JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2011-05-05-04 / NON-PRECEDENTIAL
ID: P-10-526-H / TOMBERLIN "TEST CASE" (E-MERGE E4)
DATE: MAY 5, 2011
DISPOSITION: DENIED
TAX TYPE: ELECTRIC CAR INCOME TAX CREDIT
APPEAL:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above matter comes on for entry of a final order of disposition by the Oklahoma Tax Commission. Having reviewed the files and records herein, including the Findings of Fact, Conclusions of Law and Recommendations made and entered by the Administrative Law Judge on the 3rd day of March, 2011, the Commission denies the request of the Account Maintenance Division for consideration en banc and makes the following Findings of Fact and Conclusions of Law and enters the following order.

PROCEDURAL HISTORY

On June 21, 2010, 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 July 7, 2010, DIVISION'S COUNSEL filed an Entry of Appearance as Counsel of record for the Division. On July 14, 2010, a Litigation Conference was held on the "Electric Car Cases," in which PROTESTANTS' ATTORNEY'S firm represented the Protestants. Present at the conference were PROTESTANTS' ATTORNEY ONE, DIVISION'S COUNSEL, ADMINISTRATIVE LAW JUDGE ONE, and ADMINISTRATIVE LAW JUDGE TWO. In order to effectively manage the case load of "Electric Car Cases," the following litigation strategy was agreed upon by Counsel and the Office of Administrative Law Judges,[3] in pertinent parts as follows, to-wit:

> The undersigned would for purposes of hearing only, consolidate cases where Tomberlin Outdoor ("Tomberlin") was the Manufacturer/Distributor, which appears to be representative of all Tomberlin Models currently under protest. Separate *Findings, Conclusions and Recommendations* would be issued for each Tomberlin Model. Letters would be mailed to the Protestant(s) (if pro se) or their representative on all of the remaining cases on the docket for Tomberlin explaining the litigation strategy and advising that the remaining cases would be stayed pending the outcome of the "Test Cases." Once a

[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] *See* ALJ's Exhibit 1.

> Commission Order was issued in each of the "Test Cases," a redacted copy would be mailed advising the Protestant(s) (if pro se) or their representative of the outcome on their Tomberlin Model. If the Protestant(s) prevail in the "Test Cases," then theoretically that should determine the outcome of the remaining cases for Tomberlin. If the Protestant(s) do not prevail, then chances are that PROTESTANTS' ATTORNEY ONE will appeal the Commission Order directly to the Oklahoma Supreme Court. If that is the case the Protestant(s) will have the option of having their case stayed pending the appeal or go forward with a hearing to get a Commission Order on their individual case for purposes of filing their own appeal.

On August 3, 2010, a letter was mailed to Counsel stating this matter had been assigned to ADMINISTRATIVE LAW JUDGE, and docketed as Case Number P-10-526-H. The letter also advised Counsel that 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.*[4] On August 3, 2010, a letter was mailed to Counsel listing the randomly selected Tomberlin "Test Cases," which would be consolidated for hearing purposes only. Counsel was directed to propose a procedural schedule on or before August 16, 2010. On August 11, 2010, Counsel submitted a proposed procedural schedule. On August 18, 2010, the Scheduling Order and Notice of Hearing was issued setting the hearing for September 29, 2010, at 9:00 a.m. on the following Tomberlin "Test Cases":

P-10-126-H, E-MERGE E2 LE
P-10-135-H, E-MERGE E4 LE
P-10-213-H, E-MERGE E2 48SS
P-10-257-H, E-MERGE E2
P-10-294-H, E-MERGE E4, AC DRIVE
P-10-305-H, E-MERGE E2 48SS[5]
P-10-325-H, E-MERGE CLASSIC
P-10-526-H, E-MERGE E4
P-10-784-H, E-MERGE E2 SHELBY[6]

On August 23, 2010, the Protestants filed their Preliminary Witness and Exhibit List with the Court Clerk.[7]

On September 13, 2010, the Respondent's (Division's) Exclusionary Motion was filed with the Court Clerk. On September 13, 2010, PROTESTANTS' ATTORNEY TWO filed an Entry of Appearance as Co-Counsel of record for the Protestants. On September 20, 2010, the

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

[5] Based upon initial information it appeared that this case concerned an E-Merge E4 48SS. In fact, the case is for the purchase of two (2) E-Merge E2 48SS models.

[6] On September 16, 2010, a letter was mailed to Counsel adding this protest to the "Test Cases."

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

Division's Position Statement was filed with Exhibits A through F attached thereto. On September 21, 2010, PROTESTANTS' ATTORNEY ONE filed a letter advising that the Protestants declined the filing of any further brief, but stood on their protest as briefed and filed. On September 23, 2010, the Final Witness and Exhibit Lists of Respondent, Account Maintenance Division, was filed with the Court Clerk. On September 24, 2010, the Protestants filed a Motion to File Out of Time the response to the Division's Motion to Exclude. On September 24, 2010, for good cause shown and there being no objection by the Division, an Order Granting Protestants' Motion to File Out of Time was issued giving the Protestants until Monday, September 27, 2010, to file their response. On September 27, 2010, the Protestants' Response to the Division's Exclusionary Motion was filed electronically[8] with the Court Clerk. On September 28, 2010, an Order Denying Division's Exclusionary Motion was issued in pertinent parts as follows, to-wit:

> 1. The Transcript of the District Court proceedings in Garfield County Case No. CJ-2009-386 is admissible pursuant to the provisions of Section 2804 of Title 12.[9]
> 2. The Administrative Law Judge's judicial notice of the Internal Revenue Service official website shall be limited to any relevant portions of the website, and specifically to IRS Notice 2009-54, which is referenced in Protestants' Exhibit 10 in each of the captioned cases.
> 3. The objection to the Protestants' calling LAW FIRM'S ATTORNEY as a witness is denied.

