

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2006-10-10-07 (Non-Precedential)
ID: CR-06-003-H
DATE: OCTOBER 10, 2006
DISPOSITION: DENIED
TAX TYPE: SALES/USE CLAIM FOR REFUND
APPEAL: NONE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPANY (“Claimant”) appears through TAX AUDITOR, Tax Auditor. The Credits and Refunds Section of the Account Maintenance Division (“Division”), Oklahoma Tax Commission, appears through OTC ATTORNEY, Assistant General Counsel, and LAW CLERK, Law Clerk, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On May 1, 2006, the protest letter was received by this office and on May 2, 2006, a request for the protest file was forwarded to the Division. On May 3, 2006, a notice was mailed to the parties stating that this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number CR-06-003-H.¹ The letter also advised the parties that this case had been set for hearing before the undersigned on June 20, 2006, at 9:30 a.m., with position letters or memorandum briefs due on or before June 13, 2006. A copy of the *Rules of Practice and Procedure Before the Oklahoma Tax Commission* was enclosed with the notice of hearing. On May 4, 2006, the protest file was received by this office for further proceedings consistent with the Uniform Tax Procedure Code² and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.³

On May 30, 2006, an Entry of Appearance was filed by OTC ATTORNEY, Assistant General Counsel, as counsel of record for the Division. On June 8, 2006, the Claimant filed its “Position Letter.” On June 13, 2006, the Division filed its “Position Letter” and LAW CLERK, Law Clerk, Office of General Counsel, filed an Entry of Appearance, as a Representative for the Division.

¹ OKLA. STAT. ANN. tit. 68, § 208 (West 2001). The notice was mailed to the Claimant c/o TAX AUDITOR, ADDRESS.

See OKLA. STAT. ANN. tit. 68, § 227(e) (West 2001):

Upon the taxpayer's timely filing of a demand for hearing, the Commission shall set a date for hearing upon the claim for refund which date shall not be later than sixty (60) days from the date the demand for hearing was mailed. The taxpayer shall be notified of the time and place of the hearing. The hearing may be held after the sixty-day period provided by this subsection upon agreement of the taxpayer.

² OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

³ OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47 (June 11, 2005).

An open hearing⁴ was held on June 20, 2006, at approximately 1:30 p.m. The Division called one witness, MANAGER, Revenue Unit Manager, Account Maintenance Division, Oklahoma Tax Commission, who testified regarding the records of the Division. The Division's Exhibits A and B were identified, offered, and admitted into evidence. The ruling on the Division's Exhibit C was reserved for a post-hearing ruling.⁵ TAX AUDITOR, Tax Auditor, testified on behalf of the Claimant. The Claimant did not offer any exhibits for admission into evidence.

Upon conclusion of the hearing, the record remained opened until July 5, 2006, for the Division to provide the original "Affidavit of AFFIANT" (Division's Exhibit C) and information concerning the terms of service by notaries in the State of Louisiana. On June 21, 2006, the parties were so notified by letter.

On July 5, 2006, the Division filed its Brief regarding Louisiana Notary Requirements and Admissibility of Division's Exhibit C. On July 6, 2006, the record was closed and this case was deemed submitted for decision.

On August 9, 2006, an Order Granting Admission of Division's Exhibit C was issued simultaneously with the Findings, Conclusions and Recommendations.⁶

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. The Claimant is an oil and gas company with drilling operations in Oklahoma. The Claimant rented equipment with a "supervisor"⁷ from EQUIPMENT COMPANY. There is no evidence in the record defining or describing the duties of the "supervisor" listed on the invoices from EQUIPMENT COMPANY.

⁴ The Protestant waived its right to a confidential hearing as provided by the provisions of OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2006) and OKLA. ADMIN. CODE § 710:1-5-27(d) (June 25, 1999).

⁵ The Claimant did not have any objection to the Division's Exhibit C, as identified and offered, but the undersigned reserved ruling on the admittance of the exhibit because the Affidavit was a copy, the Affidavit was not executed in the "State of Oklahoma" and "County of Oklahoma" as reflected by the Affidavit; nor was there a notary seal or stamp, and the notary indicated that the commission expired "at death."

⁶ The Exhibit C admitted into evidence was the "Corrected" Affidavit submitted by the Division, with its Brief, which reflects that the Affidavit was executed in the State of Louisiana, Parish of Lafourche. The text of the "Corrected" Affidavit is the same as the "Original" Affidavit.

