JURISDICTION:	**OKLAHOMA TAX COMMISSION DECISION**
CITE:	**2009-04-23-02 / NON-PRECEDENTIAL**
ID:	**CR-08-018-K**
DATE:	**APRIL 23, 2009**
DISPOSITION:	**SUSTAINED**
TAX TYPE:	**MANUFACTURER'S EXEMPTION / CLAIM FOR REFUND**
APPEAL:	**NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant, CLAIMANT, is represented by REPRESENTATIVE, CONSULTING FIRM. The Account Maintenance Division of the Oklahoma Tax Commission ("Division") is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

On or about March 27, 2008, Claimant requested a refund of "all past paid taxes dating back to September 6, 2005", the date the business registration and application for the manufacturer/sales exemption permit was originally filed with the Commission. Claimant sought a refund of the sales taxes paid on utilities used in its manufacturing operations. By letter dated October 24, 2008, the Division denied the refund request in the amount of $5,839.39 for the periods inclusive of the months of September, 2005 through April, 2007, for the reason that: "[a]ccording to the documentation provided and our system records, the exemption did not become effective until 5/16/07." Claimant timely protested the denial and requested a hearing.

On November 27, 2008, the Division referred the protest to the Office of the Administrative Law Judges for further proceedings consistent with the Uniform Tax Procedure Code[1] and the Rules of Practice and Procedure before the Oklahoma Tax Commission[2]. The case was docketed as Case No. CR-08-018-K and assigned to ALJ, Administrative Law Judge.[3]

By *Notice of Hearing* issued November 12, 2008, a hearing on Claimant's protest was scheduled for January 6, 2009.[4] By e-mail received December 30, 2008, Claimant's representative requested a continuance of the scheduled hearing. By *Notice of Hearing* issued December 31, 2008, the hearing was rescheduled for January 27, 2009. Due to unforeseen circumstances, the January 27, 2009 hearing was stricken and continued to February 5, 2009, which hearing due to a scheduling conflict was stricken and continued to February 12, 2009, by *Notices of Hearing* issued January 29, 2009 and February 2, 2009, respectively.

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[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.

[4] *See*, 68 O.S. 2001, § 227(e).

An open hearing[5] was held on February 12, 2009, as rescheduled. Claimant's representative was duly sworn and gave a statement regarding the factual circumstances leading up to the refund request. AUDITOR, Auditor with the Compliance Division, Oklahoma Tax Commission, testified with respect to the records of the Tax Commission. Exhibits A through D, and F through I were identified, offered and admitted into evidence without objection. Upon conclusion of the hearing, the record was closed and the protest to the denial of the sales tax refund claim was submitted for decision.[6]

FINDINGS OF FACT

Upon review of the file and records, including the recording of the hearing, the exhibits and the pleadings of the parties, the undersigned finds:

1. On September 6, 2005, Claimant's representative submitted a letter requesting an exemption on two (2) ELECTRIC COMPANY accounts which were being assessed sales tax and enclosed therewith an updated *Business Registration* that was executed by CONTROLLER 1, Claimant's controller at the time. Exhibit A. According to AUDITOR, the *Registration* submitted with the letter was obsolete when submitted and was incomplete. The indicated reason for filing the *Registration* was "Other: Mfg Sales Tax Exemption." The letter requests that the Commission call Claimant's representative if there were any questions concerning the exemption. Exhibit A.

2. Upon receipt of the *Registration*, a file was built and assigned to an auditor to perform a review of the application. Testimony of AUDITOR. According to AUDITOR, it is normal procedure for the auditor to attempt to contact the representative of the taxpayer as listed on the *Registration* by telephone to provide answers to the *MSEP Determination Questionnaire*. The auditor in this case did not receive any response to her telephone calls and on September 13, 2006, denied the MSEP because of the lack of response. Exhibit B.

3. On September 29, 2006, a no response letter was mailed to Claimant advising that if a response was not received within thirty (30) days of the date of the letter, the application file would be closed. Exhibit C.

4. On November 13, 2006, Claimant's representative sent a five (5) page facsimile to AUDITOR which included a copy of the September 6, 2005 letter, a copy of the previously submitted *Registration* (Exhibit A herein), and a *Letter of Authorization to Deal with the Oklahoma Tax Commission*. The *Letter of Authorization* shows an execution date of March 15, 2006, by CONTROLLER 2, Claimant's Controller at the time. Exhibit D.

5. On February 14, 2007, AUDITOR responded by e-mail to an e-mail inquiry by Claimant's representative. In the response, AUDITOR wrote:

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[5] Claimant's representative waived confidentiality. *See*, 68 O.S. 2001, § 205.

