**JURISDICTION:** **OKLAHOMA TAX COMMISSION - DECISION**
**CITE:** **2008-03-18-02 / NON-PRECEDENTIAL**
**ID:** **CR-07-012-H**
**DATE:** **MARCH 18, 2008**
**DISPOSITION:** **DISMISSED**
**TAX TYPE:** **SALES / CLAIM FOR REFUND**
**APPEAL:** **NO APPEAL TAKEN**

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

CONSTRUCTION COMPANY ("Claimant") appears pro se[1] by and through MANAGER, Member/Manager. The Credits and Refunds Section of the Account Maintenance Division ("Division"), Oklahoma Tax Commission, appears by and through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

## PROCEDURAL HISTORY

On December 3, 2007, the protest file was received by this office for further proceedings consistent with the Uniform Tax Procedure Code[2] and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.[3] On December 7, 2007, a letter was mailed to the parties showing that this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number CR-07-012-H. The letter advised the parties that the matter had been set for hearing on January 15, 2008, at 9:30 a.m., with position letters or memorandum briefs due on or before January 8, 2008.[4] A copy of the *Rules of Practice and Procedure Before the Oklahoma Tax Commission* was also enclosed.

On December 21, 2007, the Division filed a *Motion to Dismiss* on jurisdictional grounds. On December 26, 2007, the *Motion to Dismiss* and the *Notice of Hearing on Motion to Dismiss*

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[1] "**pro se**" (proh **say** *or* **see**), *adv.* & *adj.* [Latin] For oneself; on one's own behalf; without a lawyer <the defendant proceeded pro se> <a pro se defendant>. -- Also termed *pro persona*; *in propria persona*; *propria persona*; *pro per*. See PROPRIA PERSONA. BLACK'S LAW DICTIONARY (8th ed. 2004), available at *http://westlaw.com*. (March 16, 2006).

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

[3] OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

[4] OKLA. ADMIN. CODE § 710:1-5-24:

> A claim for refund has to be denied by the tax division before a taxpayer can file a protest. Once a claim is denied and the taxpayer files a protest with the Tax Commission, the Administrative Law Judge shall set a hearing within sixty (60) days after the filing of the protest. The taxpayer shall be duly notified of time of the hearing. Protests to denials of claims for refund have priority status and shall be set for hearing at the earliest practicable date.

OKLA. STAT. ANN. tit. 68, § 208 (West 2001). The notice was mailed to the last known address of the Claimant c/o MANAGER, Member/Manager at CLAIMANT'S ADDRESS.

*and Order Setting Hearing* were mailed to the Claimant setting the hearing on the Division's motion for January 15, 2008, at 9:30 a.m.[5]

On January 2, 2008, a letter was mailed to the parties to clarify that the hearing on the merits of the protest set for January 15, 2008, had been stricken from the docket, as well as the related briefing dates, and that the hearing set for January 15, 2008, at 9:30 a.m. was only on the Division's *Motion to Dismiss*.

On January 15, 2008, the Claimant requested a continuance of the hearing due to a "work related emergency." The Division did not have an objection to the request. On January 18, 2008, a notice was mailed to the parties stating that the hearing for January 15, 2008, had been stricken from the docket and reset for January 23, 2008, at 1:30 p.m.

On January 23, 2008, at approximately 1:30 p.m., the hearing on the Division's *Motion to Dismiss* was held as scheduled. MANAGER, Manager/Member, testified on behalf of the Claimant. The Claimant did not offer any exhibits to be identified and introduced into evidence. The Division called two (2) witnesses. The Division's first witness, UNIT MANAGER, Revenue Unit Manager, Credits and Refunds Section of the Account Maintenance Division, Oklahoma Tax Commission, testified about the Division's procedures for preparing and mailing a letter denying a claim for refund and as custodian of the Division's records. The Division's second witness, AUDITOR, Auditor, Credits and Refunds Section of the Account Maintenance Division, Oklahoma Tax Commission, testified about preparing and mailing the Division's letter denying part of the Claimant's refund. Division's Exhibits A through C were identified, offered, and admitted into evidence. Upon conclusion of the hearing, the record was closed and the Division's *Motion to Dismiss* was submitted for decision on January 23, 2008.

## FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, and the Division's *Motion to Dismiss*,[6] the undersigned finds:

1. The Claimant[7] is a "qualified manufacturer"[8] and holder of manufacturer's sales tax exemption permit[9] ("MSEP") No. XXX, with an effective date of July 26, 2005.[10]

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[5] *See* Note 4.

[6] The Claimant did not file a response to the Division's motion.

[7] The Administrative Law Judge is taking judicial notice of the Oklahoma Secretary of State's website to complete the factual details and background of the audit of this claim for refund. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999). *See* https://www.sooneraccess.state.ok.us/corp_inquiry (Last visited January 24, 2008). According to the Oklahoma Secretary of State's website, the Claimant was formed as a "Domestic Limited Liability Company," with an effective date of August 4, 2004.

