JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2011-08-30-04 / NON-PRECEDENTIAL**
ID: **P-09-120-H**
DATE: **AUGUST 3, 2011**
DISPOSITION: **DENIED**
TAX TYPE: **ESTATE**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Estate of DECEDENT ("Protestant") appears through attorney, ATTORNEY, FIRM. The Estate Tax Section, Compliance Division ("Division") of the Oklahoma Tax Commission, appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On July 20, 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 July 28, 2009, a letter was mailed to Counsel stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-09-120-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 Oklahoma Tax Commission.*[3] On July 29, 2009, OTC ATTORNEY filed an Entry of Appearance as Counsel of record for the Division.

On August 7, 2009, the Notice of Prehearing Conference was mailed to Counsel setting the prehearing conference for September 1, 2009, at 11:00 a.m. The prehearing conference was held via telephone as scheduled.

On September 3, 2009, copies of the decision in Appeal No. 106,023 (*In re: Estate of Hester*) and the Tax Commission's Petition for Writ of Certiorari were filed with the Court Clerk.[4] On September 9, 2009, pursuant to the parties' request, an Order Holding Case in Abeyance until a final decision in Appeal No. 106,023 was issued.

On November 6, 2009, OTC ATTORNEY 2, Assistant General Counsel, filed an Entry of Appearance as Co-Counsel of record for the Division.

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

On July 9, 2010, OTC ATTORNEY filed a Notice of Substitution of Attorney and Entry of Appearance as Counsel of record for the Division.[5]

On March 11, 2011, OTC ATTORNEY filed a Status Report and Request for Scheduling Order for this matter to be submitted on stipulations and briefs.[6] On March 14, 2011, the Scheduling Order was issued as more fully set out therein.

On April 29, 2011, the Joint Stipulation of Facts and Statement of Issue was filed by Counsel, with Exhibits 1 through 4, attached thereto.

On May 13, 2011, by facsimile, ATTORNEY filed the Protestant's Brief in Chief.[7] On May 27, 2011, the Division's Memorandum Brief was filed with the Court Clerk.

The record in this matter was closed and this case was submitted for decision on June 7, 2011.

STIPULATION OF FACTS

On April 29, 2011, the parties filed Joint Stipulation of Facts and Statement of Issue,[8] along with the attached exhibits, as follows, to-wit:

1. On October 17, 2005, DECEDENT ("Decedent") died intestate in CITY X, Oklahoma. **(Exhibit 1.)** On October 20, 2005 a Petition for Letters of Administration and for Determination of Heirs was filed in COUNTY Y, County District Court, Oklahoma.

2. On April 3, 2009 the Estate filed an Oklahoma Estate Tax Return. The return reported a net estate of $1,040,336.25, and reflected a single 100% distribution made to Decedent's sister. The distribution was treated as one to a lineal heir on the face of the return for tax computation purposes. On the tax computation portion of the return, the lineal heir exemption of $950,000.00 was applied, and a net taxable Oklahoma estate of $90,336.25 reported. The return reported $1,608.41 in estate tax due which was remitted with the return. **(Exhibit 2.)**

3. Following an audit of the return, on May 15, 2009 the Oklahoma Tax Commission issued an Order of Assessment assessing additional estate tax (and interest computed through

[5] This filing serves as a Withdrawal of Counsel for OTC ATTORNEY 2 and OTC ATTORNEY 3.

[6] On March 11, 2011, OTC ATTORNEY advised the Court Clerk by email that a mandate had been issued in Appeal No. 106,023. The opinion was withdrawn from publication by the Oklahoma Supreme Court.

[7] On May 16, 2011, the hard copy of the Protestant's Brief in Chief was received by mail.

[8] 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.

December 17, 2008) due in the total amount of $173,376.29. The reason for the assessment was stated as "no exemption for collateral heir in 2005". **(Exhibit 3[.])**

4. On July 13, 2009, the Division received the Estate's letter of protest thereby placing the assessed amount in controversy. In the letter, the Estate cited two substantive grounds on which it contended the assessment was incorrect: (1) the assessment was not made in accordance with the law of the State of Oklahoma and (2) the exemption allowed under 68 O.S. §809(A)(7). (as amended January 1, 2007) should apply. **(Exhibit 4[.])**

STATEMENT OF ISSUE

Whether the Estate is entitled to the $950,000.00 exemption for distributions to collateral heirs contained in 68 O.S. Supp. 2006 §809(A)(7).

