JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2005-06-21-03
ID:	CR-05-002-H
DATE:	JUNE 21, 2005
DISPOSITION:	DENIED
TAX TYPE:	SALES/CLAIM FOR REFUND
APPEAL:	OK SUP CT 102,327 / AFFIRMED
CITE:	NOT FOR OFFICIAL PUBLICATION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

An open hearing[1] was held on April 7, 2005, at approximately 1:30 p.m. The Claimant called two (2) witnesses, EMPLOYEE and MANAGER, who testified regarding the records of the Claimant. The Claimant's Exhibits One (1) through Ten (10) were identified, offered, and admitted into evidence. The Division called two (2) witnesses, SUPERVISOR, Credits and Refunds Section, Account Maintenance Division, and AUDITOR, Field Auditor, Audit Division, Oklahoma Tax Commission, who testified regarding the records of the Division. The Division's Exhibits One (1) and Exhibits A through E were identified, offered, and admitted into evidence. Upon conclusion of the hearing the record was held open until April 18, 2005, for the parties to submit proposed findings of fact and conclusions of law. On April 18, 2005, the record was closed and this case was submitted for decision on April 19, 2005.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, and the position letters, the undersigned finds:

1. On December 6, 2001, prior to the commencement of operations, the Claimant filed a Business Registration Application ("Business Registration") at the Tulsa Office of the Oklahoma Tax Commission ("Tulsa Office").[2] The Business Registration purports to have been filled out and signed by MANAGER, but the Business Registration was filled out and signed by EMPLOYEE, an employee of the Claimant.[3]

2. Pursuant to the Business Registration, the Claimant was granted sales tax permit number 999999, with an effective date of December 6, 2001, and expiration date of December 6, 2004.[4]

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[1] The Claimant waived its right to a confidential hearing as provided by the provisions of OKLA. STAT. ANN. tit. 68, § 205 (West 2001).

[2] Division's Exhibit One (1).

[3] MANAGER and EMPLOYEE both testified that MANAGER gave EMPLOYEE oral permission to fill out and sign the Registration in MANAGER'S name.

[4] Division's Exhibit One (1). The SIC Code for the Claimant is listed on the permit as G5211. This code reflects the Claimant answered Question 7 of the Business Registration that its principal type of business was retail, wholesale and other. The manufacturing box on Question 7 of the Business Registration was not checked.

3. The Claimant did not apply for a Manufacturer Sales Exemption Permit ("MSEP") on the day the Business Registration was filed with the Tulsa Office.[5]

4. Up and through the date of hearing, the Claimant has never filed an application for a MSEP.

5. On July 7, 2003, the Claimant filed a Claim for Refund ("Claim") for sales tax paid on the purchases of equipment.[6]

6. The Claim consisted of the following invoices:[7]

Invoice Number	Date	Vendor	Sales Tax Paid
22661	09/05/2001	VENDOR 1.	$ 5,646.83
23031	01/04/2002	VENDOR 1.	5,400.00
4741	10/24/2001	VENDOR 2	21,276.94
4833	04/22/2002[8]	VENDOR 2	310.74
25678	12/21/2001	VENDOR 3	914.62
G11120181	11/09/2001	VENDOR 3	13,129.77
772	10/09/2001	VENDOR 4	2,454.27
Total			$49,133.17

7. On January 10, 2005, the Division denied the Claim by letter, the pertinent part of which is as follows:

> Your request for a Sales Tax refund dated July 7, 2003 for the periods of September 2001 through November 2002 in the amount of $49,133.17 has

[5] EMPLOYEE testified that he inquired from a female employee working the counter at the Tulsa Office (EMPLOYEE did not know the employee's name) about the section to receive an MSEP (Business Registration Questions 18 through 20). EMPLOYEE'S testimony was that he described the proposed operations of the Claimant to the employee, and that the employee stated that she did not think that the Claimant would qualify as a manufacturer. EMPLOYEE further testified that the employee left the counter to talk to someone else (EMPLOYEE did not know who the employee talked to after she left the counter). The employee returned to the counter and confirmed her earlier statement. The employee did not prevent EMPLOYEE from filing the application, and EMPLOYEE did not attempt to file the application for an MSEP or make any further inquiries. However, SUPERVISOR testified that in his experience at working the window in the Oklahoma City Office that the person at the window does not have the authority to make that decision, and that the taxpayer would fill out the application and it would be processed and the taxpayer would be notified of the Division's decision.

[6] *See* Claimant's Exhibit Nine (9) and Division's Exhibit A. The Claim was submitted on behalf of the Claimant by REPRESENTATIVE, CPA. The basis of the Claim was the decision in *Dolese Bros. v. State of Oklahoma ex rel Oklahoma Tax Commission*, 2003 OK 4, 64 P.3d 1093. More specifically, the Claim states, "Pursuant to the above court case, we are claiming a refund of sales tax paid by the company for equipment purchased for use in sand production. [Claimant's] primary business is dredging river beds for sand for the purpose of processing and selling sand to various vendors."

