JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2010-02-23-03 / NON-PRECEDENTIAL**
ID: **P-09-115-K**
DATE: **FEBRUARY 23, 2010**
DISPOSITION: **DENIED**
TAX TYPE: **INCOME**
APPEAL: **AFFIRMED ON APPEAL / OK S.CT. 108,127**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestants, HUSBAND AND WIFE, appear pro se. The Account Maintenance Division of the Oklahoma Tax Commission (hereinafter "Division") is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

Protestants timely filed their 2008 Oklahoma Resident Income Tax Return (Form 511) claiming a refund in the amount of $2,918.00. Upon audit of the return, the Division disallowed (1) Protestants' claim to a special exemption and (2) reduced the Oklahoma income tax withheld from the reported amount of $3,713.00 to $838.00. The Division by letter dated April 1, 2009, notified Protestants of the proposed adjustments, the denial of the refund claim and the assessment of additional income tax in the amount of $13.00. Protestants timely protested the proposed adjustments by letter dated May 15, 2009.

On July 2, 2009, the Division referred the protest to the Office of the Administrative Law Judges ("ALJ's Office") for further proceedings pursuant to the Uniform Tax Procedure Code[1], the Rules of Practice and Procedure Before the Office of the Administrative Law Judges[2] and the Oklahoma Income Tax Act[3]. The case was docketed as Case No. P-09-115-K and assigned to ALJ, Administrative Law Judge.[4]

A pre-hearing conference was scheduled for August 27, 2009, by *Prehearing Conference Notice* issued August 4, 2009.[5] At the conference, Protestants conceded that the disallowance of the special exemption was correct. A hearing was scheduled for November 9, 2009, by *Notice of Hearing* issued October 14, 2009.[6]

An open hearing[7] was held on November 16, 2009, as rescheduled by *Notice of Continued Hearing* issued October 22, 2009. Protestant, HUSBAND, was sworn and made a statement

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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] 68 O.S. 2001, § 2351 et seq., as amended.

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

[5] *OAC*, 710:1-5-28.

[6] *OAC*, 710:1-5-29.

[7] Confidentiality of the proceeding was waived. See, 68 O.S. Supp. 2009, § 205.

concerning the basis of the protest. Protestants' Exhibit 1 was admitted into evidence without objection. AUDITOR, Auditor, testified with respect to the records of the Division, the audit of Protestants' 2008 return and the reason for the adjustment. Division's Exhibits 1 through 3 were identified, offered and admitted into evidence. Protestants were allowed additional time to secure a statement from PROGRAM MANAGER, Program Manager, State and Indian Coordination of Minerals Management Services, United States Department of Interior, which statement dated November 23, 2009, was filed in this cause on December 1, 2009. On December 1, 2009, the record was closed and the protest was submitted for decision.[8]

FINDINGS OF FACT

Upon review of the file and records, including the recording of the hearing, the pleadings of the parties and the exhibits received into evidence, the undersigned finds:

1. At all times relevant, Protestants were Oklahoma residents. Division's Exhibit 1[9].

2. Protestant, HUSBAND, 11/16th degree Indian blood is a citizen of the NATION, one of the Five Civilized Tribes of Oklahoma. Paragraph 3, Facts in the Case, *Position Letter* filed November 9, 2009 by Protestants.

3. During tax year 2008, Protestants received royalties in the amount of $41,284.41 from oil and/or gas produced in the counties of COUNTY A and COUNTY B, State of Oklahoma.[10]

4. The *Consolidated Form 1099* reported "[e]xpenses related to oil and gas royalties" in the amount of $2,870.25 which have been identified and confirmed to be gross production and petroleum excise taxes withheld from the oil and/or gas income and remitted by the oil and gas companies to the State of Oklahoma. United States Department of the Interior, Office of the Special Trustee for American Indians letter dated April 15, 2009. Attachment B to Position Letter.

5. Protestants timely filed their 2008 Oklahoma income tax return reporting Oklahoma taxable income of $22,298.00, income tax due of $795.00, Oklahoma withholding of $3,713.00 and an income tax refund of $2,918.00. Division's Exhibit 1.

6. Protestants submitted with their 2008 Oklahoma income tax return, documentation of Oklahoma income tax withheld in the amount of $838.00. Division's Exhibit 1.

7. Upon audit of the return, the Division disallowed the claim to a special exemption and adjusted the reported amount of Oklahoma income tax withheld of $3,713.00 to $838.00. The

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

[9] Copy of Protestants' 2008 State of Oklahoma Resident Income Tax Return, Form 511 and attachments filed February 18, 2009.

[10] *Consolidated Form 1009 for Tax Year 2008* attached to Division's Exhibit 1. The land from which the oil and/or gas was produced was inherited by Protestant, HUSBAND, from FATHER, a full blood TRIBE Indian whom received the property as an original allotment. The oil and gas leases are held in trust in FATHER'S name under the control of the United States Department of Interior. Paragraphs 1 through 5, Facts in the Case, *Position Letter*.

Division by letter dated April 1, 2009, notified Protestants of the proposed adjustments which resulted in the denial of the refund claim and the assessment of additional income tax in the amount of $13.00. Division's Exhibit 3.[11]

8. Protestants timely protested the proposed adjustments to their 2008 income tax return by letter dated May 15, 2009. Division's Exhibit 2.

