

**JURISDICTION:** OKLAHOMA TAX COMMISSION DECISION  
**CITE:** 2009-04-30-03 / NON-PRECEDENTIAL  
**ID:** CR-08-013-K / CR-08-014-K  
**DATE:** APRIL 30, 2009  
**DISPOSITION:** DENIED  
**TAX TYPE:** SALES / CLAIM FOR REFUND  
**APPEAL:** NO APPEAL TAKEN

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

ENTITY 1 and ENTITY 2 collectively referred to as Claimants, are represented by ATTORNEY 1, ATTORNEY 2 AND ATTORNEY 3, Attorneys at Law, LAW FIRM. The Compliance 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 July 24, 2007, PARENT COMPANY filed a claim for refund on behalf of its subsidiaries<sup>1</sup>, including Claimants herein, for sales taxes paid on gas and electric utilities used in manufacturing at Claimants' business location in CITY, Oklahoma for the periods inclusive of the months of December, 2004 through August, 2007. The claim was amended in June, 2008, to separate the claims and to name the subsidiaries as the Claimants. By letters dated July 18, 2008, the Division denied the claims for refund in total. Claimant timely filed a protest to the denials.

On July 25, 2008, the Division referred the protests to the Office of the Administrative Law Judges for further proceedings consistent with the Uniform Tax Procedure Code<sup>2</sup> and the Rules of Practice and Procedure before the Oklahoma Tax Commission<sup>3</sup>. The protests were docketed as Case Nos. CR-08-013-K and CR-08-014-K and assigned to ALJ, Administrative Law Judge.<sup>4</sup>

By *Notice of Hearing* issued July 28, 2008 in each case, the protests to the denials of the claims for refund were scheduled for a hearing before the undersigned on September 18, 2008, at 9:30 a.m. and 1:30 p.m., respectively.<sup>5</sup> On September 5, 2008, a *Request for Continuance* of the scheduled hearings was filed in each of the cases by the representative of the Division which requests were consented to by the prior representative of the Claimants, MANAGER, Claimants' Parent Company's in-house Tax Manager. By *Notice of Hearing* issued September 8, 2008 in each case, the hearings scheduled for September 18, 2008 were stricken and rescheduled for November 5, 2008, at 9:30 a.m. and 1:30 p.m., respectively.

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<sup>1</sup> The original claim for refund included a third subsidiary, ENTITY 3. The claim for refund for this subsidiary was withdrawn because it was sold.

<sup>2</sup> 68 O.S. 2001, § 201 et seq.

<sup>3</sup> Rules 710:1-5-20 through 710:1-5-47 of the *Oklahoma Administrative Code* ("OAC").

<sup>4</sup> See, OAC, 710:1-5-22 and 710:1-5-30.

<sup>5</sup> See, 68 O.S. 2001, § 227(e).

On October 24, 2008, a *Limited Power of Attorney* was filed in each case appointing the current representatives to represent the Claimants. By letter dated October 28, 2008, Claimants' representatives were notified of the requirement for out-of-state Attorneys to register for practice in Oklahoma and directed the representatives to provide verification of compliance on or before December 29, 2008.

On October 29, 2008, a *Joint Motion to Strike Hearing and Set Status Report* and a *Motion to Consolidate Cases* were filed in each case. By *Order Granting Joint Motions* issued November 3, 2008 in each case, the hearings scheduled for November 5, 2008 were stricken, the cases were consolidated and the parties were directed to file a status report on or before December 3, 2008.

On November 26, 2008, a *Motion to Associate Counsel* was filed which *Motion* was granted by *Order Admitting to Practice* issued December 4, 2008.

On December 3, 2008, a *Joint Motion to Set Briefing Schedule* was filed which *Motion* was granted by *Order Granting Joint Motion to Set Briefing Schedule* issued December 4, 2008. On December 15, 2008, a *Joint Request to Amend Briefing Schedule* was filed which *Request* was granted by *Order Granting Joint Request to Amend Briefing Schedule* issued December 16, 2008.