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[9]

2. A tax, at the rates prescribed in Section 803 of Title 68,[10] is levied upon the transfer of the net estate of every decedent, whether in trust or otherwise, to persons, associations, corporations, or bodies politic, of property, real, personal, or mixed, whether tangible or intangible, or any interest therein or income therefrom, by will or the intestate laws of Oklahoma, by any order setting apart property and/or granting family allowances pursuant to the probate code, by deed, grant, bargain, sale, or gift made in contemplation of death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death.[11] The tax is imposed on the value of the net estate and transfers at the rates, under the conditions, and subject to the exemptions and limitations prescribed by the Estate Tax Code.[12]

3. The tax levied by the Estate Tax Code[13] accrues at the time of the transfer by the death of decedent or otherwise and is due and payable nine (9) months after the date of the death of the decedent.[14]

4. The executor, administrator, trustee, devisee, heir or transferee shall within nine (9) months after the date of death of the decedent, unless the time has been extended by the

[9] OKLA. STAT. tit. 68, § 815(B) (West Supp. 2005).

[10] OKLA. STAT. ANN. tit. 68, § 803 (West 2001).

[11] OKLA. STAT. ANN. tit. 68, § 802 (West 2001).

[12] *Id*. OKLA. STAT. ANN. tit. 68, § 801 *et seq.* (West 2001).

[13] *Id.*

[14] OKLA. STAT. ANN. tit. 68, § 806(A) (West 2001).

Oklahoma Tax Commission, make a detailed return, verified by affidavit, to the Tax Commission upon forms furnished by it, giving all the information called for or that may be necessary to determine the value of the net estate.[15]

5. Prior to the 2006 amendment,[16] Section 809(A) of Title 68,[17] provided:
If any portion of the net estate, as herein determined, in excess of the deductions allowed in Section 808 of this *title passes to the father, mother, child, child of husband or wife, adopted child or any lineal descendant of decedent or of such adopted child*, there shall be deducted from such net estate the portion of the net estate passing to such person or persons to the extent of and not exceeding a total aggregate exemption in amounts as follows, and the tax shall be paid on the remainder at the rates herein set out:

1. For the estate of a decedent who dies before January 1, 1999, the exemption shall be One Hundred Seventy-five Thousand Dollars ($175,000.00);

2. For the estate of a decedent who dies on or after January 1, 1999, and before January 1, 2000, the exemption shall be Two Hundred Seventy-five Thousand Dollars ($275,000.00);

3. For the estate of a decedent who dies on or after January 1, 2000, and before January 1, 2001, the exemption shall be Four Hundred Seventy-five Thousand Dollars ($475,000.00);

4. For the estate of a decedent who dies on or after January 1, 2001, and before January 1, 2002, the exemption shall be Six Hundred Seventy-five Thousand Dollars ($675,000.00);

5. For the estate of a decedent who dies on or after January 1, 2002, and before January 1, 2004, the exemption shall be Seven Hundred Thousand Dollars ($700,000.00);

6. For the estate of a decedent who dies on or after January 1, 2004, and before January 1, 2005, the exemption shall be Eight Hundred Fifty Thousand Dollars ($850,000.00);

7. For the estate of a decedent who dies on or after January 1, 2005, and before January 1, 2006, the exemption shall be Nine Hundred Fifty Thousand Dollars ($950,000.00); and

8. For the estate of a decedent who dies on or after January 1, 2006, the exemption shall be One Million Dollars ($1,000,000.00).

(Emphasis added.)

[15] OKLA. STAT. tit. 68, § 815(A)(1) (West Supp. 2005).

[16] 2006 Okla. Sess. Laws, c. 42, § 2.

[17] OKLA. STAT. ANN. tit. 68, § 809(A) (West 2001).

6. Effective January 1, 2007,[18] Section 809(A) of Title 68[19] ("Statute") was amended as follows, to-wit:

> There shall be deducted from the net estate to the extent of and not exceeding a total aggregate exemption in amounts as follows, and the tax shall be paid on the remainder at the rates herein set out:
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> 1. For the estate of a decedent who dies before January 1, 1999, the exemption shall be One Hundred Seventy-five Thousand Dollars ($175,000.00);
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> 2. For the estate of a decedent who dies on or after January 1, 1999, and before January 1, 2000, the exemption shall be Two Hundred Seventy-five Thousand Dollars ($275,000.00);
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> 3. For the estate of a decedent who dies on or after January 1, 2000, and before January 1, 2001, the exemption shall be Four Hundred Seventy-five Thousand Dollars ($475,000.00);
>
> 4. For the estate of a decedent who dies on or after January 1, 2001, and before January 1, 2002, the exemption shall be Six Hundred Seventy-five Thousand Dollars ($675,000.00);
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> 5. For the estate of a decedent who dies on or after January 1, 2002, and before January 1, 2004, the exemption shall be Seven Hundred Thousand Dollars ($700,000.00);
>
> 6. For the estate of a decedent who dies on or after January 1, 2004, and before January 1, 2005, the exemption shall be Eight Hundred Fifty Thousand Dollars ($850,000.00);
>
> *7. For the estate of a decedent who dies on or after January 1, 2005, and before January 1, 2006, the exemption shall be Nine Hundred Fifty Thousand Dollars ($950,000.00);*
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> 8. For the estate of a decedent who dies on or after January 1, 2006, and before January 1, 2008, the exemption shall be One Million Dollars ($1,000,000.00);
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> 9. For the estate of a decedent who dies on or after January 1, 2008, and before January 1, 2009, the exemption shall be Two Million Dollars ($2,000,000.00); and
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> 10. For the estate of a decedent who dies on or after January 1, 2009, and before January 1, 2010, the exemption shall be Three Million Dollars ($3,000,000.00).
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> (Emphasis added.)

