**JURISDICTION:** **OKLAHOMA TAX COMMISSION - DECISION**
**CITE:** **2001-05-24-006 / NOT PRECEDENTIAL**
**ID:** **P0000158**
**DATE:** **05-24-00**
**DISPOSITION:** **DENIED**
**TAX TYPE:** **INCOME**
**APPEAL:** **NO APPEAL TAKEN**

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties stipulate to the following:

### Procedural Facts

1. By letter dated March 22, 2000, the Division in a letter by A TAX COMMISSION AUDITOR, denied the Protestants' claim of out of state income in the amount of One Hundred Thirty-two Thousand Three Hundred Thirty-four Dollars ($132,334.00).

2. The Division's tax treatment for the claimed out-of-state business income was to treat it on a Schedule "E" as a credit for taxes paid to another state.

3. The Protestants timely filed a formal protest objecting to the proposed treatment of the claimed out of state business income, all as set out in letters by the Protestants' representative, dated April 20, 2000 and May 18, 2000.

4. The 2000 protest of MR. PROTESTANT AND MS. PROTESTANT is properly before the Commission.

### Facts Relating to Out of State Business Income

5. Protestant is self employed in heavy construction equipment repair.

6. Protestant filed a 1040 Schedule "C" listing an Oklahoma address.

7. The Protestant claimed income earned in ANOTHER STATE as out of state business income.

8. The Division gave the Protestant Schedule "E" credit for taxes paid to another state on the claimed out of state income.

Additional Findings:

1. At all times relevant to these proceedings, Protestants were residents and domiciliaries of the State of Oklahoma.

2. Protestants filed their 1998 joint Oklahoma income tax return, Form 511, on or about January 12, 2000. Attached to the return were copies of Protestants' 1998 nonresident OUT OF STATE income tax return and 1998 federal income tax return.

3. On the Oklahoma return, Protestants claimed a refund in the amount of Twenty Dollars ($20.00), after excluding the income earned in ANOTHER STATE as out of state income.

4. The Division adjusted the return by disallowing the exclusion of the income earned in ANOTHER STATE as out of state income and allowing a credit for the taxes paid to ANOTHER STATE on the income. The adjustment resulted in the denial of the Twenty Dollar refund. No additional Oklahoma income tax was assessed as a result of the adjustment.

5. For federal income tax purposes, Protestants reported the income earned in ANOTHER STATE on Schedule C, Profit or Loss from Business. The principal business is listed as "heavy equipment repair/construction." A numeric code of is also listed. The code number is for the category "Other Services"/"Repair & Maintenance"/"Commercial & industrial machinery & equipment (except automotive & electronic) repair & maintenance."

## ISSUE AND CONTENTIONS

The issue presented for decision is whether the income earned by Protestant in ANOTHER STATE constitutes "business income" as opposed to "professional or occupational earnings" or "compensation for personal services."

Protestants contend that the Division's adjustment to their 1998 Oklahoma income tax return is erroneous. In support of this contention, Protestants argue that the income in question was derived from "business transacted" outside the state as distinguished from "personal services". Protestants assert that MR. PROTESTANT was physically present in ANOTHER STATE for approximately 305 days in 1998 transacting the business of heavy equipment repair, that this business required him to provide his own specialized equipment in which he maintained a significant investment and that he incurred miscellaneous operating expense in connection with transacting this business. Protestants also assert that the fact they filed a federal Schedule C to report this income as opposed to receiving a Form W-2 from his "OUT OF STATE employer" should be the determining factor with respect to the identity of this income.

The Division contends that the adjustment should be sustained. In support of this contention, the Division argues that Protestants failed to present sufficient evidence to show that the income in question was derived from business transacted in ANOTHER STATE as opposed to income from personal services.

## CONCLUSIONS OF LAW

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

2. A state has the power to tax its own residents on their net incomes though derived wholly from activities carried on by them outside of the state. ***Davis v. Oklahoma Tax Commission***, 488 P.2d 1261 (Okl. 1971); ***Colchensky v. Oklahoma Tax Commission***, 184 Okl. 207, 86 P.2d 329 (1939). Domicile itself establishes a basis for taxation. ***Colchensky***, supra at 184 Okl. 208.

3. Income received by a resident individual as compensation for personal services in a state other than Oklahoma is subject to Oklahoma income tax. 68 O.S. 1991, § 2357(B)(1). See, ***Oklahoma Tax Commission v. Benham***, 198 Okl. 384, 179 P.2d 123 (1947). A credit against the tax imposed on such income by Oklahoma is allowed for the amount of tax paid on the income in the other state. Id.

4. In ***Benham***, supra, the Court in a syllabus to the decision concluded:

> The entire income of an individual Oklahoma resident derived from wages, salaries, commissions, professional or occupational earnings, or other compensation received from personal services is taxable in this state without regard to the place wherein the services were performed. That portion of the income, however, derived from "business transacted" outside the state as distinguished from "professional" or "personal" services is nontaxable in this state.

5. Net income or loss from a business activity which is not a part of business carried on within or without the state of a unitary character shall be separately allocated to the state in which such activity is conducted. 68 O.S. 1991, § 2358(A)(4)(c). See, Rule 23.007.05(A) of the *Oklahoma Tax Commission Permanent Rules*.[1] The provisions of Section 2358(A)(4)(c) apply equally to corporations and individuals. See, *Oklahoma Tax Commission Order No. 92-07-14-003.*

6. A "business activity" is one in which capital, time, attention, labor, and intelligence are invested for gain and profit for private benefit, purposes and use. *Black's Law Dictionary* 179 (5th ed. 1979). A "business activity" entails a possibility of a personal profit or loss.

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[1]Adopted March 3, 1989. Currently codified as Rule 710:50-15-52 of the *Oklahoma Administrative Code*. This rule provides, "[F]or resident individuals, 'out-of-state income' consists of income from real or tangible personal property or business income in another state. Any amount deducted must be substantiated with the appropriate Federal schedule which sets out the Oklahoma portion."

7. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect, and in what respect. Rule 710:1-5-47 of the *Oklahoma Administrative Code*. See, ***Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission***, 768 P.2d 359 (Okl. 1988). The burden of proof standard in administrative proceedings is "preponderance of evidence". *Black's Law Dictionary* 1064 (5th ed. 1979). See, *Oklahoma Tax Commission Order No.* 91-10-17-061. "Preponderance of evidence" means "[E]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Id.

8. Whether income is derived from "business transacted" or from "occupational, professional or personal services" presents an issue of fact. ***Benham****, supra* at 386, citing with approval *Iselin et al. v. Flynn*, 90 Misc. 164, 154 N.Y.S. 133.

9. Here, Protestants failed to present sufficient evidence to show the Division's proposed adjustment to their 1998 Oklahoma income tax return was incorrect. Nothing herein shows that Protestants could have sustained a loss from this endeavor. Further, the fact that the income was reported on Schedule C, while admittedly a factor, is not determinative of the identity of the income since Schedule C is used to report income or loss from business or professional activities, including that of a statutory employee.

10. Protestants' protest should be denied.

## DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it WAS DETERMINED that the protest of Protestants 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.