

**JURISDICTION:** OKLAHOMA TAX COMMISSION  
**CITE:** 2018-11-20-11 / NON-PRECEDENTIAL  
**ID:** CR-18-017-K  
**DATE:** NOVEMBER 20, 2018  
**DISPOSITION:** DISMISSED  
**TAX TYPE:** USE  
**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 19<sup>th</sup> 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**

#### **(RECOMMENDATION OF DISMISSAL)**

Now on this 19<sup>th</sup> 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 VICE PRESIDENT, Vice President of Claimant. The Account Maintenance Division of the Oklahoma Tax Commission ("Division") is represented by FDGC, First Deputy General Counsel and AGC, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

#### **STATEMENT OF THE CASE**

On May 19, 2015, Claimant filed an amended vendors use tax return for the December, 2014 reporting period showing a liability less than the original return of \$6,693.99. On February 24, 2016, the Division received Claimant's Application for Credit or Refund of State and Local Sales or Use Tax in the amount of \$6,693.99 for the December, 2014 reporting period. By letter dated September 11, 2017, the Division notified Claimant that the amended return could not be processed without supporting documentation to validate the return. The letter also informed Claimant that if the information was not provided within 30 days, a formal denial would issue. The formal denial

issued January 4, 2018. Claimant formally requested a hearing by an unverified letter dated July 18, 2018.

On July 26, 2018, the protest and Division's file were referred to the Office of the Administrative Law Judges to initiate proceedings under the Uniform Tax Procedure Code<sup>1</sup> and the Rules of Practice and Procedure before the Office of the Administrative Law Judges<sup>2</sup>. The protest was docketed as Case No. CR-18-017-K.

A hearing on the protest was scheduled for September 13, 2018, by *Notice of Hearing* issued July 31<sup>st</sup>, 2018.<sup>3</sup> On September 4, 2018, the Division filed a motion to dismiss and brief in support with Exhibits A through D attached thereto. By *Order Setting Hearing on Motion*, the hearing scheduled for September 13, 2018 was stricken and the motion to dismiss was set for hearing on September 26, 2018, in accordance with *OAC* 710:1-5-46(d).

A closed hearing on the motion was held as scheduled.<sup>4</sup> Claimant did not attend the hearing, but responded to the *Notice of Hearing* with an e-mail outlining its position with several attachments supporting the statements. Claimant's response to the *Notice of Hearing* with attachments 1 through 10, the *Account Maintenance Division's Motion to Dismiss and Brief in Support* with Exhibit A through D ("*Motion*") and a copy of the envelope regarding the mailing of the *Order Setting Hearing on Motion* and showing additional postage due were marked and admitted into evidence as ALJ's Exhibits 1 through 3, respectively. The Division stood on its *Motion* and no one was called to testify. Upon conclusion of counsel's remarks regarding the reason for admission of ALJ's Exhibit 3, the record closed and the protest to the denial of the refund claim submitted for decision.<sup>5</sup>

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<sup>1</sup> 68 O.S. 2011, § 201 et seq., as amended.

<sup>2</sup> Rules 710:1-5-20 through 710:1-5-49 of the *Oklahoma Administrative Code* ("*OAC*").

<sup>3</sup> 68 O.S. Supp. 2016, § 227(e).

<sup>4</sup> Confidentiality was invoked by the Court on behalf of Claimant. 68 O.S. 2011, § 205.

<sup>5</sup> *OAC* 710:1-5-39(a).

**FINDINGS OF FACT**

Upon review of the file and records, including the digital recording of the hearing, the exhibits received into evidence and the pleadings of the parties, undersigned finds:

1. On May 19, 2015, Claimant filed an amended vendors use tax return for the December, 2014 reporting period showing a liability less than the original return of \$6,693.99. ALJ's Exhibit 1, attachments 1 and 2; ALJ's Exhibit 2, Exhibit B<sup>6</sup>.

