

ATTACHMENT 1



OKLAHOMA TAX COMMISSION

STATE OF OKLAHOMA

THOMAS E. KEMP, JR., Chairman
STEVE BURRAGE, Vice Chairman
DAWN CASH, Secretary-Member

2501 NORTH LINCOLN BLVD.
OKLAHOMA CITY, OK 73194-0001

DATE OF MAILING:

February 27, 2015

E. Kendrick Smith
John M. Allan
Jones Day
1420 Peachtree Street, N.W., Ste. 800
Atlanta, GA 30309-3053

David Kutik
Jones Day
901 Lakeside Avenue
Cleveland, OH 44114

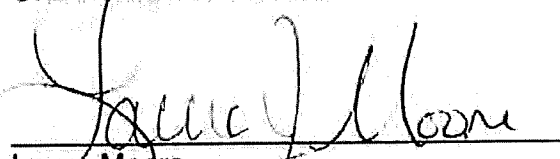
Re: Lowe's Home Centers, LLC, a/k/a Lowe's Home Centers, Inc.;
Case No. P-09-195-H

Transmittal and Certificate of Mailing or Service

Transmitted here with is a certified copy of the Oklahoma Tax Commission Order No. 2015-02-26-13 issued in the above matter.

I hereby certify that on the above date a true and correct copy of the above referenced Order was e-copied to the Office of the General Counsel of the Oklahoma Tax Commission, the Administrative Law Judge, and a certified copy was mailed by U.S. Mail to the person whose name and address appears above.

OKLAHOMA TAX COMMISSION



Laura Moore
Headquarters Division

BEFORE THE OKLAHOMA TAX COMMISSION
STATE OF OKLAHOMA

IN THE MATTER OF THE SALES TAX)
AND USE TAX PROTEST OF LOWE'S)
HOME CENTERS, LLC A/K/A LOWE'S)
HOME CENTERS, INC.)

CASE NO. P-09-195-H

ORDER NO. 2015 02 26 13

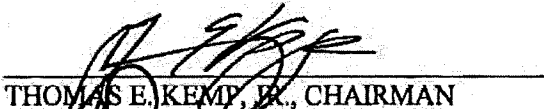
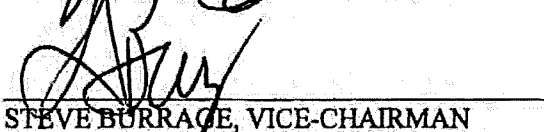
This comes on before the Oklahoma Tax Commission pursuant to regular assignment on the Agenda. The Commission, having reviewed the facts and authorities presented and being fully advised in the premises, finds and orders that the Application for Oral Argument Before the Oklahoma Tax Commission En Banc is hereby denied. Having reviewed the files and records herein, the Commission hereby adopts the Findings of Fact, Conclusions of Law and Recommendation made and entered by the Administrative Law Judge on the 7th day of July, 2014, and the same, appended hereto, together herewith shall constitute the Order of the Commission.

DATED this FEB 26 2015.

OKLAHOMA TAX COMMISSION



ASSISTANT SECRETARY


THOMAS E. KEMP, JR., CHAIRMAN
STEVE BURRAGE, VICE-CHAIRMAN

I do hereby certify that the above and foregoing is a true copy of the original document now on file in my office. Witness my hand and the seal of The Oklahoma Tax Commission on this FEB 26 2015
Dawn Cash Secretary Member
By Dawn Q Moore
Assistant Secretary
Oklahoma Tax Commission

DAWN CASH, SECRETARY-MEMBER

BEFORE THE ADMINISTRATIVE LAW JUDGE

OKLAHOMA TAX COMMISSION

STATE OF OKLAHOMA

FILED
OKLAHOMA TAX COMMISSION
JUL 07 2014
OFFICE OF ADMINISTRATIVE
LAW JUDGES

IN THE MATTER OF THE SALES TAX)
AND USE TAX PROTEST OF LOWE'S)
HOME CENTERS, LLC F/K/A LOWE'S)
HOME CENTERS, INC.)

CASE NO. P-09-195-H

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

(ISSUE NO. TWO)

NOW on this 7th day of July, 2014, the above-styled and numbered cause comes on for consideration pursuant to assignment regularly made by the Oklahoma Tax Commission to Jay L. Harrington, Administrative Law Judge. Lowe's Home Centers, LLC f/k/a Lowe's Home Centers, Inc.¹ ("Protestant") appears through attorneys, John M. Allan, E. Kendrick Smith, and David Kutik, JONES DAY. The Compliance Division ("Division") of the Oklahoma Tax Commission appears through Marjorie L. Welch, First Deputy General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On November 20, 2009, the protest file was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*² and the

¹ On March 3, 2014, the Protestant filed its *Proposed Findings, Conclusions and Recommendations (Issue No. 2)* advising that it is now known as Lowe's Home Centers, LLC. According to the Oklahoma Secretary of State's website located at <https://www.sos.ok.gov>, Lowe's Home Centers, Inc. was formed February 27, 1985 and converted to an LLC, effective November 14, 2013. OKLA. ADMIN. CODE § 710:1-5-36 (July 11, 2013).

² OKLA. STAT. ANN, tit. 68, § 201 *et seq.* (West 2001).

2015 02 26 13

*Rules of Practice and Procedure Before the Office of Administrative Law Judges.*³ On November 23, 2009, the Court Clerk ("Clerk")⁴ mailed the Introductory Letter to the Protestant's Counsel, which advised of the case assignment to Jay L. Harrington, Administrative Law Judge ("ALJ"), and docketed as Case Number P-09-195-H. The letter also advised Counsel that a Notice of Prehearing Conference ("PHC") would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Office of Administrative Law Judges.*⁵ On November 23, 2009, the ALJ advised that the Oklahoma Bar Association must grant out-of-state attorneys a Special Temporary Permit to Practice in the State of Oklahoma.⁶

On December 2, 2009, Ms. Welch filed an Entry of Appearance as Counsel for the Division. On December 8, 2009, the Clerk mailed the Notice of PHC to Counsel, setting the PHC for January 11, 2010, at 2:30 p.m. On December 21, 2009, Protestant filed a Motion to Associate Counsel (Mr. Allan), with Exhibits A through C, attached thereto. On December 22, 2009, the ALJ issued an Order Admitting to Practice.

On January 6, 2010, the Division, on behalf of the parties, filed a Request for Scheduling Order in Lieu of Scheduled Prehearing Conference, along with a proposed scheduling order. On January 8, 2010, the Protestant filed a Motion to Associate Counsel (Mr. Smith), with Exhibits A through C, attached thereto. On January 11, 2010, the ALJ issued an Order Admitting to Practice. On January 11, 2010, the ALJ issued a Scheduling Order and Notice of Alternative Hearing Date.

On February 12, 2010, the Division filed its Preliminary Witness and Exhibit List.

³ OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

⁴ OKLA. ADMIN. CODE § 710:1-5-10(c)(2) (June 25, 2009).

⁵ *Id.* Unless otherwise noted herein, the ALJ notified the parties by letter.

⁶ OKLA. STAT. tit. 5, Ch. 1, App. 1, Art. 2, § 5 (West Supp. 2009).

On March 22, 2010, the parties filed a Joint Request to Suspend Scheduling Order in order to address and resolve discovery issues and potential resolution of issues in this matter. On March 23, 2010, the ALJ issued an Order Granting Joint Request to Suspend Scheduling Order, with a revised proposed schedule to submit on or before May 6, 2010.

The ALJ omits the Procedural History from April 28, 2010 to June 19, 2011. On June 20, 2011, Mr. Kutik filed an Entry of Appearance as Co-Counsel for the Protestant.⁷

The ALJ omits the Procedural History from August 12, 2011 to November 16, 2011. On November 17, 2011, the parties filed a Joint Status Report requesting the issues in this matter be bifurcated,⁸ as more fully set forth therein.

On November 22, 2011, the ALJ issued an Order Bifurcating Proceedings as follows, to-wit:

Issue No. One

Whether Protestant properly took sales tax deductions on its Oklahoma sales tax returns during the period of November 12, 2004 through October 31, 2007 for purchases made on private label credit cards ("PLCC") when the PLCC accounts were written off as worthless and deducted on LHC's federal corporate income tax returns, will be submitted on stipulations and briefs in accordance with the *Amended Scheduling Order* dated September 28, 2011.

Issue No. Two

Whether and to what extent Protestant is acting as a "contractor" under Oklahoma law when it contracts to affix tangible personal property to real property owned by its customers, is hereby bifurcated from Issue No. 1. On or before February 17, 2012, a status report regarding Issue No. 2 is to be submitted to the undersigned.⁹

On February 17, 2012, the parties filed a Joint Status Report on Issue No. Two advising that this matter could not be resolved and the parties requested to file a proposed scheduling

⁷ Mr. Kutik is admitted to practice in the State of Oklahoma. See Entry of Appearance filed herein.

⁸ The parties filed the Joint Status Report pursuant to a Teleconference with the ALJ on November 15, 2011.

⁹ On November 29, 2012, the ALJ issued an Amended Scheduling Order on Issue No. Two, as more fully set forth therein.

order in thirty (30) days. On February 28, 2012, the ALJ advised the parties to submit a joint proposed scheduling order on or before March 19, 2012.

On March 19, 2012, the parties filed a Joint Proposed Scheduling Order. On March 20, 2012, the ALJ issued the Scheduling Order setting this matter for hearing on October 9 & 10, 2012, at 9:30 a.m., with position letters and/or memorandum briefs due on or before September 28, 2012.

On August 15, 2012, the parties filed a Request to Modify Scheduling Order on Issue No. Two. On August 17, 2012, the ALJ issued an Amended Scheduling Order to submit this matter on stipulations, briefs, and the ALJ to hear Oral Argument on March 5, 2013, at 9:30 a.m.

On November 28, 2012, the parties filed a Joint Motion to Amend Scheduling Order (Issue No. Two) as more fully set forth therein. On November 29, 2012, the ALJ issued an Amended Scheduling Order (Issue No. Two) with the ALJ to hear Oral Argument on May 6, 2013, at 9:30 a.m.

On March 15, 2013, the parties filed a Joint Motion to Suspend Amended Scheduling Order (Issue No. Two) until the record closed on Issue No. One and submitted for decision. On March 19, 2013, the ALJ issued the Order (Issue No. Two) striking the November 29th Scheduling Order. The ALJ directed the parties to file a proposed scheduling order on Issue No. Two, within fifteen (15) days after the record closed and the case submitted for decision on Issue No. One.

On July 2, 2013, the parties filed a Joint Proposed Scheduling Order, as more fully set forth therein.¹⁰ On July 3, 2013, the ALJ issued the Scheduling Order on Issue No. Two with a hearing set for November 18-19, 2013, at 9:30 a.m., with position letters and/or memorandum briefs due on or before November 12, 2013.

¹⁰ On June 18, 2013, the ALJ closed the record and Issue No. One submitted for decision.

On August 6, 2013, Ms. Burdg filed an Entry of Appearance as Co-Counsel of record for the Division.

On September 30, 2013, the Division filed a Request for Extension of Time to File Pretrial Motions and Responses. Counsel for the Protestant did not have any objection to the request. On September 30, 2013, the ALJ issued an Order Granting Request for Extension of Time on Issue No. Two extending the deadlines for filing Pretrial Motions and Responses to October 4, 2013 and October 21, 2013, respectively.

On October 7, 2013, the Protestant filed a *Motion for Summary [Disposition] and Memorandum of Law* ("MSD"),¹¹ with Exhibits 1 through 3, attached thereto. On October 8, 2013, the parties filed the Stipulated Facts and Issue (Issue No. Two). On October 8, 2013, the ALJ directed the Division to file its response to the Protestant's MSD on or before October 21, 2013. On October 21, 2013, the Division filed its *Response to Protestant's Motion for Summary Disposition and Memorandum of Law in Support of its Motion for Summary Disposition* ("Response") to the Protestant's MSD.

On November 1, 2013, the ALJ confirmed the teleconference held on October 31, 2013,¹² as follows, to-wit:

The undersigned has summarized the matters discussed during the Teleconference, as follows, to-wit:

Issue One (1): Pursuant to OTC Order No. 2013-10-17-03 (October 17, 2013), and Stipulation No. 34, the verification of the Bad Debt Deductions (dollar amount) is remanded back to the parties to determine a reasonable sampling method. The parties are to file a status report on or before January 29, 2014.

Issue Two (2):

- Division's Counsel is to provide contact information for the cities of Tulsa and Oklahoma City, if they wish to attend any hearing and/or Oral Argument on Issue Two (2). The Clerk will send out notice to the respective municipalities.
- Protestant's Counsel is to determine the dollar amounts for Type 1 and Type 2 Installations, and file a status report, prior to hearing.
- Division's Counsel is to email the electronic copies of Stipulated Exhibits 6, 7,

¹¹ See OKLA. ADMIN. CODE § 710:1-5-38.1 (July 11, 2013).

¹² The ALJ held the teleconference at his request.

and 12. The undersigned will review the electronic copies to determine if they are legible and acceptable. If they are not legible, the undersigned will advise Counsel in writing that legible hard copies must be obtained to replace the current Stipulated Exhibits.

- Counsel will supplement the Stipulated Exhibits to include copies of the "Itemized Materials and Labor List(s)," which reflect how the lump sums were determined on the Installation Contracts, which comprise Stipulated Exhibit 7. To the extent possible, as discussed, Counsel will provide an example(s) of cash register receipts to support Stipulated Exhibit 7.
- Counsel will provide an example(s) of contracts between Protestant and the Installers.
- The undersigned confirmed with Division's Counsel that the statement made in the Protestant's *Motion for Summary Disposition*, Page 2, and Footnote 1 is accurate. The Division "...is not challenging the fact that the Installation Contracts involved improvements to real property."
- The undersigned advised Counsel that a ruling on the pending *Motion for Summary Disposition* would not issue prior to hearing, but would be incorporated into the *Findings, Conclusions and Recommendations*.
- The Division has not filed its own *Motion for Summary Disposition*. The Division filed only a *Response* to the Protestant's *Motion for Summary Disposition* on October 21, 2013.
- The parties are attempting to resolve any issues regarding Type 2 Installations prior to hearing. If the parties cannot resolve any issues regarding Type 2 Installations prior to hearing, the parties will attempt to enter into Stipulations. If Stipulations are possible, the parties will file Briefs supplementing the *Motion for Summary Disposition* and the *Response*, on November 12, 2013, according to the Scheduling Order. In that event, a hearing on the merits will not be necessary. Counsel indicated that they wished to present Oral Arguments on the pending *Motion for Summary Disposition*, which would be held on November 18, 2013, at 9:30 a.m., in accordance with the Scheduling Order. If the parties cannot agree on Stipulations for Type 2 Installations, then the parties would file Briefs on November 12th. Oral Arguments would be held at 9:30 a.m. on November 18th, followed by a hearing on the merits regarding Type 2 Installations. Counsel will advise the undersigned how the parties wish to proceed prior to November 12, 2013.
- Protestant's Counsel advised that Issue II has been taken to hearing in one (1) other jurisdiction, that being the State of Indiana. Counsel indicated the hearing was held last week in Indiana. (Emphasis added.)