*Joint Stipulations* were filed December 22, 2008. Attached thereto were the Affidavits of AUDITOR, Auditor III for the Division; and DIRECTOR, Director of Tax and Assistant Treasurer; CONTROLLER, Vice President, Controller and Chief Accounting Officer; and VICE-PRESIDENT, Vice President, Finance and Treasurer of the Parent Company, PARENT COMPANY and Exhibits A through N, which Exhibits M and N consisted of letters dated August 26, 2008 and Exhibits A through H in support thereof. The *Joint Stipulations* included a statement of the issue to be determined.

On January 2, 2009, Claimants filed *Taxpayer Brief in Chief*. The *Division's Response Brief* was filed January 9, 2009. On January 14, 2009, Claimants filed a *Motion for Leave to Supplement the Record with Material Agreements* which *Motion* was granted by *Order Granting Motion for Leave to Supplement Record with Administrative Services Agreements* issued January 15, 2009, over the Division's objection which was made in the *Division's Response to Claimants' Motion for Leave to Supplement the Record with Material Agreements* filed January 14, 2009.

On January 16, 2009, Claimants filed *Taxpayer Reply Brief*. The *Addendum to Division's Response Brief* was filed January 29, 2009. The *Reply to Addendum to Division's Response Brief* was filed by Claimants on February 6, 2009.

On February 9, 2009, the record in the consolidated cases was closed and the protests to the denials of the claims for refund were submitted for decision.<sup>6</sup>

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<sup>6</sup> OAC, 710:1-5-39(a).

**FINDINGS OF FACT**

Upon review of the file and records, including the *Stipulations*, the affidavits and exhibits attached thereto, the *Administrative Services Agreements* and the pleadings of the parties, the undersigned finds:

A. The parties stipulate to the following:

1. [Claimants] are members of a commonly controlled-affiliated group of entities that are directly and/or indirectly owned by a holding company, PARENT COMPANY. CONTROLLER Affidavit, ¶ 2.

2. Claimants' proceedings have been consolidated because they concern the same question of law.

3. For the administrative convenience and accounting efficiency of its subsidiaries, PARENT COMPANY maintains in its name, a central cash management account ("Cash Management Account") for and on behalf of the subsidiaries. CONTROLLER Affidavit, ¶ 3. This type of central cash account is very common with commonly controlled and affiliated corporations and entities to increase accounting efficiency and reduce unnecessary administrative and overhead costs. PriceWaterhouseCoopers, *Global Best Practices*.

4. Under the Cash Management Account, PARENT COMPANY may acquire goods and services, including utilities, for and on behalf of a subsidiary (including each Claimant), and debit such subsidiary's allocable share of the Cash Management Account for the payment of such goods and services. It is common for PARENT COMPANY to acquire goods and services, such as natural gas and other utilities, in the name of PARENT COMPANY, for and on behalf of a subsidiary, notwithstanding the fact that the subsidiary (not PARENT COMPANY) is the actual user and consumer of, and bears the economic responsibility for the utilities. CONTROLLER Affidavit, ¶ 4; DIRECTOR Affidavit, ¶ 4.

5. Under the Cash Management Account, when PARENT COMPANY pays a bill from a utility company, on behalf of a subsidiary, the amount due is debited from the subsidiary's allocable share of the Cash Management Account. Although PARENT COMPANY'S name appears on each invoice from the utility company, the books and records of the respective subsidiary (not PARENT COMPANY) clearly reflect payment by it of the amount due. CONTROLLER Affidavit, ¶¶ 7 and 8.

6. Each subsidiary's funds are deposited and held solely for the benefit of each subsidiary, and dispersed solely for the benefit of such subsidiary. VICE-PRESIDENT Affidavit, ¶ 4.

7. The cash receipts and cash payments of each subsidiary are credited and debited, respectively, to and from the Cash Management Account, so each subsidiary realizes the respective economic benefits and burdens of such receipts and payments. CONTROLLER Affidavit, ¶¶ 7 and 8.

8. Any funds deposited into the Cash Management Account on behalf of a subsidiary are held solely for the benefit of such subsidiary, and each subsidiary of PARENT COMPANY, including each Claimant, has access only to its allocable share of the Cash Management Account. VICE-PRESIDENT Affidavit, ¶¶ 4 through 6.

