

**JURISDICTION:** OKLAHOMA TAX COMMISSION DECISION  
**CITE:** 87-11-17-30 / PRECEDENTIAL  
**ID:** P-85-248  
**DATE:** NOVEMBER 17, 1987  
**DISPOSITION:** DENIED  
**TAX TYPE:** SALES  
**APPEAL:** NO APPEAL TAKEN

### **ORDER**

This comes on before the Oklahoma Tax Commission pursuant to regular assignment on the agenda. The Commission, having reviewed the facts and authorities presented therein, and being fully advised in the premises, finds and orders that the Findings, Conclusions and Recommendations of the Administrative Law Judge, filed herein on the 23rd day of October, 1987, marked as Exhibit "A", attached hereto and hereby incorporated by reference as though fully set out herein, be and the same are hereby adopted as the Order of the Commission.

It is further determined that the statement of law contained herein is precedential in nature; thus, it is hereby ordered that this document be expunged of the protestant's name and identifying data, and that it be made available for public inspection at the M. C. Connors Building, 2501 Lincoln Boulevard, Oklahoma City, Oklahoma.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The above styled cause comes on for consideration pursuant to assignment made to ALJ, Administrative Law Judge, by the Oklahoma Tax Commission. A hearing was had, at which hearing, the Protestant appeared by attorney, ATTORNEY, and the Sales Tax Section of the Business Tax Division appeared by Attorney, OTC ATTORNEY. Testifying on behalf of the Protestant was PROTESTANT'S WITNESS, and testifying on behalf of the Sales Tax Section of the Business Tax Division were OTC WITNESS 1, OTC WITNESS 2 and OTC WITNESS 3. Exhibits, not herein itemized, were received into evidence and this case was submitted for a decision.

### **STATEMENT OF FACTS**

The Protestant is in the business of providing security systems to its customers. The Protestant contracts with a customer to place certain electronic protective equipment at the customer's home or business, as specified in the agreement, and thereafter provides services in regard to maintaining the equipment and monitoring the equipment. More specifically, the Protestant will install certain surveillance equipment in the premises of the customer. Most times, the equipment is connected to the customer's telephone whereby any alarm of the security system will automatically call the Protestant's monitoring station by telephone. Then, if warranted, the Protestant will notify the applicable police authorities. In very few cases, the Protestant will provide a security system that triggers only a local bell at the premises of the customer.

The Protestant normally contracts with a customer by standardized form whereby the terms of the agreement are specified. The following terms are a part of the contract utilized by the Protestant:

1. The subscriber expressly covenants and agrees not to tamper with, disturb, injure or remove or otherwise interfere with said apparatus nor to permit the same to be done. It is further agreed that the apparatus shall remain in the same location as installed, ...
2. Should any part of the alarm system be damaged by fire, riot, act of God, water or extraneous cause, repairs or replacement thereof shall be paid for by Subscriber.
3. Subscriber agrees that all alarm components remain the property of the Company and further agrees to allow Company access to property at any time after termination of this agreement and allow company to remove all alarm components.
4. The customer agrees to pay the following:
  - a. An amount for the cost of connecting the system and of installing the equipment.
  - b. An amount for operating the equipment.
5. Any liability established against the Protestant by virtue of the equipment or the relationship between the Protestant and the Customer shall be limited to the rental service contract to exceed six months.

The Sales Tax Section of the Business Tax Division conducted a field audit of the Protestant's business and by letter dated June 13, 1985, issued an assessment, for the period June 1, 1982 through March 31, 1985. The Protestant timely protested the assessment by letter dated August 9, 1985, after having received an extension of time in which to file a protest.

After further discussions by the parties, the original assessment letter was revised, and by letter dated May 15, 1986, the Sales Tax Section issued its revised assessment in the following amounts:

Sales Tax	\$18,503.14
Interest	4,121.45
Penalty	<u>1,853.36</u>
TOTAL	\$24,475.25

### ISSUES

- (1) Whether a sale has occurred pursuant to the provisions 68 O.S. 1981, §§1352(L) and 1354?