The undersigned did not address one (1) matter during the Teleconference. Has Protestant engaged its own Court Reporter for purposes of the hearing/Oral Argument on November 18th? If not, does it intend to or does the Clerk need to make other arrangements? Please advise the Clerk if other arrangements should be made by this office.

On November 6, 2013, the ALJ notified the City of Bixby and the City of Oklahoma City of the pending hearing, as follows, to-wit:

Pursuant to the Municipalities' request that they receive notice of protests and claims for refund hearings; please be advised that a hearing has been scheduled in the above-captioned matter on November 18-19, 2013, at 9:30 a.m. in the Courtroom located at 3700 North Classen, Suite 260, Oklahoma City, Oklahoma.

For details concerning the hearing, please contact Ms. Welch, in the Office of General Counsel, at (405) 319-8550.

On November 12, 2013, the parties filed Supplemental Stipulations, with Exhibits A through C, attached thereto.¹³ On November 18, 2013, at 9:30 a.m. the ALJ heard Oral Argument on the Protestant's *MSD*.¹⁴ Mr. Smith appeared on behalf of the Protestant. Ms. Welch and Ms. Burdg appeared on behalf of the Division. Representatives for the Municipalities appeared not.¹⁵ Mr. Smith provided Binders to Division's Counsel and the ALJ, with Exhibits A through N, for "demonstrative" purposes only.¹⁶ The Division did not have any objection to the use of the exhibits for "demonstrative" purposes only.¹⁷ After Oral Argument concluded, the ALJ advised Mr. Smith that the Protestant's *MSD* did not include an argument on the violation of equal protection.¹⁸ Ms. Welch did not object, and advised the Division would address the equal protection argument in its "proposed" Findings of Fact and Conclusions of Law. The ALJ announced judicial notice of the "electronic" copies of Stipulated Exhibits 6, 7, and 12, which the Division provided.¹⁹ The parties did not object. At the conclusion of Oral Argument, the ALJ held the record open for the Protestant to make a written request for a transcript of Oral Argument.²⁰ Upon receipt of the transcript the ALJ gave the parties notice the date proposed Findings of Fact and Conclusions of Law ("*Proposed Findings*") would have to be filed. Upon

¹³ The parties stipulated to Supplemental Exhibits A through C. Tr. at 6.

¹⁴ The Protestant, through Mr. Smith, waived its right to a confidential hearing as provided by the provisions of OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2014). Mr. Smith subsequently withdrew the waiver of confidentiality. See Procedural History hereinafter.

¹⁵ Tr. at 4.

¹⁶ Tr. at 8-9.

¹⁷ *Id.*

¹⁸ Tr. at 46-48.

¹⁹ Tr. at 6-7. See Note 1, *supra*.

²⁰ Tr. at 7.

the filing of the *Proposed Findings*, the ALJ would close the record and the Protestant's *MSD* would submit for decision. On November 19, 2013, by e-mail, the Clerk received the written request for a transcript of Oral Argument on the Protestant's *MSD*.²¹ Mr. Smith also requested that the Protestant's waiver of confidentiality be withdrawn and confidentiality invoked.²² The Division did not object to the request. On November 20, 2013, the ALJ issued an Order Granting Request to Withdraw Waiver of Confidentiality and to Invoke Confidentiality (Issue No. Two).²³ On November 20, 2013, the ALJ advised the Protestant the "estimated" cost of the transcript was \$86.30. On November 25, 2013, the Clerk received the check for the "estimated" cost of the transcript.

On December 26, 2013, the Clerk received the Transcript from the Court Reporter. On December 27, 2013, the ALJ notified the Protestant that the "final" cost of the Transcript was \$125.00 minus \$86.30 leaving a balance due of \$38.70.

On January 16, 2014, the Clerk received the balance for the "final" cost of the Transcript. On January 17, 2014, Clerk mailed "copies" of the Transcript to the parties. The ALJ advised the parties *Proposed Findings* file on or before March 3, 2014, at which time the ALJ would close the record and the Protestant's *MSD* submit for ruling.

On March 3, 2014, by e-mail, the Protestant filed its *Proposed Findings*, which also serves as the Protestant's Post-Hearing Brief. On March 4, 2014, due to inclement weather,²⁴ the Division filed its *Proposed Findings*, which also serves as the Division's Post-Hearing Brief. On

²¹ On November 22, 2013, the Clerk received a hard copy of the letter.

²² See Note 14, *supra*.

²³ *Id.*

²⁴ On Sunday, March 2, 2014, at 8:14 p.m. the Commissioner of Public Safety, as authorized by the Governor, announced that due to inclement weather state agencies could temporarily reduce non-essential services. The Office of Administrative Judges was closed on March 3, 2014 and open for business on March 4, 2014. See Note 1, *supra*.

March 5, 2014, the ALJ acknowledged the filing of the parties' *Proposed Findings*. The ALJ closed the record and submitted the Protestant's *MSD* for ruling on March 4, 2014.

On April 1, 2014, Ms. Burdg filed a Notice of Withdrawal as Co-Counsel of Record for the Division.

STIPULATED FACTS AND ISSUE

On October 8, 2013, the parties filed Stipulated Facts and Issue, with Exhibits 1 through 12, as follows,²⁵ to-wit:

The parties hereby submit this joint Stipulated Facts and Issue, limited to "Issue No. 2" relating to the protest of [Lowe's Home Centers, LLC f/k/a Lowe's Home Centers, Inc.²⁶ ("LHC" or "Taxpayer") to the assessment of state and local sales tax (and any corresponding interest and penalties) by the Compliance Division of the Oklahoma Tax Commission ("Division").

STIPULATED FACTS

Background

1. LHC is a corporation organized under North Carolina law with a principal place of business in Mooreville,²⁷ North Carolina. LHC was at all times registered to conduct business in Oklahoma during the assessment period of November 1, 2004 through October 31, 2007 (the "Assessment Period") at issue in this protest.

2. LHC is a retailer of home improvement products and services, including lumber, electrical and plumbing supplies, and other items for improving and maintaining residences and businesses. In addition, LHC also engages persons (the "Installers") to install products selected by LHC's customers such as roofing, vinyl siding, decks, hardwood, laminate flooring, vinyl flooring, ceramic tile, carpeting, doors and windows, storm doors and windows, showers,

²⁵ The text of the stipulated facts is set out verbatim, unless otherwise noted.

²⁶ See Note 1, *supra*.

²⁷ The Stipulations for Issue No. One reflects that the Protestant's principal place of business is Wilkesboro, North Carolina.

fencing, water heaters, water softeners, toilets, vanities, faucets and sinks, lights and ceiling fans, and kitchen countertops and cabinets at LHC's customers' locations.

3. LHC operates retail store locations in Oklahoma, each employing dozens of individuals.

Procedural Facts

4. Division, formerly the Audit Division, conducted a sales and use tax audit of LHC for the Assessment Period.

5. LHC executed Statute of Limitation Waiver Agreements on or about December 12, 2007 and July 29, 2008 extending the time to assess until December 31, 2008 and December 31, 2009, respectively. True and correct copies of the Statute of Limitation Waiver Agreements are attached hereto as Exhibit 1.

6. Division, by letters dated May 7, 2009, proposed to assess LHC and, as officers and individuals, Larry D. Stone, President, and David R. Green, Vice President, sales tax, penalty and interest accrued through June 30, 2009 in the amount of \$6,899,999.63. True and correct copies of the proposed assessment[s] are attached hereto as Exhibit 2.

7. LHC requested, and was granted, an extension of time to respond to Division's letter[s] of assessment until October 4, 2009. A true and correct copy of LHC's request for extension and Division's letter granting LHC's extension request is attached hereto as Exhibit 3.

8. LHC's timely protest to the assessments was dated October 1, 2009 and received by Division on October 2, 2009. A true and correct copy of LHC's protest is attached hereto as Exhibit 4.

9. Based on documentation submitted by LHC subsequent to filing its protest, Division revised its audit workpapers. With respect to "Issue No. 2," LHC and Division agree the amount of sales tax at issue, exclusive of penalty and interest, is \$1,343,371.27. A true and correct copy of the revised audit workpapers related to "Issue No. 2" is attached hereto as Exhibit 5.

Selection of Items By the Customer

10. All of the installation contracts ("Installation Contracts") included in Issue No. 2 involve a customer's selection of a product which was either in inventory at an LHC store or was specially ordered by an LHC store for the customer.

11. True and correct copies of photographs taken at an LHC store location in Norman, Oklahoma are attached as hereto as Exhibit 6.

The Installation Contracts

12. LHC regularly enters into written Installation Contracts with customers in Oklahoma. True, correct and representative copies of Installation Contracts used during the Assessment Period are attached hereto as Exhibit 7.

13. A true, correct and representative copy of the terms and conditions which appeared on Installation Contracts during the Assessment Period is attached hereto as Exhibit 8.

14. A true, correct and representative copy of LHC's installed sales policy in effect from the beginning of the Assessment Period through April 3, 2005 is attached hereto as Exhibit 9.

15. A true, correct and representative copy of LHC's installed sales policy in effect from April 4, 2005 through July 1, 2007 is attached hereto as Exhibit 10.

16. A true, correct and representative copy of LHC's installed sales policy in effect from July 2, 2007 through the end of the Assessment Period is attached hereto as Exhibit 11.

The Installation Transaction

17. Some of LHC's Installation Contracts require a "Detail Fee," sometimes referred to as an "in-home measurement fee," which includes among other things measuring and evaluating the space, determining how much installation materials will likely be necessary, and estimating how much time will be required for the installation. If required, LHC charges and collects from the customer a Detail Fee immediately and assigns an Installer to visit the customer location.

The Installer takes measurements at the customer's location and completes both a labor cost estimate and a material quantity estimate for the proposed project. Upon receiving the material quantity estimate, an LHC employee calculates the material component of the Installation Contract by multiplying the material quantity by the retail price of the products itemized in the contract, and adding the retail price of any additional materials that may be required for the installation. If the cost for basic installation is dependent on the amount of materials, such as _ \$ per sq. ft., the LHC employee multiplies the states price for installation by the quantity of materials to determine the labor cost for the Installation Contract. The customer receives credit towards the total Installation Contract price for any Detail Fee previously paid by the customer.

18. Once the customer agrees to the price and is ready to enter into an Installation Contract, the customer typically executes the Installation Contract at the service station in the area of an LHC store where the product is located. At the station, the LHC employee enters the specifics into its computer system, which then calculates the total amount that LHC will charge and collect from the customer. This information is then entered/printed on the face of the Installation Contract.

19. At the checkout register, the cashier processes the sale and collects payment for the Installation Contract using a cash register linked to LHC's computer system, which retrieves the previously entered information relating to the Installation Contract.

20. After the customer pays the amount of the Installation Contract in full, LHC typically, if it has in stock items to be installed, moves the materials identified in the Installation Contract to the Installed Sales Bay for pick-up by the Installer. In some cases, the manufacturer may directly deliver the items pursuant to the Installer's direction. In either event, although not prohibited by the Installation Contract, the customer generally does not take the materials to be installed from the store.

21. Once the installation is complete, the customer executes a Certificate of Completion, a true, correct and representative copy of which is attached hereto as Exhibit 12. Thereafter, LHC contacts the customer to determine if the customer is satisfied. Once the customer is satisfied with the installation, LHC pays the Installer for services rendered.

Tax Remittance

22. During the Assessment Period, LHC remitted Oklahoma state and local use tax to the OTC for the Installation Contracts included in Issue No. 2 on LHC's costs for the materials included in the Installation Contracts. LHC accrued and remitted local use tax based on the location of the store in which the customer executed the Installation Contract.

Division assessed LHC sales tax on the retail price of the materials identified in the Installation Contracts, sourcing its assessment to the city/county of installation. LHC was credited in the assessment for the amount of use tax remitted by LHC.

DECISION TO BE APPLIED TO SUBSEQUENT PERIODS

LHC and Division agree that the determination made with respect to the issues in this proceeding will be applied to subsequent periods provided the parties agree that the facts are substantially similar to the facts herein and there has been no change in applicable law.

SUPPLEMENTAL STIPULATIONS

1. Type 2 Installation Transactions: After the Administrative Law Judge conducted a pre-hearing conference with counsel on October 31, 2013, the parties conferred regarding the issue of "Type 2 Installations." Protestant Lowe's Home Center, Inc. ("LHC"), upon reviewing its own records and the audit work papers prepared by the Division, has now confirmed that the Division's sales tax assessment in this case (the "Assessment") does not include assessment of additional sales tax on Type 2 Installation transactions. As a result, the parties hereby stipulate as follows: (i) The assessment of additional sales tax does not include Type 2 Installation

transactions occurring in Oklahoma during the Assessment Period; (ii) the issue of whether Type 2 Installations²⁸ are subject to sale tax is not before the Administrative Law Judge in this case; and (iii) there is no need for a hearing or adjudication of any issues relating to Type 2 Installations.

2. **Customer Receipts**: Attached as Exhibit A are true and correct copies of sales receipts relating to Type 1 installation transactions given by LHC to customers in Oklahoma. Although the receipts were generated after the Audit Period in this case, their appearance is generally representative of the types of receipts provided to Installed Sales Contract customers during the Audit Period. The receipts typically itemized the materials and labor. LHC typically does not retain hard copies of the customer receipts on installation transactions.

3. **LHC Documentation**: Attached as Exhibit B is a true and correct copy of a LHC's store's electronic receipt information retained for a limited period of time by the store. Although the document contained in Exhibit B was generated after the Audit Period in this case, the document is representative of documents generated during the Audit Period.

4. **LHC Contract with Installer**: Attached as Exhibit C is a true and correct copy of a contract between LHC and an installer used in Oklahoma during the Audit Period. Its terms are typical of Installer Contracts used by LHC during the Audit Period.

²⁸ See MSD at 20. "For Type 2 Installations, either a manufacturer delivers the product to be installed directly to an Installer or the Installer already has the materials in his inventory. ...For Type 2 Installations, since LHC gains neither title to nor possession of the materials, the materials cost are not itemized in the Installation Contract." See also Exhibit 2 to MSD. "For some sales, LHC does not own the products and materials to be installed ("Type 2 Installations"), such as solid-surface granite countertops and certain brands of garage doors (e.g., Amarr and Wayne Dalton). For Type 2 Installations, either a manufacturer delivers the product to be installed directly to an Installer or the Installer already has the materials in his inventory. For Type 2 Installations, since LHC gains neither title to nor possession of the materials, the material costs are not itemized in the Installation Contract."

STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO CONTROVERSY

1. During the Assessment Period, the Protestant was a North Carolina corporation²⁹ with its principal place of business in Mooresville, North Carolina.³⁰ Claimant was at all times registered to conduct business in Oklahoma during the Assessment Period.³¹

2. Protestant is a retailer of home improvement products and services, including lumber, electrical, and plumbing supplies, and other items for improving and maintaining residences and businesses. In addition, Protestant also engages (the "Installers") to install products selected by Protestant's customers such as roofing, vinyl siding, decks, hardwood, laminate flooring, vinyl flooring, ceramic tile, carpeting, doors and windows, storm doors and windows, showers, fencing, water heaters, water softeners, toilets, vanities, faucets and sinks, lights and ceiling fans, and kitchen countertops and cabinets at Protestant's customers' locations.³²

3. During the Assessment Period, Protestant regularly entered into a Contract For Installation Services with Installers.³³ The terms of a typical Contract For Installation Services, in pertinent parts,³⁴ states as follows, to-wit:

WHEREAS, [Protestant] does not install certain goods and/or materials ("Goods") sold by it and customers purchasing such Goods at times desire to arrange for installation hereof by a qualified Installer; and

²⁹ See Note 1, *supra*.

³⁰ See Stipulation 1.

³¹ *Id.*

³² See Stipulation 2. See also MSD Exhibit 2. "[Protestant] primarily engages in two types of customer transactions: (i) standard retail sales of tangible personal property and some services (*i.e.* assembly and delivery services) to customers (no contract); and (ii) installation contract transactions undertaken pursuant to its installed sales and real property improvement line of business ("Installation Contracts")."

³³ *Id.* See Supplemental Stipulation 4. See also Supplemental Exhibit C.

³⁴ *Id.*

WHEREAS, [Protestant] is willing to arrange for certain of said installations as desired by customers through Installer; and

WHEREAS, Installer is willing and desires to do such installation work but only as an independent Installer and not as an employee of [Protestant], and pursuant to the terms and conditions set out herein.

...

2. During the term of this Contract, Installer may accept one or more ("Order(s)") tendered by [Protestant], on behalf of customers, to install the following Goods:

Windows, Doors, Cabinets [sic]

(describe specific types of Goods, e.g., kitchen cabinets, flooring, ceiling fans, etc.) in customers' residential premises (the "Premises"), provided that each accepted Order can be performed satisfactorily by Installer. Acceptance of an Order shall occur when Installer executes the Installed Sales Contract between [Protestant] and its customer (the "Customer Contract") for the particular job covered by that Order. Installer will install the Goods and perform each Order in a neat and professional manner in accordance with (i) the Installation instructions as contained in the current manufacturer's specifications, (ii) Instructions as contained in the Customer Contracts, (iii) [Protestant's] Installer Performance Standards, a copy of which have been provided to Installer and which are incorporated by reference as if fully set out herein, (iv) the established trade practices in the area, and (v) all applicable laws, rules, regulations, ordinances, building codes, or other lawful requirement. Installer shall promptly notify [Protestant] and the applicable customer if, as a result of a change in existing applicable lawful requirements or enactment of a new applicable lawful requirement, any additional Goods or labor are necessary to complete the installation in accordance with the Customer Contract.

...

4. Installer stipulates and agrees that it has no ownership or security interest in any Goods furnished by [Protestant] for any Order accepted pursuant to this Contract, and that any such interest that might arise as a matter of law is hereby fully, unconditionally, and forever released and waived, that [Protestant] is the owner of such Goods unless and until they are purchased by [Protestant's]

installed customers as a bailee for hire.³⁵ In case of shortage of [Protestant's] Goods for any job, Installer will arrange with the [Protestant's] store where the Order is originated unless requested by the customer to leave such Goods. Installer will not install Goods containing defects and will notify [Protestant] promptly of any such defective Goods. Additionally, Installer will not be authorized to use [Protestant's] dumpsters to dispose of any waste Goods and shall dispose of such Goods in compliance with all applicable governmental law, rules, and regulations.

...

7. [Protestant] will tender, for acceptance by the Installer, the Customer Contract which shall contain the specifications for the

³⁵ "bailee." (16c) A person who receives personal property from another, and has possession of but not title to the property. • A bailee is responsible for keeping the property safe until it is returned to the owner. See bailment. [Cases: Bailment ¶1.] Black's Law Dictionary (9th ed. 2009), available at <http://westlaw.com>.

"bailment," (16c) 1. A delivery of personal property by one person (the *bailor*) to another (the *bailee*) who holds the property for a certain purpose, usu. under an express or implied-in-fact contract. • Unlike a sale or gift of personal property, a bailment involves a change in possession but not in title. Cf. pawn. [Cases: Bailment ¶1.] "The customary definition of a bailment considers the transaction as arising out of contract. Thus Justice Story defines a bailment as 'a delivery of a thing in trust for some special object or purpose, and upon a contract express or implied, to conform to the object or purpose of the trust' [Joseph Story, *Bailments* 5 (9th ed. 1878)]. There has, however, been a vigorous dissent to this insistence on the contractual element in bailments. Professor Williston ... defines bailments broadly 'as the rightful possession of goods by one who is not the owner' [4 Samuel Williston, *Law of Contracts* 2888 (rev. ed. 1936)].... It is obvious that the restricted definition of a bailment as a delivery of goods on a contract cannot stand the test of the actual cases. The broader definition of Professor Williston is preferable." Ray Andrews Brown, *The Law of Personal Property* § 73, at 252, 254 (2d ed. 1955). "Although a bailment is ordinarily created by the agreement of the parties, resulting in a consensual delivery and acceptance of the property, such a relationship may also result from the actions and conduct of the parties in dealing with the property in question. A bailment relationship can be implied by law whenever the personal property of one person is acquired by another and held under circumstances in which principles of justice require the recipient to keep the property safely and return it to the owner." 8A Am. Jur. 2d *Bailment* § 1 (1997). *actual bailment*. (1821) A bailment that arises from an actual or constructive delivery of property to the bailee. *bailment for hire*. A bailment for which the bailee is compensated, as when one leaves a car with a parking attendant. — Also termed *lucrative bailment*. Cf. *bailment for mutual benefit*. *bailment for mutual benefit*. (1868) A bailment for which the bailee is compensated and from which the bailor receives some additional benefit, as when one leaves a car with a parking attendant who will also wash the car while it is parked. Cf. *bailment for hire*. *bailment for sale*. A bailment in which the bailee agrees to sell the goods on behalf of the bailor; a consignment. [Cases: Bailment ¶2; Sales ¶457.] *bailment for sole benefit of bailor*. See *gratuitous bailment*. *constructive bailment*. (1843) A bailment that arises when the law imposes an obligation on a possessor of personal property to return the property to its rightful owner, as with an involuntary bailment. Cf. *involuntary bailment*. *gratuitous bailment*. (1811) A bailment for which the bailee receives no compensation, as when one borrows a friend's car. • A gratuitous bailee is liable for loss of the property only if the loss is caused by the bailee's gross negligence. — Also termed *naked bailment*; *depositum*; *naked deposit*; *gratuitous deposit*; *deposit*; *bailment for sole benefit of bailor*. *involuntary bailment*. (1840) A bailment that arises when a person accidentally, but without any negligence, leaves personal property in another's possession. • An involuntary bailee who refuses to return the property to the owner may be liable for conversion. — Also termed *involuntary deposit*. See *abandoned property*, *lost property*, *mislaid property* under property. Cf. *constructive bailment*. *lucrative bailment*. See *bailment for hire*. *naked bailment*. See *gratuitous bailment*. 2. The personal property delivered by the bailor to the bailee. [Cases: Bailment ¶4.] 3. The contract or legal relation resulting from such a delivery. [Cases: Bailment ¶1.] 4. The act of posting bail for a criminal defendant. 5. The documentation for the posting of bail for a criminal defendant. Black's Law Dictionary (9th ed. 2009), available at <http://westlaw.com>.

job to be performed and the installation charge based on the negotiated Schedule of Installer's Charges attached hereto as Appendix A (the "Installer's Schedule").³⁶ The Installer's invoice, (b) executed "Waivers of Lien", (c) executed Installer's Certification of Completion, (d) executed customer's Certificate of Completion, and (e) verification by [Protestant] that the Order has been properly completed in accordance with the Customer Contract and the provisions of this Contract. Installer will not be paid by [Protestant] for any work not specified on the Customer Contract unless agreed to in writing by [Protestant] in change order or new Customer Contract.

8. In the event customer requests changes in or additions to the specified work involving additional Goods or labor, or in the event a change is necessitated as a result of a change in the condition of the Premises from that stated in the Customer Contract, Installer will notify [Protestant] immediately. In the event no change order or new customer contract is executed by [Protestant's], Installer may not perform such work. If Installer performs such work it will be deemed a material breach of this Contract and Installer shall assume full responsibility and liability for all such work and must advise customer that said changes and/or additions, will not be subject to [Protestant's] guarantees. Further, all leads and prospects for additional business resulting from or in any way connected to any work or Orders tendered hereunder are the property of [Protestant].

...

18. In the event the full contract price under a Customer Contract is not paid upon execution, Installer, upon request of [Protestant] agrees to maintain a fidelity bond naming [Protestant] as an obligee with a company acceptable to [Protestant] and in an amount approved by [Protestant]. (Emphasis added.)

4. During the Assessment Period, the Protestant's Installed Sales Policy was in pertinent parts,³⁷ as follows, to-wit:

...

GENERAL DESCRIPTION. By this installed sales contract (the "Contract"), Customer agrees to purchase and [Protestant] agrees to sell the goods

³⁶ *Id.* Appendix A (the "Installers Schedule") is not attached to Supplemental Exhibit C.

³⁷ See Stipulations 14 through 16. See also Exhibits 8, 9 through 11.

and/or materials (the "Goods") and the services to install same (the "Installation Services") in or on the above-identified Premises, for the stated total cash price (the "Price") and according to the specifications and other provisions of the Contract documents, including (a) this Contract form, (b) the Addendum, if and to the extent applicable, (c) and any attached sketches, materials lists, floor plans, and/or specification sheets.

INSTALLATION SERVICES. Customer authorizes [Protestant] (a) to arrange for the Installation Services to be performed by an experienced Installer (licensed when legally required), (b) to issue a work order to the Installer to perform the Installation Services, (c) to inspect the Installer's work, and (d) to pay the Installer after completion of the work and after receipt of a certificate, signed and dated by Customer, that the work has been satisfactorily completed (the "Certificate of Completion"). Customer understands that [Protestant] will rely upon the Certificate of Completion in paying the Installer for the Installation Services.

GOODS. [Protestant] will arrange for delivery of the Goods to the Premises. Any surplus materials upon completion of the Installation Services shall remain the property of [Protestant] and shall be returned to [Protestant] by the Installer.

PRICE. The Price owed by Customer to [Protestant] covers the Goods, Installation Services, and applicable taxes. The Price assumes sound existing substructures, superstructure and points of attachments. The price shall be increased by the cost and reasonable profit to [Protestant] of having to provide additional Goods and/or Installation Services as a result of defective substructures, superstructures, or points of attachments.

PAYMENT. Payment of the Price by Customer to [Protestant] is due in full upon execution of the Contract.

...

MANUFACTURER WARRANTY FOR
GOODS/[PROTESTANT'S] WARRANTY FOR
INSTALLATION SERVICES.

Customer is entitled to any warranty provided by a manufacturer of the Goods sold under this Contract. The Installer will provide Customer with any manufacturer consumer warranty information accompanying the Goods, and Customer may also obtain such information by contacting [Protestant]. [Protestant] does not warrant the Goods. [Protestant] does warrant that the Installation Services will be performed by the Installer in a good and "workmanlike manner." ... (Emphasis added.)

From April 4, 2005 to July 1, 2007, and July 2, 2007 through October 31, 2007, there were "revisions" and/or "additions" to various provisions, but it appears that the three (3) "Installed Sales Policies" in effect during the Assessment Period are substantially the same as set out above. The "revisions" and/or "additions" appear to consist mostly of procedural changes addressing how the Protestant handles and/or processes Installed Sales.³⁸

5. During the Assessment Period, Protestant regularly entered into written "Installation Contracts" with customers in Oklahoma.³⁹

6. Once the customer agrees to the price and is ready to enter into an "Installation Contract," the customer typically executes the "Installation Contract" at the service station in the area of a Protestant's store where the product is located. At the station, the Protestant's employee enters the specifics into its computer system, which then calculates the total amount that Protestant will charge and collect from the customer. This information is then entered/printed on the face of the "Installation Contract."⁴⁰

³⁸ *Id.*

³⁹ *Id.* See Stipulation of Facts 12 and 17. See also Exhibit 7 for Representative copies of "Installation Contracts" used during the Assessment Period.

⁴⁰ *Id.* See Stipulation 18. See also Exhibit 8.

7. At the checkout register, the cashier processes the sale and collects payment for the Installation Contract using a cash register linked to Protestant's computer system, which retrieves the previously entered information relating to the Installation Contract.⁴¹

8. After the customer pays the amount of the Installation Contract in full, Protestant typically, if it has in stock items to be installed, moves the materials identified in the Installation Contract to the Installed Sales Bay for pick-up by the Installer.⁴²

9. In some cases, the manufacturer may directly deliver the items pursuant to the Installer's direction. In either event, although not prohibited by the Installation Contract, the customer generally does not take the materials to be installed from the store.⁴³

10. Once the installation is complete, the customer executes a Certificate of Completion, which is part of the Itemized Installed Sales Contract.⁴⁴ The Certificate of Completion contains the following information, to-wit:

<u>Customer Name</u>	<u>Printed Store Number</u>	<u>P.O. #</u>
I, the buyer, hereby certify that the Contractors, or their assigned sub-contractors, furnished all goods and/or services, that installation, repairs and alteration or improvements have been completed as set-forth in our sales contract with [Protestant] defined in the contract.		
Date	Buyer's Signature	Address

⁴¹ See Stipulation 19. See also Supplemental Stipulations 2 and Exhibits A and B. "The receipts typically itemizes the materials and labor."

⁴² See Stipulation 20.

⁴³ Id.

⁴⁴ See Stipulation 21. See also Exhibits 7 and 12.

