

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2005-09-06-02 / PRECEDENTIAL
ID: CR-04-009-K
DATE: SEPTEMBER 6, 2005
DISPOSITION: DENIED
TAX TYPE: SALES
APPEAL: REVERSED AND REMANDED
CITE: 2006 OK CIV APP 68, 136 P.3d 1072

FINDINGS OF FACT AND CONCLUSIONS OF LAW

By three (3) letters dated May 26, 2004, ELECTRIC COMPANY filed with the Credits/Refunds Section of the Division advices setting forth the amount of state, city and county sales tax collected on three of Claimant's electric utilities located at its manufacturing facility in ANYTOWN, Oklahoma. The aggregate amount of the advices was \$258,171.35.

The Division by three (3) letters dated August 3, 2004, granted ELECTRIC COMPANY'S letters of credit for the total amount of the advices conditioned upon ELECTRIC COMPANY refunding or crediting Claimant with the total amount of the taxes paid including the discount. The letters of credit contained the following disclaimer: 'PLEASE NOTE THAT REFUNDS REMAIN SUBJECT TO AUDIT WHICH MAY ADJUST THE REFUND AMOUNT UPON FINDING OF AN ACCOUNTING ERROR OR MISAPPLICATION OF STATUTORY OR ADMINISTRATIVE RULE PROVISIONS.'

The Division by letter dated August 30, 2004, requested Claimant repay to the Tax Commission a portion of the sales tax refunded to Claimant by ELECTRIC COMPANY. The request was based on the Division's denial of the claim to an exemption from sales tax paid on the electric utilities prior to December, 2002, the date of Claimant's application for a manufacturing exemption permit for the facility located in ANYTOWN, Oklahoma. The total amount claimed to be refunded in error was \$128,604.24.

By letter dated October 1, 2004, Claimant through its representatives rejected the Division's request for repayment of the tax alleged to have been refunded in error. A demand for hearing was not included in the letter.

On October 12, 2004, the Division forwarded its file in this matter to the Office of the Administrative Law Judges ("ALJ's Office") for further proceedings consistent with the Uniform Tax Procedure Code¹ and the Rules of Practice and Procedure before the Oklahoma Tax Commission.² The case was docketed as Case No. CR-04-009-K and assigned to ALJ, Administrative Law Judge.³

¹ 68 O.S. 2001, § 201 et seq.

² Rules 710:1-5-20 through 710:1-5-47 of the Oklahoma Administrative Code ("OAC").

³ See, OAC, 710:1-5-22 and 710:1-5-30.

By letter dated October 20, 2004, Claimant's protest was scheduled for hearing for December 7, 2004.⁴ The hearing scheduled for December 7, 2004, was stricken and rescheduled for December 16, 2004, by *Notice of Hearing* issued November 5, 2004. On December 7, 2004, Claimant requested a continuance of the hearing scheduled for December 16, 2004, which request was granted by *Notice of Hearing* issued December 9, 2004. The hearing was rescheduled for January 26, 2005. Upon the request of the Claimant, the hearing scheduled for January 26, 2005 was stricken and rescheduled for February 9, 2005, by *Notice of Hearing* issued December 13, 2004.

On January 14, 2005, Claimant filed a *Motion to Grant Discovery* which motion was granted by *Order* issued January 25, 2005.⁵ On January 26, 2005, the Division filed its *Answers to Claimant's Interrogatories*. *Claimant's Motion to Issue Subpoena* was filed on February 3, 2005, which subpoenas were issued February 3, 2005.⁶ In accordance with the Notice of Hearing issued December 13, 2004, the parties filed their *Position Statements* on February 2, 2005.