2. On February 24, 2016, the Division received Claimant's Application for Credit or Refund of State and Local Sales or Use Tax ("*Application*") in the amount of \$6,693.99 for the December, 2014 reporting period. ALJ's Exhibit 1, attachment 3; ALJ's Exhibit 2, Exhibits A and C<sup>7</sup>.

3. By letter dated September 11, 2017, the Division notified Claimant that the amended return could not be processed without supporting documentation to validate the return, inclusive of: (1) explanation for all changes; (2) copies of invoices related to changes; (3) copies of all credit memos related to changes; and (4) all additional documentation to validate the amended return. ALJ's Exhibit 1, attachment 6; ALJ's Exhibit 2, Exhibit B.

4. The September 11<sup>th</sup> letter informed Claimant that if the requested information was not provided within 30 days, a formal denial would issue. *Id.*

5. The September 11<sup>th</sup> letter was mailed to Claimant's address as it appears on the records of the Division and the *Application* filed by Claimant. *Id.*; ALJ's Exhibit 1, attachment 3; ALJ's Exhibit 2, Exhibit A.

6. By letter dated January 4, 2018, the Division notified Claimant that the additional information previously requested to substantiate the refund had not been received and that the request for refund was denied. ALJ's Exhibit 1, attachment 6; ALJ's Exhibit 2, Exhibit C.

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<sup>6</sup> This exhibit acknowledges receipt of the amended return.

<sup>7</sup> This exhibit acknowledges receipt of the *Application*.

7. The January 4<sup>th</sup> letter was mailed to Claimant's address as it appears on the records of the Division and the *Application* filed by Claimant. *Id.*

8. The January 4<sup>th</sup> letter informed Claimant that "you may within sixty (60) days file a written protest and request a hearing[.]" *Id.*

9. By an unverified letter dated July 18, 2018, Claimant made a formal hearing request in regard to the denial of the refund. ALJ's Exhibit 2, Exhibit D.

### ISSUE AND CONTENTIONS

The issue presented for decision is whether Claimant's demand for hearing should be dismissed for lack of jurisdiction.

Claimant does not dispute that the demand for hearing was filed out of time. Claimant asserts that they did not receive the letter denying the refund request until July 18, 2018, and suggests that possibly the right amount of postage was not put on the letter as demonstrated by ALJ's Exhibit 3. Claimant requests reconsideration of the denial of the refund due to the circumstances of this particular matter.

The Division seeks the dismissal of this matter for lack of jurisdiction since the demand for hearing was not filed within the time provided by statute.

### 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, including the dismissal thereof is vested in the Oklahoma Tax Commission. O.S. Supp. 2016, § 227(d); *OAC* 710:1-5-46(c) and (d).

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 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 (5<sup>th</sup> 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.

## II. CLAIMS FOR REFUND OF ERRONEOUSLY PAID TAX

1. The refund of any erroneously paid tax collected by the Tax Commission is governed by § 227 of the Uniform Tax Procedure Code. 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.<sup>8</sup>

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(c) Said claim so filed with the Tax Commission, except for an amended report or return, 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 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

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<sup>8</sup> *But see*, § 227(f) providing 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.

correctness of his claim and the claim for refund shall be approved or denied by written notice to the taxpayer.

(d) 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.

2. “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, head note 1. Generally, when a statute creates both a right to recover tax payments and a remedy for enforcement of the recovery, 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. As stated in *Apache, supra* at ¶ 11, “[t]his Court has previously declined to interpose equity to block the requirements of mandatory procedural tax statutes”, citing *R.R. Tway, Inc., supra* and *Whig Syndicate, Inc. v. Keyes*, 1992 OK 95, 836 P.2d 1283, 1288.

