JURISDICTION:	**OKLAHOMA TAX COMMISSION DECISION**
CITE:	**87-05-26-26 / NON-PRECEDENTIAL**
ID:	**CR-85-021 / CR-86-014 / CR-86-016**
DATE:	**MAY 26, 1987**
DISPOSITION:	**DENIED**
TAX TYPE:	**SALES**
APPEAL:	**AFFIRMED / S.CT. 69,093**
	1991 OK 73, 814 P.2D 1036

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATEMENT OF FACTS

Claimants are licensed to do business in Oklahoma and are owners and operators of apartment houses and multi-unit housing for the handicapped and elderly in Oklahoma.

Claimants filed Claims for Refund in the following manner:

HOUSING, INC., an Oklahoma corporation, on or about October 18, 1985, filed its Claim for Refund for sales tax paid to Oklahoma Gas and Electric Company for the purchase of electricity for the period February 26, 1985 to August 25, 1985 in the amount of Six Hundred Twenty-Three Dollars and Ten Cents ($623.10). Sales tax for this period is no longer at issue, but Claimant has filed an amended Claim for Refund for the subsequent period. Claimant states that the electricity at issue is utilized, at least in part, by a coin operated laundry, kitchen, dining room, vending machines, clinic, assembly room, beauty shop, thrift shop, maintenance room, recreation room, and office of Claimant.

APARTMENTS, INC., an Oklahoma corporation, filed its Claim for Refund on or about January 10, 1986 for sales tax paid to Oklahoma Gas and Electric Company for the purchase of electricity for the period February 19, 1985 to August 18, 1985, in the amount of Eight Hundred Eleven Dollars and Twenty-Five Cents ($811.25). Claimant states that the electricity at issue is utilized, at least in part, by a coin operated laundry operated by an unrelated entity and the office of Claimant.

APARTMENTS, a limited partnership, on or about August 15, 1986, filed its Claim for Refund for sales tax paid to Oklahoma Gas and Electric Company for the purchase of electricity for the period June 13, 1983 to June 12, 1986 in the amount of One Thousand Four Hundred Four Dollars and Thirty-Five Cents ($1,404.35) and for sales tax paid to Oklahoma Natural Gas for the purchase of natural gas for the period June 21, 1983 to June 25, 1986, in the amount of Three Thousand Four Hundred Seventy Dollars and Twenty-Five Cents ($3,470.25). Claimant states that the electricity and natural gas at issue are utilized, at least in part, by a coin operated laundry, a recreation room and the office of Claimant.

Claimants assert that the purchase of electricity and natural gas at issue herein is exempt by virtue of 68 O.S. §1357(G).

Claimants agreed to consolidate their claims for hearing and briefing purposes, but retained the right to have individual decisions in each case.

Claimants assert entitlement to relief under Title 68 O.S. 1981, § 227, Erroneous payments-Claims for refund.

ISSUE

Whether the purchases of electricity made by a purchaser of electricity who uses a portion of the electricity purchased in its business and provides the remainder of the electricity purchased to tenants are exempt from sales tax.

CONTENTIONS OF CLAIMANTS

The policy of the Sales and Use Tax Section of the Business Tax Division as to the exemption at issue was developed in 1982, after enactment of 68 O.S. 1981, § 1357(G), without notice to the general public or the Oklahoma Legislature. There has been no approval or rejection by the Oklahoma Tax Commission or the Legislature of the Sales and Use Tax Section's policy. The policy that should be used by the Sales and Use Tax Section is the "predominant use" test in the context of an apartment/landlord arrangement.

CONTENTIONS OF THE DIVISION

Section 1357(G) of Title 68 of the Oklahoma Statutes is an exemption statute. Exemption statutes must be strictly construed against the one claiming the exemption. The use of electricity by the landlord for common areas and for offices is not an exclusively residential use as required under the exemption statute.

APPLICABLE LAW

This action arises under Title 68 O.S. 1981, §§ 1354(B) and 1357(G), and the Oklahoma Tax Commission has jurisdiction under Title 68 O.S. l981, § 207.

Section 1354(B) of Title 68 of the Oklahoma Statutes provides:

> §1354. Tax Levy-Rate-Sales subject to tax
>
> There is hereby levied upon all sales, not otherwise exempted in this article, an excise tax of two percent (2%) of the gross receipts or gross proceeds of each sale of the following:
>
> …
>
> (B) Natural or artificial gas, electricity, ice, steam or any other utility or public service, except water and those specifically exempt under Section 1357 of this Code;

Subsequent versions of Section 1354 of Title 68 were passed by the Oklahoma Legislature, providing for, inter alia, the rate of the tax to increase from two percent (2%) to three percent (3%) on February 1, 1984, and to three and one quarter percent (3¼%) on July 1, 1985. This section is otherwise unaffected by amendments to the Sales Tax Code in the years covered in these assessments.

