

JURISDICTION: OKLAHOMA TAX COMMISSION DECISION
CITE: 87-04-30-57 / NON-PRECEDENTIAL
ID: P-86-084
DATE: APRIL 30, 1987
DISPOSITION: DENIED
TAX TYPE: BANK TAX
APPEAL: AFFIRMED / OK S.C.T. 68,905
DECISION NOT PUBLISHED

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above styled cause comes on for consideration, pursuant to assignment regularly made to ALJ, Administrative Law Judge, by the Oklahoma Tax Commission. A hearing was had, at which hearing Protestant, PROTESTANT, appeared by and through its attorney, ATTORNEY, and the Income Tax Division of the Oklahoma Tax Commission appeared by and through its attorney, OTC ATTORNEY, of the General Counsel's Office.

Opening statements were made by the respective parties and exhibits, not herein itemized, were received into evidence. There was no other testimony other than closing arguments made by the respective parties and upon completion of such, the case was submitted for a decision.

STATEMENT OF FACTS

The Protestant timely filed its 1982 tax return on March 9, 1983. In reporting its Oklahoma taxable income on Line 1 of said return, the Protestant showed a loss of \$321,189.06, excluding from the tax calculation \$478,323.99 as "Interest on Federal obligations not deemed taxable on the basis of the U.S. Supreme Court's decision of January 24, 1983, in Memphis Bank & Trust Company, Appellant, vs. Riley C. Garner, Shelby County Trustee, et al."

On February 10, 1986, pursuant to office audit, the Income Tax Division issued a proposed assessment of additional tax and interest in the total amount of \$3,620.00. The basis of the assessment was the inclusion in the tax calculation of the interest income from federal obligations excluded by Protestant.

By letter dated March 10, 1986, the Protestant timely protested the assessment and requested a hearing.

Since the issue in this case has been the subject of recent litigation, it is appropriate, at the outset, to briefly highlight the chronology of events leading up to this protest.

In 1971, the Oklahoma Legislature enacted an in lieu tax applicable to banks which was codified at 68 O.S. 1971, §§ 2370 and 2371. Insofar as here relevant, the calculation of the tax excluded interest income on obligations of the State of Oklahoma while including interest income on obligations of the federal government.

The State of Tennessee had a similar statute which levied a local excise tax on banks doing business in the state in addition to a state excise tax on said banks. The local tax law, which referred to the state tax law for definitional purposes, was challenged by various banking institutions. In Memphis Bank & Trust Company vs. Riley C. Garner, Shelby County Trustee, et al., 459 U.S. 392, 103 S.Ct. 692 (1983), the United States Supreme Court held that the Tennessee bank tax impermissibly discriminated against the federal government and was thus unconstitutional. The Memphis Bank case was decided on January 24, 1983.

The Oklahoma Tax Commission reviewed the Memphis Bank case as it related to 68 O.S. 1971, §§ 2370 and 2371, and issued Order No. 83-05-10-15. Said Order denied all bank refund claims on taxes accrued and voluntarily paid pursuant to §§ 2370 and 2371, and denied all exclusions based on Memphis Bank which accrued prior to January 24, 1983. The Order also distinguished Memphis Bank from the Oklahoma taxing scheme and found that §§ 2370 and 2371 were facially constitutional, and that Memphis Bank should be applied prospectively.

Although on June 6, 1983, the Governor of Oklahoma signed into law Enrolled House Bill 1380, amending the provisions of 68 O.S. 1981, § 2370 and repealing 68 O.S. 1981, § 2371, the provisions as they existed from 1971 to June 6, 1983, were still presumed constitutional as written and applied.

Approximately two hundred and seventy (270) banks filed appeals of Oklahoma Tax Commission Order No. 83-05-10-15 with both the Oklahoma Supreme Court and the Oklahoma Tax Commission. The Oklahoma Supreme Court consolidated the appeals and stayed all other appellate proceedings of similarly situated banks pending resolution of the consolidated appeal. The consolidated case was identified as First of McAlester Corporation vs. Oklahoma Tax Commission and First State Bank and Trust Company of Shawnee vs. Oklahoma Tax Commission, 709 P.2d 1026 (Okla. 1985).

