JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2004-10-12-04
ID:	P-03-182-K
DATE:	OCTOBER 12, 2004
DISPOSITION:	DENIED
TAX TYPE:	USE
APPEAL:	NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Findings, Conclusions and Recommendations issued in the above styled and numbered cause on August 23, 2004, come on for further consideration and amendment on motion of the assigned Administrative Law Judge, ALJ, to correct an error of law contained in Paragraph 8 of the Conclusions of Law. Pursuant to 59 O.S. 2001, § 725.2(C) the term "physician" unless otherwise specifically provided in a particular section or chapter of the Oklahoma Statutes shall mean and include a "person licensed to practice dentistry under Chapter 7 of [Title 59]." As a physician, a dentist is a "practitioner" for purposes of 68 O.S. § 1357.6(B) since a dentist is not specifically excluded from the term "physician."

Therefore, the Findings, Conclusions and Recommendations issued on August 23, 2004, in this cause are withdrawn and these Amended Findings, Conclusions and Recommendations are submitted to the Commission, as a substitute therefore, for further consideration by the Commission as to the recommendation contained herein.

The above styled and numbered cause comes on for decision pursuant to assignment regularly made by the Oklahoma Tax Commission to ALJ, Administrative Law Judge. Protestant, DENTAL OFFICE, is represented in this cause by PRESIDENT., President. The Audit Division of the Tax Commission ("Division") is represented by OTC ATTORNEY, General Counsel's Office of the Tax Commission.

STATEMENT OF THE CASE

A field audit of Protestant's books and records for the period inclusive of August 1, 1998 through July 31, 2003, was conducted by the Division. The Division by letter dated October 29, 2003, caused to be issued a proposed assessment of use tax, interest and penalty against Protestant for the audit period. Protestant by letter dated October 14, 2003, timely protested the proposed assessment. A hearing was not requested in the letter of protest.

On November 7, 2003, the Division forwarded its file to the Office of the Administrative Law Judges (ALJ's Office) for further proceedings consistent with the Uniform Tax Procedure

Code[1] and the Rules of Practice and Procedure Before the Oklahoma Tax Commission[2]. The case was docketed as Case No. P-03-182-K and assigned to ALJ, Administrative Law Judge.[3]

A pre-hearing conference was scheduled in this cause for January 5, 2004, by *Notice of Prehearing Conference* issued December 3, 2003.[4] The conference was held by telephone with the representatives of the parties in attendance. Pursuant to the pre-hearing conference, a *Prehearing Conference Order and Notice of Alternative Hearing Date* was issued whereby this cause was scheduled to be submitted for decision by the filing of a stipulation of facts and briefs[5] or, in the event the parties were unable to stipulate to a full and complete factual record, the filing of pre-trial briefs and a hearing scheduled for March 31, 2004.[6]

A *Joint Stipulation of Fact and Law* was filed by the parties on April 12, 2004. Protestant filed a *Legal Brief* on June 16, 2004, and the Division filed a *Position Letter* on June 30, 2004, whereupon the record in this cause was closed and the matter was considered submitted for decision.

FINDINGS OF FACT

Upon review of the file and records, including the Joint Stipulation of Fact and Law and the respective position statements, the undersigned finds:

A. The parties stipulate to the following:

CASE HISTORY

1. Protestant is a dental office in the City of BIGCITY, Oklahoma.

2. The Division conducted a consumer use tax audit of [Protestant].

3. On October 29, 2003, the Division issued an assessment letter to [Protestant] for consumer use tax for the period of August 1, 1998 through July 31, 2003, in the following amount:

Tax Due:	$	2,022.32
Interest @ 15% Through 11/30/03:	$	758.09
Tax & Interest Due Within 30 Days:	$	2,780.41

[1] 68 O.S. 2001, § 201 et seq.

[2] Rules 710:1-5-20 through 710:1-5-47 of the Oklahoma Administrative Code ("*OAC*").

[3] *See*, *OAC*, 710:1-5-22 and 710:1-5-30.

[4] *See*, *OAC*, 710:1-5-28.

[5] *OAC*, 710:1-5-38.

[6] *OAC*, 710:1-5-29.