The hearing was held on the scheduled date and at the appointed time, with the parties present. As a preliminary matter, the parties stipulated to the admission of Exhibits A through C, Exhibits E through G and Exhibits 1 and 2. Opening statements by the representatives were made. Six (6) witnesses were called by Claimant, including the Division's witnesses, who were examined by the representatives of the parties and the undersigned. Two additional exhibits were identified, Exhibits 3 and 4. Over the objection of the Division, Exhibit 3 was admitted into evidence. The objection to Exhibit 4 was sustained and it was not admitted. One additional witness was examined by the undersigned. Upon the request of the undersigned the parties agreed to file post-trial proposed findings, conclusions and recommendations in lieu of closing statements. Proposed Findings of Fact and Conclusions of Law were filed by each party on April 18, 2005, whereupon the record in this cause was closed and the matter was submitted for decision.⁷

FINDINGS OF FACT

Upon review of the file and records, including the *Transcript of Hearing*, the exhibits received into evidence and the pre and post-trial pleadings of the parties, the undersigned finds:

1. Claimant is a manufacturer and wholesale distributor of dairy products. Tr. 16.
2. Claimant's business headquarters are located in SOMEPLACE, Missouri. Tr. 16.

⁴ See, 68 O.S. 2001, § 207(d).

⁵ OAC, 710:1-5-33.

⁶ OAC, 710:1-5-33(1)(A).

⁷ OAC, 710:1-5-39(a).

3. Claimant has manufacturing facilities located in ANYTOWN, Oklahoma; SMALL CITY, Oklahoma; FAKE TOWN, Kansas; SOMEPLACE, Missouri; ANY CITY, Arkansas and FAKEBURGH, Arkansas. Tr. 16.

4. Claimant acquired the ANYTOWN manufacturing facility in May, 2001 from COMPANY. Tr. 27. Exhibit A.⁸

5. Claimant had acquired the SMALL CITY manufacturing facility prior to May, 2001, possibly as early as late 1993 or early 1994. Tr. 32.

6. Claimant had not sought an exemption from sales tax on the purchases of electricity used directly in manufacturing at either its SMALL CITY facility or ANYTOWN facility prior to June, 2003, although the managers of the facilities were aware Claimant was paying sales tax on the electricity and were also aware of the potential sales tax exemption on the purchase of the electricity. Tr. 28 and 34.

7. SALES MANAGER, Claimant's General Sales Manager, testified that in late 2001 and approximately six months later, in 2002, he was contacted by and met with representatives of the Oklahoma Department of Commerce and the Oklahoma Tax Commission; and that at these meetings the discussions centered around opportunities available to businesses in Oklahoma, including exemptions from sales tax for expenses related to manufacturing. Tr. 8-10. According to SALES MANAGER, he was advised in each of the meetings that Claimant would be eligible to claim a refund for sales tax paid on the purchase of energy used in the manufacturing process for a period of up to 36 months. Tr.10 and 15. After each of the meetings, SALES MANAGER forwarded the information and materials received from the representatives to Claimant's President, PRESIDENT, in the first instance and to PRESIDENT and Claimant's CFO, FINANCIAL OFFICER, in the second instance. Tr. 10 and 11.

8. On June 13, 2003, FINANCIAL OFFICER and PLANT MANAGER, Claimant's SMALL CITY Plant Manager, met with AUDITOR, Auditor with the Audit Division of the Tax Commission, to discuss the process of exemption; "what needed to occur for Claimant to become exempt from paying sales tax on utilities." Tr. 18-19 and 33-34. According to FINANCIAL OFFICER, AUDITOR told them what materials or evidence would need to be forwarded to him for review to make the determination whether the utilities were exempt, including ELECTRIC COMPANY meter account numbers, usages for the electricity on the meters, asset listings, one year of utility bills, a description of the processing facilities, types of products produced and the functions and operations of the plants. Tr. 29-30. The information relative to the ANYTOWN facility was accumulated by FINANCIAL OFFICER, along with the asset information for both facilities and forwarded to AUDITOR. Tr. 30. The information relative to the SMALL CITY facility was accumulated by PLANT MANAGER and forwarded to AUDITOR. Tr. 35. According to both FINANCIAL OFFICER and PLANT MANAGER, AUDITOR informed them that Claimant could be eligible to claim a refund for a period up to 36 months. Tr. 18 and 34.