ISSUE AND CONTENTIONS

The issue presented for decision is whether the gross production and petroleum excise taxes withheld from Protestants' oil and/or gas royalty income may be claimed on their income tax return as Oklahoma income tax withholding.

Protestants contend that they are due a credit or refund of the gross production and petroleum excise taxes withheld from their oil and/or gas royalties. In support of this contention, Protestants argue that the gross production and petroleum excises taxes were erroneously withheld and remitted to the State of Oklahoma since the oil and gas production is exempt from state taxation as it was derived from restricted Indian lands, citing ***Bruner v. Oklahoma Tax Commission***, 2006 OK CIV APP 21, 130 P.3d 767. Protestants argue that the gross production and petroleum excise taxes are essentially the same as withheld income taxes as the taxes were withheld from their gross unearned income. Protestants further argue that the credit should be allowed since they have not been denied the credit on income tax returns in previous years.

The Division contends that Protestants' contention that they are entitled to a credit against income taxes for the amount of gross production taxes withheld from oil and gas royalties is unsupported by the law.

CONCLUSIONS OF LAW

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

1. Jurisdiction of the parties and subject matter of this action is vested in the Tax Commission. 68 O.S. Supp. 2002, § 221(D).

2. This matter is governed by the Oklahoma Income Tax Act.[12] ***State, ex rel. Oklahoma Tax Commission v. Texaco Exploration & Production, Inc.,*** 2005 OK 52, ¶ 7, 131 P.3d 705, 707.

3. The amount deducted and withheld as tax by an employer making payment of wages during any calendar year shall be allowed as a credit to the recipient of the income as income taxes paid. 68 O.S. 2001, § 2385.5. See, 68 O.S. 2001, § 2357(A).

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[11] The Division's proposed adjustments included the disallowance of a special exemption claimed on the return which resulted in Oklahoma income tax due of $851.00 on the adjusted Oklahoma taxable income of $23,298.00. This adjustment to the return has been conceded by Protestants.

[12] 68 O.S. 2001, § 2351 et seq.

4. "Deductions [and credits against tax] are a matter of legislative grace rather than judicial intervention." ***Flint Resources Company v. Oklahoma Tax Commission***, 1989 OK 9, 780 P.2d 665, 673. In order to be allowed, authority for the deduction or credit sought must be clearly expressed. ***Home-State Royalty Corporation v. Weems***, 1935 OK 1043, 175 Okla. 340, 52 P.2d 806 (1935). None may be allowed in absence of a statutory provision therefor. *Id. See*, ***New Colonial Ice Co. v. Helvering***, 292 U.S. 435, 440, 54 S.Ct. 788, 78 L.Ed. 1348 (1934).

5. A proposed assessment or an adjustment to a return resulting in the disallowance or reduction of a refund is presumed correct and the taxpayer bears the burden of showing that it is incorrect, and in what respect. *OAC*, 710:1-5-47. See, ***Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission***, 1988 OK 91, 768 P.2d 359.

6. "[E]stoppel is not ordinarily applicable to state agencies operating under statutory authority." ***In the Matter of Kenneth R. Strong v. State of Oklahoma, ex rel. The Oklahoma Police Pension and Retirement Board***, 2005 OK 45, ¶9, 76 O.B.A.J. 1400, *citing State ex rel. Bd. Of Regents of University of Oklahoma v. Greer*, 204 F.Supp.2d 1292 (W.D.Okla.2002); *Burdick v. Independent School Dist.*, 1985 OK 49, ¶7, 702 P.2d 48; *Board of Educ. v. Rives*, 1974 OK 153, ¶8, 531 P.2d 423. "Generally, estoppel is not imposed merely where a party is given incorrect information or a mistake occurs." *Id., citing Indiana Nat'l Bank v. State Dept. of Human Services*, 1993 OK 101, ¶15, 857 P.2d 53; *Ashland Oil, Inc. v. Corporation Comm'n*, 1979 OK 17, ¶22, 595 P.2d 423; *State ex rel. Comm'rs of Land Office v. Phillips Petroleum Co.*, 1953 OK 395, ¶0, 258 P.2d 1193.

7. Further, although not at issue in this cause, the Court of Appeals, Div. 2, in the case of ***Bruner v. Oklahoma Tax Commission***, 2006 OK APP CIV 21, ¶ 9, 130 P.3d 767, 770, held that the State of Oklahoma is not prohibited from imposing gross production and petroleum excises taxes on production from allotted Indian lands.

8. Protestants' protest to the proposed adjustments to their 2008 Oklahoma income tax return should be denied.

DISPOSITION

THEREFORE, based on the above and foregoing findings and conclusions, it is ORDERED that the protest of Protestants, HUSBAND AND WIFE, be denied. It is further recommended that the amount in controversy, inclusive of any accrued and accruing interest, be fixed as the deficiency due and owing.

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.

NOTE: The distinction between a Commission Order designated as "Precedential" or "Non-Precedential" has been blurred because all OTC Orders resulting from cases heard by the Office of Administrative Law Judges are now published, not just "Precedential" Orders. *See* OKLA. STAT. ANN. tit.68, § 221(G) (West Supp. 2009) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002). *See also* OTC Orders 2009-06-23-02 and 2009-06-23-03 (June 23, 2009), which also conclude the language of the Statute is "clear and unambiguous."