

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 2001-03-29-003 / NOT PRECEDENTIAL
ID: P9800213
DATE: 03-29-01
DISPOSITION: DENIED AS TO PROTESTANT / SUSTAINED AS TO SPOUSE
TAX TYPE: INCOME
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

NOW on this 22nd day of February, 2001, the above styled and numbered cause comes on for consideration pursuant to assignment regularly made by the Oklahoma Tax Commission to AN Administrative Law Judge. Protestants, PROTESTANT AND SPOUSE, represent themselves in this matter. The Audit Division is represented by AN Assistant General Counsel, General Counsel's Office of the Oklahoma Tax Commission. A hearing was held. Notice of the hearing was mailed to Protestants at their last known address, yet they did not appear. At the conclusion of the hearing, this matter was submitted for decision. The undersigned finds as follows:

1. Protestant filed an Oklahoma Individual Income Tax Return for 1994 reporting a filing status of "head of household with qualifying person". A 1994 Wage and Tax Statement for Protestant from the United States Defense Finance and Accounting Service bearing the designation "VSI" was submitted with the return. On line 26 of that return, Protestant took a military pay exclusion of \$5,500.00.

2. The Division audited the return in comparison with information submitted by the Internal Revenue Service ("IRS"). The Division disallowed the \$5,500.00 and allowed only \$1,500.00. The Division made this adjustment based on the position that the voluntary separation incentive ("VSI") pay is not retirement benefits but rather is military pay.

3. By letter dated February 17, 1998, the Division caused to be issued against Protestant a proposed assessment of additional income tax, interest and penalty for the 1994 tax year.

4. The assessment for the 1994 tax year assesses a total amount of \$413.33, consisting of tax in the amount of \$280.00, interest in the amount of \$119.33 and penalty in the amount of \$14.00.

5. Protestant, by letter dated March 15, 1998, filed a timely protest to the assessment, stating that the "pay I received from the military was a retirement not active duty pay" and "I took the retirement deduction".

6. THE Revenue Examiner, Audit Division, testified that based upon a review of information received from the IRS, Protestant reported the VSI as wages on his 1994 Form 1040 and not as pension income.

7. The Division agrees that because the 1994 return adjusted by the Division was the separate return of PROTESTANT, and SPOUSE was not a signatory to that return, she should have been omitted from the assessment.

CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter of law that the Tax Commission is vested with jurisdiction over the parties and subject matter of this action, 68 O.S. 1991, § 207; that a proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect, and in what respect, *Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission*, 768 P.2d 359 (Okla. 1988); and that Protestant has failed to prove sufficient facts entitling him to the relief requested, *Oklahoma Administrative Code 710:1-5-47*, specifically Protestant did not show that the voluntary separation incentive pay¹ constitutes military retirement benefits entitling Protestant to the \$5,500.00 military retirement exclusion pursuant to Section 2358(D)(9) of Title 68.

DISPOSITION

THEREFORE, IT IS DETERMINED that the protest of Protestant be denied and that the amount in controversy, plus any additional accrued and accruing interest, be fixed as the deficiency due and owing. It is further DETERMINED that the income tax assessment as issued against SPOUSE should be withdrawn.

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.

¹Pay designated as separation pay which is offered to encourage military personnel to leave the service voluntarily rather than be terminated due to a reduction in force, base closure, reorganization, function transfer or other similar action. 5 U.S.C. §5597(b).