JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2010-12-16-04 / NON-PRECEDENTIAL**
ID: **CR-09-014-H**
DATE: **DECEMBER 16, 2010**
DISPOSITION: **REMANDED TO ALJ**
TAX TYPE: **USE**
APPEAL: **NO APPEAL TAKEN**

ORDER

The above matter comes on for entry of a final order of disposition by the Oklahoma Tax Commission. Having reviewed the files and records herein, including the Findings of Fact, Conclusions of Law and Recommendations made and entered by the Administrative Law Judge on the 30th day of July, 2010, the Commission denies the application of the Account Maintenance Division for a hearing en banc and makes the following Findings of Fact and Conclusions of Law and enters the following order.

PROCEDURAL HISTORY

On September 1, 2009, the protest file[1] was received by the Office of Administrative Law Judges for further proceedings consistent with the Uniform Tax Procedure Code[2] and the Rules of Practice and Procedure Before the Office of Administrative Law Judges.[3] On September 3, 2009, a letter was mailed to the Claimant setting this matter for hearing on October 27, 2009, at 9:30 a.m., with position letters or memorandum briefs due on or before October 20, 2009. The letter also advised the Claimant that this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number CR-09-014-H. A copy of the Rules of Practice and Procedure Before the Office of Administrative Law Judges[4] was enclosed. On September 10, 2009, OTC ATTORNEY 1 filed an Entry of Appearance as Counsel of record for the Division.

On October 7, 2009, the parties filed a Joint Motion for Continuance, requesting the hearing should be moved to December 2009, on the grounds the Claimant was providing additional information and due to the numerous claims for refund and the volume of documents that must be reviewed in this matter. On October 8, 2009, an Order Granting Joint Motion for Continuance was issued setting the hearing for December 8, 2009, at 1:30 p.m., with position or memorandum briefs due on or before December 1, 2009.

---

[1] Included in the protest file is a copy of a Memorandum dated August 31, 2009, from MANAGER advising that Claim #2005-0600-3 (NAME) and Claim #2005-0600-12 (NAME) which are included in the Claimant's protest *have not been denied as of August 31, 2009*. These two (2) claims for refund will not be addressed herein.

[2] OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

[3] OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

[4] *See* Note 3, *supra.*

On November 24, 2009, the parties filed a second Motion for Continuance. The parties wanted to meet again and discuss the claims for refunds. They requested that the hearing be stricken and the matter set for the filing of a status report by December 30, 2009.

On December 2, 2009, an Order Striking Hearing and Requesting Status Report was issued with a status report due on or before December 30, 2009. On December 29, 2009, the Status Report was filed requesting that this matter be set for hearing and advising the parties would have stipulations attached to the briefs. On December 30, 2009, the parties were informed by letter that this matter had been set for hearing on February 4, 2010, at 1:30 p.m., with position letters or memorandum briefs due on or before January 28, 2010.

On January 6, 2010, ATTORNEY filed an Entry of Appearance as Counsel of record for the Claimant along with a Status Report and Request for Continuance due to a scheduling conflict. On January 11, 2010, the parties were advised by letter that the hearing in this matter had been stricken from the docket and reset for February 9, 2010, at 1:30 p.m., with position letters or memorandum briefs due on or before February 2, 2010.

On February 1, 2010, the Claimant filed its Position Letter with the Court Clerk.[5] On February 2, 2010, the parties filed Joint Stipulation of Facts with "Joint"[6] Exhibits 1 through 5 attached thereto. On February 2, 2010, the Division's Memorandum Brief was filed with the Court Clerk.

On February 9, 2010, at approximately 1:30 p.m. an open hearing[7] was held as scheduled. The Claimant called one (1) witness, CONSULTANT, Health Care Consultant,[8] CONSULTING FIRM, who testified about the filing of the claims for refund, the documentation provided to the Division, and the filing of previous claims for refund of sales and/or use tax on behalf of the Claimant for the treatment of Medicare/Medicaid patients with the Division. The Division called two (2) witnesses to testify. The Division's first witness, AUDITOR,[9] Credits and Refund Section of the Account Maintenance Division, Oklahoma Tax Commission, testified about the processing of the Claimant's use tax refunds, the Division's processing of sales and/or use tax refunds for the treatment of Medicare/Medicaid patients, and as custodian of the

[5] OKLA. ADMIN. CODE § 710:1-5-10(c)(2) (June 25, 1999).

