JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2012-12-04-01 / NON-PRECEDENTIAL**
ID: **CR-12-005-H**
DATE: **DECEMBER 4, 2012**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

ORDER

CLAIMANT ("Claimant") appears pro se,[1] through Member, MEMBER. The Credits and Refunds Section, Account Maintenance Division ("Division") of the Oklahoma Tax Commission appears through OTC ATTORNEY 1, Assistant General Counsel and OTC ATTORNEY 2, Deputy General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On July 27, 2012, the Office of Administrative Law Judges received the protest file 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 July 30, 2012, this office notified the Claimant by letter of the case assignment to ALJ, Administrative Law Judge, docketed as Case Number CR-12-005-H. The letter also enclosed a copy of the *Rules of Practice and Procedure Before the Office of Administrative Law Judges.*[4] On July 30, 2012, OTC ATTORNEY 1 and OTC ATTORNEY 2 filed an Entry of Appearance as Co-Counsel for the Division.

On August 1, 2012, the Notice of Hearing mailed to the last-known address[5] of the Claimant, setting the hearing for September 20, 2012, at 9:30 a.m., with position letters and/or memorandum briefs due on or before September 13, 2012. On August 17, 2012, OTC ATTORNEY 1 notified the Court Clerk[6] by e-mail that the Claimant's new mailing address was

---

[1] "Pro se" (proh say *or* see), *adv.* & *adj.* [Latin] For oneself; on one's own behalf; without a lawyer <the defendant proceeded pro se> <a pro se defendant>. -- Also termed *pro persona*; *in propria persona*; *propria persona*; *pro per*. See PROPRIA PERSONA. BLACK'S LAW DICTIONARY (9th ed. 2009), available at *http://web2.westlaw.com*.

[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] *Id.*

[5] OKLA. STAT. ANN. tit. 68, § 208 (West Supp. 2012). The Court Clerk mailed the notice to Claimant c/o MEMBER at BUSINESS ADDRESS.

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

NEW ADDRESS. On August 17, 2012, the "Revised" Notice of Hearing was mailed to the Claimant c/o MEMBER, NEW ADDRESS.

On September 12, 2012, the Division filed its Brief with the Court Clerk, with no attachments thereto. On September 13, 2012, the Claimant filed its Brief with the Court Clerk, with no attachments thereto.[7] On September 17, 2012, the Division filed its *Motion for Leave to File Reply to [Claimant's] Brief* ("*Motion*") on the basis that "In its Brief at page 5 … [Claimant] raised for the first time the argument that it detrimentally relied on statements or representations made by an Oklahoma Tax Commission employee."[8] On September 18, 2012, OTC ATTORNEY 1 filed a Status Report. The Claimant, through MEMBER, did not have any objection to the Division's *Motion.* On September 18, 2012, an Order issued granting the Division's *Motion.* The Division's Reply Brief was due on or before the hearing set for September 20, 2012, at 9:30 a.m. On September 19, 2012, the Division filed its Reply Brief with the Court Clerk.

On September 20, 2012, an open hearing[9] convened as scheduled. MEMBER appeared on behalf of the Claimant. OTC ATTORNEY 1 and OTC ATTORNEY 2 appeared on behalf of the Division. MEMBER made a brief opening statement and announced the Claimant was not protesting the refund denial of items purchased out-of-state. The Division waived its opening statement.

MEMBER testified on behalf of the Claimant. MEMBER did not offer and identify any exhibits to be admitted into evidence for the Claimant. The Division called AUDITOR, Auditor II ("Auditor"),[10] Credits and Refunds Section, Account Maintenance Division of the Oklahoma Tax Commission, who testified concerning the Division's policy and procedure on granting refunds of sales tax to permit holders on sales-for-resale, the processing of Claimant's Application for Refund, and as custodian of the Division's records. The parties stipulated to the admission into evidence of Division's Exhibit A, and A-1 through A-4. The Division's Exhibits B through F were identified, offered, and admitted into evidence without objection. At the end of the hearing, the undersigned closed the record and this case submitted for decision on September 20, 2012.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, the Briefs, and the Division's Reply Brief, the undersigned finds:

---

[7] The Claimant's Brief is "unsigned," but indicates that MEMBER submits it on behalf of the Claimant.

