

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2006-12-07-03 (Non-Precedential)
ID: CR-06-002-K
DATE: DECEMBER 7, 2006
DISPOSITION: DENIED
TAX TYPE: SALES/CLAIM FOR REFUND
APPEAL: NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

CLAIMANT (“Claimant”) is represented by ATTORNEY 1, Corporate Counsel, and ATTORNEY 2, General Counsel. The Credits and Refunds Section of the Account Maintenance Division (“Division”) is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

On or about August 15, 2005, Claimant filed an *Application for Credit or Refund of State and Local Sales or Use Tax* for the period of December, 2003 through October, 2004 in the amount of \$4,381.38. The Division by letter dated November 18, 2005, denied the *Application*. Claimant timely responded to the denial by facsimile sent December 15, 2005.¹

On March 22, 2006, the Division’s file was referred to the Office of the Administrative Law Judges (“ALJ’s Office”) for further proceedings consistent with the Uniform Tax Procedure Code² and the Rules of Practice and Procedure before the Oklahoma Tax Commission³. The protest to the denial of the *Application* was docketed as Case No. CR-06-002-K and assigned to ALJ, Administrative Law Judge.⁴

A hearing was scheduled in this cause for May 18, 2006, by *Notice of Hearing* issued March 24, 2006.⁵ Upon *Request for continuance* filed April 11, 2006 and for good cause shown, the hearing was stricken and rescheduled for June 21, 2006, by *Order Granting Request for Continuance* issued April 11, 2006. A hearing was ultimately scheduled for September 13, 2006, by *Order Granting Request for Continuance* issued July 26, 2006.⁶

¹ In its response, Claimant advised that it would provide additional evidence in support of its *Application* upon receipt of such documentation from the Tribe. On February 3, 2006, Claimant forwarded certain information to the Division by facsimile. Unaware of Claimant’s December 15th correspondence, the Division believed Claimant was out of time to protest the denial to the *Application*. Claimant thereafter produced the December 15th facsimile.

² 68 O.S. 2001, § 201 et seq.

³ Rules 710:1-5-20 through 710:1-5-47 of the *Oklahoma Administrative Code* (“OAC”).

⁴ OAC, 710:1-5-22(b).

⁵ 68 O.S. 2001, § 227(e).

⁶ OAC, 710:1-5-30 and 710:1-5-29.

Pursuant to the *Order* issued July 26, 2006, Claimant on September 6, 2006, filed *Claimant's Brief* and Exhibits A through K, including Exhibits C-1 and C-2. The *Division's Brief* and Exhibits A through H had been previously filed on April 7, 2006.⁷

By *Order Granting Request for Decision on Briefs* issued September 11, 2006, the hearing scheduled for September 13, 2006 was stricken from the docket, the record was closed and the protest to the denial of the *Application* was submitted for decision.⁸

FINDINGS OF FACT

Upon review of the file and records, including the *Briefs* of the parties and Exhibits attached thereto, the undersigned finds:

1. Claimant, located in SOMEPLACE, Nevada, is a supplier of electronic bingo equipment, including hand-held bingo units, fixed based units and turnkey account and management software which it leases to bingo halls and gaming facilities. Claimant's Exhibit A and Division's Exhibit A.

2. During the period of December 1, 2003 through October 31, 2004, Claimant leased certain gaming equipment and sold certain gaming supplies to its customer, SMALL TOWN Bingo, and remitted sales taxes of \$4,381.38 related thereto to the Tax Commission under sales tax permit number 12345. Claimant's Exhibit B and Division's Exhibit B.

3. On or about August 15, 2005, Claimant filed an *Application for Credit or Refund of State and Local Sales or Use Tax* ("*Application*") in the amount of \$4,381.38 which taxes were remitted with respect to Claimant's sales to the SMALL TOWN Bingo during the period of December, 2003 through October, 2004. Claimant's Exhibits B, C-1 and C-2; and Division's Exhibits B through E.

