JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **99-06-14-005 / NON-PRECEDENTIAL**
ID: **CR-96-004**
DATE: **JUNE 14, 1999**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above styled and numbered cause comes on for decision pursuant to Rule 710:1-5-38 of the *Oklahoma Administrative Code*. CLAIMANT (hereinafter "Claimant") is represented by ATTORNEY, Attorney at Law, FIRM. The Account Maintenance Division of the Tax Commission (hereinafter "Division") is represented by OTC ATTORNEY, Assistant General Counsel, General Counsel's Office of the Tax Commission.

Upon review of the file and records, including the evidence and argument of counsel, the undersigned finds:

FINDINGS OF FACT

1. Claimant operates a chain of retail grocery stores in Oklahoma under FEI ####.

2. Claimant timely filed sales tax reports for the period of July 1, 1993 through June 30, 1996 and remitted the sales tax attributable to those reports.

3. Sales tax was originally reported by Claimant based on the gross proceeds from sales of cigarettes inclusive of the amount of state cigarette excise tax.

4. On or about August 15, 1996, and September 6, 1996, Claimant filed amended sales tax reports for the relevant period.

5. The amended reports calculate sales tax on sales of cigarettes based on the gross proceeds exclusive of state cigarette excise tax.

6. Claimant requests a refund of sales tax for the relevant period in the aggregate amount of $720,822.28.

7. The Division denied the claim for refund by letter dated October 11, 1996.

8. Claimant filed its protest to the denial and request for hearing on November 8, 1996.

ISSUES AND CONTENTIONS

Two issues are presented for decision. The first issue is whether state cigarette excise tax is deductible from the gross receipts or gross proceeds of each sale of cigarettes for purposes of

calculating the sales tax to be charged, collected and remitted on the sale of cigarettes. The second issue is whether Claimant in accordance with Rule 710:65-11-1 of the *Oklahoma Administrative Code* has sustained the burden of establishing its right to the refund.

Claimant contends that the Division's denial of the claim for refund is erroneous. In support of this contention, Claimant argues that where the burden of an excise tax is placed on the consumer, the amount of the excise tax is not included in gross proceeds for sales tax purposes. Claimant further argues that as the person required to file the sales tax report and remit the tax, it has standing to sue for the refund of the tax.

The Division contends that the claim for refund should be denied. In support of this contention, the Division argues that none of the exemptions listed under 68 O.S. Supp. 1992, ' 321 fall within the basis of Claimant's claim. The Division further argues that Claimant lack standing to argue the merits of the imposition of a cigarette excise tax since the excise tax is imposed on the consumer/user not the seller.

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. 1991, ' 207.

2. Sales tax is levied on the gross receipts or gross proceeds of all sales not otherwise exempted by the Oklahoma Sales Tax Code. 68 O.S. 1991, ' 1354(1).

3. The terms "gross receipts" or "gross proceeds" are synonymous and are defined in part to mean "the total amount of consideration for the sale . . . whether the consideration is in money or otherwise." 68 O.S. Supp. 1998, ' 1352(7)[1]. No deduction from gross receipts or gross proceeds is allowed "on account of the property sold, labor service performed, interest paid, or losses, or of any expenses whatsoever". *Id.*

4. Oklahoma levies an excise tax on "the sale, use, gift, possession, or consumption of cigarettes within the [state]". 68 O.S. Supp. 1992, ' 302. "The impact of the tax . . . [is] on the vendee, user, consumer, or possessor of cigarettes in this state, and, when said tax is paid by any other person, such payment [is] considered as an advance payment and shall thereafter be added to the price of the cigarettes and recovered from the ultimate consumer or user." *Id.* "Every retailer who makes sales of cigarettes within this state to persons for use or consumption shall separately show the amount of tax paid as evidenced by appropriate stamps on each package of cigarettes sold, and the tax shall be collected by the retailer from the user or consumer." *Id.*

