JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2012-08-28-05 / NON-PRECEDENTIAL**
ID: **P-11-475-K**
DATE: **AUGUST 28, 2012**
DISPOSITION: **DENIED**
TAX TYPE: **INCOME**
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 10th day of May, 2012, the Commission makes the following Findings of Fact and Conclusions of Law and enters the following order.

STATEMENT OF THE CASE

The Compliance Division of the Oklahoma Tax Commission audited Protestants' 2010 Oklahoma part-year resident income tax return, and disallowed the credit for employees in the aerospace sector claimed on the return in the amount of $5,000.00. As a result of the audit, the Division by letters dated April 12, 2011 and April 27, 2011, denied the refund claimed on the return in the amount of $2,210.00 and proposed the assessment of additional income tax in the amount of $523.00. Protestants filed a timely written protest to the proposed assessment.

On July 5, 2011, the protest was referred to the Office of Administrative Law Judges for further proceeding consistent with the Uniform Tax Procedure Code[1] and the Rules of Practice and Procedure Before the Office of Administrative Law Judges[2]. The protest was docketed as Case Number P-11-475-K and assigned to Kris D. Kasper, Administrative Law Judge.[3]

A pre-hearing conference was scheduled for September 20, 2011, by *Prehearing Conference Notice* issued August 24, 2011. Pursuant to the conference, the parties were directed to file a status report and proposed procedural schedule. Pursuant to the *Status Report and Request for Scheduling Order* filed October 21, 2011, a *Scheduling Order* ("*Order*") was issued setting forth the procedure for the submission of the protest for decision.

A *Joint Stipulation of Facts and Statement of Issue* ("*Stipulation*") was filed December 5, 2011 with Exhibits 1 through 11 attached thereto. *Protestants' Brief in Chief* ("*Brief*") was filed

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[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).

December 16, 2011. Protestants submitted therewith three (3) attachments. On January 6, 2012, the *Compliance Division's Reply Brief* ("*Reply Brief*") and *Compliance Division's Motion to Strike* ("*Motion*") were filed. By *Order* issued January 10, 2012, Protestants were advised that a response to the *Motion* could be filed on or before January 25, 2012, and that the date for filing their response brief was stayed pending further notification. Protestants did not file a response to the *Motion* within the allotted time.

On February 10, 2012, Protestants' representatives filed an Entry of Appearance. An *Order Granting Motion to Strike* was issued February 15, 2012. *Protestant's Response Brief ("Response Brief")* was filed March 9, 2012. On March 14, 2012, the record was closed and the protest was submitted for decision.[4]

FINDINGS OF FACT

Upon review of the file and records, including the *Stipulation*, the exhibits and the pleadings of the parties, the undersigned finds:

A. The parties stipulate in the Stipulation of Facts to the following[5]:

1. On March 21, 2011, Protestants filed an original Oklahoma individual part-year resident income tax return for 2010, stating Oklahoma residency dates of March 22, 2010 to December 31, 2010. During that period, PROTESTANT was employed by COMPANY, a corporation whose principal business activity involves the aerospace sector within the meaning of 68 O.S. § 2357.301. The return claimed a Line 38 Oklahoma income tax credit, the "Credit for Employees in the Aerospace Sector" in the full amount of $5,000.00 and a Line 43 credit for Oklahoma withholding in the amount of $2,249.00. The return claimed a refund of $2,210.00. The return as filed did not have attached Forms W-2 verifying the withholding credit, nor did it have attached a Form 564 making declarations to support the aerospace credit.

2. By letter dated April 12, 2011, the Division notified Protestants that it had adjusted the return to deny the credit for Oklahoma withholding because no Forms W-2 were attached verifying the withholding credit.

[4] *OAC*, 710:1-5-39(a).

[5] The references to exhibits supporting the statements are omitted.

3. Protestants provided the Division the missing Forms W-2 and Form 564, and by letter dated April 27, 2011, the Division notified Protestants that it had re-adjusted the return to grant the withholding credit, but also to deny the aerospace credit for the reason that PROTESTANT'S hire date with COMPANY Corporation was prior to January 1, 2009. This adjustment resulted in a balance due of $523.00, which the Division proposed to assess by way of the April 27, 2011 letter.

4. On June 27, 2011, the Division received Protestants' hand-delivered letter of protest to the denial of the aerospace credit.