9. Prior to the meeting of June 13, 2003, Claimant filed a business registration for the ANYTOWN location with the Tax Commission. Exhibit A. Tr. 19 and 26. The business

⁸ Business Registration filed by Claimant on December 3, 2002, for the ANYTOWN location.

registration was filed on December 3, 2002. Exhibit A. According to AUDITOR, his review of whether Claimant qualified as a manufacturer at the ANYTOWN location started in May, 2003, by audit assignment which was initiated by the filing of the business registration for the ANYTOWN location. Tr. 70. He testified that during the meeting of June, 13th, the representatives of Claimant mentioned they had a SMALL CITY location and that they had made some changes to that location which initiated a second application for that location. Tr. 70-71. He stated that Claimant had two application which required the issuance of two different permits, one was an update for the SMALL CITY location because Claimant had an existing manufacturer sales tax/exemption permit (“MSEP”) for that location, but had made changes to the utilities and the other was a new permit for the ANYTOWN location because it was not a continuing operation, but a purchase of assets. Tr. 71. Both FINANCIAL OFFICER and PLANT MANAGER could not recall ever being informed that the SMALL CITY facility already had an existing exemption certificate. Tr. 22 and 35.

10. COORDINATOR, Audit Division’s Manufacturing Auditor Coordinator, identified Exhibit 3 as a MSEP issued to Claimant for its SMALL CITY business location. Tr. 49. He stated that Exhibit 3 does not show a specific date when the manufacturer exemption permit for the SMALL CITY facility was issued, but does show a date of December 10, 1986 as the date a sales tax exemption permit was issued for that location. Tr. 55-56. He further stated that he recalled seeing a business registration filed by Claimant in 2003 for the SMALL CITY facility, but could not say whether Exhibit 3 was in effect at the time the 2003 application was filed. Tr. 50-51. SALES MANAGER testified that he found a copy of Exhibit 3 in his files relative to the meetings with the two representatives of the state, Tr. 12; and PLANT MANAGER testified that Exhibit 3 is posted at Claimant’s SMALL CITY facility, Tr. 36. The number assigned to the MSEP is 999999. Exhibit 3.

11. The business registration filed by Claimant on December 3, 2002, for the ANYTOWN location indicates it was filed for the reason of “change in business ownership.” Exhibit A. The registration seeks a manufacturer’s limited exemption certificate, reporting that Claimant manufactures “Dairy Products” and that Claimant began its manufacturing business in Oklahoma on May 1, 2001. Exhibit A. The registration also indicates that Claimant has more than one location in Oklahoma and that separate reports would be filed for each location for each filing period. Exhibit A. FINANCIAL OFFICER testified that it was his understanding that the business registration was required to be filed prior to proceeding with any kind of sales tax exemption on utilities. Tr. 31.

12. By letter dated July 7, 2004, the Audit Division of the Tax Commission notified Claimant that “on August 8, 2003, our auditor, AUDITOR, determined that your firm qualifies as a manufacturer and a permit has been updated.” Exhibit B. FINANCIAL OFFICER testified that he actually received two letters dated April 7, 2004, notifying Claimant that the ANYTOWN and SMALL CITY locations each qualified for the exemption on utilities in the manufacturing process as of August 8, 2003. Tr. 19-20. The letter identified by FINANCIAL OFFICER as Exhibit B indicates that it is relative to the ANYTOWN location. Tr. 20. The number assigned to the MSEP was 999999. Exhibit B.

13. By letter dated April 7, 2004, ELECTRIC COMPANY was notified that the utilities through certain account numbers at Claimant's ANYTOWN location were used primarily in the direct process of manufacturing and were exempt from sales tax effective August 8, 2003. Exhibit C. ELECTRIC COMPANY was advised to adjust their records accordingly and to keep the letter as verification of the exemption. Exhibit C.

