JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2006-12-21-23
ID: P-05-169-K
DATE: DECEMBER 21, 2006
DISPOSITION: SUSTAINED IN PART/DENIED IN PART
TAX TYPE: SALES
APPEAL: AFFIRMED CIV. APP. TC-104216

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATEMENT OF THE CASE

A field audit of Protestants' books and records for the period of May, 2000 through April, 2005 was conducted by AUDITING FIRM. As a result of the audit, the Division by letters dated September 14, 2005, proposed the assessment of sales tax, interest and penalty against Protestants. Protestants timely protested the proposed assessments by letter dated November 3, 2005.[1] A hearing was requested in the letter of protest.[2]

The protest was filed in the office of the Secretary-Member of the Tax Commission.[3] On November 4, 2005, the protest was referred to the Office of the Administrative Law Judges ("ALJ's Office") for further proceedings consistent with the Uniform Tax Procedure Code[4] and the Rules of Practice and Procedure before the Oklahoma Tax Commission.[5] Upon receipt, the audit file of the Division was requested. The audit file was received on December 12, 2005. The protest was docketed as Case No. P-05-169-K and assigned to ALJ, Administrative Law Judge.[6]

A pre-hearing conference was scheduled in this cause for December 15, 2005, by *Prehearing Conference Notice* issued November 22, 2005.[7] The pre-hearing conference was conducted as scheduled. At the conference a question arose regarding the proposed assessments of and protests thereto by the officers of the Corporation. By Memorandum filed by the Division on December 16, 2005 and Amendment to Protest filed by Protestants on December 19, 2005, the protests of the officers of the Corporation to the proposed assessments were included in the docketed case.

A *Prehearing Conference Order and Notice of Hearing* was issued December 28, 2005, 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

[1] Rule 710:1-5-22(a) of the *Oklahoma Administrative Code* ("*OAC*").

[2] *OAC*, 710:1-5-23.

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

[4] 68 O.S. 2001, § 201 et seq.

[5] *OAC*, 710:1-5-20 through 710:1-5-47.

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

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

position letters.[8] The *Order* also scheduled the protest for hearing on April 20, 2006.[9] Pursuant to Protestants' unopposed request and for good cause shown, the hearing scheduled for April 20, 2006 was rescheduled for April 26, 2006.[10]

A closed hearing[11] was held as scheduled. Protestants called one (1) witness, PRESIDENT, President of the Corporation to testify on behalf of Protestants. The Division also called one (1) witness, AUDITOR, AUDITING FIRM who testified regarding the audit. Exhibits A through D, E-1, E-2, E-3, and F were identified offered and admitted into evidence. Upon conclusion of the closing statements of the parties, the record was closed and the matter was submitted for decision.[12]

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. TELECOM COMPANY, an Oklahoma corporation, has been in business since July, 1996. Testimony of PRESIDENT. The principal officers of TELECOM COMPANY are PRESIDENT, President and SECRETARY, Secretary. Testimony of PRESIDENT. *See*, Exhibit C.[13]

2. Protestants' business can be described as a "wire puller" or "cabling contractor" which according to PRESIDENT consists of installing the cable and/or wire infrastructure capable of carrying voice, data and/or video signals inside residences or businesses so that the consumer of these systems can connect to the outside world. Protestants only install cable and/or wire on the consumer side of the demarcation point ("D-mark") which point is generally represented by the gray switching box located on the outside of a residence or business and consists of two sides, the service provider side and the consumer side. Protestants do not install telecommunication equipment on the consumer side of the D-mark. Testimony of PRESIDENT.

3. The consumer side of the D-mark runs from the consumer side of the switching box into the residence or business to a terminal point which in this case would be a telephone or computer jack located on a wall. The service provider side of the D-mark runs from the service provider side of the switching box to the provider's central office. Testimony of PRESIDENT.

4. The service providers install the cable and/or wire from the provider's central office to its customer's premises at the service provider side of the D-mark. Testimony of PRESIDENT.

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

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

[10] *OAC*, 710:1-5-30.

[11] Protestants invoked their rights to a confidential hearing pursuant to 68 O.S. Supp. 2005, § 205.

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

[13] Consisting of the franchise tax returns of TELECOM COMPANY for the periods of July, 1999 through June, 2000; July, 2000 through June, 2001; July, 2001 through June, 2002; July, 2002 through June, 2003; July, 2003 through June, 2004; and July, 2004 through June, 2005, with accompanying schedules.