[7] *See* Claimant's Exhibit Nine (9).

[8] The invoice reflects an "order date" of 10/24/2001 and "invoice date" of 04/22/2002.

> been reviewed. We have denied your claim based upon Title 68 OS 1359(2) [sic] that the business does not qualify as a manufacturer under Oklahoma Statutes.[9]

8. On February 8, 2005, the Division received a timely protest to the denial of the Claim.[10]

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of the proceeding.[11]

2. All sales of tangible personal property are subject to sales tax unless otherwise specifically exempted by the Oklahoma Sales Tax Code.[12] The phrase "tangible personal property" is all inclusive, and not limited except by specific exemption.[13]

3. The Claim is based on the manufacturer's exemption, which provides:

> There are hereby specifically exempted from the tax levied by Section 1350 et seq. of this title:
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> 1. Sales of goods, wares, merchandise, tangible personal property, machinery and equipment to a manufacturer for use in a manufacturing operation;[14]

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[9] *See* Claimant's Exhibit Ten (10) and Division's Exhibit B. The Division could not offer a complete explanation as to why the Claim was not timely processed. However, the Division was able to explain part of the delay with Division's Exhibit B. The Claim was initially denied August 18, 2004, but the denial letter was never mailed to the Claimant. The original denial letter was still in the Division's file.

Testimony revealed that there are two (2) errors contained in the form denial letter. The first is in the statutory citation. The letter should have read "1359.2", not "1359(2)". The second error was stating that the Claim was denied because "the business does not qualify as a manufacturer." Through testimony it was established that the letter should have stated that the Claimant had not filed an application for an MSEP, as required by the statute. These are not "serious" errors. The Division has not reviewed the Claimant's operations to determine whether the Claimant would qualify for an MSEP, because the Claimant has never filed an application as required by Section 1359.2. *See* Division's Exhibit E. Copy of the Claimant's Permit Root Update Screen.

[10] *See* Claimant's Exhibit Ten (10) and Division's Exhibit D. The basis of the protest was the decision in *Dolese Bros. v. State of Oklahoma ex rel Oklahoma Tax Commission*, 2003 OK 4, 64 P.3d 1093.

[11] OKLA.. STAT. ANN. tit. 68, § 227(e) (West 2001).

[12] OKLA. STAT. ANN. tit. 68, § 1350 *et seq*. (West 2001).

[13] *See Magnolia Petroleum Co. v. Oklahoma Tax Commission*, 1958 OK 124, 326 P.2d 821.

[14] OKLA. STAT. ANN. tit. 68, § 1359(1) (West 2001).

4. The Legislature enacted Section 1359.2, with an effective date of November 1, 1998, with respect to the manufacturer's exemption, which provides:

> A. In order to qualify for the exemption authorized in paragraph 1 of Section 1359 of Title 68 of the Oklahoma Statutes, *at the time of sale*, the person to whom the sale is made, provided the purchaser is a resident of this state, *shall be required* to furnish the vendor proof of eligibility for the exemption as required by this section. All vendors shall honor the proof of eligibility for sales tax exemption as authorized under this section, and sales to a person providing such proof shall be exempt from the tax levied by Section 1350 et seq. of Title 68 of the Oklahoma Statutes.
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> B. Each resident manufacturer wishing to claim the exemption authorized in paragraph 1 of Section 1359 of Title 68 of the Oklahoma Statutes *shall be required to secure* from the Oklahoma Tax Commission *a manufacturer exemption permit*, the size and design of which shall be prescribed by the Tax Commission. This permit shall constitute proof of eligibility for the exemption provided in paragraph 1 of Section 1359 of Title 68 of the Oklahoma Statutes. Each such manufacturer *shall file with the Tax Commission an application for an exemption permit*, setting forth such information as the Tax Commission may require. The application shall be signed by the owner of the business or representative of the business entity and as a natural person, and, in the case of a corporation, as a legally constituted officer thereof.
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> C. Each manufacturer exemption permit issued shall be valid for a period of three (3) years from the date of issuance. If a manufacturer applying for a manufacturer exemption permit is already the holder of a manufacturer's sales tax permit issued under Section 1364 of Title 68 of the Oklahoma Statutes at the time of initial application, the manufacturer exemption permit shall be issued with an expiration date which corresponds with the expiration date of the manufacturer's sales tax permit. Thereafter, the Tax Commission shall issue the exemption permits at the same time of issuance or renewal of the manufacturer's sales tax permit issued under Section 1364 of Title 68 of the Oklahoma Statutes.
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> D. The Tax Commission shall honor all manufacturer's limited exemption certificates issued prior to the effective date of this act. However, holders of such certificates shall apply for a manufacturer exemption permit pursuant to the provisions of this section at the same time they apply for issuance or renewal of a manufacturer's sales tax permit.[15] (Emphasis added)

[15] OKLA. STAT. ANN. tit. 68, § 1359.2 (West 2001).