### **CONTENTIONS**

The Protestant contends that title to the equipment has not passed since the agreement between the Protestant and the customer that the equipment shall remain the property of the Protestant. The Protestant further contends that possession of the equipment has not transferred since the customer never has control of the equipment, citing Ford v. Oklahoma Tax Commission, 285 P.2d 436 (Okla. 1955). The Protestant also contends that the essence of the contract is for the provision of electronic surveillance services and not the sale of tangible personal property. The Protestant finally contends that installation charges and service costs are not taxable under the Sales Tax Code because of the exemption found at 68 O.S. 1981, §1354(Q).

The Sales Tax Section contends that the Protestant's business involves the lease of tangible personal property for a valuable consideration and is thus a sale within 68 O.S. 1981, §§1352(L) and 1354. More specifically, the Sales Tax Section argues that there is indeed a transfer of possession of the equipment, citing Ford v. Oklahoma Tax Commission, supra.

### **APPLICABLE LAW**

68 O.S. 1981, §1354 provides as follows:

There is hereby levied upon all sales, not otherwise exempted in this article, an excise tax of two percent (2%) of the gross receipts or gross proceeds of each sale of the following:

(A) Tangible personal property; ...

(Q) Gross receipts or gross proceeds from the rental or lease of tangible personal property, including rental or lease of personal property when the rental or lease agreement requires the vendor to launder, clean, repair, or otherwise service the rented or leased property on a regular basis, without any deduction for the cost of the service rendered. Provided if the rental or lease charge is based on the retail value of the property at the time of making the rental or lease agreement and the expected life of the property, and the rental or lease charge is separately stated from the service cost in the statement, bill, or invoice delivered to the consumer, the cost of services rendered shall be deducted from the gross receipts or gross proceeds;

[NOTE: The tax rate was increased during the audit period by amendments to Section 1354]

Of critical importance to the Section 1354 levy is the definition of the word "sale". 68 O.S. 1981, §1352(L) defines "sale" as follows:

“Sale” shall mean the transfer of either title or possession of tangible personal property for a valuable consideration regardless of the manner, method, instrumentality or device by which the transfer is accomplished in this state, including but not limited to:

(1) The exchange, barter, lease or rental of tangible personal property resulting in the transfer of the title to or possession of the property; ...

It is clear from a reading of the Protestant’s agreement entered into with its customers that the title to the Protestant’s equipment remains in the Protestant. The agreement specifically provides “Subscriber agrees that all alarm components remain the property of the Company.... There is thus no transfer of title. The next question, whether there is a transfer of possession, is not as easily determined.

The Protestant contends that possession of the equipment has not transferred since it retains control over the equipment. That is, the Protestant argues, it can in effect shut off the equipment at its central location and thereby render the equipment useless. Again, the Protestant argues that it has not given up the custody or control over the equipment. However, the equipment is physically located on the premises of the Protestant’s customer. The equipment is installed at the customer’s premises and the customer can effectively lock out the Protestant from regaining the equipment, short of a court order. As stated by the Division, if the Protestant did not relinquish possession of its security equipment, the Protestant could only provide a security system to itself. Both parties rely on the Oklahoma Supreme Court case of Ford v. Oklahoma Tax Commission, supra.

In Ford, the Appellant was engaged in the business of renting its automobiles and trucks to the general public. The Appellant did not furnish the drivers with the vehicles and it delivered possession to the renters of the vehicles under written agreement providing that the renter will return the vehicle to the owner on a date certain or sooner upon demand of the owner. The issue before the Court was whether a sale occurred; more specifically, whether a transfer of possession occurred.

The Court began its analysis by setting forth the statutory provisions, 68 O.S. 1951, Section 1251(A), the predecessor statute of Section 1352(L). Section 1251(A) provided:

(c) Sale: the term “sale” is hereby declared to mean the transfer of either the title or possession of tangible personal property for a valuable consideration, ... The term “sale” is also declared to include the ... lease or rental of tangible personal property where such ... lease or rental results in either the transfer of a title or the possession....

Ford, at 4.

The Appellant contended that the rental of the vehicles to the users for a short period of time and with the right of the Appellant to retake the vehicle at any time did not amount to a

transfer of possession within the meaning of the Sales Tax Code. The Appellant further contended that the character of the possession referred to in the statute defining “sale” connoted a permanent possession carrying the exclusive and whole possession, both actual and constructive, and not a temporary possession such as in the case at hand.

