

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2006-03-21-03 (PRECEDENTIAL)
ID: P-01-120-K
DATE: MARCH 21, 2006
DISPOSITION: DENIED
TAX TYPE: AD-VALOREM/MANUFACTURER'S EXEMPTION
APPEAL: NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A hearing was held before the undersigned Administrative Law Judge on September 17, 2003, in accordance with the request of the Protestant, COMPANY. Protestant is represented in these proceedings by ATTORNEY, Attorney at Law, LAW FIRM. The Ad Valorem Division of the Tax Commission ("Division") is represented by OTC ATTORNEY, Assistant General Counsel, General Counsel's Office of the Tax Commission.

Upon review of the file and records, including the transcript of the hearing, the Stipulation of Facts and attached exhibits and the respective pre and post-hearing pleadings of the parties, the undersigned finds:

FINDINGS OF FACT

A. The parties stipulate to the following:

1. The Taxpayer is an Oklahoma corporation that owns and operates a "manufacturing facility" as defined by 68 O.S. § 2902.

2. The manufacturing facility which is the subject of Taxpayer's Protest of Denial of Application for a Five-Year Manufacturing Exemption was built, expanded and owned by Taxpayer in FAKE County, Oklahoma, all as required in 68 O.S. § 2902.

3. In 2000 the Taxpayer expanded with a new manufacturing facility (an asphalt production facility - applicable SIC Code 32412108) situated in FAKE County, Oklahoma. Taxpayer continued to operate all other manufacturing facilities which it owned at time of building the new FAKE County facility.

4. The cost of the expansion was Two Million Eighty-five Thousand Five Hundred and No/100 Dollars (\$2,085,500.00).

5. The Taxpayer filed its Form 901 for the 2000 tax year on March 14, 2001. Attached to it was OTC Form 900XM-R92 entitled "Application for Five-Year Ad Valorem Tax Exemption for Oklahoma Manufacturing or Research and Development Facilities" (the "XM1 Application"). The OTC Form 900XM-R92 is a standardized form prescribed by the Oklahoma Tax Commission in accordance with 68 O.S. § 2902. The XM1 Application filed by Taxpayer was approved by the FAKE County Assessor on April 23, 2001, (the "Approved Application") and was then forwarded to the FAKE County Board of Equalization for review pursuant to 68 O.S. § 2902. The Approved

Application was then filed by the FAKE County Assessor with the Ad Valorem Division of the Oklahoma Tax Commission pursuant to 68 O.S. § 2902.1.¹

6. Pursuant to 68 O.S. § 2902 the Oklahoma Tax Commission verified Taxpayer's payroll.²

7. On May 23, 2001, the Division notified the Taxpayer that its Approved Application was denied because the Taxpayer had:

- (a) an Insufficient Increase of Full-Time Employees
- (b) an Insufficient Increase of Payroll
- (c) Failed to Maintain Payroll³

8. The Taxpayer timely filed its protest.⁴

9. The Oklahoma Tax Commission submitted its Status Report dated August 17, 2001, which included the following:

9.01 Oklahoma Tax Commission in its status report to Administrative Law Judge on August 17, 2001, revised its denial of the Approved Application by withdrawing code 13(a) (Insufficient Increase of Full-Time Employees), stating this reason for denial was incorrect.

9.02 Oklahoma Tax Commission in the same Status Report further advised the Administrative Law Judge of the Oklahoma Tax Commission review of Taxpayer's health insurance plan documents.

9.03 Oklahoma Tax Commission Status Report dated August 17, 2001, serves as the Ad Valorem Division's denial of the previously Approved Application for Code 13(d) reason (Insurance is not made available as per statute).⁵

10. If called as a witness, SECRETARY/TREASURER, Secretary-Treasurer of COMPANY., would testify as is stated in her Affidavit.⁶

¹Exhibits 1 and 2 to the Stipulation of Facts.

²Exhibit 3 to the Stipulation of Facts.

³Exhibit 4 to the Stipulation of Facts.

⁴Exhibit 5 to the Stipulation of Facts, inclusive of Exhibits A through E attached to Exhibit 5.

⁵Exhibit 6 to the Stipulation of Facts. Paragraph 9.04 omitted as it only recites that Exhibit 6 is attached to the Stipulation of Facts.

⁶Exhibit 7 to the Stipulation of Facts, inclusive of Exhibit 1 to Exhibit 7. In the Affidavit the affiant, SECRETARY/TREASURER, avers:

1. That I am a corporate officer of COMPANY, Inc., an Oklahoma corporation, and in such capacity I am responsible for accounting, financial, tax, employment information and ad valorem tax and related

compliance with federal, state, and local reporting requirements;

2. That I am the same person responsible for preparation of Application For Five-Year Ad Valorem Tax Exemption for Oklahoma Manufacturing or Research & Development Facilities, OTC Form 900XM-R99 and filing of same by COMPANY, Inc. with the FAKE County Assessor on or about March 14, 2001 [sic], and that I signed said Form 900XM-R99 and the Affidavit thereto on behalf of the Applicant as its Secretary/Treasurer;

3. That on or about June 1, 2001, in my corporate capacity as Secretary/Treasurer of COMPANY, I caused to be prepared and signed on behalf of COMPANY, letter dated June 1, 2001, and Exhibits A-E attached thereto and included therein by reference; and that all of the facts and representations contained therein are true, correct and complete to the best belief and knowledge of Affiant;

4. That Employers Quarterly Contribution Reports prepared and filed by COMPANY for each of the four calendar quarters of 1999 and 2000 properly report all employees and all salaries and wages paid all employees of COMPANY and do not provide for separate schedules of employees and/or salaries and wages by either geographic county or individually identified manufacturing facility;

