

**JURISDICTION:** OKLAHOMA TAX COMMISSION  
**CITE:** 2012-07-24-02 / NON-PRECEDENTIAL  
**ID:** P-10-1503-H  
**DATE:** JULY 24, 2012  
**DISPOSITION:** DENIED  
**TAX TYPE:** SALES  
**APPEAL:** NO APPEAL TAKEN

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPANY (“Protestant”) appears through its Vice President, VP. The Ad Valorem Division (“Division”), Oklahoma Tax Commission, appears through OTC ATTORNEY, Senior Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

### PROCEDURAL HISTORY

On November 3, 2010, the protest file was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*<sup>1</sup> and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.<sup>2</sup>

On December 2, 2010, OTC ATTORNEY filed an Entry of Appearance as Counsel for the Division. On December 10, 2010, a letter was mailed to the Protestant stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-10-1503-H. The letter also advised the Protestant 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*.<sup>3</sup>

On January 19, 2011, the Notice of Prehearing Conference was mailed to the last-known address of VP, setting the prehearing conference for February 7, 2011, at 10:00 a.m.<sup>4</sup>

On February 7, 2011, the prehearing conference was held as scheduled. OTC ATTORNEY appeared via telephone. VP appeared not. On February 10, 2011, an Application for Stay of Proceedings (“Application”) was filed by VP with the Court Clerk<sup>5</sup> on the grounds that “...Senate Bill 935 before the First Session of the 53<sup>rd</sup> Legislature (2011) ... if adopted, would render Taxpayer eligible and entitled to receive the exemptions, the denial of which are

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<sup>1</sup> OKLA. STAT. ANN. tit. 68, § 201 *et seq.* (West 2001).

<sup>2</sup> OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

<sup>3</sup> *Id.*

<sup>4</sup> OKLA. STAT. ANN. tit. 68, § 208 (West Supp. 2012). The notice was mailed to the VP at ADDRESS.

<sup>5</sup> OKLA. ADMIN. CODE § 710:1-5-10(c)(2) (June 25, 1999).

the subject of this Protest.”<sup>6</sup> On February 11, 2011, a letter was mailed granting the Application as more fully set forth therein.

On July 1, 2011, a letter was received from OTC ATTORNEY advising that SB 935 had been adopted by the legislature, but the legislation could not affect the pending case because the provisions of Section 2902(C)(9)<sup>7</sup> did not take effect until January 1, 2012. On July 19, 2011, a letter was mailed to the parties directing a status report be filed on or before August 1, 2011, advising how they wished to proceed.

On October 26, 2011, a letter was mailed to VP and OTC ATTORNEY advising that the status report due on or before August 1, 2011, had not been filed and the parties were directed to file a status report on or before November 9, 2011. The parties did not file the required status report.

On January 4, 2012, the Division’s *Motion for Summary Disposition* (“*Motion*”) was filed with the Court Clerk. The Verification was not attached to the Division’s *Motion*, nor was any evidentiary materials attached to the *Motion*.<sup>8</sup> On January 5, 2012, a letter was mailed acknowledging the filing of the Division’s *Motion* and advising the Protestant could file a response to the Division’s *Motion* on or before January 19, 2012.

On April 9, 2012, a letter was mailed advising the Protestant had not filed a response, the record in this matter was closed, and the Division’s *Motion* was submitted for decision as of April 9, 2012.

### **DIVISION’S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO CONTROVERSY**

1. The Division’s *Motion* states, “All relevant facts are established by the Protest file herein.” The Division’s *Motion* goes on to state,<sup>9</sup> as follows, to-wit:

On August 25, 2010, OTC denied Protestant’s Application for Five Year Manufacturing Exemption (XM 2) for failure to maintain payroll, as required by 68 O.S. § 2902.C.4(a). On October 7, 2010, Protestant’s written protest,

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<sup>6</sup> See Application for Stay of Proceedings filed herein.