On September 29, 2010, at approximately 9:00 a.m., an open hearing[10] was held as scheduled. The Administrative Law Judge announced that by agreement of the parties the proceedings had been bifurcated, with the hearing on the Protestants' cases being limited to the taking of evidence with respect to the technical aspects of the Tomberlin E-Merge Line, and future proceedings, if necessary, to taking testimony of the individual taxpayers. Counsel invoked the Sequestration Rule,[11] with witnesses being duly instructed by the Administrative Law Judge.

Counsel waived opening statements and the Protestants proceeded with calling their first witness, DIRECTOR OF THE TAX POLICY DIVISION, Oklahoma Tax Commission. The Division's objections were noted for the record. DIRECTOR OF THE TAX POLICY DIVISION testified as to how the Tax Policy Division determined that the Tomberlin E-Merge Line did not constitute "qualified electric motor vehicle property" for purposes of the income tax credit ("Credit") available pursuant to 68 O.S. § 2357.22(D) ("Statute"). DIRECTOR OF THE

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[8] On September 30, 2010, the Court Clerk received a hard copy by mail.

[9] OKLA. STAT. ANN. tit. 12, § 2804 (West 2009).

[10] The Protestants in the Tomberlin "Test Cases," through PROTESTANTS' ATTORNEY ONE, waived their right to confidentiality for the hearings only. OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2010).

[11] OKLA. STAT. ANN. tit. 12, § 2615 (West 2009).

TAX POLICY DIVISION further testified as to the research performed by the Tax Policy Division and the issuance of Letter Rulings concluding that the Tomberlin E-Merge Line did not constitute "qualified electric motor vehicle property" qualifying for the Credit. The Protestants called their second witness, LAW FIRM'S ATTORNEY,[12] with objections by the Division being noted for the record. LAW FIRM'S ATTORNEY testified about a meeting with DIRECTOR OF THE TAX POLICY DIVISION held on October 13, 2009. The Protestants third witness, MANUFACTURER,[13] testified about his company, the manufacturing and technical details of the Tomberlin E-Merge Line, the distinctions between "Golf Car(s)" and "Golf Cart(s)" and other matters relevant to the issues herein. The Protestants' Exhibits 1 through 16 were identified, offered, and admitted into evidence, with any objections by Division's Counsel noted for the record. The second part of Protestants' Exhibit 4 was stricken from the record.

The Division called one (1) witness, DIRECTOR OF THE TAX POLICY DIVISION,[14] Oklahoma Tax Commission, who testified in detail concerning the Tax Policy Division's determination that the Tomberlin E-Merge Line did not qualify for the Credit. The Division's Tomberlin Exhibits 1 through 34[15] were identified, offered, and admitted into evidence, with any objections by Protestants' Counsel noted for the record. A copy of the letter dated August 16, 2010, outlining the Litigation Conference held on July 14, 2010, at 1:30 p.m., was identified and admitted as ALJ's Exhibit 1. Counsel waived closing arguments. At the conclusion of the hearing, the record was held open for receipt of the transcript of the hearing, at which time Counsel would be notified that they would have thirty (30) days to submit proposed findings of fact and conclusions of law.

On October 19, 2010, a letter was mailed to Counsel acknowledging that the transcript was filed with the Court Clerk on October 18, 2010. Counsel was advised that proposed findings of fact and conclusions of law could be submitted on or before November 18, 2010, at which time the record in this matter would be closed and this case submitted for decision.

On November 16, 2010, the parties filed the Certification of the Issue of the Admissibility of Transcript of Proceedings Before the District Court of Garfield County ("Certification").[16] On November 17, 2010, a letter was received by facsimile from Counsel for Protestants' Law Firm requesting an extension from November 18, 2010, to November 26, 2010, to file proposed findings. On November 19, 2010, a letter was mailed to Counsel granting the

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[12] Tr. at 74. LAW FIRM'S ATTORNEY is employed as an attorney for LAW FIRM.

[13] Tr. at 83. Mr. MANUFACTURER is the owner of Tomberlin Automotive Group based in CITY, Georgia, which manufactures the E-Merge Line.

[14] Tr. at 12-13. DIRECTOR OF THE TAX POLICY DIVISION acts as the legislative liaison for the Tax Commission. The staff works on legislative language, fiscal impacts to support legislative staff in preparing the fiscal impact for proposed legislation and issues letter rulings. Tax Policy also has a group of economists who provide fiscal forecasts used by the state board (State Board of Equalization) for legislation.

[15] Division's Tomberlin Exhibit 5, TM000757-758 was not admitted.

[16] OKLA. ADMIN. CODE § 710:1-5-34(b) (June 25, 1999). On November 19, 2010, the original Certification was filed with the Secretary-Member of the Tax Commission.

extension requested to file proposed findings. On November 22, 2010, the Division filed with the Court Clerk copies of the pleadings provided to the Commissioners on the Certification. On November 29, 2010,[17] both parties filed Proposed Findings of Fact and Conclusions of Law.

On December 9, 2010, a copy of OTC Order No. 2010-12-09-04 (December 9, 2010) was filed with the Court Clerk, which states in pertinent part "…the Commission finds that the transcript of proceedings taking place on October 21, 2009 before the District court of Garfield County, Oklahoma in the case of *Ada Electric Cars, et al. vs. Oklahoma Tax Commission*, Case No. CJ-2009-386, is admissible in the above captioned Protest proceedings."[18] On December 10, 2010, a letter was mailed to Counsel acknowledging the filing of the parties' Proposed Findings of Fact and Tax Commission Order No. 2010-12-09-04 (December 9, 2010) and advising Counsel that the records in these matters were closed and the Tomberlin "Test Cases" were submitted for decision on December 10, 2010. The Certification was placed upon the December 16, 2010, Commission Agenda to correct the notice on the December 9, 2010, Commission Agenda. On December 16, 2010, a copy of OTC Order No. 2010-12-16-02 (December 16, 2010) was filed which states in pertinent part "…the Commission finds that the transcript of proceedings taking place on October 21, 2009 before the District court of Garfield County, Oklahoma in the case *Ada Electric Cars, et al. vs. Oklahoma Tax Commission*, Case No. CJ-2009-386, is admissible in the above captioned Protest proceedings."[19] On December 21, 2010, a letter was mailed to Counsel acknowledging receipt of OTC Order 2010-12-16-02 (December 16, 2010) and advising Counsel that the records previously closed on December 10, 2010, were reopened to receive the orders; and due to the intervening holidays for Christmas and New Year's Day, the records would be closed and the Tomberlin "Test Cases" resubmitted for decision on Monday, January 3, 2011.

