JURISDICTION: **OKLAHOMA TAX COMMISSION DECISION**
CITE: **2006-08-01-02 / NOT PRECEDENTIAL**
ID: **P-05-112-H**
DATE: **AUGUST 1, 2006**
DISPOSITION: **DENIED**
TAX TYPE: **INCOME TAX**
APPEAL: **NO APPEAL TAKEN**

The above matter comes on for entry of a final order of disposition by the Oklahoma Tax Commission. Having reviewed the files and records herein, the Commission hereby adopts the Findings of Fact, Conclusions of Law and Recommendations made entered by the Administrative Law Judge on the 20th day of April, 2006, and the same, appended hereto, together herewith shall constitute the Order of the Commission.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROTESTANTS appear pro se.[1] The Individual Audit Section, Audit Division ("Division"), Oklahoma Tax Commission, appears through NAME, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On August 17, 2005, the protest file was received by this office for further proceedings consistent with the Uniform Tax Procedure Code[2] and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.[3] On August 24, 2005, a letter was mailed to the Protestants advising that this matter had been assigned to ADMINISTRATIVE LAW JUDGE, and docketed as Case Number P-05-112-H. The letter also advised the Protestants that a Notice of Prehearing Conference would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Oklahoma Tax Commission.* On October 4, 2005, the Notice of Prehearing Conference was mailed to the last known address of the Protestants setting the prehearing conference for October 27, 2005, at 1:30 p.m.[4] On October 14, 2005, this office received a written request from the Protestants that the Prehearing Conference be reset due to a scheduling conflict. There was no objection by the Division. On October 19, 2005, a letter was mailed to the parties advising that the Prehearing Conference was rescheduled for November 8, 2005, at 10:30 a.m.

The Prehearing Conference was conducted by telephone on November 8, 2005, at 10:30 a.m. The parties advised that information was needed from the Internal Revenue Service. On November 10, 2005, a letter was mailed to the parties directing that a status report was to be filed on or before January 9, 2006. On January 4, 2006, the Protestants filed a Status Report requesting additional time to respond to the Division's position. On January 9, 2006, a letter was mailed to the parties directing that a status report be filed on or before March 10, 2006.

On March 1, 2006, the Protestants filed a Status Report, which attached a copy of a letter sent to the Division's counsel. On March 9, 2006, the Division filed a Status Report stating that the parties had reached an impasse and were unable to resolve this matter. On March 15, 2006, a

letter was mailed to the parties setting this case for hearing on April 5, 2006, at 9:30 a.m., with position letters or briefs due on or before March 29, 2006.

On March 29, 2006, the Division filed the Position Statement of the Audit Division. On March 30, 2006, a position letter was received from the Protestants, which also stated that the Protestants were unable to travel to the State of Oklahoma for the scheduled hearing and requested that the hearing be conducted by telephone or that the case be submitted on the position statements as filed. The Division had no objection to submitting this matter on position statements. On April 3, 2006, a letter was mailed to the parties advising that this matter would be submitted on position statements. The letter further advised the parties that the scheduled hearing was stricken and this cause would be submitted for decision based on the position statements and written materials previously filed by the parties.[5] On April 3, 2006, the record in this matter was closed and the case submitted for decision.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, and the position statements, the undersigned finds:

1. On April 15, 2000, the Protestants filed an Oklahoma Income Tax Return (Form 511NR), as part-year residents for the 1999 tax year.[6]

2. On June 27, 2001, the Internal Revenue Service ("IRS") adjusted the Protestants' taxable wages to include an additional $12,940.00.[7]

3. On March 14, 2005, the Division issued a proposed income tax assessment[8] for the 1999 tax year based upon information received from the IRS under the authority of Section 6103 (d) of the Internal Revenue Code (Report No. CP2000, Date of Notice to taxpayer 06-27-01), which adjusted and increased the Protestants adjusted gross income, as follows, to-wit:

Corrected Taxable Income-Method I	$33,573.00
Total Tax as Adjusted	370.00
Less Tax Previously Reported or Assessed	2.00
Additional Tax Due	$ 368.00
Interest @ 15% from 04-15-00 to 05-13-05	280.39
Tax and Interest if Paid Within 60 days	$ 648.39
30 Day Delinquency Penalty @ 10%	36.80
Tax, Interest & Penalty if Paid After 60 Days	$ 685.19

