JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2011-09-08-02 / NON-PRECEDENTIAL**
ID: **P-10-1344-K**
DATE: **SEPTEMBER 8, 2011**
DISPOSITION: **SUSTAINED**
TAX TYPE: **ELECTRIC CAR INCOME TAX CREDIT**
APPEAL: **NO APPEAL TAKEN**

ORDER

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 5th day of August, 2011, the Commission 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 $460.00 and by adjustment letter dated August 5, 2010, notified Protestants that their income tax refund in the amount of $1,500.00 had been reduced to $1,040.00. Protestants timely protested the proposed adjustment by letter dated September 30, 2010. A hearing was requested in the letter of protest.

On October 12, 2010, the protest file was referred 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 the Administrative Law Judges[2]. The protest was docketed as Case No. P-10-1344-K and assigned to ALJ, Administrative Law Judge.

Protestants purchased a Hunter 4X4 manufactured by Ruff & Tuff Electric Vehicles, Inc. ("Ruff & Tuff") and placed the vehicle in service on July 30, 2009. Protestants have not submitted proof that they registered the vehicle pursuant to the Oklahoma Vehicle License and Registration Act[3]. Protestants' protest was stayed pending final disposition of certain randomly selected test cases representing the vehicles manufactured by Ruff & Tuff.

A hearing was held on September 29, 2010, in the Ruff & Tuff test cases. The hearing was limited to receiving evidence regarding the technical aspects of the Ruff & Tuff models and the Division's reasoning for disqualifying the models as qualified electric motor vehicle property. In each of the test cases, the vehicle had been registered pursuant to the Oklahoma Vehicle License and Registration Act; ergo, the vehicle was titled and tagged and legal for use on the streets and highways.

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[1] 68 O.S. 2001, § 201 et seq., as amended.

[2] Rules 710:1-5-20 through 1-5-47 of the *Oklahoma Administrative Code* ("*OAC*").

[3] 47 O.S. 2001, § 1102 et seq., as amended.

On March 21, 2011, *Findings, Conclusions and Recommendations* were issued in each test case sustaining the protest to the disallowance of the income tax credit for investment in qualified electric motor vehicle property. On May 5, 2011, the Commission issued final Orders[4] in the test cases holding that the Ruff & Tuff manufactured electric motor vehicles qualified for the income tax credit for investment in qualified electric motor vehicle property.

On May 23, 2011, the instant *Motion for Summary Disposition [Ruff & Tuff Vehicles without Proof of Tagging and Registration]* ("*Motion*") was filed by the Division seeking an order denying the protest of those taxpayers who had not submitted proof of registration of their Ruff & Tuff vehicles. On May 26, 2011, a conference was held to discuss the procedure for the submission of the *Motion* for decision which agreed procedure was reduced to writing, including the agreement of Protestants' counsel to waive oral argument on the *Motion*.

The *Response to Motion for Summary Disposition [Ruff & Tuff Vehicles without Proof of Tagging and Registration]* ("*Response*") was filed June 16, 2011 seeking denial of the *Motion*. Upon *Respondent's Unopposed Application for Leave to File Reply to Protestants' Response to Respondent's Motion for Summary Disposition [Ruff & Tuff Vehicles without Proof of Tagging and Registration]* ("*Application*"), an *Order Granting Unopposed Application for Leave to File Reply* was issued requiring the Division to file its reply on or before July 7, 2011, at which time the *Motion* would be submitted for consideration. *Respondent's Reply to Protestants' Response to Respondent's Motion for Summary Disposition [Ruff & Tuff Vehicles without Proof of Tagging and Registration]* ("*Reply*") was filed July 7, 2011.

The *Order Granting Proposal for Submission of Issue for Decision by Summary Disposition* ("*Order*") was issued June 30, 2011, finding that with respect to the issue propounded by the *Motion* "no substantial controversy or genuine issue as to the facts material to the decision" and the issue presents a question of law to which one of the parties is entitled to a decision as a matter of law. The *Order* further decreed the record closed with respect to the issue propounded by the *Motion* and the case submitted for decision.