11. The Subcontractor ("Installer") executes a Waiver of Lien and One Year Warranty, which is also part of the Itemized Installed Sales Contract,⁴⁵ and states as follows, in pertinent part, to-wit:

I, the undersigned Contractor, having been employed by the customer whose name appears on the reverse side, do hereby certify that the work referred to on the reverse side has been completed to the customer's satisfaction. In consideration of the receipt of one dollar and other good consideration and valuable consideration, I hereby acknowledge receipt of PAYMENT IN FULL, and hereby waive and relinquish all liens and all rights and claims of liens which I, the undersigned, now have or may hereafter have for labor or material furnished. I, the undersigned, certify that all the work performed and materials furnished, if any, by any other party or parties upon the order of the undersigned, has been fully paid for. Further, I the undersigned, agree to cause the prompt release of any mechanic's lien which may be filed against the premises referred to on the reverse side by any subcontractor, laborer, mechanic or material supplier claiming the right to file such a lien through work related to this contract. I further agree to hold harmless and indemnify the customer whose name appears on the reverse side and/or [Protestant], from and against all costs and expenses arising from or by reason of such lien or the release or discharge of such liens.

12. All of the Installed Sales Contracts covered by the Assessment Period involved an improvement to real property.⁴⁶

⁴⁵ See Exhibits 7 and 12. Some of the examples of Installed Sales Contract in Exhibit 7 omit the language "I hereby acknowledge receipt of PAYMENT IN FULL."

⁴⁶ See Procedural History herein at 5-6.

CONCLUSIONS OF LAW

A. SALES TAX

1. The Tax Commission has promulgated rules as provided by law for the purpose of compliance with the Oklahoma Administrative Procedures Act⁴⁷ and to facilitate the administration, enforcement, and collection of taxes under the Oklahoma Sales Tax Code.⁴⁸

2. The rules promulgated pursuant to the Administrative Procedures Act are presumed to be valid and binding on the persons they affect and have the force of law.⁴⁹

3. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Sales Tax Code").⁵⁰ The Sales Tax Code levies "upon all sales,"⁵¹ not otherwise

⁴⁷ See Note 49, *infra*.

⁴⁸ OKLA. STAT. tit. 68, §§ 1351 *et seq.* (West Supp. 2006). The Legislature amended the Sales Tax Code numerous times during the Assessment Period, which spans November 1, 2004 through October 31, 2007. The portions of the Sales Tax Code cited hereinafter are from the 2006 Legislative Session, unless otherwise noted herein. The language is the same, only the numbering changed through the 2006 Legislative Session. The amendments to the Sales Tax Code during the 2007 Legislative Session did not become effective until November 1, 2007, the day after the Assessment Period ended.

⁴⁹ OKLA. STAT. ANN. tit. 75, § 250 *et seq.* (West 2002).

⁵⁰ See Note 48, *supra*.

⁵¹ OKLA. STAT. tit. 68, § 1352(21)(a) (West Supp. 2006):

"Sale" means 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, or other transactions as provided by this paragraph, including but not limited to:

- a. the exchange, barter, lease, or rental of tangible personal property resulting in the transfer of the title to or possession of the property,
- b. the disposition for consumption or use in any business or by any person of all goods, wares, merchandise, or property which has been purchased for resale, manufacturing, or further processing,

...

See OKLA. ADMIN. CODE § 710:65-1-2 (June 11, 2005), states in pertinent parts, as follows, to-wit:

"Retail sale" means any sale, lease, or rental for any purpose other than for resale, sublease, or subrent.

exempted . . . an excise tax of four and one-half percent (4.5%) of the gross receipts⁵² or gross proceeds of each sale of . . . tangible personal property⁵³. . . .” Oklahoma Statutes authorize

“Sales tax” means all applicable state, city and county sales tax.

“Sales value” means:

(E) Otherwise, “sales value” means the larger of either the vendor’s cost at the time the exempt purchase of goods was made, or the price at which it would be sold to the vendor’s best customer in the ordinary course of business.

See also OKLA. STAT. tit. 68, § 1352(22)(a) (West Supp. 2006):

“Sale for resale” means:

a. a sale of tangible personal property to any purchaser who is purchasing tangible personal property for the purpose of reselling it within the geographical limits of the United States of America or its territories or possessions, in the normal course of business either in the form or condition in which it is purchased or as an attachment to or integral part of other tangible personal property,

⁵² OKLA. STAT. tit. 68, § 1352(11)(a) (West Supp. 2006):

(a) “Gross receipts”, “gross proceeds” or “sales price” means the total amount of consideration, including cash, credit, property and services, for which personal property or services are sold, leased or rented, valued in money, whether received in money or otherwise, without any deduction for the following:

- (1) the seller’s cost of the property sold,
- (2) the cost of materials used, labor or service cost,
- (3) interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller,
- (4) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges,
- (5) delivery charges and installation charges, unless separately stated on the invoice, billing or similar document given to the purchaser, and
- (6) credit for any trade-in.

⁵³ OKLA. STAT. tit. 68, § 1354(A)(1) and (A)(20) (West Supp. 2006):

A. There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code, an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds of each sale of the following:

incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.⁵⁴

4. "Vendor" means, any person making sales of tangible personal property or services in this state, the gross receipts or gross proceeds from which are taxed by the Sales Tax Code.⁵⁵

5. "Tangible personal property" ("TPP") means personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses.

-
1. Tangible personal property, except newspapers and periodicals;

...

20. Any taxable services and tangible personal property including materials, supplies, and equipment sold to contractors for the purpose of developing and improving real estate even though said real estate is intended for resale as real property, hereby declared to be sales to consumers or users, however, taxable materials, supplies and equipment sold to contractors as provided by this subsection which are purchased as a result of and subsequent to the date of a contract entered into either prior to the effective date of any law increasing the rate of sales tax imposed by this article, or entered into prior to the effective date of an ordinance or other measure increasing the sales tax levy of a political subdivision shall be subject to the rate of sales tax applicable, as of the date such contract was entered into, to sales of such materials, supplies and equipment if such purchases are required in order to complete the contract. Such rate shall be applicable to purchases made pursuant to the contract or any change order under the contract until the contract or any change order has been completed, accepted and the contractor has been discharged from any further obligation under the contract or change order or until two (2) years from the date on which the contract was entered into whichever occurs first. The increased sales tax rate shall be applicable to all such purchases at the time of sale and the contractor shall file a claim for refund before the expiration of three (3) years after the date of contract completion or five (5) years after the contract was entered into, whichever occurs earlier. However, the Oklahoma Tax Commission shall prescribe rules and regulations and shall provide procedures for the refund to a contractor of sales taxes collected on purchases eligible for the lower sales tax rate authorized by this subsection; (Emphasis added.)

⁵⁴ OKLA. STAT. tit. 68, § 1370 *et seq.* (West Supp. 2006) and OKLA. STAT. tit. 68, § 2701 (West Supp. 2007).

⁵⁵ OKLA. STAT. tit. 68, § 1352(27)(a) (West Supp. 2006). *See* OKLA. STAT. tit. 68, § 1363(1) (West 2001):

For the purpose of this article, all vendors are classified into five groups:

1. Group One, vendors who are regularly and continuously engaged in a business at an established place of business and make sales subject to this article;

"TPP" includes electricity, water, gas, steam and prewritten computer software. This definition shall be applicable only for purposes of the Sales Tax Code.⁵⁶

⁵⁶ See OKLA. STAT. tit. 68, § 1352(23) (West Supp. 2006) and Note 48, *supra*. See also OKLA. ADMIN. CODE § 710:65-1-2 (June 25, 2004), which states as follows, to-wit:

"Tangible personal property" means personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses. For purposes of the Oklahoma Sales Tax Code, "tangible personal property" includes electricity, water, gas, steam and prewritten computer software. [68 O.S. Supp. 2003, § 1352(23)] The term does not include real property, such as land and buildings, tangible personal property that loses its identity when it becomes an integral and inseparable part of the realty, or tangible personal property which is removable only with substantial damage to the premises. Property severed from real estate becomes tangible personal property. "Tangible personal property" does not include intangible personal property constituting mere rights of action and having no intrinsic value, such as contracts, deeds, mortgages, stocks, bonds, certificates of deposit, or uncanceled United States postage or revenue stamps sold for postage or revenue purposes. [See: 68 O.S. § 1352; 68 O.S. § 1354; See Also: 60 O.S. §§ 7, 8] (Emphasis original.)

6. "Fixtures" is statutorily defined as follows,⁵⁷ to-wit:

A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines or shrubs, or embedded in it, as in the case of walls, or permanently resting upon it, as in the case of buildings, or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts or screws.

7. "Consumer" or "user" means a person⁵⁸ to whom a taxable sale of tangible personal property⁵⁹ is made or to whom a taxable service is furnished. "Consumer" or "user" includes all

⁵⁷ OKLA. STAT. tit. 60, § 7 (West 2001). See OKLA. ADMIN. CODE § 710:65-19-107, which states as follows, to-wit:

(a) The term "materials for the purpose of developing and improving real property" as used in the Sales and Use Tax Codes, means all tangible personal property, including any device or appliance used by builders, contractors, or landowners in making improvements, additions, alterations or repairs to real property in such a way that such tangible personal property becomes identified with a part of realty.

(b) A device or appliance becomes a fixture and a part of the real property to which it is connected when it is built into or is attached to a structure in such a way that its removal would substantially damage or deface such structure.

(c) Where the removal of the device or appliance would not substantially damage or deface the structure to which it is connected the following factors shall be considered:

(1) Actual connection with or attachment to real property. To become a part of real property, the device or appliance must have some physical connections such as: by bolts, screws, nails, cement piping, or cable; by contact, where by reason of great weight or bulk, no additional attachment is required; by contact, where the device or appliance is necessary to make complete or usable something which is real property; by attachment to another device or appliance which has become a part of real property.

(2) Appropriateness to the use or purpose of the real property to which connected. The use or purpose of the device or appliance must become an element of the use or purpose of the real property to which it is connected.

(d) This Section is not intended to apply to cook stoves, refrigerators, dishwashers, washing machines, dryers, curtains, draperies, and portable heaters, acquired for the personal use of householders or tenants which may be removed without material damage to the building in which they are used. [See 68 O.S. §1352]

⁵⁸ See OKLA. STAT. tit. 68, § 1352(17) (West Supp. 2006):

contractors⁶⁰ to whom a taxable sale of materials, supplies, equipment, or other tangible personal property⁶¹ is made or to whom a taxable service is furnished to be used or consumed in the performance of any contract.⁶²

“Person” means any individual, company, partnership, joint venture, joint agreement, association, mutual or otherwise, limited liability company, corporation, estate, trust, business trust, receiver or trustee appointed by any state or federal court or otherwise, syndicate, this state, any county, city, municipality, school district, any other political subdivision of the state, or any group or combination acting as a unit, in the plural or singular number;

⁵⁹ See Note 56, *supra*.

⁶⁰ See Note 65, *infra*.

⁶¹ See Note 56, *supra*. See also OKLA. STAT. tit. 68 § 1352(5) (West Supp. 2006). See OKLA. ADMIN. CODE § 710:65-1-2 (June 11, 2005):

“User” or “consumer” means a person to whom a taxable sale of tangible personal property is made or for who a taxable service is performed. (Emphasis added.)

OKLA. ADMIN. CODE § 710:65-1-7 (June 25, 2007), which states in pertinent parts:

“Consumer” or “user” means a person to whom a taxable sale of tangible personal property is made or for whom a taxable service is performed.

...

(2) Withdrawals from stock. If any business purchases tangible personal property for resale, manufacturing or further processing and that business withdraws tangible personal property, either from its inventory or after such inventory has been manufactured or processed for its own use or consumption, that business has made a taxable sale and the value of the property withdrawn is taxable at its “sales value”, as defined in *OAC* 710:65-1-2. The business withdrawing tangible personal property from inventory should include the “sales value” of such property in gross receipts or gross proceeds on its sales tax report for the month the property was withdrawn. (Emphasis original.)

(3) Contractors. Contractors are consumers or users, 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. Examples of contractors subject to this paragraph are: painting contractors, road contractors, grading and excavating contractors, electrical contractors, plumbing contractors, and other persons engaged in a contractual arrangement to make improvements on real property. A person working for a salary or wage is not considered a contractor. The Sales Tax Code limits the ability of contractors to make purchases exempt from sales tax based on the exempt status of another entity to the following situations: [See: 710:65-7-6 and 710:65-7-13] (Emphasis original.)

⁶² See OKLA. ADMIN. CODE § 710:65-7-13 (June 25, 2007), which states in pertinent parts, as follows, to-wit:

8. "Contractor" means any person who performs any improvement upon real property and who, as a necessary and incidental part of performing such improvement, incorporates tangible personal property⁶³ belonging to or purchased⁶⁴ by the person into the real property being improved.⁶⁵

(a) **General rule.** Contractors are defined by statute as consumer/users and must pay sales tax on all taxable services and tangible personal property, including materials, supplies, and equipment purchased to develop, repair, alter, remodel, and improve real property.

(b) **Limited exceptions.** A contractor may make purchases based upon the exempt status of another entity only in the statutorily-limited circumstances described in this paragraph. (The limited circumstances outlined in (b) are not applicable to Issue No. 2. and therefore been omitted herein.)

⁶³ See Note 56, *supra*.

⁶⁴ See Note 76, *infra*.

⁶⁵ OKLA. STAT. tit. 68, § 1352(6) (West Supp. 2006). See OKLA. STAT. tit. 68, § 1701 (West 2001):

As used in Sections 1701 through 1707 [Nonresident Contractors and Subcontractors] of this title:

1. "Contractor" includes all prime and general contractors, subcontractors, independent contractors and persons engaged in contract labor who through negotiations or competitive bidding enter into contracts to furnish labor, materials or both and the required equipment to perform the contract for a fixed price and who in pursuit of independent business undertake a job in whole or in part retaining substantial control of the method and manner of accomplishing the desired result and means any person, firm, joint venture, partnership, copartnership, association, corporation, or other organization engaged in the business of the construction, alteration, repairing, dismantling, or demolition of roads, bridges, viaducts, sewers, water and gas mains, streets, disposal plants, water filters, tanks, towers, airports, buildings, dams, levees, canals, railways and rail facilities, oil and gas wells, water wells, pipelines, refineries, industrial or processing plants, chemical plants, power plants, electric or telephone or any other type of energy or message transmission lines or equipment, or any other type of construction excluding family farm operations. The term contractor shall not include the state or any agency, institution, or political subdivision of the state or any duly constituted authority of a political subdivision;
2. "Resident contractor" means a contractor who maintains his principal place of business in this state or a multistate employer who maintains a permanent work force of three or more employees in this state;
3. "Nonresident contractor" means a contractor who maintains his principal place of business outside this state or a multistate employer who does not maintain a permanent work force of three or more employees in this state.

