JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2011-05-10-02 / NON-PRECEDENTIAL**
ID: **CS-09-008-H**
DATE: **MAY 10, 2011**
DISPOSITION: **DENIED**
TAX TYPE: **INCOME**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HUSBAND and WIFE ("Protestants") appear by and through REPRESENTATIVE 1 and REPRESENTATIVE 2, ACCOUNTING FIRM. The Amended Section, Compliance Division ("Division"), Oklahoma Tax Commission, appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On December 23, 2009, 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 December 30, 2009, a letter was mailed to the Protestants' Representatives stating this matter had been assigned to ALJ 1, Administrative Law Judge, and docketed as Case Number CS-09-008-H. The letter also advised the Protestants' Representatives 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.*[3]

On January 7, 2010, OTC ATTORNEY filed an Entry of Appearance as Counsel of record for the Division.

On February 4, 2010, the Prehearing Conference Notice was mailed to the last-known address of the Protestants' Representatives, setting the prehearing conference for March 23, 2010, at 9:30 a.m.[4] This case was selected by the Protestants' Representatives to serve as one (1) of two (2) "Lead Cases" in a group of Forty-Two (42) cases with the same issue.

On March 23, 2010, at 9:30 a.m. the prehearing conference was held with the parties' Representatives attending in person. Present at the conference were REPRESENTATIVE 1, REPRESENTATIVE 2, OTC ATTORNEY 1, ALJ 1, Administrative Law Judge, and ALJ 2. In order to effectively manage the case load of "Civil Service Cases," the following litigation

[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] *Id.*

[4] OKLA. STAT. ANN. tit. 68, § 208 (West Supp. 2011). The notice was mailed to the Protestants' Representatives at ADDRESS.

strategy was agreed upon by Counsel and the Office of Administrative Law Judges, as follows, to-wit:

> The "Civil Service Cases" comprise two (2) distinct groups. The first group consists of "retired civil service employees" and the second group consists of "retired police officers." The first group of cases with "retired civil service employees" would be assigned to ALJ 2, a "Lead Case" selected, with the remaining cases being held in abeyance pending a final decision, and the "Lead Case" would be submitted on position letters or memorandum briefs. The second group of cases with "retired police officers" would be assigned to ALJ 1 and a "Lead Case" selected, with the remaining cases being held in abeyance pending a final decision in the "Lead Case," which would be set for hearing.

On March 25, 2010, a Notice of Reassignment of Case in this matter was mailed to the parties' Representatives as agreed during the prehearing conference. On March 25, 2010, a letter was mailed to the parties' Representatives directing that a status report be filed on or before April 22, 2010. On March 30, 2010, OTC ATTORNEY 2, Assistant General Counsel, filed an Entry of Appearance as Co-Counsel for the Division.

On April 22, 2010, the Division filed the Status Report advising this matter had been selected as the "Lead Case," and a proposed Scheduling Order, along with *Joint Motions to Hold in Abeyance* ("*Motions*") the remaining Twenty-Five (25) Cases. On April 23, 2010, an Order Granting *Motions* was issued holding in abeyance the remaining Twenty-Five (25) cases until a final decision in this matter is rendered, including the exhaustion of any appeals. On April 23, 2010, a Scheduling Order was issued for this matter to be submitted on briefs as more fully set out therein.

On May 17, 2010, the Protestants' Representatives filed a Motion for Discovery requesting an Order Compelling the Division to deliver legible copies of the following, to-wit:

- OTC order 97-11-04-007, 11/04/1997
- Any and all records relating to *Davis v. Michigan*, 489 US 803 (1989) from March 01, 1989 to December 31, 1995, including but not limited to email, memorandums, and official correspondence retained by the Oklahoma Tax Commission.

On June 16, 2010, OTC ATTORNEY 2 filed a Notice of Withdrawal as Co-Counsel of record for the Division. On June 17, 2010, the Division's Objection to Protestants' Motion for Discovery and Division's Response to Protestants' Motion for Discovery were filed with the Court Clerk.[5] On June 17, 2010, the Court Clerk received by facsimile, the Protestants' Reply to Compliance Division's First Set of Interrogatories and Requests for Production of Documents. On June 24, 2010, the Court Clerk received by facsimile, the Protestants' Withdrawal of Motion

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

for Discovery. On June 29, 2010, the Court Clerk received by facsimile, the Protestants' First Set of Requests for Production of Documents.