FINDINGS OF FACT

Upon review of the file and records, including the *Motion*, *Response* and *Reply*, the undersigned finds:

1. The facts material to the disposition of the issue are not in dispute and the issue is one of law.

2. On or about July 30, 2009, Protestants purchased and placed in service a 2009 Hunter 4X4; VIN XYZ123, manufactured by Ruff & Tuff Electric Vehicles, Inc. ("Ruff & Tuff"), an Oklahoma authorized manufacturer. 2009 Form 567-B, *State of Oklahoma Credit for Investment in Qualified Electric Motor Vehicle Property* attached to Protestants' 2009 Form 511, *Oklahoma*

[4] Order Nos. 2011 05 05 09; 2011 05 05 10; 2011 05 05 11; 2011 05 05 12; 2011 05 05 13; and 2011 05 05-17

Resident Income Tax Return and purchase invoice from DEALERSHIP[5]; Oklahoma Tax Commission ("OTC") Orders, *Findings of Fact*, ¶ 2 in the Ruff & Tuff "Test Cases"[6].

3. All Ruff & Tuff manufactured vehicles meet the low speed vehicle ("LSV") requirements as defined by the National Highway Traffic Safety Administration, 49 CFR 571.500. OTC Orders, *Findings of Fact*, ¶ 4.

4. Ruff & Tuff vehicles are manufactured for road use, although they have a dual use. OTC Orders, *Findings of Fact*, ¶ 5.

5. Protestants have not provided proof that the vehicle they purchased has been registered, titled and tagged pursuant to the Oklahoma Vehicle License and Registration Act, 47 O.S. 2001, § 1102 et seq. See, 2009 Form 567-B.

6. Protestants' protest was stayed pending final disposition of certain randomly selected test cases representing the models manufactured by Ruff & Tuff.

7. A hearing was held on September 29, 2010, in the Ruff & Tuff test cases to receive evidence regarding the technical aspects of the vehicles and the Division's reasoning for disqualifying the vehicles. OTC Orders, *Statement of the Case*, ¶ 7.

8. In each of the test cases, the electric motor vehicle property had been registered, titled and tagged pursuant to the Oklahoma Vehicle License and Registration Act. OTC Orders, *Findings of Fact*, ¶ 7.

9. Ruff & Tuff manufactured electric motor vehicles qualify for the Oklahoma income tax credit for investment in qualified electric motor vehicle property. OTC Orders, *Analysis of the Evidence*.

10. The Division audited Protestants' 2009 Oklahoma income tax return, disallowed the credit for investment in qualified electric motor vehicle property in the amount of $460.00 and by adjustment letter dated August 5, 2010, notified Protestants that their income tax refund in the amount of $1,500.00 had been reduced to $1,040.00. Note 5.

11. Protestants filed a timely written protest to the proposed letter of adjustment and requested a hearing. Note 5.

12. Protestants' counsel waived oral argument with respect to the *Motion*.

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[5] Included as part of the protest file of which official notice is hereby taken. *OAC*, 710:1-5-36.

[6] Evidence by official notice. *OAC*, 710:1-5-36. All references shall be to the OTC Orders in the Ruff & Tuff "Test Cases".

ISSUE AND CONTENTIONS

The issue propounded by the *Motion* is whether an otherwise qualified electric motor vehicle is required to be registered as a vehicle (titled and tagged) in order to qualify for the income tax credit for investments in qualified electric motor vehicle property.

In the *Motion*, the Division contends that only those qualified electric motor vehicles that can be legally operated on street and highways are eligible for the subject income tax credit. In support of this contention, the Division argues that the term "motor vehicle" as used in the operative statute refers to a vehicle that is registered, title and tagged since "qualified electric motor vehicle property" is in essence defined as a motor vehicle that is manufactured principally for use on streets and highways.