[6] The exhibits were originally identified as Claimant's Exhibits, but at hearing Counsel changed the reference to "Joint" Exhibits. Tr. at 4.

[7] 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). Tr. at 1-2.

[8] Tr. at 7.

[9] AUDITOR has been employed by the Tax Commission for approximately four (4) years. The last three (3) years, AUDITOR has been an auditor, whose primary responsibility has been auditing hospital claims for the refund of sales and use tax for the treatment of Medicare/Medicaid patients. Tr. at 28.

Division's records. The Division's second witness, MANAGER, Revenue Unit Manager,[10] Credits and Refunds Section of the Account Maintenance Division, Oklahoma Tax Commission, testified concerning the claims for refund of use tax filed by the Claimant and the Division's policy and procedures for processing hospital claims for the refund of sales and/or use tax filed by hospitals for the treatment of Medicare/Medicaid patients. Counsel stipulated to the admission into evidence of "Joint"[11] Exhibits 1, 2, 4 through 7, which are attached to the Joint Stipulation of Facts.[12] Counsel withdrew "Joint" Exhibit 3. Claimant's Exhibits 8 and 9 were identified, offered, and admitted into evidence, with any objections noted in the record.

On February 10, 2010, a letter was mailed to Counsel to memorialize the announcement made at the hearing that the record would remain open for the Division to provide a copy of its document on the Division's forty-five (45) day policy.[13] The Division was to file the document with the Court Clerk on or before March 11, 2010, and would be marked as ALJ Exhibit 1. On February 10, 2010, the Division filed a copy of the document, titled "Stent Claims" dated August 29, 2002, which was identified and admitted into evidence at hearing as ALJ Exhibit 1. On February 11, 2010, a letter was received from ATTORNEY requesting a transcript of the hearing. On February 17, 2010, the Court Clerk mailed a letter to ATTORNEY acknowledging receipt of the request and advising ATTORNEY to submit a deposit for Eighty Dollars ($80.00) and that ATTORNEY would receive written notification upon completion of the transcript with the balance due, before the transcript would be mailed. On February 22, 2010, OTC ATTORNEY 1 filed a Withdrawal of Counsel with the Court Clerk. On February 22, 2010, the Court Clerk received the Eighty Dollar ($80.00) deposit from ATTORNEY for the transcript. On February 23, 2010, OTC ATTORNEY 2 filed an Entry of Appearance as Counsel of record for the Division.

On April 16, 2010, the Court Clerk mailed a letter to ATTORNEY advising that the transcript had been completed with a balance due of Eighty-five Dollars ($85.00). On April 23, 2010, ATTORNEY paid the Court Clerk the balance due for the preparation of the transcript. On April 26, 2010, the transcript of the hearing was mailed to Counsel with a letter advising that the parties could file proposed findings of facts and conclusions of law on or before May 26, 2010, at which time the record in this matter would be closed and this case submitted for decision.

On May 5, 2010, a letter from ATTORNEY was filed with the Court Clerk advising the Claimant intended to submit proposed findings of fact and conclusions of law. No response was received from the Division. On May 25, 2010, the Claimant's Proposed Findings of Fact were filed with the Court Clerk. The Division did not file proposed findings of fact and conclusions of

[10] MANAGER has been employed by the Tax Commission for approximately thirteen (13) years. For approximately four (4) years, MANAGER has been the Revenue Unit Manager for the Credits and Refunds Section of the Division. Tr. at 43.

[11] *See* Note 6, *supra.*

[12] Tr. at 3-4. Joint Exhibit 5 is incorrectly numbered. There is no Joint Exhibit 5-4. Tr. at 13-14.

[13] Tr. at 64-65.

law. The record in this matter was closed and this case was submitted for decision on June 3, 2010.

STIPULATION OF FACTS

On February 2, 2010, the parties filed Joint Stipulation of Facts, as follows, to-wit:

1. During October 2009 and November 2009, the Division reviewed Claimant's use tax claims for refunds. Some and parts of the claims were approved and some were denied. ([Joint] Exhibit "4").

2. The Division denied claims because lack of documentation to link the patient to the invoice. The parties agree that [Joint] Exhibits "1", "2", and "3"[14] are fair representation of all claims that are protested in the above matter and documentations that were filed to support the claims. The parties agree that the Division denied the claims in which [Joint] Exhibit "1", "2", and "3",[15] but approved some of the parts of the claims.