5. PROTESTANT'S educational and employment history is as follows:

6. From June 6, 2007 through November 3, 2007 PROTESTANT was employed by COMPANY as an intern while he was a student in Oklahoma. On December 15, 2007, PROTESTANT was awarded a Bachelor of Science degree in Electrical Engineering from STATE University, CITY, Oklahoma. STATE University is an institution within the Oklahoma State System of Higher Education, and PROTESTANT'S degree program was a "qualified program", both within the meaning of 68 O.S. § 2357.301. Following graduation, in early 2008, PROTESTANT interviewed for, was offered and accepted a full-time position of employment with COMPANY, Flight Test Division, in CITY, STATE, to where PROTESTANT relocated his residence. He remained at that position until February, 2010 when he applied for a position with COMPANY, Software Maintenance at Tinker Air Force Base, in Oklahoma City, Oklahoma, a position he accepted on February 26, 2010. PROTESTANT'S employment in this position was effective March 22, 2010, and he remains employed in this position to this date. PROTESTANT'S employment history with COMPANY is summarized on his Job History records maintained by that employer.

7. PROTESTANT did not file Oklahoma income tax returns for 2008 and 2009, but had previously filed a 2007 Oklahoma income tax return due to a filing requirement for that year caused by his student intern employment with COMPANY. His 2007, 2008 and 2009 Forms W-2 from COMPANY reflect a STATE address; his 2010 Form W-2

from COMPANY reflects an Oklahoma address and withholding.

ISSUES AND CONTENTIONS

In the Statement of Issue, the parties stipulate to the following:

Whether PROTESTANT was a "qualified employee" within the meaning of 68 O.S. § 2357.301 so as to qualify for the "Credit for Employees in the Aerospace Sector" claimed on Protestants' 2010 return.

The Division contends that Protestants do not qualify for the credit for employees in the aerospace sector because PROTESTANT was employed by a qualified employer prior to January 1, 2009. In support of this contention, the Division asserts that in order to qualify for the credit a taxpayer must meet three requirements: first, the taxpayer must be employed by a qualified employer; second, the taxpayer must have been hired after January 1, 2009; and third, the taxpayer must not have been employed in the aerospace sector in Oklahoma immediately preceding employment by the qualified employer. The Division further argues that to the extent the definition of "qualified employee" is ambiguous, the ambiguity must be resolved in its favor, citing ***Phillips Petroleum Co. v. Oklahoma Tax Commission***, 1975 OK 146, 542 P.2d 1303.

Protestants contend that the Division is incorrectly construing the plain language of § 2357.301(5). In support of this contention, Protestants assert that the plain language uses the word "employed" in the first phrase which is not an ambiguous term. Protestants further argue that if the legislature had intended to limit the credit to taxpayers hired after January 1, 2009, it could have used that term or at the very least, qualified the term "employed". Further, Protestants argue that the phrase "employed by or contracting with a qualified employer on or after" merely excludes retroactive application of the exemption. Finally, Protestants argue that the semantics of the prior employment exclusion in the third prong of the definition further highlights the meaning of the first prong of the definition.

CONCLUSIONS OF LAW

1. Jurisdiction of the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S. 2011, § 221.

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. The basis for the Division's action and Protestants' protest thereto are governed by the provisions of Enrolled House Bill No. 3239 of the Second Regular

Session of the 51st Oklahoma Legislature.[6]

3. A credit of up to $5,000.00 per year for not to exceed five (5) years is allowed against the tax imposed by § 2355 of the Oklahoma Income Tax Act ("Act")[7] to a qualified employee for taxable years beginning after December 31, 2008. 68 O.S. Supp. 2010, § 2357.304(A).[8] The credit is a non-refundable credit and, if not used, may be carried over, in order, to each of the five (5) subsequent taxable years. 68 O.S. Supp. 2008, § 2357.304(B) and (C).

4. A "qualified employee" is defined by the Act to mean "any person employed by or contracting with a qualified employer on or after January 1, 2009, who has been awarded an undergraduate or graduate degree from a qualified program by an institution, and who was not employed in the aerospace sector in this state immediately preceding employment or contracting with a qualified employer[.]" 68 O.S. Supp. 2008, § 2357.301(5).

5. The Act extends non-refundable income tax credits to a qualified employer beginning after December 31, 2008, "for tuition reimbursed to a qualified employee" and "for compensation paid to a qualified employee". 68 O.S. Supp. 2010, §§ 2357.302(A) and (D), and 2357.303(A) and (D).[9] The employee tuition reimbursement credit is only allowed to the qualified employer "if the qualified employee has been awarded an undergraduate or graduate degree within one (1) year of commencing employment with the qualified employer." 68 O.S. Supp. 2008, § 2357.302(B). The credit is equal to fifty percent (50%) of the tuition reimbursed to a qualified employee for the first through fourth years of employment". 68 O.S. Supp. 2008, § 2357.302(C). No tuition reimbursement credit may be claimed by the qualified employer "after the fourth year of employment." 68 O.S. Supp. 2008, § 2357.302(E).
The credit for compensation paid to a qualified employee is equal to "[t]en percent (10%) of the compensation paid for the first through fifth years of employment in the aerospace sector if the qualified employee graduated from an institution located [Oklahoma]; or [f]ive percent of the compensation paid for the first through fifth years of employment in the aerospace sector if the qualified employee graduated from an

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6 The provisions of this legislation are now codified at Sections 2357.301 through 2357.304 of title 68 of the Oklahoma Statutes and Section 85.3 of title 3 of the Oklahoma Statutes.