[8] *Motion* at 1.

[9] The Claimant, through MEMBER, waived its right to a confidential hearing as provided by the provisions of OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2012).

[10] The Tax Commission has employed the Auditor in that capacity for approximately ten plus (10+) years.

1. On July 8, 2008, Claimant filed "Articles of Organization of an Oklahoma Limited Liability Company" with the Oklahoma Secretary of State.[11]

2. On July 10, 2010, Claimant filed a Business Registration Application ("Application") for "Internet Retail Sales," with the physical and mailing address reflected as BUSINESS ADDRESS. SPOUSE (spouse) and MEMBER are the Members of the Claimant, with SPOUSE as the "Managing Member."[12]

3. On December 15, 2010, the Claimant, through MEMBER, filed an Application for Refund of Sales Tax ("Application") for February 13, 2009 through November 25, 2010 ("Refund Period") for $1,240.55, with a spreadsheet and "receipt" copies attached thereto.[13]

4. On June 19, 2012, the Division mailed a letter to the Claimant,[14] which states in pertinent part, as follows, to-wit:

> Your Oklahoma Sales Tax account indicates an overpayment for the following period(s):

PERIOD(S)	DLN	REASON	AMOUNT
02/01/09-11/30/10	(omitted)	EXEMPT PURCHASES FROM VARIOUS VENDORS	$106.60

5. On June 28, 2012, the Division mailed a letter to the Claimant reiterating the June 19th letter and denied the remainder of the Application,[15] as follows, to-wit:

> The remainder of the refund request in the amount of $1,133.95 has been denied in accordance with Oklahoma Statute Title 68, Section 227(c) for the following reasons:
>
> - Invoices not issued to the company.
> - Purchases made outside the state of Oklahoma.
> - Calculation error in addition of receipts.

---

[11] Testimony of Auditor. Division's Exhibit F. The Administrative Law Judge announced to the parties judicial notice of the Oklahoma Secretary of State's website at https://www.sos.ok.gov to complete the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999). The website reflects that Claimant is "Inactive," of which MEMBER was unaware. OTC ATTORNEY 1 confirmed the Claimant's status.

[12] *Id.* Division's Exhibit E. Testimony of MEMBER. The Claimant's sales tax permit number is ######.

[13] *Id.* Division's Exhibit A. The post-mark on the envelope reflects a mail-date of December 13, 2010 by USPS Parcel Post Mail. The return address is "USERNAME," BUSINESS ADDRESS. At hearing, MEMBER testified that "USERNAME" was not a business, but his E-Bay "user" name.

[14] *Id.* Division's Exhibit D.

[15] *Id.* Division's Exhibit B. The Auditor testified that it was Division Policy to deny refunds when the holder of the sales tax permit did not make the purchases, as in this matter.

6. On July 19, 2012, the Claimant filed a protest by e-mail stating, "I would like to officially file a protest to the denial of the refund of sales tax paid by [Claimant]. We have been told that since my wife's name is on the business credit card, we can't get a refund. However, no one can show me the policy that requires this, and we have received the refund in previous years. We have waited more than two years for this refund, and it is time for this to get resolved."[16]

7. On July 25, 2012, the Auditor requested by e-mail a copy of the Claimant's credit card. On July 25, 2012, MEMBER provided a copy of the credit card by e-mail. The American Express credit card is in the name of "SPOUSE."[17]

8. MEMBER announced at hearing the Claimant was not protesting purchases made out-of-state ($88.98), which is included in the denial of $1,133.95. MEMBER did not stipulate to the $5.89 calculation error, which is also included in the denial of $1,133.95, but the Claimant did not dispute the calculation error at hearing.[18]