5. By reason of the format for reporting salaries and wages paid and number of employees by month on each Employers Quarterly Contribution Report submitted by employer to Oklahoma Employment Security Commission it is not possible for any person examining the Employers Quarterly Contribution Report to determine where one or more of the listed employees are employed, either geographically or by manufacturing facility; and that the format of the Employers Quarterly Contribution Report is determined by the Oklahoma Employment Security Commission and not by the individual employer;

6. That the information reported by COMPANY on the third and fourth quarter contribution reports for calendar years 1999 and 2000 are summarized as follows:

Third Quarter 1999	\$ 872,992.83	114
Fourth Quarter 1999	\$1,035,182.53	108.33
Average	\$ 954,087.68	111.17
Third Quarter 2000	\$1,045,830.60	127
Fourth Quarter 2000	\$ 997,694.96	122.33
Average	\$1,021,762.28	124.67

That based upon the above employers Quarterly Contribution Report data the average payroll and average number of employees not only was maintained as required by the ad valorem tax exemption statutes but was actually increased from 1999 to 2000.

7. That notwithstanding the absence of employment data as to geographic and manufacturing facility location Affiant is personally knowledgeable of manufacturing and job site locations of COMPANY and the number of employees at the various manufacturing and job site locations; and Affiant knows that by reason of construction of the manufacturing facility in FAKE County for which the approved application for five-year ad valorem tax exemption was submitted by COMPANY to the FAKE County Assessor the number of full-time employees in FAKE County and the payroll were not only maintained as required by Oklahoma statute but in fact increased;

8. That the worksheets prepared by or at the request of the Oklahoma Tax Commission shows an increase in average number of employees and average salaries and wages paid. See FTE Count/Payroll per OESC faxed to COMPANY. from General Counsel's office January 31, 2001.

11. COMPANY. Group Health Plans of which Taxpayer was plan sponsor were provided by XYZ INSURANCE COMPANY from March 1, 1997, through February 18, 2001, and effective March 1, 2001, by ABC INSURANCE COMPANY.⁷

12. If called as a witness for COMPANY. regarding each of the Group Health Plans provided by COMPANY. as plan sponsor the testimony of ACCOUNT MANAGER, Account Manager Employee Benefits of RANDOM Company of Oklahoma would be as stated in her letter of December 20, 2001.⁸

B. Additional Findings:

1. Protestant's business operations include the operation of rock quarries and asphalt manufacturing facilities, the production, sales, trucking and installation of rock for lining roadways, and the production, sale, trucking and laying of asphalt on roadways. Tr. 27-28.

2. Protestant does business in and files corporate income tax, franchise tax and withholding tax returns in the States of Oklahoma and Kansas. Tr. 10-11.

3. Protestant is an S corporation and files its corporate income tax returns in the States of Oklahoma and Kansas accordingly. Tr. 11. As a result, Protestant's stockholders are liable for any income tax on net income from sources within the State of Oklahoma and/or the State of Kansas. Tr. 12.

9. That the handwritten comments by an unknown author at the bottom of the faxed FTE Count/Payroll per OESC form

"Emp. are at other plants. This plant has no Emp."

are false, inaccurate and incorrect.

10. That Affiant is familiar with each of the Group Health Plans in force in 1999 and 2000 respectively and of which COMPANY was the Plan Sponsor, that Affiant knows that the Group Health Plans were offered to the employees of COMPANY'S manufacturing facility in FAKE County, Oklahoma, at time of each person's employment and the Affiant believes that such Group Health Plans are what are otherwise known as employee welfare benefit plans under ERISA;

11. That Affiant incorporates in this Affidavit by reference thereto all of the facts and representations previously set forth in letter from COMPANY. dated June 1, 2001, and signed by Affiant.

Further, Affiant sayeth not.

⁷Exhibits 8 and 9 to the Stipulation of Facts which are copies of the group health plans.

⁸Exhibit 10 to the Stipulation of Facts. The letter advises that the elements of coverage present in both group health plans (XYZ INSURANCE COMPANY and ABC INSURANCE COMPANY) include coverage for basic hospital care, physician care, mental health care, substance abuse treatment, prescription drugs and prenatal care and also provide for the payment of at least fifty percent (50%) of the cost of the premiums by COMPANY.

4. Protestant employs individuals some of whom reside in the State of Oklahoma and others of whom reside in the State of Kansas. Tr. 9-10.

5. Protestant is engaged in interstate commerce.

6. SECRETARY/TREASURER, Secretary-Treasurer of Protestant and a director of the S corporation, testified that the group health insurance provided by Protestant to its employees is offered to the employees on the first day they begin work for the company, however, there is a one year eligibility period prior to the employees participation in the insurance plan. Tr. 15-16.

7. On cross-examination, SECRETARY/TREASURER testified as follows:

Q. Do the employees contribute at all to the premiums in this plan?

A. Yes.

Q. How much do they contribute?

A. Ten percent.

Q. When do they begin having that taken out of their paychecks?

A. After their eligibility period and if they decide that they want the insurance.

Q. Okay, so -- and by that, you mean after the one year that they begin having their share of the premiums taken out of their paychecks, right?

A. Correct.

Q. Can they refuse this health insurance coverage?

A. Yes.

Q. When do they have the right to refuse it, after how many -- after what time being employed do they have the right to refuse it?

A. We don't ask them if they want this or they don't want it until the one-year period, eligibility period is up.

Tr. 17-18.

