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| JURISDICTION: | OKLAHOMA TAX COMMISSION |
| CITE: | 2006-10-12-12 (Non-Precedential) |
| ID: | P-05-171-K |
| DATE: | OCTOBER 12, 2006 |
| DISPOSITION: | DENIED |
| TAX TYPE: | APPLICATION FOR SALES TAX EXEMPTION |
| APPEAL: | NONE |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestant, PROTESTANT is represented by ASSISTANT, Administrative Assistant. The Taxpayer Assistance Division of the Tax Commission (hereinafter "Division") is represented by the General Counsel's Office of the Tax Commission, OTC ATTORNEY, Assistant General Counsel.

## STATEMENT OF THE CASE

By letter dated January 28, 2005, Protestant requested a sales tax exemption for the purchases of tangible personal property, including materials, equipment and fuel used or consumed during the period of February, 2003 through March, 2004 in the remediation of lead contaminated soils in the XYZ Superfund Site and the deposition of those soils in a Repository near SMALL TOWN, Oklahoma. On March 2, 2005, the Division wrote Protestant requesting "documentation from the Department of Environmental Quality that the Repository near SMALL TOWN, Oklahoma is a DEQ approved site." On April 5, 2005, Protestant forwarded a copy of a letter it had received from the Oklahoma Department of Environmental Quality ("ODEQ") dated March 25, 2005. By letter dated May 6, 2005, the Division denied Protestant's application stating: "[p]er the requirements of O.S. Title 68 § 1359(6) your company does not qualify for the exemption."

On June 13, 2005, Protestant requested from the Tax Policy and Research Division, Tax Commission, a formal letter ruling with respect to its application for exemption. By letter dated August 18, 2005, ANALYST, Tax Policy Analyst, advised that the Tax Policy Division agreed Protestant's request for exemption was properly denied by the Division. By letter to the Office of General Counsel, Tax Commission, dated September 2, 2005, Protestant protested the denial of its sales tax exemption application by the Tax Policy Division and requested further consideration of the same.

By *Memorandum* from the Office of General Counsel, Tax Commission, filed November 4, 2005, Protestant's protest to the denial of the sales tax exemption application was referred 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] Upon receipt, both the audit file of the Division and the file of the Tax Policy Division were requested. The protest was docketed as Case No. CR-05-171-K and assigned to ALJ, Administrative Law Judge.[3]

[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] *OAC*, 710:1-5-22(a) and (b).

A pre-hearing conference was scheduled in this cause for December 29, 2005, by *Prehearing Conference Notice* issued December 5, 2005.[4] The pre-hearing conference was conducted by telephonic means as scheduled. Pursuant to the conference, a *Prehearing Conference Order and Notice of Hearing* was issued setting forth dates for exchanging preliminary witness lists and documents, conducting discovery, exchanging final witness lists and documents, and filing factual stipulations and pre-trial briefs or position letters.[5] The *Order* also scheduled the protest for hearing on April 12, 2006.[6]

The hearing was held as scheduled. Two witnesses testified on Protestant's behalf, PRESIDENT, Protestant's President, and ASSISTANT, Protestant's Administrative Assistant. Protestant's Exhibits A-1, A-2 and B through H were identified, offered and admitted into evidence. The Division called SUPERVISOR, Supervisor, Business Registration Section of the Division who testified regarding the file and records of the Division. Division's Exhibits A, C, D, E, G and I were identified, offered and admitted into evidence. Upon conclusion of the hearing, the record was closed and the matter was submitted for decision.[7]

## FINDINGS OF FACT

Upon review of the file and records, including the record of the hearing, the exhibits admitted into evidence and the briefs and arguments of the parties, the undersigned finds:

1. Protestant is licensed in the states of Arkansas and Louisiana as a general contractor, heavy highway construction. Protestant's primary business consists of excavating, grading, erosion control and concrete work on roadway projects for the Department of Transportation for the State of Missouri. Testimony of PRESIDENT.

2. The work performed by Protestant in the State of Oklahoma consisted of the excavation of lead contaminated soil from residential areas located in the XYZ Superfund site in XYZ County, Oklahoma; the transportation and deposition of said soil in a repository located within the Superfund site near SMALL TOWN, Oklahoma; back filling the excavated residential properties with clean soil and laying of sod. Testimony of PRESIDENT. *See*, Division's Exhibit A.[8]

3. Protestant commenced the remediation project in February, 2003, by and through a subcontract with GENERAL CONTRACTOR, the general contractor and project manager of the U.S. Environmental Protection Agency ("EPA") for Operable Unit (OU) #2 at the XYZ Superfund site. Testimony of PRESIDENT. *See*, Protestant's Exhibit D.[9] Operable Unit 2 (OU2) at the XYZ

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[4] *OAC*, 710:1-5-28(a).