5. Protestants do not connect the cable and/or wire to the service provider. Normally, the service provider connects the customer's cable and/or wire to the switching box. Testimony of PRESIDENT.

6. Protestants are not in the telecommunication services business; that is, they do not provide dial tone or internet ("voice and data) services to a consumer. Protestants do not sell voice or data equipment. Protestants don't transmit any voice or data as a part of their business. Protestants don't move, repair or service any telecommunication equipment as a part of their business. Protestants' charges for its services are not billed to a consumer's telephone number or account and Protestants do not rent or lease telecommunication equipment and consequently do not charge rent for such. Testimony of PRESIDENT.

7. PRESIDENT testified that when they install cable and/or wire on the consumer side of the D-mark, they do not know to what the cable and/or wire will be connected. PRESIDENT also testified that Protestants install phone jacks.

8. Protestants were audited by the AUDITING FIRM for the period of May, 2000 through April, 2005. AUDITING FIRM is an auditing firm that contracts with municipalities in Oklahoma to perform sales and use tax audits. In this case, AUDITING FIRM reviewed Protestants' invoices and source documents to determine what they were doing[14], reviewed the tax laws to determine whether in their opinion what Protestants were doing was taxable, scheduled those items being performed by Protestants within Oklahoma City[15] and provided this information to the Tax Commission for review and assessment. Testimony of AUDITOR.

9. In performing the audit, AUDITING FIRM found that Protestants were installing cabling and/or wiring that connected to telecommunication systems. Testimony of AUDITOR. AUDITOR agreed that a television set is not a piece of telecommunication equipment. Exhibit B-1, Invoice # 10214, billed to COMPANY 1.

10. According to AUDITOR, where an invoice did not separate labor from material charges, the total amount of the invoice was scheduled as taxable. According to PRESIDENT, labor charges generally represent forty percent (40%) of the total amount charged. Exhibit B-1, Invoice # 9837, billed to COMPANY 2.

11. As a result of the audit, the Division by letters dated September 14, 2005, proposed the assessment of sales tax, interest and penalty against Protestants in the aggregate amount of $29,189.38, consisting of tax of $23,813.79, interest accrued through September 30, 2005, of $2,994.15, and a thirty (30) day delinquent penalty at ten percent (10%) of $2,381.44. Exhibits E-1, E-2 and E-3.

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[14] Exhibit B which consists of a sampling of Protestants' invoices which were subjected to sales tax. Exhibit B-1 is the same invoices as admitted in Exhibit B except in alphabetical order.

[15] Exhibit D which is the audit work papers.

12. Protestants timely protested the proposed sales tax assessments placing the entire amounts thereof in controversy. Exhibit F.

ISSUE AND CONTENTIONS

Two issues are presented for decision. The first issue is whether Protestants' labor charges for installing voice, data or video cable and/or wire on the consumer side of the D-mark are subject to sales tax pursuant to 68 O.S. 2001, § 1354(A)(4)[16]. The second issue is whether Protestants are "vendors" with respect to their wire pulling operations and therefore, responsible for charging, collecting and remitting sales tax on the labor charges billed to their customers.

Protestants contend that the provisions of § 1354(A)(4) are not applicable to their wire pulling operations and therefore, the assessment of sales tax on their labor charges are erroneous. In support of this contention, Protestants argue that the statute only taxes "installation and construction charges" on the service provider side of the D-mark, not on the consumer side. In support of this argument, Protestants assert that the only "installation and construction charges" which are taxable are those "charged to the consumer's telephone number or account". Protestants also assert that if they are responsible for this tax, they will be required to charge 911 and FCC fees, and the federal excise tax.

In the alternative, Protestants contend that they are not the proper party to collect and remit the sales tax. In support of this contention, Protestants argue that they only serve as a subcontractor and only perform a minor function in the overall operation; whereas, the telecommunication companies or general contractors they work for affix the equipment to the cable and/or wire and deliver the completed telecommunications system to the end user. Further, Protestants argue that generally they are unaware of the end use or function for which the wiring is actually installed.

Although, Protestants do not specifically request a waiver of penalty and interest, several of Protestants' statements suggest that a waiver will be requested if the taxes assessed are found due and owing. First, Protestants state that this is a case of first impression in regard to the taxation of their activities. Second, they state they were without knowledge of the potential obligation to collect sales tax on the labor charges associated with their wire pulling operations. And third, Protestants state that no one else in their general line of business charges and collects sales tax on their labor charges.