[6] *OAC*, 710:1-5-39(a).

> [Claimant] has been denied. The taxpayer did not respond to the auditor's telephone calls. They did not respond to the Supervisor's letter requesting they contact him to complete the utility review. This file was closed denied 1/16/07.

Exhibit F.

6. By letter to Claimant dated February 21, 2007, Claimant was notified that the auditor had denied the manufacturer's sales tax exemption as of September 13, 2006, because "[t]axpayer did not respond to Auditor. Utility review unable to be completed. The letter also advised that if Claimant disagreed with the determination, they could request a hearing to show cause why the permit should be issued. Exhibit G.

7. On May 16, 2007, Claimant's representative sent a nine (9) page facsimile to AUDITOR which included an updated *Business Registration Application* executed by SIGNEE, a copy of Claimant's *Manufacturer Sales Tax/Exemption Permit*, copies of two (2) utility bills, and a copy of the *Letter of Authorization to Deal with the Oklahoma Tax Commission* dated March 15, 2006. Exhibit H. The indicated reason for filing the Application was: "Other: Mfg. Sales Tax Exemption on Electric." Claimant's MSEP reports an effective dated of January 20, 1987 and an expiration date of December 15, 2007.

8. According to AUDITOR, based on the information sent by Claimant's representative on May 16, 2007, the Division was able to determine that Claimant qualified for a utility exemption.

9. By letter to Claimant dated February 14, 2008, Claimant was notified that the auditor had determined it qualified as a manufacturer as of January 17, 2008, and that its permit had been updated for a utility exemption. Exhibit I. The letter reflects the utility exemption became effective May 16, 2007, the date the second *Business Registration Application* was filed. *See*, Exhibit H.

10. On March 27, 2008, Claimant's representative requested a refund of "all past paid taxes dating back to September 6, 2005, the date that CONSULTING FIRM originally filed for the manufacturer's sales tax exemption with Oklahoma Tax Commission" on the reference utility account.

11. On July 10, 2008, Claimant's representative made a second request for refund of the sales tax paid on the referenced utility account and enclosed Form 13-9 – "Application for Credit or Refund of State and Local Sales or Use Tax" and a copy of the utility exemption approval letter. Form 13-9 reports an amount claimed of $5,839.39.

12. By letter dated October 24, 2008, the Division denied the refund request and gave as the reason therefor; "[a]ccording to the documentation provided and our system records, the exemption did not become effective until 5/16/07." The letter was mailed to Claimant with a cc to Claimant's representative.

13. On November 5, 2008, Claimant's representative protested the denial and requested a hearing. In the letter, Claimant's representative writes in part:

> The original business registration was filed on September 6, 2005 and the refund should be retro-active to September 2005. Nobody from the tax commission

> contacted any of the corporate officers listed on the business registration form. The individual who signed the business registration form was no longer employed and the tax commission should have made an effort to contact a corporate officer listed on the business registration form.

ISSUE AND CONTENTIONS

The issue presented for decision is whether Claimant has shown by a preponderance of the evidence that the Division's denial of its refund request is erroneous.

Claimant contends that it should be refunded the sales taxes paid on the utilities used and consumed in manufacturing from the date of its original application. In support of this contention, Claimant cites the Division policy of refunding any taxes erroneously paid to the date of application for a manufacturer exemption permit as confirmed in ***Reasor's LLC v Oklahoma Tax Commission***, 2006 OK CIV APP 43, 134 P.3d 918, and argues that neither any of the corporate officers listed on the *Business Registration* nor its representative who filed the exemption application were contacted with respect to questions concerning the application.

The Division contends that the denial of the refund is proper. In support of this contention, the Division argues that the initial application for utility exemption was denied because the application was not properly applied for, and the required information was not provided. The Division further argues that it is Claimant's fault the utility exemption was not issued in September 2005, and the Division made repeated attempts to assist Claimant in completing the application process. The Division also cites ***Reasors***, *supra*., for the propositions that the provisions of § 1359.2 established a mandatory duty of specific compliance, the Commission is without authority to make the exemption permit retroactive and the Commission is not free to disregard or subvert statutory requirements.

CONCLUSIONS OF LAW

1. Jurisdiction of the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. 2001, § 227(d) and (e).[7]

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[7] These subsections provide:

> (d) If [a] 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.
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> (e) 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 is 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. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Code").[8] Sales tax is levied on the gross receipts or gross proceeds of all sales not otherwise exempted by the Code. 68 O.S. 2001, § 1354(A). The sale of "tangible personal property" and specifically, the sale of "[n]atural or artificial gas, electricity, ice, steam, or any other utility or public service, except water, sewage and refuse" are expressly made subject to sales tax. 68 O.S. 2001, § 1354(A)(1) and (2). *See, OAC*, 710:65-13-120.

