JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2003-04-29-06 / PRECEDENTIAL**
ID: **CR010004**
DATE: **04-29-03**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The parties stipulate to the following:

I. Procedural Facts

1. On April 2, 2001, CLAIMANT filed a sales tax claim for refund in the amount of $92,642.08, which asserted that CLAIMANT was entitled to a refund of sales tax relating to the unpaid balance of a financing contract for the purchase of consumer goods.

2. By letter dated April 5, 2001, Division denied the claim stating that according to OTC Rule 710:65-11-2(e) ". . .The tax credit is allowable only to the person who remitted and reported the tax to the Commission. . ."

3. CLAIMANT, by letter dated April 26, 2001, timely perfected a protest to the denial of the claim.

4. On June 1, 2001, Division filed a Motion to Dismiss a Portion of the Claim as barred pursuant to 68 O.S. ϶ 227(d) and the remainder for Failure to Comply with 68 O.S. ϶ 227(c) and OAC 710:65-11-2.

5. On June 18, 2001, CLAIMANT filed its Show Cause Response to Division's Motion, and revised its claim from $92,642.08 to $110,337.93.

6. On June 25, 2001, CLAIMANT and Division filed a Joint Motion to Strike Show Cause Hearing and set Procedural Schedule.

II. Relevant Facts

1. PREDECESSOR CORPORATION was incorporated within Oklahoma on August 24, 1982. According to records filed with the Oklahoma Secretary of State, PREDECESSOR changed its name to CLAIMANT effective June 30, 2000. During the Claim Period, CLAIMANT had employees and property within the State. CLAIMANT is currently engaging in business in the State of Oklahoma.[1]

[1] Where applicable, "CLAIMANT" includes "PREDECESSOR".

2. CLAIMANT generates business by entering into dealer agreements with retailers located within Oklahoma.

3. In the transactions at issue in this case, the customer selected items from the retailer for purchase. The customer completed an application for a Revolving Charge Agreement.

4. Pursuant to the agreement between CLAIMANT and the retailer, CLAIMANT purchases certain open-ended credit agreements from the retailer. The retailer makes a conditional sale to the consumer and upon credit approval by CLAIMANT, CLAIMANT will finance the entire price of the purchased item less any cash down payment(s) by the retail customer and any discounts agreed upon by CLAIMANT and the retailer.

5. The financing of retail installment contracts on behalf of the retail consumer is the performance of a service within the state. Upon a qualified application, CLAIMANT will provide funds to a consumer (i.e., in the form of an open-ended line of credit) at an agreed interest rate to be repaid over a pre-determined period of time or indefinitely through a minimum payment option.[2]

6. The amount financed includes the full retail price for the consumer goods (less any initial down payments) and the full amount of sales tax (attributable to the amount financed) levied upon gross receipts or gross proceeds of the sale of tangible personal property by Section 1354, Title 68 O.S. as required to be collected and remitted to the state by Section 1361, Title 68 O.S.

7. Once CLAIMANT approved the credit sale from the retailer to the consumer, CLAIMANT remitted payment of the amount financed, inclusive of sales tax, to the retailer on a contract-by-contract basis.

8. During the period when the sales included in the claim were made, CLAIMANT did not hold a sales tax permit issued by the Oklahoma Tax Commission. CLAIMANT did not report or remit any of the sales tax at issue in this proceeding.

9. CLAIMANT has documented that five loans selected by CLAIMANT, pursuant to an agreement between CLAIMANT and Division, were made pursuant to the procedures outlined in the previous stipulations. CLAIMANT has further documented that the selected accounts were not paid in full according to the terms of the agreement between the retailer, CLAIMANT, and the purchaser and that such loans were subsequently written off by CLAIMANT as worthless and/or uncollectible. The name of the purchaser, the name of the vendor, the portion of the purchase price written off and the amount of sales tax attributable to the portion of the purchase price written off are documented.

[2] The interest charges are waived if payment is made in full within a specified time period. This is the "same as cash" concept.

10. The total amount of sales tax attributable to the purchase price written off by CLAIMANT for the purposes of the sample contracts presented herein is $397.96. The amount of vendor discount attributable to the sales tax of $397.96 that would have been retained by the retailer had the retailer timely reported and remitted the sales at issue herein is $8.95.

11. The accounts listed have been determined by CLAIMANT to have become worthless and/or uncollectible and have been written off for federal income tax purposes pursuant to Section 166 of the Internal Revenue Code on CLAIMANT's income tax return.

B. Additional Findings:

1. The parties agree and admit that the claim for refund filed April 2, 2001, is proper and timely for the period of March 1, 1998 through December 29, 2000.

2. The parties further agree and admit that the amount of the claim for refund is subject to verification and audit by the Division and that such will be a time consuming and costly process.