14. By letter dated May 26, 2004, ELECTRIC COMPANY notified Claimant that it had requested refunds of the sales taxes paid on the exempt accounts at Claimant's ANYTOWN facility for service from July, 2001 to April, 2004, and enclosed copies of the documents sent to the Tax Commission requesting the refunds. Exhibit 1. Tr. 21. ELECTRIC COMPANY'S letters to the Division, dated May 26, 2004, indicate they are furnishing the amount of state, city and county sales tax collected on Claimant's electric service exempt accounts at the ANYTOWN facility "prior to notification of their tax exempt status." Exhibit 1. Tr. 21. The attachments to the letters provide a breakdown of the sales taxes paid by Claimant between the dates of July 27, 2001 and April 27, 2004. Exhibit 1.

15. CLERK, Reports Clerk for ELECTRIC COMPANY, testified that part of his job duties for the last three to three and one-half years include forwarding requests for refunds of sales taxes to the Tax Commission on behalf of ELECTRIC COMPANY'S customers. Tr. 39. He stated that the customer initiates the request. Tr. 40. He identified Exhibit C and stated that the letter would cause him to code the account tax exempt so that taxes were no longer charged on the account in the future, but would not cause him to request a refund of taxes paid on the account on behalf of the customer. Tr. 40. He further stated that it is ELECTRIC COMPANY'S policy to request a refund for three years or back to when the account started, Tr. 43; that three years is the maximum allowable refund, Tr. 45; and that no one has informed him or anyone at ELECTRIC COMPANY to his knowledge that refunds will not be paid for taxes remitted on utilities prior to the issuance of a manufacturer's exemption certificate, Tr. 42.

16. The Division by three (3) letters dated August 3, 2004, granted ELECTRIC COMPANY letters of credit for the amount of the sales taxes paid by Claimant on the exempt accounts as requested for the periods of July, 2001 through April, 2004, conditioned upon ELECTRIC COMPANY refunding or crediting Claimant with the total amount of the taxes paid including the discount. Exhibit E. The letters of credit contained the following disclaimer: "PLEASE NOTE THAT REFUNDS REMAIN SUBJECT TO AUDIT WHICH MAY ADJUST THE REFUND AMOUNT UPON FINDING OF AN ACCOUNTING ERROR OR MISAPPLICATION OF STATUTORY OR ADMINISTRATIVE RULE PROVISIONS." Exhibit E.

17. OTC MANAGER, Division Revenue Unit Manager, testified that ELECTRIC COMPANY'S refund request on behalf of Claimant was reviewed by a Division auditor, the auditor's work was reviewed by his immediate supervisor, the audit file was then reviewed by a deputy director of the Division and in cases such as this where the amount of the refund exceeds \$5,000.00, the file is forwarded to the Chairman of the Tax Commission for his signature. Tr. 58-59. He stated the steps and procedures to be followed in processing a manufacturing claim for refund involve reviewing the claim to understand its nature with regard to its statutory application, reviewing the claim for statistical accuracy and checking the records of the Tax

Commission to determine when the application for the manufacturer's exemption permit was made. Tr. 66. He further stated that a detail examination of the refund request is not made at each level of review. Tr. 60.

18. According to OTC MANAGER, the error committed by the auditor in this case was the failure to check Claimant's business registration to confirm the date of the application for a manufacturer exemption permit. Tr. 59, 63 and 67. He stated that the error was discovered "within a matter of days right after the credit letters were mailed to ELECTRIC COMPANY." Tr. 67. He further stated that although the letter from ELECTRIC COMPANY to the Tax Commission specifies that it is for sales tax collected prior to notification of Claimant's tax exempt status, the procedure to be followed by the auditor is to refer to the business registration application. Tr. 64. He further testified that auditors are instructed to not pay the portion of a claim which precedes the date of the application for manufacturer's exemption. Tr. 66.

19. The Division by letter dated August 30, 2004, requested Claimant repay to the Tax Commission a portion of the sales tax refunded to Claimant by ELECTRIC COMPANY. Exhibit F. The request was based on the Division's denial of the claim to an exemption from sales tax paid on the electric utilities prior to December, 2002, the date of Claimant's application for a manufacturing exemption permit for the facility located in ANYTOWN, Oklahoma. Exhibit F. The total amount claimed to be refunded in error was \$128,604.24. Exhibit F.