4. On March 23, 2005, a timely letter of protest was received from the Protestants.[9]

5. On April 19, 2005, the Division received additional correspondence from the Protestants reasserting the protest.[10]

6. On April 26, 2005, the Division mailed a letter to the Protestants which attempted to explain how the proposed income tax assessment was calculated and enclosed a copy of the Protestants' Oklahoma Individual Income Tax Return (Form 511NR) for the 1999 tax year, with corrections.[11]

7. On May 25, 2005, the Division received additional correspondence from the Protestants.[12] In this letter, the Protestants acknowledged that the June 2001 notice of adjustment to the federal return for the 1999 tax year had been received from the IRS and paid.[13]

8. On September 21, 2005, the Division received additional correspondence from the Protestants explaining why the Division's proposed assessment was incorrect.[14]

9. On December 20, 2005, counsel for the Division mailed a letter to the Protestants, which thoroughly and accurately provided a factual and legal explanation of how and why the Division issued the proposed assessment.[15]

10. On March 1, 2006, counsel for the Division received a response from the Protestants to the correspondence of December 20, 2005, which challenged the Division's method for calculating taxes on part-year residents.[16]

ADDITIONAL FINDINGS OF FACT

11. The Protestants did not contest or appeal the IRS adjustments to the federal return for the 1999 tax year, which increased taxable wages $12,940.00. The IRS adjustment included a "1099" for a $12,500.00 settlement with the former Texas employer of the husband.[17]

12. The Protestants did not file an "Amended" Oklahoma Income Tax Return for the 1999 tax year reporting the IRS adjustments to federal "adjusted gross income."

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[18]

2. The State of Oklahoma levies a tax upon the Oklahoma "taxable income"[19] of every resident[20] or nonresident individual.[21]

3. The starting point for the computation of Oklahoma personal income is federal "adjusted gross income."[22]

4. "Oklahoma adjusted gross income" means "adjusted gross income" as reported to the federal government (or as would have been reported by the taxpayer had a return been filed), or in the event of adjustments thereby by the federal government as finally ascertained under the Internal Revenue Code.[23]

5. The assessment of Oklahoma income tax subsequent to a change or correction made by the IRS to a taxpayer's federal taxable income is governed by the provisions of Section 2375(H)[24] of the Oklahoma Income Tax Act.[25]

6. The period of time prescribed in Section 223[26] of this title, in which the procedures for the assessment of income tax may be commenced by the Tax Commission, shall be tolled and extended until the amount of taxable income for any year of a taxpayer under the Internal Revenue Code has been finally determined under applicable federal law and for the additional period of time hereinafter provided in this subsection.

7. Assessments shall be made in accordance with the Uniform Tax Procedure Code. The income information furnished by the IRS shall be that upon which any tax liability is computed. Unless otherwise indicated in the Revenue Agent's Report (R.A.R.), all income is considered to be from Oklahoma sources, as are all deductions and credit, to the extent that they are allowed by Oklahoma Statute. The taxpayer is considered to be, or to have been an Oklahoma resident during the year or years examined by the IRS by virtue of the fact that the results of the examination are disclosed to the Commission by the IRS. The assessment shall be mailed to the address shown on the R.A.R. or the last known address of the taxpayer.[27]

8. The Division is bound by the IRS's determination of the Protestants' federal adjusted gross income for the 1999 tax year.[28]

9. The Tax Commission's methodology[29] for calculating Oklahoma "adjusted gross income" for nonresident and part-year residents "does not impose a tax on out-of-state income, but merely uses that income in calculating the rate at which Oklahoma-derived income shall be taxed."[30]

10. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[31] A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.[32]

In this matter the Protestants have failed to meet their burden of showing that the proposed income tax assessment for the 1999 tax year is incorrect and in what respect. The Division is bound to follow the adjustments made to the Protestants' federal "adjusted gross income." From the record it does not appear that the Protestants disputed the adjustments made by the IRS increasing taxable wages $12,940.00, including the $12,500.00 settlement, and the Division does not have the statutory authority to disregard the adjustments.

DISPOSITION

It is ORDERED, based upon the specific facts and circumstances of this case, that the protest should be denied.

It is further ORDERED that the proposed income tax assessment for the 1999 tax year should be fixed as the Protestants' deficiency, and that amount should be determined as due and owing, including penalties and interest, accrued and accruing.

OKLAHOMA TAX COMMISSION

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[1] "**pro se"** (proh **say** *or* **see**), *adv.* & *adj.* [Latin] For oneself; on one's own behalf; without a lawyer <the defendant proceeded pro se> <a pro se defendant>. -- Also termed *pro persona*; *in propria persona*; *propria persona*; *pro per*. See PROPRIA PERSONA. BLACK'S LAW DICTIONARY (8th ed. 2004), available at *http://westlaw.com*. (March 16, 2006).

