JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2008-01-03-19 / NON-PRECEDENTIAL**
ID: **P-06-083-H**
DATE: **JANUARY 3, 2008**
DISPOSITION: **SUSTAINED**
TAX TYPE: **AVIATION EXCISE**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROTESTANT COMPANY ("Protestant") appears by and through its attorneys, OUT-OF-STATE ATTORNEY and IN-STATE ATTORNEY. The Business Service Section of the Taxpayer Assistance Division ("Division") of the Oklahoma Tax Commission appears by and through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On May 9, 2006, the protest file was received by this office for further proceedings consistent with the Uniform Tax Procedure Code[1] and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.[2] On May 10, 2006, a letter was mailed to the Protestant stating that this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-06-083-H. The letter also advised the Protestant 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 May 25, 2006, the Notice of Prehearing Conference was mailed to the Protestant's representatives, setting the prehearing conference for June 13, 2006, at 3:30 p.m.

The Prehearing Conference was held as scheduled by telephone. On June 14, 2006, a letter was mailed to the parties advising that a status report was to be filed on or before July 13, 2006. On June 23, 2006, the Protestant, pursuant to the prehearing conference, provided a packet of documents regarding the organization and merger of the Protestant. On June 28, 2006, this office acknowledged receipt of the packet and requested a copy of the bill of sale for the aircraft. On July 13, 2006, a copy of the "un-filed" bill of sale was received pursuant to the request.

Also on July 13, 2006, the Status Report was filed by the Division, along with a "proposed" Scheduling Order, which had been provided to the Protestant. On July 26, 2006, the "proposed" Scheduling Order was filed with this office. On July 28, 2006, the Scheduling Order was issued setting this matter for hearing on November 14, 2006, at 1:30 p.m. as requested by the parties.

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

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

On August 14, 2006, a Motion to Associate Counsel ("OUT-OF-STATE ATTORNEY") and Order Admitting to Practice were filed by IN-STATE ATTORNEY.[3] On August 16, 2006, an Order Admitting to Practice was issued by the undersigned admitting OUT-OF-STATE ATTORNEY to practice in the above and numbered cause of action "for the purposes of the above entitled matter only."[4]

At the request of the parties, an Amended Scheduling Order was issued on September 22, 2006, setting the hearing in this matter for January 4, 2007, at 1:30 p.m.

On December 7, 2006, the parties filed Joint Stipulations. On December 11, 2006, Protestant's Brief was filed. On December 13, 2006, at the request of the parties, an Amended Scheduling Order was issued rescheduling the due dates for briefs and the Protestant's Reply Brief. On December 22, 2006, the Response Brief of the Oklahoma Tax Commission was filed.

On January 3, 2007, this office received an e-mail from the parties advising of their intention to submit this matter on stipulations and briefs. Also on January 3, 2007, the Reply Brief of Taxpayer was filed, along with confirmation that the parties wanted to submit this matter on stipulations and briefs, striking the hearing scheduled for January 4, 2007. The hearing was stricken from the docket. On January 5, 2007, the record in this matter was closed and this case submitted for decision on the stipulations and briefs.

On January 12, 2007, a Motion to Supplement Legal Authority to Division Response Brief was filed. On January 29, 2007, Suggestions in Opposition to Motion to Supplement was filed by the Protestant. On January 31, 2007, an Order Granting Motion to Supplement Legal Authority to Division Response Brief was granted, with the filing due on or before February 9, 2007. The Protestant was granted fifteen (15) days from the date of the Division's filing to submit a reply. At that time, the record would be closed and the case submitted for decision. On February 12, 2007, the Division filed a Request to File Out of Time. On February 12, 2007, an Order Granting Request to File Out of Time was issued and the Division's filing was accepted. The Protestant was to file a reply on or before February 27, 2007. On February 27, 2007, the Protestant's Reply to Supplemental Legal Authority was filed. On February 28, 2007, the record in this matter was closed and this case was submitted for decision.

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[3] Attached to the Motion to Associate Counsel, were the following documents, to-wit:

Exhibit A. The Oklahoma Bar Association Form Application (Out of State Attorney).

Exhibit B. Certificate of Admission as an Attorney at Law from the Supreme Court of Missouri dated June 16, 2006, and a letter from the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois dated July 13, 2006, both reflecting that OUT-OF-STATE ATTORNEY was active and in good standing with both jurisdictions.

Exhibit C. The Oklahoma Bar Association Form Certificate of Compliance for OUT-OF-STATE ATTORNEY dated July 24, 2006.

[4] The order was Oklahoma Bar Association Form 300B.

On April 23, 2007, a letter was mailed to the parties advising that a matter had come to the attention of the undersigned, which must be addressed in more detail, that being the earlier use of the Aircraft by DELAWARE COMPANY, prior to the merger. This case was pulled from submission for decision and the record reopened to receive evidence on the issue of the "use of any such aircraft within this state."[5] On April 30, 2007, a letter was mailed to the parties setting this matter for a teleconference for May 10, 2007, at 2:00 p.m.

Pursuant to the teleconference, the Protestant filed an *Affidavit in Lieu of Testimony Submitted by Taxpayer* on August 6, 2007. The record in this matter was closed on August 14, 2007, and the case resubmitted for decision.

STIPULATIONS

On December 7, 2006, the parties entered into the following Joint Stipulations,[6] as follows, to-wit:

PARTIES OF OWNERSHIP AND FORMATION

FIRST

HOLDING COMPANY:

HOLDING COMPANY filed a Certificate of Incorporation with the Office of the Secretary of State, State of Oklahoma, on September 21, 2005, to be effective October 1, 2005.

The registered address is HOLDING COMPANY MAILING ADDRESS. The registered agent is INDIVIDUAL 3.

The Certificate of Incorporation was signed by IN-STATE ATTORNEY, incorporator.

The above transactions are marked as **Exhibit "A"**.

