

**JURISDICTION:** OKLAHOMA TAX COMMISSION  
**CITE:** 2010-07-27-34 / NON-PRECEDENTIAL  
**ID:** CR-09-020-H  
**DATE:** JULY 27, 2010  
**DISPOSITION:** SUSTAINED  
**TAX TYPE:** SALES  
**APPEAL:** NO APPEAL TAKEN

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

LLC (“Claimant”) appears through attorney, ATTORNEY. The Credits and Refunds Section of the Account Maintenance Division (“Division”), Oklahoma Tax Commission, appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

### PROCEDURAL HISTORY

On December 16, 2009, the protest file was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*<sup>1</sup> and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.<sup>2</sup> On December 17, 2009, a letter was mailed to the parties setting the matter for hearing on February 2, 2010, at 9:30 a.m., with position letters or memorandum briefs due on or before January 26, 2010. The letter also advised the Claimant that this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number CR-09-020-H. A copy of the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*<sup>3</sup> was enclosed.

On December 21, 2009, OTC ATTORNEY filed an Entry of Appearance as Counsel of record for the Division. On December 29, 2009, ATTORNEY filed an Entry of Appearance as Counsel of record for the Claimant.

On January 25, 2010, the Claimant’s Position Letter was filed with Exhibits 1 through 9 attached thereto. On January 26, 2010, the Account Maintenance Division’s Memorandum Brief was filed with Exhibits A through G attached thereto.

On February 1, 2010, the Claimant filed a Motion for Continuance on the basis its primary witness had a scheduling conflict. On February 4, 2010, there being no objection by the Division, an Order Granting Motion for Continuance was issued setting the hearing for March 17, 2010, at 1:30 p.m.

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<sup>1</sup> OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

<sup>2</sup> OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

<sup>3</sup> See Note 2, *supra*.

On March 4, 2010, the Division caused to be issued a Subpoena Duces Tecum to WHOLESALER for the production of documents at the Office of General Counsel on or before March 12, 2010, as more fully set out therein. On March 5, 2010, the Division filed the Return of Service with the Court Clerk.<sup>4</sup>

On March 11, 2010, the Division filed a Request for Continuance of Hearing Date due to a scheduling conflict with a matter set in District Court. On March 12, 2010, there being no objection by the Claimant, an Order Granting Request for Continuance was issued setting the hearing for April 13, 2010, at 1:30 p.m.

On April 12, 2010, a Joint Request for Continuance of Hearing Date was filed by the parties due to a problem with the availability of Claimant's primary witness to appear at hearing and the Division was still awaiting the production of documents by WHOLESALER. On April 13, 2010, an Order Granting Joint Request for Continuance was issued setting the hearing for May 18, 2010, at 1:30 p.m.

On May 18, 2010, at approximately 1:30 p.m. an open hearing<sup>5</sup> was held as scheduled. The Claimant called two (2) witnesses. MEMBER, sole member of the Claimant, testified about the Claimant's business dealings with WHOLESALER, the filing of the claims for refund, the documentation provided to the Division, and the approval by the Division of a previous claim for the refund of sales tax. The Claimant's second witness, TERRITORY MANAGER 1, formerly Territory Manager for WHOLESALER and salesman, testified about WHOLESALER'S process of accepting new customers and the purchase of products by the Claimant covered by the claims for refund. Claimant's Exhibits 1 through 9 were identified, offered, and admitted into evidence without objection. The Division called two (2) witnesses. The Division's first witness, AUDITOR, Credits and Refund Section of the Account Maintenance Division, Oklahoma Tax Commission, testified about the processing of the claims for refund of sales tax and as custodian of the Division's records. The Division's second witness, SUPERVISOR, Revenue Unit Manager, Credits and Refunds Section of the Account Maintenance Division, Oklahoma Tax Commission, testified about the claims for refund of sales tax filed by the Claimant and the Division's policy and procedures for processing claims for refund of sales tax. The Division's Exhibits A through G were identified, offered, and admitted into evidence, without objection. At the conclusion of hearing, the record in this matter was closed and this case submitted for decision on May 18, 2010.

### FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, the Claimant's Position Letter, and the Division's Memorandum Brief, the undersigned finds:

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<sup>4</sup> OKLA. ADMIN. CODE § 710:1-5-10(c)(2) (June 25, 1999).

<sup>5</sup> The Claimant, through ATTORNEY, waived its right to a confidential hearing as provided by the provisions of OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2010).

1. On May 27, 2008, the Claimant was formed as a Domestic Limited Liability Company, with MEMBER, as its sole member (“Sole Member”), to operate a food service establishment doing business as RESTAURANT located at BUSINESS ADDRESS (“Business Location”). The Claimant’s offices are located at MAILING ADDRESS (“Mailing Address”), which is the home address of the Sole Member.<sup>6</sup>

2. On June 12, 2008, the Tax Commission issued a probationary sales tax permit (#####) with an expiration date of December 31, 2008.<sup>7</sup>

3. WHOLESALER is a national wholesale supplier of food products with offices in the State of Oklahoma located in CITY A and CITY B. WHOLESALER was the Claimant’s vendor of all food purchases in this matter.<sup>8</sup>

4. The WHOLESALER employees who made sales to the Claimant<sup>9</sup> in this matter were DISTRICT MANAGER, District Sales Manager; TERRITORY MANAGER 1, Territory Manager; and TERRITORY MANAGER 2, Territory Manager.

5. Initially, WHOLESALER refused to allow the Claimant to make its purchases as sales for resale, charging the Claimant sales tax.<sup>10</sup>

6. The Division received one (1) claim for the refund of sales tax paid to WHOLESALER dated September 23, 2008, covering July 2008 through August 2008 in the amount of \$337.29.<sup>11</sup>

7. On February 3, 2009, the Division approved the claim for July 2008 through August 2008 in the amount of \$335.65.<sup>12</sup>

8. The Division received three (3) claims for the refund of sales tax from the Claimant as follows, to-wit:

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<sup>6</sup> Testimony of MEMBER. The Administrative Law Judge is taking judicial notice of the Oklahoma Secretary of State’s website at <https://www.sos.ok.gov/corp/corpInformation> to complete the factual details and background of this matter. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999).

<sup>7</sup> Claimant’s Exhibit 1. Testimony of MEMBER. After the probationary period ended, the expiration date of the Claimant’s sales tax permit is June 12, 2011.

<sup>8</sup> Testimony of MEMBER. *See* Notes 13-15, *infra*.

<sup>9</sup> Claimant’s Exhibit 9. Testimony of MEMBER.

<sup>10</sup> Testimony of MEMBER. *See* Notes 13-15, *infra*.

<sup>11</sup> Claimant’s Exhibit 8.

<sup>12</sup> *Id.* The refund was issued on February 11, 2009. There is no explanation in the record why the claim is \$1.64 less than the claim as filed.

Claim	Dated	Period	Purchase Amount	Sale Tax Paid
#1 <sup>13</sup>	03/18/09	09/03/08-03/11/09	21,247.97	1,980.54
#2 <sup>14</sup>	05/27/09	03/18/09-05/27/09	5,990.30	510.17
#3 <sup>15</sup>	07/23/09	06/02/09-07/01/09	3,066.21	260.46
		Totals	\$30,304.48	\$2,751.17

9. On November 5, 2009, the Division denied all three (3) claims for refund (“Claims”) by letters mailed to the Claimant,<sup>16</sup> one of which states in pertinent part as follows, to-wit:

We have reviewed your refund request received ... for the periods of ... in the amount of ... for Sales tax paid to WHOLESALER. The request is for Sales tax assessed on invoices sold to TERRITORY MANAGER 1, DISTRICT MANAGER, and TERRITORY MANAGER 2. According to our records, TERRITORY MANAGER 1, DISTRICT MANAGER, and TERRITORY MANAGER 2 do not have a valid resale permit. The exemption permit indicated in the refund claim is in the name of LLC....

