

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2011-01-06-02 / NON-PRECEDENTIAL
ID: P-09-196-K
DATE: JANUARY 6, 2011
DISPOSITION: DENIED
TAX TYPE: SALES / MOTOR FUEL
APPEAL: PENDING, S.Ct. Case No. 109153

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestant, COMPANY is represented by ATTORNEY, Attorney at Law, FIRM. The Compliance Division of the Oklahoma Tax Commission ("Division") is represented by OTC ATTORNEY 1 and OTC ATTORNEY 2, Assistant General Counsels, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

During the audit period, Protestant applied for and received refunds of motor fuel taxes paid on non-dyed diesel fuel. Upon audit of Protestant's refund applications, the Division by letter dated June 17, 2009, proposed the assessment of sales tax against Protestant on the "sales of diesel fuel for off-highway use." Protestant timely protested the proposed assessment.

On November 25, 2009, the protest was referred to the Office of the Administrative Law Judges for further proceedings consistent with the Uniform Tax Procedure Code¹ and the Rules of Practice and Procedure before the Office of Administrative Law Judges². The protest was docketed as Case No. P-09-196-K and assigned to ALJ, Administrative Law Judge.³

A pre-hearing conference was scheduled for January 12, 2010, by *Prehearing Conference Notice* issued December 16, 2009.⁴ The conference was rescheduled for February 2, 2010 upon Protestant's request. On February 1, 2010, a *Status Report in Lieu of Prehearing Conference* was filed wherein it was advised that an informal conference had been scheduled between the parties.

On or about March 16, 2010, Protestant filed a *Supplemental Protest* to the proposed assessment. By *Status Report* filed April 2, 2010, the Division requested additional time to review the *Supplemental Protest*.

At the request of the parties, a status conference was scheduled for June 15, 2010. Due to the employment resignation of Division's previous counsel, the status conference was continued

¹ 68 O.S. 2001, § 201 et seq., as amended.

² Rules 710:1-5-20 through 710:1-5-47 of the *Oklahoma Administrative Code* ("OAC").

³ OAC, 710:1-5-22(b).

⁴ OAC, 710:1-5-28.

to July 13, 2010. Upon the filing of a *Status Report and Request for Hearing*, the conference was cancelled and a hearing was scheduled for September 21, 2010. The hearing was stricken and rescheduled for October 14, 2010, by *Order Granting Request for Continuance* issued September 3, 2010.

Protestant's Statement of Position was filed October 6, 2010. The *Division's Brief* and attachments A through C, D-1 and D-2, E-1 and E-2, and F were filed October 7, 2010. *Protestant's Supplemental Statement of Position* was filed October 8, 2010. *Joint Stipulations* and Exhibits A through C, D-1 and D-2, and E-1 and E-2 were filed October 12, 2010.

On October 12, 2010, *Protestant's Motion in Limine* was filed. The *Division's Response to Protestant's Motion in Limine* was filed October 13, 2010. Due to the Division's response, the motion was mooted.

An open hearing⁵ was held on October 14, 2010. As preliminary matters, the *Joint Stipulations* and Exhibits A through C, D-1 and D-2, and E-1 and E-2 were marked as ALJ's Exhibit 1 and admitted into evidence; and the undersigned took official notice⁶ of Exhibit 2 to *Protestant's Motion in Limine* and Oklahoma Tax Commission Form 130 (Revised May 2008), *Oklahoma Tax Commission Application for Refund of Motor Fuel Tax Gasoline and Undyed Diesel Only*, marked as Protestant's Exhibit 2. Protestant called two witnesses: CEO, Protestant's Chief Executive Officer who testified with respect to Protestant's business operations and the use of the diesel fuel; and ACCOUNTANT, Protestant's Accountant, who testified with respect to the preparation of the motor fuel tax refund applications. The Division called two witness; AUDITOR, auditor 1 who testified in regard to conducting the audit and issuing the assessment; and AUDITOR 2, auditor who testified in regarding to the telephone calls she placed with Protestant. On October 18, 2010, the record was closed and the protest was submitted for decision.⁷

FINDINGS OF FACT

Upon review of the file and records, including the recording of the hearing, the evidence and the pleadings, the undersigned finds:

A. The parties stipulate to the following:

1. Protestant is an Oklahoma corporation incorporated on August 22, 1980. It operates a commercial/construction waste disposal business in northeastern Oklahoma under sales tax permit number ##### and federal identification number #####. The major portion of Protestant's business consists of weekly commercial waste disposal routes in the Tulsa metropolitan

⁵ Confidentiality was waived. See, 68 O.S. 2001, § 205.

⁶ OAC, 710:1-5-36.

