

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2018-11-13-04 / NON-PRECEDENTIAL
ID: GP-18-020-K
DATE: NOVEMBER 13, 2018
DISPOSITION: DENIED
TAX TYPE: GROSS PRODUCTION
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 10th day of October, 2018, appended hereto, together herewith shall constitute the Order of the Commission.

SO ORDERED

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

NOW on this 10th day of October, 2018, the above styled and numbered cause comes on for decision under assignment regularly made by the Oklahoma Tax Commission to ALJ, Administrative Law Judge. Claimant, COMPANY is represented by ATTORNEY, Attorney at Law, FIRM. The Compliance Division (“Division”) of the Oklahoma Tax Commission is represented by DGC, Deputy General Counsel, and AGC, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

On July 17, 2017, Claimant filed an Application for Certification Economically at Risk Lease and a Gross Production 841/495 Refund Application (“Application”) on the lease in question for the production periods inclusive of January, 2016 through December, 2016. By letter dated April 25, 2018, the Division notified Claimant that the Application had been disallowed due to the untimely filing of the same. Claimant timely filed a demand for hearing on or about June 18, 2018.

On June 21, 2018, the demand for hearing and concomitant records of the Division were referred to the Office of the Administrative Law Judges to initiate proceedings pursuant to the

Uniform Tax Procedure Code¹ and the Rules of Practice and Procedure before the Office of Administrative Law Judges².

A hearing was scheduled for August 14, 2018, by *Notice of Hearing* issued June 25, 2018.³ The notice was returned: “not deliverable” and was re-mailed on July 3rd, 2018. A request to continue the hearing was received by e-mail from the Claimant on August 2, 2018. The request was granted and the hearing was re-scheduled for September 11, 2018.

The *Compliance Division’s Motion for Summary Disposition and Brief in Support* (“*Motion*”) was filed August 22, 2018, with Exhibits A through D attached thereto.⁴ By letter dated August 23, 2018, Claimant was notified that a written statement in opposition to the *Motion* was due within fifteen (15) days of service of the same and that the hearing scheduled for September 11, 2018, would be limited to oral argument.⁵ On August 23, 2018, the *Compliance Division’s Amended Motion for Summary Disposition and Brief in Support* (“*Amended Motion*”) was filed with the Affidavit of Andrea Welsh and Exhibits A through D attached thereto. Claimant did not file a response in opposition to the *Motion* or *Amended Motion*.

Oral argument was held as scheduled. Claimant did not appear. On September 20, 2018, the record was closed and the protest submitted for decision.⁶

FINDINGS OF FACT

Upon review of the file and records, including the digital recording of oral argument, the *Amended Motion* and attached exhibits, and Claimant’s correspondence filed August 10, 2018, the undersigned finds:

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 68 O.S. Supp. 2016, § 227(e).

⁴ *OAC* 710:1-5-38.1.

⁵ *OAC* 710:1-5-38.1(3) and (5).

⁶ *OAC* 710:1-5-38(b)(6) and 710:1-5-39(a).

1. The facts material to the disposition of the protest are not in dispute and the issue is one of law.

2. The material facts as set forth in the *Amended Motion*, STATEMENT OF FACTS⁷, are:

1. On July 17, 2017, Claimant filed its Gross Production Claim for Refund (“Claim for Refund”) for the amount of \$15,617.98.

2. On July 18, 2017, Division received the Claim for Refund.

3. On April 25, 2018, Division sent Claimant a letter denying its Claim for Refund.

4. On June 18, 2018, Claimant emailed Division a demand for hearing on the denial of the Claim for Refund.

5. This protest is properly before the Administrative Law Judge.

3. The Claim for Refund is limited to production from an economically at-risk oil or gas lease in the calendar year ending December 31, 2016, and the gross production tax reporting periods of January, 2016 through December, 2016. Exhibit B.

4. The amount in controversy is \$15,617.98.

ISSUES AND CONTENTIONS

The dispositive issue is whether the Claim for Refund of the gross production taxes remitted on production from the economically at-risk oil or gas lease in the calendar year ending December 31, 2016, was timely filed.