DELAWARE COMPANY:

DELAWARE COMPANY filed a Certificate of Formation Limited Liability Company with the State of Delaware on December 15, 2005, signed by OUT-OF-STATE ATTORNEY, authorized person.

The State of Delaware certified that DELAWARE COMPANY was in good standing as of December 16, 2005.

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[5] OKLA. STAT. ANN. tit. 68, § 6002 (West 2001).

[6] The text of the stipulated facts is set out *in haec verba*. "***in haec verba***" (in heek **v<<schwa>>r**-b<<schwa>>). [Latin] In these same words; verbatim. BLACK'S LAW DICTIONARY (8th ed. 2004), *at* http://westlaw.com (October 18, 2006).

DELAWARE COMPANY'S member adopted an "Operating Agreement" on December 22, 2005, which authorized One Hundred (100) Membership Units which reflects all the ownership interest in the Company. The "Operating Agreement" reflected HOLDING COMPANY, HOLDING COMPANY STREET ADDRESS, as the only member owning all one hundred percent (100%) of DELAWARE COMPANY.

DELAWARE COMPANY entered into an Aircraft Purchase/Sale Agreement of the aircraft in question. This agreement is dated December 22, 2005, and is between the Seller, SELLER COMPANY and the Buyer, DELAWARE COMPANY. The agreement is signed by SELLER REPRESENTATIVE, SELLER COMPANY, seller, and PRESIDENT, President, HOLDING COMPANY, Member, buyer. DELAWARE COMPANY accepted receipt of the aircraft on December 22, 2005 at CITY A, Kansas.

HOLDING COMPANY, as the only member of DELAWARE COMPANY, gave consent to borrow One Million Seven Hundred Ninety Thousand Dollars ($1,790,000.00) from PRESIDENT, an individual. The consent agreement was dated December 22, 2005, and signed by PRESIDENT, President, HOLDING COMPANY, Member.

The promissory note provides payment of interest on the principal to be paid annually. Payment of the principal is not due until 2035.

A security interest was filed with the Federal Aviation Administration ("FAA") naming the Debtor as DELAWARE COMPANY, DELAWARE COMPANY ADDRESS, and the secured party as PRESIDENT, HOLDING COMPANY STREET ADDRESS. The security interest was dated December 22, 2005, and signed by the debtor, DELAWARE COMPANY, by PRESIDENT, President, HOLDING COMPANY, Member.

DELAWARE COMPANY filed an Aircraft Registration Application on the aircraft with FAA on December 22, 2005, and was signed by PRESIDENT, Member.

The above transactions are marked as **EXHIBIT "B".**

MERGER OF DELAWARE COMPANY AND PROTESTANT COMPANY:

DELAWARE COMPANY entered into a Unanimous Written Consent to merge with PROTESTANT COMPANY, dated December 24, 2005, signed by PRESIDENT, President, HOLDING COMPANY.

PROTESTANT COMPANY entered into a Unanimous Written Consent to merge with DELAWARE COMPANY, dated December 24, 2005, signed by PRESIDENT, President, HOLDING COMPANY.

DELAWARE COMPANY and PROTESTANT COMPANY both signed an agreement and Plan of Merger on December 31, 2005. The Agreement was signed by PRESIDENT on behalf of DELAWARE COMPANY and PROTESTANT COMPANY.

The Articles of Merger were filed with the states of Oklahoma and Delaware.

The above documents are marked as **EXHIBIT "C".**

PROTESTANT COMPANY:

PROTESTANT COMPANY was granted a Certificate of Limited Liability Company from the State of Oklahoma on December 8, 2005.

PROTESTANT COMPANY filed Articles of Organization with the Secretary of State, Oklahoma, on December 6, 2005, and was signed by IN-STATE ATTORNEY.

PROTESTANT COMPANY entered into an Operating Agreement on December 22, 2005, granting one hundred percent (100%) interest in PROTESTANT COMPANY to HOLDING COMPANY. The agreement was signed by PRESIDENT, President, HOLDING COMPANY.

PROTESTANT COMPANY received an Aircraft Bill of Sale on the aircraft from DELAWARE COMPANY, dated February 1, 2006 and signed by PRESIDENT, President, HOLDING COMPANY, Member.

PROTESTANT COMPANY filed an Aircraft Registration Application with the FAA on March 16, 2006, dated February 1, 2006, and signed by PRESIDENT, President, HOLDING COMPANY, Member.

The above documents are marked as **EXHIBIT "D".**

SECOND

The aircraft in question was purchased by DELAWARE COMPANY, a State of Delaware Limited Liability Company, with an address of DELAWARE COMPANY ADDRESS, from SELLER COMPANY, on or about December 22, 2005. Neither an excise tax nor an equivalent tax was paid on said aircraft by DELAWARE COMPANY to the State of Delaware or any other state. The Aircraft Bill of Sale from SELLER COMPANY, to DELAWARE COMPANY, is dated December 22, 2005 and signed by SELLER REPRESENTATIVE, Vice President of SELLER COMPANY, and filed with the FAA on January 19, 2006.

An Aircraft Registration Application for said aircraft was signed by PRESIDENT, President, HOLDING COMPANY, on December 22, 2005, on behalf of DELAWARE COMPANY, DELAWARE COMPANY ADDRESS and filed with the FAA on January 19, 2006.

A security interest was filed by PRESIDENT, HOLDING COMPANY STREET ADDRESS, as an individual secured party. The address and name of the debtor is DELAWARE

COMPANY, DELAWARE COMPANY ADDRESS. The security interest was signed for DELAWARE COMPANY by PRESIDENT, President, HOLDING COMPANY, member, on December 22, 2005, for the debtor, DELAWARE COMPANY. The security interest was filed with FAA on January 19, 2006.