3. Claimant's principal business is the financing of sales of consumer goods from retailers to consumers.

4. Claimant facilitates the sale of consumer goods to purchasers through a retailer.

5. Pursuant to the General Dealer Agreements entered into between a retailer and Claimant, the retailer assigns to Claimant "all right, title, and interest in and to [the] revolving charge sales invoice, the indebtedness and property covered by it, and the Revolving Charge Agreement under which [the] sale [is] made."

6. The retailer reports and remits to the Tax Commission the sales tax attributable to a sale of consumer goods financed by Claimant.

ISSUES

A. The parties stipulate to the following:

III. Legal Issues

1. Wherefore Section 1352, Title 68 O.S. provides in relevant part:

> 1. "Business" means any activity engaged in or caused to be engaged in by any person with the object of gain, benefit, or advantage, either direct or indirect;
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> * * *
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> 8. "Maintaining a place of business in this state" means and includes having or maintaining in this state, directly or by subsidiary, an office, distribution house, warehouse, or other physical place of business...

12. "Person" means any individual, company, partnership, joint venture, joint agreement, association, mutual or otherwise...or any other group or combination acting as a unit, in the plural or singular number...

* * *

21. "Vendor" means:

a. any person making sales of tangible personal property or services in this state, the gross proceeds from which are taxed by the Oklahoma Sales Tax Code.

b. any person maintaining a place of business in this state and making sales of tangible personal property or services, whether at the place of business or elsewhere, to persons within this state, the gross receipts or gross proceeds from which are taxed by the Oklahoma Sales Tax Code.

c. any person who solicits business by employees, independent contractors, agents, or other representatives or by distribution of catalogs or other advertising matter, and thereby makes sales to persons within this state of tangible personal property or services, the gross receipts or gross proceeds from which are taxed by the Oklahoma Sales Tax Code; or,

d. any person, pursuant to an agreement with the person with an ownership interest in or title to tangible personal property, who has been entrusted with the possession of any such property and has the power to designate who is to obtain title, to physically transfer possession of, or otherwise makes sales of property.

2. Therefore, in light of the foregoing, [the issues presented for decision are]:

1. Does CLAIMANT meet the definition of a "vendor" by virtue of the fact that it facilitates the sale of tangible personal property subject to sales tax within the state by selling its financing options to consumers?

2. Are property, contract and statutory rights assignable in Oklahoma?

3. Is CLAIMANT, by operation of law, immediately vested with all the rights of the retailer, including the right to a refund, at the time the contracts are assigned?

4. As the party to the transaction that provided the funds that were collected and remitted to the state pursuant to Sec. 1354 & Sec. 1361, Tit. 68, O.S., is CLAIMANT entitled to the statutory relief provided in Sec. 1366 Tit. 68, O.S., and Rule 710:65-11-2?

5. Is the Oklahoma Tax Commission entitled to retain taxes paid on accounts found to be worthless on debt instruments that were assigned to CLAIMANT?

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. Claimant's cause of action does not fall under the provisions of Section 227 of the Uniform Tax Procedure Code, 68 O.S. 1991, ϶ 201 et seq.; but instead, is governed by the provisions of Section 1366 of the Oklahoma Sales Tax Code, 68 O.S. 1991, ϶ 1350 et seq.

3. "Taxes paid on gross receipts represented by accounts receivable" . . . "may be credited upon subsequent reports and remittances of the tax levied [by the Oklahoma Sale Tax Code]" provided the accounts are "worthless or uncollectible" and are "eligible to be claimed . . . or could be eligible to be claimed" as bad debts for federal income tax purposes. 68 O.S. 1991, ϶ 1366.

4. The credit is allowed to a "taxpayer." 68 O.S. 1991, ϶ 1366. The term "taxpayer" is defined as "any person liable to pay a tax imposed by the Oklahoma Sales Tax Code." 68 O.S. 1991, ϶1352(18).

5. In general, the "consumer or user" of tangible personal property or services taxable by the Oklahoma Sales Tax Code is liable for and required to pay to the vendor, the taxes levied on the gross receipts or gross proceeds from the sale of such property or services, 68 O.S. 1991, ϶ 1361(A) and (B); and the "vendor" is required to report the gross receipts or gross proceeds from the sale of such property or services and remit the tax attributable to such receipts or proceeds to the Tax Commission. 68 O.S. 1991, ϶ 1362(A) and (C).

6. A "consumer or user" is defined as "a person to whom a taxable sale of tangible personal property is made or to whom a taxable service is furnished". 68 O.S. 1991, ϶ 1352(3). A "vendor" is defined as:

> a. any person making sales of tangible personal property or services in this state, the gross proceeds from which are taxed by the Oklahoma Sales Tax Code.
>
> b. any person maintaining a place of business in this state and making sales of tangible personal property or services, whether at the place of business or elsewhere, to persons within this state, the gross receipts or gross proceeds from which are taxed by the Oklahoma Sales Tax Code.
>
> c. any person who solicits business by employees, independent contractors, agents, or other representatives or by distribution of catalogs or other advertising matter, and thereby makes sales to persons within this state of tangible personal property or services, the gross receipts or gross proceeds from which are taxed by the Oklahoma Sales Tax Code; or,

d. any person, pursuant to an agreement with the person with an ownership interest in or title to tangible personal property, who has been entrusted with the possession of any such property and has the power to designate who is to obtain title, to physically transfer possession of, or otherwise makes sales of property.