Claimant does not dispute that the Claim for Refund was filed after the deadline. Claimant contends that lack of due notice to the passage of the new law and reliance on the Division’s website that no refund claims would be accepted prior to July 1, led to the untimely filing of the claim for the 2016 production. Claimant argues that there was no time period in which to file a claim for the 2016 production given the legislation was approved on May 25, 2017, the deadline for filing claims was set at July 1, 2017 and the Division’s website indicated refund claims were not to be filed prior to July 1.

⁷ All references to exhibits are omitted.

The Division contends that the Claim for Refund for the 2016 production from the economically at-risk oil or gas lease is statutorily barred since it was filed after July 1, 2017. The Division argues that the proposition Claimant had insufficient notice of the change to the filing requirement is without merit since the law changing the deadline was effective July 1, 2016, not May 25, 2017. The Division further argues that the Commission is under no obligation to notify taxpayers of changes in the tax laws, citing 68 O.S., § 257.

CONCLUSIONS OF LAW

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

I. JURISDICTION AND BURDEN OF PROOF

1. Jurisdiction of the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S. Supp. 2016, § 227(d).⁸

2. The taxpayer has the burden of proof to show 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, 130 P.3d 302; *Geoffrey, Inc. v. Oklahoma Tax Commission*, 2006 OK CIV APP 27, 132 P.3d 632. If the taxpayer fails to prove a prima facie case, the protest may be denied solely on the grounds of failure to prove sufficient facts which would entitle the taxpayer to the requested relief. *OAC 710:1-5-47; 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.

3. The burden of proof standard is “preponderance of evidence.” 2 Am.Jur.2d *Administrative Law* § 357. “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

⁸ This subsection 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

as a whole shows the fact sought to be proved is more probable than not * * * evidence which is more credible and convincing to the mind * * * that which best accords with reason and probability.” 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.

4. An order of the Tax Commission must be supported by substantial evidence. *Dugger v. State ex rel. Oklahoma Tax Commission*, 1992 OK 105, 834 P.2d 964. Likewise, the audit upon which a portion of the record is formed and order issued, must be supported by substantial evidence. Oklahoma Tax Commission Order No. 2003-07-22-09, 2003 WL 2347117.

5. An audit is supported by substantial evidence when an evidentiary foundation for the audit has been established. Usually the evidentiary foundation will be established by the records reviewed by the auditor. Where an evidentiary foundation has been established, the taxpayer must prove the action of the Tax Commission in assessing the tax is incorrect, and in what respect. *OAC 710:1-5-47*; *Enterprise Management Consultants, Inc.*, supra. However, where an evidentiary foundation has not been laid or the records upon which the audit is based establish no basis for assessing a tax, the audit and assessment in the initial instance cannot be sustained as supported by substantial evidence. *Dugger*, supra.

II. ECONOMICALLY AT-RISK OIL OR GAS LEASE – TAX EXEMPTIONS

1. The economically at-risk oil or gas lease tax exemptions (“Tax Exemption”) was first enacted in 2005. S.B. No. 309; 2005 Okla. Sess. Law Serv. Ch. 436, § 1. As enacted, § 1001.3a of the Gross Production Tax Code⁹ provided in part:

A. As used in this section:

1. “Economically at-risk oil or gas lease” means any oil or gas lease operated at a net loss or at a net profit which is less than the total gross production tax remitted for such lease during the previous calendar year;

⁹ 68 O.S., § 1001 et seq.

2. "Lease" shall be defined as in Section 1001.2 of Title 68 of the Oklahoma Statutes.

B. When certified as such pursuant to the provisions of this section, production from an economically at-risk oil or gas lease shall be eligible for an exemption from the gross production tax levied pursuant to subsection B of Section 1001 of Title 68 of the Oklahoma Statutes for production on such lease during the previous calendar year in the following amounts:

1. If the gross production tax rate levied pursuant to subsection B of Section 1001 of Title 68 of the Oklahoma Statutes was seven percent (7%), then the exemption shall equal six-sevenths (6/7) of the gross production tax levied;

2. If the gross production tax rate levied pursuant to subsection B of Section 1001 of Title 68 of the Oklahoma Statutes was four percent (4%), then the exemption shall equal three-fourths (3/4) of the gross production tax levied;

3. If the gross production tax rate levied pursuant to subsection B of Section 1001 of Title 68 of the Oklahoma Statutes was one percent (1%), no exemption shall apply.

