

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2012-08-21-36 / NON-PRECEDENTIAL
ID: P-11-142-K
DATE: AUGUST 21, 2012
DISPOSITION: DENIED
TAX TYPE: AIRCRAFT EXCISE
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestant, LLC is represented by ATTORNEY 1, ATTORNEY 2 and ATTORNEY 3, Attorneys at Law, **FIRM**. The Compliance Division of the Oklahoma Tax Commission (“Division”) is represented by OTC ATTORNEY 1, First Deputy General Counsel, and OTC ATTORNEY 2 and OTC ATTORNEY 3, Assistant General Counsels, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

On July 23, 2010, Protestant filed an *Application for Registration of Aircraft and Report of Excise Tax* for calendar year 2010; Form 13-34, with the Taxpayer Assistance Division reporting excise tax was not applicable to the purchase of a Cessna 560XL. An audit of Protestant’s records was performed by the Division. As a result of the audit, the Division by letter dated November 17, 2010, proposed the assessment of aircraft excise tax, penalty and interest against Protestant in the aggregate amount of \$388,171.86. Protestant filed a timely written protest to the proposed assessment. The protest included a request for oral hearing.

On February 11, 2011, the Division referred the protest to the Office of the Administrative Law Judges for further proceedings consistent with the Uniform Tax Procedure Code¹ and the Rules of Practice and Procedure before the Office of the Administrative Law Judges². The protest was docketed as Case No P-11-142-K and assigned to ALJ, Administrative Law Judge.³

A pre-hearing conference was scheduled for March 14, 2011, by *Prehearing Conference Notice* issued February 25, 2011.⁴ A *Status Report in Lieu of Prehearing Conference* was filed March 4, 2011. By letter dated March 7, 2011, the parties were directed to file a status report on or before May 13, 2011. An *Agreed Scheduling Order and Order Setting Hearing* was filed April 22, 2011.

The *Division’s Motion for Summary Disposition* and *Division’s Appendix in support of its Motion for Summary Disposition* (“*Motion*”) containing Exhibits A through D, F through L, N through P, R and T, and Tabs 1 through 7 were filed July 14, 2011. An *Interim Status Report* was also filed by the Division requesting that the remainder of the scheduling order previously entered

¹ 68 O.S. 2011, § 201 et seq., as amended.

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

³ OAC, 710:1-5-22(b).

⁴ OAC, 710:1-5-28.

be vacated pending a ruling on the *Motion*. By letter dated July 25, 2011, the parties were notified that the remaining scheduling dates contained in the scheduling order and the hearing scheduled for August 18, 2011, were cancelled pending a ruling on the *Motion*. The letter also advised that Protestant was permitted to file a response to the *Motion* on or before July 29, 2011. *Protestant's Response to Division's Motion of Summary Disposition* ("Response") with Exhibits 1 through 11 attached thereto was filed July 29, 2011.

A hearing limited to oral argument pursuant to OAC, 710:1-5-38(b)(5) was scheduled for December 15, 2011, by *Notice of Hearing* issued November 16, 2011. Oral argument was held as scheduled. Pursuant to the Court's directive, the parties were allowed thirty (30) days to supplement the record and file any objections. On January 11, 2012, Protestant filed the *Affidavit of AFFIANT* attesting to LESSEE LLC, LLC's continuing effort to obtain a Part 135 Certificate from the Federal Aviation Administration. On January 17, 2012, *Division's Objection to the Supplemental Evidentiary Material Offered by Protestant and Motion to Strike same from the Record* was filed. *Protestant's Response to Division's Objection to Supplemental Evidentiary Material* was filed January 25, 2012. An *Order Granting Motion to Strike* was issued February 22, 2012, sustaining the Division's objection. Further, the record was closed and the protest was submitted for decision by *Order Granting Proposal for Submission of Issue for Decision by Summary Disposition* issued February 22, 2012.

Pursuant to the superintendent authority of the Court, the record was reopened and a hearing limited to receiving evidence and argument with respect to the FAA's due diligence procedures for obtaining a Part 135 Certificate was scheduled for May 8, 2012, by *Order Reopening Record and Scheduling a Limited Hearing* issued April 19, 2012. *Division's Position Statement and Supplemental Evidentiary Material in Response to the Tribunal's April 19, 2012 Order Reopening Record* was filed May 3, 2012. *Protestant's Unopposed Motion for Continuance* was granted by *Order Granting Protestant's Unopposed Motion for Continuance* issued May 8, 2012, wherein the hearing was stricken and continued to May 17, 2012 and the briefing deadline was continued to May 14, 2012. *Protestant's Position Letter and Brief Addressing Court's April 19, 2012, Order Reopening Record* was filed May 14, 2012.