The Court disagreed with the Appellant’s assertions. The Court stated:

We may not speculate as to a probable intent of the Legislature apart from the words of the statute. “Sale” is defined in statute, and unless there is doubtfulness, doubleness of meaning, or indistinctness or uncertainty of meaning of the language and expression used in defining sale, the statute is to be applied, and not interpreted, since the statute speaks for itself.

Ford, at 437.

The Court ultimately held:

Under all circumstances in its connection with tangible personal property the otherwise unmodified word “possession” clearly refers to him who has actual physical control of a thing and conveys a clear and definite meaning. In short, we find no ambiguity in the statutory language defining a sale. The statutory definition of “sale” clearly fits the situation of the appellants to which it was applied.

Ford, at 437-38.

Applied to the facts of the instant case, there could be no question that the customer of the Protestant does indeed have the actual physical control of the security equipment. The equipment is installed on the premises of the customer and the customer exercises the exclusive control over said equipment. The Protestant does reserve the right of access to the equipment for removal, just as the Appellant in Ford reserved the right to the return of the vehicle on demand. There is thus no doubt that a transfer of possession of the equipment in question has occurred.

The next question is whether there has been a transfer of possession of tangible personal property for a valuable consideration. The Protestant contends that it is in the business of providing a service and incidental to said service tangible personal property is transferred. The Business Tax Division contends otherwise.

The payment terms of the Protestant’s agreement with its customers provide for:

- (1) A sum for the cost of connecting the system and for installing the equipment; and,
- (2) A sum for operating the apparatus, payable either monthly or quarterly.

The operating payment was termed a lease/rental payment on the Protestant's statements to its customers and it is that payment which was assessed the sales tax. The Protestant contends that the monthly operating charge is for the services provided by the Protestant and does not represent a lease of tangible property. The Protestant contends the charge was termed a lease for lack of a better description. There was testimony to the effect that the actual cost of the equipment was incorporated into the installation fee. (No taxes were assessed against the installation fee)

However, there was also testimony to the effect that not the total cost of the equipment was in the installation charge. Additionally, the testimony revealed that there was a correlation between the cost of the equipment installed and the monthly operating charge. This testimony would indicate that the monthly operating charge was, at least partly, attributable to the "rental" of the equipment. The testimony also revealed that a customer can switch off the equipment at his premises, have no monitoring performed, and would still be required to pay the monthly charge. It is clear that the charges in such cases could be for nothing other than the lease of the equipment. Moreover, some of the Protestant's customers have systems installed with a local bell alarm only and no monitoring services are connected to the telephone. Again, the monthly charge could be for nothing other than the rental of the equipment.

This case has been well briefed and well argued by the parties. While there is testimony and documentation to support both positions, the undersigned is of the opinion that the Protestant has simply not sufficiently met its burden of proving that the sales tax assessment in question was incorrect. (See Rule 26 of the Rules of Practice and Procedure Before the Oklahoma Tax Commission)

It is also necessary to note that there were items within the assessment that were outright sales of equipment (such as telephones). The Protestant did not protest said amounts and the Business Tax Division was instructed to notify the Protestant of the tax due on those items.

### **CONCLUSIONS OF LAW**

(1) The Oklahoma Tax Commission has jurisdiction in this matter. 68 O.S. 1981, Section 207.

(2) A change of possession did occur within the definition of the term "sale". 68 O.S. 1981, §1352(L). (See also Ford v. Oklahoma Tax Commission, 285 P.2d 436 (Okla. 1955)).

(3) There was a transfer of possession of tangible personal property for a valuable consideration pursuant to 68 O.S. 1981, §1352(L).

(4) The Protestant has failed to meet its burden of proving that the sales tax assessment was incorrect. (See Rule 26 of the Rules of Practice and Procedure Before the Oklahoma Tax Commission).

(5) The Business Tax Division's revised assessment letter of May 15, 1986, in the total amount of Twenty-four Thousand Four Hundred Seventy-five Dollars and Twenty-five Cents (\$24,475.25) plus any additional accrued interest is correct.

**DISPOSITION**

It is the ORDER of the OKLAHOMA TAX COMMISSION that the protest of COMPANY to the proposed assessment of additional sales tax, penalty and interest be denied.

OKLAHOMA TAX COMMISSION