7. Vendors are required to apply for and obtain a permit from the Tax Commission prior to engaging in business within the State of Oklahoma. 68 O.S. 1991, ϶ 1364. Vendors are also required to keep and maintain "suitable records of the gross daily sales together with invoices of purchases and sales, bills of lading, bills of sale and other pertinent records and documents . . . for a period of three (3) years", 68 O.S. 1991, ϶ 1364(C); and have the administrative burden and expense of reporting their gross receipts or proceeds, filing said reports and remitting the tax attributable to those receipts or proceeds.

8. Sales tax is levied on the gross receipts or gross proceeds of each sale of tangible personal property or services taxable under the Oklahoma Sales Tax Code. 68 O.S. 1991, ϶ 1354. "Sale" is defined as "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". 68 O.S. 1991, ϶ 1354(15).

9. Pursuant to the authority prescribed in Section 203 of the Uniform Tax Procedure Code[3], the Tax Commission promulgated Rule 710:65-11-2 of the *Oklahoma Administrative Code*[4] which essentially provides: (1) the bad debt credit for sales tax previously paid shall be taken against the vendor's present monthly remittance of sales tax, 710:65-11-2(a); (2) the credit must be evident on the face of the sales tax report, 710:65-11-2(b); (3) the vendor has the burden of establishing the right to, and the validity of the credit, 710:65-11-2(c); (4) the credit is limited to the tax shown on the invoice and must be adjusted to reflect any remuneration, 710:65-11-2(e); and (5) the credit is allowed only to the person who reported and remitted the tax to the Commission, 710:65-11-2(e).

10. Rules promulgated pursuant to the Administrative Procedures Act[5], are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court. 75 O.S. 1991, ϶ 306(C). They are valid and binding on the persons they affect and have the force of law. 75 O.S. 1991, ϶ 308.2(C). They are prima facie evidence of the proper interpretation of the matter to which they refer. Id.

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[3] 68 O.S. 1991, ϶ 201 et seq.

[4] *OAC*, 710:65-11-2 is a re-codification of Rule 13-58 of the Sales and Use Tax Rules which was adopted by the Commission on May 19, 1986.

[5] 75 O.S. 1991, ϶ 250 et seq., ϶ 301 et seq.

Further, the legislature is deemed to adopt an administrative construction of a statute when, subsequent to such construction, it amends the statute or reenacts it without overriding such construction. ***Branch Trucking Co. v. Oklahoma Tax Commission***, 1990 OK 41, 801 P.2d 686 (Okla. 1990).

11. Here, Claimant neither transferred nor received title to or possession of the tangible personal property which gave rise to its claim for refund. Therefore, Claimant is neither a "vendor" nor a "consumer" with respect to the transactions at issue, and consequently is not a "taxpayer" under the Oklahoma Sales Tax Code. As stipulated, Claimant performs a service. Claimant facilitates the sale and purchase of consumer goods by extending credit to a consumer or user which is precipitated by credit agreements it offers through the vendors of the consumer goods.

12. Claimant did not hold a sales tax permit during the claim period and did not report or remit any of the sales tax for which it requests a refund. While contractual rights, in general are freely assignable, ***Earth Products Co. v. Oklahoma City***, 441 P.2d 399 (Okla. 1968); the legislature has not extended the right to a bad debt credit to the assignee of a vendor's installment contract. See, 68 O.S. 1991, ∋ 1366.

13. Tax statutes are penal in nature. ***Globe Life and Accident Insurance Company v. Oklahoma Tax Commission***, 1996 OK 39, 913 P.2d 1322 (1996). Penal statutes are to be strictly construed. ***Mid-Continent Pipeline Co. v. Crauthers***, 267 P.2d 568 (Okla. 1954). Strict construction with respect to a penal statute is that which refuses to extend the law by implication or equitable consideration and confines its operations to cases clearly within the letter of the statutes, as well as within its spirit of reason. ***State ex rel. Allen v. Board of Education of Independent School Dist. No. 74 of Muskogee County***, 206 Okl. 699, 246 P.2d 368 (1952). Courts cannot enlarge the taxing act's ambit to make its provisions applicable to cases not 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. ***Globe***, supra at 1327.

14. Claimant's protest to the denial of its sales tax claim for refund is denied.

DISPOSITION

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

OKLAHOMA TAX COMMISSION