[8] *See* OKLA. ADMIN. CODE § 710:65-13-153(a)(2) (June 25, 2004).

[9] *See* OKLA. STAT. ANN. tit. 68, § 1359.2 (West 2001). *See also* OKLA. ADMIN. CODE § 710:65-13-153 (June 25, 2004).

2. On June 21, 2006, the Division received an Application for Refund of Sales Tax from the Claimant for the period August 2004 through April 2006 ("Claim Period") for a total refund of $21,270.19.[11]

3. The refund request consisted of two (2) distinct claims,[12] as follows, to-wit:

| | | |
|---|---|---|
| Sales Tax Paid Before MSEP Was Issued | | |
| ABC COMPANY-Purchase of Asphalt Plant | | |
| Invoice #717903 | 08/17/04 | |
| State Sales Tax | | $14,193.00 |
| COUNTY | | 1,577.00 |
| Total | | $15,770.00 |
| | | |
| Purchase of Manufacturing Materials From XYZ COMPANY | | |
| Total | | $ 5,500.19 |

4. On July 31, 2007, the Division mailed a letter to the Claimant showing that $5,376.44[13] (Purchases/XYZ COMPANY) of the $21,270.19 in sales tax requested to be refunded for the Claim Period had been approved and the remainder ($15,770.00) denied because the "initial purchase of the manufacturing facility…was prior to the effective date of the manufacturing exemption."[14] The letter also contained the following paragraph, to-wit:

> In accordance with Oklahoma Statute Title 68, Section 227, you may within thirty (30) days, of the date of this letter, file a written protest and request a hearing before the Commission for the portion of the denied request.[15]

5. On November 14, 2007, the Claimant, through MANAGER, mailed a protest to the partial denial of the refund for $15,893.75.[16] The basis for the protest is stated in pertinent part, as follows, to-wit:

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[10] The court file contains an audit packet, which was forwarded by the Division as part of the protest file on this matter. The Administrative Law Judge is taking judicial notice of the materials contained in the court file to complete the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999). The court file contains a letter dated March 8, 2006, to the Claimant from the Audit Division (now known as the "Compliance Division") stating that on January 5, 2006, the Audit Division determined that the Claimant qualified as a manufacturer, with an effective date of July 26, 2005.

[11] Division's Exhibit A.

[12] Division's Exhibit A. The Application for Refund was dated June 19, 2006, and signed on behalf of the Claimant by MEMBER, Member.

[13] $5,500.19 less $123.75 (2.25% Vendor Discount for Electronic Filing) equals $5,376.44.

[14] Division's Exhibit B. The letter was mailed to the Claimant at CLAIMANT'S ADDRESS.

[15] Division's Exhibit B.

> The manufacturing permit should have been issued with an effective date August 4, 2004. This is the date that the company was formed. The manufacturing permit was applied for on the original Oklahoma Registration, which was several months after the company was formed. This was done because it took several months to set up the plant. During the set-up time there were no sales or payroll.
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> Oklahoma statute allows us to go back up to 3 years when issuing a manufacturing permit. The tax commission employee doing the manufacturing audit may not have been aware of this.[17]

6. At hearing, MANAGER conceded that the protest was not filed within thirty (30) days, but raised as a defense "that the same rules should apply to the Division that apply to the Claimant. The Division had over one (1) year to review the claim for refund and the Claimant only had thirty (30) days to review the denial and file a protest in writing."[18]

## CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[19]

2. The Claimant may file a written protest within thirty (30) days after the notice of denial is mailed.[20]

3. 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.[21]

4. The Tax Commission is without jurisdiction to consider a protest that is not filed within the time provided by statute. The question of the Commission's jurisdiction to consider a

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[16] Division's Exhibit C. The postmark on the envelope is November 14, 2007. The letter itself is dated November 13, 2007, and stamped as received by the Tax Commission on November 15, 2007. The Division date-stamp is November 20, 2007.

[17] Division's Exhibit C.

[18] Testimony of MANAGER.

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

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

> If the claim for refund is denied, the taxpayer may file a demand for hearing with the Commission. The demand for hearing must be filed on or before the thirtieth day after the date the notice of denial was mailed. If the taxpayer fails to file a demand for hearing, the claim for refund shall be barred.

