JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2012-04-19-03 / NON-PRECEDENTIAL**
ID: **CR-11-008-K**
DATE: **APRIL 19, 2012**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
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 2nd day of March, 2012, the Commission denies the request of the Account Maintenance Division for consideration en banc, and makes the following Findings of Fact and Conclusions of Law and enters the following order.

STATEMENT OF THE CASE

On or about December 13, 2010; Claimant, a 100% disabled veteran filed a claim for refund of sales taxes paid on purchases of tangible personal property and services during the period of June, 2009 through December, 2010. The Division by letter dated September 13, 2011, notified Claimant that a portion of the refund claim in the amount of $104.10 had been denied. On September 26, 2011, Claimant presented additional documentation in support of the denied portion of the claim for refund, in particular: an invoice of the charges and a copy of the check in payment of the invoice. On October 11, 2011, the Division notified Claimant that despite the additional documentation submitted in support of the refund claim of $104.10, the claim was denied. Claimant timely protested the denial and requested a hearing.

On November 15, 2011, the protest and request for hearing was referred to the Office of the Administrative Law Judges for the institution of proceedings consistent with the Uniform Tax Procedure Code[1] and the Rules of Practice and Procedure before the Office of Administrative Law Judges[2]. The protest was docketed as Case No. CR-11-008-K and assigned to ALJ, Administrative Law Judge.

A hearing was scheduled for January 5, 2012, by *Notice of Hearing* issued November 17, 2011.[3] The *Brief of the Account Maintenance Division* was filed December 22, 2011. Pursuant to a *Status Report* filed the date of the hearing, the hearing was cancelled and the parties were directed to file a status report.

Pursuant to a *Status Report* filed January 6, 2012, a hearing was scheduled for January 26, 2012, by *Notice of Hearing* issued January 10, 2012. The hearing was rescheduled for February 2,

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[1] 68 O.S. 2011, § 201 et seq., as amended.

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

[3] 68 O.S. 2011, § 227(e) and *OAC*, 710:1-5-24.

2012, by *Notice of Hearing* issued January 19, 2012, in accordance with the *Status Report* filed January 19, 2012. Claimant filed a position letter on January 19, 2012.

The hearing was held as rescheduled. Claimant did not appear at the hearing. As a preliminary matter, the Court acknowledged the presence of SENATOR, State Senator, District ##. SENATOR was excused from the Courtroom prior to proceeding with the hearing since Claimant was not present to waive confidentiality[4] nor did SENATOR have a power of attorney to represent Claimant in these proceedings. DIRECTOR, Deputy Director of the Division testified with respect to the records of the Division and the reasons for the denial of Claimant's refund claim. Exhibits A and B, C-1 and C-2, D-1 and D-2, E and F were identified, offered and admitted into evidence. Claimant's position letter was marked as ALJ's Exhibit 1 and admitted into evidence. On February 7, 2012, 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 recording of the hearing and the exhibits received into evidence, the undersigned finds:

1. Claimant is a 100% disabled veteran as certified by the United States Department of Veterans Affairs. See, 68 O.S. Supp. 2006, § 1357(34); Exhibit B.

2. On December 13, 2010, Claimant submitted purchase receipts from various vendors for the periods inclusive of the months of June, 2009 through December, 2010 reflecting the payment of state, local and where appropriate county sales taxes in the aggregate amount of $471.55.[6] Exhibits A and B.

3. Upon audit of the receipts, the Division approved the refund of sales taxes paid by or on behalf of Claimant in the amount of $367.45, denied the refund of sales taxes paid on a receipt from VENDOR A in the amount of $104.10, and by letters dated September 6, 2011 and September 13, 2011, notified Claimant of the same. Exhibits B, C-1 and C-2.

4. The denied portion of the refund was initially disapproved for the reason that the receipt was not issued in Claimant's name. Exhibit C-1. The subject invoice reflects that VENDOR A sold trees and mulch to VENDOR B in a total amount of $1,297.63, inclusive of a loading fee of $75.00 and sales tax of $104.13. Exhibit C-2.

5. On September 26, 2011, Claimant presented additional documentation in support of the claim to the denied portion of the refund, in particular: an invoice from VENDOR B to himself in the amount of $1,772.63 which includes the amount billed by VENDOR A to VENDOR B ($1,297.63) with the description: "[i]nstall of tree on prop" and a copy of the check in payment of the invoice. Exhibits D-1 and D-2. The invoice does not show a charge for sales tax. Exhibit D-1.

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[4] 68 O.S. 2011, § 205.

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

[6] Claimant did not identify the amount of the refund claim. Testimony of DIRECTOR.

6. By letter dated October 11, 2011, the Division notified Claimant that despite the additional documentation submitted in support of the refund claim of $104.10, the claim was denied. Exhibit E. In the letter, the Division cited a portion of *OAC*, 710:65-13-275(e) and wrote "we find the purchase was made by a contractor." Id.

7. Claimant timely protested the denial and requested a hearing. Exhibit F.

8. The amount in controversy is $104.13.[7]

ISSUES AND CONTENTIONS

The issue presented for decision is whether a 100% disabled veteran is entitled to a refund of the amount of sales taxes passed through and paid by the veteran on a contract for landscaping work on his real property.

The Division contends that "[s]ince the goods underlying the claim for refund were not sold to [Claimant], or to an eligible representative of [Claimant] as defined by section 1357(34), the sale was not exempt from the levy of sales tax, and [Claimant] is not eligible to receive a refund." *Brief of the Account Maintenance Division*, pp. 5. In support of this contention, the Division argues that the facts clearly show the purchase at issue was made by and paid by Claimant's contractor; not Claimant, and that by rule the exemption from sales tax for 100% disabled veterans does not extend to purchases made by a disabled veteran's contractor, citing *OAC*, 710:65-13-275(e).