3. The parties agree that the Division has granted similar claims as representative in [Joint] Exhibit "5".

ADDITIONAL 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, the Division's Memorandum Brief, and the transcript of the hearing, the undersigned finds:

4. The Division received claims for the refund of use tax ("Claims") from Claimant on the purchase of drugs and medical devices or equipment used in the treatment of Medicare/Medicaid patients ("M/M Patients")[16] as follows, to-wit:

[14] Joint Exhibit 3 was withdrawn by Counsel. *See* Procedural History herein.

[15] *Id.*

[16] Joint Exhibit 4. The court file contains voluminous audit packets for each of the Claims, which were forwarded by the Division as part of the protest file on this matter. The Administrative Law Judge is taking judicial notice of the materials contained in the court file to complete the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999). None of the Claims are date-stamped to reflect when the Division received the Claims.

VENDOR	CLAIM NO.	DATE	PERIOD	AMOUNT	APPROVED 08/03/09	APPROVED 10/12/09-11/19/09	TOTAL APPROVED	DISAPPROVED	DENIAL LETTER
NAME	2005-7	01/18/06	07/04-12/05	9,867.94	8,598.87	0.00	8,598.87	1,269.07	08/18/09
NAME	2005-8	01/18/06	07/04-06/05	7,844.92	1,261.53	2,809.76	4,071.29	3,773.63	08/19/09
NAME	2005-14	01/18/06	07/04-10/05	11,420.13	5,112.59	1,031.65	6,144.24	5,275.89	08/19/09
NAME	2005-17	01/18/06	06/04-10/05	2,560.12	2,151.94	0.00	2,151.94	408.18	08/18/09
NAME	2005-18	01/18/06	07/04-12/05	62,130.30	17,444.52	6,866.90	24,311.42	37,818.88	08/18/09
NAME	2005-19	01/18/06	07/04-12/05	2,976.78	649.38	0.00	649.38	2,327.40	08/19/09
NAME	2005-25	01/18/06	06/04-12/04	2,146.52	0.00	0.00	0.00	2,146.52	08/18/09
NAME	2005-27	01/18/06	07/04-12/05	798.32	390.70	0.00	390.70	407.62	08/19/09
NAME	2005-36	01/18/06	06/04-12/05	4,753.83	0.00	0.00	0.00	4,753.83	08/18/09
NAME	2005-90	01/31/07	01/05-12/05	8,025.57	0.00	0.00	0.00	8,025.77	08/18//09
NAME	2005-111	01/18/06	01/05-12/05	1,100.77	0.00	0.00	0.00	1,100.77	08/18/09
NAME	2005-116	01/31/07	01/05-11/05	3,596.15	0.00	0.00	0.00	3,596.15	08/18/09
				117,221.35	35,609.53	10,708.31	46,317.84	70,903.51	

5. On August 6, 2009, the Claimant, through VICE PRESIDENT, of Financial Services, CLAIMANT, sent a letter to the Division by facsimile,[17] which states in pertinent part, as follows, to-wit:

> The CLAIMANT patient data provided to the OTC in claims from CONSULTING GROUP [sic] represents an accurate relationship between the unique Financial patient number and the Surgery department's (ORSOS) unique patient tracking number also known as "Case Number".
>
> Any documentation relating case number to patient number or vice versa, represents the valid patient-specific relationship that exists in our data systems.
>
> The valid patient data provided to you are sourced from data extractions performed by internal CLAIMANT decision support professionals.

[17] "Claimant's" Exhibit 9. This exhibit is more accurately described as Claimant's Exhibit 1. Tr. at 33-35.

6. The Division denied the Claims by letters in whole or part,[18] which in pertinent part states as follows, to-wit:

> After our review of the provided documentation, your request has been denied for failure to provide the appropriate documentation in accordance with OTC Rule 710:65-13-173(b), which states:
>
> 1. Name and address of the purchaser or lessee or person on whose behalf the item is being purchased or leased.
> 2. A copy of the prescription or work order; and
> 3. A copy of the document which shows that the person on whose behalf the item is being purchased or leased is a Medicare or Medicaid patient.