In the *Response*, Protestants contend that the *Motion* violates Protestants' procedural due process rights and should be denied. In support of this contention, Protestants argue that the Division is presenting a new argument; one that has not been briefed nor evidence offered in support thereof in the previous hearing, for the disqualification of the tax credit after the issuance of a contrary final order of the Commission. Protestants further contend that the *Motion* violates procedural rules applicable to the Commission and should be denied. In support of this contention, Protestants argue that the options available to the parties after a ruling by an administrative law judge are set forth in the procedural rules of the Commission, and none of the provisions permit the filing of a request for ruling; alleging new arguments, subsequent to the issuance of a final order by the Commission. Protestants further contend that qualified electric motor vehicle property does not have to be tagged and titled in order to qualify for the subject credit. In support of this contention, Protestants argue that the definition of "qualified electric motor vehicle property" in the operative statute does not require the vehicle to be registered, titled and tagged. Protestants further argue that since § 2357.22 does not reference Title 47 there is no evidence the legislature intended to require the vehicle to be registered, titled and tagged. Further, Protestants argue that § 2357.22 only requires that the vehicles not be manufactured principally for use off the street and highways which does not mean that the vehicles must be used on the streets and highways, legally or otherwise.

In the *Reply*, the Division contends that Protestants' claim to procedural due process violations are groundless as the very procedures employed by this proceeding accord Protestant due process. The Division further contends that the filing of its *Motion* does not violate the Tax Commission procedural rules. In support of this contention, the Division argues that the *Order* issued June 30, 2011 disposes of this argument. The Division further argues that not all issues with respect to the eligibility of Ruff & Tuff vehicles for the income tax credit were tried in the "test cases", nor was it contemplated that all issues would be tried in the "test cases" and Protestants cannot credibly claim to the contrary. Further, the Division contends that "qualified electric motor vehicle property" are "vehicles" under Oklahoma law, and must be tagged and registered to be operated on Oklahoma's streets and highways. In support of this contention, the Division argues that the plain language of the operative statute defines "qualified electric motor vehicle property" as a "motor vehicle" and all motor vehicles are required to be registered, titled and tagged.

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. Supp. 2002, § 207.

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

3. An income tax is imposed upon the Oklahoma taxable income of every resident or nonresident individual. 68 O.S. 2001, § 2355(A). "Oklahoma taxable income" is defined to mean "taxable income' as reported (or as would have been reported by the taxpayer had a return been filed) to the federal government, and in the event of adjustments thereto by the federal government as finally ascertained under the Internal Revenue Code, adjusted further as hereinafter provided." 68 O.S. 2001, § 2353(12).

4. The provision of the Act at issue is the credit for investment in qualified electric motor vehicle property found at § 2357.22[8] 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

[7] 68 O.S. 2001, § 2351 et seq.

[8] 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.

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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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> 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.[9]

5. "Deductions [and credits against tax] are a matter of legislative grace rather than judicial intervention." ***Flint Resources Company v. Oklahoma Tax Commission***, 1989 OK 9, 780 P.2d 665, 673. In order to be allowed, authority for the deduction sought must be clearly expressed. ***Home-State Royalty Corporation v. Weems***, 1935 OK 1043, 175 Okla. 340, 52 P.2d 806 (1935). None may be allowed in absence of a statutory provision therefor. Id. See ***New Colonial Ice Co. v. Helvering***, 292 U.S. 435, 440, 54 S.Ct. 788, 78 L.Ed. 1348 (1934).

6. Words of a statute are generally assumed to be used by the Legislature as having the same meaning as attributed to them in ordinary and usual parlance. ***Neer v. Oklahoma Tax Commission***, 1999 OK 41, 982 P.2d 1071, corrected. When common words are used in statutes, principles of statutory construction require that the words be given their common and ordinarily accepted meaning. ***In re Skaggs***, 196 B.R. 865 (W.D.Okla. 1996). The words of a statute may not be construed in a manner as to defeat statutory intent. ***McNeill v. City of Tulsa***, 1998 OK 2, 953 P.2d 329. The primary goal of rules of statutory construction is to ascertain the legislature's intent; such intent must be gleaned from the statute as a whole in view of its general purpose and object. ***DeLaughter v. State ex rel. Oklahoma State Dept. of Mental Health & Substance Abuse Services***, 2001 OK 61, 47 P.3d 462.