10. On December 9, 2009, the Division received a timely filed protest to the denial of the Claims.<sup>17</sup>

11. Before WHOLESALER accepts a new client, the customer must submit an application, which must go through an approval process. Once the application is approved, WHOLESALER assigns a “Customer Number,” which enables the customer to purchase food products exempt from sales tax as “sales for resale.”<sup>18</sup>

<sup>13</sup> Claimant’s Exhibit 2. *See* Division’s Exhibit A.

<sup>14</sup> Claimant’s Exhibit 3. *See* Division’s Exhibit B.

<sup>15</sup> Claimant’s Exhibit 4. *See* Division’s Exhibit C.

<sup>16</sup> Claimant’s Exhibits 5-7. *See* Division’s Exhibits D-F.

<sup>17</sup> Division’s Exhibit G.

<sup>18</sup> Testimony of SALESMAN. *See* OKLA. STAT. ANN. tit. 68, § 1352(23) (West 2008):

“Sale for resale” means:

a. a sale of tangible personal property to any purchaser who is purchasing tangible personal property for the purpose of reselling it within the geographical limits of the United States of America or its territories or possessions, in the normal course of business either in the form or condition in which it is purchased or as an attachment to or integral part of other tangible personal property,

12. At the time the purchases (Claims) were made, WHOLESALER was aware that the Claimant was the holder of a sales tax permit. The Claimant had filed the required application, but the application process had not been completed. In order for the Claimant to purchase food products for its business before the application process was completed, WHOLESALER required the Claimant to purchase food products paying in cash (“COD”) or certified funds and to pay sales tax. The purchases were invoiced to the salesman, who was responsible for collecting the total amount of the invoice in cash (or certified funds) before the Claimant could accept delivery. It was also the responsibility of the salesman to deposit the amount collected into WHOLESALER account.<sup>19</sup>

13. All purchase invoices covered by the Claims contain the following basic information,<sup>20</sup> in pertinent part, to-wit:

SOLD TO	SALESMAN, SALES ADDRESS CITY B, OK XXXXX	TAX# ALL TAX  (XXX) XXX-XXXX
CUST NO. ##### <sup>21</sup>	SALESMAN xxx	CUST P.O. NO. RESTAURANT
TERMS	COD-CHECK *DRIVER WILL COLLECT*	***COD***COD***COD***

On each invoice where TERRITORY MANAGER 1 is the salesman, the sales tax rate charged is for CITY B ( $4.5 + 3.0 + 1.017 = 8.517$ ).<sup>22</sup>

14. Once the Claimant’s application was approved, WHOLESALER assigned the Claimant a “Customer Number,” which allowed it to make its purchases exempt from sales tax as sales for resale and to pay by business check.<sup>23</sup>

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<sup>19</sup> Testimony of TERRITORY MANAGER 1. TERRITORY MANAGER 1 could make deposits only to the WHOLESALER account.

<sup>20</sup> See Notes 13-15, *supra*. The majority of the invoices have TERRITORY MANAGER 1’S name and office information, but a few invoices contain the names of the other two (2) WHOLESALER employees/salesman, DISTRICT MANAGER and TERRITORY MANAGER, along with their office information.

<sup>21</sup> This is the number used by TERRITORY MANAGER 1 as a salesman for WHOLESALER.

<sup>22</sup> Testimony of TERRITORY MANAGER 1. Because of the purchase requirements imposed by WHOLESALER, even though the Claimant was the purchaser, the salesman was invoiced, which is why the sales tax rate for CITY B was charged, instead of the CITY C sales tax rate. On the invoice(s) where DISTRICT MANAGER was the salesman, the sales tax rate is for TOWN ( $4.5 + 2.0 + 2.0 = 8.5$ ) and where TERRITORY MANAGER is the salesman, the sales tax rate is CITY A ( $4.5 + 3.875 = 8.375$ ). See the last two (2) pages of Division’s Exhibit C.

