JURISDICTION: **OKLAHOMA TAX COMMISSION DECISION**
CITE: **2008-06-24-07 / NON-PRECEDENTIAL**
ID: **P-07-123-K**
DATE: **JUNE 24, 2008**
DISPOSITION: **SUSTAINED**
TAX TYPE: **FRANCHISE**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestant, COMPANY is represented by ATTORNEY, Attorney at Law. The Compliance Division of the Tax Commission (hereinafter "Division") is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

By letter dated May 25, 2007, the Division proposed the assessment of franchise tax, interest and penalty against Protestant for the fiscal year periods inclusive of July 1, 2001 through June 30, 2006. On July 13, 2007, Protestant filed a timely verified protest to the proposed assessment, disputing the entire amount of the assessment.

On August 14, 2007, the protest was referred to the Office of the Administrative Law Judges ("ALJ's 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]. The protest was docketed as Case No. P-07-123-K and assigned to ALJ, Administrative Law Judge.[3]

A pre-hearing conference was scheduled for October 9, 2007, by *Prehearing Conference Notice* issued September 12, 2007.[4] The conference was held as scheduled. Pursuant to the conference, a *Prehearing Conference Order* was issued setting forth the procedure by which this matter would be submitted for decision.[5]

A *Stipulation of Facts and Statement of Issue* was filed December 13, 2007. Exhibit 1 through Exhibit 16 was attached thereto. The *Brief of Protestant* was filed January 8, 2008, the *Brief of the Compliance Division* was filed January 28, 2008, and the *Response Brief of Protestant* was filed February 7, 2008. On February 11, 2008, the record was closed and the case was submitted for decision.[6]

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[1] 68 O.S. 2001, § 201 et seq.

[2] Rules 710:1-5-20 through 710:1-5-47 of the *Oklahoma Administrative Code* ("*OAC*")

[3] *OAC*, 710:1-5-22(b).

[4] *OAC*, 710:1-5-28(a).

[5] *OAC*, 710:1-5-28(b) and 710:1-5-38.

[6] *OAC*, 710:1-5-39(a).

FINDINGS OF FACT

Upon review of the file and records, including the *Stipulation of Facts and Statement of Issue*, the exhibits and the briefs, the undersigned finds:

A. The parties stipulate to the following:

1. Protestant began doing business in Oklahoma in 1948 under the name "BUSINESS." On or about April 15, 2002, Protestant filed an Oklahoma corporate income tax return for the 2001 tax year. The return was signed by an individual as an officer with the title of President. The return reported total assets of $301,250.00 on the attached December 31, 2001 year-end balance sheet.

2. On or about April 30, 2003, Protestant filed an Oklahoma corporate income tax return for the 2002 tax year. The return was signed by an individual as an officer with the title of President. The return reported total assets of $303,191.00 on the attached December 31, 2002 year-end balance sheet.

3. On or about July 9, 2004, Protestant filed an Oklahoma corporate income tax return for the 2003 tax year. The return reported total assets of $286,783.00 on the attached December 31, 2003 year-end balance sheet.

4. On or about June 22, 2005, Protestant filed an Oklahoma corporate income tax return for the 2004 tax year. The return was signed by an individual as an officer with the title of President. The return reported total assets of $270,896.00 on the attached December 31, 2004 year-end balance sheet.

5. On or about November 14, 2005, Protestant registered with the Oklahoma Secretary of State as a for-profit corporation under the name "COMPANY". Protestant previously had never registered with the Oklahoma Secretary of State.

6. On or about November 11, 2005, Protestant issued 500 certificated shares of stock to "The TRUST of November 11, 2003."

7. On or about July 6, 2006, Protestant filed an Oklahoma corporate income tax return for the 2005 tax year. The return was signed by an individual as an officer with the title of President. The return reported total assets of $241,209.00 on the attached December 31, 2005 year-end balance sheet.

8. By letter dated March 30, 2007, the Division notified Protestant that it had a franchise tax filing requirement for the periods July 1, 2001 through June 30, 2006, and requested that franchise tax returns be filed for these periods. Protestant had not filed franchise tax returns for these periods.