To briefly summarize the holding in First of McAlester, the Oklahoma Supreme Court held that 68 O.S. 1971, §§ 2370 and 2371, were unconstitutional because they impermissibly discriminated against the federal government. The Court also held, after analyzing the large body of case law on the issue of retroactivity, that its decision should be applied prospectively from January 24, 1983, the date Memphis Bank was decided.

After directing each of the non-named banking institutions in First of McAlester to show cause why summary disposition was not to be effected by reason of stare decisis, the Oklahoma Supreme Court, by Order dated December 10, 1985, summarily disposed of all other appeals consolidated with the First of McAlester case.

By Oklahoma Tax Commission Order No. 86-03-04-21, and pursuant to First of McAlester, the Oklahoma Tax Commission summarily disposed of all pending protests which were filed simultaneously with appeals to the Oklahoma Supreme Court. Said Order also directed each of the named Protestants to show cause why summary disposition should not be effected.

The Protestant in the instant case, PROTESTANT, filed, along with its protest of the February 10, 1986 assessment, an Explanation of Cause pursuant to Oklahoma Tax Commission Order No. 86-03-04-21, even though Protestant was not a party to the First of McAlester case.

CONTENTIONS OF PROTESTANT

In its Protest and Explanation of Cause, the Protestant argues that First of McAlester applied only to claims for refund and not additional assessments. Additionally, Protestant argues that the basis of the First of McAlester decision on prospective application of Memphis Bank was the potential hardship to the State of Oklahoma and that no such hardship is present in the instant case since there is no pending claim for refund.

CONTENTIONS OF DIVISION

The Division contends that the merits of this case have been decided by First of McAlester and that by reason of stare decisis, this protest should be denied.

ISSUE

The sole issue is whether the merits of this case have been decided by First of McAlester vs. Oklahoma Tax Commission and First State Bank and Trust Company of Shawnee vs. Oklahoma Tax Commission, 709 P.2d 1026 (Okla. 1985).

APPLICABLE LAW

The first part of First of McAlester, vacating that part of Oklahoma Tax Commission Order No. 83-05-10-15 as it related to the constitutionality of 68 O.S. 1971, §§ 2370 and 2371, is not at issue here. Sections 2370 and 2371 were clearly held to be unconstitutional.

It is the second part of First of McAlester which is at issue here. The Oklahoma Supreme Court analyzed the large body of case law relating to prospectivity, including Great Northern Railroad vs. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932); Chevron Oil Co. vs. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed. 2d 296 (1971); Arizona Governing Committee vs. Norris, 463 U.S. 1073, 103 S.Ct. 3492, 77 L.Ed. 2d 1236 (1983); Texas Company vs. Oklahoma Tax Commission, 207 Okla. 363, 249 P.2d 982 (1952); Cox vs. Dillingham, 199 Okla. 161, 184 P.2d 976 (1947); City of Hartshorne vs. Dickinson, 207 Okla. 305, 249 P.2d 422 (1952); and Bartow County Bank vs. Bartow County Board of Tax Assessors, 312 S.E. 2d 102 (Ga. 1984), rev'g 285 S.E. 2d 920 (Ga. 1982), vacated, 463 U.S. 1221, 103 S.Ct. 3563, 77 L.Ed. 2d 1402 (1983). After reviewing the law, the Court held:

Upon consideration of all the foregoing, we conclude that the application to this appeal of the Memphis Bank decision shall operate prospectively from January 24, 1983, and not retroactively. Our decision in the instant case shall be understood to affect the rights, positions and actions of taxpayers which have claimed, or will claim, refunds to the Oklahoma Tax Commission, or in which appeals have been taken to this Court.

First of McAlester, 709 P.2d at 1036.

The Protestant reads the above language as being words of limitation. That is, the Protestant reads the last sentence as affecting only those taxpayers which have claimed, or will claim refunds. And, the Protestant argues that since it is protesting an assessment and not claiming a refund, the prospectivity of Memphis Bank announced in First of McAlester does not apply.

At first blush, the Protestant's argument appears meritorious. However, a closer analysis of the facts surrounding First of McAlester leads to another conclusion.

