

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2011-03-22-02 / NON-PRECEDENTIAL
ID: P-10-104-K
DATE: MARCH 22, 2011
DISPOSITION: SUSTAINED
TAX TYPE: INCOME
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestant, LLC, is represented by CPA, CPA, ACCOUNTING FIRM. The Compliance 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

The Division denied the investment/new jobs credit claimed by Protestant on its 2007 Oklahoma Partnership Income Tax Return. Protestant timely protested the denial.

On April 7, 2010, the Division’s file was referred to the Office of the Administrative Law Judges (“ALJ’s Office”) for further proceedings consistent with the Uniform Tax Procedure Code¹ and the Rules of Practice and Procedure before the Office of the Administrative Law Judges². The protest was docketed as Case No. P-10-104-K and assigned to ALJ, Administrative Law Judge.³

A pre-hearing conference was scheduled for June 2, 2010, by *Prehearing Conference Notice* issued April 20, 2010.⁴ The conference was considered held upon receipt of a *Status Report in Lieu of Prehearing Conference* filed May 19, 2010. The parties were directed to file a status report. By *Status Report* filed July 29, 2010, 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 29, 2010.

A *Joint Stipulation of Facts* was filed September 29, 2010, with Exhibits A through E attached thereto. Protestant’s *Brief in Chief* was filed October 29, 2010. The Division’s *Reply Brief* was filed November 10, 2010. *Protestant’s Reply Brief* was filed November 30, 2010. The record was closed and the protest was submitted for decision on December 15, 2010.⁵

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.

⁵ OAC, 710:1-5-39.

FINDINGS OF FACT

Upon review of the file and records, including the *Joint Stipulation of Facts*, the exhibits attached thereto and the pleadings of the parties, the undersigned finds:

The parties stipulate to the following:

PROCEDURAL FACTS

1. By letter dated January 15, 2010, the Division informed [Protestant] that the tax credit taken for the Investments/New Jobs Credit, 68 O.S. §2357.4, was denied because [Protestant] did not hold a valid Manufacturing Sales/Exemption Permit (“MSEP”).

2. No assessment or denial of refund resulted from the Division’s denial of the Investments/New Jobs Credit because the tax effect of the Division’s denial would occur at the partner level.

3. By letter dated February 2, 2010, the Division clarified its letter of January 15th by providing information conveyed at a meeting held with liaisons of the Commission and the Oklahoma Society of Certified Public Accountants (OSCPA) on February 11, 2009.

4. On March 26, 2010, [Protestant] timely protested the Division’s denial of its claim for the 2007 Investments/New Jobs Credit.

5. The Protest of [Protestant] is properly before the Commission.

GENERAL FACTS

6. [Protestant] is an investment management firm whose business activities include the management of commercial real estate used in the manufacturing process by COMPANY.

7. [Protestant] is not a manufacturer and has not received a MSEP issued by the Commission.

8. [Protestant] owns certain property which it manages and leases to COMPANY, a company related by common ownership electing treatment as an S corporation for federal and Oklahoma income tax purposes. The property consists of an office and manufacturing facility, in which COMPANY conducts its manufacturing operation. The manufacturing facility includes manufacturing equipment and permanent machining fixtures used by COMPANY in the manufacturing process.

9. COMPANY manufactures pipeline flanges for the oil and gas and various other industries and holds a valid MSEP issued by the Commission.

10. As part of its 2007 Oklahoma Partnership Return, [Protestant] filed Form 506 for tax year 2007 claiming a credit of \$11,710.00 under 68 O.S. §2357.4 for investment in qualified

depreciable property placed in service in 2007. The qualified depreciable property [Protestant] invested in was a manufacturing facility located at ADDRESS, OK (the “Facility”).

11. [Protestant] and COMPANY are both pass-through entities with the same taxpayer owners for federal and Oklahoma income tax purposes.

ISSUES AND CONTENTIONS

As stipulated by the parties, the issue presented for decision is “[w]hether a taxpayer claiming a tax credit for investment in qualified depreciable property under 68 O.S. Supp. 2006, § 2357.4 must hold a valid manufacturer exemption permit in order to qualify for the Investment/New Jobs Credit under section 2357.4.”

Protestant contends that the denial of the investment credit because it does not hold a manufacturer exemption permit is erroneous in form and in substance. In support of this contention, Protestant argues that the language of the investment credit is clear in that it requires the issuance of a manufacturer exemption permit for the manufacturing operation, not the taxpayer investing in the property. Protestant further argues that if the legislature had intended that only manufacturers receive the credit, it could have specifically addressed that. Further, Protestant argues that under the Internal Revenue Code Protestant’s business activities are considered inherently part of the business of COMPANY and that federal investment credits are allowed to a lessor of property based on the lessee’s use of the property.