9. Because Protestant did not file the franchise tax returns as requested, the Division performed an office audit of Protestant's records with the Tax Commission. As part of the audit, the

Division prepared audit workpapers. These workpapers also dummy Oklahoma franchise tax returns July 1, 2001 through June 30, 2006.

10. Based on the office audit, by letter dated May 25, 2007, the Division proposed to assess Oklahoma franchise tax against Protestant for the periods July 1, 2001 through June 30, 2006, including interest and penalty thereon, in the aggregate amount of $3,074.25. The letter was mailed to Protestant's last-known address as reflected on the records of the Tax Commission.

11. On or about July 13, 2007, the Division received Protestant's timely-filed verified letter of protest. In the letter, Protestant stated that franchise tax was not due for the periods assessed because Protestant was not incorporated until after the assessed periods.

ISSUE AND CONTENTIONS

The issue submitted for decision as stipulated by the parties is "[w]hether the Protestant is subject to Oklahoma franchise tax for the periods in question despite it not being formally incorporated or registered with the Oklahoma Secretary of State until after those periods."

Protestant contends that the assessment erroneously imposes franchise tax for years prior to its incorporation date and for the fiscal year during which incorporation occurred. In support of this contention, Protestant argues that franchise tax is levied against corporations and corporate existence does not commence until the certificate of incorporation is filed with the Secretary of State.

The Division contends that the assessment is proper because Protestant was doing business in Oklahoma in the same manner as a corporation. In support of this contention, the Division cites § 1202 of the Franchise Tax Code and argues that business conduct rather than formal registration controls whether franchise taxes are due.

In response to the Division's argument, Protestant contends that the Division has misconstrued § 1202 and argues that the powers and privileges alluded to in § 1202 are derived from the act of incorporation and do not exist without it.

CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter of law that:

1. The Tax Commission is vested with jurisdiction over the parties and subject matter of this protest. 68 O.S. Supp. 2002, § 221(C) and (D).

2. This proceeding is governed by the provisions of the Oklahoma Franchise Tax Code ("Code"). 68 O.S. 2001, § 1201 et seq.

3. The Code applies to "every corporation organized under the laws of this state, or qualified to do, or doing business in Oklahoma in a corporate or organized capacity by virtue of creation or organization under the laws of this or any other state, territory or district, or a foreign

country, including associations, joint-stock companies and business trusts". 68 O.S. 2001, § 1201. See, ***Great Lakes Pipe Line Co. v. Oklahoma Tax Commission***, 204 Okla. 518, 1951 OK 123, 231 P.2d 655.

4. "Corporation" is defined to mean "an organization, other than a partnership" that is:

(1) Created or organized under the laws of Oklahoma;

(2) Qualified to do or doing business in Oklahoma, in a corporate or organized capacity, by virtue of creation or organization under the laws of the United States or of some state, territory or district, or of a foreign country;

(3) Associations, joint-stock companies, insurance companies, including surety and bond companies;

(4) Business trusts, which shall mean and include common law trusts, such as Massachusetts trusts and every other business organization consisting essentially of an arrangement whereby property is conveyed to one or more trustees for purposes other than the protection and conservation of assets or the protection of debtholders; and

(5) National banking associations, state banks, and trust companies.

68 O.S. 2001, § 202(g).

5. A "franchise or excise tax" is imposed "upon every corporation, association, joint-stock company and business trust organized under the laws of this state", 68 O.S. 2001, § 1203; or "organized and existing by virtue of the laws of some other state, territory or country, now or hereafter doing business in this state", 68 O.S. 2001, § 1204. The declared purpose of the tax on domestic corporations and business organizations is "to require the payment * * * for the right granted by the laws of this state to exist as such organization and enjoy, under the protection of the laws of this state, the powers, rights, privileges and immunities derived from the state by reason of the form of such existence." 68 O.S. 2001, § 1203. See, ***Scott-Rice Co. v. Oklahoma Tax Commission***, 1972 OK 75, 503 P.2d 208.

