JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2011-02-22-04 / NON-PRECEDENTIAL**
ID: **P-09-181-K**
DATE: **FEBRUARY 22, 2011**
DISPOSITION: **DENIED**
TAX TYPE: **AD VALOREM**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestant, COMPANY, is represented by MANAGER, Senior Manager, and TREASURER, Assistant Treasurer. The Ad Valorem Division of the Oklahoma Tax Commission ("Division") is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

Protestant's 2009 Applications for Manufacturer's Ad Valorem Tax Exemption (XM-1, 2008 acquisitions; XM-2, 2007 acquisitions; XM-3, 2006 acquisitions; and XM-4, 2005 acquisitions) were filed with the Division on or about July 17, 2009. By letters dated July 20, 2009, the Division notified Protestant and the COUNTY ASSESSOR that the applications were denied due to an insufficient increase of payroll (XM-1) and failure to maintain payroll (XM-2, XM-3 and XM-4). Protestant timely protested the denial letters.

On October 22, 2009, the Division's file was referred to the Office of the 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]. The case was docketed as Case No. P-09-181-K and assigned to ALJ, Administrative Law Judge.[3]

A pre-hearing conference was scheduled in this cause for December 10, 2009, by *Prehearing Conference Notice* issued November 4, 2009.[4] The pre-hearing conference was held as scheduled. Pursuant to the conference, the parties were directed to file a status report. Following the filing of several status reports, a *Status Conference* was scheduled and held on July 13, 2010. During the conference, the parties advised of their agreement to submit the protest for decision by stipulations and briefs and requested a scheduling order. The *Scheduling Order* was issued July 14, 2010.

The *Stipulation of the Parties* was filed September 8, 2010. *Protestant's Brief in Chief* was filed October 25, 2010. The *Division Response to Protestant's Brief in Chief* was also filed on

[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).

October 25, 2010. Protestant did not file a reply brief. The record was closed and the protest was submitted for decision on December 14, 2010.[5]

FINDINGS OF FACT

Upon review of the file and records, including the *Stipulation* and the briefs, the undersigned finds:

The parties stipulate to the following:

1. On September 3, 2009, Taxpayer filed a timely protest to denial of applications for five-year manufacturing exemptions, as follow:

(a)	2008	acquisitions:	XM	1
(b)	2007	acquisitions:	XM	2
(c)	2006	acquisitions:	XM	3
(d)	2005	acquisitions:	XM	4

2. Taxpayer timely filed applications for the referenced exemptions.

3. The Taxpayer property in question is located at Taxpayer's facilities in the City of ANYTOWN, COUNTY, Oklahoma.

4. COUNTY, Oklahoma, has a population of less than 75,000.

5. Pursuant to 68 O.S. § 2902.C.4.a., all initial applications for any exemption for new, acquired or expanding manufacturing facilities shall be granted only if there is a net increase in annualized payroll of at least $250,000, while maintaining or increasing payroll in subsequent years.

6. Pursuant to 68 O.S. § 2902.C.4.a, the Oklahoma Tax Commission ("OTC") is required to use Oklahoma Employment Security Commission ("OESC") reports for the calendar year immediately preceding the year for which initial application is made for baseline payroll, which must be maintained/increased for each subsequent year.

7. The applications filed by Taxpayer for those exemptions shown at #1 above each demonstrated a decrease in OESC reported payroll between calendar 2007 and calendar 2008.

8. Based upon Taxpayer's applications for those exemptions referenced at #1, the Ad Valorem Division, OTC, denied each of the applications for failure to maintain or increase payroll, as required by 68 O.S. § 2902.C.4.a.

9. Taxpayer timely protested denial of the subject applications.

10. Taxpayer does not deny that its 2008 payroll declined from the previous year.

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

11. Taxpayer requests approval of the subject applications based on factors as set-forth below:

> The state of the US economy and its effect on manufacturers in Oklahoma.
>
> - In an effort to remain in business, the Taxpayer's ANYTOWN plant has been forced to reduce its manufacturing operations.
> - Financial strains have suspended additional capital spending at the facility, which is prohibiting the plant from remaining competitive in the marketplace.
> - Not only will the loss of the manufacturing exemption negatively affect financials but, it will delay the time period in which jobs will be provided at the plant that will undoubtedly spur economic growth for the County and ultimately the State of Oklahoma.
> - The denial of the manufacturing exemptions will have a significant influence on the plant's future operations.

12. Taxpayer unsuccessfully sought an amendment of 68 O.S. § 2902.C.4.a, which would excuse noncompliance based upon the current economic downturn.

13. The Oklahoma Attorney General ("OAG") has ruled that neither "good cause" nor "best interests of the public" can be used in considering applications for exemption filed after statutory deadlines, 2003 OAG 23.

14. The OTC is bound to follow Opinions of the Oklahoma Attorney General, unless and until those Opinions are superseded by determination by the court of competent jurisdiction, *Aetna Casualty and Surety Co. vs. State Board for Property and Casualty Rates*, 1983 OK 153, ¶ 10, 637 P.2d 1251; 2006 OAG 8.

Additional facts:

1. The North American Industry Classification System code number for Protestant is 311813 which code "comprises establishments primarily engaged in manufacturing frozen bakery products (except bread), such as cakes, pies, and doughnuts." See, http://www.census.gov/cgi-bin/sssd/naics/naicsrch.

ISSUE

The issue presented for decision is whether Protestant sustained its burden of proving that the denials of its 2009 Applications for Manufacturer's Ad Valorem Tax Exemption are erroneous.