4. Claimant's explanation for the *Application* as set forth in an accompanying letter dated August 16, 2005, was: the taxes were remitted "on behalf of our customer, SMALL TOWN Bingo - XYZ Nation"; "sales tax should not have been charged to this customer as they have proved to be a tax-exempt tribe"; and Claimant "has credited SMALL TOWN Bingo's account for the tax charged in error." Claimant's Exhibit C-1 and Division's Exhibit D.

5. Also accompanying the *Application* was a copy of a check dated October 3, 2005, made payable to Claimant and drawn on the "SMALL TOWN Indian Community Gaming Center" bank account, located in SMALL TOWN, Oklahoma. Claimant's Exhibit C-2 and Division's Exhibit E.

6. The Division by letter dated November 18, 2005, denied Claimant's *Application* stating: "[t]he documentation provided demonstrates that the purchases were not made by XYZ [sic] Nation of Oklahoma." Claimant's Exhibit D and Division's Exhibit F.

⁷ OAC, 710:1-5-29.

⁸ OAC, 710:1-5-38.

7. On December 15, 2005, Claimant responded to the Division's denial of the *Application* by facsimile advising that Claimant would fax additional documentation to show "SMALL TOWN Bingo' is a XYZ Nation establishment" upon receipt of "written confirmation that 'SMALL TOWN Bingo' is a XYZ Nation owned and operated establishment" from "the XYZ Nation of Oklahoma legal department". Claimant's Exhibit E and Division's Exhibit G.

8. On February 3, 2006, Claimant forwarded to the Division a copy of a letter dated January 30, 2006 from the XYZ Nation Gaming Operations Authority Board which advised: "the Gaming Operations Authority Board has control over the SMALL TOWN Indian Gaming Center until further notice from the XYZ National Council". Claimant also forwarded a copy of Tribal Resolution 04-050 which accompanied the letter from the Gaming Operations Authority Board and which was adopted at the XYZ National Council meeting of April 15, 2004. Claimant's Exhibit F and Division's Exhibit H. TR 04-050 provides:

A TRIBAL RESOLUTION OF THE XYZ NATION AUTHORIZING THE XYZ NATION GAMING OPERATIONS AUTHORITY BOARD TO EXERCISE TEMPORARY JURISDICTION AND CONTROL OVER THE SMALL TOWN INDIAN GAMING CENTER

Be it resolved by the National Council of the XYZ Nation:

WHEREAS, The SMALL TOWN Indian Community Gaming Center ("Gaming Center") is not being effectively managed and operated; and,

WHEREAS, There has been a high turnover rate for the General Manager of the Gaming Center and there appears to be confusion among the SMALL TOWN Indian Community Board and the Gaming Center General Manager regarding their respective duties and responsibilities; and,

WHEREAS, MCNCA Title 21, § 4-103.C.1.1., provides that the Gaming Operations Authority Board (hereinafter "GOAB") shall have no power to have or attempt to exercise jurisdiction or control over any gaming activities conducted by Chartered XYZ Communities without first obtaining approval by Tribal Resolution by the National Council; and,

WHEREAS, GOAB possesses the resources to effectively manage and operate the Gaming Center.

NOW THEREFORE BE IT RESOLVED THAT, the XYZ Nation Gaming Operations Authority Board is hereby authorized to exercise temporary jurisdiction and control over the SMALL TOWN Indian Gaming Center.

BE IT FURTHER RESOLVED THAT, the XYZ Nation Gaming Operations Authority Board shall maintain temporary jurisdiction and

control over the Gaming Center until the National Council determines by Tribal Resolution that the SMALL TOWN Indian Community possesses the ability to effectively manage and operate the Gaming Center.

ENACTED by the XYZ National Council on this 15th day of April 2004.