Claimant does not deny the existence of the rule applied by the Division to reject his claim. However, Claimant argues that he is not aware of any restrictions on his exempt status, and that he in fact paid the sales tax amount claimed as a refund whether or not it was separately stated as sales tax on the invoice.

CONCLUSIONS OF LAW

1. Jurisdiction of the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S. 2011, § 227.

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Code").[8] 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); including sales of "tangible personal property"[9], 68 O.S. 2001, § 1354(A)(1). The phrase "tangible personal property" is all

[7] The record indicates that Claimant submitted invoices reflecting total sales tax charges of $471.55. The Division refunded $367.45 of these charges leaving a balance of $104.10. The record does not indicate why there is a difference of 3 cents between the sales tax charged on the VENDOR A invoice and its calculation of the sales tax charges on the submitted invoices.

[8] 68 O.S. 2011, § 1350 et seq., as amended.

[9] Defined by the Code to mean "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

inclusive, and is not limited except by specific exemption. ***Magnolia Petroleum Co. v. Oklahoma Tax Commission***, 1958 OK 124, 326 P.2d 821.

3. Exempted from the levy of sales tax are "[s]ales[10] of tangible personal property or services to persons who are residents of Oklahoma and have been honorably discharged from active service in any branch of the Armed Forces of the United States or Oklahoma National Guard and who have been certified by the United States Department of Veterans Affairs or its successor to be in receipt of disability compensation at the one-hundred-percent rate and the disability [is] permanent and [was] sustained through military action or accident or resulting from disease contracted while in such active service; provided, sales for the benefit of the person to a spouse of the eligible person or to a member of the household in which the eligible person resides and who is authorized to make purchases on the person's behalf, when such eligible person is not present at the sale, shall also be exempt". 68 O.S. Supp. 2009, § 1357(34)[11]. See 68 O.S. Supp. 2006, § 1361.2 and *OAC*, 710:65-13-336.

4. Except in certain statutorily-limited circumstances[12]; none of which are applicable in this case, a "contractor"[13] as a consumer/user is required to pay sales taxes on all taxable services and tangible personal property purchased to develop, repair, alter, remodel, and improve real property. *OAC*, 710:65-19-56(b). Specifically, "[a] contractor who performs improvements to real property for a disabled veteran * * * may not purchase tangible personal property or services to perform the contract exempt from sales tax under the exemption provided by statute to disabled veterans". *OAC*, 710:65-19-56(e). This rule simply mirrors § 1357(34) by prohibiting anyone other than the disabled veteran or an authorized immediate family member of the disabled veteran from purchasing property or taxable services on behalf of the disabled veteran exempt from sales tax.

5. Rules promulgated pursuant to the Administrative Procedures Act[14] are presumed to be valid until declared otherwise by a court of competent jurisdiction. 75 O.S. 2001, § 306(C). They 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. 75 O.S. 2001, § 308.2(C).

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prewritten computer software." The definition is applicable only for purposes of the Oklahoma Sales Tax Code". 68 O.S. Supp. 2007, § 1352(24); *OAC*, 710:65-1-2.

[10] "Sale" is defined to mean "the transfer of either title or possession of tangible personal property for a valuable consideration regardless of the manner, method, instrumentality, or device by which the transfer is accomplished in this state, or other transactions as provided by this paragraph, including but not limited to:

(a) the exchange, barter, lease or rental of tangible personal property resulting in the transfer of the title to or possession of the property.

[11] Added by Laws 2006, c. 16, § 58.

[12] See *OAC*, 710:65-19-56(c) which describes the circumstances when a contractor may make purchases of tangible personal property or services exempt from sales taxes based on the exempt status of another entity.

[13] Defined by the Code to mean "any person who performs any improvement upon real property and who, as a necessary and incidental part of performing such improvement, incorporates tangible personal property belonging to or purchased by the person into the real property being improved. 68 O.S. Supp. 2007, § 1352(7). The term includes a landscaper working on a contractual basis. *OAC*, 710:65-19-56(a).

[14] 75 O.S. 2011, § 250 et seq., § 301 et seq.

The legislature is deemed to have adopted 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.

6. In administrative proceedings, the burden of proof is on the taxpayer to show in what respect the action or proposed action of the Tax Commission is incorrect. *OAC*, 710:1-5-47. ***In re Adway Properties, Inc.***, 2006 OK CIV APP 14, 130 P.3d 302; ***Geoffrey, Inc. v. Oklahoma Tax Commission***, 2006 OK CIV APP 27, 132 P.3d 632.

DISCUSSION AND ORDER

Here, a contractor did landscaping work on Claimant's real property, and incorporated tangible personal property in the landscaping project. The contractor paid sales taxes on the tangible personal property which he affixed to the Claimant's real property as part of the landscaping job. The invoice for the landscape project included an item described as "install trees on prop" for a charge which was equal to the amount the contractor had paid for the tangible personal property and the sales tax thereon. There is no evidence that any sales tax was charged, collected or remitted on the landscaping project. Thus Claimant is not entitled to any amount he paid the contractor for the landscaping project. Claimant was not a party to the sale wherein the contractor purchased the tangible personal property and the contractor paid sales tax. Claimant is not entitled to a refund of the sales tax paid by the contractor on that sale.

The protest to the denial of the sales tax refund claim of Claimant, CLAIMANT is 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."