30-Day Delinquent Penalty @ 10%:	$	202.25
Tax/Interest/Penalty Due After 30 Days:	$	2,982.66

4. By letter dated October 14, 2003, and received by the Division on October 20, 2003, Protestant filed a protest of a portion of the October 29, 2003 assessment.

5. Protestant's protest makes several assertions. Protestant claimed in its protest that an entry error had been made in scheduling invoice #020251 dated June 27, 2000, from COMPANY. It was erroneously entered as $3,100.80 even though the invoice indicates a purchase in the amount of $310.80. Upon receipt of the invoice, the Division made an adjustment to the assessment. The amended assessment is as follows:

Tax Due:	$	1,801.43
Interest Through 01/31/04:	$	691.97
Penalty:	$	180.15
Tax/Interest/Penalty Through 01/31/04:	$2,673.55	

ISSUES RAISED BY PROTESTANT

6. Protestant contends the purchase of Biogran, a synthetic bone material, is exempt from use tax because it is used to replace missing body parts and falls under the definition of artificial implant and prosthetic device.

7. Protestant contends the purchase of adhesive which attaches indirect and direct restorations to the tooth falls within the definition of prosthetic device and is thus exempt from use tax.

8. Protestant contends the purchase of composition material falls within the definition of prosthetic device and is thus exempt from use tax.

9. Protestant contends the purchase of certain drugs and medicines, including anesthetic, is exempt from taxation pursuant to 68 O.S. § 1357(7) and Rule 710:65-13-170(a). The Division stipulates that the purchase of legend drugs is exempt from taxation. Upon receipt of a copy of invoices for purchase of legend drugs, an adjustment will be made to the assessment to account for Protestant's purchase of legend drugs.

10. Protestant contends a quad-helix, purchased from an out-of-state dental laboratory, is exempt from taxation pursuant to Rule 710:65-19-71. The Division stipulates that the purchase of a quad-helix from a dental laboratory is exempt from taxation. Upon receipt of a legible copy of Invoice #D64738 which reflect the purchase of a quad-helix from a dental laboratory, an adjustment will be made to the assessment to account for Protestant's purchase of a quad-helix.

11. Protestant contends Invoice #337485 in the amount of $110.00 is a credit invoice and #556260 in the amount of $29.57 is a return invoice. The two invoices were erroneously included as purchases. Upon receipt of a legible copy of the two invoices, an adjustment will be made to the assessment.

12. Protestant contends Invoice #299724 and Invoice #1465756-1 was assessed twice. An adjustment will be made to the assessment to eliminate the duplication of the two invoices.

UNDERLYING FACTS

13. Biogran is a synthetic bone material used for synthetic grafts.

14. Composite material is a tooth-colored material used for the replacement of missing tooth structure, i.e., fillings.

15. Protestant purchased Biogran during the audit period from an out-of-state vendor and did not remit sales tax to the vendor or use tax to the Oklahoma Tax Commission.

16. Protestant purchased composite material during the audit period from an out-of-state vendor and did not remit sales tax to the vendor or use tax to the Oklahoma Tax Commission.

17. Protestant purchased adhesive during the audit period from an out-of-state vendor and did not remit sales tax to the vendor or use tax to the Oklahoma Tax Commission.

RELEVANT LAW

18. Rule 710:65-19-71(a) states: "Dentists primarily render services and incidentally use tangible personal property in connection therewith. The gross receipts of dentists derived from these sources are not subject to the sales tax."

19. Rule 710:65-19-71(d) states: "Items which are purchased by dentists, but which are used incidentally in the rendition of professional or laboratory services, are subject to sales or use tax and the dentists or professional must pay sales or use tax when the item is purchased. . .."

20. Rule 710:65-19-71(b) states: "Dental supply houses who sell tangible personal property such as platinum, gold, silver or cement for filling, artificial teeth or other such materials to a dentist for use in the performance of the dentist's services are making sales within the Sales and Use Tax Code and must collect, report and remit tax based on the gross receipts received from such sales. This is true whether the dental supply house sells material to a dentist whose services are rendered directly to a patient, or to a dental laboratory that uses the material in producing plates, bridge-work, artificial teeth or prosthetic devices on prescription of the dentist for the dentist to use in connection with rendering dental services. . .."