The Division contends that it correctly assessed Protestants for the sales tax they failed to collect and remit on their labor and service charges. In support of this contention, the Division

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[16] Originally enacted as § 1354(1)(D) by Laws 1992, c. 383, § 1, emerg. eff. June 9, 1992, which prior thereto read:

> Service by telephone or telegraph companies to subscribers or users, including transmission of messages, whether local or long distance, and all services and rental charges in connection with transmission of any message.

Section 1354(A)(4) was amended by Laws 2001, c. 153, § 10, to include as taxable "all mobile telecommunications services that are sourced to this state pursuant to the federal Mobile Telecommunications Sourcing Act, 4 U.S.C., Sections 116-126". Otherwise, and except for a change in numbering, the provisions of § 1354(A)(4) have not substantively changed since the original enactment in 1992.

argues that the provisions of § 1354(A)(4) are clear and unambiguous and that Protestants' wire pulling services fall squarely within the taxing ambit of the statute. The Division also cites the rule promulgated by the Tax Commission with respect to "services relating to telecommunications and telecommunications equipment"[17] and argues that the rule has been in effect since 1995 without an objection by the Legislature. The Division further argues that Protestants are responsible for collecting and remitting the sales tax on their labor charges. In support of this argument, the Division asserts whether Protestants are contractors or mere subcontractors is irrelevant, they purchased the cable and/or wire they installed and they billed their customers directly for the cost of these materials and the labor to install the materials.

Whether Protestants should receive a waiver of the penalty and/or interest assessed and accruing is not addressed herein as the ALJ's Office is not authorized to waive penalty and/or interest. *See*, 68 O.S. 2001, § 220. The authority to waive penalty and interest or any portion thereof ordinarily accruing by reason of a taxpayer's failure to pay a state tax within the statutory period allowed for its payment lies with the three (3) members of the Tax Commission or their designees. 68 O.S. 2001, § 220(A).

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. Supp. 2002, § 221(D).

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Code").[18] An excise tax is levied upon all sales,[19] not otherwise exempted by the Code. 68 O.S. 2001, § 1354(A). At issue in this proceeding is the application of § 1354(A)(4) to Protestants wire pulling services, which subsection provides:

> Telecommunications services that originate and terminate in this state and that originate or terminate in this state and are charged to the consumer's telephone number or account in this state regardless of where the billing for such service is made, all mobile telecommunications services that are sourced to this state pursuant to the federal Mobile Telecommunications Sourcing Act, 4 U.S.C., Sections 116-126, and all local telecommunications service and rental charges, including <u>all</u> installation and construction charges and all service and rental charges having <u>any connection with transmission of any message or image</u>. Provided:
>
> > a. the term 'telecommunications services' shall mean the transmission of any interactive, two-way electromagnetic communications, including voice, image, data and information, through the use of any medium such as wires, cables, microwaves,

[17] *OAC*, 710:65-19-329. Added at 12 Ok Reg 2635, eff 6-26-95. Amended at 15 Ok Reg 2827, eff 6-25-98 and 22 Ok Reg 1587, eff 6-11-05.

[18] 68 O.S. 2001, § 1350 et seq.

[19] As relevant to this proceeding, "Sale" is defined for purposes of the Code to mean "the furnishing or rendering of services taxable under the [Code]". 68 O.S. 2001, § 1352(15)(d), renumbered § 1352(21)(d) by Laws 2003, c. 413, § 1, eff. Nov. 1, 2003.

cellular radio, radio waves, light waves, or any combination of those or similar media, but shall not include the following:

(1) sales of value-added nonvocal services in which computer processing applications are used to act on the form, content, code, or protocol of the information to be transmitted, including charges for the storage of data or information for subsequent retrieval but not including services commonly known as voice mail,
(2) any interstate telecommunications service which is:

(a) rendered by a company for private use within its organization, or
(b) used, allocated, or distributed by a company to its affiliated group, or

(3) sales of any carrier access services, right of access services, telecommunications services to be resold, or telecommunications services used in the subsequent provision of, use as a component part of, or integrated into end-to-end telecommunications service, and

b. the term 'telecommunications services' shall include, but not be limited to sales of any interstate telecommunications services which:

(1) entitle the subscriber to inward or outward calling respectively between a station associated with an access line in the local telephone system area or a station directly connected to any interexchange carrier's facilities and telephone or radiotelephone stations in diverse geographical locations specified by the subscriber, or
(2) entitle the subscriber to private communications services which allow exclusive or priority use of a communications channel or group of channels between exchanges, and

c. the term 'interstate' includes any international service that either originates or terminates outside of the fifty (50) United States and the District of Columbia.