On July 7, 2010, a Motion (joint) for Extension of Time was filed requesting the deadline of July 9, 2010, for the filing of Stipulation of Facts and Issue be moved to July 20, 2010. On July 8, 2010, an Order Granting Motion for Extension of Time was mailed to the parties' Representatives as requested. On July 20, 2010, Joint Stipulation of Facts and Issues was filed by the parties' Representatives, with Exhibits A through G attached thereto.

On September 9, 2010, a Joint Motion to Strike Scheduling Order was filed with the Court Clerk. On September 13, 2010, an Order Granting Joint Motion to Strike was mailed to the parties' Representatives, striking the April 23, 2010, Scheduling Order, and advising that a Status Report was to be filed on or before December 1, 2010.

On December 1, 2010, the Division filed the Status Report advising that the parties were ready to proceed and submitted a proposed scheduling order. On December 7, 2010, the Scheduling Order was issued as more fully set out therein.

On January 25, 2011, the Protestants' timely filed their Motion for Judgment and Brief in Support Thereof, with Exhibits A through G attached thereto.[6]

On February 15, 2011, the Reply Brief of the Compliance Division was timely filed with the Court Clerk.

The record in this matter was closed and this case was submitted for decision on March 8, 2011.

JOINT STIPULATION OF FACTS AND ISSUES

On July 20, 2010, the parties filed Joint Stipulation of Facts and Issues, with Exhibits A through G attached thereto,[7] as follows, to-wit:

1. Protestant HUSBAND was employed by EMPLOYER as a Logistics Management Specialist from July 12, 1973 through April 30, 2005.

2. On or about June 25, 2009, Protestants filed amended Oklahoma Income Tax Returns for tax years 2006, 2007 and 2008.

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[6] Pursuant to the Agreement of the parties' Representatives as reflected by the Scheduling Order, the parties agreed to submit this matter on stipulations and briefs. Although, the Protestants' filing is titled as a "Motion for Judgment," it is being treated as the Protestants' Brief, pursuant to the agreement of the parties, not a Motion for Summary Disposition.

[7] The text of the stipulated facts is set out *in haec verba*. "***in haec vega***" (in heek v<<schwa>>r-b<<schwa>>). [Latin] In these same words; verbatim. BLACK'S LAW DICTIONARY (8TH ed. 2004), available at http://westlaw.com.

3. On their 2006 amended return, Protestants claimed a subtraction for "Oklahoma government or Federal civil service retirement" in the amount of $22,076 on line 4 of their Schedule 511-A. The 2006 amended return is attached hereto as **Exhibit A**.

4. On their 2007 amended return, Protestants claimed a subtraction for "Oklahoma government or Federal civil retirement" in the amount of $34,266 on line 5 of their Schedule 511-A. The 2007 amended return is attached hereto as **Exhibit B**.

5. On their 2008 amended return, Protestants claimed a subtraction for "Oklahoma government or Federal civil service retirement" in the amount of $35,094 on line 5 of their Schedule 511-A. The 2008 amended return is attached hereto as **Exhibit C**.

6. On or about July 09, 2009 Protestant received refunds from the Oklahoma Tax Commission for the amount claimed on the 2006, 2007, and 2008 amended returns.

7. On August 31, 2009, an assessment letter was issued to Protestants for the 2006 tax year. An attachment to the assessment letter explained that Protestants were "assessed for taking the incorrect amount of your retirement deduction." The 2006 assessment letter is attached hereto as **Exhibit D**.

8. Also on August 31, 2009, an assessment letter was issued to Protestants for the 2007 tax year. An attachment to the assessment letter explained that Protestants were "assessed for taking the incorrect amount for your retirement deduction." The 2007 assessment letter is attached hereto as **Exhibit E**.

9. On September 15, 2009, an assessment letter was issued to Protestants for the 2008 tax year. An attachment to the assessment letter explained that Protestants were "assessed for taking the incorrect amount for your retirement deduction." The 2008 assessment letter is attached hereto as **Exhibit F**.

10. In September 2009, Protestants paid in full the amount of the assessments for the 2006, 2007 and 2008 tax years.

11. On or about October 7, 2009, Protestants filed three separate protest letters stating that they disagreed with the adjustments made to their 2006, 2007 and 2008 tax returns. Attached to each letter was a separate request for abatement of interest assessed for each year. The protest letters are attached hereto as **Exhibit G**.

