JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2016-06-07-06 / NON-PRECEDENTIAL**
ID: **CR-15-015-K**
DATE: **JUNE 7, 2016**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NONE**

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, the Commission hereby adopts the Findings of Fact, Conclusions of Law and Recommendation made and entered by the Administrative Law Judge on the 12th day of May, 2016, appended hereto, together herewith shall constitute the Order of the Commission.

SO ORDERED

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

NOW on this 12TH day of May, 2016, the above styled and numbered cause comes on for decision pursuant to assignment regularly made by the Oklahoma Tax Commission to ALJ, Administrative Law Judge. Claimant, CLAIMANT is represented by REPRESENTATIVE 1 and REPRESENTATIVE 2, TAX FIRM. The Account Maintenance Division ("Division") is represented by OTC ATTORNEY 1, Assistant General Counsel and OTC ATTORNEY 2, Interim General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

On October 25, 2010, Claimant filed an *Application for Credit or Refund of State and Local Sales or Use Tax* ("*Application*") for the period of January 1, 2009, through September 30, 2010, in the total amount of $47,260.04. By three (3) separate letters dated June 11, 2015, the Division denied a portion of the refund for each of the tax types included in the *Application*. Claimant timely protested the denied portions of the refunds and demanded a hearing.

On August 25, 2015, the protest and concomitant records were referred to the Office of Administrative Law Judges to initiate appellate proceedings in accordance with the *Uniform Tax Procedure Code*[1] and the *Rules of Practice and Procedure before the Office of Administrative Law Judges*.[2] The protest to the denial of the *Application* was docketed as Case No. CR-15-015-K and assigned to ALJ, Administrative Law Judge.[3]

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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] *OAC* 710:1-5-22(b).

A hearing was scheduled for September 28, 2015, by *Notice of Hearing* issued September 15, 2015.[4] A thirty-day continuance of the hearing was requested by Claimant on September 18, 2015. By *Notice of Hearing* issued September 21, 2015, the hearing was stricken and rescheduled for December 8, 2015. Several additional continuance requests were filed by Claimant, each of which was granted by striking the scheduled hearing and rescheduling the same. The hearing was ultimately scheduled for March 29, 2016, by *Notice of Hearing* issued January 21, 2016.

The hearing was held as rescheduled. Claimant did not appear[5], consequently confidentiality of the proceedings was invoked on Claimant's behalf by the Court. AUDITOR, Field Auditor testified with respect to the review of the *Application*, the supporting documents and Claimant's explanations, and the reasons for denying the claims or portions thereof on certain transactions. Exhibits A through F were identified, offered and admitted into evidence. Upon conclusion of the hearing, the record was closed and the protest to the denial of the *Application* was submitted for decision.[6]

On May 2, 2016, the record was re-opened to receive certain evidence submitted by Claimant to Division's counsel in an e-mail dated December 28, 2015. The information was provided on May 4, 2016, with the *Division's Supplement to its Brief*. On May 5, 2016, the protest was resubmitted for decision.

FINDINGS OF FACT

Upon review of the file and records, including the recording of the hearing, the *Brief of the Account Maintenance Division*, the exhibits received into evidence and the supplemental information, the undersigned finds:

1. Claimant is a provider of cable broadband services, which includes internet, telephone, pay for view, and cablevision. *Refund Review* prepared by the Auditor on May 12, 2015, pp. 1 ("*Refund Review*").[7]

2. Claimant has cablecast head-end system locations in Enid, Stillwater and Muskogee, Oklahoma. *Brief of the Account Maintenance Division*, pp. 2, citing the annual corporate filings of Claimant's parent company.

3. On October 25, 2010, Claimant filed the *Application* for the period of January 1, 2009, through September 30, 2010, in the total amount of $47,260.04.[8] Exhibit A.[9]

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[4] 68 O.S. 2011, § 227(e).

[5] In an e-mail dated December 28, 2015, to counsel for the Division, Claimant's representative requested that the case be resolved without a formal hearing.

[6] *OAC* 710:1-5-38.

[7] Evidence officially noticed. *OAC* 710:1-5-36(a).

[8] The auditor notes in the *Refund Review* that the *Application* was found in a file cabinet in or around September, 2014.

[9] Exhibit A admitted at the hearing only included the *Application* itself. The records received from

4. In the letter of October 25, 2010, Claimant writes: "[t]hese exempt Oklahoma purchases consisted of * * * tangible personal property used by a licensed cable television operator in cable casting prior to cable distribution." *See*, note 9.