7. On August 28, 2009, the Division received a timely filed protest to the denial of the Claims.[19]

8. The Claimant paid use tax to the vendors as reflected by the invoices comprising the Claims.[20]

9. CONSULTANT submitted claims for the refund of sales and/or use tax on behalf of the Claimant to the Division for approximately five (5) years ("Five Year Period"), consisting of approximately twenty-five (25) claims totaling over $500,000.00, which were approved by the Division based upon the same information as the Claims.[21]

10. During the Five Year Period, CONSULTANT submitted claims on behalf of the Claimant to the Division and claims were approved by the Division based upon the following information,[22] to-wit:

---

[18] Joint Exhibit 6. *See* Note 16, *supra*, for the specific date of the Division's denial letter.

[19] Joint Exhibit 7.

[20] ATTORNEY incorrectly refers to the tax paid by the Claimant as "sales" tax. Tr. at 11-12.

[21] Tr. at 15.

[22] Joint Exhibit 5.

VENDOR Claim No. SF-2003-13

Excerpt of Claim No. SF 2003-13[23]

Claim Type	Date of Claim	Date Range of Claim	Claim Tracking No.	Vendor	Reason for Claim	Amount of Claim
Sales Tax Paid	05/20/04	05/01/01-06/30/04 01/01/02-06/30/04	SF 2003-13	VENDOR	Products for M/M Patients	$47,588.19 $46,872.31

Sales Tax Charged on Exempt M/M Purchases[24]

Index	Inv Nbr	Inv Dt	Item ID	Description	Pt Name	Inv. CSQuty	CSCst	Qty Per	Unit Cost	Units Used	Exempt Amount	State Tax	City Tax	County Tax	Total Tax
328	98504030	01/04/02	11	Balloon, Scimed	NAME	5	285.00	1	285	1	285.00	12.83	8.55	1.19	22.57

Extract of Invoice No. 98504030[25]

Invoice Date	Purchase Order No.	Item	Product No. /Product Description	Quantity	Net Unit Price	Extended Price	Tax
01/04/02	7500147842	0020	H7493027520350 Model-Maverick Monorail 20 MM 30275-2035	3	285.00	855.00	Y

Excerpt from Patient Billing System Detailed Charges[26]

Index	Pt Nbr	Pt Name	Admit	Dschg	ChgDesc	ChgCode	Qty	Insurance	Tot Chg	Total Pymt
328	950466091	NAME	01/02/02	01/03/002	Balloon, Scimed	S1883	1	Medicare	14,156.79	-9,480.27

[23] *Id.* The Exhibit contains a full copy of the "Claim for Refund of Overpaid Tax." The exhibit does not explain why the claim was less than filed, but it appears a portion of the period may have been outside the three (3) year statute of limitations.

[24] *Id.* The exhibit contains numerous patients. Only one (1) patient was selected as an example, but the excerpt accurately reflects each line item on the spreadsheet.

[25] *Id.* The exhibit contains a full and complete copy of Invoice No. 98504030. It appears this product came in a five (5) pack.

[26] *Id.* AUDITOR testified that prior to the last two (2) years her supervisor, MANAGER had instructed her that the detailed patient charge document (which is a spreadsheet) was acceptable as proof that an M/M Patient received the item. Tr. at 41.

Division's Approval of Claim (Excerpt of Pertinent Information)[27]

Tax Type	Period(s)	Reason	Amount
Use (STU)	01/02-06/04	Claimant paid tax to [vendor] on the purchase of implants used to treat M/M Patients. Refund from [vendor's] account.	46,872.31

11. The parties submitted as examples two (2) of the Claims, which were denied by the Division based upon the same information previously[28] provided by the Claimant as follows, to-wit:

VENDOR Claim No. 2005-19[29]

Excerpt from Division's Denial of Claim No. 2005-19[30]

Index	Inv Nbr	Inv Dt	Pt Last	Pt First	Comment
1	64300803	07/07/04	NAME	NAME	Patient to Invoice Link not established.
1	64300803	07/07/04	NAME	NAME	Patient to Invoice Link not established.

Products Used for M/M Patients[31]

Index	Inv Nbr	Inv Dt	Pt Last	Pt First	Item Desc	Unit Cost	Qty	Exempt Amt	St Tax	City Tax	Cnty Tax	Total Tax
1	64300803	07/07/04	NAME	NAME	405254	60.00	1	60.00	2.70	1.80	0.61	5.11
1	64300803	07/07/04	NAME	NAME	405254	60.00	1	60.00	2.70	1.80	0.61	5.11

[27] *Id.*

[28] *See* Joint Exhibit 1.