9. PARENT COMPANY was only the means by which Claimants obtained natural gas and electricity, and paid vendor utility companies. DIRECTOR Affidavit, ¶ 4.

10. Claimant, ENTITY 1 previously manufactured freight cars at ADDRESS (the "Manufacturing Facility")<sup>7</sup> and operated under federal employer identification ("FEI") number XX-1 and manufacturer sales exemption permit ("MSEP") number XXX1. Exhibits A and B.

11. Claimant, ENTITY 2 manufactures tank cars at the Manufacturing Facility, and operates under FEI XX-2, and MSEP number XXX2. Exhibits C and D.

12. PARENT COMPANY does not hold an Oklahoma MSEP.

13. On or about October 1, 2006, Claimant, ENTITY 2 applied for an MSEP.

14. By letter dated June 19, 2007, Claimant, ENTITY 2 was notified that on June 5, 2007, the Division issued its MSEP effective October 1, 2006. Auditor advised Claimant, ENTITY 2 that although approved for an MSEP, the "utility exemption" was contingent upon changing the utilities from PARENT COMPANY'S name to Claimant, ENTITY 2's name. Exhibits C through E; AUDITOR Affidavit, page 2.

15. Neither PARENT COMPANY, nor any other entity or business, operated or used in any way the Manufacturing Facility. In manufacturing tank cars and freight cars, the Manufacturing Facility required the consumption of natural gas. Claimants were the actual users and consumers of the utilities and were responsible for paying for their proportional usage of the natural gas that was consumed at the Manufacturing Facility. DIRECTOR Affidavit, ¶¶ 4 and 5.

16. By letter dated July 24, 2007, PARENT COMPANY filed a sales tax claim for refund in the amount of \$97,929.43, covering the period of December 1, 2004

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<sup>7</sup> The Manufacturing Facility at ADDRESS, was converted from a freight car manufacturing facility to a tank car manufacturing facility on or about October 1, 2006. Footnote original to *Stipulations*.

through August 8, 2007, for sales tax paid on gas and electric utilities used in its manufacturing operations. Exhibit F.

17. Auditor determined that PARENT COMPANY'S sales tax claim for refund covered utilities used at PARENT COMPANY'S three (3) separate manufacturing locations – ENTITY 1, ENTITY 2, and ENTITY 3<sup>8</sup> – and that each had a valid MSEP. Exhibits A through D; AUDITOR Affidavit, page 1.

18. In June 2008, Auditor informed PARENT COMPANY'S accountant that the claim would be denied as filed because PARENT COMPANY did not have an MSEP, and the utility bills were in the name of PARENT COMPANY rather than Claimants and ENTITY 3. AUDITOR Affidavit, page 1.

19. By letters dated June 2008, Claimants submitted separate, revised claims for refund. Exhibits G and H; AUDITOR Affidavit, pages 1 - 2.

20. The revised claim for refund of Claimant, ENTITY 1 covered the period of December 1, 2004 through September 30, 2006, and totaled \$28,165.57. Exhibit G.

21. The revised claim for refund of Claimant, ENTITY 2 covered the period of October 1, 2006 through August 8, 2007, and totaled \$50,015.09. Exhibit H.

22. Auditor contacted PARENT COMPANY after Claimant's revised claims for refund were received to inquire about the claim for refund of ENTITY 3. AUDITOR Affidavit, page 2.

23. Auditor was advised that ENTITY 3 had been sold, and its claim for refund was no longer sought. AUDITOR Affidavit, page 2.

24. By letter dated July 18, 2008, the Division denied Claimants' claims for sales tax refund because the utilities purchased by PARENT COMPANY, for Claimants, were in PARENT COMPANY'S name. Exhibits I and J.

25. By letter dated July 22, 2008, and facsimile [sic] date stamped July 23, 2008, Claimants protested the Division's denial of their claims for sales tax refund. Exhibits K and L.

26. By letters dated August 26, 2008, PARENT COMPANY forwarded additional information for review with separate, revised amounts claimed for refund for each Claimant. Exhibits M and N.