C. For all production exempt from gross production taxes pursuant to this section, a refund of gross production taxes paid for production in the previous calendar year in the amounts specified in this subsection shall be issued to the well operator or a designee. The refund shall not be claimed until after July 1 of the year subsequent to the year of production.

* * * * *

F. The Tax Commission shall have sole authority to determine if an oil or gas lease qualifies for certification as an economically at-risk oil or gas lease and shall make the determination within sixty (60) days after an application is filed for economically at-risk oil or gas lease status. The Tax Commission shall promulgate rules governing the certification process.

G. Gross production tax exemptions under the provisions of this section shall be limited to production from calendar years 2005, 2006 and 2007.

(Emphasis added).

2. In 2007 and 2010, the Tax Exemption was extended to calendar years "2008, 2009, and 2010", H.B. No. 1718; Laws 2007, c. 260, § 2, eff. July 1, 2007; and calendar years "2009, 2010, 2011, 2012 and 2013", S.B. No. 1882; Laws 2010, c. 252, § 2, emerg. eff. May 10, 2010, respectively.

3. In 2014, the Tax Exemption was amended by not allowing an exemption if the gross production tax rate was two percent (2%) in subsection (B)(3), limiting the window for

existing claims to December 31, 2015 in subsection (G) and future claims to an eighteen month period after becoming first available in subsection (H). Remaining unchanged by the amendatory language was the first day the refund became available under subsection (C). H.B. No. 2562; Laws 2014, c. 346, § 2, eff. July 1, 2014. As amended, subsections (C), (G) and (H) of the Tax Exemption provided:

C. For all production exempt from gross production taxes pursuant to this section, a refund of gross production taxes paid for production in the previous calendar year in the amounts specified in this subsection shall be issued to the well operator or a designee. The refund shall not be claimed until after July 1 of the year subsequent to the year of production.

* * * * *

G. Except as provided in subsection H of this section, gross production tax exemptions under the provisions of this section shall be limited to production from calendar years 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012 and 2013; provided, no claims for refund for calendar years provided in this subsection shall be paid on or after December 31, 2015.

H. Gross production tax exemptions claimed under the provisions of this section shall be limited to production from calendar years 2014 through 2020; provided, no claims for refunds for the calendar years 2014 through 2020 shall be claimed or paid more than eighteen (18) months after the first day of the fiscal year during which the refund is first available.

4. In 2016, the Legislature rewrote the Tax Exemption. S.B. No. 1577; Laws 2016, c. 383, § 1, eff. July 1, 2016. As amended, § 1001.3a (with additions highlighted and deletions over-scored) provided in part:

A. As used in this section:

1. ~~“Economically Prior to January 1, 2015, “economically~~ at-risk oil or gas lease” means any oil or gas lease operated at a net loss or at a net profit which is less than the total gross production tax remitted for such lease during the previous calendar year; ~~and~~

2. **On or after January 1, 2015, “economically at-risk oil or gas lease” means any oil or gas lease with one or more producing wells with an average production volume per well of ten (10) barrels of oil or sixty (60) MCF of natural gas per day or less operated at a net loss or at a net profit which is less than the total gross production tax remitted for such lease during the previous calendar year; and**

3. “Lease” shall be defined as in Section 1001.2 of Title 68 of the Oklahoma Statutes.

* * * * *

C. For all production exempt from gross production taxes pursuant to this section, a refund of gross production taxes paid for production in the previous calendar year in the amounts specified in ~~this subsection B of this section~~, **subject to the limitations specified in subsection D of this section**, shall be issued to the well operator or a designee. ~~The~~ **For production in calendar years ending on or before December 31, 2015**, the refund shall not be claimed until after July 1 of the year ~~subsequent to~~ **following** the year of production. **For production in the calendar year ending December 31, 2016, and each year thereafter, the refund shall be claimed before July 1 of the year following the year of production. The Tax Commission shall not accept or pay any claim for refund filed on or after July 1 of each year following the year of production.**

* * * * *

~~F.~~ **G.** The Tax Commission shall have sole authority to determine if an oil or gas lease qualifies for certification as an economically at-risk oil or gas lease ~~and shall make the determination within sixty (60) days after an application is filed for economically at-risk oil or gas lease status.~~ The Tax Commission shall promulgate rules governing the certification process.