STIPULATION OF FACTS

During the hearing on September 29, 2010, at 9:00 a.m., the Tax Policy Division stipulated to the following:

1. The Tomberlin E-Merge Line of "vehicles" are Low Speed Electric Vehicles ("LSVs"), which meet Federal guidelines and the State of Oklahoma's guidelines for LSVs.[20]

FINDINGS OF FACT

Upon review of the files and records of the Tomberlin "Test Cases," including the record of the proceedings, the exhibits received into evidence, the Protest Letters from the Tomberlin

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[17] The Office of Administrative Law Judges was closed November 25th and 26th for the Thanksgiving holiday. The next official business day was Monday, November 29, 2010. OKLA. ADMIN. CODE § 710:1-5-44(1) (June 25, 1999).

[18] A copy of the Certification is attached thereto.

[19] *Id.*

[20] Tr. at 38-41.

"Test Cases," the Division's Position Letter, the transcript of the hearing held on September 29, 2010, at 9:00 a.m., and the parties' Proposed Findings of Fact and Conclusions of Law, the undersigned finds:

2. On June 30, 2009, the Oklahoma Motor Vehicle Commission issued Certificate of License #XXXX to ELECTRIC CAR COMPANY as an authorized Dealer for E-Merge LSV in the State of Oklahoma. Certificate of License #XXXX has an expiration date of June 30, 2009.[21]

3. On July 16, 2009, the Oklahoma Motor Vehicle Commission issued Certificate of License #308 to Tomberlin Outdoor ("Tomberlin") as an authorized Distributor[22] in the State of Oklahoma. Certificate of License #308 has an expiration date of June 30, 2010.[23]

4. On August 14, 2009, and November 20, 2009,[24] Tomberlin Automotive Group received certification letters from the Department of the Treasury, Internal Revenue Service, INDUSTRY DIRECTOR, Industry Director, Heavy Manufacturing and Transportation, which state in pertinent parts as follows, to-wit:

> We reviewed your submission received on June 22, 2009 and August 7, 2009, prepared by Tomberlin Automotive Group which was submitted under Notice 2009-54 and Internal Revenue Code Section 30D relative to the 2008, 2009 and 2010 Tomberlin E-Merge and Anvil Low Speed Vehicles. The certification asserts that the vehicle meets the requirements of the Qualified Plug-in Electric Vehicle Credit as Qualified Plug-in Electric Vehicle. This acknowledgement is valid only through December 31, 2009 at which time the vehicles will need to be re-submitted under the revised provisions of IRC 30D and any subsequent Notice covering that period.
>
> We have determined that the purchaser(s) of this Qualified Plug-in Electric Vehicle may rely on the certification concerning the vehicle's qualification for the Qualified Plug-in Electric Vehicle Credit. The tax credit is available to qualifying purchaser(s) is (see below):

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[21] *See* Note 25, *infra*. *See also* OKLA. STAT. ANN. tit. 47, § 561 *et seq.* (West 2000).

[22] OKLA. STAT. ANN. tit. 47, § 562(6) (West Supp. 2010):

> "Distributor" means any person, firm, association, corporation or trust, resident or nonresident, who, being authorized by the original manufacturer, in whole or in part sells or distributes new and unused motor vehicles to motor vehicle dealers, or who maintains distributor representatives;

[23] Protestants' Exhibit 9. *See* OKLA. STAT. ANN. tit. 47, § 561 *et seq.* (West 2000).

[24] Protestants' Exhibit 10. The second certification letter was based on a submission received on September 30, 2009, for the 2010 Tomberlin E-Merge Classic LSV.

Model Years	Low Speed Vehicles
2008/2009/2010	Tomberlin E-Merge E4 SS Low Speed Vehicle
2008/2009/2010	Tomberlin E-Merge E4 Low Speed Vehicle
2008/2009/2010	Tomberlin E-Merge E2 SS Low Speed Vehicle
2008/2009/2010	Tomberlin E-Merge E2 Low Speed Vehicle
2009/2010	Tomberlin E-Merge E2 AC Drive Low Speed Vehicle
2009/2010	Tomberlin E-Merge E2 Shelby Low Speed Vehicle
2009/2010	Tomberlin E-Merge E2 LE Low Speed Vehicle
2009/2010	Tomberlin E-Merge E4 AC Drive Low Speed Vehicle
2009/2010	Tomberlin E-Merge E4 Shelby Low Speed Vehicle
2009/2010	Tomberlin E-Merge E4 Low Speed Vehicle
2010	Tomberlin Anvil AVL
2010	Tomberlin E-Merge Classic Low Speed Vehicle

5. The Tomberlin E-Merge E4 specifications[25] are as follows, to-wit:

- Length: 126.7″
- Width: 47.2″
- Height: 73.4″
- Weight w/batteries: 1584 lbs
- Voltage: 48 volts, Eight 6-Volt lead/acid Batteries
- Kilowatt Hour Capacity: 11.14
- Maximum Power: 19.5 Kilowatts
- Maximum Range: 30+ Miles
- Maximum Speed: 25 mph
- 4-Wheel Brakes with Regenerative Motor Braking
- Redundant Mechanical Park Brake
- 3-point seat belts for two persons
- Scratch Resistant, High Impact Windshield
- Tip-Load & trade; Removable Rear Storage Cover
- Headlights, Taillights, Turn Signals, High Mount Stop Lamp
- Stalk Mounted Horn Control
- Driver/Pass. Side and Inside Rear View Mirrors
- Downhill regenerative Braking with roll-away protection
- 10" Aluminum Wheels
- Windshield Wiper (Standard)
- Speedometer/Odometer/Trip Odometer

[25] Division's Tomberlin Exhibit 1, TM000492-510. The Administrative Law Judge is also taking judicial notice of the Tomberlin website at http://www.tomberlin.net to complete the factual details and background of the Tomberlin "Test Cases." OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999). *See* ALJ's Exhibit 1.

