

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 97-04-15-007 / PRECEDENTIAL
ID: CR-94-016
DATE: APRIL 15, 1997
DISPOSITION: DENIED
TAX TYPE: SALES / CLAIM FOR REFUND
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, the Commission hereby adopts the Findings of Fact, Conclusions of Law and Recommendation made and entered by the Administrative Law Judge on July 17, 1996, and the same, which are appended hereto, together herewith shall constitute the Order of the Commission.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above styled and numbered cause comes on for decision pursuant to Rule 710:1-5-38 of the Oklahoma Administrative Code. COMPANY (hereinafter "Claimant") is represented by ATTORNEY, Attorney at Law, FIRM. The Business Tax Division of the Tax Commission (hereinafter "Division") is represented by OTC ATTORNEY, Deputy General Counsel, General Counsel's Office of the Tax Commission.

Upon review of the file and records, including the Stipulation of Facts and attached exhibits, and the briefs of the parties, the undersigned finds:

FINDINGS OF FACT

A. The parties stipulate to the following:

1. By letter dated April 13, 1994, [Claimant] requested a refund of sales and use tax in the amount of Twenty-eight Thousand Nine Hundred Seventy-nine Dollars and Seventy-six Cents (\$28,979.76) for the period of May 1, 1990 through December 31, 1992. Attached to said correspondence was a schedule which summarized the items upon which [Claimant] alleges it erroneously paid sales tax to one of its vendors, VENDOR. The letter and schedule are attached [to the joint stipulations of fact] as Exhibit "A".

2. The Division, by letter dated June 20, 1994, advised [Claimant] that the period of May, 1990 through January, 1991 would be excluded from its request pursuant to Section 227(b) of Title 68. The letter is attached [to the joint stipulations of fact] as Exhibit "B".

3. By letter dated June 28, 1994, the Division denied [Claimant's] request for refund. A copy of the letter is attached [to the joint stipulations of fact] as Exhibit "C".

4. [Claimant], by letter dated July 29, 1994 protested the Division's denial of its claim for refund. A copy of the letter is attached [to the joint stipulations of fact] as Exhibit "D".

5. During the period of May, 1990 through December 31, 1992, [Claimant] contracted with VENDOR, a sign manufacturer for the construction and installation of various types of signs and other related items, i.e., building sign, pole sign, sign face, building letter, trapezoid sign, double face sign, single fact [sic] sign, menu cabinets, neon sign, hi-rise sign or letter face. A copy of the independent contracting agreement is indicia of the verbal agreement referenced above, which is attached [to the joint stipulations of fact] as Exhibit "E".

A copy of a [sic] illustration and photograph setting forth the physical characteristics of certain types of signs and other related items involved herein is attached [to the joint stipulations of fact] as Exhibit "F".

6. During the period of May, 1990 through December, 1992 VENDOR invoiced [Claimant] for the purchase price, cost of installation and tax for various types of signs and other related items, i.e., building sign, pole sign, sign face, building letter, trapezoid sign, double face sign, single face sign, menu cabinet, neon signs, hi-rise sign or letter face. Copies of invoices [are] attached [to the joint stipulations of fact] as Exhibit "H".

7. In addition, during that period, VENDOR invoiced [Claimant] for various services performed, including but not limited to, the repair, recondition and removal of the various signs and their component parts. Copies of representative invoices are included in Exhibit "H".

8. During the period of May 1, 1990 through December 31, 1992, [Claimant] leased the tract of land with building upon which the signs at issue are located from LESSOR. A copy of the lease agreement is attached [to the joint stipulations of fact] as Exhibit "G".

9. On November 22, 1985, [Claimant] filed, with the Oklahoma Secretary of State, a Second Amendment to its Articles of Incorporation that said corporation would be named NEW COMPANY NAME 1 and NEW COMPANY NAME 2. A copy of the amendment is attached [to the joint stipulations of fact] as Exhibit "I".

B. Additional findings of fact:

1. Claimant filed its claim for refund of the sales tax paid on the purchase price, cost of installation and various services performed, including but not limited to, the repair, recondition and removal of the various types of signs and other related items and component parts pursuant to the provisions of 68 O.S. Supp. 1993, § 227. See, Exhibit A.

2. The parties stipulate that the tracts of land with buildings upon which the signs at issue are located are leased by Claimant from LESSOR. See Joint Stipulations of Fact.

3. The term of the lease is twelve (12) years beginning the 26th day of December, 1984. See, Exhibit G.

4. The lease agreement provides, "[A]t the expiration of the term, or sooner termination of said lease and term . . . all trade fixtures and equipment, including, but not limited to, shelving, ice cream and meat cabinets, cases, dairy doors, refrigeration equipment and machinery, and signs, neon or otherwise, installed and placed on the premises by and at the expense of Lessee, shall remain the property of the Lessee and Lessee shall have the right to remove the same, provided it is not in default in performance of its covenants hereunder and provided that it repair the damage caused by any such removal." See, Exhibit G.