~~G.~~ **H.** Except as provided in subsection ~~H I~~ of this section, gross production tax exemptions under the provisions of this section shall be limited to production from calendar years 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012 and 2013; provided, no claims for refund for calendar years provided in this subsection shall be paid on or after December 31, 2015.

~~H.~~ **I.** Gross production tax exemptions claimed under the provisions of this section shall be limited to production from calendar years 2014 through 2020; provided, no claims for refunds for the calendar years 2014 ~~through 2020~~ **and 2015** shall be claimed or paid more than eighteen (18) months after the first day of the fiscal year during which the refund is first available. **For production in calendar years 2016 through 2020, no claim for refund filed on or after July 1 following the calendar year shall be claimed or paid.**

5. In 2017, the Legislature eliminated the Tax Exemption for production occurring subsequent to December 31, 2016 and provided for a thirty-six month payout of rebates on claims for production periods ending on or before December 31, 2016. H.B. No. 2377; Laws 2017, c. 336, § 2, eff. July 1, 2017. The current version of the Tax Exemption (with additions highlighted and deletions over-scored) provides in part:

C. For all production exempt from gross production taxes pursuant to this section, a refund of gross production taxes paid for production in the previous calendar year in the amounts specified in subsection B of this section, subject to

the limitations **and provisions** specified in ~~subsection~~ **subsections D and J** of this section, shall be issued to the well operator or a designee. For production in calendar years ending on or before December 31, 2015, the refund shall not be claimed until after July 1 of the year following the year of production. For production in the calendar year ending December 31, 2016, ~~and each year thereafter~~, the refund shall be claimed before July 1 ~~of the year following the year of production~~, **2017**. The Tax Commission shall not accept or pay any claim for refund filed on or after July 1 ~~of each year following the year of production~~, **2017**.

* * * * *

I. Gross production tax exemptions claimed under the provisions of this section shall be limited to production from calendar years 2014 ~~through 2020~~, **2015 and 2016**; provided, no claims for refunds for the calendar years 2014 and 2015 shall be claimed or paid more than eighteen (18) months after the first day of the fiscal year during which the refund is first available. For production in calendar ~~years~~ year 2016 ~~through 2020~~, no claim for refund filed on or after July 1 ~~following the calendar year~~, **2017**, shall be claimed or paid.

6. Pursuant to its authority to administer and enforce each and every provision of any state tax law, the Tax Commission promulgated *OAC 710:45-9-82*. 68 O.S. 2011, §203.

This rule provides:

The exemption for economically at risk oil and gas leases is limited to calendar years 2005 through 2016, with each year being claimed separately. No claims for rebates regarding the economically at risk leases shall be permitted after December 31, 2015 for production periods occurring between calendar years 2005 through 2013. No claims for rebates regarding the economically at risk leases for production periods occurring between calendar years 2014 through 2015 shall be claimed or paid more than eighteen (18) months after the date that the refund is first available. Claims for rebates regarding economically at risk leases for production periods ending on or before December 31, 2015 shall not be claimed until after July 1 of the year following the year of production. Claims for rebates regarding economically at risk leases for production occurring in calendar year 2016 shall be claimed prior to July 1, 2017. Any claims for refunds received on or after July 1, 2017 will not be accepted by the Tax Commission.

III. EQUITABLE ESTOPPEL

1. In Oklahoma Tax Commission Order No. 2017 05 04 08, the Commission declined an invitation to venture outside Oklahoma and the Tenth Circuit to determine the requirements for estoppel against the government, instead relying on *Malonek v. United States*, 923 F.Supp. 1462 (D. Wyo. 1996), which held at 1467:

In [the Tenth Circuit], the requirements for estoppel against the government are a bit more strict. They include the traditional elements of equitable estoppel, which are: (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that his conduct will be acted upon or must so act that the party asserting the estoppel has the right to believe that it was so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must rely on the other party's conduct to his injury. *Penny v. Giuffrida*, 897 F.2d 1543, 1545-46 (10th Cir. 1990); *Che-Li Shen v. INS*, 749 F.2d 1469, 1473 (10th Cir. 1984). *In addition, a party seeking to estop the government must prove that there was some sort of 'affirmative misconduct' on the part of the government or its agents. Penny*, 897 F.2d at 1546.