[2] OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

[3] OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

[4] OKLA. STAT. ANN. tit. 68, § 208 (West 2001). The notice was mailed to the Protestants at ADDRESS, TOWN, Arkansas ZIP CODE.

[5] In order to timely notify the Protestants, a copy of the letter was scanned and emailed to the Protestants.

[6] Division's Exhibit A. The Protestants' address on the return is ADDRESS, CITY, OK ZIP CODE.

[7] *See* Division's Exhibits B and C.

[8] Division's Exhibit D. The increase consisted of an adjustment to the reported taxable wages from $31,633.00 to $32,956.00 (+$1,323.00), non-employee compensation (+$12,500.00), and a self-employment deduction (-$883.00).

[9] Division's Exhibit E. The Protestants stated that the notice from the IRS had not been received, that the Division's proposed assessment was outside the standard audit period, and that the Division was attempting to tax Texas income.

[10] Division's Exhibit F.

[11] Division's Exhibit G.

[12] Division's Exhibit H.

[13] Division's Exhibit H. The Protestants continued to question if the Division was outside the "time limit" for issuing the proposed assessment.

[14] Division's Exhibit I. The Protestants acknowledge that the notice of adjustment to the federal return for the 1999 tax year was received from the IRS and that the proposed amount owed of $4,106.00 was paid.

[15] Division's Exhibit K. *See* Division's Exhibit L, the Protestants' response to Exhibit K, which restates the Protestants' position.

[16] Division's Exhibit L.

[17] *See* Division's Exhibits B, C, H and I. *See also* the Protestants' position statement filed March 30, 2006.

[18] OKLA. STAT. ANN. tit. 68, § 221(D) (West Supp. 2001).

[19] OKLA. STAT. ANN. tit. 68, § 2353(10) (West Supp. 2006):

> "Taxable income" with respect to any taxpayer means the "taxable income", "life insurance company taxable income", "mutual insurance company taxable income", "(regulated) investment company taxable income", "real estate investment trust taxable income", and "cooperatives' taxable income" and any other "taxable income" as defined in the Internal Revenue Code as applies to such taxpayer or any other income of such taxpayer including, but not limited to, lump sum distributions as defined by the Internal Revenue Code of 1986, as amended; provided, in the case of income derived from oil and gas well production, any taxpayer, at his or her option, may deduct as an allowance for depletion, in lieu of other calculation of depletion based on the cost of the oil and gas deposit, twenty-two percent (22%) of the gross income derived from the properties during the taxable year. Provided further, for tax years beginning on or after January 1, 1997, and ending on or before December 31, 1999, and for tax years beginning on or after January 1, 2001, and ending on or before December 31, 2006, for major oil companies as defined in Section 288.2 of Title 52 of the Oklahoma Statutes, such allowance shall not exceed fifty percent (50%) of the net income of the taxpayer (computed without allowance for depletion) from the property. During taxable years other than those specified herein, for all taxpayers, such allowance shall not exceed fifty percent (50%) of the net income of the taxpayer (computed without allowance for depletion) from the property. If a depletion allowance is allowed as a deduction in arriving at the adjusted gross income in the case of an individual, or taxable income for corporations and trusts, or distributable income of partnerships by the Internal Revenue Service, the percentage depletion so calculated shall in no event be a duplication of depletion allowed on the Federal Income Tax Return;

[20] OKLA. STAT. ANN. tit 68, § 2353(4) (West Supp. 2006):

> "Resident individual" means a natural person who is domiciled in this state, and any other natural person who spends in the aggregate more than seven (7) months of the taxable year within this state shall be presumed to be a resident for purposes of Section 2351 et seq. of this title in absence of proof to the contrary. A natural person who resides less than seven (7) months of the taxable year within this state is presumed to be a "part-year resident individual" for purposes of the Oklahoma Income Tax Code, Section 2351 et seq. of this title, in absence of proof to the contrary. A "nonresident individual" means an individual other than a resident individual or a part-year resident individual.

[21] OKLA. STAT. ANN. tit 68, 2355(A) (West Supp. 2006).

[22] OKLA. STAT. ANN. tit 68, § 2353(11) (West Supp. 2006):

> "Adjusted gross income" means "adjusted gross income" as defined in the Internal Revenue Code;

[23] OKLA. STAT. ANN. tit. 68, § 2353 (13) (West Supp. 2006).