- Heavy Duty High Speed Axle and Ventilated Motor
- On-Board Electronic Charger-compatible with most household outlets

6. Each LSV has a Certificate of Origin[26] For a Vehicle from Tomberlin, which contains the following information:

Date (of Transfer)	Invoice Number	Make (Tomberlin)
Vehicle Identification Number	Year (Model Year)	
Body Type (Low Speed Vehicle)	Shipping Weight	
H.P. (S.A.E.) G.V.W.R.	Series or Model (E-Merge E4)	

This Vehicle Conforms To Federal Regulations
Under Title 49 CFR Part 571.500-Low Speed Vehicle

I, the undersigned authorized representative of the company, firm or corporation named below, hereby certify that the new vehicle described above is the property of the said company, firm, or corporation and is transferred on the above date and under the Invoice Number indicated to the following distributor or dealer.

Dealer Name
Dealer Address
Dealer City, ST, Zip

It is further certified that this was the first transfer of such new vehicle in ordinary trade and commerce.

PowerGroup International, LLC

BY: _____MANUFACTURER_____
(Signature of Authorized Representative) (Agent)

_____ CITY, Georgia_____
CITY - STATE

[26] Division's Tomberlin Exhibit 1, TM000495.

7. On April 28, 2009, MRS. PROTESTANT [sic] purchased a 2008 Powergroup International, LLC d/b/a Tomberlin Outdoor (also "Tomberlin") E-Merge E4 from ELECTRIC CAR COMPANY for a total purchase price of $8,900.00.[27]

8. On May 27, 2009, the Tax Commission, through Agent #1431, issued a Certificate of Title to MRS. PROTESTANT on the 2008 Tomberlin E-Merge E4, VIN #XXXXXXXXXXXXXXXXX and Tag #XXXXXX.[28]

9. Mr. PROTESTANT insured the Tomberlin E-Merge E4 with INSURANCE COMPANY, Policy #(illegible) with a policy period from September 28, 2010, through May 11, 2011.[29]

10. On or about February 17, 2010, the Protestants filed their Oklahoma Resident Income Tax Return (Form 511) for the 2009 Tax Year. On Line Seventeen (17) (Other Credits) the Protestants claimed the Credit for Investment in Qualified Electric Motor Vehicle Property ("Credit") (Form 567-B) in the amount of $4,450.00.[30]

11. On April 21, 2010, the Division sent the Protestants a letter disallowing the Credit,[31] as follows, to-wit:

Form 511	Reported	Adjusted
Line 17 Other Credits (511 CR)	4,450.00	0.00
Line 18 Balance	980.00	5,430.00
Line 30 Overpayment of Income Tax	3,954.00	0.00
Line 34 Refund	3,954.00	0.00
Line 35 Income Tax Due	0.00	496.00
Line 38 Total Balance Due	0.00	496.00
Balance Due After Adjustments		496.00

The 511CR Electric Car Credit has been disallowed. The Vehicle(s) does not meet the definition of Qualified Electric Motor Vehicle Property as set forth in 68 O.S. Section 2357.22.

[27] Protestants' Exhibit 13-H.

[28] Protestants' Exhibits 2-H and 14-H.

[29] Protestants' Exhibit 3-H.

[30] *See* Notes 25 and 28, *supra.*

[31] Protestants' Exhibit 1-H.

12. The Division disallowed the Credit for the Tomberlin E-Merge Line[32] of LSVs based upon a determination by the Tax Policy Division ("Tax Policy"), that the Tomberlin E-Merge Line of LSVs is *known as "Golf Carts."*[33] In making its determination, Tax Policy looked at the language of the Statute, and specifically to the last sentence of the Statute which states, "The term 'qualified electric motor vehicle property' *shall not apply to vehicles known as 'golf carts',* 'go-carts' and other motor vehicles which are manufactured principally for use off the streets and highways."[34] (Emphasis added.) Tax Policy determined that there is not an Oklahoma statutory definition of "Golf Cart(s),"[35] nor are "Golf Cart(s)" defined by Tax Commission Rule. Tax Policy reviewed statutory definitions of "Golf Cart(s)" from other states, but could not find anything useful, so Tax Policy relied on the plain language of the Statute.[36]

13. Tax Policy based its determination of whether the Tomberlin E-Merge Line of LSVs are known as "Golf Carts" on a review of internet research, including advertising, marketing, the appearance of the vehicles, enclosures, available options, and the Tomberlin controller (Two-Way Switch (Golf or Street)).[37] "What we ended up doing was looking at people in the industry, dealers, manufacturers, people who golf and sell golf carts."[38] Tax Policy also looked at the phrase "principally for use off the streets and highways."[39]

14. Tax Policy did not differentiate between the terms "golf cart(s)" and "golf car(s)" in determining whether the Tomberlin E-Merge Line of LSVs are "*known as golf carts*."[40]

15. Tax Policy has issued Letter Rulings approving the Credit provided by the Statute for approximately Eighty-Four (84) Models of LSVs and disallowing the Credit for approximately Sixty-Six (66) models of LSVs from approximately Thirty (30) manufacturers.[41]

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[32] On October 7, 2009, Tax Policy issued LR-09-138 and LR-09-139 disallowing the Credit for the E-Merge E2 and E4. On April 9, 2010, Tax Policy issued LR-10-027A disallowing the Credit for the E-Merge Classic. *See* Note 25, *supra.*

[33] Tr. at 24.

