JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2009-12-15-02 / NON-PRECEDENTIAL**
ID: **CR-09-015-K**
DATE: **DECEMBER 15, 2009**
DISPOSITION: **DENIED**
TAX TYPE: **USE**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant, COMPANY is represented by MANAGER, Tax Manager of Claimant. The Credits and Refunds Section of 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 July 23, 2009 (postmarked July 21, 2009), the Division received Claimant's refund request for use tax remitted for the June, 2006 reporting period. By letter of August 3, 2009, the Division denied the refund as barred by statute. Claimant timely protested the denial. Claimant requested disposition of the protest through written correspondence in lieu of a hearing.

On September 3, 2009, 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 Office of the Administrative Law Judges[2]. The case was docketed as Case No. CR-09-015-K and assigned to ALJ, Administrative Law Judge.[3]

Pursuant to Claimant's request for written submission of the protest, the parties were directed to submit on or before November 2, 2009, any additional information and/or documentation to be considered in rendering the decision and their arguments. The *Division's Memorandum Brief* was filed September 18, 2009. Attached to the *Brief* were Exhibits A through D. Claimant did not submit any additional information or argument. On November 5, 2009, the record was closed and the protest to the denial of the refund claim was submitted for decision.[4]

FINDINGS OF FACT

Upon review of the file and records, including the exhibits attached to the *Division's Memorandum Brief*, the undersigned finds:

1. The Oklahoma Tax Commission received Claimant's June, 2006 use tax report and remittance of the taxes on July 17, 2006. Exhibit A.

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

2. By letter dated July 19, 2009 (postmarked July 21, 2009) and received by the Division on July 23, 2009, Claimant requested a refund of the use tax remitted for the period of June, 2006, in the amount of $8,396.10. The refund request was occasioned by the double posting of certain ecommerce sales transactions in Claimant's tax return preparation software. Exhibit B.

3. Citing § 227(b) of the Uniform Tax Procedure Code, the Division by letter of August 3, 2009, denied the request as filed beyond the statute of limitations. Exhibit C.

4. Claimant by letter dated August 20, 2009, timely protested the refund denial. Exhibit D.

ISSUE AND CONTENTIONS

The issue presented for decision is whether Claimant's refund request is statutorily barred by the refund limitation provisions of the tax laws of the State of Oklahoma.

Claimant requests reconsideration of the claim for refund. In support of this request, Claimant argues:

> We interpreted the Oklahoma statute regarding refund claims to be the later of the due date of the sales and use tax return (20 JUL) or the date payment was received. We made every attempt to file our refund claim by the 20th of July 2009 based upon the fact that we incur penalties and interest to our monthly filings if our monthly sales and use tax returns are not filed by the 20th day of each month. We were unaware of the date payment was recorded by the state of Oklahoma.

The Division contends that Claimant's refund is barred and the claim must be denied because the refund request was made outside the three (3) year limitation period under § 227 of the Uniform Tax Procedure Code. In support of this contention, the Division argues that claims for refund of taxes erroneously remitted are governed by the provisions of § 227, that the language of § 227 is plain and unambiguous, and its meaning is clear, and that § 227 restricts the refund of erroneously paid taxes to a three (3) year period commencing with the date of payment of the taxes.

CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter 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).[5]

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[5] This subsection provides:

> (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.

2. The refund of erroneously paid use tax is governed by § 227 of the Uniform Tax Procedure Code. Section 227 provides in pertinent part:

> (a) Any taxpayer who has paid to the State of Oklahoma, through error of fact, or computation, or misinterpretation of law, any tax collected by the Tax Commission may, as hereinafter provided, be refunded the amount of such tax so erroneously paid, without interest.[6]
>
> (b) Any taxpayer who has so paid any such tax may, within three (3) years from the date of payment thereof file with the Tax Commission a verified claim for refund of such tax so erroneously paid.
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> (c) Said claim so filed with the Tax Commission, * * * shall specify the name of the taxpayer, the time when and period for which said tax was paid, the nature and kind of tax so paid, the amount of the tax which said taxpayer claimed was erroneously paid, the grounds upon which a refund is sought, and such other information or data relative to such payment as may be necessary to an adjustment thereof by the Tax Commission. * * *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.