[24] OKLA. STAT. ANN. tit. 68, § 2375(H) (West Supp. 2006):

> H. 1. The period of time prescribed in Section 223 of this title, in which the procedures for the assessment of income tax may be commenced by the Tax Commission, shall be tolled

and extended until the amount of taxable income for any year of a taxpayer under the Internal Revenue Code has been finally determined under applicable federal law and for the additional period of time hereinafter provided in this subsection.

2. If, in such final determination, the amount of taxable income for any year of a taxpayer under the Internal Revenue Code is changed or corrected from the amounts included in the federal return of the taxpayer for such year and such change or correction affects the Oklahoma taxable income of the taxpayer for such year, the taxpayer, within one (1) year after such final determination of the corrected taxable income, shall file an amended return under Section 2351 et seq. of this title reporting the corrected Oklahoma taxable income, and the Tax Commission shall make assessment or refund within two (2) years from the date the return required by this paragraph is filed and not thereafter, unless a waiver is agreed to and signed by the Tax Commission and the taxpayer.

3. In the event of failure by a taxpayer to comply with the provisions of paragraph 2 of this subsection, the statute of limitations shall be tolled for a period of time equal to the time between the date the amended return under this subsection is required until such return is actually furnished.

4. In administering the provisions of this subsection, the Tax Commission shall have the authority to audit each and every item of income, deduction, credit or any other matter related to the return where such items or matters relate to allocation or apportionment between the State of Oklahoma and some other state or the federal government even if such items or matters were not affected by revisions made in such final determination. Where such items or matters do not relate to allocation or apportionment between the State of Oklahoma and some other state or the federal government, the Tax Commission shall be bound by the revisions made in such final determination.

5. The provisions of this subsection shall be effective on September 1, 1993, and except in the case of tax years which are the subject of closing, settlement or resolution agreements entered into by taxpayers and the Tax Commission, keep open all tax years beginning after June 30, 1988, and all tax years beginning on or before June 30, 1988, for which extensions of the statute of limitations have been executed by the taxpayer, but only to the extent such extensions remain open on the date of enactment hereof.

[25] OKLA. STAT. ANN. tit. 68, § 2351 et seq. (West 2001).

[26] OKLA. STAT. ANN. tit. 68, § 223(A) (West 2001):

No assessment of any tax levied under the provisions of any state tax law except as provided in this section, shall be made after the expiration of three (3) years from the date the return was required to be filed or the date the return was filed, whichever period expires the later, and no proceedings by tax warrant or in court without the previous assessment for the collection of such tax shall be begun after the expiration of such period. No assessment shall be required if a report or return, signed by the taxpayer, was filed and the liability evidenced by the report or return has not been paid. If the assessment has been made within the limitation period set forth in this subsection, the tax may be collected by tax warrant or court proceeding, but only if the tax warrant is issued or the proceeding begun within ten (10) years after the assessment of the tax has become final.

[27] OKLA. ADMIN. CODE § 710:50-5-10:

(a) Assessments shall be made in accordance with the Uniform Tax Procedure Code. The income information furnished by the I.R.S. shall be that upon which any tax liability is computed. Unless otherwise indicated in the Revenue Agent's Report (R.A.R.), all income is

considered to be from Oklahoma sources, as are all deductions and credit, to the extent that they are allowed by Oklahoma Statute. The taxpayer is considered to be, or to have been an Oklahoma resident during the year or years examined by the I.R.S. by virtue of the fact that the results of the examination are disclosed to the Commission by the I.R.S. The assessment shall be mailed to the address shown on the R.A.R. or the last known address of the taxpayer.
(b) In cases where returns have not been previously filed by the taxpayer, the Tax Commission may, in its discretion and in the alternative to assessing taxes, demand that the taxpayer file a return as required. For the purpose of this Section, the determination that the taxpayer was, in fact, required to file an Oklahoma Tax Return shall be based on the information furnished by the I.R.S.

[28] OKLA. ADMIN. CODE § 710:50-3-8:

Adjustments by the Internal Revenue Service

(a) If any taxpayer's Federal Income Tax Return is adjusted, an Amended Oklahoma Income Tax Return must be filed within one year. All supporting documentation must be enclosed with an Oklahoma Amended Income Tax Return for the tax year involved. Upon request, the taxpayer must furnish a complete copy of the Federal Income Tax Return, including all schedules, to enable the Tax Commission to determine the correct Oklahoma tax.