[5] *OAC*, 710:1-5-28(b).

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

[7] *OAC*, 710:1-5-39(a).

[8] Letter of January 28, 2005, "request[ing] a tax exemption for purchases of tangible personal property including materials, equipment and fuel directly used or consumed in the remediation of lead contaminated soils at 293 residential properties located in RURAL TOWN and ANY TOWN, Oklahoma."

[9] Form DB450S, Subcontract between GENERAL CONTRACTOR, and Subcontractor, Subcontract Number:

Superfund site[10] was designated by the EPA as "[t]he cleanup activities related to the millions of tons of mining waste that were deposited on the surface of the ground [in the residential area[11] portion] at the Site" which consisted of 293 residential properties, including five (5) schools and two (2) day care centers. Protestant's Exhibit B, paragraph IV – Scope and Role of the Operable Units, pages 6-7.[12] Testimony of ASSISTANT.

4. The EPA's primary responsibility at Superfund sites is to select remedial actions that are protective of human health and the environment.[13] The EPA is the owner of the remediation project[14], coordinates, oversees and approves the remedial activity and pays ninety percent (90%) of the costs of the remedial action[15].

5. The Oklahoma Department of Environmental Quality ("ODEQ") by statute has jurisdiction of "Superfund responsibilities of the state under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA")[16] and amendments thereto, except the planning requirements of Title III of the Superfund Amendment and Reauthorization Act of 1986[17]." Protestant's Exhibit A.2.[18] The ODEQ does not issue permits or approve any of the remedial activity of a Superfund site, but is responsible for ten percent (10%) of the costs. See, Note 15.

6. The selected remedy employed by the EPA for OU2 at the XYZ Superfund site required the excavation by lightweight mechanical or hand methods of soil with a lead concentration greater than or equal to 500 ppm to a maximum depth of 18 inches, the transportation of the excavated soil by trucks to an on-site repository located on private land between SMALL TOWN and RURAL

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XXXX, dated January 6, 2003 and Appendix A1 thereto (Statement of Work for Remediation of 293 Residential Properties).

[10] The Oklahoma portion of the MINING District, located in XYZ County, Oklahoma, consisting of an area approximately forty (40) square miles in northern XYZ County where lead and zinc mining operations were conducted which includes the cities of SMALL TOWN, RANDOM TOWN, RURAL TOWN, FAKE TOWN, and portions of ANY TOWN. The MINING District covers hundreds of square miles in southwestern Missouri, southeastern Kansas, and northeastern Oklahoma. *See*, Protestant's Exhibit B, Record of Decision, Decision Summary, paragraph I - "Site Name, Location and Description", page 1.

[11] "The term 'residential areas' as used in this ROD document is not limited solely to single-family residences, but also includes other residential properties (e.g., apartments, and condominiums) and high access areas (HAAs) which are places frequented by children such as day-care centers, playgrounds, and schoolyards." Protestant's Exhibit D, Record of Decision, Decision Summary, paragraph IV – Scope and Role of the Operable Units, pages 6-7.

[12] Record of Decision, Residential Areas, Operable Unit 2, XYZ Superfund Site, XYZ County, Oklahoma, prepared by U.S. Environmental Protection Agency, ADDRESS, dated August, 1997 ("ROD").

[13] Protestant's Exhibit B, Record of Decision, Decision Summary, paragraph X – Statutory Authority Findings and Conclusions of Law, page 47.

[14] Protestant's Exhibit D.

[15] Auditor's contemporaneous notes of telephone conversations with EPA REP with the EPA in CITY, Texas; ODEQ REP 1 at ODEQ; ODEQ REP 2 at ODEQ; and ODEQ REP 3 at ODEQ, of which official notice is taken.

[16] 42 U.S.C.A. § 9601 et seq.

[17] 42 U.S.C.A. § 11001 et seq.

[18] Copy of 27A O.S. 2001, § 1-3-101(B)((10).