An Aircraft Bill of Sale was given from DELAWARE COMPANY, signed on February 1, 2006 by PRESIDENT, as President of HOLDING COMPANY, President, to PROTESTANT COMPANY. The Aircraft Bill of Sale was filed with the FAA on Mar 16, 2006. Neither an excise tax nor an equivalent tax was paid on said aircraft by PROTESTANT COMPANY, to the State of Oklahoma or any other state.

An Aircraft Registration Application for said aircraft was signed by PRESIDENT as President, HOLDING COMPANY, on February 1, 2006 and filed with the FAA on March 16, 2006, for PROTESTANT COMPANY, HOLDING COMPANY STREET ADDRESS.

All of the above stated documents are official records of the Federal Aviation Administration and are attached as **EXHIBIT "E".**

THIRD

PROTESTANT COMPANY submitted its Application for Registration of Aircraft on or about April 11, 2006. PROTESTANT COMPANY paid a registration fee in the amount of One Thousand Three Hundred Eighty Dollars ($1,380.00) and claimed that the aircraft was exempt from excise tax. A copy of OUT-OF-STATE ATTORNEY'S letter dated April 11, 2006, a copy of the Application, and a copy of the statement of exemption is attached as **EXHIBIT "F".**

FOURTH

That on April 24, 2006, a letter was mailed to OUT-OF-STATE ATTORNEY, attorney for PROTESTANT COMPANY, denying the exemption for excise tax and assessing excise tax in the sum of Fifty Eight Thousand One Hundred Seventy Five Dollars ($58,175.00). A copy of the letter and assessment is attached as **EXHIBIT "G".**

PARTIES POSITION

FIFTH

PROTESTANT COMPANY'S position is that the aircraft in question was purchased in the name of DELAWARE COMPANY, a Delaware corporation, on December 22, 2005, from SELLER COMPANY, and registered in the name of DELAWARE COMPANY, DELAWARE COMPANY ADDRESS, on January 19, 2006, with the Federal Aviation Administration.

That DELAWARE COMPANY, merged with PROTESTANT COMPANY, and the aircraft was transferred to PROTESTANT COMPANY on February 1, 2006, and registered the aircraft in the name of PROTESTANT COMPANY, HOLDING COMPANY STREET ADDRESS, on March 16, 2006 with the FAA.

PROTESTANT COMPANY claims that since the transfer of ownership is a merger, excise tax is not due and owing pursuant to 68 Okl.St.Ann. §6003(4).

SIXTH

The position of the Division is that excise tax on an aircraft is due and owing on the first registration in this state (Oklahoma) 68 Okl.St.Ann. §6002. DELAWARE COMPANY never registered the aircraft in Oklahoma and never paid an excise or equivalent tax to any state. The aircraft was registered in the name of PROTESTANT COMPANY on March 16, 2006, and excise tax was due and owing at registration and becomes delinquent after twenty days after the legal ownership of any aircraft is obtained. The interest accrued for failure to pay the excise tax within twenty days is one and one-quarter percent (1¼%) per month from the delinquent date. A penalty in the amount of ten percent (10%) is due and owing for failure of PROTESTANT COMPANY to pay the excise tax and such amount is Five Thousand Eight Hundred Seventeen Dollars and Fifty Cents ($5,817.50).

The only exemption that could have been claimed would have been if DELAWARE COMPANY had registered the aircraft in Oklahoma and claimed that an excise tax or equivalent tax was paid to another state per 68 Okl.St.Ann. §6003(11). This did not occur as DELAWARE COMPANY did not pay an excise o[r] equivalent tax to any state and sold the aircraft to PROTESTANT COMPANY who in turn registered the aircraft in Oklahoma. The Division claims that excise tax, accrued interest and penalty are due and owing by PROTESTANT COMPANY, per 68 Okl.St.Ann. §6002. The Division is not contesting the legality of the formation of HOLDING COMPANY, DELAWARE COMPANY, and PROTESTANT COMPANY, or the merger of DELAWARE COMPANY and PROTESTANT COMPANY.

ADDITIONAL FINDINGS OF FACT

1. On December 22, 2005, DELAWARE COMPANY took delivery of the Raytheon Beechcraft, C90A, Serial No. XXX, Registration No. X12345("Aircraft") at CITY A, Kansas, together with two (2) PT6A-135A engines, bearing the manufacturer's serial numbers XXX1 and XXX2 installed on the Airframe and the equipment and documents listed in that certain Aircraft Sales Agreement Dated December 22, 2005.[7]

2. In the Agreement and Plan of Merger ("Merger Agreement") dated December 24, 2005, between PROTESTANT COMPANY and DELAWARE COMPANY, RANDOM COMPANY 1 and RANDOM COMPANY 2 are referred to as "Constituent Companies." This is the only document that mentions RANDOM COMPANY 1 and RANDOM COMPANY 2 and no explanation is offered as to their relationship to PROTESTANT COMPANY, DELAWARE COMPANY, or HOLDING COMPANY.[8]

[7] Exhibit B.

[8] Exhibit C.

3. Pursuant to Section 4.3, the Merger Agreement "shall be governed by and construed and enforced in accordance with the laws of the State of Oklahoma and, so far as applicable, the merger provisions of the Oklahoma Limited Liability Company Act."[9]

4. The Merger Agreement became effective on January 18, 2006, upon the filing of the State of Delaware Certificate of Merger of a Domestic Limited Liability Company into a Foreign Limited Liability Company.[10]

5. As of December 22, 2005, the shareholders of HOLDING COMPANY[11] were:

PRESIDENT, Trustee-PRESIDENT Rev. Trust U/A November 11, 1993
INDIVIDUAL 1, Trustee-INDIVIDUAL 1 Rev. Trust U/A November 11, 1993
INDIVIDUAL 2
INDIVIDUAL 2, Trustee-INDIVIDUAL 2 Family Trust U/A July 30, 2004
INDIVIDUAL 3
INDIVIDUAL 3, Trustee-INDIVIDUAL 3 Family Trust U/A July 30, 2004

6. As of December 22, 2005, PRESIDENT was the President of HOLDING COMPANY.[12]

7. The sole member of DELAWARE COMPANY was HOLDING COMPANY. The sole member of PROTESTANT COMPANY is HOLDING COMPANY.

8. PRESIDENT, Individually, is the named "promisee" on the Promissory Note dated December 22, 2005, and "secured party" on the FAA Aircraft Registry filed January 19, 2006, with DELAWARE COMPANY as the "debtor."[13]

9. PRESIDENT executed the other documents contained in the record, as President of HOLDING COMPANY or President of HOLDING COMPANY, as a Member of DELAWARE COMPANY or PROTESTANT COMPANY.