STATEMENT OF ISSUES

12. At issue in this matter is whether a retiree who receives an exemption from taxable income pursuant to 68 O.S. § 2358(E)(9) for retirement benefits is entitled to the same exclusion of retirement benefits as a retired member of a component of the Armed Forces of the United States receives under 68 O.S. § 2358(E)(19).

13. Protestants maintain that, based on their interpretation of the U.S. Supreme Court's decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), it is incorrect to allow a different level of taxation among various groups of Government retirees, and thus retired government employees are entitled to an exclusion from income for retirement benefits that is equal to the amount of excludable income granted to retired Military Service members.

14. The Division maintains that it correctly adjusted Protestants' retirement exclusion for the relevant tax years because the Protestants' filing position was not in conformity with 68 O.S. § 2358(E)(9). The Division maintains that *Davis* is inapplicable to this protest because the taxing statute in that case favored retired state and local government employees over retired federal employees, whereas 68 O.S. 2358 treats state government and federal civil service retirees equally.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[8]

2. The rules promulgated pursuant to the Administrative Procedures Act are presumed to be valid and binding on the persons they affect and have the force of law.[9]

3. The rules and regulations of an administrative agency which implement the provisions of a statute are valid unless they are beyond the scope of the statute, are in conflict with the statute or are unreasonable.[10]

4. Agency rules need not be specifically authorized by statute, but must generally reflect the intent of the Legislature as expressed in the statute.[11] As a general rule, it is presumed that administrative rules and regulations are fair and reasonable and that the complaining party has the burden of proving the contrary by competent and convincing evidence.[12]

5. 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,

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[8] OKLA. STAT. tit. 68, § 221(D) (West Supp. 2007).

[9] OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2002). *See Toxic Waste Impact Group, Inc. v. Leavitt*, 1988 OK 20, 755 P.2d 626.

[10] *Arkansas Louisiana Gas Co. v. Travis*, 1984 OK 33, 682 P.2d 225. *See Boydston v. State*, 1954 OK 327, 277 P.2d 138.

[11] *Jarboe Sales Company v. Oklahoma Alcoholic Beverage Laws Enforcement Commission*, 2003 OK CIV APP 23, 65 P.3d 289.

[12] *State ex rel. Hart v. Parham*, 1966 OK 9, 412 P.2d 142.

as occurs when ambiguity or conflict (with other statutes) is shown to exist, may rules of statutory construction be employed. Statutes that provide an exemption from taxation are to be strictly construed against the claimant.[13] Statutory construction presents a question of law.[14]

6. Tax exemptions, deductions, and credits depend entirely on legislative grace and are strictly construed against the exemption, deduction or credit.[15]

7. The Statute is a tax exemption or deduction statute, not a tax levying statute; and as such, it must be strictly construed unless authority for the deduction 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, and except also that the words hereinafter explained are to be understood as thus explained.[17]

9. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[18]

10. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[19]

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[13] *Blitz U.S.A., Inc. v. Oklahoma Tax Com'n*, 2003 OK 50, ¶ 14, 75 P.3d 883. (Citations omitted).

[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] OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999):

> In all administrative proceedings, unless otherwise provided by law, the burden of proof shall be upon the protestant to show in what respect the action or proposed action of the Tax Commission is incorrect. If, upon hearing, the protestant fails to prove a prima facie case, the Administrative Law Judge may recommend that the Commission deny the protest solely upon the grounds of failure to prove sufficient facts which would entitle the protestant to the requested relief.

OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999), provides in pertinent part:

> …"preponderance of the evidence" means the evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which as a whole shows that the fact sought to be proved is more probable than not.

[19] *See Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

THE STATUTE AND THE RULE

Section 2358(E)(9) ("Section E9") of Title 68[20] was amended by the Legislature in 1989 in response to the decision of the United States Supreme Court in *Davis*,[21] as follows, to-wit:

> Retirement benefits not to exceed Five Thousand Five Hundred Dollars ($5,500.00), *which are received by an individual from the civil service of the United States, any component of the Armed Forces of the United States*, the Oklahoma Public Employees Retirement System, the Teachers' Retirement System of Oklahoma, 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 pursuant to Sections 951 et seq. of Title 11 of the Oklahoma Statutes shall be exempt from taxable income. (Emphasis added.)