9. Unless specifically exempt by statute, a contractor shall pay the sales or use tax as a consumer on the purchase of all materials, supplies, tools and equipment, including rentals thereof and all replacement parts used by him in fulfilling either a lump-sum contract, a cost-plus contract, a time and material contract with an upset or guaranteed price which may not be exceeded, or any other kind of construction contract for the development and/or improvement of real property.⁶⁶

10. "Consideration" means and includes, but is not limited to:

(A) The price arrived at between purchaser and vendor.⁶⁷

11. The retail sale, excluding lease or rental, of a product shall be sourced,⁶⁸ as follows, to-

See also OKLA. ADMIN. CODE § 710:65-1-7(3) (June 11, 2005), which states in pertinent part, as follows, to-wit:

Contractors are consumers or users, 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. Examples of contractors subject to this paragraph are: painting contractors, road contractors, grading and excavating contractors, electrical contractors, plumbing contractors, and other persons engaged in a contractual arrangement to make improvements on real property.

⁶⁶ OKLA. ADMIN. CODE § 710:65-19-55 (June 25, 1998):

Unless specifically exempt by statute, a contractor shall pay the sales or use tax as a consumer on the purchase of all materials, supplies, tools and equipment, including rentals thereof and all replacement parts used by him in fulfilling either a lump-sum contract, a cost-plus contract, a time and material contract with an upset or guaranteed price which may not be exceeded, or any other kind of construction contract for the development and/or improvement of real property. (Citations omitted.)

See OKLA. STAT. tit. 68, § 1354(20) (West Supp. 2006):

Any taxable services and tangible personal property including materials, supplies, and equipment sold to contractors for the purpose of developing and improving real estate even though said real estate is intended for resale as real property, hereby declared to be sales to consumers or users, however, taxable materials, supplies and equipment sold to contractors as provided by this subsection which are purchased as a result of and subsequent to the date of a contract entered into either prior to the effective date of any law increasing the rate of sales tax imposed by this article, ...

See also OKLA. STAT. tit. 68, § 1356(10) (West Supp. 2006).

⁶⁷ OKLA. ADMIN. CODE § 710:65-1-2 (June 11, 2005).

wit:

1. When the product is received by the purchaser at a business location of the seller, the sale is sourced to that business location.
2. When the product is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser, or the purchaser's donee, designated as such by the purchaser, occurs, including the location indicated by instructions for delivery to the purchaser or donee, known to the seller. ...

B. USE TAX

12. The term "purchase price" applies to the measure subject to the tax levied under Section 1402 of Title 68⁶⁹ and has the same meaning as "gross receipts" or "gross proceeds" or "sales price" as defined in Section 1352 of Title 68.⁷⁰

13. The term "purchase at retail" means and includes all purchases except purchases made for the purpose of resale.⁷¹

14. The term "sale" means and includes the transfer of either the title or possession for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality or device by which such transfer is accomplished. The term "sale" also includes the exchange, barter, lease, or rental of tangible personal property where such exchange, barter, lease or rental results in either the transfer of the title or the possession.⁷²

15. The term "purchase" means and includes any method whereby a transferee⁷³ receives⁷⁴

⁶⁸ OKLA. STAT. tit. 68, § 1354.27(A)(1) and (A)(2) (West Supp. 2006).

⁶⁹ OKLA. STAT. tit. 68, § 1402 (West 2001).

⁷⁰ OKLA. STAT. tit. 68, § 1401(3) (West Supp. 2006).

⁷¹ OKLA. STAT. tit. 68, § 1401(5) (West Supp. 2006).

⁷² OKLA. STAT. tit. 68, § 1401(6) (West Supp. 2006).

⁷³ "transferee." One to whom property interest is conveyed. BLACK'S LAW DICTIONARY (9th ed. 2009), available at <http://westlaw.com>.

from a transferor⁷⁵ either the title or possession, for a valuable consideration, of tangible personal property, regardless of the manner, method, instrumentality or device by which such transfer is accomplished. The term "purchase" also includes the exchange, barter, lease or rental of tangible personal property where such exchange, barter, lease or rental results in either the transfer of the title or the possession to the transferee.⁷⁶

16. The term "use" means and includes the exercise of any right or power over tangible personal property incident to the ownership or possession of that property, except that it shall not include the sale of that property in the regular course of business.⁷⁷

17. The term "retailer" means every person engaged in the business of selling tangible personal property for use within the meaning of the Use Tax Code;⁷⁸ provided, however, that when in the opinion of the Tax Commission it is necessary for the efficient administration of this article to regard any salesmen, representatives, truckers, peddlers, or canvassers as the agents of the dealers, distributors, supervisors, employers, or persons under whom they operate or from whom they obtain

⁷⁴ OKLA. STAT. tit. 68, § 1354.27(E) (West Supp. 2006):

For the purposes of this section, the terms "receive" and "receipt" mean:

1. Taking possession of tangible personal property;
2. Making first use of services; or
3. Taking possession or making first use of digital goods, whichever comes first.

The terms "receive" and "receipt" do not include possession by a shipping company on behalf of the purchaser.

See Matter of Sales Tax Protest of LTV Energy Products Co., 1994 OK CIV APP 140, 883 P.2d 1287. The "point of sale" provision was deleted by 2004 Okla. Sess. Laws c. 5, § 64, emerg. eff. March 1, 2004.

⁷⁵ "transferor." (1875) One who conveys an interest in property. BLACK'S LAW DICTIONARY (9th ed. 2009), available at <http://vestlaw.com>.

⁷⁶ OKLA. STAT. tit. 68, § 1401(7) (West Supp. 2006).

⁷⁷ OKLA. STAT. tit. 68, § 1401(8) (West Supp. 2006).

⁷⁸ OKLA. STAT. tit. 68, § 1401 *et seq.* (West 2001).

the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, employers, or persons, the Tax Commission may so regard them and may regard the dealers, distributors, supervisors, employers or persons as retailers for purposes of this article.⁷⁹

18. There is hereby levied and there shall be paid by every person storing, using, or otherwise consuming within this state, tangible personal property purchased or brought into this state, an excise tax on the storage, use, or other consumption in this state of such property at the rate of four and one-half percent (4.5%) of the purchase price of such property. Said tax shall not be levied on tangible personal property intended solely for use in other states, but which is stored in Oklahoma pending shipment to such other states or which is temporarily retained in Oklahoma for the purpose of fabrication, repair, testing, alteration, maintenance, or other service. The tax in such instances shall be paid at the time of importation or storage of the property within the state and a subsequent credit shall be taken by the taxpayer for the amount so paid upon removal of the property from the state. Such tax is hereby levied and shall be paid in an amount equal to four and one-half percent (4.5%) of the purchase price of such tangible personal property.⁸⁰

19. The provisions of Oklahoma Use Tax Code ("Use Tax Code")⁸¹ shall not apply;

...

2. In respect to the use of any article of tangible personal property brought into the State of Oklahoma by a nonresident individual, visiting in this state, for his or her personal use or enjoyment, while within the state;

...

⁷⁹ OKLA. STAT. tit. 68, § 1401(9) (West Supp. 2006).

⁸⁰ OKLA. STAT. tit. 68, § 1402 (West 2001).

⁸¹ See Note 78, *supra*.

4. In respect to the use of tangible personal property purchased for resale before being used;⁸²

C. RULES AND STATUTORY INTERPRETATION

20. 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.⁸³ Generally, 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.⁸⁴

21. The goal of any inquiry into the meaning of a legislative act is to ascertain and give effect to the intent of the legislature. The law-making body is presumed to have expressed its intent in a statute's language and to have intended what the text expresses. Hence, where a statute is plain and unambiguous, it will not be subject to judicial construction, but will be given the effect its language dictates. Only where the intent cannot be ascertained from a statute's text, as occurs when ambiguity or conflict (with other statutes) is shown to exist, may rules of statutory construction be employed.⁸⁵

22. The legislature will not be presumed to have intended a vain or absurd result.⁸⁶

23. Tax statutes are penal in nature. Where there is reasonable doubt about the taxing act's meaning, all ambiguity must be resolved in favor of the taxpayer. Legislative intention ascertained from a general consideration of the entire act must be given effect. Nonetheless, courts cannot enlarge the taxing act's ambit to make its provision's applicable to cases not

⁸² OKLA. STAT. tit. 68, § 1404 (West Supp. 2006).

⁸³ See *Boydston v. State*, 1954 OK 327, 277 P.2d 138.

⁸⁴ See *Toxic Waste Impact Group, Inc. v. Leavitt*, 1988 OK 20, 755 P.2d 626. See also *State ex rel. Hart v. Parham*, 1966 OK 9, 412 P.2d 142. (Citations omitted.)

⁸⁵ *Blitz U.S.A., Inc. v. Oklahoma Tax Com'n*, 2003 OK 50, 75 P.3d 883. (Citations omitted.)

⁸⁶ *Strelecki v. Oklahoma Tax Com'n*, 1993 OK 122, 872 P.2d 910. (Citations omitted.)

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.⁸⁷

24. Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears, and except also that the words hereinafter explained are to be understood as thus explained.⁸⁸

25. Whenever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.⁸⁹

26. In the absence of a contrary definition, regulatory words are to have the same meaning as that attributed to them in ordinary and usual parlance.⁹⁰

D. MOTION FOR SUMMARY DISPOSITION

27. The Legislature vested the Oklahoma Tax Commission with jurisdiction over the parties and subject matter of this proceeding.⁹¹

28. A party may file a motion for summary disposition on any or all issues on the ground that there is no substantial controversy as to any material fact.⁹² The procedures for such motion are as follows:

(1) The motion for summary disposition shall be accompanied by a concise written statement of the material facts as to which the movant contends no genuine issue exists and a statement of argument and authority demonstrating that summary disposition of any or all issues should be granted. The moving

⁸⁷ *Globe Life and Acc. Ins. Co. v. Oklahoma Tax Commission*, 1996 OK 39, ¶¶ 11-14, 913 P.2d 1322. (Citations omitted).

⁸⁸ OKLA. STAT. tit. 25, § 1 (West 2001).

⁸⁹ OKLA. STAT. tit. 25, § 2 (West 2001).

⁹⁰ See Note 85, *supra*.

⁹¹ OKLA. ADMIN. CODE § 710:1-5-38.1 (July 11, 2013). OKLA. STAT. tit. 68, § 221(C) (West Supp. 2014).

⁹² *Id.*

party shall verify the facts to which such party contends no genuine controversy exists with affidavits and evidentiary material attached to the statement of material facts.

(2) If the protest has been set for hearing, the motion shall be served at least twenty (20) days before the hearing date unless an applicable scheduling order issued by the Administrative Law Judge establishes an earlier deadline. The motion shall be served on all parties and filed with the Office of the Administrative Law Judge.

(3) Any party opposing summary disposition of issues shall file with the Administrative Law Judge within fifteen (15) days after service of the motion a concise written statement of the material facts as to which a genuine issue exists and the reasons for denying the motion. The adverse party shall attach to the statement evidentiary material justifying the opposition to the motion, but may incorporate by reference material attached to the papers of the moving party. All material facts set forth in the statement of the movant which are supported by acceptable evidentiary material shall be deemed admitted for the purpose of summary disposition unless specifically controverted by the statement of the adverse party which is supported by acceptable evidentiary material.

(4) The affidavits that are filed by either party shall be made on personal knowledge, shall show that the affiant is competent to testify as to the matters stated therein, and shall set forth matters that would be admissible in evidence at a hearing. A party challenging the admissibility of any evidentiary material submitted by another party may raise the issue expressly by written objection or motion to strike such material.

(5) If the taxpayer has requested a hearing, the Administrative Law Judge will issue a notice to the parties scheduling the motion for a hearing limited to Oral Argument. If the taxpayer has not requested a hearing, the Administrative Law Judge will rule on the motion based on the submission of the parties, including the motion, opposition to the motion, and attachments thereto.

(6) If the Administrative Law Judge finds that there is no substantial controversy as to the material facts and that one of the parties is entitled to a decision in its favor as a matter of law, the Judge will grant summary disposition by issuing Findings of Fact, Conclusions of Law, and Recommendations. Such Findings of Fact, Conclusions of Law and Recommendations are subject to review by the Commission pursuant to *OAC* 710:1-5-10, 710:1-5-40 and 710:1-5-41. If a motion for summary disposition is denied, the Administrative Law Judge will issue an order denying such motion.

(7) If the Administrative Law Judge finds that there is no substantial controversy as to certain facts or issues, the Judge may grant partial summary disposition by issuing an order which specifies the facts or issues which are

not in controversy and directing that the action proceed for a determination of the remaining facts or issues. If a hearing of factual issues is required, evidentiary rulings in the context of the summary procedure shall be treated as rulings in limine. Any ruling on partial summary disposition shall be incorporated into the Findings of Fact, Conclusions of Law, and Recommendations issued at the conclusion of the proceedings before the Administrative Law Judge.

E. STANDARD OF REVIEW

29. An order that grants summary relief, in whole or part, disposes solely of law questions.⁹³

30. Although a trial court in making a decision on whether summary judgment is appropriate considers factual matters, the ultimate decision turns on purely legal determinations, i.e. whether one party is entitled to judgment as a matter of law because there are no material disputed factual questions.⁹⁴

31. Summary judgment should be granted only if it is perfectly clear that there is no material fact at issue. For summary judgment to be appropriate, the trial court must not only find there is no substantial controversy as to any material fact, but also that reasonable people could not reach differing conclusions from the undisputed facts.⁹⁵

32. A fact is material for purposes of summary judgment if proof of the fact would establish or refute an essential element of a cause of action or a defense.⁹⁶

⁹³ *Ashtikian v. Oklahoma Horse Racing Commission*, 2008 OK 64, 188 P.3d 148. "Summary process is a special pretrial procedural track pursued with the aid of acceptable probative substitutes; it is a search for undisputed material facts which, sans forensic combat, may be utilized in the judicial decision-making process." *Id.* at ¶ 6.

⁹⁴ *Carmichael v. Beller*, 1996 OK 48, ¶ 6, 914 P.2d 1051. (Citations omitted.)

⁹⁵ *Fulton v. People Lease Corporation*, 2010 OK CIV APP 84, ¶ 52, 241 P.3d 255. (Citations omitted.) See *Winston v. Stewart & Elder, P.C.*, 2002 OK 68, ¶ 10, 55 P.3d 1063. "If reasonable minds might reach different conclusions when viewing the evidentiary materials (even those which are undisputed), summary judgment is inappropriate."

⁹⁶ *Id.* at ¶ 9. (Citations omitted.)

PROTESTANT'S MOTION
FOR SUMMARY DISPOSITION

On October 7, 2013, the Protestant filed its *MSD*, stating in pertinent part,⁹⁷ as follows,

to-wit:

Issue No. 2 involves the following discrete tax question:

What sales and use tax responsibility does [Protestant] have under Oklahoma law with respect to customer transactions that involved fixed-priced installations of tangible personal property that, once installed, became affixed to and part of the customer's real estate.