10. Recital (C) of the Merger Agreement[14] states as follow, to-wit:

> The Members of the Constituent Companies deem it advisable and to the advantage of the Constitute Companies and their respective member be

[9] Exhibit C.

[10] Exhibit C. *See* provision 1.2 (Effective Date). *See also* Certificate of Merger filed with the State of Delaware on January 18, 2006.

[11] *See* Exhibit A to the Reply Brief of Taxpayer filed January 3, 2007.

[12] *See* Note 10.

[13] *See* Note 10. *See also* Exhibit E.

[14] Exhibit C.

> merged with and into PROTESTANT COMPANY for the purpose of changing the jurisdiction of organization of DELAWARE COMPANY from the State of Delaware to the State of Oklahoma and in order for PROTESTANT COMPANY and its parent company to qualify for certain exemptions available under 91.501 of the Federal Aviation Regulations.[15]

11. Section 91.501 of the Federal Aviation Regulations allows PROTESTANT COMPANY to provide "wet leases"[16] flights to related companies. This increases the deductibility of certain expenses, but only if the flights are incidental[17] to the business of the deducting company.

12. The Aircraft was being flown into the State of Oklahoma, prior to PROTESTANT COMPANY'S registration of the Aircraft with the Division:

> Once a favorable hangar site was located in CITY B, Oklahoma, and once construction plans were made, [HOLDING COMPANY] further made the decision to merge the Delaware and earlier organized Oklahoma entities, bringing the aircraft closer to its users. *Prior to this time, DELAWARE COMPANY was incurring additional repositioning costs associated with the earlier use-ferrying the pilot to Missouri to pick up the aircraft, flying it into Oklahoma to pick up passengers, and then doing the same in reverse at the conclusion of all flights.* For all of these economic, business and regulatory reasons, the merger was effectuated, consideration was paid and debt was assumed." (emphasis added.)[18]

13. PILOT, an Oklahoma resident, is the chief pilot ("Chief Pilot") of the Aircraft and responsible for positioning the Aircraft, flying the Aircraft, and maintaining the Aircraft.[19]

14. Based upon the Chief Pilot's review of the Aircraft log records and his own memory, from December 22, 2005, through April 11, 2006, the Aircraft was physically located in the State of Oklahoma, as per the following schedule,[20] to-wit:

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[15] *See* 14 C.F.R. § 91.501.

[16] *See* 14 C.F.R. § 212.2. "Wet Lease" means a lease between direct air carriers by which the lessor provides all or part of the capacity of an aircraft, and its crew, including operations where the lessor is conducting services under a blocked space or code-sharing arrangement.

[17] "**incidental",** *adj.* Subordinate to something of greater importance; having a minor role <the FAA determined that the wind played only an incidental part in the plane crash>. BLACK'S LAW DICTIONARY (8th ed. 2004), *at* *http://westlaw.com*. (March 29, 2007).

[18] *See* Protestant's Reply to Supplemental Legal Authority filed February 27, 2007. On December 22, 2005, DELAWARE COMPANY took delivery of the Aircraft in CITY A, Kansas and filed its registration with the Division on or about April 11, 2006.

[19] *See Affidavit In Lieu of Testimony Submitted By Taxpayer* filed August 6, 2007, and Exhibit A (Aircraft logs) attached thereto.

01/03/06	0.5 Hour	CITY B Municipal Airport
01/04/06	16.0 Hours	Overnight at CITY B Municipal Airport
01/05/06	0.5 Hour	CITY B Municipal Airport
01/10/06	0.5 Hour	CITY B Municipal Airport
01/12/06	0.5 Hour	CITY B Municipal Airport
01/18/06	15.0 Hours	Overnight at CITY B Municipal Airport
01/20/06	0.5 Hour	CITY B Municipal Airport
02/06/06	72.0 Hours	CITY C, Oklahoma – Wing Lockers Painted
02/09/06	1.0 Hour	CITY D Municipal Airport
02/20/06	1.0 Hour	CITY B Municipal Airport
02/23/06	1.0 Hour	CITY B Municipal Airport
03/06/06	0.5 Hour	CITY B Municipal Airport
03/07/06	0.5 Hour	CITY B Municipal Airport
03/10/06	0.5 Hour	CITY B Municipal Airport
03/12/06	0.5 Hour	CITY D Municipal Airport
03/31/06	0.5 Hour	CITY B Municipal Airport
04/01/06	0.5 Hour	CITY B Municipal Airport
Total	111.5 Hours	
	4.64 Days	

15. After the Aircraft was purchased, the Seller agreed to install "Raisbeck wing lockers"[21] immediately after closing. Under the "Aircraft Purchase/Sale Agreement," the Seller provided three (3) months of hangar space in CITY E, Missouri, at no additional charge while the maintenance was being conducted.[22]

16. After December 22, 2005, through April 11, 2006, the Aircraft was located in CITY E, Missouri, while undergoing modifications.[23]

17. Prior to April 11, 2006, there were seventeen (17) occasions where the Aircraft was physically located in the State of Oklahoma for a total of 111.5 hours.[24]

18. The Aircraft was not based, operated, or otherwise used in the State of Oklahoma an accumulation of thirty (30) days.[25]

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[20] *See* Note 19.