CONCLUSIONS OF LAW

1. Jurisdiction of the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S. 2001, § 207(c) and *OAC*, 710:10-7-15[6].

2. All property in this state, whether real or personal, except that which is specifically exempted by law and is relieved of ad valorem taxation by reason of the payment of an in lieu tax, is subject to ad valorem taxation. 68 O.S. 2001, § 2804.[7] During the periods in question, there was specifically exempted from the levy of ad valorem taxes for a period of five (5) years "new, expanded or acquired manufacturing facilities, including facilities engaged in research and development" of a "qualifying manufacturing concern". Oklahoma Constitution, Art. X, § 6B[8]; 68 O.S. Supp. 2003, § 2902(A).[9]

3. At all times relevant herein and in particular to this proceeding[10], an initial application for exemption for a new, acquired or expanded manufacturing facility, "shall be granted only if there is a net increase in annualized payroll of at least Two Hundred Fifty Thousand Dollars ($250,000.00) * * * <u>while maintaining or increasing payroll in subsequent years</u> * * *". (Emphasis added.) 68 O.S. Supp. 2009, § 2902(C)(4)(a). Section 2902(C)(4)(a) further provides in part:

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[6] This rule provides:

Review; protest; appeal

(a) **Notice of erroneous exemption; assessment.** If the 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 to the applicant 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.

(b) **Notice to applicant.** The 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.

(c) **Protest.** 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.

(d) **Law governing protest procedure.** The Applicant's right of protest, hearing and procedure to be followed shall be governed by the provision of the Uniform Tax Procedure Code.

(e) **Appeal.** Appeals from the decision of the Oklahoma Tax Commission regarding any protest shall be made directly to the Supreme Court of Oklahoma, as provided by law.

[7] Added by Laws 1988, c. 162, § 4, effective January 1, 1992 which replaced 68 O.S. 1981, § 2404 that was repealed by Laws 1988, c. 162, § 165.

[8] Added by State Question No. 588, Legislative Referendum No. 252, adopted at election held on April 30, 1985. Addition proposed by Laws 1985, p. 1664, S.J.R. No. 9. The purpose of this provision was to induce any manufacturing concern to locate or expand manufacturing facilities within any county of this state.

[9] Laws 2003, c. 458, § 1, emerg. eff. June. 6, 2003.

[10] As stipulated, Protestant's manufacturing facilities are located in a county with a population of fewer than seventy-five thousand (75,000) according to the most recent federal decennial census. Further, the undersigned concludes that the provisions of §§ 2902(C)(5) and (C)(6) are not relevant to this proceeding.

> 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 * * *. (Emphasis added.)

4. "The five-year period of exemption from ad valorem taxes for any qualifying manufacturing facility property shall begin on January 1 following the initial qualifying use of the property in the manufacturing process." 68 O.S. Supp. 2009, § 2902(D). "Any person, firm or corporation claiming the exemption * * * shall file each year for which exemption is claimed, an application therefore * * *". 68 O.S. Supp. 2009, § 2902(E).

5. The fundamental rule of statutory construction is to ascertain and, if possible, give effect to the intention and purpose of the legislature as expressed in a statute. ***Samson Hydrocarbons Co. v. Oklahoma Tax Commission***, 1998 OK 82, 976 P.2d 532. Legislative intent must be ascertained from the whole act, ***Walls v. American Tobacco Co.***, 2000 OK 66, 11 P.3d 626; based on its general purpose and objective, ***Comer v. Preferred Risk Mut. Ins. Co.***, 1999 OK 86, 991 P.2d 1006. Statutes must be read to render every part operative, and to avoid rendering any part superfluous or useless. ***Bryant v. Commissioner of the Dept. of Public Safety, State of Okl.***, 1996 OK 134, 937 P.2d 496. If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the 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.

As a general rule, statutes exempting property from taxation are to be applied circumspectly and are to be strictly construed against the allowance of an exemption. ***Matter of Wal-Mart Stores, Inc.***, 1991 OK CIV APP 73, 817 P.2d 1281; ***Bert Smith Road Machinery Co. v. Oklahoma Tax Commission***, 1977 OK 75, 563 P.2d 641. No claim of tax exemption can be sustained unless it clearly comes within the statutory provision under which the exemption is claimed. ***Home-Stake Production Co. v. Board of Equalization of Seminole County***, 1966 OK 115, 416 P.2d 917. The rule that ambiguity in tax law should be resolved in favor of the taxpayer does not apply where a statute exempts property from taxation. ***Phillips Petroleum Co. v. Oklahoma Tax Commission***, 1975 OK 146, 542 P.2d 1303. The burden of proving the existence of a deduction is on the individual seeking the exemption, and constitutional provisions are strictly construed against those claiming exemption. ***Austin, Nichols & Co., Inc. v. Oklahoma County Bd. of Tax-Roll Corrections***, 1978 OK 65, 578 P.2d 1200.

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.

6. In all administrative proceedings the burden of proof is on the taxpayer to show in what respect the action or proposed action of the Tax Commission is incorrect. *OAC*, 710:1-5-47. *See* ***Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission***, 1988 OK 91, 768 P.2d 359.

7. The evidence shows that Protestant failed to increase its annualized payroll by $250,000.00 for the initial year application (XM-1, 2008 acquisitions) and failed to maintain its annualized payroll for the subsequent year applications (XM-2, 2007 acquisitions; XM-3, 2006 acquisitions; and XM-4, 2005 acquisitions). Accordingly, Protestant's protest should be denied.

DISPOSITION

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

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."