[29] *Id.* The exhibit contains numerous patients. Only one (1) patient was selected as an example, but the excerpt accurately reflects each line item on the spreadsheet. AUDITOR testified that the Claims were denied because there was no patient's name on a purchase order or patient log. Tr. at 29-30.

[30] *Id.*

[31] *Id.*

Extract of Invoice No. 64300803[32]

Invoice Date	Purchase Order No.	Product No./ Product Description	Quantity	Net Unit Price	Extended Price	Tax
07/07/04	7500321875	405254 Peel-Awy Intro 9F 23 CM	10	60.00	60.00	26.75

Excerpt from Patient Accounting-Detailed Charges
(M/M Patients)[33]

Index	Pt Nbr	Pt Last	Pt First	DOS	Charge Desc	Qty	Ins Name
1	970506472	NAME	NAME	07/01/04	405254	1	Medicare HPA
1	970506472	NAME	NAME	07/01/04	405254	1	Medicare HPA

VENDOR Claim No. 2005-08[34]

Excerpt from Division's Denial of Claim No. 2005-08[35]

Index	Inv Nbr	Inv Dt	Pt Last	Pt First	Comment
11	102586601	08/10/04	NAME	NAME	Patient to Invoice Link not established.

[32] *Id.* The exhibit contains a full and complete copy of Invoice No. 64300803.

[33] *Id.* The exhibit contains numerous patients. Only one (1) patient was selected as an example, but the excerpt accurately reflects each line item on the spreadsheet. AUDITOR testified that she could not accept a detailed patient charge document (which is a spreadsheet) as proof that an M/M Patient received the item. AUDITOR further testified that it was sometime in the past two (2) years her supervisor, MANAGER, instructed her that the detailed patient charge document was no longer acceptable. Tr. at 40.

[34] Joint Exhibit 2. The exhibit contains numerous patients. Only one (1) patient was selected as an example, but the excerpt accurately reflects each line item on the spreadsheet.

[35] *Id.*

Products Used for M/M Patients[36]

Index	Inv Nbr	Inv Dt	Pt Last	Pt First	Item Desc	Unit Cost	Qty	Exempt Amt	St Tax	City Tax	Cnty Tax	Total Tax
11	102586601	08/10/04	NAME	NAME	100998640	275.00	1	275.00	12.38	8.25	2.80	23.43

Extract of Invoice No. 102586601[37]

Invoice Date	Purchase Order No.	Product No./ Product Description	Quantity	Net Unit Price	Extended Price	Tax
08/10/04		1009888-40 AGILTRAC .035 Peripheral Dilation Catheter	2	275.00	550.00	46.84

Excerpt from Patient Accounting-Detailed Charges
(M/M Patients)[38]

Index	Pt Nbr	Pt Last	Pt First	DOS	Charge Desc	Qty	Ins Name		
11	970568459	NAME	NAME	08/10/04	100998640	1	Medicare HPA	$11,167.86	($4,406.58)

12. On or about February or March, 2009, the Division met with CONSULTANT and advised him that the documentation previously submitted for the refund of sales and/or use tax was no longer acceptable.[39]

13. The Claimant, through CONSULTANT, could have provided screen prints from the Claimant showing that patients were M/M patients, but did not because the Division had accepted the Claims as filed for the Five Year Period previous to the filing of the Claims.[40]

14. On or about August 29, 2002, the Division adopted a written forty-five (45) day policy regarding Stent Claims, through an informal internal document,[41] which states as follows, to-wit:

---

[36] *Id.*

[37] *Id.* The exhibit contains a full and complete copy of Invoice No. 102586601.

[38] *Id.*

[39] Tr. at 15. The Division was represented by MANAGER and SUPERVISOR, Supervisor, Credits and Refunds Section of the Account Maintenance Division.

[40] Tr. at 24-25.

Some concerns have arisen from claims from hospitals for stents that are filed without a purchase order linking the patient to the stent purchase. OTC has no definite link that the stent purchase on the invoice was actually used on the patient. The documentation that is provided only demonstrates that a patient may have received a stent and in some cases it only demonstrates that an angioplasty was performed. The claims have been submitted for more than one stent and sometimes the patient is listed on two different vendor claims receiving a stent from each vendor on the same procedure date. The questions that arise from reviewing these claims based on this type of documentation are as follows:

1. If the auditor filing the claim only reviews the information provided to OTC, how does the auditor determine that the patient received more than one stent?
2. How does the auditor determine the size of the stent, which vary in cost?
3. How do we avoid allowing for a later claim being filed on a different invoice if the purchase date for the stent is not within the same month that the procedure was performed? We had had claims filed for an invoice date of 6/30/99 and the procedure was not performed until 4/18/00.