[18] *See* Note 16, *supra*.

[19] OKLA. STAT. tit. 68, § 809(A) (West Supp. 2007).

7. As a general rule, statutes and statutory amendments are to be construed as operating prospectively only unless by express declaration or necessary implication from the language used, the Legislature clearly demonstrates a contrary intent. In every case of doubt, the doubt must be resolved against retroactivity.[20]

8. No claim of tax exemption can be sustained unless it clearly comes within the statutory provision under which the exemption is claimed.[21]

9. The goal of any inquiry into the meaning of a legislative act is to ascertain and give effect to the intent of the legislature. A 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. When construing a statute which has been amended, the Supreme Court is mindful that legislature may have intended: (a) to effect a change in existing law, or (b) to clarify that which previously appeared doubtful. Statutes that provide an exemption from taxation are to be strictly construed against the claimant.[22] Statutory construction presents a question of law.[23]

10. Tax exemptions, deductions, and credits depend entirely on legislative grace and are strictly construed against the exemption, deduction or credit.[24]

11. 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.[25]

12. Statutes and statutory amendments are presumed to operate prospectively, and presumption is rebutted only where intention of the Legislature to give statutes retrospective effect is expressly declared or necessarily implied from the language of the statute.[26] Doubt as to whether statute was intended to be prospective or retrospective must be resolved against retrospective application.[27] As in other matters concerning statutory interpretation, whether to

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[20] *Dolese Bros. v. State ex rel. Oklahoma Tax Commission*, 2003 OK 4, 64 P.3d 1093.

[21] *Home-Stake Production Company v. Board of Equalization of Seminole County*, 1966 OK 115, 416 P.2d 917.

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

[23] *Id.* at ¶ 6.

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

[25] *Id.*

[26] *Department of Human Services ex rel. Pavlovich v. Pavlovich*, 1996 OK 71, 932 P.2d 1080. (Citations omitted).

[27] *Fraternal Order of Police, Lodge No. 165 v. City of Choctaw*, 1996 OK 78, 933 P.2d 261.

give prospective or retroactive effect should be controlled by the fundamental or transcendent canon of statutory construction of giving effect to legislative design.[28]

13. Where a statute or a portion thereof is amended by setting forth the amended section in full, the provisions of the original statute which are repeated are to be considered as having been the law from the time they were first enacted, and the new provisions or changed portions are to be understood as enacted at the time the amended act takes effect, and not to have any retroactive operation.[29]

14. An "estate tax" is an excise tax rather than a property tax, and unlike an inheritance tax, is a tax on the privilege of transfer at death, rather than a tax on beneficiary's right to receive.[30]

15. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[31] A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[32]

DISCUSSION

The Protestant acknowledges that the version of the Statute in effect at the time of the Decedent's death (DATE) provided for an exemption of $950,000.00 to any property passing only to lineal descendants, but asserts that the "Amended" Statute, which became effective January 1, 2007, retroactively applies in this case allowing the $950,000.00 exemption to collateral heirs (in this case the Decedent's sister). In support of its position, the Protestant states in pertinent part, "A review of the language in Title 68 O.S. Supp 2006 §809(A)(7) reveals that the legislature rewrote the introductory paragraph, notably deleting language of limitation in

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[28] *Houck v. Hold Oil Corp.*, 1993 OK 166, 1993 OK 167, 867 P.2d 451. (Citations omitted).

[29] *Wilson v. State ex rel. Oklahoma Tax Commission*, 1979 OK 62, 594 P.2d 1210. *See* Note 19, *infra.*

[30] *Ward v. Oklahoma Tax Commission*, 1957 OK 141, 322 P.2d 172.

[31] 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.