8. In response to the question on cross-examination, "[d]oes COMPANY have to notify the insurance companies issuing its health insurance plans of the names of the employees that will be covered", SECRETARY/TREASURER testified that Protestant notifies the insurance companies as to each employee "[w]hen their eligibility period is up and if they sign on that they want insurance." Tr. 18-19.

9. The decision to require a one year eligibility period was a business decision of Protestant. Tr. 25.

10. EXPERT ATTORNEY, Attorney at Law, XYZ FIRM was certified as an expert witness with respect to the employee welfare benefits aspect of the Employee Retirement Income Security Act of 1979 ("ERISA")⁹. Tr. 41.

11. EXPERT ATTORNEY opined that both Sections 2902(C)(4)(b) and 3603(A)(1)(b) of Title 68 of the Oklahoma Statutes relate to employee welfare benefit plans as defined by ERISA and therefore, are pre-empted by the provisions of ERISA and are not enforceable as to Protestant's health benefit plans. Tr. 62-63.

12. On cross-examination, EXPERT ATTORNEY testified that ERISA does not require a private sector employer to create or maintain an employee welfare benefit plan, Tr. 65; nor does ERISA dictate an eligibility period or how much coverage an employer's plan must provide to an employee. Tr. 67.

13. The two health insurance plans in effect during the tax year at issue provided by Protestant to its full-time equivalent employees constitute welfare benefit plans as defined by ERISA.

12. The Division has conceded that the reasons for the initial denial¹⁰ of Protestant's application for the five-year ad valorem tax manufacturing facility exemption have been abandon, i.e; insufficient increase of full-time employees, insufficient increase of payroll and failure to maintain payroll, and that the only reason for the denial is the failure to offer a health insurance plan within 180 days to full-time employees. Tr. 73-74.

ISSUE AND CONTENTIONS

Three issues are presented for decision. The first issue is whether the Tax Commission has the authority to deny an application for a manufacturing facility - five-year ad valorem tax exemption. The second issue is whether the basic health benefits plan requirements of Sections 2902(C)(4)(b) and 3603(A)(1)(b) are preempted by ERISA and therefore, unenforceable. The third issue is whether Protestant's basic health benefits plan was offered to its full-time-equivalent employees within 180 days of the date of their employment.

With respect to the first issue, Protestant contends that the Tax Commission's denial of the previously approved exemption is an ultra vires act, citing *State, ex rel. Oklahoma State Board of Medical Licensure and Supervision v. Migliacco*, 1996 OK CIV APP 37, 917 P.2d 483 (1996); *Heiman v. Atlantic Richfield Co.*, 1995 OK 19, 131 Oil & Gas Rep. 59, 891 P.2d 1252 (1995) and *Matador Pipeline, Inc. v. Oklahoma Water Resources Board*, 1987 OK 65, 742 P.2d 15 (1987). In support of this contention, Protestant argues that the only authority granted the Tax Commission

⁹29 U.S.C. § 1001 et seq.

¹⁰See, Paragraph 7 of Section A of the Findings of Fact and Footnote 3.

within the statutory regime is (1) to establish the eligibility of the applicant as a manufacturing facility, (2) to verify payroll information, (3) to perform evaluation and assessment of property and (4) to prescribe forms and promulgate rules. Protestant further argues that Rule 710:10-7-15 of the Oklahoma Administrative Code ("OAC") should be declared invalid since to permit the Tax Commission the authority to deny an application creates a duplicitous and possibly conflicting review procedure.

The Division cites 68 O.S. Supp. 2000, § 2902(I) and *Jarboe Sales Co. v. Oklahoma Alcoholic Beverage Laws Enforcement Commission*, 2003 OK CIV APP 23, 65 P.3d 289 (2003), and contends that OAC 710:10-7-15 does not exceed the scope of the statutory authority granted the Tax Commission to "carry out and administer the terms and provisions" of Section 2902. In support of this contention, the Division argues that the Tax Commission must be allowed to act as a watchdog over the provisions of Section 2902 because with the reimbursement provisions of the Ad Valorem Tax Code¹¹ the County Assessors only have an incentive to grant the exemption.

With respect to the second issue, Protestant contends that Oklahoma's basic health benefits plan requirements in 68 O.S. §§ 2902 and 3603 are preempted by federal law embodied in ERISA as to employee welfare benefit plans offered by employers engaged in interstate commerce and thus cannot be a requirement for the five-year ad valorem tax manufacturing facility exemption, citing *Agsalud v. Standard Oil Company of California*, 454 U.S. 801, 102 S.Ct. 79, 70 L.Ed.2d 75, affirming the Ninth Circuit Court of Appeals judgement in *Standard Oil Company of California v. Agsalud*, 633 F.2d 760 (C.A. 9th (Cal.) 1980) and *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 113 S.Ct. 580, 121 L.Ed.2d 513 (1992). In support of this proposition, Protestant argues that the Division has not denied that Protestant is engaged in interstate commerce and that the health insurance plan offered by Protestant to its employees is a welfare benefit plan as defined by ERISA. Protestant further argues that the provisions of Sections 2902 and 3603 "relate to" welfare benefit plans, are clearly preempted by ERISA and thus cannot be applied to deny the exemption.

The Division contends that Section 2902 is not preempted by ERISA. In support of this contention, the Division argues that an act of Congress will be deemed to preempt state law only where the intent is unmistakable and the nature of the regulated subject matter permits no other conclusion, citing *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 83 S.Ct. 1210 (1963). The Division further argues that where there is no actual conflict between a state law and a federal law, compliance with both is possible and there is no preemption, citing *Pacific Gas & Electric Company v. State Energy Commission*, 461 U.S. 190, 103 S.Ct. 1713 (1983). The Division further argues that Protestant has failed to demonstrate a connection between the subject matter of Section 2902 and the subject matter of ERISA, citing the testimony of Protestant's witness that the decision to impose a one year eligibility period was a business decision rather than a decision prompted by the provisions of ERISA.