The majority of the hospitals file claims with documentation that shows that the patient received a particular model of stent or a purchase order that shows that model was purchased on behave [sic] of the patient.

The hospital has to have some type of documentation that demonstrates that the patient received the number and model numbers of the stents that were claimed, and without this type of documentation the validity of the claim can not be substantiated. Also in order to maintain the pricing of the stents has not change [sic] OTC should only allow a 45-day window between purchase date and procedure date.

We have addressed these issues with the auditor that files the claims in this manner. As of 8/28/02 all stent claims from this point forward will have an invoice dated with [sic] 45 days of the procedure and the model number of the stent will need to be documented. For all outstanding claims filed prior to 8/28/02 a comprised [sic] was reached and the auditor is going to revise the claims by taking the number of stents purchased on each invoice and figure an average cost of the stents. For all patients listed receiving a stent that is a Medicare/Medicaid patient, this average cost will be used instead of the cost being selected by the auditor filing the claim.

[41] ALJ's Exhibit 1. MANAGER testified that he drafted the document and that his supervisor at the time, FORMER SUPERVISOR, directed him to offer it to the Division's Director for approval. The testimony does not specifically state that the Division's Director approved the policy, but the Division implemented the policy beginning August 28, 2002, to the present. Tr. at 49.

15. During the Five Year Period, the Division accepted claims for the refund of sales and/or use tax for the treatment of M/M patients using "summaries" because the Division had over a two (2) year backlog.[42]

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[43]

2. Section 227 of Title 68[44] 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 Oklahoma Use Tax Code imposes tax solely on tangible personal property purchased outside the State of Oklahoma and brought into the State of Oklahoma. Neither intangible personal property nor services fall within the scope of the Oklahoma Use Tax Code.[45]

4. A tax of four and one-half percent (4.5%) is imposed and shall be paid by every person "storing, using, or otherwise consuming within this state, tangible personal property purchased or brought into this state…"[46] An additional tax may be levied by a county levying a county sales tax or a municipality levying a municipal sales tax, at a rate that equals the county or municipal sales tax of such county or municipality.[47]

---

[42] Tr. at 45.

[43] OKLA. STAT. ANN. tit. 68, § 221(D) (West 2001).

[44] OKLA. STAT. ANN. tit. 68, § 227 (West 2001).

[45] OKLA. STAT. ANN. tit. 68, § 1404 (West 2008).

[46] *See* OKLA. STAT. ANN. tit. 68, § 1401 (West 2008) and OKLA. STAT. ANN. tit. 68, § 1402 (West 2008). *See also* OKLA. ADMIN. CODE § 710:65-21-2, OKLA. ADMIN. CODE § 710:65-21-3, and OKLA. ADMIN. CODE § 710:65-21-4.

[47] OKLA. STAT. ANN. tit. 68, § 1411 (West 2008). *See also* OKLA. ADMIN. CODE § 710:65-1-3.

5. The provisions of Oklahoma Use Tax Code[48] shall not apply in respect to the use of tangible personal property now specifically exempted from taxation under Oklahoma Sales Tax Code.[49]

6. Sales taxes and use taxes were meant to be complementary and supplementary, but not overlapping.[50] While the sales tax and the use tax codes are complementary and supplementary to one another, they are neither identical nor coterminous.[51]

7. Use tax is an excise tax which the State of Oklahoma is authorized to exact, in connection with sales tax, for the primary purpose of raising revenue for state purposes, and is designed to prevent consumers from escaping sales tax by going outside the state and purchasing property and bringing it into the State of Oklahoma for use or consumption.[52]

8. Effective July 1, 1992, there are hereby exempted from the tax levied by the Oklahoma Sales Tax Code,[53] sales of drugs for the treatment of human beings, medical appliances, medical devices and other medical equipment including but not limited to corrective eyeglasses, contact lenses, hearing aids, prosthetic devices, as defined in subsection C of this section, durable medical equipment, as defined in subsection D of this section, and mobility enhancing equipment, as defined in subsection E of this section, when administered or distributed by a practitioner, as defined in subsection B of this section, who is authorized by law to administer or distribute such items or when purchased or leased by or on behalf of an individual for use by such individual under a prescription or work order of a practitioner who is authorized by law to prescribe such items and when the cost of such items will be reimbursed under the Medicare or Medicaid Program.[54]