The Division contends that the taxpayer claiming the investment/new jobs credit is required to be a manufacturer that holds a manufacturer exemption permit. In support of this contention, the Division cites the 1998 amendment of §2357.4 in conjunction with the addition of §1359.2 to the Sales Tax Code, and argues that § 1359.2 does not reference “manufacturing operation”, but rather the manufacturer who is required to qualify for the manufacturer exemption permit. The Division further argues that to interpret the language of the investment/new jobs credit differently renders the requirement to have a manufacturer exemption permit extraneous and negates the purpose of the credit. The Division also argues that the decisions of the Oklahoma Tax Commission have consistently found that it is the operations of the taxpayer claiming the credit which qualifies it for the credit. Further, the Division argues that Protestant’s reliance on the provisions of the Internal Revenue Code to support its position is irrelevant since the investment/new jobs credit is a state created credit independent of the Internal Revenue Code and the income tax liability of related entities is separately determined under the Oklahoma Income Tax Act.

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 proceeding is vested in the Oklahoma Tax Commission. 68 O.S. 2001, §207(c).

2. A “limited liability company” is defined as “an organization other than a corporation or partnership”, but is “treated the same and taxed as a * * * partnership * * * provided * * * [the] limited liability company [is] classified as a partnership for federal income tax purposes.” 68 O.S. 2001, §202(j). The Oklahoma Income Tax Act (“Act”)⁶ requires the partners of a partnership to report “[t]he Oklahoma distributive share of partnership income, gains, losses or deductions”. 68 O.S. 2001, §2363.

3. Oklahoma income tax is imposed on the “Oklahoma taxable income of every resident or non resident individual”, 68 O.S. 2001, §2355(B); the “Oklahoma taxable income of every corporation doing business within this state or deriving income from sources within this state”, 68 O.S. 2001, §2355(D); and the “Oklahoma taxable income of every trust and estate”, 68 O.S. 2001, §2355(F). An individual’s “Oklahoma taxable income” is “‘taxable income’ as reported (or as would have been reported by the taxpayer had a return been filed) to the federal government, and in the event of adjustments thereto by the federal government as finally ascertained under the Internal Revenue Code, adjusted further as hereinafter provided”. 68 O.S. 2001 §2353(12).

4. A credit against the tax imposed by §2355 of the Act is allowed for “[i]nvestment in qualified depreciable property placed in service * * * for use in a manufacturing operation, as defined in Section 1352 of this title, which has received a manufacturer exemption permit pursuant to the provisions of Section 1359.2 of this title”. 68 O.S. 2001, §2357.4(A)(1). The credit provided for in §2357.4(A)(1) shall not be allowed unless the investment is at least \$50,000.00 and is not the direct cause of a decrease in the number of full-time-equivalent employees. 68 O.S. 2001, § 2357.4(E). The qualified property subject to the credit is limited to “machinery, fixtures, equipment, buildings or substantial improvements thereto”. *Id.* The credit is equal to one percent (1%) of the cost of the qualified property in the year the property is placed in service, and in each of the four subsequent years. 68 O.S. 2001, §2357.4(G)(1) and (E).

5. “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 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).

6. 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

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

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.

7. The title of §2357.4 is “[b]usiness credit for investment or increase in full-time employees”. The phrase “which has received a manufacturer exemption permit” modifies the term “manufacturing operation”. A “manufacturing operation” is defined to mean “the designing, manufacturing, compounding, processing, assembling, warehousing, or preparing of articles for sale as tangible personal property”, but does not include “administration, sales, distribution, transportation, site construction, or site maintenance” nor “extractive activities and field processes”. 68 O.S. 2001, §1352(15).

While the Division is correct in its argument that a manufacturer exemption permit is issued to the manufacturer and not the manufacturing operation, the permit covers the manufacturer’s manufacturing operation. Otherwise, the manufacturer is not entitled to the exemption permit.

The language of §2357.4(A)(1) is clear and unambiguous. The language does not restrict the credit to manufacturers only. In fact such construction requires you to read more into the statute than is there.

The previous decisions of the Oklahoma Tax Commission cited by the Division are inapposite to this decision. These cases found that the credit is not available unless the investment is in property used in manufacturing.

8. Protestant’s protest to the denial of the claim to an investment/new jobs credit on its 2007 Oklahoma Partnership Income Tax Return should be sustained.

DISPOSITION

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

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.”