JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2011-05-05-11 / NON-PRECEDENTIAL**
ID: **P-10-154-K / RUFF & TUFF "TEST CASE" (HUNTER CRUISER 4x4)**
DATE: **MAY 5, 2011**
DISPOSITION: **SUSTAINED**
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 21st 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.

STATEMENT OF THE CASE

The Division audited Protestants' 2009 Oklahoma income tax return, disallowed the credit for investment in qualified electric motor vehicle property in the amount of $5,498.00 and by adjustment letter dated March 22, 2010, notified Protestants of the denial of their income tax refund in the amount of $2,682.00 and the proposal to assess additional income tax in the amount of $1,099.00. Protestants timely protested the proposed adjustment.

On May 7, 2010 and July 16, 2010, the Division referred the protest file to 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] The protest was docketed as Case Number P-10-154-K and assigned to ADMINISTRATIVE LAW JUDGE.[3]

On July 14, 2010, a conference was held in the "Electric Car Cases" in which the taxpayers were represented by Protestants' representative. The matters discussed at the conference were formalized in a letter issued July 16, 2010.

On August 2, 2010, the parties were notified by letter of the randomly selected test cases for the Ruff & Tuff models of electric cars; including the instant protest, which protests were consolidated for hearing purposes only. An agreed proposed procedural schedule was filed on August 12, 2010. The *Scheduling Order and Notice of Hearing* was issued August 20, 2010, setting the procedure by which the Ruff & Tuff test cases would be submitted for decision and the hearing for September 29, 2010.[4]

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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(b).

On September 13, 2010, *Respondent's* (Division) *Exclusionary Motion* ("*Motion*") was filed seeking the exclusion of the transcript of the proceedings held before the Honorable DISTRICT JUDGE in and for the District Court of Garfield County, State of Oklahoma as inadmissible. The *Motion* also objected to the decision to take official notice of the Internal Revenue Service website regarding "plug-in" electric vehicles. Further, the Motion sought to exclude WITNESS, as a witness for Protestants' case in chief. On September 27, 2010, *Protestants' Response to Respondent's Exclusionary Motion* was filed. The *Order Denying Division's Exclusionary Motion* was issued September 28, 2010.

The *Position Statement of Respondent* (Division) was filed September 20, 2010. By letter dated September 21, 2010, Protestants advised that they would stand on the arguments set forth in their initial protest and would not file any further brief.

An open hearing[5] was held as scheduled. The hearing was limited by agreement to taking evidence of the technical aspects of the Ruff & Tuff models and the reasoning for the Division's disqualification of the models. As a preliminary matter, the Administrative Law Judge took official notice of the manufacturer's website and specifications of each model, the website of the Oklahoma Tax Commission, the Oklahoma Motor Vehicle Commission's website, statutes and administrative rules, the website of the Internal Revenue Service and Notice 2009-54, and copies of licenses obtained from other pending protests for Manufacturer/Distributors and dealer licenses issued by the Oklahoma Motor Vehicle Commission.

Two witnesses testified for Protestants' case in chief: DEPUTY DIRECTOR of the Tax Policy and Research Division of the Oklahoma Tax Commission who testified with respect to the research conducted in regard to the Ruff & Tuff models and the reasoning for the disqualification of the models; and VICE PRESIDENT of Sales for Ruff & Tuff Electric Vehicles, Inc. ("Ruff & Tuff") who testified with respect to the development and technical aspects of the Ruff & Tuff models. Protestants' Exhibits 1 through 5, and 8 through 15 were identified, offered and admitted into evidence. Official notice of Protestants' Exhibits 6 and 7 was taken. Objections to the admission of Protestants' Exhibits 8 through 12, and 15 were overruled and exceptions to the rulings were noted for the record.

DEPUTY DIRECTOR testified for the Division's case in chief. Division's Exhibits 1 through 3, and 26 were identified, offered and admitted into evidence. Objections to the admission of Division's Exhibits 1 through 3 were overruled, exceptions noted for the record and admission of the exhibits was limited to the fact that these were records which were reviewed by the Division in formulating its opinion to disqualify the Ruff & Tuff models. Official notice of Division's Exhibits 27 through 29 was taken. At the conclusion of the Division's case in chief, the taking of closing statements was denied and the parties were directed to submit proposed findings of fact and conclusions of law for the Administrative Law Judge's consideration.

[5] Confidentiality under 68 O.S. Supp. 2010, § 205 was waived with respect to the instant proceeding.