5. Invoice No. 17166 from VENDOR (hereinafter "VENDOR"), dated February 13, 1991, requires the removal of an existing 10' x 14' trapezoid sign at Store #XX, the reconditioning of the sign and the installation and connection of the sign at Store #XX. See, Exhibit H.

6. Invoice No. 17380 from VENDOR, dated May 24, 1991, requires the removal of a 10' x 14' street sign at Store #XX, the refinishing, reconditioning, cleaning, touch-up and repair of the sign and installation of the sign at store #XXXX. See, Exhibit H.

7. Invoice No. 18154 from VENDOR, dated May 12, 1992, requires the removal of a 10' x 14' trapezoid sign at ADDRESS in CITY, the repair and repainting of the sign as needed and the installation of the sign at Store #XXX in CITY, Oklahoma. The invoice also requires the removal of the old sign at Store #XXX and the transportation of the sign to CITY for storage. See, Exhibit H.

8. Invoice No. 18160, dated May 15, 1992, requires the rebuilding of a sign removed from a store in CITY, TEXAS, and installation of the sign at Store #XXX in CITY, See, Exhibit H.

9. Invoice No. 18190, dated June 4, 1992, requires the removal of a trapezoid sign at Store #11, the repair, reconditioning and addition of a 2-1' x 6' breakfast sign to the sign and installation of the sign at Store #123. See, Exhibit H.

10. Invoice No. 18362, dated August 10, 1992, requires the removal of a 10' x 14' trapezoid sign at ADDRESS in CITY, the repair and reconditioning to, and installation of 2-1' x 6' breakfast signs on the sign and installation and connection of the sign at Store #XX. The invoice also requires the removal and destruction of the old sign at Store #XX. See, Exhibit H.

11. Invoice No. 18570, dated November 20, 1992, requires the reconditioning of one set of cluster letters for installation at a store. See, Exhibit H.

12. Invoice Nos. 18573, 18574 and 18575, dated November 20, 1992, each require the removal, reconditioning and reinstallation of two (2) sets of letter faces. See, Exhibit H.

ISSUES AND CONTENTIONS

Two issues are presented for decision. The first issue is whether a portion of the claim for refund, inclusive of the period of May 1, 1990 through February 28, 1991, is barred by the provisions of 68 O.S. Supp. 1993, § 227(b). The second issue is whether the transactions between Claimant and VENDOR involving the sale, including the installation of the signs and other related items on real property or things appurtenant thereto, and the servicing of such items are subject to the levy of sales tax.

Claimant contends that it erroneously paid sales tax on the amounts charged for the sale and servicing of the signs and other related items. In support of this contention, Claimant argues that the sales transactions ultimately culminated in the signs and other related items being permanently affixed to real property or things appurtenant thereto so as to become fixtures and thus VENDOR, as a contractor, should have paid sales tax on the cost of materials as opposed to Claimant paying sales tax on the sale of the signs and other related items. Claimant asserts that forty percent (40%) of the total amount charged by VENDOR is attributable to the cost of materials and thus its refund request is for the amount of sales tax paid on sixty percent (60%) of the total charges.

The Division contends that it properly denied the claim for refund. In support of this contention, the Division argues that the claim for refund of taxes paid prior to the month of March, 1991, is barred by the provisions of Section 227(b) since the taxes were paid more than three years prior to the filing of the claim. The Division further argues that the sale and servicing of the signs and other related items, including the construction and installation thereof, is subject to sales tax pursuant to 68 O.S. 1991, § 1354(J). Further, the Division cites the three-part test for determining whether an item of personal property affixed to real property or something appurtenant thereto becomes a fixture and argues that the facts demonstrate the signs and other related items did not become fixtures and thus the transactions involving the sale and servicing of such items are properly subject to the levy of sales tax.

APPLICABLE LAW

Any taxpayer who has paid any tax through error of fact, or computation, or misinterpretation of law may file a claim for refund of such tax within three (3) years from the date of payment. 68 O.S. Supp. 1993, § 227(a) and (b). The Tax Commission shall proceed to review the claim for refund as soon as practicable after the filing thereof and advise the taxpayer by written notice of the approval or denial of the refund claim. 68 O.S. Supp. 1993, § 227(c). If the refund request is denied, the taxpayer must file a demand for hearing on or before the thirtieth day after the date the notice of denial is mailed and the Tax Commission shall set a date for hearing upon the claim for refund which date shall not be more than sixty (60) days from the date the demand for hearing is mailed. 68 O.S. Supp. 1993, § 227(d) and (e).