<sup>7</sup> Laws 2011, c. 383, § 1, eff. Jan. 1, 2012:

An entity which has been granted an exemption for a time period which included calendar year 2009 but which did not meet the base-line payroll requirements of subparagraph a of paragraph 4 of this subsection during calendar year 2009, shall be allowed an exemption, to begin on January 1 of the first calendar year after the effective date of this act, for the number of years, including calendar year 2009, remaining in the entity’s five-year exemption period, provided such entity attains or increases payroll at or above the base-line payroll established for the exemption which was in force during calendar year 2009.

<sup>8</sup> See OKLA. ADMIN. CODE § 710:1-5-38(b)(1) (June 25, 2009).

<sup>9</sup> *Motion* at 1.

received by OTC on October 12, 2010, conceded: "... Due to the unprecedented decline in the housing and construction markets in 2009 and the subsequent decrease in demand for our manufactured products, *we experienced an unexpected decrease in payroll during the 2009 calendar year*" (emphasis supplied). Protestant subsequently filed, on February 10, 2011, an "Application for Stay of Proceedings", based upon the pendency of Senate Bill 935 before the First Session of the 53<sup>rd</sup> Oklahoma Legislature, upon the assumption that the legislation, if adopted, would render Protestant eligible and entitled to receive the exemption denied. Without opposition, the Protest was stayed, pending the end of the legislative session. On July 1, 2011, counsel for OTC advised the Honorable Administrative Law Judge and Protestant's representative that Senate Bill 935, as adopted, did not entitle Protestant to the exemption denied, the operative "saving provision" does not take effect until January 1, 2012, and therefore, did not affect the Protest. On July 19, 2011, the Honorable Administrative Law Judge directed Protestant to advise by August 1, 2011, how it wished to proceed, in light of the provisions of Senate Bill 935, as adopted. Protestant did not respond. On October 26, 2011, the Honorable Administrative Law Judge directed Protestant to advise by November 9, 2011, how it wished to proceed, in light of the provisions of Senate Bill 935, as adopted. Protestant did not respond. It is undisputed, per the contents of the Protest file of this Tribunal, that Protestant did not meet the payroll maintenance requirement of 68 O.S. § 2902.C.4(a).

#### **ADDITIONAL FINDINGS OF MATERIAL FACTS AS TO WHICH THERE IS NO CONTROVERSY**

Upon review of the court file, the protest letter, the *Notice*, and the Division's *Motion*, the undersigned finds:

2. On August 15, 1988, the Protestant was formed as a "Domestic For Profit Business Corporation."<sup>10</sup> The Protestant's facility located in the City of CITY, COUNTY, Oklahoma ("Manufacturing Facility") manufactures "Commercial HVAC Equipment."<sup>11</sup>

3. On March 9, 2010, Protestant timely filed its Application (XM 2) for Five-Year Ad Valorem Tax Exemption for Oklahoma Manufacturing or Research & Development Facilities ("Application") with the COUNTY Assessor's Office for assets acquired in 2008.<sup>12</sup>

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<sup>10</sup> The Administrative Law Judge is taking judicial notice of the Oklahoma Secretary of State's website at <http://www.sos.ok.gov> to complete the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999).

<sup>11</sup> *Id.* The court file contains an audit packet which was forwarded by the Division as part of the protest file on this matter.

<sup>12</sup> *Id.* The Application indicates the Manufacturing Facility is a "Research and Development facility" (new product development, product improvement and new product features).