21. Rule 710:65-13-169 defines "prosthetic devices," in the case of sales to individuals who are **not** Medicare or Medicaid recipients, as "those devices which replace a missing part of the human body, including any supplies physically connected to the device."

22. According to 68 O.S. § 1357(20), the following sales are exempt from sales and use tax: "Sales of prosthetic devices to an individual for use by that individual. . .." Rule 710:65-13-171 restates 68 O.S. § 1357(20).

23. Rule 710:65-13-169 defines "medical devices" as including prosthetic devices.

24. Rule 710:65-13-170(c) states: "Sales of medical appliances, medical devices and other medical equipment to. . .practitioners are taxable when such items are furnished to their patients as part of the services provided. . .. [P]ractitioners are considered to be the users or consumers. . .."

25. 68 O.S. § 1402 provides that an excise tax, at a rate of 4½%, be levied and paid by every person consuming within this state tangible personal property purchased or brought into this state. 68 O.S. § 1411 similarly authorizes a use tax imposed by counties and municipalities.

26. "Use tax" is defined by Rule 710:65-21-2 as "an excise tax charged on the sale of tangible personal property purchased from outside Oklahoma and brought into the state for consumption or use."

27. Rules 710:65-21-3 and 710:65-21-4 require a purchaser to remit use tax directly to the Oklahoma Tax Commission on the tangible personal property bought outside this state by an Oklahoma user or consumer and brought into this state for use. "Use tax must be reported and paid by the purchaser on forms prescribed by and available from the Commission."

ISSUE AND CONTENTIONS

The issue presented for decision is whether the purchase of Biogran, composite material or dental adhesive by a dentist from an out-of state vendor for use in connection with rendering dental services in this state is exempt from the levy of use tax.

Protestant contends that Biogran, a synthetic bone material used for permanent grafting in the human body, by definition is an artificial implant and is therefore exempt from tax under *OAC*, 710:65-13-173(h)(6) and 710:65-13-170. Protestant contends that Biogran and composite material are prosthetic devices exempt from tax under *OAC*, 710:65-13-169 and 710:65-13-171. In support of the contention that composite material is exempt from tax, Protestant cites *OAC*, 710:65-19-71 and argues that since all other restorative materials are identified as subject to tax and composite material is not listed, the legislature intended composite material to be exempt. Protestant also contends that dental adhesive is exempt from tax under *OAC*, 710:65-13-171 since the adhesive attaches prosthetic devices permanently to tooth structure. Protestant further contends that Biogran, composite material and dental adhesive are legend drugs and are therefore exempt from tax under *OAC*, 710:65-13-170. In support of this contention, Protestant argues that the items can only be obtained by prescription from a duly licensed practitioner.

Protestant requests that any liability remaining after resolution of the issues herein be restricted to the use tax only. The Division has not addressed Protestant's request.

The Division contends that Protestant's citation of *OAC*, 710:65-13-173(h)(6) in arguing Biogran is exempt from taxation is misplaced since Protestant has not presented any evidence that the purchased Biogran was furnished to a Medicare or Medicaid program recipient and reimbursable by Medicare or Medicaid, one of the requirements for exemption under the rule. The Division contends that Protestant's citation of *OAC*, 710:65-13-171 in arguing that Biogran,

composite material and dental adhesive is exempt from tax is also misplaced since the rule provides that the sale must be to an individual for use by that individual. In support of this contention, the Division cites *OAC*, 710:65-13-170(c) which provides that sales of medical devices to "practitioners are taxable when such items are furnished to their patients as part of the services provided" and *OAC*, 710:65-19-71 which the Division argues that by its reference to prosthetic devices as being subject to tax, supports its position. The Division further contends that Protestant's reliance on *OAC*, 710:65-13-171 as authority to exempt Biogran, composite material and dental adhesive from tax as legend drugs is also misplaced. The Division argues that the specific rule with respect to dentists and prescriptions by dentist must be applied as opposed to the general rule relating to legend drugs.