### III. NOTICE

1. “Any notice required by [the Uniform Tax Procedure Code], or any state tax law, to be given by the Tax Commission shall be in writing and may be served personally or by mail.” 68 O.S. 2011, § 208. Section 208 further provides:

If mailed, it shall be addressed to the person to be notified at the last-known address of such person. As used in this article or any other state tax law, ‘last-known address’ shall mean the last address given for such person as it appears on the records of the division of the Tax Commission giving such notice, or if no address appears on the records of that division, the last address given as appears on the records of any other division of the Tax Commission. If no such address appears, the notice shall be mailed to such address as may reasonably be obtainable. If the Tax Commission receives an address from the United States Postal Service as a result of a change of address submitted to the United States Postal Service, ‘last-known address’ shall mean the address provided to the United States Postal Service. The mailing of such notice shall be presumptive evidence of receipt of the same by the person to whom addressed. If the notice has been mailed as provided in this section, failure of the person to receive such notice shall neither invalidate nor be grounds for invalidating any action taken pursuant thereto, nor shall such failure relieve any taxpayer from any tax or addition to tax or any interest or penalties thereon.

#### IV. DISMISSAL OF CASE

1. When a written protest to a proposed assessment is not filed within the sixty (60) day period provided by 68 O.S. 2011, § 221(C) or within the period as extended by the Tax Commission under 68 O.S. 2011, § 221(F), the proposed assessment, without further action of the Tax Commission, becomes final and absolute. 68 O.S. 2011, § 221(E). Similarly, when a demand for hearing on a denied refund claim is not filed within the sixty (60) day period provided by 68 O.S. Supp. 2016, § 227(d), the claim for refund is barred without further action of the Tax Commission. Where either a written protest or demand for hearing is not filed within the time period provided by statute, the Tax Commission is without jurisdiction to hear the appeal. *Matter of Phillips Petroleum Co.*, 1982 OK 112, 652 P.2d 283, fn. 1; *OAC 710:1-5-46(c)*.

2. A protest or demand for hearing may be dismissed voluntarily, *OAC 710:1-5-46(a)*; for mootness, *OAC 710:1-5-46(b)*; or for lack of jurisdiction, *OAC 710:1-5-46(c)*. The dismissal for lack of jurisdiction provides: “[t]he Tax Commission is without jurisdiction to consider a protest that is not filed within the time provided by statute.” *Id.*

#### **ANALYSIS**

1. Claimant admits that they received the September 11<sup>th</sup> letter requesting information/documentation to substantiate the refund claim. ALJ’s Exhibit 1, attachment 9. Evidence in the Division’s file<sup>9</sup> shows on June 28<sup>th</sup>, 2016, Claimant’s representative faxed to the Division the invoice and credit memo on the transaction that caused Claimant to file the claim for refund<sup>10</sup>. On June 28<sup>th</sup>, 2016, the auditor notes that Claimant’s representative was to meet with Claimant’s tax preparation firm to determine why there were numerous differences in the net sales amounts reported for cities and counties included on the original and amended returns. On October

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<sup>9</sup> Auditor’s notes regarding conversations with Claimant’s representative. ALJ’s Exhibit 4, evidence by official notice. *OAC 710:1-5-36(a)*.

<sup>10</sup> In the transaction, Claimant erroneously included a shipping charge of \$86,752.00 on an order with an extended price of \$4.99 and erroneously charged taxes on the shipping charge in the amount of \$7,157.44, not excluding tax on the cost of the goods sold. ALJ’s Exhibits 5, 6 and 7, evidence by official notice. *OAC 710:1-5-36(a)*.

9, 2017, after the September 11<sup>th</sup> letter was mailed, the auditor again notes that Claimant's representative was to meet with their tax preparation firm and have them explain the differences on the amended return.

2. The letter denying Claimant's claim for refund was mailed to Claimant in accordance with § 208 of the Uniform Tax Procedure Code at Claimant's last-known address as it appeared on the records of the Division and the *Application* filed by Claimant. Mailing of the letter is presumptive evidence of receipt of the same by Claimant and no evidence other than the unverified statement of Claimant's representative has been offered to rebut the presumption. Upon expiration of the sixtieth day from the date the letter of denial was mailed without appeal by demanding a hearing, the claim for refund was statutorily barred. The Tax Commission is without jurisdiction to hear the appeal. *OAC 710:1-5-46(c)*.

### RECOMMENDATIONS

Claimant's hearing request should be dismissed.

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).