20. By letter dated October 1, 2004, Claimant through its representatives rejected the Division's request for repayment of the tax alleged to have been refunded in error. Exhibit G. In the letter, it is written:

We have also reviewed the legal authority referenced in your letter to [Claimant] and would respectfully disagree that the court's decision in the Apache case would mandate a return of the monies [Claimant] received from ELECTRIC COMPANY. The Apache case holds that a taxpayer must obtain a permit to qualify for an exemption, however, the court is silent as to the OTC's policy of allowing taxpayers to apply for prior period refunds once an exemption certificate has been obtained. [Claimant] relied in the fall of 2002 upon the representations of state officials when they told [Claimant] of the OTC's policy of allowing prior period refunds. For the OTC to now retroactively apply a court holding to overturn its prior procedural policy is neither equitable nor appropriate, as has also been recognized by the Oklahoma Supreme Court in prior decisions.

21. The amount in controversy is \$128,604.24.

ISSUE AND CONTENTIONS

Claimant offers two propositions in support of its contention that the Division's request to return that portion of the sales taxes refunded to Claimant which were paid on the electric

utilities prior to the date of Claimant's application for a manufacturing exemption permit for the ANYTOWN facility is erroneous. Claimant initially argues that at all times relevant herein it had a valid MSEP issued by the Tax Commission. In support of this argument, Claimant asserts that neither Section 1359.2 nor Commission policy requires a separate MSEP for each manufacturing facility location. Claimant further argues that the Division changed its procedural refund policy after the decision in *Apache*⁹ was issued and that such change in policy should be applied prospectively only. In support of this argument, Claimant asserts that prior to the decision in *Apache*, the Division's refund policy was to allow the refund of taxes erroneously remitted for a period of up to three years from the date of filing the claim for refund; that only after the decision in *Apache* did the Division change its refund policy to deny a refund of taxes erroneously remitted prior to the application for a MSEP, and that Claimant relied on the past procedural refund policy of the Division as represented by representatives of the state and any retroactive application of the Division's new refund policy is inappropriate and inequitable.

The Division contends that its request for repayment of the taxes erroneously refunded to Claimant should be sustained. In support of this contention, the Division argues that a separate MSEP is required to be obtained from the Tax Commission for each manufacturing facility location of a manufacturer. In support of this argument, the Division cites Section 1359.2(C) and (D) which refer to manufacturer sales tax permits issued pursuant to 68 O.S. 2001, § 1364. The Division further contends that the Commission has a longstanding policy of denying manufacturer's claim for refund of taxes erroneously remitted for periods prior to the filing date of the manufacturer's application for a MSEP.

The issues presented for decision are: (1) whether either the Oklahoma Sales Tax Code or Tax Commission policy requires only a single MSEP for a resident manufacturer notwithstanding that the manufacturer has more than one manufacturing site in the state; and (2) whether the Division changed its procedural refund policy and if so, should the Division be estopped from requesting repayment of the balance of the sales taxes allegedly erroneously refunded 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. 2001, § 207(d).

2. All sales of electricity are subject to sales tax except those specifically exempted by the provisions of Section 68 O.S. 2001, § 1357(6)¹⁰ or otherwise specifically exempted by the Oklahoma Sales Tax Code¹¹. 68 O.S. 2001, § 1354(A)(1).

⁹ *Apache Corp. v. Oklahoma Tax Commission*, 2004 OK 48, 98 P.3d 1061.

¹⁰ The provisions of Section 1357(6) are not applicable to this proceeding.

¹¹ 68 O.S. 2001, § 1350 et seq.

3. Claimant's exemption from sales tax on the purchases of electricity at its ANYTOWN manufacturing facility and subsequent refund thereof is based on the manufacturer's exemption. At all times relevant herein, the manufacturer's exemption provided:

There are hereby specifically exempted from the tax levied by Section 1350 et seq. of this title:

1. Sales of goods, wares, merchandise, tangible personal property, machinery and equipment to a manufacturer for use in a manufacturing operation.

68 O.S. 2001, § 1359(1).¹²

4. In 1998, the Legislature enacted Section 1359.2¹³ with respect to the manufacturer's exemption. Section 1359.2 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.