5. The auditor began the review by requesting copies of the purchase orders ("POs") for each line item of the spreadsheet which POs were provided on December 10, 2014. *Refund Review*, pp. 1.

6. The auditor notes that the spreadsheet did not separate the purchases by tax type, so the vendors' tax permits were used to determine the tax types. *Id*.

7. The auditor also notes that the spreadsheet did not identify the purchased items or how they were used in the cablecasting system, so the descriptions on the POs were used to identify the items and the General Ledger account descriptors were used to determine how the items were used. *Refund Review*, pp. 1-2.

8. The *Application* was separated into three (3) tax types: sales tax (STS); consumer use tax (SCU); and vendor use tax (SVU). *Refund Review*, pp. 2-3.

9. The STS refund claim totaled $27,327.97, of which $13,617.85 was approved for refund net remuneration and $13,396.95 was denied covering 11 invoices. *Refund Review*, pp. 2.

10. The 11 invoices were denied "[t]ax requested * * * was greater than what was remitted their vendor". Exhibit D; *Refund Review*, pp. 2.

11. The SCU refund claim totaled $563.64, of which nothing was approved for refund on a total of six (6) invoices. *Refund Review*, pp. 2.

12. The SCU invoices were denied "[t]his appears to be Texas sales maximum rate of 8.25%." Exhibit D; *Refund Review*, pp. 2.

13. The SVU refund claim totaled $19,368.41, of which $11,107.38 was approved for refund net remuneration and $8,077.91 was denied covering 167 invoices. *Refund Review*, pp. 2-3.

14. Thirty-two (32) of the 167 invoices were denied "[t]his would be part of the distribution after the Headend exempt", 85 of the invoices were denied "restocking of Parts and supplies used by CCA for installation, repair, and cable service and the remaining 40 invoices were denied "[t]ax amount requested * * * was greater than the Tax remitted by their vendor".

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the Division shows that the *Application* was accompanied by a letter dated October 25, 2010 from Claimant's representative, a *Power of Attorney* (Form BT-129), a CD with all applicable invoices and a spreadsheet detailing the purchase information, including: (1) vendor name; (2) invoice number and date; (3) merchandise amount; (4) sales tax amount; (5) freight; (6) ship to city, state and zip code; (7) state, county and city rate charged; (8) total refund requested; and (9) notes. Evidence officially noticed. *See*, note 7.

Exhibit D; *Refund Review*, pp. 2-3.

15. By three (3) separate letters dated June 11, 2015, the Division notified Claimant that all or a portion of the refund claim for each tax type had been denied. Exhibit B.

16. Claimant timely protested the refund denial. Exhibit C.

17. In response to the STS denials, Claimant wrote "[t]his was the sales tax amount paid to the vendor * * * [Claimant] cannot control the vendor's reporting practices for city/county sales tax and any adjustments made to their Oklahoma Sales Tax account".[10]

18. In response to the SCU denials, Claimant wrote: "[t]his tax amount was remitted directly by [Claimant], on the December 2009 Consumer's Use Tax Return". *See*, note 10.

19. In response to the SVU denials, Claimant did not provide a response to the "head-end" and "restocking" denials, but wrote in regard to the discrepancy between the amount of tax claimed and the tax reported and remitted: "[t]his was the sales tax amount paid to the vendor * * * [Claimant] cannot control the vendor's reporting practices for city/county sales tax and any adjustments made to their Oklahoma Sales Tax account". *Id*.

20. In an e-mail sent to Division's counsel on December 28, 2015, Claimant advised that it was no longer pursuing the denied SCU refund claims and withdrew the request for refund. Exhibit E.

21. In the same e-mail, Claimant wrote:

> Below is a summary of the response in the schedules for Sales and Vendor's Use Tax.
>
> **Sales Tax:** The entire denied amount was local tax for purchases made from VENDOR. The state amount on these transactions refunded. We communicated with VENDOR as to why there was insufficient local sales [tax] to be refunded. VENDOR provided us a letter indicating that they had a large credit carry forward during this period, additionally the tax was reported to the Oklahoma City jurisdiction. The letter they provided is also attached. We respectively [sic] request the denied amounts from VENDOR be reconsidered and refunded.
>
> **Vendor's Use:** There are certain transaction [sic] that are no longer being pursued for refund, for these transactions we respectively [sic] withdraw our request for refund. These transactions are identified as withdraw refund request. There are others where the auditor denied more tax than what was being requested for refund, stating that the local tax was

[10] Included in the audit package referred by the Division on August 25, 2015. Evidence officially noticed. *See*, note 7.