⁷ OAC, 710:1-5-39(a).

area. Protestant also performs “roll off” or waste removal activities for construction projects located in northeastern Oklahoma.

2. From 2006 through 2009, Protestant maintained a fleet of over 100 waste disposal trucks and other service trucks. All of Protestant’s trucks are diesel fueled vehicles. The commercial and construction waste disposal trucks have waste disposal equipment mounted directly on the truck. This equipment is operated by using diesel fuel. The equipment is used to lift or move large waste disposal containers and to compress or eject material after it is loaded onto the truck. Both the truck and the waste disposal equipment are operated with non red dyed diesel fuel drawn from a common reservoir or tank located on the truck.

3. Protestant paid motor fuel tax on motor fuel “used to operate trucks designed, equipped and used exclusively for garbage, refuse or solid waste disposal” and qualified under the law, for a motor fuel exemption and a refund of thirty-five percent (35%) of the tax it paid on the portion of the motor/diesel fuel that it used to operate equipment attached to its trucks parked off the highways of this state.

4. The Division contacted Protestant on at least four occasions in May, June and July, 2008, to advise it that a refunded motor fuel tax would be subject to sales taxation. (Exhibit “A”)

5. Protestant perfected its claim for motor fuel tax refunds by timely filing claims with the OTC from March 16, 2006 through February 27, 2009. (Exhibit “B”)

6. The OTC remitted to Protestant twenty diesel fuel tax refunds totaling \$79,409.09, from May 10, 2006 through March 18, 2009. (Exhibit “C”)

7. On June 17, 2009, the Division proposed to assess Protestant sales tax, interest and penalty on the motor fuel tax-exempt portion of the motor fuel Protestant purchased for off the highway use. (Exhibits “D-1” and “D-2”)

8. Protestant filed a timely protest (as well as a “supplemental protest”) protesting the proposed assessment of sales tax on August 6, 2009, and March 16, 2010, respectively. (Exhibits “E-1” and “E-2”)

9. The proposed sales tax assessment at issue is currently:

Tax:	\$126,922.61
Interest ⁸ :	54,192.34
Penalty:	<u>12,692.29</u>
Total:	\$193,807.24

⁸ Accrued through October 31, 2010.

B. Additional findings of fact:

1. Protestant's fleet of waste disposal trucks consists of two types: front-end loaders; and roll offs. Protestant's trucks have two tanks (the common fuel reservoir) that feed into one fuel line to the diesel engine which propels the truck and also powers the hydraulics that perform the function of collection, compression and ejection of waste material. The basic function of waste disposal trucks has not changed over the past thirty (30) years. The diesel fuel run in the trucks is non-dyed diesel. Motor fuel taxes of 13 cents per gallon were paid at the time of purchasing the diesel fuel which taxes are included in the price of the fuel. Protestant filed refund claims for the motor fuel taxes paid on the diesel fuel used to operate the hydraulics on the waste disposal trucks. Testimony of CEO.

2. The thirty-five percent (35%) allowance to operate trucks designed, equipped and used exclusively for garbage, refuse, or solid waste disposal is for powering the hydraulics, not for off-highway use of the fuel. The application form for claiming a refund of non-dyed diesel fuel was changed in May, 2008, by the addition of the note on page two, which provides:

In an effort to minimize administrative costs and expedite processing, the Tax Commission requests that applicants not submit a refund application until their claim exceeds \$25.00. Also please note that Diesel Non-Highway fuel is subject to sales tax when the Diesel Fuel Tax is refunded. The sales tax is due on the 20th day following the month in which the refund is issued and could exceed the amount of the diesel fuel tax refund.

Testimony of ACCOUNTANT.

3. In 1999, the Division started assessing sales taxes on that portion of the diesel fuel purchase price to which a refund of the motor fuel taxes had been issued. In this matter, sales tax was assessed on thirty-five percent (35%) of Protestant's diesel fuel purchase cost which cost was determined by multiplying the gallons of diesel fuel purchased by the price of the fuel less the 13 cents per gallon motor fuel tax. Testimony of AUDITOR 1.

ISSUE AND CONTENTIONS

The issue presented for decision is whether the Division properly assessed sales tax on the diesel fuel used to operate the hydraulics on Protestant's waste disposal trucks and to which Protestant received a refund of the motor fuel taxes paid at the time of purchasing the fuel.