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.

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

¹² Amended by Laws 1998, c. 301, § 7, eff. Nov. 1, 1998.

¹³ Added by Laws 1998, c. 301, § 8, eff. Nov. 1, 1998.

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.

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.

(Citation omitted).

5. The fundamental rule and governing principle of statutory construction is to ascertain and, if possible, give effect to the intention and purpose of the legislature as expressed in a statute. *Samson Hydrocarbons Co. v. Oklahoma Tax Commission*, 1998 OK 82, 976 P.2d 532; *State ex rel. Dept. of Public Safety v. 1985 GMC Pickup, Serial No. 1GTBS14EOF2525894, OK Tag No. ZPE852*, 1995 OK 75, 898 P.2d 1280. Legislative intent must be ascertained from the whole act, *Walls v. American Tobacco Co.*, 2000 OK 66, 11 P.3d 626; based on its general purpose and objective, *Comer v. Preferred Risk Mutual Ins. Co.*, 1999 OK 86, 991 P.2d 1006. Statutes must be read to render every part operative, and to avoid rendering any part superfluous or useless. *Bryant v. Commissioner of the Dept. of Public Safety, State of Okla.*, 1996 OK 134, 937 P.2d 496. The Legislature will not be presumed to have intended an absurd result, *In re Holt*, 1997 OK 12, 932 P.2d 1130; nor to have done a vain or useless act in the promulgation of a statute, *Comer, supra.*; or when creating law, *Purcell v. Santa Fe Minerals, Inc.*, 1988 OK 45, 961 P.2d 188. 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. *Sullins v. American Medical Response of Oklahoma, Inc.*, 2001 OK 20, 23 P.3d 259.

6. Tax statutes are penal in nature. *Globe Life and Accident Insurance Company v. Oklahoma Tax Commission*, 1996 OK 39, 913 P.2d 1322. Penal statutes are to be strictly construed. *Mid-Continent Pipeline Co. v. Crauthers*, 1954 OK 61, 267 P.2d 568. 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 statute, as well as within its spirit or reason. *State ex rel. Allen v. Board of Education of Independent School Dist. No. 74 of Muskogee County*, 1952 OK 241, 206 Okla. 699, 246 P.2d 368. 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.

7. The Supreme Court of Oklahoma has recognized that Section 1359.2 is a "mandatory procedural tax statute", *Apache Corp. v. Oklahoma Tax Commission*, 2004 OK 48 at ¶ 11, 98

P.3d 1061, 1064; which must be followed to obtain the statutory tax exemption, *Id.* at ¶ 10. The Court also found that "when a statute creates both a right and a remedy for its enforcement the statutory remedy is [generally] exclusive." *Id.*, citing *R.R. Tway, Inc. v. Oklahoma Tax Commission*, 1995 OK 129, 910 P.2d 972, 978. In *Apache* at ¶ 11, the Court held "Apache's claim for a refund for taxes paid [after November 1, 1998], is barred by Apache's failure to follow [obtain or at least attempt to obtain the required manufacturer exemption permit] 68 O.S. Supp. 1998, § 1359.2."

8. Claimant's first proposition of error, i.e.; that neither Section 1359.2 nor Commission policy requires a separate MSEP for each manufacturing facility location, is not practicable given the mandates of Section 1359.2 and the Oklahoma Sales Tax Code. As asserted by the Division, Section 1359.2(C) and (D) refer to manufacturer sales tax permits issued pursuant to 68 O.S. 2001, § 1364. In fact, Section 1359.2(C) and (D) mandate that "the manufacturer exemption permit shall be issued with an expiration date which corresponds with the expiration date of the manufacturer's sale tax permit", that "the Tax Commission shall issue the exemption permits at the same time of issuance or renewal of the manufacturer's sales tax permit" and that "holders of [manufacturers' [sic] limited exemption certificates]¹⁴ shall apply for a manufacturer exemption permit * * * at the same time they apply for issuance or renewal of a manufacturer's sales tax permit." (Emphasis added).). "The term 'shall' is often used in a statute as part of a command or a mandatory duty." *Apache, Id.* at ¶ 11, citing *Tulsa County Budget Bd. v. Tulsa County Excise Bd.*, 2003 OK 103, n. 25, 81 P.3d 662, 671; *State ex rel. Independent School Dist. No. 1 of Oklahoma County v. Barnes*, 1988 OK 70, 762 P.2d 921, 924.

