JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2011-08-02-18 / NON-PRECEDENTIAL**
ID: **CR-11-002-K**
DATE: **AUGUST 2, 2011**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

Claimant, CLAIMANT, is represented by PRESIDENT, President of Claimant. The Account Maintenance Division of the Oklahoma Tax Commission ("Division") is represented by OTC ATTORNEY, First Deputy General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

On or about December 22, 2011, Claimant filed a claim for refund for sales taxes paid on purchases of dyed diesel fuel from COMPANY X during the period inclusive of the months of January, 2009 through November, 2010. By letter dated March 10, 2011, the Division denied the claim in total. Claimant timely protested the denial by request for a hearing dated March 15, 2011.

On March 21, 2011, the Division referred the request for hearing and its file to this Office 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 case was docketed as Case No. CR-11-002-K and assigned to ALJ, Administrative Law Judge.[3]

A hearing was scheduled for May 19, 2011, by *Notice of Hearing* issued March 25, 2011.[4] The *Position Letter of the Account Maintenance Division* and Exhibit A through C attached thereto were filed May 6, 2011. Claimant filed its previously submitted claim for refund and demand for hearing on April 25, 2011.

A closed hearing was held as scheduled.[5] As a preliminary matter, Exhibits A through E were admitted into evidence by stipulation. PRESIDENT, being first duly sworn gave a statement regarding the reason the refund claim was made necessary. AUDITOR, Auditor, Credit/Refund Section of the Division testified with respect to the records of the Division and the reason for the refund denial. Upon conclusion of the hearing, the record was closed and protest to the refund denial was submitted for decision.[6]

---

[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).

[5] Confidentiality was invoked. 68 O.S. Supp. 2010, § 205.

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

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. Claimant is located in and operates out of CITY X, Oklahoma. Exhibit A.

2. Claimant purchased dyed diesel fuel for resale from COMPANY X ("COMPANY X") during the period inclusive of the months of January, 2009 through November, 2010. Exhibit B.

3. Claimant did not have a valid sales tax permit during the period in question.[7] Testimony of PRESIDENT.

4. Upon demand of COMPANY X, Claimant paid sales tax to COMPANY X on the dyed diesel fuel it purchased for resale from COMPANY X. Testimony of PRESIDENT.

5. On or about December 20, 2010, Claimant applied for a sales tax permit. Exhibit A.

6. On or about December 22, 2010, Claimant filed a claim for refund of the sales taxes it paid to COMPANY X. Exhibit B.

7. The Division denied the refund by letter dated March 10, 2011. Exhibit C.

8. The refund was denied because Claimant did not have a valid sales tax permit at the time of purchasing the dyed diesel fuel. Testimony of AUDITOR.

9. Claimant timely protested the denial and requested a hearing. Exhibit D.

10. The amount in controversy is $19,394.69. Exhibits B and C.

ISSUE AND CONTENTIONS

The issue presented for decision is whether the lack of a valid sales tax permit at the time of purchasing the dyed diesel fuel for resale is fatal to Claimant's sales tax refund claim.

Claimant asks for mercy, contending that it was not aware that it did not have a valid permit at the time of purchasing the dyed diesel fuel and questioning why it was not notified that the permit had expired. Claimant also argues that the state is not out any revenue since the purchased diesel fuel was sold to customers who were exempt from sales tax.

The Division contends that because Claimant did not have a sales tax permit at the time it purchased the dyed diesel fuel, the sale for resale exemption of the Oklahoma Sales Tax Code is not applicable and the refund claim was properly denied.

[7] PRESIDENT testified that Claimant had a sales tax permit prior to the end of 1997, that without his knowledge the sales tax permit was allowed to expire and that it was not renew until December, 2010.

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. 2001, § 227(d) and (e).[8]

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Code").[9] 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"[10] is expressly made subject to sales tax. 68 O.S. 2001, § 1354(A)(1)[11].

3. Exempted from the levy of sales taxes are "[s]ales for resale to persons engaged in the business of reselling the articles purchased, whether within or without the state". 68 O.S. 2001, § 2357(3). For residents of Oklahoma, the sale for resale exempt is further restricted "to persons to whom sales tax permits have been issued as provided in the * * * Code." Id.

4. 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] 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.
>
> (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.

[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.

5. "Generally, 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. The Court also declined to interpose equity to block the requirements of mandatory procedural tax statutes. ***Apache***, *supra* at ¶ 11, citing ***R.R. Tway, Inc.***, *supra* and ***Whig Syndicate, Inc. v. Keyes***, 1992 OK 95, 836 P.2d 1283, 1288.

6. Claimant failed to show that the sale for resale exemption of the Code is applicable to the purchases of dyed diesel fuel. *OAC*, 710:1-5-47; ***Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission***, 1988 OK 91, ¶ 5, 768 P.2d 359, 362. Accordingly, Claimant's protest to the denial of the 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 claim for refund of Claimant, CLAIMANT, 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."