⁷ "supervisor", *n*. 1. One having authority over others; a manager or overseer. Under the National Labor Relations Act, a supervisor is any individual having authority to hire, transfer, suspend, lay off, recall, promote, discharge, discipline, and handle grievances of other employees, by exercising independent judgment. Black's Law Dictionary (8th ed. 2004).

2. EQUIPMENT COMPANY is an Oklahoma “vendor,”⁸ which is a subsidiary of PARENT COMPANY.⁹ As a subsidiary of PARENT COMPANY, EQUIPMENT COMPANY remits sales tax to the Tax Commission under the sales tax permit issued to PARENT COMPANY (Sales Tax Permit #XXX).¹⁰

3. EQUIPMENT COMPANY holds equipment and material for sale or lease. EQUIPMENT COMPANY purchases the equipment and material exempt from sales tax under the sales tax permit issued to PARENT COMPANY (Sales Tax Permit #XXX).¹¹

4. EQUIPMENT COMPANY charges sales tax on its sales of rental equipment or material, unless the consumer/user has a valid sales tax exemption permit.¹² The Claimant is not the holder of a valid sales tax exemption permit.¹³

5. EQUIPMENT COMPANY does not charge sales tax on the service provided by the “supervisors” of equipment.¹⁴ EQUIPMENT COMPANY lists equipment separately from non-taxable labor and service charges.¹⁵

6. On January 13, 2006, the Division received an “Application for Credit or Refund of State and Local Sales or Use Tax” (“Refund”) from the Claimant for the period of January 2003 through August 2005, in the amount of \$9,506.58.¹⁶ The basis for the Refund was stated as follows, to-wit:

PROTESTANT is an oil and gas company with drilling operation Oklahoma. The enclosed invoices are equipment rentals with a supervisor provided by EQUIPMENT COMPANY (out of state vendor). PROTESTANT has requested a service to be provided without involvement of PROTESTANT’S employees. EQUIPMENT COMPANY’S supervisor (operator) performs,

⁸ OKLA. STAT. ANN. tit. 68, § 1352(21) (West 2001) and (as amended) OKLA. STAT. ANN. tit. 68, § 1352(27) (West Supp. 2006).

⁹ Division’s Exhibit C. This exhibit is the “Affidavit of AFFIANT,” who handles the tax matters for PARENT COMPANY and EQUIPMENT COMPANY. Testimony of MANAGER.

¹⁰ See Note 9. MANAGER also testified that the Division had verified that EQUIPMENT COMPANY had remitted the sales tax to the Tax Commission for the period of January 2003 through August 2005.

¹¹ See Note 9.

¹² See Note 9.

¹³ See Note 9. Testimony of TAX AUDITOR.

¹⁴ See Note 9. See also Division’s Exhibit A.

¹⁵ Division’s Exhibit A. Testimony of MANAGER.

¹⁶ Division’s Exhibit A.

reviews and oversees the equipment usage for the entire rental period. The vendor has charged sales taxes for the rental equipment and parts.

PROTESTANT request sales tax refund based upon 710:65-1-11(e) [sic]¹⁷: Furnishing for a charge of equipment with an operator shall be considered a service and not subject to sales tax. Persons purchasing equipment for the purpose of furnishing equipment with an operator must pay sales tax or use tax at the time the equipment is purchased, and;

(f): Purchases by a vendor for renting or leasing. Purchases by a vendor of tangible personal property for purpose of renting or leasing same are exempt from sales tax. If such equipment purchased exempt from taxation is rented with an operator or vendor uses such equipment to perform a service, the vendor should pay tax as a withdrawal from inventory . . . and:

(g): Purchases of repair parts made by a vendor who is engaged in renting or leasing tangible personal property, where the parts are to be incorporated into the tangible personal property subsequently rented or leased, are considered purchases for resale and may be purchased exempt from sales tax.

7. On April 17, 2006, the Division issued a letter¹⁸ denying the Claimant's Refund, as follows, to-wit:

We have reviewed your refund request filed January 13, 2006 for Sales/Use Tax paid for the periods of January 2003 through August 2005 in the amount of \$9,506.58, and your request has been denied.

The company identified in your refund request has been classified as a vendor by the Oklahoma Tax Commission. As a vendor, they acquire tax-exempt resale and rental inventories.

When the vendor presents invoices to their customers, the resale and rental equipment is listed separately from the non-taxable labor and service charges. Sales/Use tax is collected based on the sales value of the equipment charges.