The state cannot be sued for the recovery of taxes in the absence of legislative consent, and the right to recover taxes must therefore be found in a statute. *Sullivan v. Oklahoma Tax Commission*, 283 P.2d 521, 523 (Okla. 1955), citing *Antrim Lumber Company v. Sneed*, 175 Okla. 47, 52 P.2d 1040, 1045 (1935). The remedy for recovery of taxes illegally exacted is provided by statute and is exclusive. *Jd.*, at 523-524. Conditions and restrictions may be

prescribed by the Legislature on the exercise of the right or privilege to file a claim for refund of taxes and these conditions or restrictions and the claim for refund must conform strictly to the statutory requirements. *Rosenman v. U.S.*, 323 U.S. 658, 65 S.Ct. 536, 89 L.Ed. 535 (1945). See, *Sowers v. Oklahoma Tax Commission*, 527 P.2d 852 (Okla. 1974) and Sullivan, *supra*.

The provisions of Section 227 restrict the refund of taxes to taxes paid within three (3) years of the filing of the verified claim for refund. See, *Sun Oil Company v. Oklahoma Tax Commission*, 620 P.2d 896, 898-899 (Okla. 1980). A claim for refund of taxes paid more than three (3) years prior to the filing of the verified claim for refund is barred. *Id.*

Sales taxes are due and payable by a vendor on the first day of each month for all sales made during the preceding calendar month. 68 O.S. 1991, S 1365(A). The taxes are delinquent if remitted after the 15th day of such month. *Id.*

Here, Claimant filed a request for refund of the sales taxes paid to VENDOR during the period of May 1, 1990 through December 31, 1992. The claim for refund was filed with the Tax Commission on April 13, 1994. No evidence has been presented to show that VENDOR did not remit the sales taxes in accordance with the statutory requirements of the Oklahoma Sales Tax Code. Accordingly, the claim for refund for the sales taxes paid by Claimant to VENDOR prior to the month of March, 1991, is barred by Section 227.

Sales Tax is levied on the gross proceeds of each sale of tangible personal property. 68 O.S. 1981, § 1354(1) (A). The phrase "tangible personal property" is all inclusive and not limited except by specific exemption. *Magnolia Petroleum Company v. Oklahoma Tax Commission*, 326 P.2d 821, 823 (Okla. 1985). See, 68 O.S. Supp. 1983, § 1352(N).¹ In *Magnolia*, the Court held at page 823, "[W]e are of the opinion that tangible personal property placed upon real estate under an oil and gas lease wherein it is

In addition, sales tax is levied on "[Advertising of all kinds, types, and characters, including any and all devices used for advertising purposes and the servicing of any advertising devices except those specifically exempt pursuant to the provisions of Section 1357² of the [Oklahoma Sales Tax Code]." 68 O.S. Supp. 1984, S 1354(1)(J). A "vendor who engage[s] in selling and servicing signs must collect, report and remit sales tax notwithstanding the fact that the signs have use or value (other than salvage value) only to the purchaser." Rule 13.018.10 of the Oklahoma Tax Commission Permanent Rules.³

¹ Defines "tangible personal property" to mean "personal property which may be seen, weighed, measured, felt, or touched or which is in any other manner perceptible to the senses." provided that the lessee or his assigns may remove said property, and which property is capable of being removed, remains tangible personal property."

² Section 1357(4) provides, "[S]ales of advertising space in newspapers and periodicals and billboard advertising service, and any advertising through the electronic media, including radio, television and cable television" are exempt from the levy of sales tax.

³ Rule 13.018.10 was amended effective May 13, 1991, to provide: "Vendors who engage in selling signs must collect, report and remit sales tax notwithstanding the fact that the signs have use or value (other than salvage value) only to the purchaser. The servicing of advertising devices is also subject to taxation." Currently codified as Rule 710:65-19-311 of the Oklahoma Administrative Code.

Whether Claimant erroneously paid sales tax on the transactions with VENDOR is dependent upon whether VENDOR was acting as a contractor in constructing, installing and servicing the signs and other related items. If VENDOR was acting as a contractor it should have paid sales tax on the purchase of "all taxable services and tangible personal property, including materials, supplies, and equipment." Rule 710:65-1-7(3) of the Oklahoma Administrative Code. See, 710:65-19-55 of the Oklahoma Administrative Code. If VENDOR was acting as a vendor it properly collected, reported and remitted sales tax on the transactions with Claimant.

"Contractor" is defined as "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 said person into the real property being improved." 68 O.S. Supp. 1983, § 1352(D). Whether VENDOR was acting as a contractor is dependent upon whether the installation of the signs and other related items qualify as "improvements" upon real property.