<sup>23</sup> *Id.* Testimony of MEMBER.

**CONCLUSIONS OF LAW**

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.<sup>24</sup>

2. Section 227 of Title 68<sup>25</sup> provides in pertinent parts as follows, to-wit:

(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.

(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. The Tax Commission may accept an amended sales tax, withholding tax or other report or return as a verified claim for refund if the amended report or return establishes a liability less than the original report or return previously filed.

3. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code (“Sales Tax Code”).<sup>26</sup> The Sales Tax Code levies “upon all sales,<sup>27</sup> not otherwise exempted . . . an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds<sup>28</sup> of each sale of . . . tangible personal property. . . .”<sup>29</sup> Oklahoma Statutes authorize incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.<sup>30</sup>

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<sup>24</sup> OKLA. STAT. ANN. tit. 68, § 221(D) (West Supp. 2010).

<sup>25</sup> OKLA. STAT. ANN. tit. 68, § 227 (West 2001).

<sup>26</sup> OKLA. STAT. ANN. tit. 68, § 1350 et seq. (West 2008).

<sup>27</sup> OKLA. STAT. ANN. tit. 68, § 1352(15)(a) (West 2008) and (as amended) OKLA. STAT. ANN. tit. 68, § 1352(21)(a) (West 2008):

“Sale” means the transfer of either title or possession of tangible personal property for a valuable consideration regardless of the manner, method, instrumentality, or device by which the transfer is accomplished in this state, or other transactions as provided by this paragraph, including but not limited to:

a. the exchange, barter, lease, or rental of tangible personal property resulting in the transfer of the title to or possession of the property,

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<sup>28</sup> OKLA. STAT. ANN. tit. 68, § 1352(7) (West 2008) and (as amended) OKLA. STAT. ANN. tit. 68, § 1352(11) (West 2008).

<sup>29</sup> OKLA. STAT. ANN. tit. 68, § 1354(A)(1) (West 2008).

<sup>30</sup> OKLA. STAT. ANN. tit. 68, § 1370 et seq. (West 2008) and OKLA. STAT. ANN. tit. 68, § 2701 (West Supp. 2010).

4. The purchaser must provide the vendor with the purchaser's sales tax permit number, the direct payment permit number or a copy of the direct payment permit if the sale is made within Oklahoma. In addition to furnishing the sales tax permit number to the vendor, the purchaser must certify in writing to the vendor that the purchaser is engaged in the business of reselling the articles purchased. Failure to so certify, or to falsely certify with the knowledge that the items purchased are not for resale, shall be sufficient grounds upon which the Tax Commission may cause the purchaser's sales tax permit to be canceled. Certification may be made on the bill, invoice or sales slip retained by the vendor or by furnishing a certification letter to the seller which contains the following:

1. The name and address of the purchaser;
2. The sales tax permit number of the permit issued to the purchaser;
3. A statement that the purchaser is engaged in the business of reselling the articles purchased, if applicable;
4. A statement that the articles purchased are purchased for resale, if applicable; and
5. The signature of the purchaser or a person authorized to legally bind the purchaser.

5. A permit is not assignable and shall be valid only for the person in whose name it is issued and for the transaction of business at the place designated therein.<sup>31</sup>

6. Estoppel generally does not apply against the state acting in its sovereign capacity because of unauthorized acts of its officers or because of mistakes or error of its employees.<sup>32</sup>

7. Application of estoppel is not allowed against state, political subdivisions, or agencies, unless the facts or circumstances implicate the imposition of estoppel would further some prevailing principal of public policy or interest.<sup>33</sup> Where there is no power to act, a public official cannot bind a government entity even if he or she mistakenly or falsely asserts such authority.<sup>34</sup>

8. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.<sup>35</sup>

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<sup>31</sup> OKLA. STAT. ANN. tit. 68, § 1365(F) (West 2008).

<sup>32</sup> *State ex rel. Cartwright v. Dunbar*, 1980 OK 15, 618 P.2d 900.