With respect to the third issue, Protestant contends that it offered its employees a basic health benefits plan within the time period prescribed by Section 2902. In support of this

¹¹68 O.S. 1991, § 2801 et seq.

contention, Protestant cites the definition of the term "offer" as used in a verbal tense in *Black's Law Dictionary*, Fifth Edition, and argues that it "offered" its employees the health insurance upon commencement of their employment.

The Division contends that it properly denied Protestant's application for a five-year ad valorem tax manufacturing facility exemption because Protestant failed to provide its full-time equivalent employees a basic health insurance plan within 180 days of their employment. In support of this contention, the Division argues that the health insurance benefits did not become effective until one year of employment.

APPLICABLE LAW

FIRST ISSUE

Whether the Tax Commission has the authority to deny an application for a manufacturing facility - five-year ad valorem tax exemption.

All property in this state, whether real or personal, except that which is specifically exempted by law or which is relieved of ad valorem taxation by reason of the payment of an in lieu tax, is subject to ad valorem taxation. 68 O.S. 1991, § 2804.¹² Specifically exempted from the levy of ad valorem tax for a period of five (5) years are "new, expanded or acquired manufacturing facilities, including facilities engaged in research and development" of a "qualifying manufacturing concern, as defined by Section 6B of Article X of the Oklahoma Constitution, and as further defined herein". 68 O.S. Supp. 2000, § 2902(A). Section 6B of Article X of the Oklahoma Constitution,¹³ as originally adopted, provided:

For the purpose of inducing any manufacturing concern to locate or expand manufacturing facilities within any county of this state, a qualifying manufacturing concern shall be exempt from the levy of any ad valorem taxes upon new, expanded or acquired manufacturing facilities for a period of five (5) years.

For purposes of this section, a "qualifying manufacturing concern" means a concern that:

1. Is not engaged in business in this state or does not have property subject to ad valorem tax in this state and constructs a manufacturing facility in this state or acquires an existing facility that has been unoccupied for a period of twelve (12) months prior to acquisition; or
2. Is engaged in business in this state or has property subject to ad valorem tax in this state and constructs a manufacturing facility in this state at a different location from present facilities and continues to operate all of its facilities or acquires an existing facility that has

¹²Added by Laws 1988, c. 162, § 4, effective January 1, 1992. Replaced 68 O.S. 1981, § 2404 which was repealed by Laws 1988, c. 162, § 165.

¹³Added by State Question No. 588, Legislative Referendum No. 252, adopted at election held on April 30, 1985. Addition proposed by Laws 1985, p. 1664, S.J.R. No. 9.

been unoccupied for a period of twelve (12) months prior to acquisition and continues to operate all of its facilities.

The exemption allowed by this section shall apply to expansions of existing facilities. Provided, however that any exemption shall be limited to the increase in ad valorem taxes directly attributable to the expansion.

For the purposes of this section "manufacturing facilities" shall mean facilities engaged in manufacturing as defined by the Standard Industrial Classification Code and facilities engaged in research and development.

The Legislature shall enact laws to carry out the provisions of this section and to provide for the reimbursement to common schools, county governments, cities and towns, emergency medical services districts, vocational-technical schools, junior colleges, county health departments and libraries for revenues lost to such entities as a result of the exemption provided by this section.

The assessed valuation of property exempt from taxation by virtue of this section shall be added to the assessed valuation of taxable property in computing the limit on indebtedness of political subdivisions contained in Section 26 of this article.¹⁴

In 1985, the Legislature enacted Section 2405.2¹⁵ of the Ad Valorem Tax Code for purposes of carrying out the provisions of Article X, Section 6B of the Oklahoma Constitution. See, Ok. Const. Art. X, § 6B. Within the enactment, the Legislature charged the Tax Commission with "the authority and duty to prescribe forms and to promulgate rules and regulations as may be necessary to carry out and administer the terms and provisions of [the] section." 68 O.S. Supp. 1985, § 2405.2(G).¹⁶ In accordance with the prescribed authority and duty, the Tax Commission by Order No. 86-02-04-09 contemporaneously approved and adopted regulations 24-1 through 24-26.¹⁷ Of these regulations, the following are pertinent to the first issue presented, to-wit:

Reg. 24-10. County assessor to approve - Valuation.

¹⁴Amended by State Question No. 618, Legislative Referendum No. 275, adopted at election held on August 23, 1988. The amendment replaced the provision defining "manufacturing facilities" with the following provision:

The Legislature shall define the term "manufacturing facility" for purposes of the ad valorem tax exemption provided by this section in order to promote full employment of labor resources within the state; provided, however, that a manufacturing facility that qualifies for the ad valorem tax exemption provided by this section, pursuant to the definition of "manufacturing facility" then applicable, shall be eligible for the exemption without regard to subsequent changes in the definition of the term "manufacturing facility".

¹⁵Added by Laws 1985, c. 341, § 1, emerg. eff. July 30, 1985. Section 2405.2 was repealed by Laws 1988, c. 162, § 165, effective January 1, 1992. Currently codified at Section 2902 of the Ad Valorem Tax Code.

¹⁶Currently codified at 68 O.S., § 2902(I).

¹⁷Currently codified at OAC, 710:10-7-1 through 10-7-27.