4. The Application reflected a decrease in net payroll from the baseline (2007)<sup>13</sup> in the 2009 calendar year,<sup>14</sup> as follows, to-wit:

2009	\$35,875,563.00
2007	<u>\$37,904,737.00</u> <sup>15</sup>
	\$ (2,029,174.00)

5. On April 28, 2010, the COUNTY Board of Equalization and COUNTY Assessor approved the Application for 2010.<sup>16</sup>

6. On June 15, 2010, the Division received the Notice of Approval by the COUNTY Board of Equalization and COUNTY Assessor, along with documentation thereto.<sup>17</sup>

7. On August 25, 2010, the Division mailed letters to the Protestant<sup>18</sup> and the COUNTY Assessor stating the Application had been denied, "Failed to Maintain Payroll" pursuant to Tax Commission Rule 710:10-7-15.<sup>19</sup>

8. On October 12, 2010, the Division received a timely filed protest to the denial of the Application,<sup>20</sup> stating in pertinent parts, as follows, to-wit:

Due to the unprecedented decline in the housing and construction markets in 2009 and the subsequent decrease in demand for our manufactured products, we experienced an unexpected decrease in payroll during the 2009 calendar year. On the basis of this decrease in payroll, the Commission denied our [Application] with respect to 2008 acquisitions.

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* See copy of Employment and Payroll Compliance for Oklahoma Ad Valorem Manufacturing Exemption.

<sup>15</sup> *Id.* The information received by the Division from Oklahoma Employment Security Commission for 2007 reflects \$37,905,041.00, not \$37,904,737.00. The difference amounts to \$304.00 more reflected on the Protestant's Employment and Payroll Compliance for Oklahoma Ad Valorem Manufacturing Exemption Form.

<sup>16</sup> *Id.* See Notice of Approval.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* OKLA. STAT. ANN. tit. 68, § 208 (West Supp. 2012). The Division mailed the letter to CONTACT, ADDRESS. CONTACT was designated on the Application as the Protestant's contact.

<sup>19</sup> *Id.* OKLA. ADMIN. CODE 710:10-7-15 (June 25, 2006). The Division verified payroll through information received from the Oklahoma Employment Security Commission. See attachment to denial letter dated August 25, 2010.

<sup>20</sup> *Id.*

The taxpayer maintains that the 2009 payroll reduction is temporary and the statute should be interpreted to allow the taxpayer to retain the exemption as long as they restore the payroll amounts to the level required to maintain the exemption. Such an interpretation would put the taxpayer on more equal footing with respect to a company who had requested the exemption in previous years, but had not yet reached the required payroll increase. Under the statute, they would be allowed a three year window to achieve the increase as long as they included a signed affidavit. Under the Commission's current interpretation, that taxpayer would remain eligible. However, in our case we are permanently losing the exemption solely because we had exceeded the level of payroll increase in the first year.

### CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.<sup>21</sup>
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.<sup>22</sup>
3. 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 ("MSD Rule").<sup>23</sup> The procedures for such motion are as follows:

(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.*

(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.

(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*

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<sup>21</sup> OKLA. STAT. ANN. tit. 68, § 207 (West 2001) and OKLA. ADMIN. CODE § 710:1-5-38(b) (June 25, 2009).

<sup>22</sup> OKLA. STAT. ANN. tit. 75, § 250 *et seq.* (West 2002).

<sup>23</sup> *See* Note 21, *supra*.

*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.*

(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.

(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.

(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.

(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. (Emphasis added.)

4. All property in this state, whether real or personal, except that which is specifically exempt by law, and except that which is relieved of ad valorem taxation by reason of the payment of an in lieu tax, shall be subject to ad valorem taxation.<sup>24</sup>

5. All initial applications<sup>25</sup> (subject to exemptions not applicable here) for any exemption for a new, acquired or expanded manufacturing facility shall be granted only if:

- a. there is a net increase in annualized payroll of at least Two Hundred Fifty Thousand Dollars (\$250,000.00) if the facility is located in a county with a population of fewer than seventy-five thousand (75,000), according to the most recent federal decennial census, while maintaining or increasing payroll in subsequent years, or at least One Million Dollars (\$1,000,000.00) if the facility is located in a county with a population of seventy-five thousand (75,000) or more, according to the most recent federal decennial census, while maintaining or increasing payroll in subsequent years...