The term "improvement" is not defined by the Oklahoma Sales Tax Code. "Improvement" is generally recognized to mean: "[A] valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes." Black's Law Dictionary 682 (5th ed. 1979). Improvement is further defined as "[G]enerally, buildings, but may also include any permanent structure or other development, such as a street, sidewalks, sewers, utilities, etc." Id.

In *Magnolia*, the Court cited *Uncle Sam Oil Company v. Union Petroleum Co.*, 90 Okla. 135, 216 P. 443 (1923), for the proposition that "in determining whether improvements placed upon real estate are to be treated as personalty or real estate, the intent of the contracting parties will govern." Relevant criteria for determining what constitutes an improvement to real property include: whether addition is meant to be permanent or temporary, whether it becomes an integral component of overall system, whether value of property is increased, and whether use of property is enhanced. See, *Zimmer v. village of Willowbrook*, 610 N.E.2d 709 (Ill.App.) and *Van Den Hul v. Baltic Farmers Elevator Co.*, 716 F.2d 504 (C.A.S.D. 1983).

Pole signs erected in front of taxpayer's convenience stores constitute tangible personal property rather than improvements. *Southland Corp. v. U.S.*, 611 F.2d 348, 353 (1979). In *Southland*, the Court held at page 350, "[T]he common characteristic which is attributable to improvements is that they are inherently permanent structures."

Here, Claimant leased the property upon which the signs and other related items were installed for a term of twelve years. The lease provided that "all trade fixtures and equipment, including, but not limited to, shelving, ice cream and meat cabinets, cases, dairy doors, refrigeration equipment and machinery, and signs, neon or otherwise, installed and placed on the premises by and at the expense of Lessee, shall remain the property of the Lessee and Lessee shall have the right to remove the same." (Emphasis added). Further, the evidence in this cause

proves the signs and other related items were capable of being removed and used at other locations.

The undersigned finds that VENDOR was not acting as a contractor, but as a vendor, in constructing, installing and servicing the signs and other related items and therefore, VENDOR properly collected, reported and remitted sales tax on the transactions with Claimant. 68 O.S. Supp. 1984, § 1354(1)(J). Accordingly, Claimant's request for refund of the sales tax paid on sixty percent (60%) of the total amount charged by VENDOR was properly denied.

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and the subject matter of this proceeding is vested in the Tax Commission. 68 O.S. 1991, § 207.

2. A claim for refund of taxes paid more than three (3) years prior to the filing of the verified claim for refund is barred by the provisions of 68 O.S. Supp. 1993, § 227. See, *Sun Oil Company v. Oklahoma Tax Commission*, 620 P.2d 896 (Okla. 1980).

3. The refund of the sales tax paid by Claimant to VENDOR prior to the month of March, 1991, is barred by Section 227 since the claim for refund was filed more than three (3) years after the remittance of the taxes.

4. A contractor, defined as any person who performs any improvement upon real property and who incorporates tangible personal property into the real property being improved, must pay sales tax on its purchases of all taxable services and tangible personal property. See, 68 O.S. Supp. 1983, § 1352(D) and Rules 55 of the Oklahoma Administrative Code.

5. An improvement is generally recognized as a valuable addition made to property or an amelioration in its condition, amounting to more than mere repairs or replacement, and includes any permanent structure or other development. Black's Law Dictionary 682 (5th ed. 1979).

6. Whether improvements placed on real estate are to be treated as personalty or real estate is to be determined by the intent of the contracting parties. *Uncle Sam Oil Company v. Union Petroleum Co.*, 90 Okla. 135, 216 P. 443 (1923).

7. Relevant criteria for determining what constitutes an improvement include: whether addition is meant to be permanent or temporary, whether it becomes an integral component of overall system, whether value of property is increased, and whether use of property is enhanced. See, *Zimmer v. Village of Willowbrook*, 610 N.E.2d 709 (Ill.App.) and *Van Den Hul v. Baltic Farmers Elevator Co.*, 716 F.2d 504 (C.A.S.D. 1983).

8. The signs and other related items installed by VENDOR on the leased premises of Claimant did not constitute improvements to the real property or things appurtenant thereto since the signs and other related items were not permanent additions to the property and therefore, VENDOR properly collected, reported and remitted sales taxes on the transactions

with Claimant. 68 O.S. Supp. 1984, S 1354(1)(J). See, *Southland Corp. v. U.S.*, 611 F.2d 348 (1979).

9. Claimant's claim for refund of the sales tax paid on sixty percent (60%) of the total amount charged by VENDOR should be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest to the denial of the claim for refund of Claimant, COMPANY be denied.

OKLAHOMA TAX COMMISSION