Section E9 was amended by the Legislature in 2006[22] as follows, to-wit:

> Retirement benefits not to exceed Five Thousand Five Hundred Dollars ($5,500.00) for the 2004 tax year, Seven Thousand Five Hundred Dollars ($7,500.00) for the 2005 tax year and Ten Thousand Dollars ($10,000.00) for the 2006 tax year and all subsequent tax years, *which are received by an individual from the civil service of the United States*, the Oklahoma Public Employees Retirement System, the Teachers' Retirement System of Oklahoma, 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 pursuant to Sections 951 et seq. of Title 11 of the Oklahoma Statutes shall be exempt from taxable income. (Emphasis added.)

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[20] *See* 1989 Okla. Sess. Laws c. 249, § 39, eff. Jan. 1, 1989. *See also* OTC Order No. 1997-11-04-007 (November 4, 1997), 1997 WL 1051754 (Okl.Tax.Com.).

[21] *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989).

[22] *See* 2006 Okla. Sess. Laws c. 16, § 65, emerge. eff. March 29, 2006.

Section (E)(19) ("Section E19") of Title 68[23] was added and amended by the Legislature in 2006, as follows, to-wit:

> For taxable years beginning after December 31, 2005, *retirement benefits received by an individual from any component of the Armed Forces of the United States* in an amount not to exceed the greater of seventy-five percent (75%) of such benefits or Ten Thousand Dollars ($10,000.00) shall be exempt from taxable income but in no case less than the amount of the exemption provided by paragraph 15 of this subsection. (Emphasis added.)

The OTC Rule ("Rule") for retirement income[24] in pertinent parts provides as follows, to-wit:

> (a) **General provisions applicable to Oklahoma or federal government retirement income.** Each individual taxpayer may deduct up to Five Thousand Five Hundred Dollars ($5,500.00) of retirement benefits paid by the State of Oklahoma or by the federal government. Effective for tax years beginning on or after January 1, 2005, and ending before January 1, 2006, this deduction increases to Seven Thousand Five Hundred Dollars ($7,500.00). *Effective for tax year 2006 and subsequent tax years the deduction increases to Ten Thousand Dollars ($10,000.00).* This deduction cannot exceed the amount included in the taxpayer's Federal Adjusted Gross Income. *The total exclusion from all government retirement benefit plans may not exceed* Five Thousand Five Hundred Dollars ($5,500.00), or for tax years beginning on or after January 1, 2005, Seven Thousand Five Hundred Dollars ($7,500.00); *or for tax years beginning on or after January 1, 2006, Ten Thousand Dollars ($10,000.00), per individual.*
>
> (b) **Qualifying Oklahoma or federal government retirement income defined.**
>
> For purposes of this Section, *"**Oklahoma or federal government retirement income**" means retirement income received from the following sources*:
>
> (1) *The Civil Service of the United States;*

[23] *Id. See* 2006 Okla. Sess. Laws c. 44, § 21, eff. January 1, 2007. The original amount was fifty percent (50%). *See also* Okla. Sess. Laws c. 16, § 65, eff. March 29, 2006:

> 19. For taxable years beginning after December 31, 2005, retirement benefits received by an individual from any component of the Armed Forces of the United States in an amount not to exceed the greater of fifty percent (50%) of such benefits or Ten Thousand Dollars ($10,000.00) shall be exempt from taxable income but in no case less than the amount of the exemption provided by paragraph 15 of this subsection.

[24] OKLA. ADMIN. CODE § 710:50-15-49 (June 25, 2007).

(2) *Any Component of the Armed Forces of the United States; [See special rule (g)]*

(3) The Oklahoma Public Employees' Retirement System;

(4) The Oklahoma Teachers' Retirement System;

(5) Oklahoma Law Enforcement Retirement System;

(6) Oklahoma Firefighters' Pension and Retirement System;

(7) Oklahoma Police Pension and Retirement System;

(8) The Employee retirement systems created by counties pursuant to 19 O.S. §§951 et seq.

(9) The Uniform Retirement System for Justices and Judges;

(10) The Oklahoma Wildlife Conservation Department Retirement Fund;

(11) The Oklahoma Employment Security Commission Retirement Plan; or,

(12) The Employee retirement systems created by municipalities pursuant to 11 O.S. §§ 48-101 et seq.