Section 1364 provides in pertinent part:

E. A separate permit for each additional place of business to be operated must be obtained from the Tax Commission for a fee of Ten Dollars (\$10.00). Such permit shall be good for a period of three (3) years. The Tax Commission shall grant and issue to each applicant a separate permit for each place of business in this state, upon proper application therefor and verification thereof by the Tax Commission.

F. A permit is not assignable and shall be valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. The permit shall at all times be conspicuously displayed at the place of business for which issued in a position where it can be easily seen. The permit shall be in addition to all other permits required by the laws of this state. Provided, if the location of the business is changed, such person shall file with the Tax Commission an application for a permit to engage in or transact business at the new location. Upon issuance of the permit to the new location of such business, no additional permit fee shall be due until the expiration of the permit issued to the previous location of such business.

¹⁴ See, OAC, 710:65-7-6(d)(2).

“Manufacturing site” is defined to mean “a location where a manufacturing operation is conducted, including a location consisting of one or more buildings or structures in an area owned, leased, or controlled by a manufacturer”. 68 O.S. 2001, § 1352(11). A “[m]anufacturing operation” does not include administration, sales, distribution, transportation, site construction, or site maintenance”. 68 O.S. 2001, § 1352(10).

Here, Claimant has two manufacturing sites or facilities located within Oklahoma. One in SMALL CITY and the other in ANYTOWN. Claimant’s SMALL CITY manufacturing facility had an existing MSEP. The MSEP for this location was site specific (“Business Location – 123 FAKE STREET, SMALL CITY, OK 99999”) and “Non-Transferable”. Exhibit 3. The MSEP provides on the face thereof “[i]f the business changes location or ownership or is discontinued for any reason, this permit must be returned to the OKLAHOMA TAX COMMISSION for cancellation WITH AN EXPLANATION ON THE REVERSE SIDE”, (emphasis original). Claimant had not filed a business registration with the Tax Commission for the ANYTOWN manufacturing site prior to December, 2002, despite operating the location from May, 2001. Claimant’s CFO understood that the business registration was required to be filed for the ANYTOWN location prior to proceeding with any kind of sales tax exemption on utilities. Tr. 31. The audit assignment to determine whether any of Claimant’s operations at the ANYTOWN location qualified as manufacturing was initiated by the filing of the business registration. Tr. 70. The functions and operations of the ANYTOWN manufacturing facility, including usages of the electricity, description of the processing facilities, and type of products produced had to be audit and verified to determine whether any of Claimant’s utilities at the ANYTOWN facility were exempt from tax as used directly in the manufacturing process. Tr. 29-30. The audit took approximately four months to complete.

Further, Claimant failed to present any evidence to show the Commission’s policy requires only a single MSEP for a resident manufacturer having more than one “manufacturing site” within the state to qualify for the exemption from taxes under 68 O.S. 2001, § 1359(1) for all of its sites. *OAC*, 710:1-5-47¹⁵ and *Continental Oil Company v. Oklahoma State Board of Equalization*, 1976 OK 23, 570 P.2d 315. For this proposition, Claimant cites the rendition of facts by the Supreme Court of Oklahoma in the *Apache* case. *Apache*, *supra*. This issue, however, was not raised by either of the parties to the *Apache* case and was not the subject of decision by the Supreme Court of Oklahoma in *Apache*. Moreover, although the same number was assigned to each of Claimant’s manufacturing locations, the MSEP placed into evidence in this cause (Exhibit 3) shows on the face thereof it is site specific and non-transferable. AUDITOR testified that Claimant had two applications which required the issuance of two different permits. Tr. 71. Finally, the basic premise of the Division’s request to return the erroneously refunded taxes refutes Claimant’s proposition.