The Claim covers purchases beginning September 5, 2001, and ending January 4, 2002. All purchases were made after the effective date of Section 1359.2.[16] According to the invoices attached to the Claim, the majority of the purchases were made before the Claimant even filed the Business Registration. The language of Section 1359.2 is clear and unambiguous. There is no provision in Section 1359.2 which makes purchases, made before the MSEP is issued, refundable. If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and no further construction is required or permitted.[17]

The Claimant in this matter failed to comply with the mandatory procedural requirements of filing an application to obtain a MSEP. Section 1359.2 provides a procedure "in order to qualify for the exemption," and a manufacturer desiring the exemption "*shall be required* to secure from the Oklahoma Tax Commission a manufacturer exemption permit."[18] (Emphasis added) The term "shall" is often used in a statute as part of a command or a mandatory duty.[19]

Once obtained, the Claimant is required to present to the vendor, at the time of the sale, the proof of eligibility for the exemption required by the statute. The Claimant in this matter failed to comply with the mandatory procedural requirements of filing an application to obtain a MSEP. The Division's denial of the Claimant's refund was correct and followed the statutory mandate prescribed by the Legislature in Section 1359.2.

The Claimant in this matter makes an alternative argument that the sales tax is refundable under the provisions of Section 227, Title 68,[20] which in pertinent part provides:

> (a) Any taxpayer who has paid to the State of Oklahoma, through error of fact, or computation, or misinterpretation of law, any tax collected by the Tax Commission may, as hereinafter provided, be refunded the amount of tax so erroneously paid, without interest.
>
> (b) Any taxpayer who has so paid any such tax may, within three (3) years from the date of payment thereof file with the Tax Commission a verified claim for refund of such tax so erroneously paid. . . .

Prior to the enactment of Section 1359.2, a "Manufacturer's Limited Exemption Certificate" could be presented to a vendor for the purpose of making exempt purchases, but

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[16] The Claimant asserts that the *Dolese* case is dispositive of this matter, but the taxpayer's claim for refund in that case was for a period prior to the enactment of Section 1359.2.

[17] *Sullins v. American Medical Response of Oklahoma, Inc.*, 2001 OK 20, 23 P.3d 259.

[18] *Apache Corporation v. State of Oklahoma ex rel Oklahoma Tax Commission*, 2004 OK 48, 98 P.3d 1061.

[19] *Apache*, 2004 OK 48, ¶11, 98 P.3d 1061.

[20] OKLA. STAT. ANN. tit. 68, § 227 (West 2001).

there was no mandatory statutory requirement that the certificate had to be presented to the vendor at the time of sale as a prerequisite to qualifying for the manufacturer's exemption.[21]

Subsequent to November 1, 1998, the enactment date of Section 1359.2, the MSEP must be presented to the vendor *at the time of sale*, not at some later date.

"As a general rule, statutes and statutory amendments will be construed as operating prospectively unless by express declaration or necessary implication from the language used the Legislature clearly demonstrates a contrary intent, ..."[22]

Section 1359.2 is an exemption statute. The Claimant's argument, in effect, attempts to re-characterize Section 1359.2 from an exemption statute into a refund or rebate statute.

The enactment of Section 1359.2 effectively eliminates claims for refund of sales and/or use taxes erroneously remitted to the state by manufacturers which do not hold an MSEP.[23] Tax exemptions and deductions are matters of legislative grace,[24] consequently the Legislature can eliminate, place conditions upon, or restrict an exemption.[25] The Legislature's enactment of Section 1359.2 changed the existing law with respect to the requirements for qualifying for the manufacturer's exemption. The Claimant's argument is that Section 227 stands alone. It does not. Section 227 is the statute under which a refund is claimed, but Section 1359.2 adds a specific condition for claiming it in the case of manufacturers. The two statutes work together. "When construing statutes, we must consider relevant portions together, where possible, to give force and effect to each statute."[26]

DISPOSITION

It is the ORDER OF THE OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the protest to the Division's denial of the Claim for Refund should 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-

[21] *See also* former OKLA. ADMIN. CODE § 710:65-13-151(a)(200).

[22] *Dolese Bros. v. State of Oklahoma ex rel Oklahoma Tax Commission*, 2003 OK 4, ¶8, 64 P.3d 1093.

[23] However, the holder of an MSEP could make a claim under Section 227 to recover sales tax that was charged and paid by the manufacturer by mistake.

[24] *R.R. Tway, Inc. v. Oklahoma Tax Commission*, 1995 OK 129, 910 P.2d 972.

[25] *See Bruner v. U.S.*, 340 F. Supp. 2d 1204 (N.D. Okla. 2004).

[26] *Samson Hydrocarbons Company v. Oklahoma Tax Commission*, 1998 OK 82, 976 P.2d 532.

precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.