7. "No person shall be deprived of life, liberty, or property, without due process of law." Okla. Const. art. 2, § 7. "Procedural due process of law contemplates a fair and open hearing before a legally constituted court or other authority with notice and an opportunity to present evidence and argument, representation by counsel, if desired, and information concerning the claims of the opposing party with reasonable opportunity to controvert them." ***Grasso v. Oklahoma Tax Commission***, 2011 OK CIV APP 37, ¶ 16, 249 P.3d 1258, 1262, citing *Jackson v. Independent School District No 16 of Payne County*, 1982 OK 74, ¶ 10, 648 P.2d 26, 30. Adequate notice shall specify the nature of the facts and evidence on which the agency proposes to take action. ***Camacho v. Bowling***, 562 F.Supp. 1012, 1020 (N.D.Ill. 1983).

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[9] Section 2357.22 was amended by Laws 2009, c. 308, § 1, eff. Jan. 1, 2010 by adding a new subsection (D) which provides:

> As used in this section, 'motor vehicle' means a motor vehicle originally designed by the manufacturer to operate lawfully and principally on street and highways.

8. The procedures relating to the filing of a motion for summary disposition are set forth in *OAC*, 710:1-5-38(b) which provides:

> A party may file a motion for summary disposition on any or all issues on the ground that there is no substantial controversy as to any material fact. The procedures for such motion are as follows:
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> (1) The motion for summary disposition shall be accompanied by a concise written statement of the material facts as to which the movant contends no genuine issue exists and a statement of argument and authority demonstrating that summary disposition of any or all issues should be granted. The moving party shall verify the facts to which such party contends no genuine controversy exists with affidavits and evidentiary material attached to the statement of material facts.
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> (2) If the protest has been set for hearing, the motion shall be served at least twenty (20) days before the hearing date unless an applicable scheduling order issued by the Administrative Law Judge establishes an earlier deadline. The motion shall be served on all parties and filed with the Office of the Administrative Law Judge.
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> (3) Any party opposing summary disposition of issues shall file with the Administrative Law Judge within fifteen (15) days after service of the motion a concise written statement of the material facts as to which a genuine issue exists and the reasons for denying the motion. The adverse party shall attach to the statement evidentiary material justifying the opposition to the motion, but may incorporate by reference material attached to the papers of the moving party. All material facts set forth in the statement of the movant which are supported by acceptable evidentiary material shall be deemed admitted for the purpose of summary disposition unless specifically controverted by the statement of the adverse party which is supported by acceptable evidentiary material.
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> (4) The affidavits that are filed by either party shall be made on personal knowledge, shall show that the affiant is competent to testify as to the matters stated therein, and shall set forth matters that would be admissible in evidence at a hearing. A party challenging the admissibility of any evidentiary material submitted by another party may raise the issue expressly by written objection or motion to strike such material.
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> (5) If the taxpayer has requested a hearing, the Administrative Law Judge will issue a notice to the parties scheduling the motion for a hearing limited to oral argument. If the

> taxpayer has not requested a hearing, the Administrative Law Judge will rule on the motion based on the submission of the parties, including the motion, opposition to the motion, and attachments thereto.
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> (6) If the Administrative Law Judge finds that there is no substantial controversy as to the material facts and that one of the parties is entitled to a decision in its favor as a matter of law, the Judge will grant summary disposition by issuing Findings of Fact, Conclusions of Law, and Recommendations. Such Findings of Fact, Conclusions of Law, and Recommendations are subject to review by the Commission pursuant to *OAC* 710:1-5-10, 710:1-5-40 and 710:1-5-41. If a motion for summary disposition is denied, the Administrative Law Judge will issue an order denying such motion.
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> (7) If the Administrative Law Judge finds that there is no substantial controversy as to certain facts or issues, the Judge may grant partial summary disposition by issuing an order which specifies the facts or issues which are not in controversy and directing that the action proceed for a determination of the remaining facts or issues. If a hearing of factual issues is required, evidentiary rulings in the context of the summary procedure shall be treated as rulings in limine. Any ruling on partial summary disposition shall be incorporated into the Findings of Fact, Conclusions of Law, and Recommendations issued at the conclusion of the proceedings before the Administrative Law Judge.[10]

9. All vehicles, unless provided otherwise by statute[11], are required to be registered, titled and tagged. 47 O.S. 2001, §§ 1115(B)(1); 1113(A)(1) and 1105(B). See 47 O.S. 2001, § 1103.[12] A "Vehicle" is defined by the Oklahoma Vehicle License and Registration Act[13] to mean "any type of conveyance or device in, upon or by which a person or property is or may be transported from

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[10] Amended at 26 Ok Reg 2320, eff. June 25, 2009.