9. The term "practitioner" means a physician, osteopathic physician, surgeon, podiatrist, chiropractor, optometrist, pharmacist, psychologist, ophthalmologist, nurse practitioner, audiologist or hearing aid dealer or fitter who is licensed by the state as required by law.[55]

10. The provisions of the Oklahoma Use Tax Code[56] shall not apply to the use of tangible personal property[57] specifically exempted from taxation under the Oklahoma Sales Tax Code.[58]

---

[48] OKLA. STAT. ANN. tit. 68, § 1401 et seq. (West 2008).

[49] OKLA. STAT. ANN. tit. 68, § 1404(4) (West 2008). *See Globe Life and Acc. Ins. Co. v. Oklahoma Tax Com'n*, 1996 OK 39, 913 P.2d 1322.

[50] *Phillips. v. Oklahoma Tax Commission*, 1978 OK 34, 577 P.2d 1278.

[51] *See* Note 49, *supra*.

[52] *Southeastern, Inc. v. Oklahoma Tax Commission*, 1960 OK 97, 351 P.2d 739.

[53] OKLA. STAT. ANN. tit. 68, § 1350 et seq. (West 2008).

[54] OKLA. STAT. ANN. tit. 68, § 1357.6(A) (West 2008).

[55] OKLA. STAT. ANN. tit. 68, § 1357.6(B) (West 2008).

11. Rules promulgated pursuant to the Administrative Procedures Act[59] are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court.[60] The rules are valid and binding on the persons they affect, have the force of law, and are prima facie evidence of the proper interpretation of the matter to which they refer.[61]

12. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[62]

13. Oklahoma Tax Commission Rule OAC 710:65-13-173(D) enumerates the documentation required for a claim for refund for sales taxes paid by an institution or practitioner for medical appliances, medical devices or medical equipment furnished to a Medicare or Medicaid patient as follows:

> (d) Sales tax refund claims. Under circumstances where hospitals, nursing homes, similar institutions and practitioners dispense or provide medical appliances, medical devices or medical equipment to Medicare or Medicaid patients, a refund may be claimed by the institution or practitioner for the sales taxes previously paid

---

[56] OKLA. STAT. ANN. tit. 68, § 1401 et seq. (West 2008).

[57] OKLA. STAT. ANN. tit. 68, § 1352(24) (West 2008), in pertinent part states:

> "Tangible personal property" means personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses.

See also OKLA. ADMIN. CODE § 710:65-1-2 (July 1, 2008).

[58] *See* OKLA. STAT. ANN. tit. 68, § 1350 et seq. (West 2008) for the Oklahoma Sales Tax Code. OKLA. STAT. ANN. tit. 68, § 1404(4) (West 2008).

[59] OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2002).

[60] OKLA. STAT. ANN. tit. 75, § 306(C) (West 2002).

[61] OKLA. STAT. ANN. tit. 75, § 308.2(C) (West 2002).

[62] 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 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.

by the institution or practitioner on such items. The documentation set out in (1) through (3) of this subsection must be obtained as part of the claimant's records to substantiate the exemption claimed:

(1) Name and address of the purchaser or lessee or person on whose behalf the item is being purchased or leased;
(2) A copy of the prescription or work order; and
(3) A copy of the document which shows that the person on whose behalf the item is being purchased or leased is a Medicare or Medicaid patient.

DISCUSSION

The Claimant's position is it filed the Claims with the Division for the refund of Use Tax for the treatment of M/M patients, which are exempt pursuant to Section 1357.6(A) of Title 68 ("Exemption Statute")[63] and Tax Commission Rule 710:65-13-173 ("Rule"),[64] and the documentation provided to the Division is consistent with both the Exemption Statute and the Rule. It is also the Claimant's position that for the Five Year Period approximately twenty-five (25) claims totaling over $500,000.00 were approved by the Division based upon the same information as comprise the Claims.[65]

The Division responds that the documentation presented by the Claimant to support the Claims was not sufficient, "…there was nothing to link the invoices to patients of Medicare and Medicaid, and that's why the Division denied the claims."[66] The Division admits that in the past claims have been granted based upon "similar" documentation and that "at [the] time, the Division was approving and granting those [claims] in the interest of expediting the process[ing] of the claims for refund."[67] The Division also stipulated by way of Joint Exhibits that claims which were approved during the Five Year Period contained the same information comprising the Claims, which have been denied in whole or in part.[68]

---

[63] *See* Note 54, *supra*.