The Protestant's position, in pertinent part,⁹⁸ is as follows, to-wit:

[Protestant], as contractor on such real property improvement projects, was the final consumer of the construction materials used in the installations. Simply stated, there were no sales of tangible personal property to customers. Rather, the customer ultimately received title to a completed improvement to real property. Consequently, [Protestant] was responsible for self-assessing use tax on the cost of the materials it consumed in performing the real property improvement services.

⁹⁷ *MSD* at 1. See Procedural History herein. On November 22, 2011, the ALJ issued the *Order Bifurcating Proceedings* issued in this case as follows, to-wit:

Whether and to what extent Protestant is acting as a "Contractor" under Oklahoma law when it contracts to affix tangible personal property owned by its customers?

⁹⁸ *Id.* See Transcript at 9:

Mr. Smith: ... What we have here is Issue No. 2, which is a discreet and simple straight forward question, which is what are the sales in – sales and use tax obligations of [Protestant's] when performing a home improvement contract.

According to the law, as [Protestant] sees it, [Protestant] is, as the contractor, the final user or consumer of the tangible personal property that is incorporated into the customer's home. The roof shingles... and it is liable for self-assessing use tax on the materials that are consumed in the course of performing the contract.

DIVISION'S RESPONSE

The Division responds, in pertinent part,⁹⁹ as follows, to-wit:

Protestant's argument that Protestant is a contractor in the installed sales contracts, using property belonging to, or purchased by, Protestant, is not supported by the stipulated facts and exhibits. Specifically, the following facts and exhibits demonstrate that the property included in the installed sales contract belongs to, or was purchased by the customer, not Protestant:

1. The customer selects the products or products; [sic]
2. Protestant, through its signage and advertising, invites its customer to "Have Your [insert product] Installed;
3. The terms and conditions of each installed sales contract include, "By this installed sales contract (the "Contract"). Customer agrees to purchase and [Protestant] agrees to sell the goods and/or materials (the "Goods") and the services to install same (the "Installation Services")..." Additionally, certain of Protestant's installations services, such as indicated in the "Entire House Carpet Installation" require purchase of the product from Protestant;
4. The installed sales contract separately states materials and labor. The material component is the retail price of the products to be installed. If more than one of a certain product is being installed, such as square feet of carpet or flooring, the material component is the retail price of the product multiplied by the quantity of the product.
5. The customer must pay the full amount of the material and labor at the time the contract is executed. The customer's receipt, which he receives after his contract is processed at a checkout counter, reflects separate line items for (1) each item included in materials, including quantity and retail price for each item and (2) the labor and its price;

⁹⁹ Response at 7-8.

6. Additional costs for materials not included in the contract are at the expense of the customer;
7. Employees of Protestant may purchase special order and stock merchandise at employee price but do not receive employee pricing on installed sales labor; and
8. As evidenced by the installed ceiling fan contract included in Exhibit 7, Protestant's customer is able to return an item not needed for installation to Protestant for a refund. (Emphasis original.)

PROTESTANT'S REPLY

The Protestant replies,¹⁰⁰ as follows, to-wit:

The Division, however, has presented no evidence to demonstrate that any of these recited facts are unique to [Protestant]. For example, the Division does not suggest that other Oklahoma contractors do not *also* (i) allow their customers to select the types of materials they want installed on their property; (ii) promote the availability of their installation services with signage; or (iii) calculate their fixed contract prices based on their best estimates of the material and labor costs they anticipate incurring in performing the home improvement. Likewise, the Division has failed to show that other contractors do not also warrant only their installation services, since the installed materials carry manufacturers' warranties. (Emphasis original.)

ARGUMENT

In support of its position, the Protestant states,¹⁰¹ as follow, to-wit:

What [Protestant] doesn't do is it doesn't sell any tangible personal property to the customers. They don't take home with them loose roof shingles or flooring installed floor, a remodeled bathroom, And that is what [Protestant] is selling. They didn't take home anything when they go through the course of entering into these contracts.

Now, there's no dispute that every installation contract that is the subject of this assessment involved a real property improvement.

¹⁰⁰ See Protestant's *Proposed Findings* at 10.

¹⁰¹ Transcript at 10. See Note 46, *supra*.

That was stipulated. You made a finding to that effect in your November 1st] letter ruling.¹⁰²

So the only issue that is before you on this matter is whether [Protestant], when it is performing a home improvement contract, is a contractor, as defined under Oklahoma law. ...

In support of its position, the Division states,¹⁰³ as follows, to-wit:

Protestant is not a contractor under the definition of "contractor" in the Sales Tax Code as Protestant is not installing property belonging to, or owned by Protestant. Under the application of the rules cited above,¹⁰⁴ Protestant is a vendor of the products which Protestant installs under an installed sales contract referred to by Protestant as a "lump sum contract."

DISCUSSION

As pointed out by the Division,¹⁰⁵ "There is no Oklahoma decision clearly applicable to this issue," making this a case of first impression, which could potentially affect the way the Protestant conducts business in the State of Oklahoma, and on a national basis.¹⁰⁶ The resolution

¹⁰² *Id.* The Protestant's characterization of the November 1, 2013 letter is incorrect. The ALJ issued a letter that confirmed the October 31, 2013 Teleconference with Counsel on the topics, as more fully set therein. The Office of Administrative Law Judges does not issue "Letter Rulings." See OKLA. ADMIN. CODE § 710:1-3-73(e) (June 25, 2009).

¹⁰³ See *Response* at 12. See also *MSD* at 1-2. The Protestant states, "The Division's overarching position is that a contractor that also happens to engage in retail sales must collect and remit sales taxes when selling its contracting services. It argues that since [Protestant] was a 'recognized retailer of tangible personal property' during the Assessment Period (See Division's Response to [Protestant's] First Set of Interrogatories No. 11), it could not also have acted as a contractor when it entered into lump-sum written contracts with customers to make real property improvements (the 'Installation Contracts'). Specifically, the Division seeks to bifurcate each real property improvement project performed by [Protestant] during the Assessment Period into two separate, independent transactions – (1) a retail sale of the construction materials to customers, and (2) a subsequent installation of those sold items. Thus, according to the Division, [Protestant] should have collected and remitted sales tax on the retail value of the tangible personal property used in each project."

¹⁰⁴ *Id.* See OKLA. ADMIN. CODE § 710:65-19-4 (June 25, 2004) (Alarm Systems), OKLA. ADMIN. CODE § 710:65-19-158 (Installation, alteration and special charges), OKLA. ADMIN. CODE § 710:65-19-159, (Installation Charges), OKLA. ADMIN. CODE § 710:65-19-290 (Radio and television antennas and television satellite dishes), OKLA. ADMIN. CODE § 710:19-367 (Water conditioning and water softeners).

¹⁰⁵ *Response* at 9.

¹⁰⁶ Protestant's Counsel advised that Issue No. Two has been taken to hearing in one (1) other jurisdiction, that being the State of Indiana. Counsel indicated the hearing was held at the end of October 2013. See Note 46, *supra*.

of Issue No. Two could potentially affect every Vendor/Retailer¹⁰⁷ in the State of Oklahoma, who purchases their inventory exempt, as sales for resale,¹⁰⁸ makes retail sales¹⁰⁹ of TPP,¹¹⁰ and does "Installed Sales," which are improvements to real property, similar to the Protestant.¹¹¹

¹⁰⁷ See Notes 55 and 79, *supra*.

¹⁰⁸ See Note 51, *supra*.

¹⁰⁹ *Id.*

¹¹⁰ See Note 56, *supra*.

¹¹¹ MSD at 17. See also Protestant's *Proposed Findings* at 16, which states, as follows, to-wit:

Jurisdictions that have addressed the existence of taxpayers functioning both as a retailer and, in a separate capacity, as a contractor, treat such taxpayers no differently than other contractors when performing contracting activities. (See MICH. ADMIN. CODE r.205.71(5) ("Where a contractor is not engaged exclusively in the contracting business but makes sales of tangible property at retail to other contractors and consumers, he shall... [pay] [u]se tax...on merchandise acquired for resale and later consumed in contract operations."); ILL. ADMIN. CODE tit., 86 § 130.2101(d)(4) ("If the construction contractor is a combination contractor/retailer and did not pay tax when purchasing the floor coverings and materials...the construction contractor incurs Retailer's Occupation Tax based on his cost price."))

MICH. ADMIN. CODE r.205.71(7) states, "A contractor purchasing tangible personal property for affixation to realty where delivery is taken in Michigan is subject to sales or use tax on the purchase price whether the improvement or construction of realty takes place within or without Michigan, except as noted in subrule 2."

MICH. ADMIN. CODE r. 205.71(2) states in pertinent part, as follows, to-wit:

Contractors are consumers of the materials used by them. All sales to or purchases by contractors of tangible personal property are taxable, except when affixed and made a structural part of real estate for a qualified exempt nonprofit hospital or a nonprofit housing entity qualified as exempt under the sales and use tax acts. All materials consumed in the performance of such contracts and not affixed and made a structural part of real property are taxable. Retailers making exempt sales shall obtain the following exemption certificate: ...

The Protestant also cites 86 ILAC § 130.2101(d)(4) (Sellers of Floor Coverings), which states, as follows, to-wit:

Construction contract situations. Construction contractors who permanently affix floor coverings to real estate under the terms of construction contracts incur tax liability based on their cost price of the floor covering and materials that they affix to real estate. In a construction contract situation, the construction contractor does not incur Retailers' Occupation Tax liability on his gross receipts from sale. Rather, the construction contractor incurs tax based on his cost price of the floor covering and materials transferred to his customer under the terms of the construction contract. (Emphasis added.)

See Note 55, *supra*.

The Division has agreed that the all of the Installed Sales Contracts covered by the Assessment Period involved improvements to real property.¹¹² As stated by Mr. Smith during Oral Argument, "So the only issue that is before you on this matter is whether [Protestant], when it is performing a home improvement contract, is a contractor, as defined under Oklahoma law."¹¹³

The Sales Tax Code¹¹⁴ does not define "Contractor-Retailer" or "Retailer-Contractor."¹¹⁵ The Sales Tax Code does defines "Contractor" as "...any person¹¹⁶ who performs any improvement upon real property and who, as a necessary¹¹⁷ and incidental¹¹⁸ part of performing such improvement, incorporates tangible personal property¹¹⁹ belonging to or purchased by the person into the real property being improved."¹²⁰

¹¹² See Note 46, *supra*.

¹¹³ Transcript at 10.

¹¹⁴ See Note 48, *supra*.

¹¹⁵ See 45 IAC 2.2-3-3. Retail merchant engaged in business in Indiana defined:

A retail merchant engaged in business in Indiana shall include:

(1) Any retail merchant engaged in selling at retail for use, storage, or consumption in Indiana and maintain, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, and office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business in Indiana.

¹¹⁶ See Note 58, *supra*.

¹¹⁷ "necessary" *adjective* \ˈne-sə-ser-ē\ : so important that you must do it or have it : absolutely needed; unable to be changed or avoided. MERRIAM-WEBSTER, available at <http://www.merriam-webster.com>.

¹¹⁸ *Id.* "incidental" *adjective* \,in(t)-sə-'den-tʃl\ : happening as a minor part or result of something else 1 a : being likely to ensue as a chance or minor consequence <social obligations *incidental* to the job> b : minor 1 2: occurring

¹¹⁹ See Note 56, *supra*.

¹²⁰ See Notes 62 and 65, *supra*. See also *Dolese Bros. Co. v. Andrecopulas*, 1925 OK 171, 237 P. 844.

The Division states, "Protestant is not a contractor in its installed sales contracts during the Assessment Period under the definition of "contractor" in the Sales Tax Code as Protestant was not installing property belonging to, or owned by Protestant. Under the application of the rules cited above, Protestant was the vendor of the products which Protestant installed under an installed sales contract which has been referred to by Protestant as a 'lump sum contract.'"¹²¹

As pointed out by Protestant, in pertinent part, "The Division, however, has presented no evidence to demonstrate that any of the recited facts are unique to [Protestant]."¹²² There is no dispute that the Protestant purchases its inventory exempt from sales tax, as sales for resale.¹²³ There is also no dispute that when the Protestant makes across the counter or "retail sales," title to the "Tangible Personal Property" transfers to its customer.

By the terms of an Installed Sales Contract, title and possession of the TPP does not transfer from the Protestant to its customer upon execution.¹²⁴ Once the Protestant and the customer execute the Installed Sales Contract, the customer pays the "Lump Sum Contract"¹²⁵ in full. Typically, the Protestant withdraws the TPP from its inventory.¹²⁶ If the TPP is simply withdrawn from the Protestant's inventory, the Protestant moves the TPP to the Installed Sales Bay for pick-up by the Installer.¹²⁷ The Installer then takes the TPP to the location of the

¹²¹ See Division's *Proposed Findings* at 19. See also Note 103, *supra*.

¹²² See Note 100, *supra*.

¹²³ See Division's *Proposed Findings* at 13.

¹²⁴ See Stipulations 12 through 21. See also Supplemental Stipulations 2 through 4.

¹²⁵ See Notes 65 through 66, *supra*.

¹²⁶ See Exhibit 2 to Protestant's *MSD*. "In some cases, the vendor may directly deliver the items pursuant to the Subcontractor's [Installer] direction. In either event, the customer typically does not take possession from the store of any tangible personal property to be installed."

¹²⁷ *Id.* If the TPP has to be ordered, the TPP may be delivered to the Protestant's Installed Sales Bay for pick-up by the Installer, delivered to the Installer, or to the location of the installation.

installation (an improvement to real property) and once the installation is complete, the customer executes a "Certificate of Completion."¹²⁸

As defined in the Sales Tax Code, "Consumer" or "user" means 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.¹²⁹

The Protestant meets the definition of "Contractor," as defined in the Sales Tax Code. The Protestant is engaged in a contractual arrangement for the improvement of real property.¹³⁰

POINT OF SALE

During the Assessment Period, Protestant remitted Oklahoma state and local use tax to the Tax Commission for the Installation Contracts, which are the subject of Issue No. Two, on the Protestant's cost of TPP/materials included in and consumed in the performance of the Installation Contracts. Protestant accrued and remitted local use tax based on the location of the store in which the customer executed the Installation Contract and/or from which the Protestant withdrew the TPP/Materials from its inventory.¹³¹ The Division assessed sales tax, sourcing¹³²

¹²⁸ *Id.* "When [Protestant] performs its real property improvement services under an Installation Contract, title to the installed tangible personal property does not transfer from [Protestant] to its customer until after the materials are affixed to and become a part of the customer's real property."

¹²⁹ See Notes 58 through 62, *supra*. See also *Harding v. Oklahoma Tax Commission*, 1954 OK 258, 275 P.2d 264. "Contractors are users and consumers and not vendors of tangible personal property used by them in carrying out the provisions of a lump sum construction contract."

¹³⁰ See Notes 65 through 66, *supra*.