> not sufficient to be refunded. It appears when the auditor analyzed the schedule, lines could have been shifted resulting in an inflated denied amount. We respectively [sic] request the amounts requested for refund be reconsidered and refunded.

Exhibit E, emphasis original.

22. With respect to the SVU denied claims, the schedule attached to the e-mail reflects that Claimant's refund request was withdrawn in regard to "head-end" and "restocking" denials. Exhibit F.

23. The schedule also reflected that Claimant had attached a worksheet entitled "Refund Request Differences" in regard to the tax discrepancy denials. *Id*.

24. In response to the Refund Request Differences worksheet, the Division corrected the excel spreadsheet and advised that "the final numbers are still the same." Exhibit C to *Division's Supplement to its Brief*.

25. On January 7, 2016, the Division communicated the following to Claimant with respect to the refund request differences:

> As I explained, the system determines a denial/approval based on the requested claim for refund amount vs. the amount of tax remitted to the associated account. When a claim for refund is denied for an insufficient amount of tax remitted, the auditor calculates the difference between the approved amount and the remainder of the refund request. The denied amount is only calculated after the refund claim has been processed and doesn't change the approved amount.

26. The STS amount in controversy is $13,396.95. Exhibit D.

27. The SVU amount in controversy is $5,819.72. Exhibit F.

28. The aggregate amount in controversy is $19,216.67. Exhibits D and F.

ISSUES AND CONTENTIONS

The issue presented for decision is whether Claimant is entitled to a refund of city and county sales and use taxes paid to its vendors, but was not reported and remitted by the vendors to the Tax Commission.

The Division contends that Claimant has failed to sustain its burden of proving the Division erred in denying the refund claim. In support of this contention, the Division argues that Claimant failed to come forward with any evidence to show the city and county sales and

use taxes denied by the Division were paid to the state and consequently, a claim for refund of those taxes against the state cannot be maintained.

Claimant contends that the amounts of the city and county sales and use taxes they claimed in the *Application* are the amounts they paid to their vendors.

CONCLUSIONS OF LAW

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

1. Jurisdiction of the parties and the subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S. Supp. 2014, § 227(d).[11]

2. The refund of erroneously paid sales and use taxes from the state is governed by § 227 of the Uniform Tax Procedure Code. *See*, Section 26 of the Streamlined Sales and Use Tax Administration Act, 68 O.S. 2011, § 1354.26.[12] 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.[13]
>
> (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.
>
> (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

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[11] This section provides:

> If the 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 sixtieth 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.

[12] This section provides that "a consumer may seek a refund of incorrectly paid sales or use taxes directly from the state or it may seek a refund from its vendor." 68 O.S. 2011, § 1354.26(A).

[13] *But see*, 68 O.S. Supp. 2014, § 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.

> 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, 523. "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. In administrative proceedings, the taxpayer has the burden of proof to show by a preponderance of evidence[14] that the action or proposed action of the Oklahoma Tax Commission is incorrect, and in what respect. *OAC* 710:1-5-47; ***In re Adway Properties, Inc.***, 2006 OK CIV APP 14, ¶ 9, 130 P.3d 302, 304; ***Geoffrey, Inc. v. Oklahoma Tax Commission***, 2006 OK CIV APP 27, ¶ 25, 132 P.3d 632, 640. Failure to provide evidence which is sufficient to show an adjustment to the proposed assessment is warranted will result in the denial of the protest. ***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.

ANALYSIS

1. A claim for refund under the provisions of § 227 is clearly dependent on: (1) the payment or remittance of a tax collected by the Tax Commission to the state; and (2) the payment or remittance being in error due to a mistake of fact, or computation, or through the misinterpretation of law. No evidence has been presented to show the city and county sales and use taxes denied by the Division were remitted to the state. Accordingly, Claimant's claim for refund of those taxes cannot be maintained against the state.

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[14] The burden of proof standard is "preponderance of evidence." 2 Am.Jur.2d *Administrative Law* § 357. *See*, Oklahoma Tax Commission Order No. 91-10-17-061. "Preponderance of evidence" means "[e]vidence which is of greater weight or more convincing than the evidence offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary 1064 (5th ed. 1979). Each element of the claim must be supported by reliable, probative, and substantial evidence of sufficient quality and quantity as to show the existence of the facts supporting the claim are more probable than their nonexistence. 2 Am.Jur.2d *Administrative Law* § 357.

RECOMMENDATIONS

Based on the above and foregoing findings of fact and conclusions of law, it is recommended that the protest to the denial of the *Application* 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. 2014) 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."