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<sup>8</sup> PARENT COMPANY did not submit a revised claim for ENTITY 3 because it was sold off. Footnote original to *Stipulations*.

27. The revised amount claimed by Claimant, ENTITY 1 totaled \$45,364.85 and the revised amount claimed by Claimant, ENTITY 2 totaled \$33,672.87. Exhibits M and N.

28. Auditor reviewed the documentation and determined that the utility accounts remained in PARENT COMPANY'S name, and that PARENT COMPANY did not have a valid MSEP. AUDITOR Affidavit, page 3.

29. Auditor reviewed additional Commission documents related to PARENT COMPANY, including the Business Registration Form and MSEP application of PREDECESSOR which became Claimant, ENTITY 1. Exhibits O and P; AUDITOR Affidavit, page 3.

30.<sup>9</sup> Auditor learned that Claimant, ENTITY 1 (f/k/a PREDECESSOR) was advised by a previous Auditor who reviewed the MSEP application that an MSEP *with utility exemption* would be issued after the utility accounts were changed into the name of the MSEP holder. (Emphasis original). Exhibits O and P; AUDITOR Affidavit, page 3.

B. Additional Findings:

1. The *Administrative Services Agreements*, at Article I, *Services* provide in pertinent part:

Section 1.02 Services Provided by PARENT COMPANY. The administrative services to be provided by PARENT COMPANY will include general administrative matters and financial, accounting, legal, information technology, human resources, risk management and treasury functions required by Company including, but not limited to, participating in PARENT COMPANY'S centralized cash management system for the payment of accounts payable and collection of accounts receivable; payment of payroll and related matters; maintaining, purchasing, leasing and selling assets relating to the business of Company; entering into, modifying or terminating contracts for products used by the Company; managing and directing banking relationships of the Company; providing risk management services; providing legal services; providing advice in merger and acquisition activities; and providing any other services as PARENT COMPANY and Company may agree.

Section 1.03 Separate Assets, Funds, Expenses and Indebtedness. Notwithstanding the Company's participation in PARENT COMPANY'S centralized cash management system, all assets, funds,

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<sup>9</sup> Numbered paragraph 18 in the *Stipulations*.

expenses and indebtedness shall be maintained by separate corporate records for PARENT COMPANY and the Company.

2. The aggregate amount in controversy is \$79,037.72. *See, Stipulations*, ¶ 27.

### ISSUE AND CONTENTIONS

The issue present for decision as stipulated by the parties is:

Whether Claimants may receive a refund for sales tax paid on gas and electric utilities billed to, and in the name of, PARENT COMPANY for use in Claimants' manufacturing operations?

Claimants contend that the Division erred in denying the claims for refund of sales taxes paid on utilities used and consumed in manufacturing, regardless of whose name the utility accounts were issued in. In support of this contention, Claimants argue that there are three requirements manufacturers must follow to be entitled to a refund of sales taxes paid on utilities used and consumed in manufacturing: (1) Claimants must be MSEP holders; (2) Claimants must be the actual users or consumers of the utilities and paid for the utilities, citing Oklahoma Tax Commission Order No. 95-08-22-021 and *Frances S. McMillin et al. v. Oklahoma Tax Commission*, 1995 OK 3, 894 P.2d 1060; and (3) Claimants must have delivered a copy of the MSEP to the vendor of the utilities at the time of purchasing the utilities or the failure to present the MSEP must have been due to an error of fact or other mistake. Claimants contend that the stipulated record and well-established Oklahoma tax law clearly shows they have satisfied all three requirements and argue that the failure to present the MSEP at the time of purchasing the utilities constitutes an error of fact. Claimants further argue that to require the utility accounts to be in the name of the manufacturer prevents affiliated groups of companies from using a centralized cash management account and from operating in the manner and method that is routine, common and accepted in today's business world.

The Division contends that the refund claims were properly denied because the utility sales were made to Claimants' parent company; the utility account holder, and the parent company remitted payment for the utilities, including the sales tax. The Division also contends that Claimants failed to comply with the requirements of the manufacturer exemption by providing proof of eligibility for the exemption; Claimants' MSEPs, at the time the utilities were purchased.