9. A letter dated September 6, 2006, from ASSISTANT ATTORNEY GENERAL, First Assistant Attorney General, Office of the Attorney General, Department of Justice, XYZ Nation, advises:

This letter is to memorialize our discussion regarding the legal owner of the SMALL TOWN Casino. As you are aware federal law, 25 U.S.C. § 2710(b)(2)(A), requires a federally recognized tribe to have the sole proprietary interest and responsibility for the conduct of any gaming activity. The Nation's Code specifically sets out the governmental agency responsible for administering and managing the Nation's gaming facilities and operations as the Gaming Operations Authority Board ("GOAB"). MCNCA Title 21, § 4-103. The GOAB is composed solely of appointees of the Nation's Principal Chief and legislature. This board reports to the Nation.

All bank accounts are controlled by the Nation and GOAB. Revenue is forwarded to the XYZ Nation and distributed in accordance with XYZ Nation law. The casino's audits are included in the Nation's financials. There are no third party management agreements in effect at the SMALL TOWN Casino and the casino is operated solely by the GOAB, the Nation's governmental agency.

Claimant's Exhibit G.

10. The XYZ Nation of Oklahoma official website, XYZTRIBE.COM; lists the SMALL TOWN Indian Community Center, 123 FAKE STREET, SMALL TOWN, Oklahoma 12345, as a XYZ Nation Community Division. Claimant's Exhibit H.

11. The XYZ Nation Casino website, XYZTRIBEGAMING.COM; identifies the gaming center as the XYZ Nation Casino SMALL TOWN, 123 FAKE STREET, SMALL TOWN, Oklahoma 12345. Claimant's Exhibit I.

12. The 500 Nations website, WEB ADDRESS; identifies the facility as the XYZ Nation Casino SMALL TOWN Bingo, 123 FAKE STREET, SMALL TOWN, Oklahoma 12345. Claimant's Exhibit J.

13. The XYZ Nation Tribal Resolution TR 03-077 provides:

A TRIBAL RESOLUTION OF THE XYZ NATION AMENDING TR 03-030 (A TRIBAL RESOLUTION OF THE XYZ NATION AUTHORIZING THE XYZ NATION GAMING OPERATIONS AUTHORITY BOARD TO EXERCISE TEMPORARY JURISDICTION AND CONTROL OVER THE SMALL TOWN INDIAN GAMING CENTER)

Be it resolved by the National Council of the XYZ Nation:

WHEREAS, TR 03-030 authorized the XYZ Nation Gaming Operations Authority Board to exercise temporary jurisdiction and control over the SMALL TOWN Indian Gaming Center for a period of sixty (60) days from date of enactment and said period will expire on July 5, 2003; and,

WHEREAS, it is not in the best interests of the SMALL TOWN Indian Community or the XYZ Nation to transfer control over said gaming operations back to the Community at the present time.

NOW THEREFORE BE IT RESOLVED THAT TR 03-030 is hereby amended to provide that the XYZ Nation Gaming Operations Authority Board shall continue to maintain temporary jurisdiction and control over the Gaming Center for ninety (90) days with a corrective action plan submitted by the Executive Branch within thirty (30) days to the National Council.

ENACTED by the XYZ National Council on the 26th day of July 2003.

Claimant's Exhibit K.

14. Claimant's "Daily Invoicing Reports" and "Credit Memo" submitted with its *Application* identify the name of its customer as "SMALL TOWN Bingo". Claimant's Exhibit B and Division's Exhibit B.

ISSUES AND CONTENTIONS

The issue presented for decision as labeled by the parties is whether the Division correctly denied Claimant a refund of the sales tax it paid the state from December, 2003 through October, 2004 on its sales of gaming supplies to "SMALL TOWN Bingo", or as Claimant avers to "SMALL TOWN Indian Community Gaming Center (also known as 'SMALL TOWN Bingo')".

The Division contends that notwithstanding the XYZ National Council placed SMALL TOWN Bingo under the temporary jurisdiction and control of the XYZ Nation Gaming Operations Authority Board on at least three separate occasions starting as early as May, 2003, Claimant has not sustained its burden of proving the gaming equipment and supplies were sold directly to the XYZ Nation of Oklahoma. In support of this contention, the Division argues that

ostensible tribal divisions or boards and agencies that operate ostensibly for the Tribe are not the tribe itself where sales tax exemptions are concerned.