[21] "Raisbeck 'nacelle' (enclosure on aircraft) wing lockers" are certified for 600 lbs (300 lbs per locker) in 16 cubic feet of stowage space. The lockers will carry up to eight (8) pair of skis, four (4) golf bags, or outsized baggage freeing up seats for additional passengers. *See* Raisbeck Engineering website *at* http://www.raisbeck.com (August 20, 2007).

[22] Exhibit B. *See* "Aircraft Purchase/Sale Agreement", ¶ 17.

[23] *See* Note 19.

[24] *See* Note 19.

[25] *See* Note 19.

ISSUE

Does the exemption contained in Section 6003(4) of Title 68 require the Protestant to have previously paid an excise tax or equivalent tax to the State of Oklahoma or any other jurisdiction before the exemption can be claimed?

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[26]

2. The collection and remittance of aircraft excise[27] tax ("STX") is governed by the Oklahoma Aircraft Excise Tax Act ("STX Act").[28]

3. The STX Act levies an excise tax of three and one-fourth percent (3¼%) of the purchase price of each aircraft that is to be registered with the Federal Aviation Administration ("FAA") [29] upon the following:

> "… upon the transfer of legal ownership of any such aircraft or the use[30] of any such aircraft within this state.[31] The excise tax levied pursuant to the

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[26] OKLA. STAT. ANN. tit. 68, § 221(D) (West Supp. 2007).

[27] **"excise", n.** A tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee). – Also termed *excise tax*. Cf. *income tax*, *property tax* under TAX. BLACK'S LAW DICTIONARY (8th ed. 2004), available at *http://westlaw.com.* (April 12, 2006).

[28] OKLA. STAT. ANN. tit. 68, § 6001 et seq. (West 2001).

[29] OKLA. STAT. ANN. tit. 68, § 6002 (West 2001).

[30] OKLA. STAT. ANN. tit. 68, § 6001(4) (West 2001):

> "Use" means and includes the operation or basing of an aircraft on or from any airport in this state for a period of thirty (30) days or more. For purposes of Section 6001 et seq. of this title, the term "use" does not apply to aircraft which are intended for exclusive use in another state, but which are stored in this state pending shipment to such other state, or aircraft which are retained in this state solely for fabrication, repair, testing, alteration, modification, refurbishing or maintenance.

See OKLA. ADMIN. CODE § 710:15-3-10(a)(3) (May 13, 2004):

> Aircraft not registered in any other state which are operating on or from any airport within the State of Oklahoma for an accumulation of thirty (30) days shall be presumed to be operating with the intent to remain in Oklahoma, and therefore are subject to Oklahoma registration laws.

See also OKLA. ADMIN. CODE § 710:15-3-2.

> provisions of Sections 6001 through 6004 of this title is in lieu of all other taxes[32] on the transfer or the first registration in this state on aircraft, …except annual aircraft registration fees. The tax hereby levied shall be due at the time of the transfer of legal ownership or first registration in this state.…"[33]

The Protestant's "use" of the Aircraft in the State of Oklahoma, as defined by the STX Act, was not "for an accumulation of thirty (30) days, triggering the imposition of STX under Section 6002 of Title 68."[34]

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[31] *See* Note 29.

[32] *See* OKLA. STAT. tit. 68, § 1355(4) (West Supp. 2005).

[33] The Vehicle Excise Tax Code contains a similar provision. *See* OKLA. STAT. ANN. tit. 68, § 2103(A)(1) (West Supp. 2007), which in pertinent part states:

> A. 1. Except as otherwise provided in Sections 2101 through 2108 of this title, there shall be levied an excise tax upon the transfer of legal ownership of any vehicle registered in this state and upon the use of any vehicle registered in this state and upon the use of any vehicle registered for the first time in this state.…

[34] *See* Note 29. *See also* OKLA. ADMIN. CODE § 710:15-3-10 (May 13, 2004):

> Procedures for making original application for registration of aircraft
>
> (a) Duty to register.
>
> (1) An application for registration of an aircraft operating on or from any airport within the State of Oklahoma shall be supplied to each purchaser of an aircraft by the dealer of the aircraft, if purchased within the State. The Oklahoma Tax Commission shall supply blank application forms to Oklahoma dealers of aircraft for dissemination.
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> (2) An application for registration of an aircraft purchased outside the State of Oklahoma which is operating on or from any airport within the State with the intent to remain for more than thirty cumulative days, shall be supplied by the Oklahoma Tax Commission upon request of the owner. Application forms shall also be made available upon request at all airports within the State of Oklahoma.
>
> (3) Aircraft not registered in any other state which are operating on or from any airport within the State of Oklahoma for an accumulation of thirty (30) days shall be presumed to be operating with the intent to remain in Oklahoma, and therefore are subject to Oklahoma registration laws.
>
> (b) When registration is due. The certified application is to be filed with the Oklahoma Tax Commission within twenty (20) days of purchase if purchased within the state or within twenty (20) days of entry into the state for other aircraft.
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> (c) Information required. The application must contain the following information:
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> (1) A description of each aircraft to be registered, including the name of the manufacturer, aircraft registration number, type and gross weight.