9. SPOUSE made purchases during the Refund Period using credit cards in her name, which were shipped in her name from various retailers,[19] as follows, to-wit:

Credit Card#	Retailer	In-State/Out-of-State
Dillards# XXXX	Dillards	In-State
Macy's Elite Star Rewards Visa# XXXX	Macy's	In-State
AMEX# XXXX	Finish Line	Mostly Out-of State
AMEX# XXXX	Sak's 5th Ave.	Unknown[20]

10. At hearing, the Auditor testified that the Division refunded $106.60 in sales tax for receipts on which SPOUSE'S name did not appear, but this was in error because SPOUSE used a credit card (AMEX#XXXX) in her name, instead of the Claimant.[21]

---

[16] *Id.* Division's Exhibit C. In the e-mail, MEMBER states, "Here is the copy of the card you requested. FYI, SPOUSE is the managing member of [Claimant]. Also, the card and associated account are only used for business purchases."

[17] *Id.*

[18] Testimony of MEMBER. *See* Division's *Brief* at 3. *See also* Division's Exhibit A-4, OTC 000080.

[19] Division's Exhibits A-1 through A-3. From the record, it does not appear that the Auditor was aware SPOUSE was using the Dillards and Macy's credit cards to make purchases, nor does it appear that MEMBER disclosed the use of any credit card other than the AMEX credit card.

[20] *Id.* The Saks Fifth Avenue "receipts" are all Shipping Summaries. From the summaries, it is impossible to determine whether the items were purchased In-State, Out-of State, or both.

[21] *Id.* The indication from the Auditor's testimony is that the Division intends to assess the Claimant because the partial refund was in error. *See* Note 15, *supra.* The partial refund letter states in pertinent part:

> "Please note that refunds remain subject to audit which may adjust the refund total upon finding of an accounting error or misapplication of statutory or administrative rule provision."

CONCLUSIONS OF LAW

1. Jurisdiction of the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission.[22]

2. The Oklahoma Sales Tax Code ("Sales Tax Code") governs the collection and remittance of sales tax.[23] The Sales Tax Code levies "upon all sales,[24] not otherwise exempted . . . an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds[25] of each sale of . . . tangible personal property. . . ."[26] Oklahoma Statutes authorize incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.[27]

3. Exempted from the levy of sales taxes are "Sales for resale[28] to persons engaged in the business of reselling the articles purchased, whether within or without the state, provided that such sales to residents of this state are made to persons[29] to whom sales tax permits have been issued as provided in the Oklahoma Sales Tax Code."[30]

---

[22] OKLA. STAT. ANN. tit. 68, § 221(C) (West Supp. 2012).

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

[24] OKLA. STAT. ANN. tit. 68, § 1352(22)(a) (West 2008):

> "Sale" means 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,
>
> …

[25] OKLA. STAT. ANN. tit. 68, § 1352(11) (West 2008).

[26] OKLA. STAT. ANN. tit. 68, § 1354(A) (1) (West 2008).

[27] OKLA. STAT. ANN. tit. 68, § 1370 et seq. (West 2008) and OKLA. STAT. ANN. tit. 68, § 2701 (West Supp. 2010).

[28] OKLA. STAT. ANN. tit. 68, § 1352(23) (a) (West 2008):

> "Sale for resale" means:
>
> a sale of tangible personal property to any purchaser who is purchasing tangible personal property for the purpose of reselling it within the geographical limits of the United States of America or its territories or possessions, in the normal course of business either in the form or condition in which it is purchased or as an attachment to or integral part of other tangible personal property,

[29] OKLA. STAT. ANN. tit. 68, § 1352(18) (West 2008):

4. Tax exemptions depend entirely upon legislative grace and are strictly construed against the exemption. No claim of tax exemption can be sustained unless it clearly comes within the statutory provision under which the exemption is claimed. The burden of proving the existence of an exemption is on the person seeking the exemption.[31]