(Emphasis added). Amended by Laws 2001, c. 153, § 10. *See*, Note 16.

3. The fundamental rule and governing principle of statutory construction is to ascertain and, if possible, give effect to the intention and purpose of the legislature as expressed in a statute. ***Samson Hydrocarbons Co. v. Oklahoma Tax Commission***, 1998 OK 82, 976 P.2d 532; ***State ex rel. Dept. of Public Safety v. 1985 GMC Pickup, Serial No. 1GTBS14EOF2525894, OK Tag No. ZPE852***, 1995 OK 75, 898 P.2d 1280. Legislative intent must be ascertained from the whole act, ***Walls v. American Tobacco Co.***, 2000 OK 66, 11 P.3d 626; based on its general purpose and objective, ***Comer v. Preferred Risk Mutual Ins. Co.***, 1999 OK 86, 991 P.2d 1006. Statutes must be read to render every part operative, and to avoid rendering any part superfluous or useless. ***Bryant v. Commissioner of the Dept. of Public Safety, State of Okla.***, 1996 OK 134, 937 P.2d 496. The Legislature will not be presumed to have intended an absurd result, ***In re Holt***, 1997 OK 12, 932 P.2d 1130; nor to have done a vain or useless act in the promulgation of a statute, ***Comer,*** *supra*.; or when creating law, ***Purcell v. Santa Fe Minerals, Inc.***, 1988 OK 45, 961 P.2d 188. If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the 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.

4. Pursuant to its authority to facilitate the administration, enforcement and collection of any taxes levied by the tax laws of the State of Oklahoma, the Tax Commission with respect to § 1354(A)(4) promulgated *OAC*, 710:65-19-329[20], which rule provides:

> **Services relating to telecommunications and telecommunications equipment**
>
> (a) **General provisions.** Charges for labor or repair services performed on equipment or wiring which is connected with the transmission of messages, voices or images or connected with equipment used for the transmission of messages, voices or images are subject to sales tax, regardless of whether the charge is stated separately from charges for either telecommunications service or for tangible personal property.
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> (b) **Examples of taxable transactions.** Services subject to sales tax include, but are not limited to, the following:
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> (1) Installation of telecommunications equipment;
> (2) Movement of telecommunications equipment;
> (3) Repair or servicing of telecommunications equipment;
> (4) Maintenance of telecommunications equipment; and

[20] Text as amended at 15 Ok Reg 2827, eff 6-25-98. The 2005 amendment added a new paragraph (c) and redesignated paragraphs (c) and (d) as (d) and (e). The new paragraph (c) provides:

> **Specific exemption.** Specifically exempted from the levy of sales tax are labor charges for the construction, installation, movement, servicing repair or maintenance of any equipment such as antennas or dishes that have a connection with the transmission of a message or image from cellular towers that are used for the transmission of telecommunications. [68 O.S.Supp.2004 § 1354(A)(4)(a)(4)]

See, Note 17.

(5) Charges for wiring or rewiring, regardless of location, for use with telecommunications equipment.

(c) **Maintenance contracts.** The sale of maintenance contracts for services subject to sales tax as described in this Section are subject to sales tax.

(d) **Applicability of rule.** The provisions of this Section apply generally to all providers of services relating to telecommunications and telecommunications equipment. In addition to requirements similar to those set out in this Section, taxation of telecommunications services rendered by telephone companies is further addressed in 710:65-19-330.

Emphasis added.

5. Rules promulgated pursuant to the Administrative Procedures Act,[21] are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court. 75 O.S. 2001, § 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. 2001, § 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. Where the 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; 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.

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; ***Boydston v. State***, 1954 OK 327, 277 P.2d 138. 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. 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.

6. Although certainly not controlling with respect to the issue whether Protestants' wire pulling activity is subject to sales tax pursuant to § 1354(A)(4), the cases of ***Capitol City Telephone,***

[21] 75 O.S. 1991, § 250 et seq., § 301 et seq.

