JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2010-04-20-18 / NON-PRECEDENTIAL**
ID: **JM-09-005-H**
DATE: **APRIL 20, 2010**
DISPOSITION: **DENIED**
TAX TYPE: **QUALITY JOBS INCENTIVE PROGRAM**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPANY ("Protestant") appears through the Protestant's Vice President, VICE-PRESIDENT ("Representative"). The Credits and Refunds Section (Quality Jobs Rebates) of the Account Maintenance Division ("Division"), Oklahoma Tax Commission, appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On November 16, 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 Office of Administrative Law Judges.*[2] On November 19, 2009, a letter was mailed to the Protestant's Representative stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number JM-08-008-H. The letter also advised the Protestant's Representative a Notice of Prehearing Conference would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Office of Administrative Law Judges.*[3] On November 19, 2009, a letter was mailed to the Protestant's Representative correcting the Case Number to JM-09-005-H. On November 24, 2009, OTC ATTORNEY filed an Entry of Appearance with the Court Clerk[4] as Counsel of record for the Division.

On December 8, 2009, the Notice of Prehearing Conference was mailed to the parties' Representatives at their last known addresses[5] setting the prehearing conference for January 11, 2010, at 1:30 p.m. The prehearing conference was held as scheduled with OTC ATTORNEY appearing on behalf of the Division. VICE-PRESIDENT did not appear in person or by telephone on behalf of the Protestant.

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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. ADMIN. CODE § 710:1-5-10(c)(2) (June 25, 1999).

[5] OKLA. STAT. ANN. tit. 68, § 208 (West Supp. 2010).

On January 11, 2010, the Prehearing Conference Order was mailed to the parties' Representatives at their last-known addresses directing the Division to file a verified response on or before February 10, 2010, with the Protestant's response due on or before February 25, 2010.

On February 10, 2010, the Division's Verified Response was filed with the Court Clerk, with Exhibits A through H attached thereto. The Verification attached to the Division's Verified Response was duly sworn under oath, on behalf of the Division, by EMPLOYEE, Credits and Refunds Section (Quality Jobs Rebates) of the Account Maintenance Division, Oklahoma Tax Commission.[6] The Protestant did not file a response to the Division's Verified Response. The record in this matter was closed and this case submitted for decision on February 26, 2010.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, and the Division's Verified Response, the undersigned finds:

1. On November 20, 2000, the State of Oklahoma (acting through the Oklahoma Department of Commerce ("Commerce") and the Oklahoma Tax Commission ("Tax Commission")) and "INTERNET RETAILER" executed an "Incentive Offer, Acceptance and Certification" ("*Agreement*") pursuant to the Oklahoma Quality Jobs Program Act[7] ("*Act*") to establish a call center in the State of Oklahoma.[8]

2. On July 7, 2007, "INTERNET RETAILER" assigned its rights under the *Agreement* to the Protestant.[9]

3. The Tax Commission made incentive payments to "INTERNET RETAILER" and the Protestant pursuant to the *Act* and *Agreement* for the Fourth (4th) Quarter of 2000 through the First (1st) Quarter of 2009, inclusive, totaling $1,289,356.94.[10]

4. On January 30, 2009, the Protestant submitted its Third (3rd) Quarter 2008 Claim Form reporting $836,771.44 in quarterly payroll. The Tax Commission paid Protestant a $27,948.17 incentive payment.[11]

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[6] *See* OKLA. ADMIN. CODE § 710:1-5-28(c) (June 25, 1999).

[7] OKLA. STAT. ANN. tit. 68, § 3601 et seq. (West 2001).

[8] Division's Exhibit A.

[9] 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).

[10] Division's Exhibit B.

[11] Division's Exhibit C.

5. On April 10, 2009, the Protestant submitted its Fourth (4th) Quarter 2008 Claim Form reporting $506,030.11 in quarterly payroll. The Tax Commission paid Protestant a $16,901.41 incentive payment.[12]

6. On March 20, 2009, the Protestant submitted its First (1st) Quarter 2009 Claim Form reporting $385,216.10 in quarterly payroll. The Tax Commission paid Protestant a $12,866.22 incentive payment.[13]

7. On August 19, 2009, the Protestant submitted its Second (2nd) Quarter 2009 Claim Form reporting $421,535.08 in quarterly payroll. The Tax Commission paid Protestant a $14,079.27 incentive payment.[14]

8. On August 27, 2009, the Division notified the Protestant by letter[15] in pertinent parts as follows, to-wit:

> Our records indicate that the claim form received for 2nd Quarter, 2009 falls below the $2.5 million annual Quality Jobs payroll threshold level. We are suspending incentive payments as required by Oklahoma Tax Commission Rules, Title 710:85-1-12-a.
>
> We will resume making incentive payments at such time as the Quality Jobs taxable payroll for the most recent four (4) consecutive quarters equals or exceeds $2.5 million dollars. Please continue submitting quarterly claim forms. This will allow us to monitor the threshold level.

