of Fact and Conclusions of Law, it is DETERMINED that the protest and OFFICER A, as an Officer of PROTESTANT and as an Individual, be denied. It is further DETERMINED that the amount in controversy be fixed as the deficiency due and owing.

**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.