Inc. v. Nebraska Department of Revenue[22] and ***Cox Cable of Omaha, Inc. v. Nebraska Department of Revenue***,[23] are instructive. In ***Capitol City***, three telecommunications services providers argued that gross receipts from charges associated with installations, moves, additions, upgrades, or changes of inside wire, station connections, and terminal connections, performed within the premises of businesses or residences at locations commonly referred to as a "customer side" of the "demarcation point" (D-mark) were not subject to Nebraska sales and use taxes. The section of law at issue subjected to tax the "gross receipts of every person engaged as a [specified] public utility * * * or as a community antenna television service operator or any person involved in connecting and installing [certain defined] services", including "gross income received from the provision, installation, construction, servicing, or removal of property used in conjunction with the furnishing, installing, or connecting of any [specified] public utility services * * * or [specified] community antenna television service". *Id.* at 519-521. In rejecting the service providers' argument, the Supreme Court of Nebraska held:

> We agree with the trial court in Capitol's case and find that the gross receipts of Capitol, Aliant, and Systems at issue are taxable. Regardless of who owns the inside wiring or terminal equipment, it is used in conjunction with the equipment of the telephone service carrier to provide the level of telecommunication service required by the customer. Capitol, Aliant, and Systems are engaged in installing and connecting telephones, wires, cables, consoles, and other property that form the telephone communication systems. Their telephone systems are connected or united with the local exchange network to carry telephone service into their customers' premises, and it is highly unlikely that their customers would pay for the systems if they would not have access to local telephone service. The services are, therefore, plainly rendered in conjunction with the furnishing, installing, or connecting of any local exchange service or intrastate message toll telephone service, even when performed on the customer side of the D mark.

Id., at 530. In so holding, the Supreme Court of Nebraska cited with approval ***Cox Cable***, *supra*., and the reasoning of the Court in ***Cox Cable***, which the Court in ***Capitol City*** recited as:

> If the Legislature had intended only labor on the regulated side of the D mark to be taxable, it could have so stated in the statute. It did not, however, and instead stated that not only would the gross receipts of the public utility be taxed, but so would the gross receipts of 'any person involved in the connecting and installing of the services defined in [the statute].

Id.

In ***Cox Cable***, independent contractors were hired by Cox to perform the installation of "house drops" at its subscriber's residences. The drops connected the subscriber's residence to Cox's distribution system and enabled the subscriber to receive cable television. Cox argued that

[22] 264 Neb. 515, 650 N.W.2d 467 (2002).

[23] 254 Neb. 598, 578 N.W.2d 423 (1998).

the taxing statute did not apply to the independent contractors because they were not licensed cable providers. In rejecting Cox's argument, the Supreme Court of Nebraska held:

> The tax imposed by [the taxing act] is on the gross receipts of cable television service operators 'or any person involved in the connecting and installing' of regulated television services. Section * * * clearly reflects an intent to tax not only the receipts of cable television service operators, but also the receipts of persons who are not franchised entities but perform services involving the connection and installation of regulated television services. * * * If the Legislature had intended to tax only the gross receipts attributable to connection and installation services performed by the holder of a franchise or permit, it could have so stated. The Legislature's use of broader language reflects that it intended the scope of the tax to extend beyond the receipts of the franchised entity to other persons or entities who derive revenue from performing services which involve the 'installing' or 'connecting' of regulated television services. Therefore, we hold that the tax imposed by [the Section] extends to the independent contractors' gross receipts derived from services which they performed in installing house drops pursuant to their contractual agreements with Cox.

Id., at 604-605. In ***Cox Cable***, the Court found:

> It is undisputed that the services performed by independent contractors in connecting and installing house drops are in all material respects identical to the services performed by Cox employees when they connect and install house drops and that the independent contractors are not themselves authorized to provide cable television services. We agree with the finding of the district court that '[t]he independent contractors * * * are clearly involved in connecting the wires used to carry the cable television transmission to the consumer's television set and receive income from such involvement.'

Id., at 604. *See*, ***Time Warner Entertainment, L.P. v. Chumley***, Slip Copy, 2006 WL 1559625 (Tenn.Ct.App.); and ***AT & T Corporation v. South Dakota Department of Revenue***, 640 N.W.2d 752, 2002 SD 25.

7. Here, although § 1354(A)(4) does not specifically provide that the gross receipts of "any person involved in the connecting and installing of the [specified] services" is taxable, it does specifically subject to tax "all installation and construction charges * * * having any connection with transmission of any message or image." (Emphasis added). Further, with respect to services relating to telecommunications and telecommunications equipment, it is specifically provided by administrative rule that "charges for wiring or rewiring, regardless of location, for use with telecommunications equipment" shall be subject to sales tax. *OAC*, 710:65-19-329(b)(5). Analogous to the statement of the Supreme Court of Nebraska in the ***Capitol City***, *supra*. and ***Cox Cable,*** *supra.* cases if the Oklahoma Legislature had intended to tax only the labor charges on the regulated side of the D-mark or only the gross receipts attributable to installation and construction services of telecommunications services providers, it could have so stated in § 1354(A)(4). However, the Legislature's use of the broader, unlimited language of "all" and "any" reflects that it intended the scope of the tax to include not only the receipts of telecommunications services

providers, but independent contractors who derive revenue from installing cable and/or wire having any connection with transmission of any message or image whether the same is on the consumer side or the service providers side of the D-mark. Accordingly, the undersigned finds that Protestants' labor charges for installing voice, data or video cable and/or wire on the consumer side of the D-mark are subject to sales tax pursuant to 68 O.S. 2001, § 1354(A)(4).