[64] OKLA. ADMIN. CODE § 710:65-13-173(b) ((June25, 2009):

(b) **Documentation required when reimbursement is made to vendor.** The documentation set out in (1) through (3) of this subsection must be obtained by the vendor and maintained as part of the vendor's records to substantiate the exemption claimed:

(1) Name and address of the purchaser or lessee or person on whose behalf the item is being purchased or leased;
(2) A copy of the prescription or work order; and
(3) A copy of the document which shows that the person on whose behalf the item is being purchased or leased is a Medicare or Medicaid patient.

[65] Tr. at 5-6.

[66] Tr. at 6, 49-50. MANAGER testified that at the time there was approximately a two (2) year backlog.

[67] *Id.*

[68] *See* Notes 21, 23, and 29, *supra*.

However, the Division asserts that during the Five Year Period it was not making sure the proper documentation was being filed to support the exemption and the claims should not have been granted.[69] The Division states "…the error of the Division's employees assigned to process the claims for refund by not following the documentation requirement of OAC 710:65-13-173 is unauthorized and should not be considered as a longstanding policy of the Oklahoma Tax Commission."[70] The Division should be allowed to correct its past practices by selecting samples from each claim for audit purposes to verify that the "Summaries" or "Excerpts" from the Claimant's records are accurate, by requesting additional information such as screen prints from hospital patient accounting records, purchase orders, doctor's written orders, and/or a patient's chart or surgical log.[71]

The Division accepted and approved claims for the refund of sales and/or use tax during the Five Year Period using the same information submitted on the Claims. The Division has denied the Claims because "the Patient to Invoice link not established."[72] Oklahoma Courts have imposed some restrictions on the ability of a state agency to change a longstanding construction of a statute.[73] Those restrictions are strongest where parties have acted in detrimental reliance on an agency's construction of a statute. The Division has taken the position that screen prints would be acceptable documentation to provide the patient–invoice link. The Claimant has admitted that it can provide such documentation. In this case, there is no detrimental reliance on the Division's practice of previously approving claims for refund with less documentation than is now being sought.[74]

The Commission concludes that the documentation submitted with the claims for refund at issue is not sufficient to satisfy the requirements of Oklahoma Tax Commission rule OAC 710:65-13-173. The Commission further concludes that in the interests of fairness and equity the Claimant should be afforded further opportunity in this proceeding to submit screen prints to establish the patient-invoice link for the claims at issue.

ORDER

[69] Tr. at 50. MANAGER testified that it is the Division's position today "…to now try to comply with the requirements that are set out in 710:65-13-173, the rule."

[70] Division's Brief at 3. *See Hiland Dairy Foods Company, LLC v. Oklahoma Tax Com'n*, 2006 OK CIV APP 68, P.3d 1072. (Citations omitted). *Hiland* is cited for the proposition that where there is no power to act, a public official cannot bind a government entity ever if he or she mistakenly or falsely asserts such authority.

[71] Tr. at 51.

[72] Joint Exhibit 1-2.

[73] *See Oral Roberts University v. Oklahoma Tax Com'n*, 1985 OK 97, 714 P.2d 1013. *See also Branch Trucking v. State, ex rel. Oklahoma Tax Com'n*, 1990 OK 41, 801 P.2d 686.

[74] Tr. at 24

This matter is remanded to the Administrative Law Judge for further proceedings not inconsistent with the Discussion herein. The Administrative Law Judge is directed to provide the Protestant a reasonable opportunity to furnish to the Division screen prints for the claims for refund at issue herein.

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.

NOTE: The distinction between a Commission Order designated as "Precedential" or "Non-Precedential" has been blurred because all OTC Orders resulting from cases heard by the Office of Administrative Law Judges are now published, not just "Precedential" Orders. *See* OKLA. STAT. ANN. tit.68, § 221(G) (West Supp. 2009) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002). *See also* OTC Orders 2009-06-23-02 and 2009-06-23-03 (June 23, 2009), which also conclude the language of the Statute is "clear and unambiguous."