TOWN, Oklahoma which is the location of the old XYZ MILL milling pond, the backfilling of the excavated areas with clean topsoil and the re-vegetation of the areas. Protestant's Exhibit B.[19] Because the remedial action was conducted entirely on-site with respect to OU2 at the XYZ Superfund site, no federal, state or local permit was required. Protestant's Exhibit A.1.[20]

7. The State of Oklahoma by and through the ODEQ concurred with the selected remedy for OU2 at the XYZ Superfund site. Protestant's Exhibit B.[21] The State of Oklahoma's concurrence with the EPA's proposed plan for OU2 at the XYZ Superfund site was addressed in a letter dated April 1, 1997, from DIRECTOR 1, Director, Waste Management Division of the ODEQ to DIRECTOR 2, P.E., Director, Superfund Division, EPA, which states in pertinent part:

> The Oklahoma Department of Environmental Quality (DEQ) would like to express our concurrence with the U.S. Environmental Protection Agency's (EPA) Proposed Plan for Operable Unit 2 at the MINING site in XYZ County, Oklahoma. As part of this concurrence, the DEQ agrees with EPA's site-specific residential soil clean-up level of 500 parts per million (ppm) lead for the MINING site.
>
> * * *
>
> Again, DEQ would like to express its concurrence with the EPA proposed plan for the MINING site.

Protestant's Exhibit C.[22]

8. By letter dated January 28, 2005, to REPRESENTATIVE of the Account Maintenance Division of the Tax Commission, Protestant requested a sales "tax exemption for the purchases of tangible personal property including materials, equipment, and fuel directly used or consumed [during the period of February 3, 2003 through March of 2004] in the remediation of lead contaminated soils at 293 residential properties located in RURAL TOWN and ANY TOWN, Oklahoma" at the XYZ Superfund site and the disposition of said soils in a repository located within the Superfund site near SMALL TOWN, Oklahoma. Division's Exhibit A.

9. On Tuesday, February 1, 2005, REPRESENTATIVE e-mailed ASSISTANT acknowledging receipt of the January 28, 2005 letter seeking exempt status as defined in 68 O.S., § 1359(6) and advising that pursuant to *OAC*, 710:65-13-80(c)[23], the request was forwarded to the Division for further evaluation of eligibility to receive the exemption.[24]

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[19] Record of Decision, Decision Summary, paragraph IX – Selected Remedy, page 44.

[20] Copy of 42 U.S.C.A. § 9621. *See*, in particular, § 9621(e)(1).

[21] Record of Decision, Declaration, paragraph – Statement of Basis and Purpose, page 1; and Record of Decision, Decision Summary, paragraph – Modifying Criteria/State Acceptance of paragraph VIII – Summary of Comparative Analysis of Alternatives, page 42 and 31, respectively.

[22] Copy of "concurrence letter" dated April 1, 1997.

[23] OAC, 710:65-13-80(c) provides:

10. On March 2, 2005, the Division wrote Protestant requesting "documentation from the Department of Environmental Quality that the Repository near SMALL TOWN, Oklahoma is a DEQ approved site. Division's Exhibit C.

11. On April 5, 2005, Protestant forwarded a copy of a letter it received from ODEQ dated March 25, 2005.[25] ODEQ's letter dated March 25, 2005, to Protestant provides:

> You have requested a letter from the Oklahoma Department of Environmental Quality regarding a project begun and overseen by the US Environmental Protection Agency (EPA) as a part of the XYZ Superfund site in Oklahoma. The EPA contracted with a private property owner to establish a repository for yard soils being removed from residential yards within the XYZ Superfund site in Oklahoma. The repository is south west of SMALL TOWN, Oklahoma on ROAD in XYZ County. Contractors who performed work for EPA moved many cubic yards of soil to this location over several years time.
>
> DEQ is aware of the repository and the arrangements made by EPA for placing soils at this location. We have visited the repository from time to time in our role as a cooperator with EPA and because the

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**Application Process.** Application shall be made by letter, addressed to the Taxpayer Assistance Division. Before the Oklahoma Tax Commission can issue a document verifying an exemption under this Section, the following information is required to substantiate the exemption claimed:

(1) Legal name of the entity seeking exemption;
(2) Mailing address;
(3) Location address of the facility at which treatment is to be conducted;
(4) Federal employer's identification number;
(5) Names and current mailing addresses of all responsible officers;
(6) A written description of the process in which the person will be engaged;
(7) Information regarding the permit or approval under which the person is operating;
(8) Documentation that any nonresident contractor or subcontractor is in compliance with the registration requirements found at 68 O.S. § 1701 et seq.; and
(9) Such additional information as the Commission may require to confirm eligibility.

