JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2011-04-21-02 / NON-PRECEDENTIAL**
ID: **P-10-972-K**
DATE: **APRIL 21, 2011**
DISPOSITION: **DENIED**
TAX TYPE: **INCOME**
APPEAL: **NO APPEAL TAKEN**

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

The Division audited Protestants' 2009 Oklahoma income tax return, disallowed the exclusion of $162,685.00 from Oklahoma taxable income which was reported as civil service retirement in lieu of social security; and by adjustment letter dated April 22, 2010, notified Protestants of the disallowance and the reduction of their income tax refund from the amount of $10,299.00, as filed to $1,352.00, as adjusted. Protestants timely protested the proposed adjustments. A hearing was not requested.

On September 2, 2010, the Division referred the protest to the Office of the Administrative Law Judges for further proceedings pursuant to the Uniform Tax Procedure Code[1] and the Rules of Practice and Procedure before the Office of the Administrative Law Judges[2]. The protest was docketed as Case No. P-10-972-K and assigned to ALJ, Administrative Law Judge.[3]

A pre-hearing conference was scheduled for October 18, 2010, by *Prehearing Conference Notice* issued October 7, 2010.[4] The conference was considered held upon receipt of a *Status Report in Lieu of Prehearing Conference* filed October 14, 2010, advising that the parties wished to submit this matter on briefs in accordance with *OAC*, 710:1-5-38. Pursuant to the parties request, a Scheduling *Order* was issued.

On December 17, 2010, a *Joint Stipulation of Facts and Issues* ("*Joint Stipulation*") was filed with Exhibits A through C attached thereto. Protestants failed to file a brief in chief. The *Brief of the Account Maintenance Division* was filed January 28, 2011. Protestants did not file a reply brief. On February 28, 2011, the record was closed and the protest was submitted for decision.[5]

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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] *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 and attached exhibits, the undersigned finds:

A. The parties stipulate to the following[6]:

STATEMENT OF FACTS

1. On or about April 21, 2010, Protestants filed their 2009 Oklahoma Resident Income Tax Return. On their return, Protestants claimed a deduction on Line 3 of Schedule 511-A for civil service in lieu of social security in the amount of $162,685.00 for pension benefits received by HUSBAND.

2. On April 22, 2010, an adjustment letter was issued to Protestants correcting the amount of pension income deducted on Schedule 511-A, Line 3. The Division's adjustments reduced Protestants' refund from $10,299.00 as filed to $1,352.00 as adjusted.

3. Protestants timely filed their protest letter on June 4, 2010, which was received by the OTC on June 7, 2010. However, when Protestants called to check the status of the protest on July 6, 2010, it was discovered that there was no notation on the system that the protest was ever received. Protestants then re-filed their protest letter via facsimile.

STATEMENT OF ISSUES

4. At issue in this matter is whether Protestants are eligible to take a deduction on Line 3 of Schedule 511-A in the amount equal to sixty percent (60%) of the pension income received by HUSBAND.

5. Protestants maintain that the adjustment to their 2009 return was incorrect because the pension income received by HUSBAND was derived from his civil service as an CITY Police officer, and was received in lieu of social security. Therefore, Protestants argue, the deduction on Line 3 of Schedule 511-A was proper and should be allowed.

6. The Division maintains that the denial of Protestants' deduction for 2009 was correct because the deduction on Line 3 of Schedule 511-A for civil service retirement benefits received in lieu of social security is available only to federal civil service retirees under 68 O.S. § 2358(E)(20). While HUSBAND does receive his pension as a result of his position as a civil servant, the pension income is not federal retirement income, and therefore does not qualify for the deduction.

[6] All references to exhibits are omitted.

B. Additional material facts:

1. Protestant, HUSBAND is a retired civil servant of the City of CITY, State of Oklahoma; whom in 2009 received a lump sum distribution of his retirement benefits from the CITY Police Deferred Option Plan in lieu of Social Security benefits.

2. The amount in controversy is $8,947.00.

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 Oklahoma Tax Commission. 68 O.S. 2001, § 207.

2. "Taxation is an exclusively legislative function that can be exercised only under statutory authority and in the manner specified by statute." ***State, ex rel. Oklahoma Tax Commission v. Texaco Exploration & Production, Inc.,*** 2005 OK 52, ¶ 7, 131 P.3d 705, 707. Accordingly, the Oklahoma Income Tax Act ("Act")[7] controls the matter in controversy.