Based on these facts, our finding is that the vendor acted properly in collecting Sales tax from PROTESTANT .

In accordance with the Oklahoma Statute Title 68, Section 227, you may within thirty (30) days of the dated [sic] of this letter, file a written protest and request a hearing before the Commission

¹⁷ The correct cite is OKLA. ADMIN. CODE § 710:65-1-11(f) (June 24, 2004) and (as amended) OKLA. ADMIN. CODE § 710:65-1-11(g) (June 11, 2005).

¹⁸ Division's Exhibit B.

8. On May 1, 2006, this office received a timely filed letter of protest from the Claimant.¹⁹

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.²⁰

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code (“Sales Tax Code”).²¹ The Sales Tax Code levies “upon all sales,²² not otherwise exempted . . . an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds²³ of each sale of . . . tangible personal property. . . .”²⁴ Oklahoma Statutes authorize incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.²⁵ There is no dispute among the parties that the correct rate of sales tax was charged and remitted on each invoice included in the Refund.

3. The Tax Commission has promulgated rules as provided by law to facilitate the administration, enforcement, and collection of excise taxes pursuant to the Sales Tax Code.²⁶

4. The rules promulgated pursuant to the Administrative Procedures Act are presumed to be valid and binding on the persons they affect and have the force of law.²⁷

¹⁹ Division’s Exhibit B. The letter does not articulate a basis for the protest.

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

²¹ OKLA. STAT. ANN. tit. 68, § 1350 et seq. (West 2001).

²² OKLA. STAT. ANN. tit. 68, § 1352(15)(a) (West 2001) and (as amended) OKLA. STAT. ANN. tit. 68, § 1352(21)(a) (West Supp. 2006):

“Sale” means 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, or other transactions as provided by this paragraph, including but not limited to:

a. the exchange, barter, lease, or rental of tangible personal property resulting in the transfer of the title to or possession of the property,

...

²³ OKLA. STAT. ANN. tit. 68, § 1352(7) (West 2001) and (as amended) OKLA. STAT. ANN. tit. 68, § 1352(11) (West Supp. 2006).

²⁴ OKLA. STAT. ANN. tit. 68, § 1354(A) (1) (West Supp. 2006).

²⁵ OKLA. STAT. ANN. tit. 68, § 1370 et seq. (West Supp. 2006) and OKLA. STAT. ANN. tit. 68, § 2701 (West Supp. 2006).

²⁶ OKLA. STAT. ANN. tit. 68, § 203 (West Supp. 2006) and OKLA. ADMIN. CODE § 710:65-1-1.

5. Tax exemptions, deductions, and credits depend entirely on legislative grace and are strictly construed against the exemption, deduction, or credit.²⁸

6. Legislative intent controls statutory interpretation.²⁹ Intent is ascertained from the whole act in light of its general purpose and objective³⁰ considering relevant provisions together to give full force and effect to each.³¹ The Court presumes that the Legislature expressed its intent and that it intended what it expressed.³²

7. Statutes are interpreted to attain that purpose and end³³ championing the broad public policy purposes underlying them.³⁴ Only where the legislative intent cannot be ascertained from the statutory language, i.e. in cases of ambiguity or conflict, are rules of statutory construction employed.³⁵ However, where the statutory language is ambiguous or uncertain, a construction is applied to avoid absurdities.³⁶

8. The phrase “tangible personal property” is defined by the Sales Tax Code to mean “personal property which may be seen, weighed, measured, felt or touched or which is in any other manner perceptible to the senses.”³⁷ The phrase “tangible personal property” is all inclusive and is not limited except by specific exemption.³⁸

²⁷ OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2001).

²⁸ *TPQ Inv. Corp. v. State ex rel. Oklahoma Tax Com’n*, 1998 OK 13, ¶8, 954 P.2d 139.

²⁹ *World Publishing v. Miller*, 2001 OK 49, ¶7, 32 P.3d 829.

³⁰ *Id.* at ¶7.

³¹ *Id.* at ¶7.

³² *Id.* at ¶7.

³³ *Id.* at ¶7.

³⁴ *Id.* at ¶7.

³⁵ *Id.* at ¶7.

³⁶ *Id.* at ¶7.

³⁷ OKLA. STAT. ANN. tit. 68, § 1352(17) (West 2001) and (as amended) OKLA. STAT. ANN. tit. 68, § 1352(23) (West Supp. 2006). See OKLA. ADMIN. CODE § 710:65-1-2 (June 24, 2004) and (as amended) OKLA. ADMIN. CODE § 710:65-1-2 (June 11, 2005).