The analysis contained within First of McAlester presupposes that the various banking institutions were indeed abiding by the law in existence at the time their respective state tax returns were filed. When the Protestant filed its 1982 return on March 9, 1983, 68 O.S. 1971, §§ 2370 and 2371 were still in full force and effect. However, the Protestant chose not to file its returns pursuant to those sections, but rather, filed its returns based on Memphis Bank. Although Memphis Bank had been decided at that time, there was no judicial determination made of the Oklahoma taxing scheme. Indeed, Oklahoma Tax Commission Order No. 83-05-10-15, issued in May of 1983 ruled that §§ 2370 and 2371 were facially constitutional. While the Oklahoma Supreme Court did ultimately find §§ 2370 and 2371 as they existed from 1971 to the amendments of June 6, 1983, to be unconstitutional, that determination was not made until First of McAlester was decided on July 2, 1985.

In view of the foregoing, it is easily explained why First of McAlester speaks of "claims for refunds" and not assessments. The reason being that the Court assumed the banking institutions were indeed abiding by the law as it existed at the time the returns were filed. If this Protestant had abided by the law and had filed its 1982 return in accordance with the law in existence at the time, the Protestant would not have excluded the interest income on federal obligations from its tax calculation. And as such, the Protestant would now be seeking a refund of taxes paid.

The above analysis is not to be construed as allowing the filing date of the return to control. Rather, said analysis is put forth so that First of McAlester can be properly interpreted. As set out below, First of McAlester should properly be read as affecting all tax years prior to January 24, 1983.

Indeed, that portion of Oklahoma Tax Commission Order No. 83-05-10-15 which applied Memphis Bank prospectively was specifically affirmed by the Oklahoma Supreme Court in First of McAlester. The Court's opinion embraced the following language of the Commission Order:

“[A]ll claims for refund of bank taxes accrued and voluntarily paid pursuant to 68 O.S. 1981 §§ 2370 and 2371 and prior to the final decision in Memphis Bank and Trust Company v. Riley C. Garner, Shelby County Trustee, et al., U.S. Supreme Court No. 81-1613 decided January 24, 1983, 51 L.W. 4104, shall be and hereby are denied; that all exclusions from net income for

calculations of bank tax liability accrued prior to the Memphis Bank case but presently unpaid shall be and hereby are denied;”

First of McAlester, 709 P.2d at 1033. (Emphasis Added)

The above language speaks of bank tax liability accrued prior to Memphis Bank but presently unpaid. This language is not limited to refunds, but includes all accrued liability presently unpaid. At the time of Memphis Bank, this Protestant did, in fact, have accrued liability presently unpaid. Thus, there is support within First of McAlester for additional assessments as well as claims for refund.

The First of McAlester decision should properly be read as affecting all tax years prior to January 24, 1983. That is, all arguments for the exclusion of interest income on federal obligations for tax years prior to January 24, 1983, should be denied. The Oklahoma Supreme Court could not have been more specific in stating “that all exclusions from net income for calculations of bank tax liability accrued prior to the Memphis Bank case but presently unpaid shall be and hereby are denied.” (First of McAlester, 709 P.2d at 1033).

Any other interpretation of First of McAlester would lead to non-uniform interpretation and application of the tax laws of this State. If the “claim for refund versus additional assessment” argument of Protestant is accepted, then taxpayers who abided by the law in existence for the 1982 tax year would, in effect, be punished because any such claims for refund would be denied based upon First of McAlester, while those taxpayers who failed to abide by the law would be rewarded with a windfall. Clearly, the Oklahoma Supreme Court did not intend to create such an inequity.

One last point should be addressed. The Protestant argues that the basis of the First of McAlester decision on prospective application of Memphis Bank was the potential hardship to the State of Oklahoma. And, the Protestant argues, that since there is no pending claim for refund in the instant case, no such hardship exists.

While it is true that the Oklahoma Supreme Court did examine the potential hardship which might be incurred by retroactive application, it was not the sole factor examined. The Court also examined other factors such as whether Memphis Bank presented a “clear break with the past” and whether retrospective operation was necessary to effectuate the new rule of law (See First of McAlester, 709 P.2d at 1034-35).