The Court found that the failure of the IRS to inform the taxpayers that the statute of limitations had expired indicated that the IRS at most was negligent, perhaps even recklessly negligent, but negligence even reckless negligence, is not affirmative misconduct. *Id.* at 1467-68.

2. “Although the principle is harsh, there is no room for equitable considerations in the administration of tax laws.” *Duncan Medical Services v. Oklahoma Tax Commission*, 1994 OK 91, 911 P.2d 247, 250, citing *Western Auto Supply Company v. Oklahoma Tax Commission*, 1958 OK 144, 328 P.2d 414, 420. General principles of equity may not override statutory requirements for timely filing of tax refund claims. Oklahoma Tax Commission Order No. 2006-03-23-07 (Prec.). See, *Republic Petroleum Corp. v. United States*, 613 F.2d 518, 527 (5th Cir. 1980). The levying of taxes is purely statutory, and tax statutes must be administered as written. *Western Auto*, *supra* at ¶ 15.

3. Estoppel generally does not apply against the state acting in its sovereign capacity because of unauthorized acts of its officers, *State ex rel. Cartwright v. Dunbar*, 1980 OK 15, 618 P.2d 900; or because of mistakes or errors of its employees, *State ex rel. Cartwright v. Tidmore*, 1983 OK 116, 674 P.2d 14; *State ex rel. Oklahoma Tax Commission v. Emery*, 1982 OK CIV APP 13, 645 P.2d 1048. Application of estoppel is not allowed against state, political subdivisions, or agencies, unless the facts and circumstances implicate the interposition of estoppel would further some prevailing principle of public policy or interest. *Tice v. Pennington*, 2001 OK CIV APP 95, 30 P.3d 1164; *Burdick v. Independent School District*, 1985 OK 49, 702 P.2d 48, 26 Ed. Law Rep. 486. 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. *Hiland Dairy Foods Company, LLC. v. Oklahoma Tax Commission*, 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, 64.

4. “He who seeks equity must do equity.” *Emery, supra* at 1051. “Basic maxims of equity teach that one who would have equity must do equity, and that those who seek equity must not slumber on their rights.” *Malonek, supra* at 1468.

ANALYSIS

1. The tax exemption for economically at-risk oil or gas leases and the procedure for claiming the rebate or refund of the gross production taxes remitted on production from an economically at-risk oil or gas lease are governed by the provisions of § 1001.3a of the Gross Production Tax Code. Where a statute creates both a right to recover tax payments and a remedy to enforce the recovery, the statutory remedy is exclusive. *Apache Corp. v. Oklahoma Tax Commission*, 2004 OK 48, ¶ 10, 98 P.3d 1061, 1064, citing *R.R. Tway, Inc. v. Oklahoma Tax Commission*, 1995 OK 129, 910 P.2d 972, 978. The claim for refund filed by Claimant after July 1, 2017, for production from an economically at-risk oil or gas lease in the calendar year ending December 31, 2016, is statutorily barred.

2. Claimant mistakenly cites the wrong version of the law requiring the refund to be claimed before July 1, for the calendar year 2016 production. Senate Bill No. 1577 added this requirement to the law. This bill was approved June 6, 2016, and became effective July 1, 2016, one year prior to the deadline for claiming refunds for production in the calendar year ending December 31, 2016. Consequently, there was a time period in which to claim a refund for the calendar year 2016 production.

3. General principles of equity may not override statutory requirements for timely filing of tax refund claims, *Republic Petroleum Corp. v. United States*, 613 F.2d 518 527 (5th

Cir. 1980); and the Tax Commission is under no obligation to notify taxpayers of changes in the state tax laws, 68 O.S. 2011, § 257.

RECOMMENDATIONS

Based on the above and foregoing, it is recommended that the protest 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 2014) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002).