[21] OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2001).

protest may be raised at any time, by a party, the Administrative Law Judge, or the Commission itself.[22]

5. A motion filed by a party to dismiss a protest for lack of jurisdiction, or a notice by the Administrative Law Judge or the Commission of intent to dismiss a protest on jurisdictional grounds, shall state the reasons therefore, shall be filed in the case, and shall be mailed to all parties or their authorized representatives. The motion or notice of intent to dismiss shall be set for hearing, which shall not be less than fifteen (15) days after the filing of such motion or notice of intent, at which time any party opposing such motion or notice of intent may appear and show cause why the protest should not be dismissed. Notice of the date, time, and place of the hearing shall be mailed to the parties or their representatives along with the motion or notice of intent to dismiss.[23]

6. The Division's *Motion to Dismiss* and *Notice to Appear or Respond in Writing* comply with the provisions of OAC 710:1-5-46(d). The protest was post-marked November 13, 2007, after the thirty (30) day provision provided by Section 227(d) of Title 68 had expired, which was conceded by MANAGER at hearing.

**DEFENSE RAISED BY CLAIMANT**

7. It shall be the duty of the Commission to determine what amount of refund, if any, is due as soon as practicable after such claim has been filed and advise the taxpayer about the correctness of his claim and the claim for refund shall be approved or denied by written notice to the taxpayer.[24]

8. The Commission will review the documentation submitted and determine *within thirty (30) days* whether the refund claimed will be allowed. In the event that the claim is denied, the person who submitted the documentation will be notified by the Commission as to the reason for denial. The person who submitted the documentation will similarly be notified that a claim has been approved.[25]

9. Legislative intent controls statutory interpretation.[26] Intent is ascertained from the whole act in light of its general purpose and objective[27] considering relevant provisions together

[22] OKLA. ADMIN. CODE § 710:1-5-46(c) (June 11, 2005).

[23] OKLA. ADMIN. CODE § 710:1-5-46(d) (June 11, 2005).

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

[25] OKLA. ADMIN. CODE § 710:65-13-153(e)(3) (June 25, 2004).

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

[27] *Id.* at ¶7.

to give full force and effect to each.[28] The Court presumes that the Legislature expressed its intent and that it intended what it expressed.[29]

10. Statutes are interpreted to attain that purpose and end[30] championing the broad public policy purposes underlying them.[31] 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.[32] However, where the statutory language is ambiguous or uncertain, a construction is applied to avoid absurdities.[33]

The Claimant has raised a novel defense in this matter, which appears to present a case of first impression. The Claimant's Application for Refund was received by the Division June 21, 2006, and the partial denial of the refund is dated July 31, 2007, more than one (1) year after the Division's receipt of the request.

The Tax Commission promulgated OAC 710:65-13-153 to administer the exemption for "qualified manufacturers" provided by Section 1359 of Title 68.[34] From a review of the rule, it appears that the thirty (30) day provision has remained unchanged since the rule was first promulgated by the Tax Commission.[35] The problem is that the rule does not indicate what happens, if anything, in the event the Division does not review the documentation submitted and determine within thirty (30) days whether the refund claimed will be allowed.

The provisions of Section 1359.1 of Title 68[36] do not contain a specific time limit within which the Tax Commission has to review the claim and either approve or deny the request. The

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[28] *Id.* at ¶7.

[29] *Id.* at ¶7.

[30] *Id.* at ¶7.

[31] *Id.* at ¶7.

[32] *Id.* at ¶7.

[33] *Id.* at ¶7.

[34] OKLA. STAT. tit. 68, § 1359 (West Supp. 2006).

[35] *See* the amendment located at 10 Okla. Reg. 3847, effective July 12, 1993.

[36] OKLA. STAT. tit. 68, § 1359.1 (West Supp. 2005) states as follows, to-wit:

> A. In order to administer the exemption for sales to a qualified manufacturer or distributor as provided by Section 1359 of this title, there shall be made a sales tax refund for state and local sales taxes paid by qualified manufacturers or distributors for tangible personal property purchased to be consumed or incorporated in the construction of a new manufacturing or distribution facility or to expand an existing manufacturing or distribution facility in the state from the account created by this section. Provided, no claim for a refund shall be filed by a distributor pursuant to subparagraph d of paragraph 7 of Section 1359 of this title before July 1, 2006.

B. The Oklahoma Tax Commission shall transfer each month from sales tax collected the amount which the Commission estimates to be necessary to make the sales tax refund provided by this section to an account designated as the Commission determines.

C. Any refund shall be paid from the account prescribed by this section at the time the claim for refund is approved by the Tax Commission. *The amount of the refund shall not exceed the total state and local sales taxes paid together with accrued interest upon such total. The amount of interest paid to a qualified manufacturer or distributor upon the principal amount of any refund made to such manufacturer or distributor for purposes of administering the exemption provided by Section 1359 of this title shall be determined according to the amount earned as invested by the State Treasurer's Office. The interest rate shall accrue upon the amount transferred to the account.*

D. For purposes of this section, state and local sales taxes paid by a contractor or subcontractor for tangible personal property purchased by that contractor or subcontractor to be consumed or incorporated in the construction of a new or expanded manufacturing facility pursuant to a contract with a qualified manufacturer or distributor shall, upon proper showing, be refunded to the qualified manufacturer or distributor.

