JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2009-12-03-12 / NON-PRECEDENTIAL**
ID: **P-09-118-H**
DATE: **DECEMBER 3, 2009**
DISPOSITION: **DENIED**
TAX TYPE: **AD VALOREM / MANUFACTURING EXEMPTION**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPANY ("Protestant") appears through the Protestant's representative, REPRESENTATIVE, Manager, EMPLOYER. The Ad Valorem Division ("Division"), Oklahoma Tax Commission, appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On July 15, 2009, the protest file was received by the Office of Administrative Law Judges 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 July 20, 2009, a letter was mailed to the Protestant stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-08-118-H (sic). 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.*[3]

On July 31, 2009, OTC ATTORNEY filed an Entry of Appearance as Counsel of record for the Division.

On August 7, 2009, the Notice of Prehearing Conference was mailed to the last-known address of the Protestant's representative, setting the prehearing conference for September 1, 2009, at 9:00 a.m.[4] On August 27, 2009, a letter was received by facsimile[5] from REPRESENTATIVE requesting that the prehearing conference be held by telephone and requesting that this matter be put on hold for 120 days so that the Protestant could attempt to get legislation passed in the next legislative session.

On September 1, 2009, at 9:00 a.m. the prehearing conference was held as scheduled by telephone with the parties' representatives. During the prehearing conference the Protestant's

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

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

[3] *Id.*

[4] OKLA. STAT. ANN. tit. 68, § 208 (Laws 2009, c. 426, § 4, emerg. eff. June 1, 2009). The notice was mailed to the Protestant's representative at REPRESENTATIVE'S ADDRESS.

[5] On September 2, 2009, the original of the letter was received for filing.

request to suspend any action on this matter for 120 days was discussed at length, but the undersigned denied the request. On September 3, 2009, a letter was mailed to the parties' representatives advising that a status report was to be filed on or before October 1, 2009.

On October 1, 2009, the Joint Stipulation of the Parties was filed with the clerk of the court ("Clerk"), with no exhibits attached thereto. On October 14, 2009, the Clerk received an e-mail from OTC ATTORNEY to REPRESENTATIVE advising that the Administrative Law Judge could rule on this matter based upon the stipulations (without the filing of briefs), but that to do so would require his consent in writing. On October 15, 2009, the Clerk received an e-mail from REPRESENTATIVE confirming the parties' agreement that this matter is to be submitted on the stipulations, without the filing of briefs.

The record in this matter was closed and this case submitted for decision on October 16, 2009.

STIPULATION OF FACTS

On October 1, 2009, the Joint Stipulation of the Parties was filed with the Clerk,[6] as follows, to-wit:

1. On March 15, 2009, COMPANY properly and timely filed its Application for Five Year Ad Valorem Tax Exemption for Oklahoma Manufacturing or Research & Development Facilities, an XM #2 filing regarding assets acquired in 2007.

2. On March 15, 2009, COMPANY properly and timely filed its Application for Five Year Ad Valorem Tax Exemption for Oklahoma Manufacturing or Research & Development Facilities, an XM #1 filing regarding assets acquired in 2008.

3. COMPANY'S XM #1 filing showed a decrease in net payroll from the year the assets which were the subject of the application were placed in service in the calendar year prior to submission of the application.

4. COMPANY'S XM #2 filing showed a decrease in net payroll from the year the assets which were subject of the application were placed in service in the calendar year prior to submission of the application.

5. COMPANY'S XM #1 and 2 filings showed, on their face, that COMPANY had failed to satisfy the requirement of 68 O.S. § 2902(C)(4)(a) of maintaining or increasing payroll.

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

6. Based upon COMPANY'S XM #1 and 2 filings, on May 15, 2009, the Ad Valorem Division, Oklahoma Tax Commission ("OTC") issued its denial of said applications for failure to satisfy the statutory requirements of 68 O.S. § 2902(C)(4)(a).

7. On July 14, 2009, COMPANY timely protested the denial of the subject XM #1 and 2 filings by letter, setting forth ameliorating factors.

8. The ameliorating factors which COMPANY wishes to be considered are:

- Due to the current state of the economy and subsequent housing crisis, the demand for building products has declined significantly over the past 18 months.

- COMPANY was forced to reduce costs by offering early retirement packages to eligible employees, as well as eliminating positions at the ANY TOWN, OK facility.

- As a result of the reduced employment as of 12/31/08, COMPANY was unable to meet the payroll increase that is required to be/remain eligible for the Five-Year Manufacturing Exemption.