On November 18, 2010, a *Certification of Issue* was filed.[6] The *Certification* sought a determination by the Commission of whether the *Order* denying the exclusion of the transcript of the proceeding had in the District Court in and for Garfield County, Oklahoma was correct. By Order No. 2010 12 16 03, the Oklahoma Tax Commission concluded that the transcript was admissible.

Protestants' Proposed Findings of Fact and Conclusions of Law was filed December 21, 2010. The *Proposed Findings and Conclusions of Respondent* (Division) was filed December 22, 2010. On January 5, 2010, the record was closed and the protest was submitted for decision[7].

FINDINGS OF FACT

Upon review of the file and records, including the transcript of the hearing, the exhibits received into evidence and the proposed findings of fact and conclusions of law, the undersigned finds:

1. On or about December 17, 2009, Protestants purchased and placed in service a 2009 Ruff & Tuff Hunter Cruiser 4x4; VIN XXXXXX[8] Protestants' Exhibits 13-C and 2-C. Protestants paid $10,995.00 for the vehicle, not including optional equipment, dealer prep fees and freight charges. Protestants' Exhibit 13-C.

2. The Hunter Cruiser 4x4 is manufactured by Ruff & Tuff Electric Vehicles, Inc. ("Ruff & Tuff") an Oklahoma authorized manufacturer. Protestants' Exhibits 9 and 10; Tr. 61, and 65-66. The license allows Ruff & Tuff to do business and sell its vehicles in Oklahoma. Tr. 65-66.

3. The Hunter Cruiser 4x4 qualifies for the federal electric vehicle credit under IRC § 30D. Protestants' Exhibits 10; Tr.64-65.

4. All of the vehicles manufactured by Ruff & Tuff meet the low speed vehicle ("LSV") requirements as defined by the National Highway Traffic Safety Administration, 49 CFR 571.500. Protestants' Exhibit 8; Tr. 62, 63, 68-69 and 81.

5. Ruff & Tuff has never engineered a golf cart, nor sold a golf cart to a golf course. Tr. 64 and 104. The vehicles are manufactured for road use, although they have a dual use. Tr. 67, 81 and 71.

6. Prior to 2007, Ruff & Tuff had a LSV package option available for the vehicles it produced at the time. Since 2008 every vehicle is an LSV per the federal standards. Tr. 79.

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[6] *OAC*, 710:1-5-34(b).

[7] *OAC*, 710:1-5-39.

[8] See Form 567-B, State of Oklahoma Credit for Investment in Qualified Electric Motor Vehicle Property attached to Protestants' 2009 Oklahoma Resident Income Tax Return, Form 511 of which official notice is taken. *OAC*, 710:1-5-36.

7. Protestants tagged and titled the Hunter Cruiser 4x4 in the State of Oklahoma. Protestants' Exhibit 2-C. The Hunter Cruiser 4x4 is insured. Protestants' Exhibit 3-C.

8. By letter dated October 7, 2009, the Tax Policy & Research Division of the Oklahoma Tax Commission ("Tax Policy") opined that the vehicles manufactured by Ruff & Tuff "do not meet the definition of qualified electric motor vehicle property as set forth in 68 O.S. § 2357.22.C", but rather the models fell within the exclusionary language of statute, to-wit: "[t]he 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." Division's Exhibit 1.

9. Specifically, the Division believes the Ruff & Tuff models don't qualify for the credit because they are known as vehicles which are manufactured principally for use off the streets and highways. Tr. 15-16, 17, 21-22, and 25. In formulating this opinion, Tax Policy reviewed the information submitted by Ruff & Tuff and information available through public sources, primarily the internet. Tr. 18. Tax Policy placed more emphasis on how the models were depicted in the photographs and written material on the internet websites of the manufacturer and dealers of the models than on the manufacturing specs of the models as shown on the websites. Tr. 137. The basis of the review was what the models were "known as" or understood to be by the general public in a usual or ordinary sense rather than a technical or subjective point of view. Tr. 31 and 111. Tax Policy reviewed the manufacturing specs of the models, but didn't use them in its determination because they could not make any distinctions between an LSV and a golf cart. Tr. 24. Tax Policy looked at how the models were marketed, and in this case saw that the written material described a bolt on LSV package option which made the models street legal. Tr. 25 and 59. Tax Policy also looked at the accessories available for each model, but agreed that if the accessories are mounted on the models the character of the models is not changed. Tr. 32 and 103.

10. In the opinion of Tax Policy, the Ruff & Tuff models can be street legal, eligible to be tagged and title and be operated on street and highways, but can still be "known as" a vehicle manufactured principally for use off street and highways. Tr. 38. The fact that the Ruff & Tuff models are LSVs or street legal was not determinative of whether the models qualified for the credit. Tr. 144. Further, the fact that the models were eligible for the federal electric vehicle credit was a separate issue. Tr. 40.