CONCLUSIONS OF LAW

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

2. Use tax is levied and shall be paid by every person storing, using or otherwise consuming within the state, tangible personal property purchased or brought into the state at the rate of four and one-half percent (4.5%) of the purchase price of such property. 68 O.S. 2001, § 1402. "Use tax" is defined to mean "an excise tax charged on the sale of tangible personal property purchased from outside of Oklahoma and brought into the state for consumption or use". *OAC*, 710:65-21-2. The Oklahoma user or consumer of tangible personal property bought outside the state and brought into the state for storage, use or consumption is required to accrue, report and remit the use tax directly to the Tax Commission where the vendor of the property does not maintain a place of business in this state and has not voluntarily agreed to collect the use tax. OAC, 710:65-21-3 and 710:65-21-4. Use taxes are meant to be complementary and supplementary to sales taxes, ***Phillips v. Oklahoma Tax Commission***, 1978 OK 34, 577 P.2d 1278; and are designed to prevent consumers from escaping sales tax by going outside of the state and purchasing property and bringing it into the state for use or consumption, ***Southeastern, Inc. v. Oklahoma Tax Commission***, 1960 OK 97, 351 P.2d 739.

3. Exempted from the levy of use tax is "the use of tangible personal property now specifically exempted from taxation under [the] Oklahoma Sales Tax Code", 68 O.S. 2001, § 1351 et seq. 68 O.S. 2001, § 1404(4).

4. In particular to this proceeding, and at all times relevant herein, the Oklahoma Sales Tax Code exempted the following from the levy of sales tax:

> In addition to the exemptions authorized by Section 1357.6 of this title, sales of medicines or drugs prescribed for the treatment of human beings by a person licensed to prescribe the medicines or drugs. Provided, this exemption shall not apply to proprietary or patent medicines as defined by Section 353.1 of Title 59 of the Oklahoma Statutes.[7]

[7] 68 O.S. § 1357(7). Added by Laws 1991, c. 342, § 15 and amended by Laws 1993, c. 275, § 11.

and

> Sales of prosthetic devices to an individual for use by such individual. For purposes of this paragraph, `prosthetic device' means a device which replaces a missing part of the human body and shall include any supplies physically connected to the device[8]

and

> Effective July 1, 1992, * * * sales of drugs or medicine for the treatment of human beings, medical appliances, medical devices and other medical equipment including but not limited to prosthetic devices,[9] * * * and durable medical equipment,[10] * * * when administered or distributed by a practitioner,[11] * * * who is authorized by law to administer or distribute such items or when purchased or leased by or on behalf of an individual for use by such individual under a prescription or work order of a practitioner who is authorized by law to prescribe such items and when the cost of such items is reimbursable to the practitioner, supplier or the individual under the Medicare or Medicaid Program.[12]

5. The Tax Commission with respect to its general duty to administer and enforce the provisions of the state tax laws,[13] promulgated the following rules in regard to the foregoing exemptions, which rules provide in pertinent part:

Medicines, drugs, hospitals, nursing homes, practitioners, and medical equipment and appliances, generally

(a) **Drugs**. Legend drugs prescribed for the treatment of human beings by a person licensed to prescribe the medicines or drugs are exempt, regardless of who purchases the medicine or drug. Proprietary drugs and medicines are subject to tax.

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[8]68 O.S. § 1357(20). Added by Laws 1997, c. 2, § 16.

[9]"Prosthetic device" is defined to mean "a device which replaces a missing part or function of the human body and shall include any supplies physically connected to such device." 68 O.S. § 1357.6(C).

[10]"Durable medical equipment" is defined to mean "equipment which (1) can withstand repeated use, (2) is primarily and customarily used to serve a medical purpose, (3) generally is not useful to a person in the absence of illness or injury, and (4) is appropriate for use in the home." 68 O.S. § 1357.6(D).

[11]"Practitioner" is defined to mean "a physician, osteopathic physician, surgeon, podiatrist, chiropractor, optometrist, pharmacist, psychologist, ophthalmologist, nurse practitioner, audiologist or hearing aid dealer or fitter who is licensed by the state as required by law." 68 O.S. 1357.6(B).