- In an effort to remain in business, COMPANY has been forced to reduce its manufacturing operations at the ANY TOWN, OK facility considerably.

- The depressed market has placed a financial strain on COMPANY, which has caused the suspension of additional capital spending at the facility. This is preventing the plant from remaining competitive in the marketplace.

- Denial of the exemptions will place an additional ad valorem tax burden on the facility which will substantially and adversely impact the facility's financials and 2009.

- The above-referenced negative impact will further delay the time period by which the facility can provide the employment consistent with the five year exemption program's intent and purpose.

- The facility provides employment in COUNTY, Oklahoma, a lightly-populated county with a limited number of manufacturing jobs. Thus, any decline in the facility's financials will result in an adverse economic impact within COUNTY, Oklahoma.

- Recent Oklahoma Legislation (Enrolled Senate Bill No. 318 and Enrolled Senate Bill No. 929) was enacted to grant Five-Year Manufacturing

Exemptions to other companies in Oklahoma that had previously had their applications denied.

- COMPANY is in the process of discussing internally the procedure for involving their local State Representative in order to obtain legislative relief.

ADDITIONAL FINDINGS OF FACT

Upon review of the file and records,[7] the undersigned finds:

9. COMPANY ("Protestant") is a foreign corporation registered to do business in the State of Oklahoma. The Protestant's facility in ANY TOWN ("ANY TOWN Facility"), COUNTY, Oklahoma ("Manufacturing Facility") manufactures "gypsum wallboard and related products".

10. On March 15, 2009, Protestant timely filed Applications for Five-Year Ad Valorem Tax Exemptions for Oklahoma Manufacturing Facilities ("Applications") for assets acquired in 2007 ("XM-1") and assets acquired in 2008 ("XM-2") with the COUNTY Assessor's Office.

11. On April 6, 2009, the COUNTY Board of Equalization and COUNTY Assessor approved the XM-1 and XM-2 for the 2009 tax year.

12. On May 13, 2009, the Division received the Notices of Approval by the COUNTY Board of Equalization and COUNTY Assessor, along with the documentation thereto for both Applications.

13. On May 15, 2009, the Division mailed letters to the Protestant and the COUNTY Assessor stating the Applications has been denied due to an "insufficient increase in payroll" pursuant to Tax Commission Rule 710:10-7-15.[8]

14. On August 27, 2009, the REPRESENTATIVE filed a letter with the Clerk, which in pertinent part, states as follows, to-wit:

> In conversations with OTC ATTORNEY, Assistant General Counsel for the Oklahoma State Tax Commission ("STC"), it is understood that the current data provided in this appeal does not warrant the STC to overturn the denial.

[7] The court file contains an audit packet, which was forwarded by the Division as part of the protest file on this matter. The Administrative Law Judge is taking judicial notice of the materials contained in the court file to complete the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999).

[8] OKLA. ADMIN. CODE 710:10-7-15 (June 25, 2006). The Division verified payroll through information received from the Oklahoma Employment Security Commission.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[9]

2. All property in this state, whether real or personal, except that which is specifically exempt by law, and except that which is relieved of ad valorem taxation by reason of the payment of an in lieu tax, shall be subject to ad valorem taxation.[10]

3. All initial applications[11] (subject to exemptions not applicable here) for any exemption for a new, acquired or expanded manufacturing facility shall be granted only if:

> a. there is a net increase in annualized payroll of at least Two Hundred Fifty Thousand Dollars ($250,000.00) if the facility is located in a county with a population of fewer than seventy-five thousand (75,000), according to the most recent federal decennial census, while maintaining or increasing payroll in subsequent years, or at least One Million Dollars ($1,000,000.00) if the facility is located in a county with a population of seventy-five thousand (75,000) or more, according to the most recent federal decennial census, while maintaining or increasing payroll in subsequent years.
>
> The Tax Commission shall verify payroll information through the Oklahoma Employment Security Commission by using reports from the Oklahoma Employment Security Commission for the calendar year immediately preceding the year for which initial application is made for base-line payroll, which must be maintained or increased for each subsequent year; provided, a manufacturing facility shall have the option of excluding from its payroll, for purposes of this section, payments to sole proprietors, members of a partnership, members of a limited liability company who own at least ten percent (10%) of the capital of the limited liability company or stockholder-employees of a corporation who own at least ten percent (10%) of the stock in the corporation. A manufacturing facility electing this option shall indicate such election upon its application for an exemption under this section. Any manufacturing facility electing this option shall submit such information as the Tax Commission may require in order to verify payroll information. Payroll information submitted pursuant to the provisions of this paragraph shall be submitted to the Tax Commission and shall be subject to the provisions of Section 205 of this title, and

[9] *Id.* *See* OKLA. STAT. tit. 68, § 207 (West 2001).