The limited hearing was held as scheduled. Upon conclusion of the hearing, the record was reclosed and the protest was submitted for decision.

FINDINGS OF FACT

Upon review of the file and records, including the recordings of the limited hearings; the Division's *Motion*, exhibits and tabs; Protestant's *Response* and exhibits; and the further pleadings of the parties, the undersigned finds:

1. Protestant purchased a Cessna Citation XLS+ aircraft from Aircraft Company of CITY, STATE for a total cost of \$10,555,825.00. Exhibit A to the *Motion*.
2. On or about July 1, 2010, Protestant took possession of the aircraft and has based the

aircraft at Airport in CITY, Oklahoma since obtaining possession. Tab 1 and Exhibit B to the *Motion*.

3. Protestant leases the aircraft on a nonexclusive basis to LESSEE LLC (“LESSEE LLC”) for use predominantly in the conduct of its business. Exhibit D to the *Motion*.

4. LESSEE LLC originally operated as an over-the-road contract freight carrier, but has been repurposed as an operator of charter flights. Exhibit P to the *Motion*; Exhibit 1 to the *Response*, at pp. 49.

5. In late May or early June, 2010, LESSEE LLC initially applied for a Part 135 Air Carrier Certificate with the Federal Aviation Administration (“FAA”). Exhibit B to the *Motion*.

6. On July 23, 2010, Protestant filed an *Application for Registration of Aircraft and Report of Excise Tax for Calendar Year 2010* (“*Application*”) with the Taxpayer Assistance Division of the Oklahoma Tax Commission reporting that excise tax was not applicable to the purchase or use of the subject aircraft. Exhibit G to the *Motion*.

7. The Division conducted an audit of the *Application* and Protestant’s records, and as a result thereof, the Division by letter dated November 17, 2010, proposed the assessment of aircraft excise tax, penalty and interest against Protestant in the aggregate amount of \$388,171.86. Exhibit H to the *Motion*.

8. Protestant timely protested the proposed assessment. Exhibit J to the *Motion*.

9. “It is undisputed that neither [Protestant] nor LESSEE LLC * * *, the lessee of the subject aircraft, possessed * * * a [Part 135] Certificate on the date of registration” of the aircraft. Protestant’s *Response*, pp. 1.

ISSUES AND CONTENTIONS

The issue presented for decision is whether an aircraft under lease by an applicant for a Part 135 Certificate at the time of registration is exempt from the levy of aircraft excise tax.

Protestant contends that the law does not require the aircraft to be used by a commercial airline at the time of registration as long as the aircraft is intended for use by a commercial airline as evidenced by the filing of an application for a Part 135 Certificate. In support of this contention, Protestant cites as persuasive authority Oklahoma Tax Commission Case No. P-92-468, and argues that the same result must be arrived at in this case since the facts of both cases are practically identical and the Commission has an obligation to apply the tax code uniformly to similarly situated taxpayers. Protestant further contends that the Division construction of the law completely abrogates the commercial airline exemption since it is impossible to register an aircraft under a Part 135 Certificate prior to a change in possession. In support of this contention, Protestant asserts that

the FAA due diligence procedures require the current title information and related leases of each aircraft to be operated by the part 135 applicant.⁵

The Division contends that the exemption does not apply to the use of the aircraft in Oklahoma since LESSEE LLC did not hold a Part 135 Certificate at the time the aircraft was registered. The Division explicitly argues that “the exemption is fairly clear and straightforward – it applies to, and therefore may only be used by, those persons and entities that already hold the status of ‘commercial airline’ prior to the acquisition of an aircraft.” Division’s *Motion*, pp. 23.

With respect to Protestant’s propositions in support of its protest, the Division argues that Case No. P-92-468 is not applicable because the relevant facts of the two cases are different. The Division asserts that in the 92 case it was undisputed that the aircraft was used by a commercial airline and there wasn’t an issue regarding who had “operational control”⁶ of the aircraft. The Division maintains that in this case it has been established that the aircraft was not intended to be used by a commercial airline at the time it was brought into Oklahoma as shown by the flight logs.