4. Section 6003 of Title 68[35] contains seventeen (17) exemptions for aircraft from the STX Act, as follows, to-wit:

> The following aircraft shall[36] be exempt from provisions of Section 6001 et seq. of this title:
>
> 1. Aircraft manufactured under an F.A.A. approved certificate and which are owned and in the physical possession of the manufacturer of the aircraft. The aircraft shall have an aircraft exemption license as provided for in Section 254 of Title 3 of the Oklahoma Statutes;
>
> 2. Aircraft owned by dealers and in the dealer's inventory, not including aircraft that are used personally or for business. In order for this exemption to apply, the dealer shall be licensed in accordance with Section 2 of this act;
>
> 3. Aircraft of the federal government, any agency thereof, any territory or possession, any state government, agency, or political subdivision thereof;
>
> 4. Aircraft transferred from one corporation or limited liability company to another corporation or limited liability company pursuant to reorganization of the corporation or limited liability company. For the purpose of this section the term reorganization means a statutory merger, consolidation, or acquisition;
>
> 5. Aircraft purchased or used by commercial airlines as defined by paragraph 2 of Section 6001 of this title;
>
> 6. Aircraft transferred in connection with the dissolution or liquidation of a corporation or limited liability company and only if included in a payment in kind to the shareholders or members;
>
> 7. Aircraft transferred to a corporation for the purpose of organizing such corporation. However, the former owners of the aircraft must have control of

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> (2) Name and address of the owner of the aircraft and county where the aircraft is based, i.e., location and/or address on the Federal Aviation Administration Certificate of Registration for the aircraft.
>
> (d) Oklahoma Certificate of registration; display; inspection. Upon receipt of the application and the fee due the Aircraft Section of the Taxpayer Assistance Division of the Oklahoma Tax Commission will issue the registrant a certificate of registration to be displayed on the aircraft in a conspicuous location and is subject to inspection by agents of the Commission.

[35] OKLA. STAT. ANN. tit. 68, § 6003 (West 2001).

[36] Generally, when the legislature uses the term "shall," it signifies a mandatory directive or command. *See Keating v. Edmondson*, 2001 OK 110, 37 P.3d 882.

the corporation in proportion to their interest in the aircraft prior to the transfer;

8. Aircraft transferred to a partnership or limited liability company when the organization of the partnership or limited liability company is by the former owners of the aircraft. However, the former owners of the aircraft must have control of the partnership in proportion to their interest in the aircraft prior to the transfer;

9. Aircraft transferred from a partnership or limited liability company to the members of the partnership or limited liability company and if made in payment in kind in the dissolution of the partnership;

10. Aircraft transferred or conveyed to a partner of a partnership or shareholder or member of a limited liability company or other person who after such sale owns a joint interest in the aircraft and on which the sales or use tax levied pursuant to the provisions of this title or the excise tax levied pursuant to the provisions of Section 6002 of this title *have previously been paid on the aircraft*;

11. Aircraft on which a tax levied pursuant to the provisions of the laws of another state, equal to or in excess of the excise tax levied by Section 6002 of this title, has been paid by the person *using* the aircraft in this state. Aircraft on which a tax levied pursuant to the laws of another state, in an amount less than the excise tax levied by Section 6002 of this title, has been paid by the person *using* the aircraft in this state shall be subject to the levy of the excise tax at a rate equal to the difference between the rate of tax levied by Section 6002 of this title and the rate of tax levied by the other state;

12. Aircraft when legal ownership of such aircraft is obtained by the applicant for a certificate of title by inheritance;

13. Aircraft when legal ownership of such aircraft is obtained by the lienholder or mortgagee under or by foreclosure of a lien or mortgage in the manner provided for by law;

14. Aircraft which is transferred between husband and wife or parent and child where no valuable consideration is given;

15. Aircraft which is purchased by a resident of this state and used exclusively in this state for agricultural spraying purposes; provided, if such aircraft is sold, leased or used outside this state or for a purpose other than agricultural spraying at any time within three (3) years from the date of purchase, the excise tax levied pursuant to the provisions of Section 6002 of this title shall be due and payable. For purposes of this subsection, "agricultural spraying" means the aerial application of any substance sold and used for soil

> enrichment or soil corrective purposes or for promoting the growth and productivity of plants and animals;
>
> 16. Aircraft which have a selling price in excess of Two Million Five Hundred Thousand Dollars ($2,500,000.00) and which are transferred to a purchaser who is not a resident of this state for immediate transfer out of state; and
>
> 17. Aircraft which is transferred without consideration between an individual and an express trust which that individual or the spouse, child or parent of that individual has a right to revoke. (emphasis added.)

5. Legislative intent controls statutory interpretation.[37] Intent is ascertained from the whole act in light of its general purpose and objective considering relevant provisions together to give full force and effect to each.[38] The Court presumes that the Legislature expressed its intent and that it intended what is expressed.[39]

6. Statutes are interpreted to attain that purpose and end championing the broad public policy purposes underlying them.[40] Only where the legislative intent cannot be ascertained from the statutory language, i.e., in cases of ambiguity or conflict, are rules of statutory construction employed.[41] However, where the statutory language is ambiguous or uncertain, a construction is applied to avoid absurdities.[42] Statutory construction presents a question of law.[43]

7. First, it must be determined that a taxable transfer has occurred before an exemption section applies.[44] The Protestant admits that the transfer of ownership of the Aircraft from DELAWARE COMPANY to PROTESTANT COMPANY is a taxable event, but "there is an exemption which applies to the otherwise taxable event."[45]

8. Exemption statutes are to be strictly construed against exemption.[46] Tax exemptions must be construed sensibly in order to give effect to governing legislative scheme.[47] Therefore,

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[37] *World Publishing v. Miller*, 2001 OK 49, ¶7, 32 P.3d 829.

[38] *Id.* at ¶7.

[39] *Id.* at ¶7.

[40] *Id.* at ¶7.

[41] *Id.* at ¶7.

[42] *Id.* at ¶7.

[43] *Blitz U.S.A., Inc. v. Oklahoma Tax Com'n*, 2003 OK 50, 75 P.3d 883.

[44] *Imaging Services, Inc. v. Oklahoma Tax Commission Excise Tax Division*, 1993 OK 164, 866 P.2d 1204.

[45] *See* Reply Brief of Taxpayer filed January 3, 2007, Page 6.