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

paragraph A, which reflects an intention to extend the statutory estate tax exemption to collateral heirs. It is also clear from review of sub-paragraph 7 that this exemption was intended to apply for a limited period of time. That period of time specifically being, to the estate of a decedent who dies on or after January 1, 2005, and before January 1, 2006, which is clearly in contradiction to the previous version of the statute that allowed the exemption only to linear heirs."[33]

The Division responds that the Protestant "seeks to have the exemption applied to the decedent's collateral heirs (and result in a reduced tax liability)[34] because, in its view, the amendment should be applied retroactively."[35] The Division points out that the Tax Commission has previously concluded that the "Amended" Statute applies "prospectively only so as to be unavailable to estates with a decedent who died prior to its effective date."[36]

Before and after the Statute was amended,[37] Section 809(A)(7) states in pertinent part, as follows, to-wit:

> For the estate of a decedent who dies on or after January 1, 2005, and before January 1, 2006, the exemption shall be Nine Hundred Fifty Thousand Dollars ($950,000.00); and

In *Wilson*,[38] the Court held, "Where statute or a portion thereof is submitted by setting forth amended section in full, provisions of original statute which are repeated are to be considered as having been the law from the time they were first enacted, and the new provisions or changed portions are to be understood as enacted at the time the amended act takes effect and not to have any retroactive operation."

The Protestant acknowledges that the version of the Statute in effect at the time of the Decedent's death (October 17, 2005) provided for an exemption of $950,000.00 to any property passing only to lineal descendants, but asserts that the "Amended" Statute, which became

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[33] Protestant's Brief at 3.

[34] The Protestant agrees that at the time of the Decedent's death the Statute provided an exemption to any property passing to lineal descendants, which established estate tax due in the amount of $121,250.44. The Protestant's interpretation of applying the "Amended" Statute would extinguish the estate tax due at the time of the Decedent's death. *See* Note 30, *supra*. *See also* OK Const. Art. 5, § 50.

[35] Division's Memorandum Brief at 3.

[36] *Id.* at 3 through 4. *See* OTC Order No. 2008-02-12-02 (February 12, 2008) and OTC Order No. 2008-02-12-03 (February 12, 2008). In OTC Order No. 2008-02-12-02 (February 12, 2008), the Tax Commission concluded "Here, the tax levied against the net estate of Protestant accrued prior to the effective date of the amendatory language to § 809(A). 68 O.S. 2001, § 806(a). Further, nothing in the language of the House Bill shows any indicia of legislative intent either expressed or clearly and plainly implied that the statute as amended should be applied retrospectively. Accordingly, since the entirety of Protestant's net estate passed to collateral heirs, Protestant was not entitled to deduct from its net estate any amount of the … exemption."

[37] *See* OKLA. STAT. tit. 68, § 2358 (West Supp. 2006) and OKLA. STAT. tit. 68, § 2358 (West Supp. 2007).

[38] *See* Note 29, *supra*.

effective January 1, 2007, retroactively applies in this case allowing the $950,000.00 exemption to collateral heirs. However, the amendatory language of the opening paragraph enlarged the Statute's scope to include an exemption for collateral heirs, which was not previously included, which indicates the Amendment is a substantive change in the law. Enlarging the scope of the Statute to include an exemption for collateral heirs who were not previously eligible for the exemption is a change to the Statute[39]

The Protestant has failed to overcome the presumption that the "Amended" Statute is to be applied prospectively.[40] As in *Wilson*, the "Amended" Statute sets forth the provisions of Section 809(A) in full, the provisions of the Statute which are repeated are to be considered as having been the law from the time it was first enacted, and the new provisions or changed portions are to be understood as enacted at the time the Amendment took effect (January 1, 2007), and not to have any retroactive operation.[41]

In this matter the estate tax levied against the Protestant accrued at the time of the Decedent's death (October 17, 2005), which is prior to the effective date of the amendatory language to Section 809(a) of Title 68,[42] and the entirety of the Decedent's estate passed to a collateral heir. The Protestant is not entitled to deduct from the net estate the $950,000.00 exemption.

The Protestant has failed to meet its burden of proof that the Division's adjustment to the estate tax return is incorrect and in what respect.

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.[43]

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.

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[39] *In re Protest of Betts Telecom Oklahoma, Inc.*, 2008 OK CIV APP 19, ¶ 15, 178 P.3d 197.

[40] *See* Note 26, *supra*.

[41] *See* Note 29, *supra*.

[42] *See* Note 19, *supra*.

[43] The protest includes a request for the waiver of interest, if it is determined that the Protestant is not entitled to the exemption for collateral heirs, which became effective January 1, 2007. This office does not have the authority to waive interest. The authority to waive interest rests exclusively with the Commissioners or their designee, pursuant to OKLA. STAT. ANN. tit. 68, § 220 (West Supp. 2011).

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."