11. Protestants filed a 2009 Oklahoma Resident Income Tax Return, Form 511 on or about February 16, 2010, claiming a credit for investment in qualified electric motor vehicle property in the amount of $5,498.00 and an income tax refund of $3,629.00. See Note 8.

12. The Division audited Protestants' return, disallowed the credit and by adjustment letter dated March 23, 2010, notified Protestants of the denial of their refund and the proposal to assess additional income tax in the amount of $1,099.00[9]. Protestants' Exhibit 1-C.

[9] The original adjustment denied the credit claimed for income tax withholding because no documentation verifying the withholding was provided with the return. A W-2 verifying the state income tax withheld was provided with the protest.

13. Protestants timely protested the proposed adjustment. Admitted by official notice.

14. The amount in controversy is $3,629.00.

ISSUES AND CONTENTIONS

The issue is whether the evidence demonstrates that the vehicles manufactured by Ruff & Tuff are manufactured principally for use on street and highways.

Protestants contend that the Ruff & Tuff vehicles are principally manufactured for use on street and highways. In support of this contention, Protestants would show that the vehicles are LSVs which meet the requirements of the Oklahoma Highway Safety Code, Oklahoma Vehicle License and Registration Act and the Federal Motor Vehicle Safety Standards. Protestants further assert that the vehicles qualify for the federal income tax credit for qualified electric motor vehicle property and that the Hunter Cruiser 4x4 is not legal to be driven on a golf course.

The Division contends that the vehicles manufactured by Ruff & Tuff do not constitute qualified electric motor vehicle property. In support of this contention, the Division argues that the subjective definition of what a LSV is does not control whether the models meet the objective definition of qualified electric motor vehicle property. In support of this argument, the Division cites the history of the statute and the introduction of the term of LSV in 2001. The Division further argues that the standard for determining what is qualified electric motor vehicle property is a matter of art, not science.

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")[10] 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).

[10] 68 O.S. 2001, § 2351 et seq.

4. The provision of the Act at issue is the credit for investment in qualified electric motor vehicle property found at § 2357.22[11] which provides in pertinent part:

> 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.
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> 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.
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> 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.
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> * * * * *
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> 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. "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

[11] 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:

> 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.

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.

Although not necessary to determine this protest, we would note that 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, therefore "a different meaning is clearly required" for those terms and reference cannot be had to the Internal Revenue Code for their use and definition.

6. 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.[12]

7. Statutes that provide an exemption from taxation are to be strictly construed against the claimant.[13] Statutory construction presents a question of law.[14] Tax exemptions, deductions, and credits depend entirely on legislative grace and are strictly construed against the exemption, deduction or credit.[15] 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.[16]

8. Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears. . .[17] 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.[18] 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.[19]

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

[13] *Id, at* ¶ 14.

[14] *Id.* at ¶ 6.

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

[16] *Id.*

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

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

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

9. 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.

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:

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 #3, that is, is it a vehicle which is manufactured principally for use off the streets and highways.

10. Whether or not a vehicle is manufactured principally for use off the streets and highways is a question of fact to be determined by a consideration of all relevant evidence.

11. 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[20]. 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)[21] of the IRC defines "motor vehicle" to mean "any vehicle which is manufactured primarily for use on public streets, roads, and highways (not including a vehicle operated exclusively on a rail or rails) and which has at least 4 wheels.

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

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

12. The IRS determination that the Hunter Cruiser 4x4 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.[22]

ANALYSIS OF THE EVIDENCE

All relevant evidence should be considered when determining whether a vehicle is manufactured principally for use off the streets and highways. The burden of proof is on the protestants and the standard of proof is the preponderance of the evidence.[23] There is considerable evidence in the record of how a vehicle is marketed. This evidence is not entitled to great weight in determining the purpose for which the vehicle was manufactured. Evidence of how the vehicle was designed, the cost incurred by the manufacturer, and the determination by the IRS that the vehicle was eligible for the federal "qualified plug-in electric vehicle" credit are all items of relevant evidence which should be considered. When all relevant evidence in this matter is considered the preponderance of the evidence indicates that the subject vehicle was not manufactured principally for use off the streets and highways. Accordingly, the Hunter Cruiser 4x4 qualifies for the Oklahoma credit for investment in qualified electric motor vehicle property.

DISPOSITION

The Oklahoma Tax Commission orders that the protest 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."

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

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