[46] OTC Precedential Order No. 89-12-19-24 (December 19, 1989), 1989 WL 251461. *See Bert Smith Road Machinery Co. v. Oklahoma Tax Commission*, 1977 OK 75. ¶1, 563 P.2d 641. *See also Blitz* at ¶14.

the Protestant has the burden[48] of showing that the transfer of the Aircraft falls within one of the exemption provisions of Section 6003 of Title 68.[49]

The Protestant has stipulated that an excise tax or equivalent tax has never been paid on the Aircraft to the State of Oklahoma or any other state, but that the taxable event is exempt pursuant to Section 6003(4) of Title 68,[50] which states as follows, to-wit:

> The following aircraft shall be exempt from provisions of Section 6001 et seq. of this title:
>
> …
>
> 4. Aircraft transferred from one corporation or limited liability company to another corporation or limited liability company pursuant to reorganization of the corporation or limited liability company. For the purpose of this section the term reorganization means a statutory merger,[51] consolidation, or acquisition;

The position of the Division is that excise tax on the Aircraft is due and owing on the first registration in the State of Oklahoma pursuant to Section 6002 of Title 68.[52] DELAWARE COMPANY never registered the aircraft in Oklahoma and never paid an excise or equivalent tax to any state. The aircraft was registered in the name of PROTESTANT COMPANY on March 16, 2006, and excise tax was due and owing at registration.

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[47] *See Blitz* at ¶16.

[48] OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999):

> 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 grounds of failure to prove sufficient facts which would entitle the protestant to the requested relief.

OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999), 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.

[49] *See* Note 35.

[50] *See* Note 35.

[51] *See* OKLA. STAT. tit. 18, § 2054 (West Supp. 2004).

[52] *See* Note 29.

The Division asserts that the only exemption the Protestant could have claimed is if DELAWARE COMPANY had registered the Aircraft in Oklahoma and claimed that an excise tax or equivalent tax was paid to another state pursuant to the provisions of Section 6003(11) of Title 68,[53] which states as follows, to-wit:

> Aircraft on which a tax levied pursuant to the provisions of the laws of another state, equal to or in excess of the excise tax levied by Section 6002 of this title, has been paid by the person *using* the aircraft in this state. Aircraft on which a tax levied pursuant to the laws of another state, in an amount less than the excise tax levied by Section 6002 of this title, has been paid by the person *using* the aircraft in this state shall be subject to the levy of the excise tax at a rate equal to the difference between the rate of tax levied by Section 6002 of this title and the rate of tax levied by the other state; (emphasis added.)

The Division stipulated that it "is not contesting the legality of the formation of HOLDING COMPANY, DELAWARE COMPANY, and PROTESTANT COMPANY, or the merger of DELAWARE COMPANY and PROTESTANT COMPANY."

House Bill No. 1791, codified at 68 O.S. 6001 et seq. (1984 supplement), effective July 1, 1984, entitled "Aircraft Excise Tax," supplanted the Oklahoma Sales Tax Code as to liability for Excise Tax on the sale or transfer of aircraft.[54]

Statutory exemptions exist for certain transfers of tangible personal property, motor vehicles and aircraft to or from various entities in connection with (i) the organization of corporations, partnerships and limited liability companies (ii) the reorganization of corporations, and (iii) the winding up, dissolution or liquidation of corporations, partnerships and limited liability companies.[55]

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[53] *See* Note 35.

[54] OTC (Precedential) Order No. 88-02-16-22 (February 16, 1988), 1988 WL 236048 (Okl. Tax. Com.). In this matter the transfer of the aircraft to a corporation 2.5 years after incorporation was held not exempt. *See* OTC Order No. 89-06-08-018 (June 8, 1989). The transfer of the aircraft five (5) years after incorporation was held not exempt, notwithstanding that the corporation had been dormant since incorporation and did not begin engaging in business until the aircraft transfer. *See also* 3A VRN-OKFORM § 3.02, *at* http://westlaw.com (August 29, 2007).

[55] *See* Note 54.

See also OKLA. STAT. ANN. tit. 68, § 1360 (West 2001), for exemptions under the Oklahoma Sales Tax Code:

> There are hereby specifically exempted from the tax levied in this article:
>
> (A) The transfer of tangible personal property, as follows:
>
> (1) From one corporation to another corporation pursuant to a reorganization. As used in this subsection the term "reorganization" means a statutory merger or consolidation or the acquisition by a corporation of substantially all of the properties of another corporation when

> the consideration is solely all or a part of the voting stock of the acquiring corporation, or of its parent or subsidiary corporation;
>
> (2) In connection with the winding up, dissolution or liquidation of a corporation only when there is a distribution in kind to the shareholders of the property of such corporation;
>
> (3) To a corporation for the purpose of organization of such corporation where the former owners of the property transferred are immediately after the transfer in control of the corporation, and the stock or securities received by each is substantially in proportion to his interest in the property prior to the transfer;
>
> (4) To a partnership in the organization of such partnership if the former owners of the property transferred are immediately after the transfer, members of such partnership and the interest in the partnership, received by each, is substantially in proportion to his interest in the property prior to the transfer;
>
> (5) From a partnership to the members thereof when made in kind in the dissolution of such partnership;
>
> (6) To a limited liability company in the organization of the limited liability company if the former owners of the property transferred are, immediately after the transfer, members of the limited liability company and the interest in the limited liability company received by each is substantially in proportion to the interest in the property prior to the transfer;
>
> (7) From a limited liability company to the members thereof when made in kind in the dissolution of the limited liability company.
>
> (B) Sale of an interest in tangible personal property to a partner or other person who after such sale owns a joint interest in such tangible personal property where the Oklahoma Sales or Use Tax has previously been paid on such tangible personal property.