### 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).<sup>10</sup>

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<sup>10</sup> 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

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code (“Code”).<sup>11</sup> 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).<sup>12</sup> *See OAC, 710:65-7-9.*<sup>13</sup> “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).<sup>14</sup> *See OAC, 710:65-13-150(b)(2)(A)(ii).*<sup>15</sup>

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

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shall be barred.

(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.

<sup>11</sup> 68 O.S. 2001, § 1350 et seq., as amended.

<sup>12</sup> Laws 2003, c. 472, § 15, which added the second sentence to paragraph 1 of Section 1359.

<sup>13</sup> 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.

<sup>14</sup> Laws 2003, c. 413, § 1. Now codified at § 1352(24) by Laws 2007, c. 155, § 4.

<sup>15</sup> This rule lists examples of supplies used in the manufacturing production process.

section, and sales to a person providing such proof shall be exempt from the tax levied by [the Code].

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, the size and design of which shall be prescribed by the Tax Commission. This permit shall constitute proof of eligibility for the exemption provided in [§ 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 fundamental rule and governing principle of statutory construction is to ascertain and, if possible, give effect to the intention and purpose of the legislature as expressed in a statute. *Samson Hydrocarbons Co. v. Oklahoma Tax Commission*, 1998 OK 82, 976 P.2d 532; *State ex rel. Dept. of Public Safety v. 1985 GMC Pickup, Serial No. 1GTBS14EOF2525894, OK Tag No. ZPE852*, 1995 OK 75, 898 P.2d 1280. The Legislature will not be presumed to have intended an absurd result, *In re Holt*, 1997 OK 12, 932 P.2d 1130; nor to have done a vain or useless act in the promulgation of a statute, *Comer v. Preferred Risk Mut. Ins. Co.*, 1999 OK 86, 991 P.2d 1006; or when creating law, *Purcell v. Santa Fe Minerals, Inc.*, 1988 OK 45, 961 P.2d 188. If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and no further construction is required or permitted. *Sullins v. American Medical Response of Oklahoma, Inc.*, 2001 OK 20, 23 P.3d 259.

6. Tax statutes are penal in nature. *Globe Life and Accident Insurance Company v. Oklahoma Tax Commission*, 1996 OK 39, 913 P.2d 1322. Penal statutes are to be strictly construed. *Mid-Continent Pipeline Co. v. Crauthers*, 1954 OK 61, 267 P.2d 568. Strict construction with respect to a penal statute is that which refuses to extend the law by implication or equitable consideration and confines its operations to cases clearly within the letter of the statute, as well as within its spirit or reason. *State ex rel. Allen v. Board of Education of Independent School Dist. No. 74 of Muskogee County*, 1952 OK 241, 206 Okla. 699, 246 P.2d 368. Courts cannot enlarge the taxing act's ambit to make its provisions applicable to cases not clearly within the legislature's contemplation or to fill lacunae in the revenue law in a manner that would distort the enactment's plain language. *Globe*, supra at 1327.

7. Rules promulgated pursuant to the Administrative Procedures Act<sup>16</sup>, are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court. 75 O.S. 1991, § 306(C). They are valid and binding on the persons they affect and have the force of law. 75 O.S. 1991, § 308.2(C). They are prima facie evidence of the proper interpretation of the matter to which they refer. *Id.* Further, the legislature is deemed to adopt an administrative construction of a statute when, subsequent to such construction, it amends the statute or reenacts it without overriding such construction. *Branch Trucking Co. v. Oklahoma Tax Commission*, 1990 OK 41, 801 P.2d 686 (Okla. 1990).

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<sup>16</sup> 75 O.S. 1991, § 250 et seq., § 301 et seq.