Thus, while the potential hardship argument was a factor in deciding for prospective application, it was not the sole factor, nor the determinative factor. As such, the Protestant’s argument must fail.

Other cases cited by the Protestant herein need not be re-examined since the Oklahoma Supreme Court has already passed on the merits of the issue.

CONCLUSIONS OF LAW

Based upon the above and foregoing findings of fact and applicable law relevant thereto, the Administrative Law Judge concludes as follows:

(1) That the Oklahoma Tax Commission has jurisdiction in this matter.

(2) That the issue raised in this protest has been decided in First of McAlester vs. Oklahoma Tax Commission and First State Bank and Trust Company of Shawnee vs. Oklahoma Tax Commission, 709 P.2d 1026 (Okl. 1985), and by reason of stare decisis this protest should be denied.

(3) That the assessment by the Income Tax Division of the Oklahoma Tax Commission, dated February 10, 1986, in the amount of \$3,620.00 is, in fact, correct and proper and that said amount, with any additional interest accruing thereon, should be deemed due and owing until paid.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION that the protest of PROTESTANT be denied and that the assessment, dated February 10, 1986, in the amount of Three Thousand Six Hundred Twenty Dollars and No Cents (\$3,620.00) be deemed due and owing and interest is to continue to accrue thereon from the date of the assessment until paid in full.

OKLAHOMA TAX COMMISSION

**ORDER CLARIFYING FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND DENYING MOTION FOR RECONSIDERATION**

The above styled cause comes on for consideration pursuant to a Motion for Reconsideration filed by Protestant on November 5, 1986, alleging error of interpretation of the law and facts in the Findings, Conclusions and Recommendations filed herein.

The Protestant did not allege the discovery of new evidence or law. However, after a careful consideration of the record, including a review of the exhibits, the Findings, Conclusions and Recommendations, and the Motion for Reconsideration, certain points of clarification are in order. Accordingly, the undersigned concludes that:

(1) While it is true, as alleged in the Motion for Reconsideration, that Oklahoma Tax Commission Order No. 83-05-10-15 did not expressly find that 68 O.S. 1981, §§ 2370 and 2371 were facially constitutional, it is clear, from a reading of said Order, that the Oklahoma Tax Commission distinguished the Tennessee statutes declared unconstitutional in Memphis Bank & Trust Company vs. Riley C. Garner, Shelby County Trustee, et al., 459 U.S. 392, 103 S.Ct. 692 (1983), and the Oklahoma statutes in question. After distinguishing the Tennessee statutes from

the Oklahoma statutes, said Order then found that the Memphis Bank decision was to be applied prospectively;

(2) Based upon the foregoing interpretation of Oklahoma Tax Commission Order No. 83-05-10-15, Oklahoma Tax Commission Order No. 86-03-04-21 did indeed expressly state that “Order No. 83-05-10-15 found that 68 O.S. 1981 §§ 2370 and 2371 were facially constitutional and that the Memphis Bank case, supra, should be applied prospectively to the administration of the Oklahoma bank tax.”

(3) Moreover, the key point is that there was no judicial determination made of the Oklahoma statutes in question until First of McAlester was decided on July 2, 1985. Until that time, said statutes were still presumed constitutional;

(4) As stated and fully supported within the Findings, Conclusions and Recommendations, First of McAlester should properly be read as affecting all tax years prior to January 24, 1983. That is, all arguments for the exclusion of interest income on federal obligations for tax years prior to January 24, 1983, should be denied. Therefore, by reason of stare decisis, this protest should be denied.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION that the protest of PROTESTANT be denied and that the assessment dated February 10, 1986, in the amount of Three Thousand Six Hundred Twenty Dollars and No Cents (\$3,620.00) be deemed due and owing and interest is to continue to accrue thereon from the date of the assessment until paid in full.

It is further ordered that the Findings, Conclusions and Recommendations issued October 14, 1986, be read in conjunction with the clarification above and that the Motion for Reconsideration filed by Protestant on November 5, 1986, should be and is hereby 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.