[11] Vehicles known and commonly referred to as "minibikes" and other similar trade names; golf carts; go-carts; and other motor vehicles, except motorcycles, which are manufactured principally for use off the street and highways shall not be registered under the provisions of the Oklahoma Vehicle License and Registration Act, or be permitted to be operated on the streets or highways of this state, except as provided for in § 11-1116 of Title 47, and transfers and sales of such vehicles shall be subject to sales tax and not motor vehicle excise taxes. 47 O.S. 2001, § 1151(E).

[12] This section provides in pertinent part:

> It is the intent of the Legislature that the owner or owners of every vehicle in this state shall possess a certificate of title as proof of ownership and that every vehicle shall be registered in the name of the owner or owners thereof. * * * Such registration and license fees shall apply to every vehicle operated upon, over, along or across any avenue of public access within this state and when paid in full, shall be in lieu of all other taxes, general and local, unless otherwise specifically provided.

[13] Note 3.

one location to another upon the avenues of public access within the state." 47 O.S. Supp. 2008, § 1102(38).

The License and Registration Act distinguishes a "low-speed electrical vehicle" from a "vehicle" by definition. 47 O.S. Supp. 2008, § 1102(15). A "low-speed electrical vehicle" is defined to mean "any four-wheeled electrical vehicle that is powered by an electric motor that draws current from rechargeable storage batteries or other sources of electrical current and whose top speed is greater than twenty (20) miles per hour but not greater than twenty-five (25) miles per hour and is manufactured in compliance with the National Highway Traffic Safety Administration standards for low-speed vehicles in 49 C.F.R. 571.500." Id.

The Oklahoma Sales Tax Code[14] and rules of the Oklahoma Tax Commission[15] also distinguish a "low-speed electrical vehicle" from a "vehicle". The Oklahoma Sales Tax Code specifically exempts from sales tax "[t]he sale of low-speed or medium speed electrical vehicles on which the Oklahoma Motor Vehicle Excise Tax * * * has been or will be paid". 68 O.S. Supp. 2008, § 1355(10). Added by Laws 2001, c. 243, § 5, eff. Nov. 1, 2001. The rule provides that a low-speed electrical vehicle "may be titled and registered at the option of the owner, with the registrant paying excise tax, rather than sales tax. *OAC*, 710:60-3-115(a).

10. This case is separate and distinct from the Ruff & Tuff "test cases" and presents an additional issue not addressed by those cases. The "test cases" and all similarly situated taxpayers' cases have been closed and the income tax credits have been granted. The current issue is before the Commission by way of a motion for summary disposition wherein the Division alleges there is no substantial controversy as to any material fact and the Division is entitled to a decision in its favor as a matter of law. Protestants were permitted in accordance with *OAC*, 710:1-5-38 to file a response to the *Motion* and to controvert any material fact. The procedural rules of the Commission have been followed and Protestants have been afforded due process.

11. The language of § 2357.22(C) providing for the subject tax credit does not include any requirement related to the use of the qualified electric motor vehicle property in which the investment is made. The clarification of the definition of "motor vehicle" added in subsection (D) effective January 1, 2010 imposes a requirement related to the design of the vehicle and does not impose any requirement related to the use of the vehicle. Eligibility for the subject tax credit does not hinge on whether the vehicle may be legally operated on the streets and highways of the state.

ORDER

The Oklahoma Tax Commission orders that this protest be sustained

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-

[14] 68 O.S. 2001, § 1350 et seq., as amended.

[15] See *OAC*, 710:60-3-115. Added at 26 Ok Reg 2344; eff 6-25-09.

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."