…

(g) **Special rule for certain retirement income from a component of the Armed Forces of the United States.** *Effective for tax year 2006, the deduction for retirement income from any component of the Armed Forces of the United States is the greater of Ten Thousand Dollars ($10,000.00) or fifty percent (50%) of the amount included in the taxpayer's Federal Adjusted Gross Income. Effective for tax year 2007 and subsequent tax years, the deduction for retirement income from any component of the Armed Forces of the United States is the greater of Ten Thousand Dollars ($10,000.00) or seventy-five percent (75%) of the amount included in the taxpayer's Federal Adjusted Gross Income.*
(Emphasis added.)[25]

…

PROTESTANTS' POSITION

The Protestants' position is that Section E19 grants a greater exclusion of retirement income received by any component of the Armed Forces of the United States compared to the exclusion granted Protestant, HUSBAND, a Federal Civil Service Retiree, by Section E9, which is in violation of the *Davis* case.[26]

[25] The Rule has not been amended to reflect the changes to Section E19. "For taxable years beginning after December 31, 2005, retirement benefits received by an individual from any component of the Armed Forces of the United States in an amount not to exceed the greater of seventy-five percent (75%)…" *See* Notes 23 through 24, *supra.*

[26] Protestants' Brief at 3.

DIVISION'S POSITION

The Division maintains that it correctly adjusted Protestants' retirement exclusion because under the terms of Section 2358 E9, the deduction is limited to $10,000. The Division further maintains that Protestants' interpretation of the *Davis* decision is incorrect, and *Davis* does not apply to this protest. Moreover, Protestants' argument is a challenge to the constitutionality of the taxing statute at issue here and is beyond the jurisdiction of this court.[27]

DISCUSSION

In essence, the Protestants assert the *Davis*[28] case stands for the proposition that HUSBAND, as a retired Federal Civil Service recipient,[29] is entitled to the same exclusion from income as a retired member of a component of the Armed Forces of the United States based upon the principles of intergovernmental tax immunity embodied in 4 U.S.C.A. § 111[a], "which authorizes States to tax 'pay or compensation for personal services as [a federal] officer or employee …, if the taxation does not discriminate against the …employee because of the source of the pay or compensation."[30]

The Division maintains that the Protestants' interpretation of *Davis* is incorrect, and *Davis* does not apply to this matter. The Division points out that *Davis* focused on the difference between state government retirees and federal government retirees, ultimately concluding that the State could not discriminate in favor of the state government retirees over the federal government retirees. In this matter, the Protestants are arguing that *Davis* should be extended to prohibit the State from distinguishing between two (2) separate groups of *Federal Retirees*: *Federal Civil Servants* ($10,000.00 per individual) and *Members of the Armed Forces of the United States* (greater of seventy-five percent (75%) of the amount included in federal adjusted gross income or $10,000.00, per individual).[31]

The Division's reading of *Davis* is supported by ample Oklahoma case law. The State, via the Legislature, has the power to "select its subjects of taxation and classify them, and they

[27] Division's Brief at 2. "…it is incorrect to allow a different level of taxation among various groups of Government retirees, and thus retired government employees are entitled to an exclusion from income for retirement benefits that is equal to the amount of excludable income granted to retired Military Service members." Stipulation 13.

[28] *See* Note 21, *supra*.

[29] "At issue in this matter is whether a retiree who receives an exemption from taxable income pursuant to 68 O.S. § 2358(E)(9) for retirement benefits is entitled to the same exclusion of retirement benefits as a retired member of a component of the Armed Forces of the United States receives under 68 O.S. § 2358(E)(19)." Stipulation 12.

[30] *Id.*

[31] *See* Notes 23 through 25, *supra*.

may tax one subject or class and exempt other subjects or classes."[32] "Such classifications made by the Legislature are presumed to be valid and constitutional."[33] "In order to justify judicial interference with a legislative taxation classification, the classification adopted must be based upon an invidious[34] and unreasonable distinction or difference with reference to the subject of the tax…. However, the fact that a classification favors one class over another 'does not demonstrate an arbitrary nature of the distinction if based on either a reasonable distinction or a difference in state policy.'"[35]

Since statehood the purpose of the Soldiers and Sailors Act[36] has been to provide benevolent services by the state for the care and protection of "ex-service persons," including rehabilitation, education and training, financial aid and loans, hospitalization, long-term care and burial.[37]

Section 67.13a(7) of Title 72,[38] provides in pertinent part as follows, to-wit:

> …Any honorably discharged war veteran of any of the Armed Forces of the United States shall be entitled to such tax exemptions to include but not be limited to tax-exempt veterans' benefits as provided in paragraph 12 of Section 2887 of Title 68 of the Oklahoma Statutes, special permits and veterans' preferences for state employment; provided, that any person who shall have served on active duty for training purposes only shall not be entitled to any such tax exemptions, special permits or veterans' preferences.