³⁸ *Magnolia Petroleum Company v. Oklahoma Tax Commission*, 1958 OK 124, 326 P.2d 821.

9. The terms “consumer” or “user” are defined by the Sales Tax Code, in pertinent part, to mean “a person to whom a taxable sale of tangible personal property is made or to whom a taxable service is furnished. . . .”³⁹

10. "Lease or rental" means any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration. A lease or rental may include future options to purchase or extend.

"Lease or rental" does not include:

(iii) Providing tangible personal property along with an operator for a fixed or indeterminate period of time. *A condition of this exclusion is that the operator is necessary for the equipment to perform as designed. For the purpose of this unit, an operator must do more than maintain, inspect, or set-up the tangible personal property.*⁴⁰ (Emphasis added.)

11. “Rental or lease” of tangible personal property is taxable. The “gross receipts” or “gross proceeds” derived from the rental or lease of tangible personal property are subject to sales tax and shall have the same meaning as set out in Tax Commission Rule 710:65-1-2.⁴¹

12. “Furnishing equipment with an operator” pursuant to Section (f) of Tax Rule 710:65-1-11 states as follows, to-wit:

The furnishing for a charge of equipment with an operator shall be considered a service and not subject to sales tax. Persons purchasing equipment for the purpose of furnishing said equipment with an operator must pay sales or use tax at the time the equipment is purchased.⁴²

13. “Purchases by a vendor for renting or leasing” by a vendor of tangible personal property for purposes of renting or leasing same are exempt from sales tax.⁴³ However, if such equipment purchased exempt from taxation is rented with an operator or the vendor uses such

³⁹ OKLA. STAT. ANN. tit. 68, § 1352(3) (West 2001) and (as amended) OKLA. STAT. ANN. tit. 68, § 1352(5) (West Supp. 2006).

⁴⁰ OKLA. ADMIN. CODE § 710:65-1-2 (June 24, 2004) and (as amended) OKLA. ADMIN. CODE § 710:65-1-2 (June 11, 2005).

⁴¹ OKLA. ADMIN. CODE § 710:65-1-11 (June 24, 2004) and (as amended) OKLA. ADMIN. CODE § 710:65-1-11 (June 11, 2005).

⁴² OKLA. ADMIN. CODE § 710:65-1-11(f) (June 24, 2004) and (as amended) OKLA. ADMIN. CODE § 710:65-1-11(g) (June 11, 2005).

⁴³ OKLA. ADMIN. CODE § 710:65-1-11(g) (June 24, 2004) and (as amended) OKLA. ADMIN. CODE § 710:65-1-11(h) (June 11, 2005).

equipment to perform a service, but the equipment remains in the rental inventory, the vendor should pay sales tax on the "sales value", pursuant to [OAC 710:65-1-2](#).⁴⁴

14. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.⁴⁵ The Division's action is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.⁴⁶

15. In this matter the Claimant has failed to meet its burden of proof that the Division's denial of the Claimant's Refund was incorrect and in what respects.

CONCLUSIONS BY ISSUE

Issue One (1): By definition the rental of equipment with a "supervisor" is not a "sale".

The Claimant asserts that the rental of equipment with a "supervisor" from EQUIPMENT COMPANY is not a "sale" by definition under the Sales Tax Code because the Claimant never took possession of the equipment from EQUIPMENT COMPANY. In the Refund, the Claimant asserts that it requested a service to be provided without the involvement of the Claimant's employees. In support of its position, the Claimant cites *Ford v. Oklahoma Commission*, 1955 OK 168, 285 P.2d 436.

In *Ford*, the Court states:

We may not speculate as to a probable intent of the Legislature apart from the words of the statute. "Sale" is defined in statute, and unless there is doubtfulness, doubleness of meaning, or indistinctness or uncertainty of meaning of the language and expression used in defining sale, the statute is to be applied, and not interpreted, since the statute speaks for itself.

⁴⁴ See Note 43.

⁴⁵ OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999), which states:

In all administrative proceedings, unless otherwise provided by law, the burden of proof shall be upon the protestant to show in what respect the action or proposed action of the Tax Commission is incorrect. If, upon hearing, the protestant fails to prove a prima facie case, the Administrative Law Judge may recommend that the Commission deny the protest solely upon grounds of failure to prove sufficient facts which would entitle the protestant to the requested relief.

OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999), provides in pertinent part:

... "preponderance of the evidence" means the evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which as a whole shows that the fact sought to be proved is more probable than not.

⁴⁶ See *Enterprise Management Consultants, Inc. v. State ex rel Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

The Claimant's position that it never took possession of the equipment is not supported by the record. From a review of the invoices comprising the Refund and the testimony of MANAGER, the invoices are for the rental of equipment by the Claimant from EQUIPMENT COMPANY. No evidence was presented to indicate that the Refund constituted nontaxable services according to the definition of "sale" or by Tax Commission Rule, and the "Affidavit of AFFIANT" confirms MANAGER'S testimony that EQUIPMENT COMPANY is not providing a nontaxable service, but holds the equipment for sale or lease.

Issue Two (2): By Tax Commission Rule "furnishing equipment with an operator" shall be considered a service and not subject to sales tax.

The Claimant also contends that by Tax Commission Rule "furnishing equipment with an operator" shall be considered a service and not subject to sales tax. The provision of the Tax Commission Rule⁴⁷ states as follows, to-wit:

(f) **Furnishing equipment with an operator.** The furnishing for a charge of equipment with an operator shall be considered a service and not subject to sales tax. Persons purchasing equipment for the purpose of furnishing said equipment with an operator must pay sales or use tax at the time the equipment is purchased.

The Division's position is that the Tax Commission Rules must be read in their entirety, and not in a piecemeal fashion. The Division's position is correct. The Claimant appears to be reading this provision of the Tax Commission Rule in isolation.

The record is void as to whether the "supervisor" listed on the invoices is synonymous with "operator" or whether a "supervisor" is necessary for the equipment rented from EQUIPMENT COMPANY to perform as designed. For purposes of this provision, "an operator must do more than maintain, inspect, or set-up the tangible personal property."⁴⁸ There is also no evidence in the record that the "supervisor" was necessary for the equipment to perform as designed or that the "supervisor" did more than "maintain, inspect, or set up the tangible personal property."

The Claimant's reliance on this provision is misplaced. The language of the Tax Commission Rules⁴⁹ is clear and unambiguous. Generally, the gross receipts or gross proceeds derived from the rental or lease of tangible personal property (in this matter equipment) are subject to sales tax. The vendor (EQUIPMENT COMPANY) calculates the amount of sales or use tax on the gross amount, unless the rental or lease charge is separately stated from service on the invoice, which is the method used by EQUIPMENT COMPANY on each invoice comprising

⁴⁷ See Note 42.

⁴⁸ See Note 40.

⁴⁹ See Notes 40 and 41.

the Refund. Sales tax was charged on the rental of the equipment only because the service was separately stated.

The furnishing of equipment with an operator is exempt from sales or use tax, if EQUIPMENT COMPANY purchased the equipment “for the purpose of furnishing the equipment with an operator.” It is clear from the record that it was not the intent of EQUIPMENT COMPANY to purchase the equipment “for the purpose of furnishing the equipment with an operator.” EQUIPMENT COMPANY choose not to conduct its business as described by the Claimant, but instead it chose to purchase the equipment exempt, as a sale for resale, properly charging the Claimant sales tax on the rental of the equipment.

The Claimant also cites the following provision of the Tax Commission Rule⁵⁰ to support its position that even if EQUIPMENT COMPANY purchased the equipment exempt from sales tax, EQUIPMENT COMPANY rented the equipment with a “supervisor” and the incidence of the sales tax falls on EQUIPMENT COMPANY, and not the Claimant:

(g) **Purchases by a vendor for renting or leasing.** Purchases by a vendor of tangible personal property for purposes of renting or leasing same are exempt from sales tax. If such equipment purchased exempt from taxation is rented with an operator or the vendor uses such equipment to perform a service, but the equipment remains in the rental inventory, the vendor should pay sales tax on the “sales value”, pursuant to OAC 710:65-1-2.

The Claimant’s reliance on this provision is also misplaced. In the Affidavit, AFFIANT makes it clear that EQUIPMENT COMPANY purchases equipment and material exempt from sales tax and that it charges sales tax on its rental of equipment or material, unless the consumer/user has a valid sales tax exemption permit. EQUIPMENT COMPANY separates nontaxable services (such as labor) and material on its invoices and charges sales tax on the rental of the equipment. The record does not support the Claimant’s position that the incidence of sales tax falls on EQUIPMENT COMPANY.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case that the protest 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-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.

⁵⁰ See Note 43.