8. The Supreme Court of Oklahoma has recognized that Section 1359.2 is a "mandatory procedural tax statute", *Apache Corp. v. Oklahoma Tax Commission*, 2004 OK 48 at ¶ 11, 98 P.3d 1061, 1064; which must be followed to obtain the statutory tax exemption, *Id.* at ¶ 10. The Court also found that "when a statute creates both a right and a remedy for its enforcement the statutory remedy is [generally] exclusive." *Id.*, citing *R.R. Tway, Inc. v. Oklahoma Tax Commission*, 1995 OK 129, 910 P.2d 972, 978. In *Apache* at ¶ 11, the Court held "Apache's claim for a refund for taxes paid [after November 1, 1998], is barred by Apache's failure to follow [obtain or at least attempt to obtain the required manufacturer exemption permit] 68 O.S. Supp. 1998, § 1359.2."

9. Here, the undersigned agrees with Claimants' argument that they were the holders of MSEPs during the claim periods and that they were the users or consumers of the utilities and paid for the utilities used in their manufacturing operations. However, the undersigned concludes that similar to the circumstances in *Apache, supra.*, the failure of Claimants or Claimants' parent company to provide the vendor of the utilities proof of eligibility for the exemption; the MSEPs, at the time of the utility sales bars their refund claims.

Claimants contend that § 227 provides an alternative procedure to obtaining the refund and argue that failure to furnish the MSEPs at the time of purchase constitutes an error of fact. The undersigned disagrees. Section 1359.2(A) provides: "[i]n order to qualify for the exemption authorized in [§ 1359(1)], at the time of sale, the person to whom the sale is made, \* \* \* shall be required to furnish the vendor proof of eligibility for the exemption". (Emphasis added). "The term 'shall' is often used in a statute as part of a command or a mandatory duty." *Apache, Id.* at ¶ 11, citing *Tulsa County Budget Bd. v. Tulsa County Excise Bd.*, 2003 OK 103, n. 25, 81 P.3d 662, 671; *State ex rel. Independent School Dist. No. 1 of Oklahoma County v. Barnes*, 1988 OK 70, 762 P.2d 921, 924. As the Supreme Court in *Apache* recognized § 1359.2 is a "mandatory procedural tax statute"; *Id.* at ¶ 11, which must be followed to obtain the statutory tax exemption and "when a statute creates both a right and a remedy for its enforcement the statutory remedy is [generally] exclusive." *Id.* at ¶ 10, citing *R.R. Tway, Inc. v. Oklahoma Tax Commission*, 1995 OK 129, 910 P.2d 972, 978.

Further, the Tax Commission has determined that "[t]he enactment of Section 1359.2 effectively eliminates claims for refund of sales and/or use taxes erroneously remitted to the state by manufacturers"; referring to *Apache* at ¶ 3 and ¶ 11, wherein the Court found that "[n]othing before us suggests that the 1998 [enactment] applies to all of Apache's sales taxes paid between 1997 and 2000" and applied the 1998 enactment only to Apache's sales taxes paid November 1, 1998 and thereafter. Oklahoma Tax Commission Order No. 2005-05-24-04 (Prec.). Tax exemptions and deductions are matters of legislative grace. *R.R. Tway, Inc., supra* at 978. Consequently, the Legislature can eliminate, place conditions upon or restrict an exemption. See, *Bruner v. U.S.*, 340 F.Supp. 2d 1204, 94 A.F.T.R.2d 2004-5977 (N.D. Okla. 2004).

Further, where a taxpayer voluntarily pays taxes on exempt property, and the taxpayer controls all material facts which causes the taxes to be statutorily due and payable, there can be no error of fact to support a claim for refund. *Budget Rent-A-Car of Tulsa v. Oklahoma Tax Commission*, 1989 OK 67, 773 P.2d 736, citing *Vinson Supply Co. v. Oklahoma Tax Commission*, 1988 OK 107, 767 P.2d 406. Here, the record reflects that Claimants, like the taxpayer in *Budget*,

were fully cognizant of the available exemption when the taxes were paid, were free to avoid payment of the sales taxes at the time the utilities were purchased and were in sole charge of the taxable event and controlled all facts pertinent to the exemption. Accordingly, there was no error of fact to support a refund claim under § 227.

### **DISPOSITION**

Based on the above and foregoing findings of fact and conclusions of law, it is **ORDERED** that the protests to the denials of the sales tax claim for refunds of Claimants, ENTITY 1 and ENTITY 2, 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.