- (a) The county assessor shall examine each application and shall determine whether the facility is exempt under the law. In determining whether the exemption application is to be approved, the assessor shall, if necessary, make inspections, make a written request for additional information, or examine any person under oath as provided by law.
- (b) The assessor shall complete the assessor's portion of each application, whether approved or rejected, and shall consecutively number each completed application received, whether approved or rejected, and shall immediately forward a copy of each application, whether approved or rejected, to the Tax Commission, Ad Valorem Tax Division. The original of each application, whether approved or rejected, shall be delivered to the county board of equalization on or before the fourth Monday in April each year for its review.
- (c) If the application is approved, the assessor shall mark it "approved." It shall then be the duty of the Tax Commission to examine each facility approved for the exemption, determine the fair cash value of the real and personal property separately, and to determine the assessed value of each by applying the assessor's assessment percentage thereto. The Commission shall then notify the county assessor of such evaluation.
- (d) If the assessor finds that the exemption should not be allowed by reason of not being in conformity to the law, he shall mark the application "rejected," state thereon the reason for such rejection, and shall notify the applicant of his action by mailing written notice to the applicant at the address shown in the application, on forms prescribed by the Tax Commission, and the notice shall be mailed on or before the fourth Monday in April. The assessor shall then immediately proceed to value and assess the property as provided by law.¹⁸

Reg. 24-11. County board of equalization to review

The county board of equalization shall review each application for exemption in the same time and manner as provided in Sections 2411 and 2412 for reviewing homestead exemptions and shall give written notice to the applicant if the board disallows an exemption heretofore allowed by the assessor, stating the reason for the rejection thereon, and shall

¹⁸Currently codified at OAC, 710:10-7-11. Amended at 14 Ok Reg 2670, eff 6-26-97 wherein the title to the regulation was changed to read - County assessor to make initial determination of status; examination and valuation of the facility; notice upon rejection; in the first sentence of paragraph (a) the phrase "for the manufacturing exemption from ad valorem taxation" was inserted between the words "application" and "and"; in paragraph (b) "Oklahoma" was inserted before "Tax Commission" and "Tax" was deleted from "Ad Valorem Division"; in paragraph (c) the first sentence was amended to read - If the manufacturer's first year application is approved, the assessor shall mark the OTC Form 900 XMA-B, Notice of Approval or Disapproval by County Board of Equalization [sic] and County Assessor of Manufacturer's Ad Valorem Tax Exemption, "APPROVED" and in the second sentence clarified that the Tax Commission's examination of the facility required a "physical inspection" of the facility; and in the first sentence of paragraph (d) replaced the word "application" with the phrase "Notice of Approval or Disapproval by County Board of Equalization [sic] and County Assessor of Manufacturer's Ad Valorem Tax Exemption (OTC Form 900 XMA-B) "DISAPPROVED" and the word "thereon" with the phrase "OTC Form 900 XMA-B".

forward a copy of the notice to the Tax Commission on forms prescribed by the Tax Commission.¹⁹

Reg. 24-12. Hearings before county board of equalization.

In case the assessor or county board of equalization disallows or rejects an application for this exemption, the applicant may obtain a hearing before said board by filing a written complaint with the secretary of said board (the county clerk) within ten (10) days from the receipt of the notice and said complaint shall specify his grievances and the pertinent facts in relation thereto, and said board shall conduct hearings as provided for in Section 2412 for homestead exemption claims.²⁰

Reg. 24-13. Appeal from board of equalization to district court.

Either the applicant or the county assessor may appeal the board's decision to the district court as provided in Section 2461 for homestead exemption appeals.²¹

Reg. 24-14. Tax Commission to review and approve - Notice - Protest - Hearing - Appeal to Supreme Court.

(a) If the Tax Commission determines that an exemption has been erroneously or unlawfully granted in whole or in part, it shall notify the appropriate county assessor who shall immediately value and assess the property and place the property on the tax rolls for ad valorem taxation.

(b) The Commission shall mail a copy of such notice to the applicant at the mailing address shown on the application. Such copy shall notify the applicant of his right to protest the commission's determination.

(c) Within thirty (30) days after the mailing of such notice, the applicant may file with the Tax Commission a written protest under oath, signed by himself or his duly authorized representative, in the same manner and subject to the same requirements as provided in Section 207 of the Uniform Tax Procedure Code, Title 68 O.S. A copy of such protest shall be mailed or delivered by the applicant to the county assessor.

¹⁹Currently codified at OAC, 710:10-7-12. Amended at 14 Ok Reg 2670, eff 6-26-97 wherein the reference to Sections 2411 and 2412 was deleted.

²⁰Currently codified at OAC, 710:10-7-13. Amended at 14 Ok Reg 2670, eff 6-26-97, wherein the reference to "Section 2412 for homestead exemption claims" was deleted and replaced by the phrase "as provided by statute".

²¹Currently codified at OAC, 710:10-7-14. Amended at 14 Ok Reg 2670, eff 6-26-97 wherein the regulation was rewritten to read "The decision of the Board of Equalization as to the exemption of a manufacturing concern from ad valorem taxation may be appealed to the District Court by either the applicant or the county assessor, as provided by law.

(d) Applicant's right of protest and hearing thereon and the procedure to be followed in connection therewith shall be in accordance with and governed by the Uniform Tax Procedure Code.

(e) Appeals from the decision of the Tax Commission regarding any such protest shall be made directly to the Supreme Court of Oklahoma in accordance with and subject to the same requirements and provisions of Section 225 of the Uniform Tax Procedure Code concerning appeals from orders, rulings or findings by the Tax Commission.²²

Rules promulgated pursuant to the Administrative Procedures Act²³, are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court. 75 O.S. 1991, § 306(C). They are valid and binding on the persons they affect, have the force of law and are prima facie evidence of the proper interpretation of the matter to which they refer. 75 O.S. 1991, § 308.2(C).