Protestant contends that the diesel fuel to which it received a refund of the motor fuel tax is exempt from sales tax because the motor fuel tax was paid on the fuel at the time of purchase. In support of this contention, Protestant argues that the language of § 1355(1) is clear and unambiguous such that a refund of the motor fuel taxes does not render the taxes unpaid. Protestant further argues that the imposition of sales tax on the diesel fuel on which the motor fuel tax has been refunded renders the motor fuel tax exemption a nullity and yields an absurd result. Protestant further contends that motor fuel tax and sales tax; tax separate and distinct transaction, and are in no manner overlapping. Protestant also contends that the assessment of

sales tax on diesel fuel which is the subject of a refund of motor fuel tax reverses a longstanding position held by the Oklahoma Tax Commission that such a refund does not create a corresponding sales tax liability. In support of this contention, Protestant argues that the telephone calls in the spring of 2008 and subsequent change in the motor fuel tax refund application form signaled a change by the Oklahoma Tax Commission to subject diesel fuel on which motor fuel tax has been refunded to sales tax.

Protestant also requests a waiver of the interest and penalty assessed should it be determined that sales tax was properly assessed on the diesel fuel. In support of this request, Protestant states that it had a reasonable belief that the refund of motor fuel tax would not result in the assessment of sales tax.

The Division contends that it correctly assessed sales tax on the diesel fuel. In support of this contention, the Division argues that all tangible personal property except that specifically exempted is subject to sales tax, that motor fuel tax is paid in lieu of sales tax, and that if Protestant's position is accepted, the subject diesel fuel would escape taxation. The Division further argues that when the motor fuel tax is refunded it is no longer paid, and the diesel fuel is subject to sales tax.

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 Oklahoma Tax Commission. 68 O.S. Supp. 2002, § 221(D).

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Code").⁹ An excise tax is levied upon 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"¹⁰ is expressly made subject to sales tax. 68 O.S. 2001, § 1354(A)(1)¹¹. Incorporated cities, towns, and counties are authorized to levy taxes as the Legislature may levy for purposes of state government, including a consumer sales tax. 68 O.S. 2001, §§ 2701 et seq. and 1370 et seq., as amended.

⁹ 68 O.S. 2001, § 1350 et seq., as amended

¹⁰ Defined as "personal property which may be seen, weighed, measured, felt, or touched or which 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).

¹¹ Gasoline and other motor fuels are tangible personal property. Oklahoma Tax Commission Order No. 90-06-07-028 (Prec.). See OAC, 710:65-13-180.

3. Section 1355(1) of the Code specifically exempts from the levy of sales tax:

The sale of gasoline, motor fuel¹², methanol, “M-85” * * * compressed natural gas, liquefied natural gas, or liquefied petroleum gas on which the Motor Fuel Tax, Gasoline Excise Tax, Special Fuels Tax or the fee in lieu of Special Fuels Tax levied in Section 500.1 et seq., Section 601 et seq. or Section 701 et seq. of this title *has been, or will be paid.*

(Emphasis added).

4. The Motor Fuel Tax Code¹³ imposes a tax of thirteen cents (\$.13) per gallon on all diesel fuel¹⁴ used or consumed in Oklahoma. 68 O.S. 2001, § 500.4(A)(2). The tax is a direct tax on the retail or ultimate consumer pre-collected for the purpose of convenience and facility to the consumer. 68 O.S. 2001, § 500.4(D). The Motor Fuel Tax Code differentiates diesel fuel from dyed diesel fuel. See 68 O.S. Supp. 2006, § 500.3(18) and § 500.3(21).

5. Subject to the Tax Commission’s determination, the portion of diesel fuel “used to operate equipment attached to a motor vehicle, if the diesel fuel was placed into the fuel supply tank of a motor vehicle that has a common fuel reservoir for travel on a highway and for the operation of equipment, or” “consumed by the vehicle while the vehicle is parked off the highways of this state” is exempt from the tax imposed by § 500.4. 68 O.S. 2001, §§ 500.10(11)(a) and (b). The exemption for use pursuant to § 500.10(11) “shall be perfected by a refund claim filed by the consumer who shall provide evidence of an allocation of use satisfactory to the Oklahoma Tax Commission.” 68 O.S. Supp. 2004, § 500.14(A)(1). “The exemption for a consumer who claims a refund pursuant to [§ 500.14(A)(1)] for tax paid on fuel used to operate trucks designed, equipped and used exclusively for garbage, refuse or solid waste disposal shall be thirty-five percent (35%) of the tax paid on such fuel; provided, the taxpayer may claim an amount greater than thirty-five percent (35%) if the taxpayer supplies evidence of an allocation of use for a tax exempt purpose satisfactory to the Tax Commission of an amount

¹² Defined by the Motor Fuel Tax Code to mean “gasoline, diesel fuel and blended fuel”. 68 O.S. Supp. 2006, § 500.3(42).

¹³ 68 O.S. 2001, § 500.1 et seq., as amended.