6. The Oklahoma General Corporation Act ("Act"), 18 O.S. 2001, § 1001 et seq., provides that its provisions "shall be applicable to every corporation, whether profit or not for profit, stock or nonstock, existing as of the effective date of [the] act or thereafter formed or qualified to transact business in this state * * *. 18 O.S. 2001, § 1002(A). It is expressly provided that "[a]ny conflicts with the provisions of the [Act] and any tax or unclaimed property laws of this state shall be governed by the tax or unclaimed property provisions, including those provisions relating to personal liability of corporate officers and directors." 18 O.S. 2001, § 1002(B). See, ***State Insurance Fund v. AAA Engineering & Drafting, Inc.***, 1993 OK 142, 863 P.2d 1218.

7. "Any person, partnership, association or corporation, singly or jointly with others, and without regard to his or their residence, domicile or state of incorporation, may incorporate or organize a corporation pursuant to the provisions of the [Act] by filing with the Secretary of State a

certificate of incorporation * * *." 18 O.S. 2001, § 1005(A). Corporate existence commences with the filing of the certificate of incorporation with the Secretary of State and "the incorporator or incorporators who signed the certificate, and his or their successors and assigns, from the date of filing, shall be and constitute a body corporate by the name set forth in the certificate". 18 O.S. 2001, § 1010. "Whenever any provision of the [Act] requires any instrument to be filed, * * * the requirement means that:

> All delinquent franchise taxes authorized by law to be collected by the Oklahoma Tax Commission shall be tendered to the Oklahoma Tax Commission as prescribed by Sections 1201 through 1214 of Title 68 of the Oklahoma statutes.

18 O.S. 2001, § 1007(C)(2). "Upon delivery of the instrument, and upon tender of the required taxes and fees, the Secretary of State shall certify that the instrument has been filed in the Secretary of State's office by endorsing upon the signed instrument the word 'Filed', and the date of its filing." 18 O.S. 2001, § 1007(C)(4).

8. Tax statutes are penal in nature. ***Globe Life and Accident Insurance Company v. Oklahoma Tax Commission***, 1996 OK 39, 913 P.2d 1322. Penal statutes are to be strictly construed. ***Mid-Continent Pipeline Co. v. Crauthers***, 1954 OK 61, 267 P.2d 568. Strict construction with respect to a penal statute is that which refuses to extend the law by implication or equitable consideration and confines its operations to cases clearly within the letter of the statute, as well as within its spirit or reason. ***State ex rel. Allen v. Board of Education of Independent School Dist. No. 74 of Muskogee County***, 1952 OK 241, 206 Okla. 699, 246 P.2d 368. Courts cannot enlarge the taxing act's ambit to make its provisions applicable to cases not clearly within the legislature's contemplation or to fill lacunae in the revenue law in a manner that would distort the enactment's plain language. ***Globe***, *supra* at 1327.

9. If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects legislative intent and no further construction is required or permitted. ***Sullins v. American Medical Response of Oklahoma, Inc.***, 2001 OK 20, 23 P.3d 259.

10. Here, the evidence shows Protestant was doing business in an organized capacity prior to filing its certificate of incorporation with the Secretary of State of Oklahoma and because of this the Division argues that Protestant is required to report and remit franchise taxes for the periods at issue. "Doing business" is defined by the Code to "mean and include each and every act, power or privilege exercised or enjoyed in this state, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organizations, as are enumerated in [§ 1201]." 68 O.S. 2001, § 1202. The organizations enumerated in § 1201 are "corporations organized under the laws of this state, or qualified to do, or doing business in Oklahoma in a corporate or organized capacity by virtue of creation or organization under the laws of this or any other state, territory or district, or a foreign country, including associations, joint-stock companies and business trusts". 68 O.S. 2001, § 1201.

Protestant's corporate existence did not commence and it was not organized, or qualified to do, or doing business in Oklahoma in a corporate or organized capacity by virtue of creation or organization under the laws of this state or any other state until the filing of its certificate of

incorporation with the Secretary of State of Oklahoma. Accordingly, franchise taxes can not be properly imposed upon Protestant for the periods prior to its date of incorporation nor the fiscal year of its incorporation. 68 O.S. 2001, §§ 1203 and 1207.

11. Protestant's protest to the proposed franchise tax assessment should be sustained.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestant, COMPANY, be sustained.

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.