Claimant contends that it has submitted proof of all of the mandatory requirements for finding that the sales of gaming equipment and supplies to the SMALL TOWN Indian Community Gaming Center were tax exempt. In support of this contention, Claimant argues that the evidence presented shows the sales were made directly to the XYZ Nation, payments for the gaming equipment and supplies were received directly from the XYZ Nation and the XYZ Nation was the consumer or user of the gaming equipment and supplies which were consumed or used within Indian Country. Claimant further argues that the Division is viewing this case with blinkers on; that is the Division is relying on the fact that SMALL TOWN Bingo in its operation and paying of its bills did not use the formal name of the XYZ Nation (“a non-mandatory requirement”), to deny the exemption.

CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter of law that:

1. Jurisdiction over the parties and the subject matter of this proceeding is vested in the Tax Commission. 68 O.S. 2001, § 227.
2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code (“Code”)⁹. All sales of tangible personal property unless otherwise specifically exempted are subject to sales tax. 68 O.S. 2001, § 1354(A)(1).
3. In general, Claimant’s *Application* is based on the exemption specifically extended to sovereignty under § 1356 of the Code, which provides in part:

Exemptions – Governmental and nonprofit entities.

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

1. Sale of tangible personal property or services to the United States government or to the State of Oklahoma, any political subdivision of this state or any agency of a political subdivision of this state; provided, all sales to contractors in connection with the performance of any contract with the United States government, State of Oklahoma or any of its political subdivisions shall not be exempted from the tax levied by this article, except as hereinafter provided;
2. Sales of property to agents appointed by or under contract with agencies or instrumentalities of the United States government if ownership and possession of such property transfers immediately to the United States government;

⁹ 68 O.S. 2001, § 1350 et seq.

3. Sales of property to agents appointed by or under contract with a political subdivision of this state if the sale of such property is associated with the development of a qualified federal facility, as provided in the Oklahoma Federal Facilities Development Act, and if ownership and possession of such property transfers immediately to the political subdivision or the state;

(Footnote omitted).

4. Pursuant to its authority to facilitate the administration, enforcement and collection of any taxes levied by the tax laws of the State of Oklahoma, the Tax Commission with respect to § 1356(1) promulgated *OAC*, 710:65-7-15.¹⁰ This rule provides in part:

(a) **Sales to entities with other specific statutory exemptions.** In the case of sales to purchasers claiming exemption based upon specific statutory authority, the vendor must obtain the information described in this subsection:

(1) A **copy** of the letter or card from the Oklahoma Tax Commission recognizing the entity as one which is statutorily exempt from sales tax on its purchases; and

(2) A signed statement that the purchase is **authorized by, and being made by**, the exempt entity, with funds of the exempt entity, and not by the individual; and,

* * *

(b) **Examples and applications.** Types of entities which may receive letters or cards, certifying or confirming a specific statutory exemption include:

* * *

(21) Federally recognized **Indian Tribes**;

(Emphasis original).

5. Rules promulgated pursuant to the Administrative Procedures Act,¹¹ are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court. 75 O.S. 2001, § 306(C). They are valid and binding on the persons they affect, have the force of law and are prima facie evidence of the proper interpretation of the matter to which they refer. 75 O.S. 2001, § 308.2(C).

Great weight is accorded an agency's construction of a statute when the administrative interpretation is made contemporaneously with the enactment of the statute and the construction

¹⁰ Added at 18 Ok Reg 2823, eff 6-25-01; Amended at 19 Ok Reg 1859, eff 6-13-02.