¹⁴ “Diesel fuel” is defined to mean “any liquid, including but not limited to, biodiesel, biodiesel blend or other diesel blended fuel, that is commonly or commercially know or sold as a fuel that is suitable for use in a diesel-powered highway vehicle. A liquid meets this requirement if, without further processing or blending, the liquid has practical and commercial fitness for use in the propulsion engine of a diesel-powered highway vehicle.” 68 O.S. Supp. 2006, § 500.3(18). A “diesel-powered highway vehicle” is defined to mean “a motor vehicle operated on a highway that is propelled by a diesel-powered engine.” 68 O.S. Supp. 2006, § 500.3(19). A “highway” or “public highway” is defined to mean “every road, toll road, highway, street, way or place generally open to the use of the public as a matter of right for the purpose of vehicular travel, including streets and alleys or any town or city notwithstanding that the same may be temporarily closed for construction, reconstruction, maintenance or repair.” 68 O.S. Supp. 2006, § 500.3(49).

greater than thirty-five percent (35%).” 68 O.S. Supp. 2004, § 500.14(A)(2)¹⁵. See *OAC*, 710:55-4-119(b)¹⁶.

6. The consumer/user of tangible personal property is liable for the tax levied by the Oklahoma Sales Tax Code on said property. 68 O.S. 2001, § 1361(A)(1).

7. As a general rule, statutes exempting property from taxation are required to be circumspectly applied and strictly construed against the allowance of an exemption. *Matter of Wal-Mart Stores, Inc.*, 1991 OK CIV APP 73, 817 P.2d 1281; *Bert Smith Road Machinery Co. v. Oklahoma Tax Commission*, 1977 OK 75, 563 P.2d 641. Tax exemptions depend entirely upon legislative grace and are strictly construed against the exemption. *TPQ Investment Corporation v. Oklahoma Tax Commission*, 1998 OK 13, ¶ 8, 954 P.2d 139, 141; *Getty Oil Co. v. Oklahoma Tax Commission*, 1977 OK 19, 563 P.2d 627, 630-631. No claim of tax exemption can be sustained unless it clearly comes within the statutory provision under which the exemption is claimed. *Home-Stake Production Co. v. Board of Equalization of Seminole County*, 1966 OK 115, 416 P.2d 917. The burden of proving the existence of an exemption is on the person seeking the exemption. *Austin, Nichols & Co., Inc. v. Oklahoma County Bd. Of Tax-Roll Corrections*, 1978 OK 65, 578 P.2d 1200.

8. 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. Legislative intent must be ascertained from the whole act, *Walls v. American Tobacco Co.*, 2000 OK 66, 11 P.3d 626; based on its general purpose and objective, *Comer v. Preferred Risk Mutual Ins. Co.*, 1999 OK 86, 991 P.2d 1006. Statutes must be read to render every part operative, and to avoid rendering any part superfluous or useless. *Bryant v. Commissioner of the Dept. of Public Safety, State of Okla.*, 1996 OK 134, 937 P.2d 496. 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, supra.*; 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.

9. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it 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, 362, citing *Continental Oil Co. v. Oklahoma State Bd. of Equalization*, 1976 OK 23, 570 P.2d 315, 317.

¹⁵ Added by Laws 2004, c. 37, § 1, eff. Nov. 1, 2004.

¹⁶ Amended at 22 OkReg 1548, eff 6-11-05.

10. The Oklahoma Tax Commission has determined that the refund of motor fuel taxes on non-dyed diesel fuel subjects the diesel fuel to the levy of sales taxes. Oklahoma Tax Commission Order No. 2008-02-05-01. In that case, the Commission upheld the assessment of sales taxes on the portion of the diesel fuel taxpayer used to operate refrigerator motors on refrigerated trailers and to which the taxpayer had received a refund of motor fuel taxes. As argued by the Division, the undersigned concludes that when motor fuel taxes on non-dyed diesel fuel are refunded, the motor fuel taxes on said fuel are not paid and the exemption from the levy of sales tax is not applicable. See **Texas Monthly, Inc. v. Bullock**, 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989), citing *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970).¹⁷ Further, Protestant failed to sustain its burden of proving that the Tax Commission has had a policy against levying sales taxes on the portion of diesel fuel that is the subject of a refund of motor fuel taxes.

11. Protestant's protest to the sales tax assessment should be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestant, COMPANY be denied. It is further ORDERED that without consideration of the waiver request the amount in controversy, inclusive of any additional accrued and accruing interest, be fixed as the deficiency due and owing.

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."

¹⁷ Cases stand for the proposition that "[q]ualification for tax exemption is not perpetual or immutable"; tax exempt status can be lost.