Great weight is accorded an agency's construction of a statute when the administrative interpretation is made contemporaneously with the enactment of the statute and the construction is longstanding and continuous by the agency charge with its execution. *Schulte Oil Co., Inc. v. Oklahoma Tax Commission*, 1994 OK 103, 882 P.2d 65 (1995). Where Legislature is made repeatedly aware of the operation of the statute according to the construction placed upon it by an agency and the Legislature has not expressed its disapproval with the agency's construction, the Legislature silence may be regarded as acquiescence in the agency's construction, *R.R. Tway, Inc. v. Oklahoma Tax Commission*, 1995 OK 129, 910 P.2d 972 (1995); and the agency's construction is given controlling weight and will not be disregarded except in cases of serious doubt, *Cox v. Dawson*, 1996 OK 11, 911 P.2d 272 (1996).

The rules and regulations of an administrative agency which implement the provisions of a statute are valid unless they are beyond the scope of the statute, are in conflict with the statute or are unreasonable. See, *Arkansas Louisiana Gas Co. v. Travis*, 1984 OK 33, 682 P.2d 225 (1984); *Boydston v. State*, 1954 OK 327, 277 P.2d 138 (1954). Agency rules need not be specifically authorized by statute, but must generally reflect the intent of the Legislature as expressed in the statute. *Jarboe Sales Company v. Oklahoma Alcoholic Beverage Laws Enforcement Commission*, 2003 OK CIV APP 23, 65 P.3d 289 (2003). As a general rule, it is presumed that administrative rules and regulations are fair and reasonable, and that the complaining party has the burden of proving the contrary by competent and convincing evidence. *State ex rel. Hart v. Parham*, 1966 OK 9, 412 P.2d 142 (1966).

The Tax Commission in Order No.86-02-04-09 found "[t]hese regulations are promulgated and issued by the Oklahoma Tax Commission in accordance with 68 O.S. Supp. 1985, Section 2405.2 G., and shall remain in force and effect until changed by law or by Attorney General's

²²Currently codified at OAC, 710:10-7-15. Amended at 14 Ok Reg 2670, eff 6-26-97 wherein the title to the regulation was changed to "Review; protest; appeal." and headings were insert in each paragraph, otherwise no substantive changes to the provisions are noted.

²³75 O.S. 1991, § 250 et seq., § 301 et seq.

Opinion or by the Commission. The Tax Commission is authorized to invalidate any rule it promulgates which is in conflict with the statute the rule interprets, especially where the invalidation does not operate to the prejudice of the taxpayer in any manner. Oklahoma Tax Commission Order No. 99-02-08-007.

SECOND ISSUE

Whether the basic health benefits plan requirements of Sections 2902(C)(4)(b) and 3603(A)(1)(b) are preempted by ERISA and therefore, unenforceable.

The title to Section 2902 is "Manufacturing facilities - Exemption from ad valorem tax" and provides in Section C thereof all initial applications for a five-year exemption for a new, acquired or expanded manufacturing facility submitted after December 31, 1993, shall be granted only if the facility offers, or will offer within one hundred eighty (180) days of the date of employment, a basic health benefits plan to the full-time-equivalent employees of the facility, which is determined by the Department of Commerce to consist of the elements specified in 68 O.S. Supp. 1993, § 3603(A)(1)(b) or elements substantially equivalent thereto.²⁴ 68 O.S. Supp. 2000, § 2902(C)(4)(b).²⁵ A "basic health benefits plan" consists of the following elements or elements substantially equivalent thereto: (1) not less than fifty percent (50%) of the premium shall be paid by the employer; (2) coverage for basic hospital care; (3) coverage for physician care; (4) coverage for mental health care; (5) coverage for substance abuse treatment; (6) coverage for prescription drugs; and (7) coverage for prenatal care. 68 O.S. Supp. 1999, § 3603(A)(1)(b).²⁶ ERISA "supersedes any and all state laws insofar as they may now or hereafter relate to any [covered] employee benefit plan". 29 U.S.C. § 1144(a). State tax laws relating to employee benefits plans are not exempt from ERISA's supersedure. 29 U.S.C. § 1144(b)(5)(B)(i). ERISA preempts all such laws regardless of whether they conflict with any specific provision of the act, *Howard v. Parisian, Inc.*, 807 F.2d 1560 (C.A. 11th 1987); and even if the law is consistent with ERISA's substantive requirements, *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 113 S.Ct. 580, 121 L.Ed.2d 513 (1992).

ERISA's section providing that act "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" has broad preemptive effect, but it is not all-encompassing, nor unlimited. *Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (C.A. 9th 1985); *Rebaldo v. Cuomo*, 749 F.2d 133 (C.S. 2nd 1984). While ERISA preemption is clearly expansive, the term "relate to," as it is used in ERISA provision purporting to supersede all state laws relating to any employee benefit plan, cannot be interpreted to extend to furthest stretch of its indeterminacy; otherwise, for all practical purposes, ERISA preemption will never run its course. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001). Although ERISA's preemption provision is very broad, the word "related" in the preemption provision must not be taken literally. *Pohl v. National Benefits Consultants, Inc.*, 956 F.2d 126 (C.A. 7th 1992). To be

²⁴Other requirements for qualification for the five-year ad valorem tax manufacturing facility exemption are mandated by the provisions of Section 2902. The discussion herein is limited to the particular facts and issues of this case.

²⁵Amended by Laws 2000, c. 339, § 20 and Laws 2000, c. 3, § 3.

²⁶Laws 1999, c. 426, § 3, emerg. eff. June 10, 1999.

preempted state law must both relate to and purport to regulate directly or indirectly employee benefit plans. *Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270 (C.A. 9th 1991).