The Division further argues that its construction of the exemption follows legislative intent and does not create a practical or legal impossibility. In support of this argument, the Division asserts that its construction of the exemption prevents misuse and guarantees the aircraft will be used as the legislature intended.

CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter of law:

1. Jurisdiction of the parties and the subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S. 2011, § 221.
2. Aircraft excise tax is levied upon the transfer of legal ownership or use⁷ within this state of each aircraft⁸ that is to be registered with the FAA at a rate of three and one-fourth percent

⁵ In its protest to the proposed assessment, Protestant initially raised the “relation back doctrine” as a reason for sustaining the protest. This issue appears to have been abandoned by Protestant as “Protestant does not dispute that LESSEE LLC’s Part 135 Certificate, if granted, would not be retroactive to the date of application or the date of registration.” *Response*, II. Division’s Remaining Underlying Issues Are Immaterial, pp. 23.

⁶ Quotation marks original. Division’s *Motion*, pp. 18.

⁷ The term “use” is defined by the Aircraft Excise Tax Act (“Act”); 68 O.S. 2011, § 6001 et seq., to mean and include “the operation or basing of an aircraft on or from any airport in this state for a period of thirty (30) days or more”, but does not mean or include aircraft that are intended for exclusive use in another state which are stored in this state pending shipment to the other state, or aircraft that are retained in this state solely for fabrication, repair, testing, alteration, modification, refurbishing or maintenance. 68 O.S. 2011, § 6001(4). Added by Laws 1995, c. 337, § 12, emerg. eff. June 9, 1995. Amended by Laws 2000, c. 239, § 2, eff. July 1, 2000 by deleting the language “nor does the term ‘use’ include aircraft which are operating within this state pursuant to the terms of a lease, the lease value of which is subject to the provisions of the Oklahoma Sales Tax Code, Section 1350 et seq. of this title”.

⁸ Defined by the Act as “every self-propelled plane, airplane, helicopter, or balloon or sailplane manufactured by mass production or individually constructed or assembled, used, or designed for

(3¼%) of the purchase price of such aircraft. 68 O.S. 2011, § 6002. The tax is due at the time of the transfer of legal ownership or first registration in this state, and shall be collected at the time of the issuance of a certificate of registration for the aircraft. *Id.*

3. “Aircraft purchased or used by commercial airlines as defined by paragraph 2 of Section 6001 of this title” are exempt from the provisions of the Act. 68 O.S. 2011, § 6003(5). A “Commercial airline” is defined as “an air carrier, foreign air carrier or intrastate air carrier, as defined by Section 40102 of Title 49 of the United States Code, 49 U.S.C., Section 40102, and operating pursuant to Part 121 or 129 of Title 14 of the Code of Federal Regulations, 14 CFR, Part 121 or 129, or conducting scheduled or unscheduled services pursuant to Part 135 thereof”. 68 O.S. 2011, § 6001(2)⁹.

4. The fundamental rule and primary goal of statutory construction is to ascertain and give effect to legislative intent. *Rogers v. Quiktrip Corp.*, 2010 OK 3, 230 P.3d 853. The starting point for any inquiry into legislative intent is the language of the statute. *Redmond v. Cauthen*, 2009 OK CIV APP 46, 211 P.3d 233. When the words of a statute are plain and unambiguous, no occasion exists to employ the rules of construction, and the statute will be accorded its clear and definite meaning. *Id.*

Only where the legislative intent cannot be ascertained from a statute’s text, as when ambiguity or conflict with other statutes is shown to exist, may rules of statutory construction be invoked. *Rogers, supra*. The test for ambiguity in a statute is whether statutory language is susceptible to more than one reasonable interpretation. *YDF, Inc. v. Schlumar, Inc.*, 2006 OK 32, 136 P.3d 656.

In resolving an ambiguity in a statute, courts will look to the various provisions of the relevant legislative scheme to ascertain and give effect to the legislative intent and the public policy underlying that intent. *Wilhoit v. State*, 2009 OK 83, 226 P.3d 682, corrected. In the interpretation of statutes, courts do not limit their consideration to a single word or phrase in isolation to attempt to determine their meaning, but construe together the various provisions of relevant legislative enactments to ascertain and give effect to the legislature’s intention and will, and attempt to avoid unnatural and absurd consequences. *Tull v. Commissioners of Dept. of Public Safety*, 2008 OK CIV APP 10, 176 P.3d 1227. It is important in construing the Legislative intent behind a word in a statute to consider the whole act in light of its general purpose and objective, considering relevant portions together to give full force and effect to each. *Estes v. ConocoPhillips Co.*, 2008 OK 21, 184 P.3d 518. The words of a statute will be given their plain and ordinary meaning unless it is contrary to the purpose and intent of the statute when considered as a whole. *Stump v. Check*, 2007 OK 97, 179 P.3d 606. The subject matter

navigation or flight in the air or airspace, and subject to registration with the Federal Aviation Administration.” 68 O.S. 2011, § 6001(1).