¹¹ 75 O.S. 2001, § 250 et seq., § 301 et seq.

is longstanding and continuous by the agency charge with its execution. *Schulte Oil Co., Inc. v. Oklahoma Tax Commission*, 1994 OK 103, 882 P.2d 65. Where the Legislature is made repeatedly aware of the operation of the statute according to the construction placed upon it by an agency and the Legislature has not expressed its disapproval with the agency's construction, the Legislature silence may be regarded as acquiescence in the agency's construction, *R.R. Tway, Inc. v. Oklahoma Tax Commission*, 1995 OK 129, 910 P.2d 972; and the agency's construction is given controlling weight and will not be disregarded except in cases of serious doubt, *Cox v. Dawson*, 1996 OK 11, 911 P.2d 272.

The rules and regulations of an administrative agency which implement the provisions of a statute are valid unless they are beyond the scope of the statute, are in conflict with the statute or are unreasonable. See, *Arkansas Louisiana Gas Co. v. Travis*, 1984 OK 33, 682 P.2d 225; *Boydston v. State*, 1954 OK 327, 277 P.2d 138. Agency rules need not be specifically authorized by statute, but must generally reflect the intent of the Legislature as expressed in the statute. *Jarboe Sales Company v. Oklahoma Alcoholic Beverage Laws Enforcement Commission*, 2003 OK CIV APP 23, 65 P.3d 289. As a general rule, it is presumed that administrative rules and regulations are fair and reasonable, and that the complaining party has the burden of proving the contrary by competent and convincing evidence. *State ex rel. Hart v. Parham*, 1966 OK 9, 412 P.2d 142.

6. For purposes of showing the Division's policy with respect to the collection of sales tax on purchases made by federally recognized Indian Tribes, the Division cites *Chickasaw Nation v. State of Oklahoma ex rel. Oklahoma Tax Commission*, 31 F.3d 964 (1994), wherein the United States Court of Appeals for the Tenth Circuit "reprint[ed] *in haec verba* the contents of" a letter the State furnished to Oklahoma Gas and Electric Company in January, 1993, "explaining the current State position" with respect to sales made to Indian Tribes. As set forth in the opinion at 973, the letter provided:

It is the position of the Business Tax Division that sales to an Indian tribe are exempt from state and local sales taxes as outlined in the Division's exemption letter of January 21, 1988, which was provided to all federally-recognized Indian tribes in Oklahoma.

However, the 1988 letter indicates that the exemption is limited to purchases made by the Tribe for governmental use as opposed to business use. In order to clarify the Division's position, I will further outline the proper limits of the exemption as the Division understands them.

A tribe may purchase taxable goods and services exempt from sales taxes if the tribe purchases the item directly, makes payment for the purchase directly and if the tribe is the consumer/user of the item, whether the item is used in tribal governmental offices or in a tribally-owned and operated business place.

Therefore, in order to be entitled to the exemption, the sale must satisfy the following requirements:

1. The sale must be made directly to the federally recognized Indian tribe.
2. Payment must be received directly from the tribe.
3. The tribe must be the consumer or user of the purchased good which is consumed or used within Indian Country.

In order to document these requirements your company should maintain the following records:

1. Invoices or statements of account should be billed to the tribe in its officially recognized name and mailed to the tribe.
2. Payment in the form of a bank draft should be drawn on an account owned by the tribe in its name.
3. The location at which the service is established should be owned and operated by the tribe on its Indian Country.

This exemption does not extend to individuals, corporations, partnerships, or other business or legal entities who are purchasing items which may be used on Indian Country and which are purchased ostensibly “for the Tribe” or for business ventures under tribal license or contract with private parties.

The exemption only applies to transactions with a federally-recognized Indian tribe itself.

The exemption also does not extend to purchases of items which a tribe does not use itself, but which it intends to resell to the general public from a business place on Indian Country for the purpose of marketing a tax exemption to those who would otherwise be required to pay sales taxes elsewhere.