9. By letter dated and post-marked October 20, 2009, a protest was received by the Division to the suspension of the Protestant's incentive payments. The basis of the protest was "…there [was] nothing in any of the documents we signed with the state indicating a minimum payroll as your letter states and which is being used to deny the money owed to us…."[16]

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[17]

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[12] Division's Exhibit D.

[13] Division's Exhibit E.

[14] Division's Exhibit F.

[15] Division's Exhibit G.

[16] Division's Exhibit H.

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

2. It is the intent of the Legislature[18] that:

   1. The State of Oklahoma provide appropriate incentives to support establishments of basic industries[19] that hold the promise of significant development of the economy of the State of Oklahoma;
   2. The amount of incentives provided pursuant to this act in connection with a particular establishment:

      a. be directly related to the jobs created as a result of the establishment locating in the State of Oklahoma, and

      b. not exceed the estimated net direct state benefits that will accrue to the state as a result of the establishment locating in the State of Oklahoma;
   3. The Oklahoma Department of Commerce and the Oklahoma Tax Commission implement the provisions of the *Act* and exercise all powers as authorized in the *Act*. The exercise of powers conferred by the *Act* shall be deemed and held to be the performance of essential public purposes; and
   4. Nothing herein shall be construed to constitute a guarantee or assumption by the State of Oklahoma of any debt of any individual, company, corporation or association nor to authorize the credit of the State of Oklahoma to be given, pledged or loaned to any individual, company, corporation or association.

3. An establishment which meets the qualifications specified in the *Act* may receive quarterly incentive payments for a ten-year period from the Tax Commission pursuant to the provisions of the *Act* in an amount which shall be equal to the net benefit rate multiplied by the actual gross payroll of new direct jobs for a calendar quarter as verified by the Oklahoma Employment Security Commission ("OESC").[20]

4. In order to qualify to receive such payments,[21] the establishment applying shall be required to:

   1. Be engaged in a basic industry;
   2. Have an annual gross payroll for new direct jobs projected by the Department to equal or exceed Two Million Five Hundred Thousand

[18] OKLA. STAT. ANN. tit. 68, § 3602 (West 2001).

[19] OKLA. STAT. ANN. tit. 68, § 3603 (West Supp. 2010).

[20] OKLA. STAT. ANN. tit. 68, § 3604(A) (West 2001).

[21] OKLA. STAT. ANN. tit. 68, § 3604(C) (West 2001).

Dollars ($2,500,000.00) within three (3) years of the anticipated date on which the establishment will receive its first incentive payment; and

3. Have a number of full-time-equivalent employees working an average of twenty-five (25) or more hours per week in new direct jobs equal to or in excess of eighty percent (80%) of the total number of new direct jobs.

5. 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.[22]

6. The Tax Commission shall cease incentive payments if the gross payroll of the qualified establishment for one of any four (4) consecutive calendar quarters does not equal or exceed the applicable total required by Section 3604 of Title 68 within three (3) years of the start date. A qualified establishment whose incentive payments have ceased under this subsection may not receive any further incentive payments unless and until actual gross payroll equals or exceeds the amount specified in Section 3604 of Title 68.[23]

7. The following procedures shall apply if the Tax Commission ceases or suspends a qualified establishment's incentive payment(s)[24]:

(1) Filing of protest. The qualified establishment may, within sixty (60) days after the mailing of notification of action by the Commission, file with the Commission a protest under oath, signed by the qualified establishment or his duly authorized agent setting out:

(A) a statement of action as determined by the Commission;

(B) a statement of the qualified establishment's disagreement with such action; and

(C) supporting documentation relied on by the qualified establishment in support of its claim.

8. A protest to the action of the Commission filed by a qualified establishment shall be governed by the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.[25]

9. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[26]

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[22] 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.

[23] OKLA. ADMIN. CODE § 710:85-1-12 (June 25, 2005).

[24] OKLA. ADMIN. CODE § 710:85-1-13(1) (June 25, 2005).

[25] *See* Note 2, *supra.*

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

10. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[27]

DISCUSSION

The Protestant asserts that "…there is nothing in any of the documents we signed with the state indicating a minimum payroll as your letter states and which is being used to deny the money owed to us….,"[28] but Part II of the *Agreement* clearly states "*THE THREE-YEAR PERIOD during which the Company must generate a minimum annual new qualified payroll of $2.5 million in gross taxable wages shall commence at the beginning of the calendar quarter for which the first incentive claim is filed,"* and the details of which are more set out in Part II of the Agreement, the *Act*, and Tax Commission Rules. (Emphasis original.)[29]

The Protestant's position is not supported by the record and accordingly the Protestant's payroll for the four (4) quarters preceding the claim which was denied was $2,149,552.73, which is below the minimum $2.5 million in gross taxable wages required by the *Agreement*, the *Act*, and Tax Commission Rules for the Protestant to receive the incentive payment for the Second (2nd) Quarter of 2009.

The Protestant has failed to meet its burden of proof that the Division's suspension of the incentive payments beginning the Second (2nd) Quarter of 2009 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

> 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.

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

[28] *See* Note 16, *supra*.

[29] *See* Note 8, *supra.* See Page 1 of the Agreement and Page 3 of the Agreement, which sets out the details of Part II.

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."