¹³¹ *Id.* See also Notes 125 and 127, *supra*.

¹³² OKLA. ADMIN. CODE § 710:65-18-2 (June 25, 2004):

"Sourced" means the location for which local sales and use taxes are to be applied.

the sale to the location of the material's installation. The Division credited the Protestant for the use tax remitted.

The Protestant states, "...as a contractor on real property improvement projects, it was the final consumer of the construction materials used in the installations. Its position is that there were no sales of TPP to customers in these transactions. Rather, the customers ultimately received title to completed improvements to their real property. Consequently, [Protestant] was responsible under Oklahoma law for self-assessing use tax on the cost of the TPP it consumed in performing the real property improvement services on behalf of the customer."¹³³

The Division contends "...that the sales tax on Protestants [sic] sales of [TPP] should be sourced to the location of the installation and not to the location of Protestant's store where the installation sales contract was entered."¹³⁴

The Streamlined Sales and Use Tax Administration Act (the "Act"),¹³⁵ provides as follows, to-wit:

A. The retail sale, excluding lease or rental, of a product shall be sourced, as follows, to-wit:

1. When the product is received by the purchaser at a business location of the seller, the sale is sourced to that business location.

2. When the product is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser, or the purchaser's donee, designated as such by the purchaser, occurs, including the location indicated by instructions for delivery to the purchaser or donee, known to the seller. ... (Emphasis added.)

¹³³ See Protestant's Proposed Findings at 7.

¹³⁴ See Division's Proposed Findings at 11.

¹³⁵ OKLA. STAT. tit. 68, § 1354.14 *et seq.* (West 2006). See OKLA. STAT. tit. 68, § 1354.27(A)(1) and (2) (West 2006).

The language of the Streamlined Act is clear and unambiguous;¹³⁶ the Act imposes tax sourced to the customer's address, where the TPP is delivered, if there has been a "sale."¹³⁷

However, by statute, TPP "...does not include...tangible personal property that loses its identity when it becomes an integral and inseparable part of the realty, or tangible personal property which is removable only with substantial damage to the premises."¹³⁸

The Tax Commission has previously held that "When the [protestant] withdraws the materials from its inventory to fulfill the 'contracted for services,' the materials lose the protection of the resale exemption and are reportable by the [protestant] as 'gross receipts.' The 'point of sale' for purposes of 'withdrawals from inventory' in this matter is the [protestant's] 'ANY TOWN Warehouse.'"¹³⁹

As a "Contractor," the Protestant is the final "Consumer" or "User"¹⁴⁰ of the "Materials"¹⁴¹ incorporated into the customer's real property, pursuant to the terms of the Installed Sales Contract. If any business purchases TPP for resale and that business withdraws TPP from its inventory, that business has made a taxable sale.¹⁴² The sourcing of the sale is the location of the store where the sale occurred, at the Protestant's cost, not the retail price.

¹³⁶ See Note 85, *supra*.

¹³⁷ *Id.* See also Notes 51 through 52, *supra*.

¹³⁸ See Note 56, *supra*.

¹³⁹ See OTC (Non-Precedential) Order No. 2007-06-05-03 (June 5, 2007), 2007 WL 2171485 (Okl. Tax Com.). The Order is also available on the Tax Commission website at <http://www.tax.ok.gov>. The distinction between a Commission Order designated as "Precedential" or "Non-Precedential" has been blurred because all OTC Orders resulting from cases heard by the Office of Administrative Law Judges are now published, not just "Precedential" Orders. See OKLA. STAT. ANN. tit.68, § 221(G) (West Supp. 2009) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002).

¹⁴⁰ See Note 62, *supra*.

¹⁴¹ See Note 57, *supra*.

¹⁴² See Note 61, *supra*.

CONCLUSION

Based upon the record, reasonable minds would reach the same conclusion, that there is no substantial controversy as to the material facts; the Protestant is entitled to a decision in its favor, as a matter of law.

JURISDICTION TO DECIDE CONSTITUTIONAL ISSUE

The Supreme Court of Oklahoma held in *Dow Jones*,¹⁴³ "We agree with the Commission that, as an administrative agency, it is powerless to strike down a statute for constitutional repugnancy. Within the framework of Oklahoma's tripartite distribution of government powers, the authority to invalidate an unconstitutional enactment resides solely in the judicial department. Art. 7, § 1, Okl. Const.¹⁴⁴ confers on administrative agencies only that quantum of 'judicial power' which is necessary to support their exercise of adjudicative authority in individual proceedings brought before them. The power assigned to boards and commissions is not coextensive with that which is vested in the courts. Every statute is hence constitutionally valid until a court of competent jurisdiction declares otherwise."

¹⁴³ *Dow Jones & Company, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1990 OK 6, 787 P.2d 843. (Citations omitted).

¹⁴⁴ OK Const. Art. 7, § 1, (West 2001) states as follows, to-wit:

The judicial power of this State shall be vested in the Senate, sitting as a Court of Impeachment, a Supreme Court, the Court of Criminal Appeals, the Court on the Judiciary, the State Industrial Court, the Court of Bank Review, the Court of Tax Review, and such intermediate appellate courts as may be provided by statute, District Courts, and such Boards, Agencies and Commissions created by the Constitution or established by statute as exercise adjudicative authority or render decisions in individual proceedings. Provided that the Court of Criminal Appeals, the State Industrial Court, the Court of Bank Review and the Court of Tax Review and such Boards, Agencies and Commissions as have been established by statute shall continue in effect, subject to the power of the Legislature to change or abolish said Courts, Boards, Agencies, or Commissions. Municipal Courts in cities or incorporated towns shall continue in effect and shall be subject to creation, abolition or alteration by the Legislature by general laws, but shall be limited in jurisdiction to criminal and traffic proceedings arising out of infractions of the provisions of ordinances of cities and towns or of duly adopted regulations authorized by such ordinances.

The Protestant asserts that the Division's position denies the Protestant equal protection of the law. The Protestant states, "The Division now seeks, without statutory authority, to divide Oklahoma contractors into two arbitrary categories – those that also make retail sales as opposed to those that do not – and it seeks to impose different tax burdens on the two groups for engaging in the exact same activity. There is nothing in the Oklahoma Tax Code that authorizes such a discriminatory scheme. ...Indeed, there is no statutory caveat or exception to OKLA. STAT. ANN. tit. 68, § 1352(7) that suggests that contractors who also sell merchandise at retail must be classed differently and bear different tax burdens than other contractors making the same real property improvements. Rather, the Division has unilaterally chosen to implement its own aberrational enforcement policy against the [Protestant]."¹⁴⁵

The Division responds, "Protestant asserts that the Division's assessment violates equal protection because it treats contractors differently. Here, Division assessed Protestant, not as a contractor who installed property owned by Protestant, but as a vendor of tangible personal property who installed property which Protestant sold to its customers under installed sales contracts. Protestant has not cited even one example of a taxpayer who is similarly situated to Protestant, but was taxed differently."¹⁴⁶

Equal protection clause does not forbid classification; it simply keeps governmental decision matters from treating differently persons who are in all relevant respects alike.¹⁴⁷ A State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable.¹⁴⁸ States have large leeway in

¹⁴⁵ Protestant's *Proposed Findings* at 20.

¹⁴⁶ Division's *Proposed Findings* at 21.

¹⁴⁷ See *Nordlinger v. Hahn*, 505 U.S. 1, 112 S.Ct. 2326.

¹⁴⁸ See *Allegheny Pittsburgh Coal Co. v. County Com'n of Webster County, W. Va.*, 488 U.S. 336, 109 S.Ct. 633.

making classifications and drawing lines which in their judgment produce reasonable systems of taxation.¹⁴⁹

The Sales Tax Code does not contain the definition of a "Contractor/Retailer" and/or "Retailer/Contractor." The Division is making a distinction, which is not supportable based upon the conclusions reached herein.

CONCLUSION

The Division's distinction between Protestant and "Contractor," as defined by the Sales Tax Code would be a violation of the equal protection clause if upheld, but based upon the Conclusions reached herein, it is a moot point.

WAIVER OF PENALTY AND INTEREST

At the discretion of the Commission, the interest or penalty, or both, may be waived provided the taxpayer can demonstrate that the failure to pay the tax when due is satisfactorily explained, or that the failure resulted from a mistake by the taxpayer of either law or fact, or that the taxpayer is unable to pay the interest or penalty due to insolvency. Requests for waiver or remission must be made in writing and must include all pertinent facts to support the request.¹⁵⁰

The Petition for Redetermination ("Protest") "...requests a complete waiver of all penalties and interest."¹⁵¹

¹⁴⁹ See *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S.Ct. 1001. (Citations omitted.)

¹⁵⁰ OKLA. ADMIN. CODE § 710:65-3-1(m) (June 25, 2004). See also OKLA. STAT. tit. 68, § 217 (West 2001), and OKLA. STAT. tit. 68, §§ 1365, and 1405 (West Supp. 2006).

¹⁵¹ See Stipulated Exhibit 4 at 20.

CONCLUSION

The ALJ does not have the authority to waive penalty and interest. The authority to waive penalty and interest rests exclusively with the Commissioners or their designee,¹⁵² but based upon the Conclusions reached herein, the request is moot.

RECOMMENDATIONS

It is the recommendation of the undersigned Administrative Law Judge, based upon the facts and circumstances of this case that the Protestant's MSD be granted, as more fully set forth herein.

OKLAHOMA TAX COMMISSION



JAY S. HARRINGTON
ADMINISTRATIVE LAW JUDGE

¹⁵² OKLA. STAT. ANN. tit. 68, § 220 (West 2014).

CERTIFICATE OF SERVICE OR MAILING

This is to certify that on this 14th day of July, 2014, true and correct copies of the above and foregoing *Findings, Conclusions and Recommendations* of the Administrative Law Judge were delivered to Marjorie L. Welch, First Deputy General Counsel, Oklahoma Tax Commission, and mailed with proper postage prepaid to:

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JLH:jlh

ATTACHMENT 2

South Carolina Private Letter Ruling No. PLR 07-4

State of South Carolina Department of Revenue

SC PRIVATE LETTER RULING #07-4

SUBJECT: Signs — Sales of Tangible Personal Property or Improvements to Realty
(Sales and Use Tax)

REFERENCES: S. C. Code Ann. Section 12-2-25(B) (Supp. 2006)
S. C. Code Ann. Section 12-36-910 (2000; Supp. 2006)
S. C. Code Ann. Section 12-36-1310 (2000; Supp. 2006)
S. C. Code Ann. Section 12-36-60 (2000)
S. C. Code Ann. Section 12-36-110 (2000)
S. C. Code Ann. Section 12-36-90 (2000; Supp. 2006)
S. C. Code Ann. Section 12-36-130 (2000; Supp. 2006)
SC Regulation 117-309.9 (Supp. 2006)
SC Regulation 117-314.2 (Supp. 2006)
SC Regulation 117-313.3 (Supp. 2006)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2000)
S. C. Code Ann. Section 1-23-10(4) (2006)
SC Revenue Procedure #05-2

SCOPE: A Private Letter Ruling is an advisory opinion issued to a specific taxpayer by the Department to apply principles of law to a specific set of facts or a particular tax situation. It is the Department's opinion limited to the specific facts set forth, and is binding on agency personnel only with respect to the person to whom it was issued and only until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion, providing the representations made in the request reflect an accurate statement of the material facts and the transaction was carried out as proposed.

Questions:

1. Is XYZ, LLC ("XYZ") a retailer selling and installing signs or a contractor making improvements to real property with respect to the types of signs described in the facts?
2. If XYZ, LLC is a retailer selling and installing signs, what is the basis for the tax?
3. If XYZ, LLC contracts with a manufacturer in South Carolina to manufacture a sign instead of ABC, Inc., is the taxation of the transaction treated the same as those in which ABC, Inc. is the manufacturer?

Conclusions:

1. XYZ, LLC is a retailer engaged in the business of selling tangible personal property at retail.

However, since XYZ, LLC is a single member limited liability company that is disregarded for federal and state income tax purposes, it is disregarded for all South Carolina tax purposes and the taxpayer for sales and use tax purposes is ABC, Inc. As the taxpayer for sales and use tax purposes and the

person liable for the tax, ABC, Inc. must obtain the retail license in its name. In completing the application form (Form SCTC -111), ABC, Inc. should be listed as the "Owner" on Line 1 of the form with XYZ, LLC listed as the "Trade Name (Doing Business As)" on Line 2 of the form.

2. Sales at retail of signs by ABC, Inc. d/b/a XYZ, LLC ("XYZ"), as described in the facts, are subject to the tax based upon "gross proceeds of sales" as follows:

(a) Sales at retail of the signs are subject to the tax, unless otherwise exempt under the law.

(b) All charges by XYZ to customers for services provided in conjunction with, or as a part of, sales at retail of signs are includable in "gross proceeds of sales" and, therefore, subject to the tax unless the sale of the sign is otherwise exempt under the law. This would include, but is not limited to, charges by XYZ to its customers for consultation, engineering and design, surveys, and permits.

However, the following charges are not subject to the tax:

(i) Charges to install signs (whether installed by XYZ or another person on its behalf), provided "such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property;" and,

(ii) Charges to customers for tangible personal property which becomes a part of the real property, such as concrete used for the foundation of a stand alone sign, provided such charges are separately stated from the sales price of the property on billing to customers and provided such charges are reasonable. However, sales to, or purchases by, XYZ of such tangible personal property are subject to the tax.

If XYZ provides services that are not provided in conjunction with, or as a part of, the sale of a sign, then charges to customers for such services are not subject to the sales and use tax. For example, if XYZ charges a customer to remove a sign, and this transaction is not associated with the sale of a new sign, then the charge for the sign removal service is not subject to the tax.

Note: For information concerning the taxability of charges for freight and delivery, repairs, and warranty and maintenance contracts, see SC Regulation 117-310, SC Regulation 117-306, and SC Revenue Ruling #06-9 respectively.

3. If XYZ, LLC contracts with a manufacturer in South Carolina to manufacture a sign instead of ABC, Inc., the taxation of the sale at retail of the sign is treated the same as those in which ABC, Inc. is the manufacturer of the sign. In other words, XYZ is still the retailer liable for the tax.

Facts:

ABC, Inc. is a Florida S Corporation. It manufactures signs in Florida for out-of-state customers as well as Florida customers. ABC, Inc. also has the signs installed at the outof-state customer's location using a subcontractor. ABC, Inc. contracts with and pays the subcontractor for installing the sign and then bills the customer for the sign and installation costs and collects sales tax on the transaction in accordance with the law of the state where the sign is delivered. This sales tax is remitted to the taxing authorities in the state where the sign is installed.