3. An income tax is imposed upon the Oklahoma taxable income of every resident or nonresident individual. 68 O.S. 2001, § 2355(A). "Oklahoma taxable income" is defined to mean "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. The adjustments to the "taxable income" of an individual taxpayer to arrive at "Oklahoma adjusted gross income" and "Oklahoma taxable income" are mostly found in § 2358 of the Act. 68 O.S. 2001, § 2358(A) and (E). In general and to a specific extent, the retirement benefits received by former employees of the United States, the State of Oklahoma and local governing bodies within Oklahoma are exempt from Oklahoma taxable income by § 2358(E)(9)[8], which provides in particular to the 2009 tax year, and in pertinent part:

> Retirement benefits not to exceed * * * Ten Thousand Dollars ($10,000.00) for the 2006 tax year and all subsequent tax years, which are received by an

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[7] 68 O.S. 2001, § 2351 et seq.

[8] Amended by Laws 2006, c. 16, § 65, emerg. eff. March 29, 2006. As originally enacted (§ 2358(B)(10)), this paragraph provided:

> Retirement benefits not to exceed Four Thousand Dollars ($4,000.00), which are received by an individual from the civil service of the United States, shall be exempt from taxable income.

Added by Laws 1980, c. 351, § 1, eff. Jan. 1, 1981. The retirement benefits of former state employees were exempted from Oklahoma taxable income by the provisions of 74 O.S. 1981, § 923. See, footnote 4, ***Strelecki v. Oklahoma Tax Commission***, 1993 OK 122, 872 P.2d 910, corrected.

> individual from the civil service of the United States, the Oklahoma Public Employees Retirement System, * * * the Oklahoma Law Enforcement Retirement System, the Oklahoma Firefighters Pension and Retirement System, the Oklahoma Police Pension and Retirement System, the employee retirement systems created by counties * * * or the employee retirements systems created by municipalities * * * shall be exempt from taxable income.

5. Since the 2007 tax year, retirement benefits paid in lieu of Social Security benefits to federal civil service retirees; including survivor annuities, have been exempt from Oklahoma taxable income to the extent the benefits are included in federal adjusted gross income pursuant to I.R.C. § 86. 68 O.S. 2007, § 2358(E)(20)[9]; *OAC*, 710:50-15-49(h). See, 68 O.S. 2001, § 2358(E)(10).[10] In tax year 2009, sixty percent (60%) of such benefits were exempt. 68 O.S. Supp. 2007, § 2358(E)(20)(c).

6. "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).

7. Informal interpretations of a statute by an administrative agency are not entitled to deference, but are of assistance in ascertaining the purpose, policy, and meaning of a statute. ***Laws v. State ex rel. Oklahoma Dept. of Human Services***, 2003 OK CIV APP 97, 81 P.3d 78, certiorari denied. Where a statute is found unambiguous, deferral to an administrative agency interpretation is not required. ***City of Tulsa v. State ex rel. Public Employees Relations Board***, 1998 OK 92, 967 P.2d 1214. Administrative construction of a statute will not override plain and unambiguous statutory language. ***Keating v. Edmondson***, 2001 OK 110, 37 P.3d 882; ***Neer v. State ex rel. Oklahoma Tax Commission***, 1999 OK 41, 982 P.2d 1071, corrected.

8. The language of § 2358(E)(20) is plain and unambiguous. The exemption from Oklahoma taxable income of retirement benefits paid in lieu of Social Security benefits is specifically and explicitly limited to “federal civil service retirees”.

9. The stipulated facts show that Protestant, HUSBAND is not a “federal civil service retiree”, but rather a civil service retiree of the City of CITY. Accordingly, the retirement benefits received by Protestants in 2009 are not eligible for the exemption from Oklahoma taxable income allowed under the provisions of § 2358(E)(20)(c). Protestants properly excluded $10,000.00 of the retirement income from Oklahoma taxable income under the provisions of § 2358(E)(9), which exclusion the Division did not disturb.

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[9] Added by Laws 2006, 2nd Ex.Sess., c. 44, § 21, eff. Jan. 1, 2007.

[10] This paragraph provides that Social Security benefits received by an individual shall be exempt from Oklahoma taxable income to the extent the benefits are included in federal adjusted gross income pursuant to the provisions of I.R.C. § 86.

10. Protestants' protest to the proposed adjustments to their 2009 Oklahoma income tax return should be denied.

DISPOSITION

WHEREFORE, based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestants, HUSBAND and WIFE, 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."