3. "The state cannot be sued for the recovery of taxes paid in absence of legislative consent to such suit, and hence the right to recover taxes so paid must be found in a statute." ***Sullivan v. Oklahoma Tax Commission***, 1954 OK 266, 283 P.2d 521, head note 1. "When examining a statutory remedy to recover tax payments, we have said that '[g]enerally, when a statute creates both a right and a remedy for its enforcement the statutory remedy is exclusive.'" ***Apache Corp. v. Oklahoma Tax Commission***, 2004 OK 48 at ¶ 10, 98 P.3d 1061, 1064, *citing* ***R.R. Tway, Inc. v. Oklahoma Tax Commission***, 1995 OK 129, 910 P.2d 972, 978.

4. As cited by the Division, the Tax Commission has determined that the language of § 227(b) is plain and unambiguous, and its meaning is clear. OTC Order No. 96-09-05-015. The provisions of § 227 restrict the refund of erroneously paid taxes to a three (3) year period commencing on the date of payment of the taxes.

5. The date of payment is deemed to be the date of postmark. 68 O.S. 2001, § 221.1. Section 221.1 provides in pertinent part:

> A. For any return, claim, * * * required to be filed or any payment required to be made within a prescribed period or on or before a prescribed date under authority of any provision of a tax law of this state, the date of the postmark stamped on the cover in which the return, claim, * * * or payment is

[6] *But see*, 68 O.S. 2001, § 227(f) which provides that § 227 does not apply to: (1) refunds of income tax erroneously paid, (2) estate taxes, and (3) in any case where the tax is paid after an assessment thereof is made and the assessment has become final under § 221 of the Uniform Tax Procedure Code.

> mailed shall be deemed to be the date of delivery or the date of payment, as the case may be.
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> B. The provisions of this section shall apply only if:
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> 1.The postmark date falls within the prescribed period or on or before the prescribed date for filing, including any extensions, of the return, claim, * * * or for making payment, including any extension granted for making such payment; and
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> 2.The return, claim, * * * or payment was, within the prescribed period or on or before the prescribed date for filing, deposited in the mail in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the Oklahoma Tax Commission, agency, officer, or office with which the return, claim, * * * is required to be filed, or to which the payment is required to be made.

6. In administrative proceedings, the burden of proof is on the taxpayer to show in what respect the action or proposed action of the Tax Commission is incorrect, and in what respect. *OAC*, 710:1-5-47. See, ***Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission***, 1988 OK 91, 768 P.2d 359. If a taxpayer fails to prove a prima facie case, the protest may be denied solely upon the grounds of failure to prove sufficient facts which would entitle the taxpayer to the requested relief. Id.

7. Here, Claimant has not come forward with any evidence to refute the records of the Tax Commission. The evidence shows Claimant remitted payment of the use taxes for the period of June, 2006 on or about July 17, 2006, within the prescribed period and on or before the prescribed date of payment. See, 68 O.S. 2001, § 1405(A).[7] The evidence further shows Claimant's refund request for the taxes erroneously remitted for the June, 2006 reporting period was filed July 21, 2009. As shown, the refund request was made three (3) calendar years beyond the date of the erroneous payment.

8. Claimant's protest to the denial of the use tax claim for refund should be denied.

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[7] This subsection provides in pertinent part:

> The tax levied by [the Use Tax Code] is due and payable on the first day of each month for the preceding calendar month, and if not paid on or before the twentieth day of each month shall thereafter be delinquent. Each taxpayer subject to the provisions of [the Use Tax Code] shall, on or before the twentieth day of every calendar month, file with the Oklahoma Tax Commission on forms to be furnished by the Tax Commission, a return verified by affidavit showing in detail the total purchase price of tangible personal property used by the taxpayer within the state during the preceding calendar month subject to the tax herein levied and such other information as the Tax Commission may require. With each such return each taxpayer shall remit to the Tax Commission the amount of tax shown therein to be due.

If it should be determined that Claimant actually reported the remittance of sales taxes instead of use taxes, the prescribed date for payment of the taxes is the same. See, 68 O.S. 2001, § 1365(A).

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 claim for refund of Claimant, COMPANY, 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.