<sup>33</sup> *Tice v. Pennington*, 2001 OK CIV APP 95, 30 P.3d 1164.

<sup>34</sup> *Hiland Dairy Foods Co., LLC v. Oklahoma Tax Com'n*, 2006 OK CIV APP 68, 136 P.3d 1072.

<sup>35</sup> OKLA. ADMIN. CODE § 710:1-5-47:

In all administrative proceedings, unless otherwise provided by law, the burden of proof shall be upon the protestant to show in what respect the action or proposed action of the Tax Commission is incorrect. If, upon hearing, the protestant fails to prove a prima facie case, the Administrative Law Judge may recommend that the Commission deny the protest solely upon the grounds of failure to prove sufficient facts which would entitle the protestant to the

**DISCUSSION**

The Claimant's contention is that WHOLESALER should not have required the payment of sales tax for the food purchases comprising the Claims because it was the holder of a sale for resale permit when the purchases were made and that it is due a refund of sales tax (\$2,751.17). In support of its contention, the Claimant provided a copy of its probationary sales tax permit effective June 12, 2008,<sup>36</sup> copies of the Claims, including copies of the invoices,<sup>37</sup> the testimony of the Sole Member, and TERRITORY MANAGER 1, the salesman who sold the majority of the food products to the Claimant involved in this matter.

The Division's response is that the invoices documenting the sales sought to be exempted from sales tax do not show sales to a valid sale for resale sales tax permit holder. That the individuals named as purchasers on the invoices do not have valid resale permits issued by the Tax Commission, and the invoices indicate sales at locations other than the Claimant's Business Location and/or Mailing Address and any effort on Claimant's part to treat the individuals named on the invoices as agents for the purpose of making the purchases for it constitute an invalid effort by the Claimant to transfer the permit.

Just from examining the invoices, it appears that the Division's position could be correct, but after hearing testimony from the Sole Member and TERRITORY MANAGER 1, there are numerous facts which could not be determined from the face of the invoices. There is undisputed testimony that WHOLESALER was aware that the Claimant was the holder of a sale for resale permit, but as part of WHOLESALER'S internal process for accepting new customers, the Claimant had to make application to be accepted as a customer. Once the application was approved the Claimant would be assigned a "Customer Number," by WHOLESALER, which would enable the Claimant to make purchases exempt from sales tax as sales for resale and to pay for its purchases by business check, instead of cash or by certified funds. While the application was pending, the Claimant was open for business and had to purchase food products in order to operate its food service establishment. TERRITORY MANAGER 1 testified that the only way WHOLESALER would permit the Claimant to make purchases at that time was to pay in cash or certified funds and pay sales tax on its purchases based upon the address of the salesman, who made the sale to the Claimant. It was the salesman's responsibility to collect the purchase price, including sales tax, before the Claimant could accept delivery from WHOLESALER. Upon collecting the monies, it was also the responsibility of the salesman to deposit the funds in WHOLESALER'S account. The salesman's access to the account was limited to "deposits only." The Claimant was the purchaser, not the salesman listed on the

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requested relief.  
OKLA. ADMIN. CODE § 710:1-5-77(b), provides in pertinent part:

. . . "preponderance of the evidence" means the evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which as a whole shows that the fact sought to be proved is more probable than not.

<sup>36</sup> See Note 7, *supra*.

<sup>37</sup> See 13-15, *supra*.

invoices, and the Claimant was not attempting to transfer its sales tax permit to the salesman on the invoice. This method of making purchases from WHOLESALER was only an interim measure imposed upon the Claimant until its application was approved and it was assigned a "Customer Number." Once the application process was completed, WHOLESALER assigned the Claimant a "Customer Number," which enabled it to make purchases exempt from sales tax as sale for resale and pay by business check.

### **CONCLUSION**

The Claimant has met its burden of proof that the Division's denial of its Claims (\$2,751.17) was incorrect and in what respects.

### **DISPOSITION**

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the protest to the Division's denial of the Claims (\$2,751.17) 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.