The Tax Commission shall verify payroll information through the Oklahoma Employment Security Commission by using reports from the Oklahoma Employment Security Commission for the calendar year immediately preceding the year for which initial application is made for base-line payroll, which must be maintained or increased for each subsequent year; provided, a manufacturing facility shall have the option of excluding from its payroll, for purposes of this section, payments to sole proprietors, members of a partnership, members of a limited liability company who own at least ten percent (10%) of the capital of the limited liability company or stockholder-employees of a corporation who own at least ten percent (10%) of the stock in the corporation. A manufacturing facility electing this option shall indicate such election upon its application for an exemption under this section. Any manufacturing facility electing this option shall submit such information as the Tax Commission may require in order to verify payroll information. Payroll information submitted pursuant to the provisions of this paragraph shall be submitted to the Tax Commission and shall be subject to the provisions of Section 205 of this title, and

- b. the facility offers, or will offer within one hundred eighty (180) days of the date of employment, a basic health benefits plan to the full-time-equivalent employees of the facility, which is determined by the Department of Commerce to consist of the elements specified in subparagraph b of paragraph 1 of subsection A of Section 3603 of this title or elements substantially equivalent thereto.

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<sup>24</sup> OKLA. STAT. tit. 68, § 2804 (West 2001).

<sup>25</sup> OKLA. STAT. tit. 68, § 2902(C)(4)(a) and (b) (West Supp. 2010).

6. All persons claiming or administering the manufacturing exemption provided for by the Constitution and the laws of this State shall strictly comply with the law and this Subchapter, under penalty of law, to the end that the objectives of the law be accomplished.<sup>26</sup>

7. Qualifying manufacturing concerns owning facilities engaged in manufacturing in Oklahoma on the first day of January may file an application for ad valorem manufacturing exemption on or before March 15, or as otherwise provided by law.<sup>27</sup>

8. The county assessor shall examine each application for the manufacturing exemption from ad valorem taxation and shall determine whether the facility is exempt under the law.<sup>28</sup>

9. The assessor shall complete the assessor's portion of each application, whether approved or rejected, and shall consecutively number each completed application received, whether approved or rejected, and shall immediately forward a copy of each application, whether approved or rejected, to the Oklahoma Tax Commission Ad Valorem Division.<sup>29</sup>

10. If the Tax Commission determines that an ad valorem manufacturing exemption has been erroneously or unlawfully granted to a manufacturing concern, in whole or in part, it shall notify the appropriate county assessor, who shall, after notice as required by law has been given, immediately value and assess the property and place the property on the tax rolls for Ad Valorem taxation.<sup>30</sup>

11. The Tax Commission shall mail a copy of the notice pursuant to the terms of 68 O.S. § 208 to the applicant at the mailing address shown on the application. The copy shall notify the applicant of his right to protest the Commission's determination.<sup>31</sup>

12. Within sixty (60) calendar days after the mailing of the notice, the applicant may file with the Oklahoma Tax Commission, a written protest, under oath, signed by himself or his duly authorized representative, in the manner and subject to the requirements set out in 68 O.S. § 207 of the *Uniform Tax Procedure Code*.<sup>32</sup> A copy of the protest shall be mailed or delivered by the applicant to the county assessor.<sup>33</sup>

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<sup>26</sup> OKLA. ADMIN. CODE § 710:10-7-3.

<sup>27</sup> OKLA. ADMIN. CODE § 710:10-7-5(c) (July 1, 2008).

<sup>28</sup> OKLA. ADMIN. CODE § 710:10-7-11(a) (June 25, 2006).

<sup>29</sup> OKLA. ADMIN. CODE § 710:10-7-11(b) (June 25, 2006).

<sup>30</sup> OKLA. ADMIN. CODE § 710:10-7-15(a) (June 25, 2006).

<sup>31</sup> OKLA. ADMIN. CODE § 710:10-7-15(b) (June 25, 2006).

<sup>32</sup> See Note 1, *supra*.