[24] The e-mail was part of the records received from the Division. Official notice of the e-mail is taken.

[25] The letter of April 5, 2005 was part of the records received from the Division. Official notice of the letter is taken. The text of the letter, follows:

> Per your request of March 2, 2005, please find enclosed a copy of the letter we received from ODEQ REP 1 with the Oklahoma Department of Environmental Quality acknowledging the Repository near SMALL TOWN, OK. ODEQ REP 1 is DEQs Programs Manager for the XYZ Project.
>
> Please contact me at (999) 999-9999 or via e-mail to ASSISTANT'S EMAIL, should you need additional information to process our request for tax exempt status on the XYZ project.

> state has matched the cost of soil removal in residential yards. Most recent match dollars for this effort came from $2,000,000 appropriated from Rainy Day money in 2002. It is our understanding that EPA has agreements with the landowner to close the repository once the remaining residential yards are [sic] remedied.

Division's Exhibit D.

12. The Division contacted the ODEQ by telephone on several occasions. The ODEQ would never say the site is an approved facility. Testimony of SUPERVISOR.[26]

13. By letter dated May 6, 2005, the Division denied Protestant's application for sales tax exemption stating: "[p]er the requirements of O.S. Title 68 § 1359(6) your company does not qualify for the exemption." Protestant's Exhibit F and Division's Exhibit E. The exemption was denied because the Division did not receive notice from ODEQ that the facility was an approved site. Testimony of SUPERVISOR.

14. On June 13, 2005, Protestant requested from the Tax Policy and Research Division, Tax Commission, a formal letter ruling with respect to its application for sales tax exemption.[27] The request was made because the Division in denying Protestant's application did not have an opportunity to review the April 1, 1997 concurrence letter. Testimony of ASSISTANT.

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[26] See, Note 15.

[27] The letter was part of the records received from the Tax Policy and Research Division. Official notice of the letter is taken. The text of the letter, follows:

> I am writing to request a formal ruling on the letter from Oklahoma Department of Environmental Quality to the US Environmental Protection Agency stating their concurrence with the EPA's proposed remedy for Operable Unit 2 at the XYZ Superfund Site. This letter was incorporated into the official record as Appendix B of the final Record of Decision. The Record of Decision for OU2 was signed in 1997, outlined in the ROD is the remedy which details the location of the soil repository for the disposal of the lead contaminated yard waste.
>
> [Protestant] entered into a subcontract with GENERAL CONTRACTOR in February 2003 pursuant to Prime Contract XXX between GENERAL CONTRACTOR and EPA to remediate lead contaminated soil from 293 residential properties in RURAL TOWN and ANY TOWN, Oklahoma. This area is within the boundaries of the XYZ Superfund Site.
>
> [Protestant's] application for tax exempt status on this project has been denied by the Oklahoma Tax Commission due in part to DEQ's unwillingness to now formally state in writing their approval of the soil repository site as required by O.S. Title 68 § 1359(6). It is [Protestant's] position; 1. DEQ approved the site by means of its letter of concurrence to the EPA in 1997 and therefore the requirement of O.S. Title 68 § 1359(6) has already been met, 2. DEQ is actively participating as a regulatory agency in the ongoing remediation activities at the XYZ Site, 3. DEQ provides partial funding of the project in the form of the State's 10% match to the Federal funds and 4. DEQ is actively involved in all decisions pertaining to the XYZ Project.
>
> I have enclosed copies of all correspondence relating to this matter along with a copy of the remedy contained in the ROD and a copy of DEQ's concurrence letter obtained thru a Freedom of Information Act request to EPA.
>
> Please feel free to contact me should you need additional information, 999-999-9999.

15. By letter dated August 18, 2005, the Tax Policy and Research Division, ANALYST, Tax Policy Analyst, advised Protestant: "this office is in agreement that the Taxpayer Assistance Division ("Division") properly denied [Protestant's] request for exemption." Protestant's Exhibit H.

16. Protestant protested the denial of its sales tax exemption application by the Tax Policy and Research Division by letter to the Office of the General Counsel, Tax Commission, dated September 2, 2005, and requested further consideration of the application. Protestant's Exhibit G and Division's Exhibit I.[28]

17. The Division's decision to deny Protestant's sales tax exemption application has not changed even with consideration of the 1997 concurrence letter because there is nothing in the letter which states ODEQ approved the site. Testimony of SUPERVISOR.

18. The Division has not granted an exemption to a contractor for purchases of tangible personal property used or consumed under a Superfund project. Testimony of SUPERVISOR.