[34] Tr. at 18 and 24.

[35] Tr. at 18.

[36] Tr. at 19.

[37] Tr. at 25, 27, 30, 76, 80, and 90-92. *See* Note 25, *supra.*

[38] Tr. at 22-23 and 155. See also Division's Tomberlin Exhibits 1 through 36.

[39] Tr. at 20-21.

[40] Tr. at 180.

[41] *See* Note 25, *supra. See also* the Tax Commission website at http://oktax.state.ok.us.

16. MANUFACTURER is the owner of Tomberlin and is the manufacturer of the Tomberlin E-Merge Line of LSVs.[42] Tomberlin acknowledges that the E-Merge Line of LSVs has different models, but is comprised of basically the same vehicle.[43]

17. MANUFACTURER testified that Tomberlin does not manufacture golf carts. To enter the segment of the industry that manufactures golf carts, Tomberlin would have to change its platform significantly, and Tomberlin elected in 2005 that it was not going to enter a purpose-engineered platform for golf.[44] However, MANUFACTURER testified that the E-Merge Line of LSV's are an LSV that can be sold for utilization if so desired on a private golf course. He also admitted, when asked by Division's Counsel, that Tomberlin products can be sold as golf carts.[45] Further, MANUFACTURER testified he doesn't know of any LSV dealer that doesn't advertise it as a street legal golf car. MANUFACTURER testified that most platforms are known by their appearance, and the reason they are advertised as golf cars is because that is what these LSV's are known as, and because of public awareness people are going to call it a golf car. He testified that he is ok with his product line being called a golf car. He testified that you can take an LSV and make it a golf car. He testified that he agreed his vehicles could be considered golf carts if you were referring to body style, but under NHTSA guidelines, the legal definition of a LSV has nothing to do with body style.[46]

18. Tomberlin spent tens of thousands of dollars (estimate) designing a brake system that differs greatly from the brake system on a "golf cart."[47]

19. Government standards for manufacturing LSVs are highly specific[48] and include headlamps, front and rear turn signal lamps, tail lamps, stop lamps, reflex reflectors, an exterior mirror, a parking brake, a windshield (49 CFR 571.205), VIN, and a seat belt assembly (49 CFR 571.209). The Tomberlin E-Merge Line of LSVs also utilizes four (4) wheel hydraulic braking plus a redundant parking brake, and double A-arm w/rack & pinion steering.[49]

20. For Tomberlin to manufacture street legal LSVs, it had to comply with VIN securement, worldwide identifier, ANSI (American Nations Standards Institute) standards, SAU (Society of Automotive Engineers) standards, NHTSA (National Highway Traffic Safety

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[42] Tr. at 83.

[43] Tr. at 112-113.

[44] Tr. at 84.

[45] Tr. at 126-127.

[46] Tr. at 123, 97, 115, 140, 141, 99 and 118.

[47] Tr. at 87-88.

[48] Tr. at 91-92.

[49] Tr. at 85-87. *See* Note 25, *supra.*

Administration) 500 standards, and department of motor vehicle license processes for various states.[50]

21. Tomberlin actively markets the E-Merge Line of LSVs for "Dual Use" ("Street" or "Golf") providing as standard equipment a "Two-Way Switch" for that purpose which was adopted across the entire line. The "Two-Way Switch" is part of the "Key Switch," which is located on the right side of the dash panel and has three (3) positions "OFF/SPEED 1/SPEED 2."[51]

22. The Dealer Information Form, Division's Exhibit 32, provides that ELECTRIC CAR COMPANY will have available in their showroom, new golf cars, used golf cars, LSV's and parts and accessories.[52]

23. MANUFACTURER testified[53] as follows, to-wit:

> Q. Okay. Let me boil this down to one thing. There are advertisements in here that refer to golf carts?
>
> A. M-hm.
>
> Q. In your opinion as the manufacturer, what is that referring to?
>
> …
>
> A. With regard to these ads, ads are very random, consumer focused. It does not alter in any respect. I've never had this type of needed response to what the regulations and the standards and qualifications are. No ad can change what a platform is. And quite frankly, no use.
>
> We're purpose engineered for on road, whether you use it on a golf or you put flotation on it and use it as a boat. That doesn't change why it was purpose engineered and the specifications to meet.
>
> Q. And your dealers and your agreements, what is it you are trying to portray to the public that you are selling? A golf cart or something else?
>
> A. Well, it's a low speed vehicle commonly referred to in the industry as a street legal golf cart.

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[50] Tr. at 85-86. *See* Division's Tomberlin Exhibit 1, TM000543-544 for a comparison of the Tomberlin E-Merge Line of LSVs versus "Golf Carts."

[51] Tr. at 106-107 and 111-114. Division's Tomberlin Exhibits 11, 12, 15, 16, 17, 22, and 23.

[52] Tr. at 130.

[53] Tr. at 145-146.

24. "Golf Carts" are not street legal in the State of Oklahoma and shall not be titled and tagged for street or highway use in the State of Oklahoma.[54]

25. Vehicles known as "Golf Carts" can be equipped to be "street legal."[55]

ISSUE

Whether the Tomberlin E-Merge Line of LSVs meets the definition of "qualified electric motor vehicle property" and qualifies for the Credit provided by the Statute.