8. "Vendor" in pertinent part is defined to mean "any person making sales of tangible personal property or services in this state, the gross receipt or gross proceeds from which are tax by the [Code]" and "any person maintaining a place of business in this state and making sales of tangible personal property or services, whether at the place of business or elsewhere, to persons within this state, the gross receipts or gross proceeds from which are taxed by the [Code]". 68 O.S. 2001, § 1352(21)(a) and (b).[24] A "vendor" is required to collect the full amount of the tax levied by the Code from the consumer or user, 68 O.S. 2001, § 1361(A); and remit the same to the Tax Commission, 68 O.S. 2001, § 1362(A).

9. Here, as previously determined, Protestants' labor charges for installing voice, data or video cable and/or wire on the consumer side of the D-mark are subject to sales tax pursuant to 68 O.S. 2001, § 1354(A)(4). Protestants billed their customers directly for the labor charges attributable to their wire pulling operations. Further, no evidence has been presented to show these labor charges were passed through to the ultimate consumer and subjected to sales tax by the general contractor or telecommunications services provider.[25] Accordingly, the undersigned finds that Protestants are "vendors" with respect to their wire pulling operations and therefore, responsible for charging, collecting and remitting sales tax on the labor charges billed to their customers.

10. The evidence presented shows that the labor charges billed to COMPANY 1, Invoice # 10214, which are attributable to the installation of cable connecting to television sets should be removed from the audit and assessments. Further, with respect to any invoices, specifically Invoice # 9837 billed to COMPANY 2, in which labor and material charges are not separately stated the audit and assessments should be revised to subject to sales tax only forty percent (40%) of the total amount billed. *See*, Note 25 and *Findings of Fact*, paragraphs 9 and 10.

11. Protestants' protest to the proposed sales tax assessments should be and the same is hereby sustained in part and denied in part.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestants, TELECOM COMPANY, PRESIDENT and SECRETARY, be sustained in part and denied in part. It is further ORDERED that the audit and proposed assessments be revised in accordance with *Conclusions of Law*, paragraph 10, and that the resultant amounts be fixed as the deficiencies due and owing.

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[24] Renumbered § 1352(27)(a) and (b) by Laws 2003, c. 413, § 1, eff. Nov. 1, 2003.

[25] A proposed 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. State ex rel. Oklahoma Tax Commission***, 1988 OK 91, 768 P.2d 359. In sales tax matters, "[t]he burden of proving that a sale was not a taxable sale shall be upon the person who made the sale." 68 O.S. 2001, 1365(E).

ADDENDUM TO
FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Division, as directed by the *Findings, Conclusions and Recommendations*, revised the proposed sales tax assessment and provided notice of the revisions to Protestants. Protestants have not challenged the revisions proposed by the Division.

Upon consideration of the *Findings, Conclusions and Recommendations* and the revisions to the assessments, the undersigned finds that the following findings should be added to and incorporated in the *Findings, Conclusions and Recommendations*:

1. That notice of the revisions to the assessments was filed of record in this cause on September 29, 2006.

2. That the Division revised the sales tax assessment to an amount of $32,271.95, consisting of tax in the amount of $23,512.60, penalty in the amount of $2,351.31, and interest accrued through September 30, 2006, in the amount of $6,408.04.

3. That the revisions comply with the recommendation set forth in the *Findings, Conclusions and Recommendations*.

4. That Protestants were provided notice of the revisions.

5. That Protestants did not file a response to the revisions.

The undersigned further finds that the following should be added to and incorporated in the *Findings, Conclusions and Recommendations*:

> It is further ORDERED that the amount in controversy, as revised, inclusive of any additional accrued and accruing interest, be fixed as the deficiency due and owing.

THEREFORE, the *Findings, Conclusions and Recommendations* issued on September 29, 2006, is amended to include and incorporate the above and foregoing findings of fact and recommendation.

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.