To address Florida sales and use tax issues, ABC, Inc. is creating a Florida singlemember limited liability company. The new LLC will be named XYZ, LLC. XYZ, LLC will be disregarded for federal and

state income tax purposes and, therefore, treated as a division of the ABC, Inc. However, for Florida sales tax purposes, ABC, Inc. and XYZ, LLC will be legally distinct. XYZ, LLC will purchase signs from ABC, Inc. for delivery to its out-of-state customers. ABC, Inc. will deliver the signs by a common carrier or pursuant to the terms of the sales contract deliver the property using ABC, Inc.'s own mode of transportation. XYZ, LLC will contract with and pay a subcontractor for installing the sign and then will bill the customer for the sign and installation costs and collect sales tax on the transaction in accordance with the law of the state where the sign is delivered.

ABC, Inc. manufactures six distinct signage products: channel letters, back-lit letters, pylon signs, monument signs, and electronic display systems, and banners. In addition, ABC, Inc. offers total customer packages which include an array of signage products custom tailored to meet the demands of a diverse range of businesses.

Channel Letters are individually illuminated letters and graphics. These letters are found everywhere, from shopping malls to exterior storefront identification. There are three types of channel letters:

The most common type is Standard Channel Letters. These letters are made up of a U-channel base, with colored Plexiglas faces.

Reverse Channel Letters have metal faces and returns (sides of letters) and have a clear plastic backing. These letters are designed to be mounted an inch or two away from the wall. At night, these letters create a halo-lit effect.

The third type of Channel Letters have "open" faces. Though not actually open, the faces of these letters are clear plastic with the balance of the letters built just like Standard Channel Letters. This allows for the raw neon to be seen, as well as the inside of the U-channel letterform itself.

Back-Lit Letters are individual letters and graphics that are illuminated from a source that is located behind the letters. The usage of back lighting creates a halo effect around the letters.

Pylon signs are an effective way to provide advance notice of the location of a business or to feature a business name or logo. It is very common to see pylon signs on or near main streets. Manufactured of aluminum & steel, the structures are made for long term usage.

Monument signs are free-standing signs constructed on the ground with a continuous footing or foundation and a base at grade level.

Electronic display systems utilize digital media to display information. The use of electronic display systems has rapidly increased due to their ability to display information rapidly, fluidly and in a more esthetically pleasing manner. Electronic displays are often utilized by companies needing to communicate large amounts of information, such as airports, bus terminals, and stadiums. However, their use has also increased rapidly in mainstream commerce.

Banners are temporary signs until the actual sign is manufactured.

Window Graphics are vinyl signs applied inside the windows or on the doors that are used to tell store hours and emergency contact information.

ABC, Inc. performs design and engineering services. The marketing design department provides clients with creative artwork concepts.

Finally, from time to time, XYZ, LLC may contract with a sign manufacturer in South Carolina to manufacture a sign instead of contracting with ABC, Inc. to manufacture the sign.

Discussion:

XYZ, LLC is a single member limited liability whose single member is ABC, Inc., a Florida S corporation. XYZ, LLC will be disregarded for federal and state income tax purposes and will, therefore, be treated as a division of ABC, Inc.

Code Section 12-2-25(B) states that “[f]or South Carolina tax purposes ... a single member limited liability company, which is not taxed for South Carolina income tax purposes as a corporation, is not regarded as an entity separate from its owner.”

Based on the above, the taxpayer for South Carolina sales and use tax purposes is ABC, Inc. since XYZ, LLC “is not regarded as an entity separate from its owner.”

For purposes of this advisory opinion, the taxpayer will be referred to as “XYZ.”

Code Section 12-36-910(A) imposes the sales tax and states:

A sales tax, equal to [six] percent¹ of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property at retail.

Code Section 12-36-1310(A) imposes the use tax and states:

A use tax is imposed on the storage, use, or other consumption in this State of tangible personal property purchased at retail for storage, use, or other consumption in this State, at the rate of [six] percent² of the sales price of the property, regardless of whether the retailer is or is not engaged in business in this State.

Code Section 12-36-60 defines the term “tangible personal property” and states:

“Tangible personal property” means personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses. It also includes services and intangibles, including communications, laundry and related services, furnishing of accommodations and sales of electricity, the sale or use of which is subject to tax under this chapter and does not include stocks, notes, bonds, mortgages, or other evidences of debt. Tangible personal property does not include the transmission of computer database information by a cooperative service when the database information has been assembled by and for the exclusive use of the members of the cooperative service.

Based on the above, in order for the sales or use tax to apply, there must be a retail sale of tangible personal property.

Code Section 12-36-110, defines the terms “retail sale” and “sale at retail” to mean, in part:

Sale at retail and retail sale mean all sales of tangible personal property except those defined as wholesale sales. The quantity or sales price of goods sold is immaterial in determining if a sale is at retail.

(1) The terms include:

(a) sales of building materials to construction contractors, builders, or landowners for resale or use in the form of real estate;

SC Regulation 117-309.9 concerns sign companies, and states:

A person engaged in the business of erecting, on properties owned or controlled by him, signs for the display of products of a second party for a consideration is deemed to be engaged in the business of selling a service. A tax is due measured by the purchase price of all tangible personal property used or consumed by such person as additions or improvements to realty.

A person engaged in the business of designing, fabricating and erecting signs on properties of another, for the display of that person's products, is deemed to be a retailer. The gross proceeds of the sale of such signs are subject to the tax. If the signs are leased or rented, the lease or rental proceeds are subject to the tax.

A person engaged in both of the above businesses shall pay the tax in accordance with the applicable provisions as set forth hereinabove.

A person who designs and constructs a sign as defined in the second paragraph above may, if all statutory requirements are met, be considered a manufacturer. (Emphasis added.)

In addition, in Commission Decision #89-70 the Department held that a taxpayer engaged in the business of designing, fabricating and erecting signs was a retailer of tangible personal property.

Based on the above and the facts set forth above, XYZ is selling tangible personal property at retail.

However, we must consider the application of the tax with respect to tangible personal property which becomes a part of real property. SC Regulation 117-314.2 addresses this matter and states:

Building materials when purchased by builders, contractors, or landowners for use in adding to, repairing or altering real property are subject to either the sales or use tax at the time of purchase by such builder, contractor, or landowner. "Building materials" as used in the Sales and Use Tax Law includes any material used in making repairs, alterations or additions to real property. "Builders," "contractors," and "landowners" mean and include any person, firm, association or corporation making repairs, or additions to real property. The term "building materials" includes such tangible personal property as lumber, timber, nails, screws, bolts, structural steel, elevators, reinforcing steel, cement, lime, sand, gravel, slag, stone, telephone poles, fencing, wire, electric cable, brick, tile, glass, plumbing supplies, plumbing fixtures, pipe, pipe fittings, prefabricated buildings, electrical fixtures, built-in cabinets and furniture, sheet metal, paint, roofing materials, road building materials, sprinkler systems, air conditioning systems, built-in-fans, heating systems, floorings, floor furnaces, crane ways, crossties, railroad rails, railroad track accessories, tanks, builders hardware, doors, door frames, window frames, water meters, gas meters, well pumps, and any and all other tangible personal property which becomes a part of real property.

For additional guidance in this matter, we refer to *City of North Charleston v. Claxton*, 315 S.C. 56, 431 S.E.2d 610 (1993). While that case dealt with the value of property in a condemnation proceeding, it also addressed the issue of real (fixtures) versus personal property.

Quoting from that case:

Criteria for determining whether an item remains personalty or becomes a fixture when affixed to realty

includes: (1) the mode of attachment; (2) the character of the structure of the article; (3) the intent of the parties making the annexation; and, (4) the relationship of the parties. *Creative Displays*, 272 S.C. at 72, 248 S.E.2d at 918.

The Court, in *Claxton*, referenced *Rebel Manufacturing and Marketing Corporation*, 54 B.R. 674 (Bkrcty. D.S.C. 1985). In that case, a bank argued that the sale of a mobile home was subject to a mortgage on the realty because it was a fixture [real property]. The mobile home was underpinned, anchored, and connected to sewerage, water and electric lines. Also, the home had a screened porch attached and was adjacent to several large trees.

In ruling for the bank, the Court reasoned:

The various substantial structures and trees surrounding the mobile home would be severely damaged, if not destroyed, should the mobile home be removed.

* * * *

It seems clear that the debtor's positioning the mobile home among the trees, and adding the construction [the porch] warrants the inference that the intent of the debtor was for the mobile home to become a part of the realty.

Paris Mountain Water Company v. Woodside, 133 S.C. 383, 131 S.E. 37 (1925), a South Carolina State Supreme Court case, was concerned with whether water pipes placed in lands belonging to others were to be taxed as realty or personalty. The Court, in holding that the pipe was to be taxed as realty, stated:

In the requirement of an intention to make the article annexed a permanent accession to the land, the expression of permanent does not, it seems, imply that the annexation must be intended to be perpetual, but rather that the article shall appear to be intended to remain where fastened until worn out, until the purpose to which the realty is devoted has been accomplished, or until the article is superseded by another article more suitable for the purpose.

Based on the above, if a tangible personal property becomes a part of real property, such as concrete used for the foundation of a stand alone sign, then such tangible personal property is considered used and consumed by XYZ and not sold by XYZ.

The next issue concerns the basis for the tax on sales of tangible personal property at retail.

The sales tax is imposed upon a retailer's "gross proceeds of sales" which is defined at Code Section 12-36-90, in part, as:

...the value proceeding or accruing from the sale, lease, or rental of tangible personal property... without any deduction for... the cost of materials, labor, or service... [or] any other expenses....

The use tax is based upon the "sales price" of tangible personal property. The term "sales price" is defined at Code Section 12-36-130, in part, as:

...the total amount for which tangible personal property is sold, without any deduction for the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses, or any other expenses.

(1) The term includes:

(a) any services or transportation costs that are a part of the sale, whether paid in money or otherwise;
...

In *Meyers Arnold, Inc. v. South Carolina Tax Commission*, 285 S.C. 303, 328 S.E.2d 920, 923 (1985), the Court of Appeals of South Carolina held the element of service involved in a lay away sale was subject to tax as being part of the sale of tangible personal property. The test used by the court was as follows:

...But for the lay away sales, Meyers Arnold would not receive the lay away fees. The fees are obviously charged for the service rendered in making lay away sales. For these reasons, this court holds the lay away fees are part of the gross proceeds and subject to the sales tax.

Accordingly, the total amount charged in conjunction with the sale or purchase of tangible personal property is subject to the tax.

A similar conclusion was reached in *Regency Towers Association, Inc. v. South Carolina Tax Commission*, 88-CP-26-1109 (1989), where the Horry County Court of Common Pleas held charges for maid service were not deductible from gross proceeds derived from charges for accommodations. In Commission Decision #92-37, the Commission held that charges for maid services, which were optional, were a part of the accommodations furnished to transients and therefore subject to the accommodations tax. (See Code Section 12-36-920(B) and SC Regulation 117-307 for subsequent changes in the statute concerning "additional guest charges," such as maid service, at places furnishing accommodations.)

In Commission Decision #90-38, the Commission held that charges for engraving services, even though optional, were a part of the sale of plaques and trophies by the retailer and includible in gross proceeds of sales. The decision states, in part:

...We find and conclude that here the "engraving charges" are part of the sale of tangible personal property since the customer is not seeking a professional service but is seeking an engraved trophy or plaque....

* * * *

...The Courts have held that although the amount of materials used may be inconsequential with respect to the labor involved where the customer seeks to purchase custom made or designed tangible personal property, the artistic skill of the craftsman is a part of the sales price of the product and is inextricably linked....

In summary, charges for services that are made in conjunction with, or as part of the sale of, tangible personal property are includable in "gross proceeds of sales" or "sales price," and, therefore, subject to the tax.

However, it is important to note two additional issues with respect to the basis for the tax.

First, SC Regulation 117-313.3, concerning installation charges, states:

Not subject to the sales or use tax are charges for installation incident to the sale of tangible personal property when such charges are separately stated from the sales price of the property on billing to

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customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property.

Second, since some tangible personal property used in the transaction becomes a part of the real property, such as concrete used for foundations of stand alone signs, then such tangible personal property is considered used and consumed by XYZ and not sold by XYZ. As such, the sales to, or purchases by, XYZ of such tangible personal property are subject to the tax.

Based on the above, sales at retail of signs by XYZ, as described in the facts, are subject to the tax based upon "gross proceeds of sales" as follows:

- (a) Sales at retail of the signs are subject to the tax, unless otherwise exempt under the law.
- (b) All charges by XYZ to customers for services provided in conjunction with, or as a part of, sales at retail of signs are includable in "gross proceeds of sales" and, therefore, subject to the tax unless the sale of the sign is otherwise exempt under the law. This would include, but is not limited to, charges by XYZ to its customers for consultation, engineering and design, surveys, and permits.

However, the following charges are not subject to the tax:

(i) Charges to install signs (whether installed by XYZ or another person on its behalf), provided "such charges are separately stated from the sales price of the property on billing to customers and provided the seller's books and records of account show the reasonableness of such labor in relation to the sales price of the property;" and,

(ii) Charges to customers for tangible personal property which becomes a part of the real property, such as concrete used for the foundation of a stand alone sign, provided such charges are separately stated from the sales price of the property on billing to customers and provided such charges are reasonable. However, sale to, or purchases by, XYZ of such tangible personal property are subject to the tax.

If XYZ provides services that are not provided in conjunction with, or as a part of, the sale of a sign, then charges to customers for such services are not subject to the sales and use tax. For example, if XYZ charges a customer to remove a sign, and this transaction is not associated with the sale of a new sign, then the charge for the sign removal service is not subject to the tax.

And finally, if XYZ, LLC contracts with a manufacturer in South Carolina to manufacture a sign instead of ABC, Inc., the taxation of the sale at retail of the sign is treated the same as those in which ABC, Inc. is the manufacturer of the sign. In other words, XYZ is still the retailer liable for the tax.

Note: For information concerning the taxability of charges for freight and delivery, repairs, warranty and maintenance contracts, see SC Regulation 117-310, SC Regulation 117-306, and SC Revenue Ruling #06-9 respectively.

s/Ray N. Stevens

Ray N. Stevens, Director

July 13, 2007

Columbia, South Carolina

¹ Beginning June 1, 2007, the total *state* sales and use tax rate is 6%. Code Section 12-36-1110, which increased the sales and use tax rate by 1% beginning June 1, 2007, states:

Beginning June 1, 2007, an additional sales, use, and casual excise tax equal to one percent is imposed on amounts taxable pursuant to this chapter, except that this additional one percent tax does not apply to amounts taxed pursuant to Section 12-36-920(A), the tax on accommodations for transients, nor does this additional tax apply to items subject to a maximum sales and use tax pursuant to Section 12-36-2110 nor to the sale of unprepared food which may be lawfully purchased with United States Department of Agriculture food coupons.

² See footnote #1.