## ISSUE AND CONTENTIONS

The issue presented for decision is whether the Division erred in denying Protestant's sales tax exemption application for the purchases of tangible personal property, including materials, equipment and fuel used or consumed during the period of February, 2003 through March, 2004 in the remediation of lead contaminated soils in residential areas of Operable Unit 2 at the XYZ Superfund site and the disposition of said soils in a repository located within the Superfund site near SMALL TOWN, Oklahoma.

Protestant contends that the Division erred in denying the sales tax exemption based on: (1) the Division incorrectly classified Protestant as a manufacturer under 68 O.S. 2001, § 1359(6), instead of a contractor under *OAC*, 710:65-1-7(3)(E)[29]; (2) approval for the repository was established in the 1997 concurrence letter to EPA; (3) CERCLA actions are not excluded from exemption under *OAC*, 710:65; and (4) the Division did not understand the meaning or significance of the 1997 DEQ concurrence letter. In support of these contentions, Protestant argues that ODEQ is more than "aware" of the repository, that ODEQ coordinates all Superfund activities for the state,

[28] The letter provides in pertinent part:

> [Protestant] disagrees with the determination made by ANALYST of the Tax Policy Division regarding the above referenced file number. In our June 17, 2005 letter to OTC DIRECTOR, Director of Tax Policy; [Protestant] had requested a ruling on a 1997 document from Oklahoma DEQ to the EPA. It is important to note, the 1997 concurrence letter was not part of the original documentation sent to the [Division]. The existence of the 1997 letter only became known to [Protestant] in June 2005, the result of a FOIA request by [Protestant] to EPA. ANALYST'S letter of August 18, 2005 does not state a ruling on the 1997 concurrence letter, only that she is in agreement with the [Division's] previous denial, nor does she give any further explanation as to the basis of her decision.

[29] It is noted for the record that whether Protestant is a manufacturer is not relevant with respect to the applied for exemption. The enacted exemption is merely encompassed in the exemptions listed for manufacturers. The Division does not dispute that Protestant as a contractor would be eligible for the exemption if all requirements of the exemption were met. The Division's position is confirmed by the rules promulgated for the exemption by the Tax Commission. *See, OAC*, 710:65-1-7(3)(E) and 65-13-80.

acts as an agent for the EPA and is a partner of the EPA with respect to any decisions, planning and site investigations. Protestant further argues that ODEQ concurred with the remediation plan of the EPA which remediation plan included as a part thereof the use of the repository as a disposal site. Protestant further argues that the applied for exemption does not state the form the approval must take from the ODEQ nor the process for obtaining approval.

The Division contends that Protestant does not qualify for the applied for exemption. In support of this contention, the Division argues that § 1359(6) clearly provides that the facilities for the cleanup of a site of contamination must be approved by the ODEQ and that Protestant has not produced any evidence to show the repository near SMALL TOWN, Oklahoma and the arrangements made by the EPA for the clean up of the residential areas were approved by ODEQ.

## CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. 2001, §§ 207(c) and 212(b).

2. All sales of tangible personal property are subject to sales tax unless otherwise specifically exempted by the Oklahoma Sales Tax Code ("Code")[30]. 68 O.S. 2001, § 1354(A)(1).

3. Generally, contractors[31] are identified as "consumers or users[32], and must pay sales tax on all taxable services and tangible personal property, including materials, supplies, and equipment, purchased to develop and improve real property." *OAC*, 710:65-1-7(3). *See*, 68 O.S. 2001, § 1352(5).

4. Protestant's application for sales tax exemption is based on 68 O.S. 2001, § 1359(6) which provides in pertinent part:

> There are hereby specifically exempted from the tax levied by Section 1350 et seq. of this title:
>
> Machinery, equipment, fuels and chemicals or other materials incorporated into and directly used or consumed in the process of treatment to substantially reduce the volume or harmful properties of hazardous waste at * * * facilities approved by the Department of Environmental Quality for the cleanup of a site of contamination.

[30] 68 O.S. 2001, § 1350 et seq.

[31] Defined for purposes of the Code 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. 2001, § 1352(6).

[32] The terms are defined for purposes of 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. 'Consumer' or 'user' 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. 2001, § 1352(5).

*See*, *OAC*, 710:65-1-7(3)(E)[33] and 710:65-13-80.

