JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2010-10-14-05 / NON-PRECEDENTIAL**
ID: **CR-09-006-K**
DATE: **OCTOBER 14, 2010**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant, COMPANY is represented by ANALYST, Sr. Tax Analyst, PARENT COMPANY. 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 August 1, 2008, Claimant filed an *Application for Credit or Refund of State and Local Sales or Use Tax* (marked received August 11, 2008) for sales taxes paid on gas utilities used in manufacturing at its business location in CITY, Oklahoma during the period inclusive of the months of June, 2005 through July, 2008. By letter dated June 1, 2009, the Division denied the claim for refund in total. Claimant timely protested the refund denial by letter dated June 19, 2009.

On July 2, 2009, Claimant's protest and the Division's file were referred 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 protest was docketed as Case No. CR-09-006-K and assigned to ALJ, Administrative Law Judge.[3]

A hearing was scheduled for August 25, 2009, by *Notice of Hearing* issued July 8, 2009.[4] A *Joint Motion to Stay Hearing* was filed August 14, 2009, which was granted by *Order* issued August 25, 2009. The parties were directed to file a status report on or before September 24, 2009. Several ensuing *Status Reports* were filed indicating that the Division was reviewing documentation submitted by Claimant in support of the refund claim. On February 19, 2010, a joint *Request to Submit Case by Brief and Waive Hearing* was filed which was granted by *Order* issued September 22, 2010. The parties were directed to file their respective briefs and corresponding exhibits on or before April 23, 2010, at which time the record would be closed and the protest to the refund denial would be submitted for decision.

Claimant's position letter dated April 16, 2010 was filed April 19, 2010. Attached to the letter were Exhibits 1 through 6. The Division's Memorandum Brief was filed April 23, 2010.

[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) and *OAC*, 710:1-5-24.

Attached to the Division's brief were Exhibits A through I. On April 27, 2010, the record was closed and the protest to the refund denial was submitted for decision.[5]

FINDINGS OF FACT

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

1. Claimant manufactures heat resistant ceramic fiber products at its manufacturing site located in CITY, Oklahoma. http://www.WEBSITE.com.

2. At all times relevant, Claimant held Manufacturer Sales Tax/Exemption Permit ("MSEP") number ### issued by the Oklahoma Tax Commission for its manufacturing site. Exhibits 1 and A.

3. Claimant purchased natural gas for use in its manufacturing operations during the period inclusive of the months of June, 2005 through July, 2008 from GAS COMPANY who charged and collected sales taxes from Claimant on said purchases and remitted the same to the Oklahoma Tax Commission. Exhibits 2, 4 and 6; and B through F.

4. GAS COMPANY'S invoices show the gas was delivered to Claimant at its manufacturing site and billed to PARENT COMPANY. Exhibits 2 and B. PARENT COMPANY formerly known as FORMER NAME was formed to provide administrative management services, including accounts payable to an affiliated group of operating companies, inclusive of Claimant. Exhibits 4 and G.

5. Although GAS COMPANY billed PARENT COMPANY for the gas delivered to Claimant's manufacturing site, Claimant remitted payment for the gas by wire transfers from its account. Exhibits 4 and; C through F.

6. During the period at issue, Claimant did not provide a copy of its MSEP to GAS COMPANY. Exhibits 2 and B.

7. On August 1, 2008, Claimant filed an *Application for Credit or Refund of State and Local Sales or Use Tax* (marked received August 11, 2008) for sales taxes paid on the natural gas used in manufacturing at its manufacturing site in CITY, Oklahoma during the period inclusive of the months of June, 2005 through July, 2008. Exhibits 2 and B.

8. By letter dated June 1, 2009, the Division denied the claim for refund in total. Exhibits 3 and H.

9. Claimant timely protested the refund denial by letter dated June 19, 2009. Exhibits 4 and I.

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

10. The amount in controversy is $26,449.06. Exhibits 2 and B.

ISSUE AND CONTENTIONS

The issue presented for decision whether the denial of the refund claim is correct because Claimant did not provide GAS COMPANY with a copy of its MSEP at the time of sale of the natural gas?

Claimant contend that the Division erred in denying the claim for refund of sales taxes paid on the natural gas used and consumed in manufacturing since they have provided proof that payment of the utilities was made by them. Claimant's Position Letter.

The Division contends that "Claimant is not entitled to a refund of sales tax paid on natural gas that was billed to its parent company and in the name of its parent company because proof of the sales tax exemption was not provided at the time of the purchases." *Division's Memorandum Brief*, Proposition, p. 3.

CONCLUSIONS OF LAW

1. Jurisdiction of the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S. 2001, § 227(d) and (e).[6]

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Code").[7] 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).[8] *See OAC*, 710:65-7-9.[9] "The phrase "tangible

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[6] 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.

[7] 68 O.S. 2001, § 1350 et seq., as amended.

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

[9] This rule provides:

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).[10] *See OAC*, 710:65-13-150(b)(2)(A)(ii).[11]

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, 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

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> 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.

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

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

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. 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).

8. Rules promulgated pursuant to the Administrative Procedures Act[12], 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).

9. 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."

10. Section 1359.2(A) provides: "[i]n order to qualify for the exemption authorized in [§ 1359(1)], <u>at the time of sale</u>, the person to whom the sale is made, * * * <u>shall</u> 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***

[12] 75 O.S. 1991, § 250 et seq., § 301 et seq.

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. Here, the failure of Claimant to provide GAS COMPANY with proof of eligibility for the exemption; its MSEP, at the time of the utility sales bars its refund claim.

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

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, 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.