5. The goal of any inquiry into the meaning of a legislative act is to ascertain and give effect to the intent of the legislature. The law-making body is presumed to have expressed its intent in a statute's language and to have intended what the text expresses. Hence, where a statute is plain and unambiguous, it will not be subject to judicial construction, but will be given the effect its language dictates. Only where the intent cannot be ascertained from a statute's text, as occurs when ambiguity or conflict (with other statutes) is shown to exist, may rules of statutory construction be employed.[32]

6. Great weight is accorded an agency's construction of a statute when the administrative interpretation is made contemporaneously with the enactment of the statute and the construction is longstanding and continuous by the agency charged with its execution.[33] Where the Legislature is made repeatedly aware of the operation of the statute according to the construction placed upon it by an agency and the Legislature has not expressed its disapproval with the agency's construction, the Legislature silence may be regarded as acquiescence in the agency's construction[34], and the agency's construction is given controlling weight and will not be disregarded except in cases of serious doubt.[35]

> "Person" means any individual, company, partnership, joint venture, joint agreement, association, mutual or otherwise, *limited liability company*, corporation, estate, trust, business trust, receiver or trustee appointed by any state or federal court or otherwise, syndicate, this state, any county, city, municipality, school district, any other political subdivision of the state, or any group or combination acting as a unit, in the plural or singular number; (Emphasis added).

[30] OKLA. STAT. ANN. tit. 68, § 1357(3) (West Supp. 2012). This provision also states, "This exemption shall not apply to the sales of articles made to persons holding permits when such persons purchase items for their use…"

[31] *Apache Corp. v. State ex rel. Oklahoma Tax Com'n*, 2004 OK 48. 98 P.3d 1061, ¶ 10, *citing R.R. Tway, Inc. v. Oklahoma Tax Com'n*, 1995 OK 129. *See Magnolia Petroleum Co. v. Oklahoma Tax Commission*, 1958 OK 124, 326 P.2d 821.

[32] *Blitz U.S.A., Inc. v. Oklahoma Tax Com'n*, 2003 OK 50, ¶ 14, 75 P.3d 883. (Citations omitted).

[33] *Schulte Oil Co., Inc. v. Oklahoma Tax Commission*, 1994 OK 103, 882 P.2d 65.

[34] *R.R. Tway, Inc. v. Oklahoma Tax Commission*, 1995 OK 129, 910 P.2d 972.

[35] *Cox v. Dawson*, 1996 OK 11, 911 P.2d 272.

7. Estoppel generally does not apply against the state acting in its sovereign capacity because of the unauthorized acts of its officers,[36] or because of mistakes or errors of its employees.[37] Application of estoppel is not allowed against state, political subdivisions, or agencies, unless the interposition of estoppel would further some principal of public policy or interest.[38] Where there is no power to act, a public official cannot bind a government entity even if he or she mistakenly or falsely asserts such authority.[39]

8. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[40] A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[41]

ISSUE

ARE PURCHASES OF TANGIBLE PERSONAL PROPERTY MADE BY THE MANAGING MEMBER OF AN LLC IN HER INDIVIDUAL NAME QUALIFIED AS TAX EXEMPT PURCHASES WHEN THE LLC IS THE HOLDER OF THE SALES TAX PERMIT?

---

[36] *State ex rel. Cartwright v. Dunbar*, 1980 OK 15, 618 P.2d 900.

[37] *Id. See State, ex rel. Oklahoma Tax Com'n v. Emery*, 1982 OK CIV APP 13, 645 P.2d 1048.

[38] OTC Order No. 2003-12-16-06 (December 16, 2006). *See Burdick v. Independent School Dist. No. 52 of Oklahoma County*, 1985 OK 49, ¶5, 702 P.2d 48:

> Generally, Oklahoma jurisprudence does not allow the application of estoppel against the state, the political subdivisions or agencies, unless its interposition would further some principle of public policy or interest. The rationale for recognizing a government shield from estoppel is to enable the state to protect public policies and interests from being jeopardized by judicial orders preventing full performance of legally-imposed duties.