The specific exemption from vehicle excise tax is provided by OKLA. STAT. tit. 68, § 2105(9) (West Supp. 2005), which in pertinent part states:

> An original or a transfer certificate of title shall be issued without the payment of the excise tax levied by Section 2101 et seq. of this title for:
>
> …
>
> 9. Any vehicle or motor vehicle, the legal ownership of which is obtained by transfers:
>
> a. from one corporation to another corporation pursuant to a reorganization. As used in this subsection the term "reorganization" means:
>
> (1) a statutory merger or consolidation, or
>
> (2) the acquisition by a corporation of substantially all of the properties of another corporation when the consideration is solely all or a part of the voting stock of the acquiring corporation, or of its parent or subsidiary corporation,
>
> b. in connection with the winding up, dissolution, or liquidation of a corporation only when there is a distribution in kind to the shareholders of the property of such corporation,
>
> c. to a corporation where the former owners of the vehicle or motor vehicle transferred are, immediately after the transfer, in control of the corporation, and the stock or securities received by each is substantially in proportion to the interest in the vehicle or motor vehicle prior to the transfer,
>
> d. to a partnership if the former owners of the vehicle or motor vehicle transferred are, immediately after the transfer, members of such partnership and the interest in the partnership received by each is substantially in proportion to the interest in the vehicle or motor vehicle prior to the transfer,
>
> e. from a partnership to the members thereof when made in the dissolution of such partnership,
>
> f. to a limited liability company if the former owners of the vehicle or motor vehicle transferred are, immediately after the transfer, members of the limited liability company and the interest in the limited liability company received by each is substantially in proportion to the interest in the vehicle or motor vehicle prior to the transfer, or

The sale of aircraft on which STX is levied pursuant to the provisions of the STX Act are specifically exempted from the provisions of the Oklahoma Sales Tax Code[56] by Section 1355(4) of Title 68,[57] which states as follows, to-wit:

> There are hereby specifically exempted from the tax levied pursuant to the provisions of Section 1350 et seq. of this title:
>
> …
>
> Sale of aircraft on which the tax levied pursuant to the provisions of Sections 6001 through 6007 of this title has been, or will be paid or which are specifically exempt from such tax pursuant to the provisions of Section 6003 of this title;

The legislature contemplated prior payment of excise tax or an equivalent tax as a prerequisite before an exemption can be claimed, but only Section 6003(10) contains such a prerequisite.[58]

The Division's reliance on Section 6003(11) is misplaced. Section 11 contemplates a situation where the "use"[59] provision of Section 6002 of Title 68 has triggered the imposition of excise tax, but allows the person *using* the aircraft in this state to claim a credit for tax paid to another state, equal to or in excess of the excise tax levied by Section 6002. This section also states that the person *using* the aircraft in this state is subject to the levy of the excise tax at a rate equal to the difference between the rate of tax levied by Section 6002 and the tax rate levied by other state.[60]

The language of the Section 6003(4) is clear and unambiguous. The exemption does not contain any language supporting the Division's position that the legislature intended that DELAWARE COMPANY must have paid an excise tax or equivalent tax to another state before PROTESTANT COMPANY can claim the exemption under Section 6003(4).[61] The provision

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> g. from a limited liability company to the members thereof when made in the dissolution of such partnership;

See OKLA. ADMIN. CODE § 710:60-7-3.

[56] OKLA. STAT. ANN. tit. 68, § 1350 et seq. (West 2001).

[57] OKLA. STAT. ANN. tit. 68, § 1355(4) (West 2001).

[58] *See* Note 35.

[59] *See* Note 29.

[60] *See* Note 35.

[61] The Oklahoma Sales Tax Code and Oklahoma Vehicle Excise Tax Code contain similar exemptions, as previously noted. There is no indication in either of these tax codes that the legislature intended prior payment of sales tax or vehicle excise tax as a prerequisite before the exemptions contained therein can be claimed, except where the exemption provision provides otherwise. *See* Note 55.

does state, "For the purpose of this section the term reorganization means a statutory merger, consolidation, or acquisition." The Protestant has fully documented the statutory merger of DELAWARE COMPANY and PROTESTANT COMPANY, and the Division has stipulated that it is not contesting the legality of the merger.

However, the Division's fallback position is that the formation and merger of DELAWARE COMPANY and PROTESTANT COMPANY was "only for the purpose of avoiding Oklahoma excise tax and has no other business purpose." The Division argues that the merger of DELAWARE COMPANY and PROTESTANT COMPANY should be disregarded.[62]

The Recital (C) of the Merger Agreement[63] states as follow, to-wit:

> The Members of the Constituent Companies deem it advisable and to the advantage of the Constitute Companies and their respective members be merged with and into PROTESTANT COMPANY for the purpose of changing the jurisdiction of organization of DELAWARE COMPANY from the State of Delaware to the State of Oklahoma and in order for PROTESTANT COMPANY and its parent company to qualify for certain exemptions available under 91.501 of the Federal Aviation Regulations.[64]

Section 91.501 of the Federal Aviation Regulations allows PROTESTANT COMPANY to provide "wet leases"[65] flights to related companies. This increases the deductibility of certain expenses, but only if the flights are incidental[66] to the business of the deducting company.

The record does not support the Division's position that the formation of DELAWARE COMPANY and PROTESTANT COMPANY and their subsequent merger does not have a legitimate business purpose. The Protestant has met its burden of proof that it can claim the exemption contained in Section 6003(4) of Title 68.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case that the protest to the Division's proposed assessment of aircraft excise tax should be sustained.

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[62] The Division cites *Gregory v. Helvering*, 293 U.S. 465 (1935), and *U.S. v. Fleming*, 19 F.3d 1325 (1994), for the proposition that the entities can be disregarded where it found that there was no legitimate business purpose, but only tax avoidance.

[63] Exhibit C.

[64] 14 C.F.R. § 91.501.

[65] *See* Note 16.

[66] *See* Note 17.

OKLAHOMA TAX COMMISSION

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.