5. As a general rule, statutes exempting property from taxation are required to be circumspectly applied and strictly construed against the allowance of an exemption. ***Matter of Wal-Mart Stores, Inc.,*** 1991 OK CIV APP 73, 817 P.2d 1281; ***Bert Smith Road Machinery Co. v. Oklahoma Tax Commission***, 1977 OK 75, 563 P.2d 641. No claim of tax exemption can be sustained unless it clearly comes within the statutory provision under which the exemption is claimed. ***Home-Stake Production Co. v. Board of Equalization of Seminole County***, 1966 OK 115, 416 P.2d 917. The burden of proving the existence of an exemption is on the person seeking the exemption. ***Austin, Nichols & Co., Inc. v. Oklahoma County Bd. Of Tax-Roll Corrections***, 1978 OK 65, 578 P.2d 1200.

6. Tax exemptions depend entirely upon legislative grace and are strictly construed against the exemption. ***TPQ Investment Corporation v. Oklahoma Tax Commission***, 1998 OK 13, ¶ 8, 954 P.2d 139, 141; ***Getty Oil Co. v. Oklahoma Tax Commission***, 1977 OK 19, 563 P.2d 627, 630-631.

7. Tax statutes are penal in nature. ***Globe Life and Accident Insurance Company v. Oklahoma Tax Commission***, 1996 OK 39, 913 P.2d 1322. Penal statutes are to be strictly construed. ***Mid-Continent Pipeline Co. v. Crauthers***, 1954 OK 61, 267 P.2d 568. Strict construction with respect to a penal statute is that which refuses to extend the law by implication or equitable consideration and confines its operations to cases clearly within the letter of the statute, as well as within its spirit or reason. ***State ex rel. Allen v. Board of Education of Independent School Dist. No. 74 of Muskogee County***, 1952 OK 241, 206 Okla. 699, 246 P.2d 368. Courts cannot enlarge the taxing act's ambit to make its provisions applicable to cases not clearly within the legislature's contemplation or to fill lacunae in the revenue law in a manner that would distort the enactment's plain language. ***Globe***, *supra* at 1327.

8. If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects legislative intent and no further construction is required or permitted. ***Sullins v. American Medical Response of Oklahoma, Inc.***, 2001 OK 20, 23 P.3d 259.

9. Here, there appears to be a lacunae or gap in the applied for exemption provision with respect to Superfund sites. The evidence shows the ODEQ concurred with the EPA's remediation plan for soil contaminated residential areas of OU2 at the XYZ Superfund site which necessarily included the disposal site of the contaminated soil in the repository located within the Superfund site near SMALL TOWN, Oklahoma. However, the evidence also shows that the ODEQ does not issue permits or approve any of the remedial activities at a Superfund site.

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[33] This rule provides:

> A contractor may make purchases of machinery, equipment, fuels, and chemicals or other materials, exempt from sales tax, which will be incorporated into and directly used or consumed in the process of treatment of hazardous waste, pursuant to *OAC* 710:65-13-80. Contractors claiming exemption for purchases to be used to remediate hazardous wastes should obtain a letter certifying the exemption status from the Tax Commission by following the procedures set out in 710:65-13-80, and provide a copy of the letter to vendors, pursuant to subsection (f) of that rule.

Section 1359(6) clearly requires that the facilities for the cleanup of a site of contamination be approved by the ODEQ. Protestant cannot show that ODEQ "approved" the repository as the facility for the cleanup of the contaminated soils in the residential areas of OU2 at the XYZ Superfund site, not because ODEQ did not agree with the use of the repository as the cleanup facility, but because ODEQ does not permit or approve any of the activity at a Superfund site. This gap in the law can not be filled by the Tax Commission, ***Globe***, *supra* at 1327; only the Legislature can close the gap, ***TPQ***, *supra* at ¶ 8; ***Getty Oil***, *supra* at 630-631.

Accordingly, the undersigned finds that the Division did not err in denying Protestant's sales tax exemption application for the purchases of tangible personal property, including materials, equipment and fuel used or consumed during the period of February, 2003 through March, 2004 in the remediation of lead contaminated soils in the residential areas of Operable Unit 2 at the XYZ Superfund site and the disposition of said soils in a repository located within the Superfund site near SMALL TOWN, Oklahoma.

10. Protestant's protest to the denial of its sales tax exemption application under the provisions of 68 O.S. 2001, § 1359(6) and *OAC*, 710:65-1-7(3)(E) and 710:65-13-80 should be and the same is hereby denied.

## DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest to the denial of the sales tax exemption application 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.