PROTESTANTS' POSITION

The Protestants' position "…is whether [Protestants'] LSV was manufactured for use on streets and highways."[56] The Protestants state, "In determining this issue, [Protestants'] use of the LSV is irrelevant, although in this case, [Protestants use] the LSV on public streets and highways as evidenced by [Protestants] having the LSV tagged and insured. Whether the LSV is qualified electric motor vehicle property depends upon how the LSV was 'principally manufactured.' If the LSV is propelled by electricity and is not a golf cart, go-cart or vehicle principally manufactured for use off streets and highways, the LSV is qualified electric motor vehicle property. An LSV manufactured for incidental off street or highway use still qualifies for the tax credit. Only LSVs 'principally manufactured' for use off streets or highways are not qualified electric motor vehicle property." In support of their position the Protestants cite to the provisions of the Oklahoma Highway Safety Code[57] and Oklahoma Vehicle and Registration Act[58] definitions of a LSV, both of which refer to the Federal Motor Vehicle Safety Standard[59] for an LSV.[60]

DIVISION'S POSITION

The Division responds that "The legislature, while amending the statute in other regards, declined to modify the statute's objective definition of 'qualified electric motor vehicle property'. When introducing the concept of 'low-speed electric vehicle', the legislature could have easily amended the definition of 'qualified electric motor vehicle property' to include vehicles matching this new nomenclature. The legislature didn't, leaving the 1996 definition as

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[54] Protestants' Exhibits 15 and 16. Tr. at 63-64.

[55] Tr. at 70 and 196.

[56] Protest at 2-3.

[57] *See* 47 O.S. 2001 § 1-101 et seq.

[58] *See* 47 O.S. 2001 § 1101 et seq.

[59] *See* 49 C.F.R. § 571.500.

[60] Protest at 2.

adopted."[61] "Regardless of whether a vehicle is a 'low-speed electric vehicle' for purposes of Titles 47 and 48, or entitled to federal credit as the 'plug-in' vehicle, or otherwise, it only qualified for the credit if it is:

> (1) ***not known*** as a 'golf cart or "go-cart' or
>
> (2) ***not known*** as a motor vehicle manufactured principally for use off the streets and highways." (Emphasis original.)

"Taken at its plain meaning, this definition would include any motor vehicle originally equipped to be propelled only by electricity. But, the legislature followed that very general definition with a specific exclusion of vehicles 'known as' golf carts, go carts and other motor vehicles which are manufactured principally for use off the streets and highways. The plain language of the statute demonstrates legislative intent to exclude certain vehicles, even if they meet the general definition of 'qualified electric motor vehicle property."[62]

CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter 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 and 221.

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")[63] 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 provision of the Act at issue is the credit for investment in qualified electric motor vehicle property found at § 2357.22[64] which provides in pertinent part:

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[61] Division's Position Statement at 2. *See* Division's Proposed *Findings* at 4.

[62] *Id.*

[63] 68 O.S. 2001, § 2351 et seq.

[64] Laws 2008, c. 126, § 1, eff. Jan. 1, 2009. The income tax credit for investments in qualified electric motor vehicle property was originally enacted by an amendment to Section 2357.22. Laws 1996, c. 224, § 1. The 1996 amendment also added the definition and exclusionary definition of qualified electric motor vehicle property at subsection C. As originally enacted subsection C provided:

A. For tax years beginning before January 1, 2010, there shall be allowed a one-time credit against the income tax imposed by Section 2355 of this title * * * for investments in qualified electric motor vehicle property placed in service after December 31, 1995.

C. As used in this section, 'qualified electric motor vehicle property' means a motor vehicle originally equipped to be propelled only by electricity to the extent of the full purchase price of the vehicle; provided, if a motor vehicle is also equipped with an internal combustion engine, then such vehicle shall be considered 'qualified electric motor vehicle property' only to the extent of the portion of the basis of such motor vehicle which is attributable to the propulsion of the vehicle by electricity. The term 'qualified electric motor vehicle property' shall not apply to vehicles known as 'golf carts,' 'go-carts' and other motor vehicles which are manufactured principally for use off the streets and highways.

D. The credit provided for in subsection A of this section shall be fifty percent (50%) of the cost of the * * * qualified electric motor vehicle property.

* * * * *

F. If the tax credit allowed pursuant to subsection A of this section exceeds the amount of income taxes due or if there are no state income taxes due on the income of the taxpayer, the amount of the credit not used as an offset against the income taxes of a taxable year may be carried forward as a credit against subsequent income tax liability for a period not to exceed three (3) years.

5. The NHTSA Standard No. 500[65] specifies requirements for LSVs, as follows, to-wit:

S2. Purpose. The purpose of this standard is to ensure that low-speed vehicles operated on the public streets, roads, and highways are equipped with the minimum motor vehicle equipment appropriate for motor vehicle safety.

S3. Applicability. This standard applies to low-speed vehicles.

S4. [Reserved]

S5. Requirements.

As used in this section, 'qualified electric motor vehicle property' means a motor vehicle originally equipped to be propelled only by electricity but only to the extent of the portion of the basis of such motor vehicle which is attributable to the propulsion of the vehicle by electricity. The term 'qualified electric motor vehicle property' shall not apply to vehicles known as 'golf carts,' 'go-carts' and other motor vehicles which are manufactured principally for use off the streets and highways.

[65] 49 C.F.R. § 571.

(a) When tested in accordance with test conditions in S6 and test procedures in S7, the maximum speed attainable in 1.6 km (1 mile) by each low-speed vehicle shall not more than 40 kilometers per hour (25 miles per hour).

(b) Each low-speed vehicle shall be equipped with:

(1) headlamps,

(2) front and rear turn signal lamps,

(3) taillamps,

(4) stop lamps,

(5) reflex reflectors: one red on each side as far to the rear as practicable, and one red on the rear,

(6) an exterior mirror mounted on the driver's side of the vehicle and either an exterior mirror mounted on the passenger's side of the vehicle or an interior mirror,

(7) a parking brake,

(8) a windshield that conforms to the Federal motor vehicle safety standard on glazing materials (49 CFR 571.205),

(9) a VIN that conforms to the requirements of part 565 Vehicle Identification Number of this chapter, and

(10) a Type 1 or Type 2 seat belt assembly conforming to Sec. 571.209 of this part, Federal Motor Vehicle Safety Standard No. 209, Seat belt assemblies, installed at each designated seating position.