ERISA does not invalidate a state law of general application which has merely a tangential effect on employee welfare benefits plans and which does not affect the structure, administration, or type of benefits provided by such plans, even though state law may have some economic impact on those plans. *Ward v. Management Analysis Co. Employee Disability Ben. Plan*, 135 F.3d 1276 (C.A. 9th 1988); *Rebaldo, supra*. Also ERISA does not supersede state laws which in addition to being an exercise of traditional police powers, affect such plans in too tenuous, remote or peripheral a manner to warrant a finding that the law relates to the plan. *District of Columbia, supra*; *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (C.A. 2nd 1985). In determining whether state law is preempted by ERISA, court should consider whether state law represents traditional exercise of state authority, whether state law affects relations among principal ERISA entities, and whether effect of state law on plan is incidental in nature. *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550 (C.A. 5th 1987). Law of general applicability is one that does not treat ERISA plans differently from non-ERISA plans. *Boyle v. Anderson*, 68 F.3d 1093 (C.A. 8th 1995), cert. den., 516 U.S. 1173, 116 S.Ct. 1266, 134 L.Ed. 2d 214 (1995).

A state law "relates to" an employee benefits plan within the meaning of ERISA preemption when it has a connection with or reference to those plans. *General Electric Co. v. New York State Depart. of Labor*, 891 F.2d 25 (C.A. 2nd 1989); *Shiffer v. Equitable Life Assurance Society of U.S.*, 838 F.2d 78 (C.A. 3rd 1988). To determine whether a state law has "connection with" an ERISA plan, so as to "relate to" plan and to be preempted, court looks both to objectives of ERISA statute, as guide to scope of state law that Congress understood would survive, as well as to nature of effect of state law on ERISA plans. *Egelhoff, supra*; *Miller v. PPG Industries, Inc.*, 237 F.Supp.2d 756 (W.D. Ky. 2002). One of the principal goals of ERISA is to enable employers to establish a uniform administrative scheme, *Egelhoff, supra*; governed by a single set of regulations, rather than a "patchwork" scheme, *Keystone Chapter, Associated Builders and Contractors, Inc. v. Foley*, 37 F.3d 945 (C.A. 3rd 1994); however, such concern only arises with respect to benefits whose provisions by nature require an ongoing administrative program to meet the employer's obligation, and thus Congress intended only to preempt state laws relating to plans, rather than those simply relating to benefits. *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 107 S.Ct. 2211, 482 L.Ed.2d 1 (1987). A state law is not preempted solely because participation of ERISA plans is required as matter of economics in order for statute to meet its social goals. *United Wire, Metal and Mach. Health and Welfare Fund v. Morristown Memorial Hospital*, 995 F.2d 1179 (C.A. 3rd 1993).

Factors to be considered in deciding whether state statute of general application "relates to" ERISA plan, and is preempted, include whether state law negates ERISA plan provision, whether state law affects relations between primary ERISA entities, whether state law affects structure of ERISA plans, whether state law affects administration of ERISA plans, whether state law has economic impact on ERISA plans, whether preemption is consistent with other ERISA provisions, and whether state law is exercise of traditional state power. *Arkansas Blue Cross and Blue Shield v. St. Mary's Hosp., Inc.*, 947 F.2d 1341 (C.A. 8th 1991), cert. den., 504 U.S. 957, 112 S.Ct. 2305, 119 L.Ed.2d 227 (1991). Also court should consider whether state law regulates types of benefits of plans, whether law requires establishment of separate employee benefit plan to comply with the law,

whether law imposes reporting, disclosure, funding or vesting requirements for plan, and whether law regulates certain ERISA relationships, including relationship between the plan and the employer and, employer and employee. *Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498 (C.A. 1993). A simplified test for determining whether state law "relates to" ERISA plans for preemption purposes is to ask whether state is telling employers how to write their ERISA plans, or conditioning some requirement on how they write their ERISA plans, or telling them that regardless of how they write their ERISA plans, they must do something else outside and independent of those plans. *WSB Elec., Inc. v. Curry*, 88 F.3d 788 (C.A. 9th 1996).

THIRD ISSUE

Whether Protestant's basic health benefits plan was offered to its full-time-equivalent employees within 180 days of the date of their employment.

An application for a manufacturing facility - five-year ad valorem tax exemption shall be granted only if the facility offers or will offer within one hundred eighty (180) days of the date of employment, a basic health benefits plan to the full-time-equivalent employees of the facility. 68 O.S. Supp. 2000, § 2902(C)(4)(b).

Neither the Ad Valorem Tax Code²⁷ nor the administrative rules of the Tax Commission on ad valorem taxation as codified in the Oklahoma Administrative Code²⁸ provide a definition for the word "offer." Terms in a statute are given their plain and ordinary meaning unless a contrary intention is apparent. *Neer v. Oklahoma Tax Commission*, 1999 OK 41, 982 P.2d 1071 (1999). The subject matter and purpose of a statute are material to ascertaining the meaning of a word or phrase used and that language should be construed to be harmonious with the purpose of the act, rather than in a way which would defeat it. *Bishop v. Takata Corp.*, 2000 OK 71, 12 P.3d 459 (2000).