Section 1357(G) of Title 68 of the Oklahoma Statutes provides:

> §1357. Exemptions-General
>
> There are hereby specifically exempted from the tax levied by this article:
>
> …
>
> (G) Sale of natural or artificial gas and electricity when sold exclusively for residential use after December 31, 1980. Provided, nothing herein shall be construed as limiting or prohibiting cities and towns from levying and collecting taxes on the sale of natural or artificial gas and electricity shall be in effect regardless of ordinance or contractual provisions referring to previously imposed state sales tax on such items.

In matters of taxation, it is well settled law that an exemption statute is to be strictly construed against the one who claims entitlement to an exemption. Bert Smith Machinery Company v. Oklahoma Tax Commission, 542 P.2d 1303 (Okl. 1975). Claimants, even provided that the actual end users of the sale of electricity were individual residences, have not met their burden under the applicable rules of statutory construction, since the Claimants also use electricity for other than residential purposes.

Testimony of Claimants respectively indicate that in each contract of every lessee, the lessors/landlords agree to provide electricity to individual lessees for their individual apartments. Claimants also provide electricity to common areas, such as management offices, beauty shop, laundry room and common areas. Claimants are billed by Oklahoma Gas and Electric Company at commercial rates and are liable for payment of the bills. The Oklahoma Corporation Commission Rules and Rates Structure provide that a landlord providing electricity to a tenant is a consumer, and also that the use of electricity by rate is a commercial use. Claimants' use of electricity is clearly not exclusively residential.

The words of a statute must be given their ordinary meaning unless technical in nature, and a plain reading of the exemption statute here indicates that the sale of electricity to a commercial enterprise, at commercial use rates, which enterprise in turn sells off some of the electricity to individual consumers while at the same time utilizing the electricity for its own commercial purposes related to the management of the commercial enterprise, may not claim an exemption for a sale intended for residential purposes exclusively.

Since the enactment of Section 1357(G) in 1981, the Oklahoma Tax Commission has interpreted the sale of electricity to owners of apartment houses, nursing homes or home for the

elderly as a sale to a commercial consumer/use. Since the enactment of Section 1357(G), the Oklahoma Sales Tax Code has been amended, Section 1357(G) has remained unamended. The reenactment of a statute in the same, or substantially the same, language together with longstanding administrative interpretation of a statute is indicative of the Legislative recognition, approval and correctness of the administrative interpretation and will not be ordinarily overturned. Dunn v. Oklahoma Tax Commission, 574 P.2d 618 (Okl. 1978).

The Oklahoma Tax Commission's interpretation of Section 1357(G) was committed to regulation by the Sales and Use Tax Section of the Business Tax Division. Sales Tax Regulation 13-2, published on May 19, 1986, states:

> "Consumer" or "user" means a person to whom a taxable sale of tangible personal property is made or to whom a taxable service is performed. The following are examples of consumer/users. A. HOSPITALS, SANITARIUMS, NURSING HOMES AND EMERGENCY MEDICAL CARE.
>
> Hospitals and sanitariums are primarily engaged in the business of selling services, and for the purposes of the Sales Tax Act are considered to be the consumers or users of all tangible personal property and services used in the operation of the institution. Thus, the gross proceeds derived from sales of tangible personal property and certain services to such institutions are subject to tax.
>
> This regulation applies to all hospitals, sanitariums and nursing homes not operated by the Federal Government, the State, or a political sub-division thereof, including those owned or operated by churches, fraternities, cooperatives, or any other organization, when such hospitals, sanitariums and nursing homes are engaged in business for profit and competing with other persons engaged in the same or a similar business.

The Claimants herein are commercial enterprises. The use of the electricity purchased by Claimants is applied to common areas in furtherance of that commercial enterprise. These severable activities do not fall within the plain meaning of the exemption statute.

CONCLUSIONS OF LAW

In view of the above and foregoing factual situation and applicable law thereto, the undersigned Administrative Law concludes as follows:

1. The Oklahoma Tax Commission has jurisdiction in this matter.

2. Section 227 of Title 68 of the Oklahoma Statutes applies only after a determination is made of whether payment was made through error of fact or misinterpretation of law. There has been no showing by Claimant that payments made to Oklahoma Gas and Electric Company and/or Oklahoma Natural Gas were made through error of fact or computation. Likewise,

Claimant's utility payments were not due to a misinterpretation of law since the Claimant did not avail itself of the commercial rate structure through ignorance of the legal consequences as it related to its taxable status as a commercial user/consumer.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION that the Claims for Refund of HOUSE, INC., APARTMENTS, INC. and APARTMENTS, A LIMITED PARTNERSHIP be denied.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are generally applicable or are limited in time and/or effect. Non-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.