3. Exempted from the levy of sales tax are "[s]ales of goods, wares, merchandise, tangible personal property, machinery and equipment to a manufacturer for use in a manufacturing operation." 68 O.S. Supp. 2003, § 1359(1).[9] *See OAC*, 710:65-7-9.[10] "The phrase "tangible personal property" for purposes of the Code is defined to mean "personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses" and includes "electricity, water, gas, steam and prewritten computer software." 68 O.S. Supp. 2003, § 1352(23).[11] *See OAC*, 710:65-13-150(b)(2)(A)(ii).[12]

4. In 1998, the Legislature enacted § 1359.2 of the Code with respect to the manufacturer's exemption. Section 1359.2 provides in pertinent part:

> A. In order to qualify for the exemption authorized in [§1359(1) of the Code] 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 [the Code].
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> B. Each resident manufacturer wishing to claim the exemption authorized in [§ 1359(1) of the Code] shall be required to secure from the Oklahoma Tax Commission a manufacturer exemption permit, * * *. This

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[8] 68 O.S. 2001, § 1350 et seq., as amended.

[9] Laws 2003, c. 472, § 15, which added the second sentence to paragraph 1 of Section 1359.

[10] This rule provides:

> In the case of sales to purchasers claiming exemption for manufacturing, the vendor must obtain a **copy** of the purchaser's manufacturer's exemption permit issued pursuant to 68 O.S. Supp. 1998, § 1359.2 (hereafter referred to as 'Sales/Manufacturers Permit'), **or if unavailable**, the name, address, and Sales/Manufacturers Permit Number of the purchaser **or**, a statement that contains the information that would appear on the Sales/Manufacturers Permit. If a copy of the Sales/Manufacturers Permit is unavailable and if the information provided has not been previously verified, it must be verified by either calling the Taxpayer Assistance Division or by reference to the sales tax permit list obtained pursuant to *OAC* 710:65-9-6, (Emphasis original).

See OAC, 710:65-9-1(g) which provides that "[e]ach applicant who is engaged in manufacturing at a manufacturing site located in Oklahoma will be issued a Sales/Manufacturers Permit.

[11] Laws 2003, c. 413, § 1. Now codified at § 1352(24) by Laws 2007, c. 155, § 4.

[12] This rule lists examples of supplies used in the manufacturing production process.

> permit shall constitute proof of eligibility for the exemption provided in [§ 1359(1) of the Code]. 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.

5. The Supreme Court of Oklahoma has recognized that § 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."

6. In Oklahoma Tax Commission Order No. 2005-05-24-04, the Commission approved the Division's policy of refunding any sales tax paid by the taxpayer during the period of time between the taxpayer's MSEP application date and issuance date of the MSEP by the Division, despite the fact that the statute required the taxpayer to present the MSEP to its vendor at the time of purchasing any tangible personal property. *See*, *Reasors, supra*. at ¶ 3, footnote 2.

7. The facts presented in this matter are similar to the facts in Oklahoma Tax Commission Order No. 2009-03-03-02, wherein the Commission denied the Division's *Motion to Dismiss* because the Division mailed the refund denial letters to taxpayer rather than taxpayer's duly authorized agent. In that case, the Division received five (5) refund claims under the agent's letterhead requesting that any questions be addressed to the agent and to mail the refunds to the agent's address. The first claim was accompanied by a power of attorney. The Division mailed the denial letters in care of the agent, but at the address of the taxpayer. Due to a change in taxpayer's personnel, the agent did not receive the denial notices until it was too late to file a demand for hearing.

In this case, Claimant's original *Registration* was filed under the letterhead of its representative which letter notified the Division that Claimant sought an exemption on utilities and requested that any questions be addressed by Claimant's representative. Due to a change in Claimant's personnel, the Division's attempts to obtain information with respect to the utilities were not addressed and the Division issued its no response letter. Shortly thereafter, but not within the thirty (30) day time period given by the Division, Claimant's representative inquired regarding the status of the exemption and submitted a copy of the *Registration* under the representative's letterhead and the *Letter of Authorization*. The record in this matter suggests nothing was done with this application.

The undersigned concludes that the Division's failure to contact Claimant's representative merely to inquire who to contact caused the original *Registration* to be denied. The Division had notice of Claimant's representation. Further, although Claimant's representative inquired about the

exemption and submitted the *Registration* for a second time, no review was conducted which would have kept the original *Registration* file open.

8. Claimant's protest to the denial of its sales tax refund claim should be sustained.

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 sales tax claim for refund of Claimant, CLAIMANT, be sustained.

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.