¹⁵ “In all administrative proceedings, unless otherwise provided by law, the burden of proof shall be upon the [taxpayer] to show in what respect the action or proposed action of the Tax Commission is incorrect.” The burden of proof standard in administrative proceedings is “preponderance of evidence”. Black’s Law Dictionary, 1064 (5th ed. 1979). “Preponderance of evidence” means “[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” *Id.* See, Oklahoma Tax Commission Order No. 91-10-17-061. It is also defined to mean “evidence which is more credible and convincing to the mind * * * [T]hat which best accords with reason and probability.” *Id.*

9. Claimant's second proposition of error, i.e.; that the Division changed its procedural refund policy after the decision in *Apache* was issued and that such change in policy should be applied prospectively only is inconsequential. Assuming arguendo that the Division changed its refund policy, it is noteworthy that Claimant does not contend that the Division's refund policy as it stands now is incorrect.

First, estoppel generally does not apply against the state acting in its sovereign capacity because of unauthorized acts of its officers, *State ex rel. Cartwright v. Dunbar*, 1980 OK 15, 618 P.2d 900; or because of mistakes or errors of its employees, *State ex rel. Cartwright v. Tidmore*, 1983 OK 116, 674 P.2d 14; *State ex rel. Oklahoma Tax Commission v. Emery*, 1982 OK CIV APP 13, 645 P.2d 1048. Application of estoppel is not allowed against state, political subdivisions, or agencies, unless the facts and circumstances implicate the interposition of estoppel would further some prevailing principal of public policy or interest. *Tice v. Pennington*, 2001 OK CIV APP 95, 30 P.3d 1164; *Burdick v. Independent School District*, 1985 OK 49, 702 P.2d 48, 26 Ed. Law Rep. 486. No prevailing principal of public policy or interest is implicated by the facts and circumstances of this proceeding and none are perceived. Further, as the Court stated in *Apache*, *supra* at ¶ 11, "[t]his Court has previously declined to interpose equity to block the requirements of mandatory procedural tax statutes", citing *R.R. Tway, Inc.*, *supra* and *Whig Syndicate, Inc. v. Keyes*, 1992 OK 95, 836 P.2d 1283, 1288.

Second, construction of an ambiguous or uncertain statute by an administrative agency charged with its administration, although not controlling, is generally entitled to the highest respect from the courts, especially when the construction is definitely settled and uniformly applied for a number of years, but the construction given must be reasonable and not clearly wrong. *Independent Finance Institute v. Clark*, 1999 OK 43, 990 P.2d 845. Where neither ambiguity nor doubt exists, the rule that weight is to be given an administrative construction is inapplicable in interpreting a statute; administrative construction cannot override plain statutory language. *Neer v. State ex rel. Oklahoma Tax Commission*, 1999 OK 41, 982 P.2d 1071.

The language of Section 1359.2 is plain and unambiguous, and clearly expresses the legislative will. Section 1359.2 requires a manufacturer "to furnish the vendor proof of eligibility for the [manufacturing] exemption" * * * "at the time of sale" * * * "in order to qualify for the exemption". 68 O.S. Supp. 1998, § 1359.2(A). Proof of eligibility for the exemption is a manufacturer exemption permit which the manufacturer is required to secure from the Tax Commission, 68 O.S. Supp. 1998, § 1359.2(B); or a manufacturer's limited exemption certificate¹⁶, 68 O.S. Supp. 1998, § 1359.2(D).

By enacting Section 1359.2 the Legislature changed the existing laws with respect to a manufacturer's eligibility for the manufacturing exemption and manufacturers' refund claims under the manufacturing exemption. Whether the Division changed its refund practice subsequent to the issuance of the decision in *Apache*, a fact in dispute; is immaterial since the Division's practice would have been contrary to the law. Claimant's entitlement to a refund of the taxes erroneously remitted is controlled by the language of the statute, not the Division's practice.

¹⁶ See, OAC, 710:65-7-6(d)(2) and 710:65-13-151.

10. Claimant's protest to the partial denial of its sales tax refund claim should be denied.

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