S6. General test conditions. Each vehicle must meet the performance limit specified in S5(a) under the following test conditions.

S6.1 Ambient conditions.

S6.1.1 Ambient temperature. The ambient temperature is any temperature between 0 [degrees] C (32 [degrees] F) and 40 [degrees] C (104 [degrees] F).

S6.1.2 Wind speed. The wind speed is not greater than 5 m/s (11.2 mph).

S6.2 Road test surface.

S6.2.1 Pavement friction. Unless otherwise specified, the road test surface produces a peak friction coefficient (PFC) of 0.9 when measured using a standard reference test tire that meets the specifications of American Society for Testing and Materials (ASTM) E1136, "Standard Specification for A Radial Standard Reference Test Tire," in accordance with ASTM Method E 1337-90, "Standard Test Method for Determining Longitudinal Peak Braking Coefficient of Paved Surfaces Using a Standard Reference Test Tire," at a speed of 64.4 km/h (40.0 mph), without water delivery (incorporated by reference; see 49 CFR 571.5).

S6.2.2 Gradient. The test surface has not more than a 1 percent gradient in the direction of testing and not more than a 2 percent gradient perpendicular to the direction of testing.

S6.2.3 Lane width. The lane width is not less than 3.5 m (11.5 ft).

S6.3 Vehicle conditions.

> S6.3.1 The test weight for maximum speed is unloaded vehicle weight plus a mass of 78 kg (170 pounds), including driver and instrumentation.
>
> S6.3.2 No adjustment, repair or replacement of any component is allowed after the start of the first performance test.
>
> S6.3.3 Tire inflation pressure. Cold inflation pressure is not more than the maximum permissible pressure molded on the tire sidewall.
>
> S6.3.4 Break-in. The vehicle completes the manufacturer's recommended break-in agenda as a minimum condition prior to beginning the performance tests.
>
> S6.3.5 Vehicle openings. All vehicle openings (doors, windows, hood, trunk, convertible top, cargo doors, etc.) are closed except as required for instrumentation purposes.
>
> S6.3.6 Battery powered vehicles. Prior to beginning the performance tests, propulsion batteries are at the state of charge recommended by the manufacturer or, if the manufacturer has made no recommendation, at a state of charge of not less than 95 percent. No further charging of any propulsion battery is permissible.
>
> S7. Test procedure. Each vehicle must meet the performance limit specified in S5(a) under the following test procedure. The maximum speed performance is determined by measuring the maximum attainable vehicle speed at any point in a distance of 1.6 km (1.0 mile) from a standing start and repeated in the opposite direction within 30 minutes.

6. "Any term used in [the Act] shall have the same meaning as when used in a comparable context in the Internal Revenue Code, unless a different meaning is clearly required." 68 O.S. 2001 § 2353(3). The Internal Revenue Code uses the "term" "manufactured primarily for use on public streets, roads, and highways" as one of the requirements to qualify for the federal "qualified plug-in electric vehicle credit." Principally is a synonym of primarily. The term "manufactured primarily for use on public streets, roads, and highways" is practically identical; inversely, to the term "manufactured principally for use off the streets and highways" used in the exclusionary language in Section 2357.22 of title 68 of the Oklahoma Statutes.

Since the terms "known as a golf cart" and "known as a go-cart" used in Section 2357.22 of title 68 have no comparable terms used in the Internal Revenue Code, "a different meaning is clearly required" for those terms and reference cannot be had to the Internal Revenue Code for their use and definition.

7. The goal of any inquiry into the meaning of a legislative act is to ascertain and give effect to the intent of the legislature. The law-making body is presumed to have expressed its intent in a statute's language and to have intended what the text expresses. Hence, where a statute is plain and unambiguous, it will not be subject to judicial construction, but will be given the effect its language dictates. Only where the intent cannot be ascertained from a statute's text,

as occurs when ambiguity or conflict (with other statutes) is shown to exist, may rules of statutory construction be employed.[66]

8. Statutes that provide an exemption from taxation are to be strictly construed against the claimant.[67] Statutory construction presents a question of law.[68] Tax exemptions, deductions, and credits depend entirely on legislative grace and are strictly construed against the exemption, deduction or credit.[69] Section 2357.22 of title 68 is a tax credit statute, not a tax levying statute; and as such, it must be strictly construed unless authority for the credit is clearly expressed.[70]

9. Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears. . .[71] It is not the place of any court to concern itself with a statute's propriety, desirability, wisdom, or its practicality as a working proposition; such questions are plainly and definitely established by fundamental law as functions of the legislative branch of government.[72] It is the duty of a court to give effect to legislative acts, not to amend, repeal or circumvent them, and a court is not justified in ignoring the plain words of a statute.[73]

10. Resolution of this protest requires the proper interpretation of the provisions of Section 2357.22(C) of title 68 of the Oklahoma Statutes, and more specifically, of the provisions of the last sentence of such subsection which reads:

> The term "qualified electric motor vehicle property" shall not apply to vehicles known as "golf carts," "go-carts" and other motor vehicles which are manufactured principally for use off the streets and highways.