As observed by the Division, "A *Davis* inquiry into the nature of the two classes at issue here, federal civil service retirees and retired member of the Armed Forces of the United States, would clearly stand."[39]

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[32] *Fent v. State ex rel. Oklahoma Tax Com'n*, 2004 OK 59, 99 P.3d 241. (Citations omitted.) *See* OK Const. Art. 10, § 13, which provides:

> The State may select its subjects of taxation, and levy and collect its revenues independent of the counties, cities or other municipal subdivisions.

See also OK Const. Art. 10, § 12.

[33] *Id.*

[34] "[I]nvidious" discrimination (in-vid-ee-<<schwa>>s). (1856) Discrimination that is offensive or objectionable, esp. because it involves prejudice or stereotyping.

[35] *Id.*

[36] OKLA. STAT. ANN. tit. 72, § 1 *et seq.* (West 2002).

[37] *McNeill v. City of Tulsa*, 1998 OK 2, 953 P.2d 329. *See* OKLA. STAT. ANN. tit. 72, § 67.13a (West 2002).

[38] OKLA. STAT. ANN. tit. 72, § 67.13a(7) (West Supp. 2011).

[39] Division's Brief at 8. The result would remain the same for any classification enumerated in Section E9.

JURISDICTION TO DECIDE CONSTITUTIONAL ISSUE

The Division also points out that the Protestants' argument is a challenge to the constitutionality of the Statute and the Rule, which is beyond the jurisdiction of this court.[40]

The Supreme Court of Oklahoma held in *Dow Jones*,[41] "We agree with the Commission that, as an administrative agency, it is powerless to strike down a statute for constitutional repugnancy. Within the framework of Oklahoma's tripartite distribution of government powers, the authority to invalidate an unconstitutional enactment resides *solely* in the judicial department. Art. 7, § 1, Okl. Const.[42] confers on administrative agencies only that quantum of 'judicial power' which is necessary to support their exercise of adjudicative authority in individual proceedings brought before them. The power assigned to boards and commissions is not coextensive with that which is vested in the courts. Every statute is hence constitutionally valid until a court of competent jurisdiction declares otherwise."[43]

CONCLUSION JURISDICTION TO DECIDE CONSTITUTIONAL ISSUE

The Division's position is supported by ample Oklahoma case law. The Statute and the Rule are deemed constitutionally valid until a court of competent jurisdiction determines otherwise.

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[40] Division's Brief at 2.

[41] *Dow Jones & Company, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1990 OK 6, 787 P.2d 843. (Citations omitted).

[42] OK Const. Art. 7, § 1, (West 2006) states as follows, to-wit:

> The judicial power of this State shall be vested in the Senate, sitting as a Court of Impeachment, a Supreme Court, the Court of Criminal Appeals, the Court on the Judiciary, the State Industrial Court, the Court of Bank Review, the Court of Tax Review, and such intermediate appellate courts as may be provided by statute, District Courts, and such Boards, Agencies and Commissions created by the Constitution or established by statute as exercise adjudicative authority or render decisions in individual proceedings. Provided that the Court of Criminal Appeals, the State Industrial Court, the Court of Bank Review and the Court of Tax Review and such Boards, Agencies and Commissions as have been established by statute shall continue in effect, subject to the power of the Legislature to change or abolish said Courts, Boards, Agencies, or Commissions. Municipal Courts in cities or incorporated towns shall continue in effect and shall be subject to creation, abolition or alteration by the Legislature by general laws, but shall be limited in jurisdiction to criminal and traffic proceedings arising out of infractions of the provisions of ordinances of cities and towns or of duly adopted regulations authorized by such ordinances.

[43] *See* Note 41, *supra*. (Citations omitted). (Emphasis original).

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case that the protest should be denied.[44]

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."

[44] Attached to the protest are three (3) separate letters requesting waiver of the penalty and interest paid by the Protestants for the 2006, 2007, and 2008 Tax Years. The Office of Administrative Law Judges does not have the authority to waive penalty and interest. The authority to waive penalty and interest rests exclusively with the Commissioners or their designee, pursuant to OKLA. STAT. ANN. tit. 68, § 220 (West Supp. 2011).