As a general rule, statutes exempting property from taxation are to be applied circumspectly and are to be strictly construed against the allowance of an exemption. *Matter of Wal-Mart Stores, Inc.*, 1991 OK CIV APP 73, 817 P.2d 1281 (1991); *Bert Smith Road Machinery Co. v. Oklahoma Tax Commission*, 1977 OK 75, 563 P.2d 641 (1977). No claim of tax exemption can be sustained unless it clearly comes within statutory provision under which exemption is claimed. *Home-Stake Production Co. v. Board of Equalization of Seminole County*, 1966 OK 115, 416 P.2d 917 (1966). Rule that ambiguity in tax law should be resolved in favor of the taxpayer does not apply where statute exempts property from taxation. *Phillips Petroleum Co. v. Oklahoma Tax Commission*, 1975 OK 146, 542 P.2d 1303 (1975). Burden of proving existence of deduction is on individual seeking exemption, and constitutional provisions are strictly construed against those claiming exemption. *Austin, Nichols & Co., Inc. v. Oklahoma County Bd. of Tax-Roll Corrections*, 1978 OK 65, 578 P.2d 1200 (1978).

The phrase "offers or will offer" is used as a verb in the sentence in question in Section 2902(C)(4)(b). The subject of the sentence is "a basic health benefits plan" and the verbal phrase is

²⁷68 O.S. 1991, § 2801 et seq.

²⁸OAC, 710:10-1-1 et seq.

modified by the adverbial clause "within one hundred eighty (180) days of the date of employment". "Offer", as a verb and as used in the sentence, is defined to mean: "(2)(a) to present for acceptance or rejection - TENDER; (b) to present in order to satisfy a requirement; (3)(a) PROPOSE, SUGGEST; (b) to declare one's readiness or willingness; * * * (5) to make available - AFFORD, *esp*: to place (merchandise) on sale". Webster's Ninth New Collegiate Dictionary, 819 (1987).

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission rules construing the provisions of the manufacturing facility - five-year ad valorem tax exemption have been in existence since February, 1986. The rules were approved and adopted contemporaneously with the enactment of the exemption. The rules have been subjected to review by the Legislature on an annualized basis²⁹ and no evidence has been presented to show the Legislature has disapproved the rules.

The rules not only reflect the general intent of the Legislature as expressed in the exemption, but conform to the specific authority and duty mandated by the Legislature to the Tax Commission. The authority and duty of the Tax Commission within the enactment is to establish the eligibility of the applicant as a manufacturing facility, 68 O.S. Supp. 2000, § 2902(B)(1)(c) and (d); to verify payroll information and that full-time-equivalent employees are offered a basic health benefits plan, 68 O.S. Supp. 2000, § 2902(C)(4); to perform evaluation and assessment of the property for which an exemption is granted, 68 O.S. Supp. 2000, § 2902(H); and to prescribe forms and promulgate rules to carry out and administer the terms and provisions of the exemption, 68 O.S. Supp. 2000, § 2902(I).

Further, the rules do not create a duplicitous and potentially conflicting review procedure. The Tax Commission's role in the review process is only invoked when the county assessor or taxpayer has exhausted his or her remedies through the procedures adopted for the approval or rejection of homestead exemptions and the valuation of property. See, 68 O.S. Supp. 1992, § 2895.

Accordingly, the undersigned finds that the Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding. 68 O.S. 1991, § 207 and *OAC*, 710:10-7-15.

2. The undersigned finds, for the following reasons, that the "basic health benefits plan" requirements of Section 2902(C)(4)(b) and 3603((A)(1)(b) of Title 68 of the Oklahoma statutes are not preempted by ERISA. First, Section 2902 "relates to" a five-year exemption from ad valorem tax for the new, expanded or acquired manufacturing facilities of a qualifying manufacturing concern and Section 3603 "relates to" the Oklahoma Quality Jobs Program Act, 68 O.S. Supp. 1993, § 3601 et seq. Second, Sections 2902 and 3603 are laws of general applicability³⁰ and represent exercises of traditional state power. Third, neither Section 2902(C)(4)(b) nor 3603((A)(1)(b) dictates that a "qualifying manufacturing concern" or "basic industry" shall have a health benefits plan, purport to regulate employee benefits plans directly or indirectly or impact any of the exclusive regulatory aspects of ERISA. Fourth, Sections 2902(C)(4)(b) and 3603((A)(1)(b) merely

²⁹75 O.S. 2001, § 308.

³⁰Laws that do not treat ERISA plans differently from non-ERISA plans. See, *Boyle v. Anderson, supra*.

refer to the benefits required of a employer sponsored plans, rather than the structure or administration of such plans. Finally, Sections 2902(C)(4)(b) and 3603((A)(1)(b) neither affect the relations between the primary basic health benefits plan entities nor prevent an employer from establishing a uniform administrative scheme governed by a single set of regulations.

3. The undersigned finds that Protestant did not offer its full-time-equivalent employees a basic health benefits plan within one hundred and eighty (180) days from the date of their employment. The word "offer", given the subject matter and purpose of Section 2902, means "to present for acceptance or rejection". At all times relevant herein, Protestant's insurance plan for its employees at the facility required a one year period starting from the date they began full-time employment before they were eligible to participate in the plan. The employees could not accept or reject the insurance prior to the end of their eligibility period. Since one of the predicates for qualification for the ad valorem tax exemption is that "the facility offers or will offer within one hundred eighty (180) days of the date of employment, a basic health benefits plan to the full-time-equivalent employees of the facility", the denial of Protestant's application for a manufacturing facility - five-year ad valorem tax exemption was not erroneous.

4. Protestant's protest to the denial of its application for a manufacturing facility - five-year ad valorem tax exemption should be denied.

DISPOSITION

Based on the above and foregoing findings of fact, applicable law and conclusions of law, it is ORDERED that the protest to the denial of the application for a manufacturing facility - five-year ad valorem tax exemption of Protestant, COMPANY, be denied.

OKLAHOMA TAX COMMISSION