7. Tax exemptions depend entirely upon legislative grace and are strictly construed against the exemption. *TPQ Investment Corporation v. Oklahoma Tax Commission*, 1998 OK 13, ¶ 8, 954 P.2d 139, 141; *Getty Oil Co. v. Oklahoma Tax Commission*, 1977 OK 19, 563 P.2d 627, 630-631. No claim of tax exemption can be sustained unless it clearly comes within the statutory provision under which the exemption is claimed. *Home-Stake Production Co. v. Board of Equalization of Seminole County*, 1966 OK 115, 416 P.2d 917. The burden of proving the existence of an exemption is on the person seeking the exemption. *Austin, Nichols & Co., Inc. v. Oklahoma County Bd. Of Tax-Roll Corrections*, 1978 OK 65, 578 P.2d 1200.

8. The burden of proof in proceedings before the Tax Commission is on the taxpayer to show in what respect the action or proposed action of the Division is incorrect. *OAC*, 710:1-5-47. See, *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission*, 1988 OK 91, 768 P.2d 359. The burden of proof and burden of persuasion on each issue are borne by the taxpayer.

In sales tax matters, “[t]he burden of proving a sale was not a taxable sale shall be upon the person who made the sale.” 68 O.S. 2001, § 1365(E). See, *Dunn v. State ex rel. Oklahoma*

Tax Commission, 1993 OK CIV APP 105, 862 P.2d 1285. Section 1365(E) further provides in part:

It shall be the duty of every tax remitter required to make a sales tax report and pay any tax under [the Code] to keep and preserve 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 which may be necessary to determine the amount of tax due hereunder and such other records of goods, wares and merchandise, and other subjects of taxation under [the Code] as will substantiate and prove the accuracy of such returns. * * * All such records shall remain in Oklahoma and be preserved for a period of three (3) years, unless the Tax Commission, in writing, has authorized their destruction or disposal at an earlier date, and shall be open to examination at any time by the Tax Commission or by any of its duly authorized agents.

The burden of proof standard is “preponderance of evidence.” 2 Am.Jur.2d *Administrative Law* § 357. See, Oklahoma Tax Commission Order No. 91-10-17-061. “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 * * * evidence which is more credible and convincing to the mind * * * that which best accords with reason and probability.” Black’s Law Dictionary 1064 (5th ed. 1979). Each element of the claim must be supported by such reliable, probative, and substantial evidence of sufficient quality and quantity as to show the existence of the facts supporting the claim are more probable than their nonexistence. 2 Am.Jur.2d *Administrative Law* § 357.

9. Here, Claimant failed to sustain its burden of proving by a preponderance of evidence that the Division’s denial of the *Application* is incorrect. First, Claimant failed to present any evidence to show it complied with the mandatory provisions of *OAC*, 710:65-7-15(a), by submitting a copy of the letter or card issued by the Tax Commission recognizing the XYZ Nation as a statutorily exempt entity and a signed statement that the purchases were authorized by, and being made by the exempt entity with funds of the exempt entity. Second, the evidence presented fails to show that the sales were made directly to and payment was received directly from the XYZ Nation and that the XYZ Nation was the consumer or user of the purchased goods. Claimant’s *Daily Invoicing Reports* and *Credit Memo* identify its customer as ‘SMALL TOWN Bingo’. Claimant has not presented any payment information relevant to the time period involved in this proceeding. And, TR 04-050 indicates the “Gaming Center” was managed and operated by a General Manager, not the SMALL TOWN Indian Community Board nor the Gaming Operations Authority Board. Third, a tribal ordinance or resolution has not been presented which shows the XYZ Nation has sole proprietary interest and responsibility for the conduct of any gaming activities at the SMALL TOWN Bingo as opposed to a tribal ordinance or resolution licensing and regulating the gaming activities owned by any person or entity other than the XYZ Nation and conducted on their lands. See, 25 U.S.C.A. § 2710(b)(1), (b)(2)(A) and (b)(4)(A).

10. Claimant's protest to the denial of the *Application for Credit or Refund of State and Local Sales or Use Tax* should be and the same is hereby 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 *Application for Credit or Refund of State and Local Sales or Use Tax* of Claimant, CLAIMANT, be denied.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are generally applicable or are limited in time and/or effect. Non-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.