5. Whether cigarette excise taxes are included in the gross proceeds of each sale of cigarettes and are therefore subject to sales tax is dependent upon whether the vendor or purchaser/consumer bears the legal incidence of the taxes. See, ***Gurley v. Rhoden***, 421 U.S. 200, 95 S.Ct. 1605, 44 L.Ed.2d 110 (1975). The tax is included in the sales tax base if the legal incidence of the tax is borne by the manufacturer, distributor, or retailer, however, the tax is

[1]Previously codified by Laws 1992, c. 172, ' 1, as Section 1352(G).

excluded from the sales tax base if the legal incidence of the tax is borne by the consumer/purchaser. *Id.* See, ***ITT Canteen Corporation v. Spradling***, 526 S.W.2d 11 (Mo. 1975); ***Ferrara v. Director, Division of Taxation***, 371 A.2d 80 (N.J. 1974); and ***Blackmon v. Coastal Service, Inc.***, 186 S.E.2d 441 (Ga. 1971).

In determining who bears the legal incidence of the tax, primary consideration is given to the specific taxing statutes. ***Spradling***, *supra* at 17. Where the statutes mandate that the incidence of the tax is on the consumer, that the tax is imposed at the time of sale, that the tax is to be added to the sales price, that the tax is to be separately stated and that the vendor is merely an agent for the collection of the tax, the courts have held that the tax is to be excluded from the sales tax base. *Id*. See, ***Ferrara***, *supra* and ***Blackmon***, *supra*.

The Oklahoma Cigarette Stamp Tax Act expressly provides that the impact of the tax is on the user/consumer, that the tax is imposed "only once" at the time of sale, use, gift, possession, or consumption, that the tax is to be added to the sales price and is to be recovered from the consumer/user, that the tax is required to be separately shown by the retailer and that the vendor is merely acting as agent for the collection of the tax. 68 O.S. Supp. 1992, ' 302. Accordingly, the undersigned finds that for purposes of the levy of sales tax on the sale of cigarettes, the "gross receipts or gross proceeds" from the sale of cigarettes does not include the Oklahoma cigarette excise tax.

6. Any taxpayer who has paid, through error of fact, or computation, or misinterpretation of law, any tax may be refunded the amount of tax so paid. 68 O.S. Supp. 1993, ' 227(a). "Taxpayer" is defined in relevant part as "[a]ny person required to file a report, a return or remit any tax." 68 O.S. Supp. 1993, ' 202(d)(2). Claimant is a taxpayer within the meaning of Section 202(d) and may properly maintain an action for the refund of taxes erroneously paid. See, ***Vinson Supply Co. v. Oklahoma Tax Commission***, 767 P.2d 406 (Okl. 1988).

Where the taxpayer is a vendor, the taxpayer's entitlement to the refund is contingent on compliance with Rule 710:65-11-1(a) of the *Oklahoma Administrative Code*[2]. See, ***ITT Canteen Corp. v. Porterfield***, 283 N.E. 2d 124, 126 (Ohio 1972)[3]. Among the documentation to be submitted by the vendor is "[c]opies of the credit invoices or checks showing the tax collected or charged in error has been refunded to [the] customer". *Id*. Here, the record before the undersigned fails to establish that Claimant submitted said documentation. Accordingly, the undersigned finds that Claimant has not established its right to the refund.

7. Claimant's protest to the denial of the claim for refund of sales tax should be denied.

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[2]Previously codified as Regulation 13-58 of the Sales Tax Rules and Regulations (1986) and Rule 13.008.01 of the Administrative Rules on Sales/Use Tax (March 10, 1989).

[3]In this case the Ohio Supreme Court denied the taxpayer/vendor's refund of sales tax upon the finding that the specific taxing statutes provided cigarette excise taxes constituted part of the sales price of cigarettes for sales tax purposes. The Court also found that:

> On the record before us, the appellant has failed to establish that it was entitled to a refund. Apart from that, it is difficult to see how appellant can claim a refund when the consumer had paid the tax. By its own admission, it is not the consumer.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest to the denial of the claim for refund of Claimant, CLAIMANT, 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.

NOTE: 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). *See also* OTC Orders 2009-06-23-02 and 2009-06-23-03 (June 23, 2009), which also conclude the language of the Statute is "clear and unambiguous."