(b) The Commission has two (2) years from the date the return or notice was filed to make an assessment or refund and not thereafter, unless a waiver is agreed to and signed by the Commission and the taxpayer.

(c) *In the event of failure by a taxpayer to comply with the requirement set out in (a) of this Section, the statute of limitations is tolled until the Amended Oklahoma Income Tax Return is actually furnished.*

(d) When the Internal Revenue Service changes the Federal Income Tax Return by issuing its final determination, the Tax Commission shall have the authority to audit each and every item of income, deduction, credit or any other matter related to the return, where such items or matters relate to allocation or apportionment between the State of Oklahoma and some other state or the federal government, even if such items or matters were not affected by revisions made in such final determination. Where such items or matters do not relate to allocation or apportionment between the State of Oklahoma and some other state or the federal government, the Tax Commission shall be bound by the revisions made in such final determination. *See* OKLA. STAT. ANN. tit. 68, § 2375 (West Supp. 2006). (Emphasis added.)

[29] OKLA. STAT. ANN. tit. 68, § 2362 (West Supp. 2006):

A. For tax years beginning on or after January 1, 1994, the Oklahoma taxable income of a part-year resident individual, nonresident individual, a nonresident trust and a nonresident estate shall be calculated following the provisions of Section 2358 of this title as if all income were earned in Oklahoma.

B. Using Oklahoma income tax rates, part-year resident individuals, nonresident individuals, nonresident trusts and nonresident estates shall compute their tax liability on the amount computed in the preceding paragraph.

C. From the liability computed there shall be deducted all allowable credits to determine the amount of tax due.

D. Part-year resident individuals, nonresident individuals, nonresident trusts and nonresident estates shall divide adjusted gross income from Oklahoma sources by the adjusted

gross income from all sources to arrive at the applicable percentage that Oklahoma adjusted gross income represents of all adjusted income received by the taxpayer in the income year.

E. Part-year resident individuals, nonresident individuals, nonresident trusts and nonresident estates shall multiply the amount of Oklahoma tax computed by the applicable percentage calculated in the preceding paragraph in order to determine the amount of income tax which must be paid to the State of Oklahoma. Nothing in this section shall be construed to allow for greater than one hundred percent (100%) of a taxpayer's income to be taxed.

F. For purposes of determining the adjusted gross income from Oklahoma, the following shall be includable:

1. The ownership of any interest in real or tangible personal property in this state;
2. A business, trade, profession or occupation carried on in this state or compensation for services performed in this state;
3. A business, trade, profession or occupation carried on or compensation for services performed partly within and partly without this state to the extent allocable and apportionable to Oklahoma as determined under Section 2358 of this title;
4. The distributive share of the Oklahoma part of partnership income, gains, losses or deductions;
5. The distributive share of the Oklahoma part of estate or trust income, gains, losses or deductions;
6. Income from intangible personal property, including annuities, dividends, interest and gains from the disposition of intangible personal property to the extent that such income is from property employed in a trade, business, profession or occupation carried on in Oklahoma. A part-year resident individual, nonresident individual, nonresident trust or nonresident estate, other than a dealer holding property primarily for sale to customers in the ordinary course of trade or business, shall not be deemed to carry on a business, trade, profession or occupation in Oklahoma solely by reason of the purchase and sale of property for its own account;
7. The distributive share of the Oklahoma taxable income or loss of a corporation defined in subchapter S of the Internal Revenue Code, 26 U.S.C., Section 1361 et seq.;
8. Income received from all sources of wagering, games of chance or any other winnings from sources within this state. Proceeds which are not money shall be taken into account at their fair market value; and
9. The distributive share of the Oklahoma part of limited liability company income, gains, losses or deductions.

[30] *Walters v. State ex rel. Oklahoma Tax Com'n*, 935 P2d 398, 1996 OK CIV APP 154.

[31] OKLA. ADMIN. CODE § 710:1-5-47, which states:

In all administrative proceedings, unless otherwise provided by law, the burden of proof shall be upon the protestant to show in what respect the action or proposed action of the Tax Commission is incorrect. If, upon hearing, the protestant fails to prove a prima facie case, the Administrative Law Judge may recommend that the Commission deny the protest solely upon the grounds of failure to prove sufficient facts which would entitle the protestant to the requested relief.

OKLA. ADMIN. CODE § 710:1-5-77(b), provides in pertinent part:

. . . "preponderance of the evidence" means the evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which as a whole shows that the fact sought to be proved is more probable than not.

[32] *See Enterprise Management Consultants, Inc. v. State ex rel Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

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.