E. The qualified manufacturer or distributor shall file with the Tax Commission the following documentation for any refund claimed:

1. Invoices indicating the amount of state and local sales tax billed;

2. Affidavit of each vendor that state and local sales tax billed has not been audited, rebated, or refunded to the qualified manufacturer but rather the sales tax charged has been collected by the vendor and remitted to the Tax Commission; and

3. All additional documentation required to be submitted pursuant to rules promulgated by the Tax Commission.

F. In the event that state and local sales tax was paid by a contractor or subcontractor, the qualified manufacturer or distributor shall file with the Tax Commission all documentation required in subsection E of this section but in lieu of the affidavit of each vendor the qualified manufacturer or distributor shall file, for any refund claimed, an affidavit from the contractor or subcontractor stating that the sales tax refund of the qualified manufacturer or distributor is based on state and local sales tax paid by the contractor or subcontractor on tangible personal property purchased to be consumed or incorporated in the construction of a new or expanded business activity and that the amount of state and local sales tax claimed was paid to the vendor and no credit, refund, or rebate has been claimed by the contractor or subcontractor.

G. Only sales of tangible personal property made after June 1, 1988, shall be eligible for the refund established by this section.

H. The qualified manufacturer or distributor shall file, within thirty-six (36) months of the date of the first purchase which is exempt from taxation pursuant to the provisions of paragraph 7 of Section 1359 of this title, with the Tax Commission a certification issued by the Employment Security Commission in order to qualify for the refund authorized by this section.

I. Notwithstanding the provisions of any state tax law, the amount refunded under this section shall be assessed if the number of full-time-equivalent employees drops below the number prescribed in paragraph 7 of Section 1359 of this title, at any time within thirty-six (36) months of the date certification is issued by the Oklahoma Employment Security Commission. (Emphasis added.)

provisions of Section 227(c) of Title 68[37] also do not provide a specific time limit but state, "It shall be the duty of the Commission to determine what amount of refund, if any, is due *as soon as practicable after such claim has been filed* and advise the taxpayer about the correctness of his claim and the claim for refund shall be approved or denied by written notice to the taxpayer."

The closest statutory analogy is contained in Section 217 of Title 68.[38] The Tax Commission has thirty (30) days after an income tax return is filed electronically to pay the refund and for all other returns, one hundred fifty (150) days. In the event the refund is not paid within the time limits prescribed after an income tax return is filed, the Tax Commission shall pay interest on the refund.[39] Section 1359.1(C) contains a provision for the payment of interest on a claim for refund of sales tax by the holder of an MSEP.[40]

However, the thirty (30) day period within which a taxpayer may file a demand for hearing or protest, contained in Section 227, is jurisdictional.[41] When the intent of the Legislature is plainly addressed in statute, it must be followed without further inquiry.[42] Where a statute is susceptible to but one construction, the Commission is bound and must proceed strictly within the provisions of the tax laws.[43]

The last sentence of Section 227(d) states, "If the taxpayer fails to file a demand for hearing, the claim for refund shall be barred."

The Division's partial denial of the Claimant's request for refund of sales tax became final thirty (30) days after the mailing of the Division's letter dated July 31, 2006. The protest mailed by the Claimant on November 14, 2007, is untimely. The undersigned ALJ is without

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

[38] OKLA. STAT. tit. 68, § 217(H) (West Supp. 2004), which in pertinent part, states as follows, to-wit:

> For tax returns filed after January 1, 2004, whenever an income tax refund is not paid to the taxpayer within the following number of days after the income tax return is filed with all documents as required by the Tax Commission or after the income tax return is due, whichever is later, entitling the taxpayer to a refund, then the Tax Commission shall pay interest on the refund at the same rate specified for interest on delinquent tax payments:
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> 1. For returns filed electronically, thirty (30) days; and
> 2. For all other returns, one hundred fifty (150) days.

[39] This also assumes the income tax return is filed with all documents required by the Tax Commission ("processible"). *See* Note 38. *See also* OKLA. ADMIN. CODE § 710:50-9-3 (July 11, 2005).

[40] *See* Note 36. *See also* Note 13.

[41] *Request of Hamm Production Co.*, 1983 OK 92, 671 P.2d 50.

[42] *Id*.

[43] *Matter of Phillips Petroleum Co.*, 1982 OK 112, 652 P.2d 283.

jurisdiction to hear this protest. The Claimant's defense is insufficient to defeat the legislative mandate contained in Section 227.

**DISPOSITION**

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the Division's *Motion to Dismiss* on jurisdictional grounds should be granted.

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.