The words "known as" cannot be ignored and must be given legal effect. We are not allowed to ignore the plain language of the statute for to do so would render such language a nullity. If we simply looked at whether or not the vehicles were golf carts (as the Administrative Law Judge did) we would be ignoring the plain express language of the statute. The language of the statute does not say that golf carts are disqualified. It says that vehicles "known as" golf carts are disqualified. We conclude that the phrase "known as" modifies the terms "golf carts" and "go-carts" and does not modify the phrase "manufactured principally for use off the streets and highways." Pursuant to Section 2357.22(C) of title 68 of the Oklahoma Statutes:

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[66] *Blitz U.S.A., Inc. v. Oklahoma Tax Com'n,* 2003 OK 50, 75 P.3d 883.

[67] *Id, at* ¶ 14.

[68] *Id.* at ¶ 6.

[69] *TPQ Inv. Corp. v. State ex rel. Oklahoma Tax Com'n,* 1998 OK 13, ¶ 8, 954 P.2d 139. (Citations omitted).

[70] *Id.*

[71] OKLA. STAT. ANN. tit. 25, § 1 (West 2008).

[72] *Fent v. Oklahoma Capitol Improvement Authority,* 1999 OK 64, 984 P.2d 200.

[73] *Toxic Waste Impact Group, Inc. v. Leavitt,* 1988 OK 20, 755 P.2d 626.

1. All vehicles known as golf carts are not qualified electric motor vehicle property;

2. All vehicles known as go-carts are not qualified electric motor vehicle property; and

3. All vehicles which are manufactured principally for use off the streets and highways are not qualified electric motor vehicle property.

A vehicle which is known as a golf cart but is manufactured principally for use on the streets and highways is not qualified electric motor vehicle property. In this case the legal issue which must be resolved is whether the subject vehicle falls into category #1, that is, is it a vehicle which is known as a golf cart.

11. Whether or not a vehicle is known as a golf cart is a question of fact to be determined by a consideration of all relevant evidence.

12. The Black's Law Dictionary defines "known" as:

> Familiar; perceived; recognized; understood; especially, when used absolutely, familiar to all; generally understood or perceived. Term may, according to context, refer to both actual and constructive knowledge.

Evidence of how a vehicle is marketed is indicative of how the vehicle is generally understood or perceived. It is of greater weight than evidence of the design or intent of how a vehicle is to be used when the legal issue to be determined is whether a vehicle is known as a golf cart or a go-cart than when the legal issue to be determined is whether the vehicle was manufactured principally for use off the streets and highways.

13. A federal income tax credit is allowed for "each new qualified plug-in electric drive motor vehicle placed in service by the taxpayer during the taxable year." I.R.C. § 30D[74]. For purposes of § 30D, "new qualified plug-in electric vehicle" is defined in pertinent part to mean a "motor vehicle – (1) which draws propulsion using a traction battery with at least 4 kilowatt hours of capacity, (2) which uses an offboard source of energy to recharge such battery, (3) which, in the case of a passenger vehicle or light truck which has a gross vehicle weight rating of not more than 8,500 pounds, has received a certificate of conformity under the Clean Air Act and meets or exceeds the equivalent qualifying California low emission vehicle standard under section 243(e)(2) of the Clean Air Act for that make and model year, * * * (4) the original use of which commences with the taxpayer, (5) which is acquired for use or lease by the taxpayer and not for resale, and (6) which is made by a manufacturer, (emphasis added)." I.R.C. § 30D(c). "Motor vehicle" for purposes of § 30D is defined to have the "meaning given such term by section 30(c)(2)." I.R.C. § 30D(e)(1). Section 30(c)(2)[75] of the IRC defines "motor vehicle" to mean "any vehicle which is manufactured primarily for use on public streets, roads, and

[74] Added Pub.L. 110-343, Div. B, Title II, § 205(a), Oct. 3, 2008, 122 Stat. 3835.

[75] Added Pub.L. 102-486, Title XIX, § 1913(b)(1), Oct. 24, 1992, 106 Stat. 3019.

highways (not including a vehicle operated exclusively on a rail or rails) and which has at least 4 wheels.

14. The IRS determination that the Tomberlin E-merge E4 is eligible for the "new qualified plug-in electric vehicle" federal credit is relevant evidence with regard to the question of whether a vehicle was manufactured principally for use off the streets and highways. It is not dispositive of that issue. Delegation of the determination of a fact necessary to implement a statute to a federal agency is an unconstitutional delegation of authority.[76] It is not relevant evidence with regard to whether a vehicle is known as a golf cart.

ANALYSIS OF THE EVIDENCE

All relevant evidence should be considered when determining whether a vehicle is known as a golf cart. The burden of proof is on the [P]rotestants and the standard of proof is the preponderance of the evidence.[77] There is considerable evidence in the record of how the vehicle was marketed. This evidence is entitled to great weight in determining how the vehicle was known. The extensive and complete testimony of the manufacturer's owner, when viewed in total, of how these vehicles are commonly referred to, marketed, and utilized in the industry and in the public domain is the strongest and most persuasive evidence in the record of how these vehicle were known. Protestant's own witness, MANUFACTURER, testified that the LSV's were commonly referred to as golf carts. The dealer agreements entered into evidence in this matter which refer to the vehicles as golf cars and the dealer information form which provides that the dealer will have available new and used golf cars is also relevant evidence of how these vehicles were known. Evidence of how these vehicles were manufactured is of great weight when determining if a vehicle was manufactured principally for use off the streets and highways, but is of little importance in determining if a vehicle is known as a golf cart. Evidence in the record of the two speed switch on these vehicles is also relevant evidence that the vehicles were known as golf carts. When all relevant evidence in this matter is considered the preponderance of the evidence indicates that the subject vehicle was known as a golf cart. Accordingly, the Tomberlin E-merge E4 does not qualify for the Oklahoma credit for investment in qualified electric motor vehicle property.

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[76] *City of Oklahoma City v. State ex rel. Oklahoma Dept. of Labor*, 1995 OK 107, 918 P.2d 26.

[77] *OAC*, 710:1-5-32 and *OAC* 710:1-5-47.

DISPOSITION

The Oklahoma Tax Commission orders that the protest 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."