[12]68 O.S. 1357.6(A).

[13]68 O.S. § 203.

(b) **Medical equipment or device**. Except as set forth in 710:65-13-173, the sale or rental of medical equipment, supplies or devices is taxable.[14]

(c) **Sales to hospitals, nursing homes and practitioners**. Sales of medical appliances,[15] medical devices[16] and other medical equipment[17] to hospitals, infirmaries, sanitariums, nursing homes, and similar institutions, and practitioners[18] are taxable when such items are furnished to their patients as part of the services provided. The institutions, companies and practitioners are considered to be the user or consumers. In-state vendors collect and remit the tax on sales of such property to the institutions, and the institutions pay use tax on out-of-state purchases. These institutions and practitioners primarily render services and are not liable for sales tax on receipts from meals, bandages, dressings, x-ray photographs, and other tangible personal property when used in rendering primary medical service to patients, regardless of whether the tangible items are billed separately.[19]

and

Sales of prosthetic devices to individuals

(a) **General provisions**. Effective July 1, 1996, the sale of any prosthetic device to an individual, other than a Medicare or Medicaid recipient, for use by that individual, is not subject to sales tax.

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[14]*OAC*, 710:65-13-173 sets forth "nonexclusive" lists of durable medical equipment, medical appliances, medical devices and supplies, orthopedic devices and prosthetic devices, including "artificial implants" which are exempt from tax provided (1) the item is a medical appliance, medical device or medical equipment as defined in 710:65-13-169, (2) the item is administered or distributed by a "practitioner" or purchased or leased pursuant to a prescription or work order of a practitioner, and (3) the item is furnished to a Medicare or Medicaid program recipient and the cost of said item is reimbursable by Medicare or Medicaid.

[15]"Medical appliance" is defined to mean "any item or replacement part thereof used to replace or substitute for any part of the human body, or used to assist the disabled person to lead a reasonably normal life." OAC, 710:65-13-169.

[16]"Medical devices" is defined to include "prosthetic, orthotic, and orthopedic devices - - [t]he scope of the term medical devices, however, is broader than the terms prosthetic, orthotic, and orthopedic devices." *OAC*, 710:65-13-169. "Prosthetic device" is defined to mean "for purposes of sales to a Medicare or Medicaid recipient * * * a device which replaces a missing part or function of the human body, and includes supplies physically connected to the device - - [i]n the case of sales to individuals who are **not** Medicare or Medicaid recipients, **`prosthetic device'** is limited to those devices which replace a missing part of the human body, including any supplies physically connected to the device." *OAC*, 710:65-13-169. (Emphasis original).

[17]"Medical equipment" is defined to mean "machinery, apparatus and other devices intended for use in the cure, mitigation, treatment or prevention of illnesses or diseases or the correction or alleviation of physical incapacity in human beings." *OAC*, 710:65-13-169.

[18]"Practitioner" is defined by *OAC*, 710:65-13-169 which is a restatement of the definition found at 68 O.S. 1357.6(B).

[19]*OAC*, 710:65-13-170.

(b) **Applicable definitions**. For purposes of this Section:

(1) **"Prosthetic device"** means a device which replaces a missing part of the human body, and includes any supplies physically connected to the device.

(2) **"Use by that individual"** means usage for the purpose and in a manner for which the device was designed and intended.[20]

and

Dentist, dental laboratories, and dental supply houses

(a) **Dentists**. Dentists primarily render services and incidentally use tangible personal property in connection therewith. The gross receipts of dentists derived from these sources are not subject to the sales tax.

(b) **Dental supply houses**. Dental supply houses who sell tangible personal property such as platinum, gold, silver or cement for filling, artificial teeth or other such materials to a dentist for use in the performance of the dentist's services are making sales within the Sales and Use Tax Code and must collect, report and remit tax based on the gross receipts received from such sales. This is true whether the dental supply house sells material to a dentist whose services are rendered directly to a patient, or to a dental laboratory that uses the material in producing plates, bridge-work, artificial teeth or prosthetic devices on prescription of the dentist for the dentist to use in connection with rendering dental services.

