JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2011-01-25-02 / NON-PRECEDENTIAL**
ID: **CR-10-008-K**
DATE: **JANUARY 25, 2011**
DISPOSITION: **DENIED**
TAX TYPE: **FRANCHISE**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimants, COMPANY and Subsidiaries is represented by CPA, CPA, Senior Corporate Tax Accountant. The Account Maintenance Division of the Oklahoma Tax Commission (hereinafter "Division") is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

By letter mailed May 14, 2010, Claimants requested "a refund of all franchise taxes paid to the State of Oklahoma for the tax years 2005, 2006, 2007, 2008 and 2009". The Division audited the request and determined that "the only Franchise Tax payments made by [Claimants] were received during 2006". As a result of this determination, the Division by letter dated June 21, 2010, denied Claimants' request as barred by the statute of limitation on refunds. By letter mailed June 24, 2010, Claimants filed a timely protest, stating: "[w]e have received your letter * * * regarding our refund request, and we understand that the Statute of Limitation has past for the 2006 tax year. We have enclosed a copy of the 12/31/2007 return and cancel [sic] check for $100.00 that was filed and paid in March 2008 which would be within the Statute of Limitation. Therefore we are requesting a refund of that $100.00 payment that was paid in error. * * * Also we have requested you remove the liability on the 0607 tax year and 0910 tax year, * * * and close this account as no future returns will be filed for the above referenced entity."

On June 30, 2010, the Division's file was 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-10-008-K and assigned to ALJ, Administrative Law Judge.[3]

A hearing was scheduled for August 24, 2010, by *Notice of Hearing* issued July 6, 2010.[4] The hearing was held as scheduled. Claimants did not appear at the hearing or respond to the Notice. The Division called one witness: AUDITOR, Auditor who testified with respect to the records of the Division. Exhibits A through E were identified, offered and admitted into evidence.

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[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*, 710:1-5-29.

Upon conclusion of the Division's case, the record was closed and the case was submitted for decision.[5]

FINDINGS OF FACT

Upon review of the file and records, including the recording of the hearing and the exhibits received into evidence, the undersigned finds:

1. By letter mailed May 14, 2010, Claimants requested "a refund of all franchise taxes paid to the State of Oklahoma for the tax years 2005, 2006, 2007, 2008 and 2009". Exhibit C.

2. Upon audit of the claim, the Division determined Claimants made two (2) franchise tax payments during the claim period under two (2) different federal identification numbers: (1) a payment of $1,250.24 on September 29, 2006 for the 2006 calendar tax year; and (2) a payment of $619.00 on September 15, 2006 for the 2007 fiscal year. Exhibits A and B.

3. As a result of this determination, the Division by letter dated June 21, 2010, denied Claimants' request as barred by the statute of limitation on refunds. Exhibit D.

4. By letter mailed June 24, 2010, Claimants filed a timely protest, stating: "[w]e have received your letter * * * regarding our refund request, and we understand that the Statute of Limitation has past for the 2006 tax year. We have enclosed a copy of the 12/31/2007 return and cancel [sic] check for $100.00 that was filed and paid in March 2008 which would be within the Statute of Limitation. Therefore we are requesting a refund of that $100.00 payment that was paid in error. * * * Also we have requested you remove the liability on the 0607 tax year and 0910 tax year, * * * and close this account as no future returns will be filed for the above referenced entity." Exhibit E.

5. The records of the Division indicate that Claimants remitted two (2) payments of $100.00 representing registered agent fee payments to the Secretary of State for fiscal years 2008 and 2009. Testimony of AUDITOR. See the franchise tax report attached to Exhibit E.

6. An investigation of the records of the Tax Commission relating to bankruptcy filings indicates that the claims[6] filed by the Tax Commission in Claimants' chapter 11 Bankruptcy have been withdrawn upon an OTC auditor's recommendation. The auditor determined that Claimants were not required to file franchise tax returns for the refund claim period.

ISSUE AND CONTENTIONS

The issue presented for decision is whether the registered agent fees collected by the Tax Commission on behalf of the Secretary of State are subject to refund by the Tax Commission.

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

[6] The claims consist of a claim for franchise tax, interest and penalty in the amount of $856.40 for the 2007 fiscal year and a claim for a registered agent fee of $100.00 for the 2010 fiscal year.

CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter of law that:

1. Jurisdiction of the parties and subject matter of this protest is vested in the Oklahoma Tax Commission. 68 O.S. 2001, § 207.

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

> (a) Any taxpayer who has paid to the State of Oklahoma, through error of fact, or computation, or misinterpretation of law, any tax collected by the Tax Commission may, as hereinafter provided, be refunded the amount of such tax so erroneously paid, without interest.[7]
>
> (b) Any taxpayer who has so paid any such tax may, within three (3) years from the date of payment thereof file with the Tax Commission a verified claim for refund of such tax so erroneously paid.
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> (c) Said claim so filed with the Tax Commission, * * * shall specify the name of the taxpayer, the time when and period for which said tax was paid, the nature and kind of tax so paid, the amount of the tax which said taxpayer claimed was erroneously paid, the grounds upon which a refund is sought, and such other information or data relative to such payment as may be necessary to an adjustment thereof by the Tax Commission. * * *It shall be the duty of the Commission to determine what amount of refund, if any, is due as soon as practicable after such claim has been filed and advise the taxpayer about the correctness of his claim and the claim for refund shall be approved or denied by written notice to the taxpayer.

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

4. "Every foreign corporation transacting business in this state shall have and maintain the Secretary of State as its registered agent in this state." 18 O.S. 2001, § 1022(B). The Secretary of State, for services performed in the office of the Secretary of State and for expense of mailing, is required to charge and collect a fee of $100.00 for acting as the registered agent. 18 O.S. 2001, § 1142(A)(14). The Tax Commission in conjunction with the collection and audit of franchise

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

taxes, is required to collect and audit the registered agent fee, and pay the same over to the State Treasurer for deposit in the General Revenue Fund. Id.

5. The question becomes whether the registered agents fee is to be consider a tax for purposes of § 227. 16 Okl. Op. Atty. Gen. 93, Okl. A.G. Opin. No. 84-42, 1985 WL 201138 (Okl.A.G.). The registered agents fee is a fee the Secretary of State is authorized by statute to charge and collect for the purpose of serving as the registered agent of a foreign corporation for service of legal process. 18 O.S. 2001, § 1022(B). See 18 O.S. 2001, § 1026(B) and (C). The fee is not in the nature of a tax, but is a fee for the services provided by the Secretary of State. Accordingly, Claimants must look elsewhere for their right to maintain suit for the recovery of the erroneously paid registered agents fee.

6. Claimants' protest to the denial of its claim for refund should be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Claimants, COMPANY and Subsidiaries, 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.

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."