[39] *Hiland Dairy Foods Co., LLC v. Oklahoma Tax Com'n*, 2006 OK CIV App 68, ¶ 11, 136 P.3d 1072, *citing Indiana Nat'l Bank v. State Dept. of Human Services*, 1993 OK 101, 857 P.2d 53.

[40] OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999):

> 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) (June 25, 1999), 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.

[41] *See Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

DISCUSSION

The Claimant asserts *inter alia* that the definition of "person"[42] includes the Claimant or the "Managing Member," which is an individual who owns and operates the LLC. The Claimant states, "The purpose of the statute is to ensure that purchases made for resale by one holding a valid sales tax permit are exempt from sales tax. The individual, who made the purchases at issue, was the owner of [Claimant], who holds a valid sales tax permit, and the owner did so for the benefit of [Claimant], using a business card solely used by [Claimant]. This is the exact type of scenario that this statute was intended to cover."[43] As an alternative argument, the Claimant asserts that Section 1357(3) of Title 68[44] is ambiguous because "…a 'person' can be either an individual or a limited liability company. Again, although [Claimant] was issued the sales tax permit, it is an individual who operates it. It is not clear that a person who owns and is acting on behalf of [Claimant] is not the person (individual) to whom the sales tax permit was issued. A business owner looking at that statute would have no reason to presume that he was not the 'person' to whom the sales tax permit had been issued."[45]

The Division responds, "[Claimant] holds a validly issued sales tax exemption permit under section 1357(3). Under section 1357(3), sales to [Claimant] are exempt from the sales tax. The consideration for the purchases at issue was from someone other than the permit holder. Pursuant to the Code, neither the exemption nor refunds extend to purchases made by a representative or member of the limited liability company. …Because the statute does not explicitly allow for a representative or member of a limited liability company, or anyone else, to make purchases on behalf of the limited liability company, the plain language and meaning of the statute is that a representative or member of a limited liability company may not make exempt purchases."[46]

In this instance, the plain and unambiguous language of the statute supports the Division's reading of Section 1357(3) of Title 68,[47] as intended by the legislature,[48] which states in pertinent part, as follows, to-wit:

> Sales for resale to persons engaged in the business of reselling the articles purchased, whether within or without the state, provided that such sales to

[42] *See* Note 29, *supra*.

[43] Claimant's Brief at 5.

[44] *See* Note 30, *supra*.

[45] Claimant's Brief at 5.

[46] Division's Brief at 4-5.

[47] *See* Note 30, *supra*.

[48] The Auditor testified that this is also the policy of the Division. *See* Note 15, *supra*. *See also* Notes 33-35, *supra*.

> residents of this state are made *to persons to whom sales tax permits have been issued* as provided in the Oklahoma Sales Tax Code. This exemption shall not apply to the sales of articles made to persons holding permits when such persons purchase items for their use and which they are not regularly engaged in the business of reselling; … (Emphasis added).

The claim for refund of sales tax by the Claimant were all on purchases made by the "Managing Member," in her individual name, using three (3) credit cards issued in her individual name, not the Claimant, who is the holder of the sales tax permit.

Lastly, the Claimant asserts that it relied on the representations of a Tax Commission employee with whom the Members had worked with in the past on previous claims for refund. Estoppel generally does not apply against the state acting in its sovereign capacity because of the unauthorized acts of its officers, or because of mistakes or errors of its employees. Application of estoppel is not allowed against state, political subdivisions, or agencies, unless the interposition of estoppel would further some principal of public policy or interest. Where there is no power to act, a public official cannot bind a government entity even if he or she mistakenly or falsely asserts such authority.[49]

CONCLUSION

The Claimant has failed to meet its burden of proof, by preponderance of the evidence, that the Division's denial of its claim for refund of sales tax during the Refund Period was incorrect, and in what respects.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case that the protest should 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."

[49] *See* Notes 36-39, *supra.*