(c) **Dental laboratories**. Dental laboratories that purchase tangible personal property to produce plates, bridge-work, artificial teeth, prosthetic devices and the like must pay tax when the material is purchased and must not charge tax to the dentist when the finished product is transferred to the dentist.

(d) **Items purchased by dentists**. Items which are purchased by dentists, but which are used incidentally in the rendition of professional or laboratory services, are subject to sales or use tax and the dentist or professional must pay sales or use tax when the item is purchased.[21]

(e) The enumeration of the taxable items in subsection (d) is made by way of illustration and not limitation.[22]

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[20] *OAC*, 710:65-13-171.

[21] The list of examples of such taxable items as set forth in the rule is not recited herein.

[22] *OAC*, 710:65-19-71.

6. As a general rule, statutes exempting property from taxation are to be applied circumspectly and are to be strictly construed against the allowance of an exemption. ***Bert Smith Road Machinery Co. v. Oklahoma Tax Commission***, 1997 OK 75, 563 P.2d 641, 643 (1977); ***McDonald's Corporation v. Oklahoma Tax Commission***, 1977 OK 74, 563 P.2d 635, 641 (1997); ***Phillips Petroleum Co. v. Oklahoma Tax Commission***, 1975 OK 46, 542 P.2d 1303, 1305 (1975). The language of an exemption statute may not be construed so as to give it an effect which is not intended. ***Protest of Hyde***, 188 Okla. 413, 1941 OK 49, 110 P.2d 292 (1941). To be entitled to an exemption, the taxpayer has the burden of proving that the transaction falls squarely within the exemption. ***Bert Smith***, *supra*.

7. Rules promulgated pursuant to the Administrative Procedures Act[23], are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court. 75 O.S. 1991, § 306(C). They are valid and binding on the persons they affect, have the force of law and are prima facie evidence of the proper interpretation of the matter to which they refer. 75 O.S. 1991, § 308.2(C).

Great weight is accorded an agency's construction of a statute when the administrative interpretation is made contemporaneously with the enactment of the statute and the construction is longstanding and continuous by the agency charge with its execution. ***Schulte Oil Co., Inc. v. Oklahoma Tax Commission***, 1994 OK 103, 882 P.2d 65 (1995). Where Legislature is made repeatedly aware of the operation of the statute according to the construction placed upon it by an agency and the Legislature has not expressed its disapproval with the agency's construction, the Legislature silence may be regarded as acquiescence in the agency's construction, ***R.R. Tway, Inc. v. Oklahoma Tax Commission***, 1995 OK 129, 910 P.2d 972 (1995); and the agency's construction is given controlling weight and will not be disregarded except in cases of serious doubt, ***Cox v. Dawson***, 1996 OK 11, 911 P.2d 272 (1996).

The rules and regulations of an administrative agency which implement the provisions of a statute are valid unless they are beyond the scope of the statute, are in conflict with the statute or are unreasonable. See, ***Arkansas Louisiana Gas Co. v. Travis***, 1984 OK 33, 682 P.2d 225 (1984); ***Boydston v. State***, 1954 OK 327, 277 P.2d 138 (1954). Agency rules need not be specifically authorized by statute, but must generally reflect the intent of the Legislature as expressed in the statute. ***Jarboe Sales Company v. Oklahoma Alcoholic Beverage Laws Enforcement Commission***, 2003 OK CIV APP 23, 65 P.3d 289 (2003). As a general rule, it is presumed that administrative rules and regulations are fair and reasonable, and that the complaining party has the burden of proving the contrary by competent and convincing evidence. ***State ex rel. Hart v. Parham***, 1966 OK 9, 412 P.2d 142 (1966).

8. Protestant's citation to *OAC*, 710:65-13-173(h)(6) and 710:65-13-170 as exempting Biogran, a synthetic bone material used for permanent grafting in the human body, from use tax is misplaced. *OAC*, 710:65-13-173 only exempts the sale of "prosthetic devices", including "artificial implants"[24] from tax if "[t]he item is administered or distributed by a `practitioner' or purchased or

[23] 75 O.S. 1991, § 250 et seq., § 301 et seq.