<sup>33</sup> OKLA. ADMIN. CODE § 710:10-7-15(c) (June 25, 2006).

**I. THE DIVISION'S FAILURE TO COMPLY WITH THE MSD RULE IS NOT FATAL TO THE MOTION**

The provisions of the MSD Rule<sup>34</sup> provide in pertinent parts, as follows, to-wit:

*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. (Emphasis added.)*

The Division's *Motion*, as filed, does not comply with the MSD Rule. The Division's *Motion* states, "All relevant material facts are established by the Protest file herein."<sup>35</sup> The Division's *Motion* does not have a *Verification* executed by a representative of the Division attached, nor does the *Motion* have evidentiary material attached thereto.

However, the failure to comply with the MSD Rule is not fatal to the Division's *Motion* for the following reasons, to-wit:

- The Protestant did as the Division pointed out in the *Motion*, concede that "...we experienced an unexpected decrease in payroll during the 2009 calendar year."<sup>36</sup>
- In the Division's July 1<sup>st</sup> letter the Protestant was informed, "The Division is prepared to proceed by Motion for Summary Disposition, if the Protestant wishes to contest the Division's interpretation of the amended statute."<sup>37</sup>
- The Protestant did not file a response to the Division's *Motion* disputing any material facts in this matter, nor the Division's interpretation of the amended statute.

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<sup>34</sup> See Note 21, *supra*.

<sup>35</sup> *Motion* at 1.

<sup>36</sup> *Id.* See Protest Letter at 1 filed herein.

<sup>37</sup> *Id.* See letter filed July 1, 2011, herein.

## II. STANDARD REVIEW

An order that grants summary relief, in whole or in part, disposes solely of law questions.<sup>38</sup> Summary judgment should be granted only if it is perfectly clear that there is no material fact at issue. For summary judgment to be appropriate, the trial court must not only find there is no substantial controversy as to any material fact, but also that reasonable people could not reach differing conclusions from the undisputed facts.<sup>39</sup> A fact is material for purposes of summary judgment if proof of the fact would establish or refute an essential element of a cause of action or a defense.<sup>40</sup>

## III. THE DIVISION'S DENIAL OF THE PROTESTANT'S APPLICATION IS A SETTLED QUESTION OF LAW

The Protestant has conceded that the Application reflects on its face it failed to maintain or increase its payroll during the 2009 calendar year, but requests ameliorating factors, which are equitable in nature, should be considered in this matter.<sup>41</sup>

The Tax Commission Rules require, "All persons claiming or administering the manufacturing exemption provided for by the Constitution and the laws of this State shall strictly comply with the law and this Subchapter, under penalty of law, to the end that the objectives of the law be accomplished."<sup>42</sup> The ameliorating factors cited by the Protestant due to the current economic crisis are equitable in nature and are not grounds for waiver of the payroll requirements contained in Section 2902(C)(4)(a) of Title 68.<sup>43</sup>

Based upon the record, reasonable minds would reach the same conclusion, that there is no substantial controversy as to the material facts and that the Division is entitled to a decision in its favor as a matter of law.

## DISPOSITION

It is the ORDER of the undersigned OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the Division's *Motion* should be granted as a matter of law.

OKLAHOMA TAX COMMISSION

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<sup>38</sup> *Ashikian v. Oklahoma Horse Racing Com'n*, 2008 OK 64, 188 P.3d 148.

<sup>39</sup> *Fulton v. People Lease Corporation*, 2010 OK CIV APP 84, 241 P.3d 255. (Citations omitted.)

<sup>40</sup> *Winston v. Stewart & Elder, P.C.*, 2002 OK 68, 55 P.3d 1063.

<sup>41</sup> See Note 36, *supra*.

<sup>42</sup> See Note 26, *supra*.

<sup>43</sup> See Note 25, *supra*. See also OTC Order No. 2009-12-03-12 (December 3, 2009).

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.”