⁹ Added by Laws 1995, c. 337, § 12, emerg. eff. June 9, 1995. Amended by Laws 1996, c. 344, § 2, eff. July 1, 1996 which prior thereto provided:

‘Commercial airline’ means an air carrier, foreign air carrier or intrastate air carrier, as defined by Section 40102 of Title 49 of the United States Code, 49 U.S.C., Section 40102, and operating pursuant to Part 121 or 129 of Title 14 of the Code of Federal Regulations, 14 CFR, Part 121 or 129, or conducting schedule services pursuant to Section 135.2 of Subpart A, Part 135 thereof.

and purpose of a statute are material to ascertaining the meaning of a word or phrase used and that language should be construed to be harmonious with the purpose of the act, rather than in a way which will defeat it. *Tull, supra*.

5. Tax statutes are penal in nature. *Williams v. Smith & Nephew, Inc.*, 2009 OK 36, 212 P.3d 484; *Globe Life and Accident Insurance Company v. Oklahoma Tax Commission*, 1996 OK 39, 913 P.2d 1322. Penal statutes are to be strictly construed. *Mid-Continent Pipeline Co. v. Crauthers*, 1954 OK 61, 267 P.2d 568. Strict construction with respect to a penal statute is that which refuses to extend the law by implication or equitable consideration and confines its operations to cases clearly within the letter of the statute, as well as within its spirit or reason. *State ex rel. Allen v. Board of Education of Independent School Dist. No. 74 of Muskogee County*, 1952 OK 241, 206 Okla. 699, 246 P.2d 368. Courts cannot enlarge the taxing act's ambit to make its provisions applicable to cases not clearly within the legislature's contemplation or to fill lacunae in the revenue law in a manner that would distort the enactment's plain language. *Globe, supra* at 1327.

6. "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).

7. Whether language of statute is ambiguous presents questions of law. *YDF, Inc., supra; State ex rel. Oklahoma Tax Commission v. Sun Co., Inc.*, 2009 OK 11, 222 P.3d 1046.

The principle of issue preclusion (previously known as collateral estoppel) operates to bar the same parties or their privies from re-litigating an issue of fact or law necessary to a court's judgment subsequent to a court deciding that issue in a suit brought upon a different claim. *Oklahoma Dept. of Public Safety v. McCrady*, 2007 OK 39, ¶ 7, 176 P.3d 1194, 1199. An issue is actually litigated and necessarily determined if it is properly raised in the pleadings, or otherwise submitted for determination, and judgment would not have been rendered but for the determination of that issue. *Id.* For invocation of issue preclusion there need not be a prior adjudication on the merits (as is often the case with *res judicata*) but only a final determination of a material issue common to both cases. *Id.* Issue preclusion is an affirmative defense and must be pleaded and proved. *Nealis v. Baird*, 1999 OK 98, ¶ 51, 996 P.2d 438, 458.

ANALYSIS

1. The language of the exemption is plain and unambiguous. The exemption applies to a person or entity established as a "commercial airline" at the time of registration of the aircraft. This conclusion is also drawn from the definition of "commercial airline" which explicitly provides "an air carrier * * * operating pursuant to * * * or conducting scheduled or unscheduled services pursuant to[.]" 68 O.S. 2011, § 6001(2). The Court is without authority to expand the exemption to

an applicant for a Part 135 Certificate.

2. The Division is not precluded by the decision in Case No. P-92-468 from litigating whether the commercial airline exemption applies to the purchase or use of an aircraft by an applicant for a Part 135 Certificate. First, this case does not involve the same parties as the 92 case. Second, the issue was not decided in the 92 case, but rather the Motor Vehicle Division of the Tax Commission conceded the issue. Third, subsequent to the decision in the 92 case, the language of the commercial airline exemption was changed and the definition of the term “use” was added to the Act.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the aircraft excise tax protest of Protestant, LLC be denied. It is further ORDERED that the amount in controversy, inclusive of any accrued and accruing interest, be fixed as the deficiency due and owing.

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.”