[24] *OAC*, 710:65-13-173(h)(6).

leased pursuant to a prescription or work order of a practitioner" and "[t]he item is furnished to a Medicare or Medicaid program recipient and the cost of said item is reimbursable by Medicare or Medicaid." Protestant has not presented any evidence to show the purchased Biogran was furnished to a Medicare or Medicaid program recipient and the cost of said item was reimbursed by Medicare or Medicaid[25]. Also, *OAC*, 710:65-13-170 does not support the claim to an exemption, but instead provides that sales of medical devices, including prosthetics[26] are subject to tax when sold to a provider of medical services and the item is furnished to the patient as part of the services provided. Further, *OAC*, 710:65-19-71 specifically provides that sales of "tangible personal property such as platinum, gold, silver or cement for filling, artificial teeth or other such materials to a dentist for use in the performance of the dentist's services" is subject to tax.[27] (Emphasis added).

9. Protestant's reliance on *OAC*, 710:65-13-171 for exempting the tangible personal property at issue is also misplaced. This rule exempts from tax "the sale of any prosthetic device to an individual, other than a Medicare or Medicaid recipient, for use by that individual." *See*, 68 O.S. § 1357(20). Here, the sale of the tangible personal property was to Protestant, a dentist, for use in the performance of his dental services as opposed to the sale to an individual for use by that individual. Accordingly, the specific rule referring to dentists and dental services applies.[28] Further, the legislature has embraced the Tax Commission construction of 68 O.S. 1357(20) as excluding dental prostheses from the exemption for sales of prosthetic devices. See, 68 O.S. Supp. 2003, § 1357(20).[29]

10. Protestant's citation to *OAC*, 710:65-13-170(a) for exempting the tangible personal property at issue as "legend drugs" is also misplaced. Initially, Protestant argues that the items at issue are "prosthetic devices" or in the case of dental adhesive "supplies physically connected to the device." Now, Protestant argues that the tangible personal property at issue are "legend drugs" because the items can only be obtained by prescription from a duly licensed practitioner.

The undersigned finds that the items at issue cannot be both "prosthetic devices" and medicine or drugs. Protestant admits that Biogran is a synthetic bone material used for synthetic grafts[30] and the composite material is a tooth-colored material used for the replacement of missing

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[25]An assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect, and in what respect. *OAC*, 710:1-5-47. *See*, ***Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission***, 1988 OK 91, 768 P.2d 359.

[26]See, the definitions of "medical devices" in *OAC*, 710:65-13-169.

[27]When a special statute clearly includes the matter in controversy, the special statute controls over a statute of general applicability. ***Davis v. GHS Health Maintenance Organization, Inc.***, 2001 OK 3, 22 P.3d 1204. *See*, ***Wagnon v. State Farm Fire and Cas. Co.***, 1997 OK 160, 951 P.2d 641.

[28]*See*, Note 27.

[29]Added by Laws 2003, c. 413, § 9, eff. Nov. 1, 2003. As amended this section provides:
Sales of prosthetic devices to an individual for use by such individual. For purposes of this paragraph, `prosthetic device' shall have the same meaning as provided in Section 1357.6 of this title, but shall not include corrective eye glasses, contact lenses, hearing aids or dental prostheses. (Emphasis added).

[30]See, paragraph 13 to the Underlying Facts to the *Joint Stipulation of Facts and Law*.

tooth structure, i.e., fillings[31]. The undersigned further finds that the items at issue fall more squarely within the definition of "prosthetic devices"[32] than "drugs"[33] or "medicine"[34].[35]

11. Protestant's protest to the proposed use tax assessment should be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the use tax protest of Protestant, DENTAL OFFICE, be denied. It is further ORDERED that the amount at issue, as finally determined by the Division after the adjustments referenced in the Findings of Fact, be fixed as the deficiency due and owing.

OKLAHOMA TAX COMMISSION

[31] *See*, paragraph 14 to the Underlying Facts to the *Joint Stipulation of Facts and Law*.

[32] *See*, 68 O.S. § 1357.6(C).

[33] *See*, 59 O.S. § 353.1(3).

[34] *See*, 59 O.S. § 353.1(4).

[35] *See*, paragraph 6 above.