JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2001-02-01-013 / NOT PRECEDENTIAL**
ID: **P9900195**
DATE: **02-01-01**
DISPOSITION: **DENIED**
TAX TYPE: **INCOME**
APPEAL: **OK SUP CT NO. 95,931 / AFFIRMED OTC DECISION**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Stipulated Facts

1. The PROTESTANT Irrevocable Trust ("Protestant") filed an amended Nonresident Oklahoma Fiduciary Income Tax Return for the taxable year 1994 on April 15, 1998.

2. The Protestant filed an amended Nonresident Oklahoma Fiduciary Income Tax Return for the taxable year 1995 on April 15, 1998.

3. The Protestant filed an amended Nonresident Oklahoma Fiduciary Income Tax Return for the taxable year 1996 on April 15, 1998.

4. By letter dated July 31, 1998, by AN Auditor, Fiduciary Section, Audit Division, OTC, denied the claims for refund for the 1994, 1995 and 1996 taxable years.

5. The Protestant filed a formal protest objecting to the denial of the claims for refund on April 8, 1999.

6. The PROTESTANT Irrevocable Trust created by written instrument executed in Oklahoma City on June 5, 1990, by SETTLOR, a resident of Midwest City, Oklahoma, as Settlor, and TRUSTEE, as resident of ANOTHER STATE, as Trustee.

7. Prior to 1994, both Trustee and Settlor moved to Nevada and have resided there since.

8. The Protestant is claiming a refund for the 1994, 1995 and 1996 taxable years based on a claim that the Trust is now a "nonresident trust".

ISSUE

Whether the PROTESTANT Irrevocable Trust is a "resident trust" and therefore required to file an Oklahoma Fiduciary Income Tax return and pay the taxes due thereon.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission has jurisdiction of this protest, 68 O.S. § 2373.

2. The PROTESTANT Irrevocable Trust, "Trust" hereafter, provides in paragraph 9 as follows:

> This trust indenture shall be construed and regulated according to the laws of the State of Oklahoma where it is made and where it is to be enforced.

Paragraph 10 of the Trust document specifically provides that the Trust is irrevocable. Oklahoma law draws a sharp distinction between revocable trusts and irrevocable trusts. The Oklahoma Trust Act provides at 60 O.S. § 175.41 that every trust shall be revocable by the trustor unless expressly made irrevocable by the terms of the trust instrument. A revocable trust has been described by the Oklahoma Supreme Court as "illusory" in the case of *Thomas v. Bank of Oklahoma*, 684 P.2d 553, 1984 OK 41, in the sense that a revocable trust does not have a separate existence or identity apart from the settlor or grantor of the trust because the transfer in trust is revocable by the transferor and does not constitute a bonafide and completed transfer since the transferor retains the right of complete control and dominion, especially the right to take back the gift at any time. The Court also noted that the federal government considers a revocable trust to be the property of the grantor and includable in the estate of the grantor for estate tax purposes, see Internal Revenue Code Section 2038, *Sanford's Estate v. Commissioner of Internal Revenue*, 308 U.S. 39, 60 S.Ct. 51, 84 L.Ed.2d 20 (1939).

3. Under the "Grantor Trust Rules" of the Internal Revenue Code at Section 671 et seq., the grantor will be treated as the owner of any portion of a trust over which he has the power to revoke such trust pursuant to Section 676. The Grantor Trust Rules do not separate the existence of the trust from the grantor of the trust and therefore the grantor must report all trust income on his individual income tax return as if the trust did not exist. However, if the grantor does not have the power to revoke the transfers into the trust, then the trust has a separate existence apart from the grantor and the trust must file a separate income tax return as a stand alone entity apart from the grantor pursuant to Section 641 of the Internal Revenue Code.

4. The Oklahoma Income Tax Code also recognizes this distinction between revocable and irrevocable trusts and defines an irrevocable trust created in Oklahoma by a citizen of Oklahoma as a "resident trust" pursuant to 68 O.S. § 2353(6) as follows:

> "Resident trust" means (a) a trust, or a portion of a trust, consisting of property transferred by will of a decedent domiciled in this state at his death, or (b) a trust, or a portion of a trust, consisting of the property of a person domiciled in this state if such trust is not irrevocable and (c) a trust, or portion of a trust, consisting of property of a person domiciled in this state at the time such property was transferred to the trust if such trust or portion was then irrevocable or a person domiciled in this state at the time such trust or portion became irrevocable. A trust, or portion of a trust, is irrevocable if it is not subject to a power exercisable solely by the transferor of such property, at any time, to revest title in himself. "Nonresident trust" means a trust other than a resident trust.

Pursuant to that statute, the PROTESTANT Irrevocable Trust is an Oklahoma "resident trust". As a resident trust, 68 O.S. § 2368(F) requires the Trust to file an Oklahoma Fiduciary Income Tax Return and pay the taxes due thereon.

5. The Trust argues that it is a nonresident trust and therefore entitled to the refund claimed because the Settlor and the Trustee are domiciled in Nevada. The Trust cites *Suglove v. Oklahoma Tax Commission*, 605 P.2.d 13,15, 1979 OK 168, for the ruling that a taxpayer may change domicile as follows:

To effect a change of domicile, there must be actual abandonment of the first domicile, coupled with the intention not to return to it and actual residence in another place with intention of making it a permanent home.

Under this ruling it is clear that the Grantor and the Trustee have a personal domicile established in Nevada and therefore have no individual income tax filing requirement in Oklahoma as residents. However, the domicile of the Grantor and Trustee does not extend to the Trust which maintains a separate existence from those individuals as a "resident trust" in Oklahoma. Because the Trust is an irrevocable trust created under Oklahoma law, it will always remain an Oklahoma "resident trust" pursuant to the Oklahoma Income Tax Act regardless of the separate domicile of the Grantor and the Trustee established outside of Oklahoma.

6. The protest should be denied.

DISPOSITION

It is the DETERMINATION of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the income tax protest of PROTESTANT Irrevocable Trust be denied.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was **NOT** deemed precedential by the Commission. This means that the legal conclusions are not 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.