[10] OKLA. STAT. tit. 68, § 2804 (West 2001).

[11] OKLA. STAT. tit. 68, § 2902(C)(4)(a) (West Supp. 2008). *See* Note 10, *supra.*

b. the facility offers, or will offer within one hundred eighty (180) days of the date of employment, a basic health benefits plan to the full-time-equivalent employees of the facility, which is determined by the Department of Commerce to consist of the elements specified in subparagraph b of paragraph 1 of subsection A of Section 3603 of this title or elements substantially equivalent thereto.

4. The rules promulgated pursuant to the Administrative Procedures Act are presumed to be valid and binding on the persons they affect and have the force of law.[12]

5. All persons claiming or administering the manufacturing exemption provided for by the Constitution and the laws of this State shall strictly comply with the law and this Subchapter, under penalty of law, to the end that the objectives of the law be accomplished.[13]

6. Qualifying manufacturing concerns owning facilities engaged in manufacturing in Oklahoma on the first day of January may file an application for ad valorem manufacturing exemption on or before March 15, or as otherwise provided by law.[14]

7. The county assessor shall examine each application for the manufacturing exemption from ad valorem taxation and shall determine whether the facility is exempt under the law.[15]

8. The assessor shall complete the assessor's portion of each application, whether approved or rejected, and shall consecutively number each completed application received, whether approved or rejected, and shall immediately forward a copy of each application, whether approved or rejected, to the Oklahoma Tax Commission Ad Valorem Division.[16]

9. If the Tax Commission determines that an ad valorem manufacturing exemption has been erroneously or unlawfully granted to a manufacturing concern, in whole or in part, it shall notify the appropriate county assessor, who shall, after notice as required by law has been given, immediately value and assess the property and place the property on the tax rolls for Ad Valorem taxation.[17]

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[12] OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2002). *See Toxic Waste Impact Group, Inc. v. Leavitt*, 1988 OK 20, 755 P.2d 626.

[13] OKLA. ADMIN. CODE § 710:10-7-3.

[14] OKLA. ADMIN. CODE § 710:10-7-5(c) (July 1, 2008).

[15] OKLA. ADMIN. CODE § 710:10-7-11(a) (June 25, 2006).

[16] OKLA. ADMIN. CODE § 710:10-7-11(b) (June 25, 2006).

[17] OKLA. ADMIN. CODE § 710:10-7-15(a) (June 25, 2006).

10. The Tax Commission shall mail a copy of the notice pursuant to the terms of 68 O.S. § 208 to the applicant at the mailing address shown on the application. The copy shall notify the applicant of his right to protest the Commission's determination.[18]

11. Within sixty (60) calendar days after the mailing of the notice, the applicant may file with the Oklahoma Tax Commission, a written protest, under oath, signed by himself or his duly authorized representative, in the manner and subject to the requirements set out in 68 O.S. § 207 of the *Uniform Tax Procedure Code*. A copy of the protest shall be mailed or delivered by the applicant to the county assessor.[19]

12. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[20] A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[21]

DISCUSSION

The Protestant in this matter has stipulated that the Division correctly denied the Applications because the "XM #1 and 2 filings showed, on their face," that the Protestant had failed to satisfy the requirement of 68 O.S. § 2902(C)(4)(a) of maintaining or increasing payroll, but the Protestant requests that ameliorating factors should be considered in this matter.[22]

The Tax Commission Rules require "All persons claiming or administering the manufacturing exemption provided for by the Constitution and the laws of this State shall strictly comply with the law and this Subchapter, under penalty of law, to the end that the objectives of

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[18] OKLA. ADMIN. CODE § 710:10-7-15(b) (June 25, 2006).

[19] OKLA. ADMIN. CODE § 710:10-7-15(c) (June 25, 2006).

[20] 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 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) (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.

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

[22] *See* Stipulations 5 and 8. The Protestant also states that it is in contact with its local state representative in order to obtain legislative relief in the next session.

the law be accomplished."[23] The ameliorating factors cited by the Protestant due to the current economic crisis are equitable in nature and are not grounds for waiver of the payroll requirements contained in Section 2902(C)(4)(a) of Title 68.[24]

The Protestant has failed to meet its burden of proof that the Division's denial of the Applications is incorrect and in what respects.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case that the protest should be denied.

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.

[23] *See* Note 13, *supra*.

[24] *See* Note 11, *supra*.