7 68 O.S. 2011, §2351 et seq. as amended.

8 A moratorium was placed on the allowance of the credit for the time period from July 1, 2010, through June 30, 2012. Laws 2010, c. 327, § 1, eff. July 1, 2010. Amended at Laws 2011, c. 5, § 3, to provide an end date for the credit of "before January 1, 2015" and lifting the moratorium as of July 1, 2011.

9 A moratorium was placed on the allowance of the credits for the time period from July 1, 2010, through June 30, 2012. Laws 2010, c. 327, § 1, eff. July 1, 2010. Amended at Laws 2011, c. 5, § 3, to provide an end date for the credit of "before January 1, 2015" and lifting the moratorium as of July 1, 2011.

institution located outside [Oklahoma]." 68 O.S. Supp. 2008, § 2357.303(B)(1) and (2). In no event may the credit for compensation paid to a qualified employee be claimed "after the fifth year of employment." 68 O.S. Supp. 2008, § 2357.303(E).

6. A "qualified employer" is defined by the Act to mean "a sole proprietor, general partnership, limited partnership, limited liability company, corporation, other legally recognized business entity, or public entity whose principal business activity involves the aerospace sector[.]" 68 O.S. Supp. 2008, § 2357.301(4). "'Aerospace sector' means a private or public organization engaged in the manufacture of aerospace or defense hardware or software, aerospace maintenance, aerospace repair and overhaul, supply of parts to the aerospace industry, provision of services and support relating to the aerospace industry, research and development of aerospace technology and systems, and the education and training of aerospace personnel[.]" 68 O.S. Supp. 2008, § 2357.301(1).

7. 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 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*.

8. 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.

9. "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).

10. Administrative Rules are valid and binding on persons they affect, and shall have the force of law unless amended or revised or unless a court of competent jurisdiction determines otherwise. Except as otherwise provided by law, rules shall be prima facie evidence of the proper interpretation of the matter to which they refer.[10]

11. Statutes that provide an exemption from taxation are to be strictly construed against the claimant.[11] Statutory construction presents a question of law.[12] Tax exemptions, deductions, and credits depend entirely on legislative grace and are strictly construed against the exemption, deduction or credit.[13] Section 2357.304 of title 68 is a tax credit statute, not a tax levying statute; and as such, it must be strictly construed unless authority for the credit is clearly expressed. In administrative proceedings, the burden of proof is on the taxpayer to show in what respect the action or proposed action of the Tax Commission is incorrect. *OAC*, 710:1-5-47. ***In re Adway Properties, Inc.***, 2006 OK CIV APP 14, 130 P.3d 302; ***Geoffrey, Inc. v. Oklahoma Tax Commission***, 2006 OK CIV APP 27, 132 P.3d 632. Failure to provide evidence which is sufficient to show an adjustment to the proposed assessment is warranted will result in the denial of the protest. ***Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission***, 1988 OK 91, 768 P.2d 359, 362, citing Continental Oil Co. v. Oklahoma State Bd. of Equalization, 1976 OK 23, 570 P.2d 315, 317.

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[10] 75 O.S. 2011, § 308.2.

[11] Blitz USA, Inc. v. Okla Tax Comm'n. 2003 OK 50, 75 P.3d 883.

[12] Id. at ¶ 6.

[13] TPQ Inv. Corp. v. State ex rel. Oklahoma Tax Com'n, 1998 OK 13, ¶ 8, 954 P.2d 139. (Citations omitted).

12. 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 Division construes the phrase "any person employed by or contracting with a qualified employer on or after January 1, 2009" in the definition of "qualified employee" to mean any person hired on or after January 1, 2009. Protestants argue that the phrase is plain and unambiguous and is applicable to all persons employed by the qualified employer as long as they remain employed on and after January 1, 2009.

The word "hired" is a synonym of the word "employed". Roget's II: the new thesaurus, HOUGHTON MIFFLIN COMPANY (1980). Definitions obtained on the internet from various online dictionaries reveal multiple definitions of the word "employ".[14] Some of those definitions gives "employ" the same meaning as the word "hire". The fact that there is more than one accepted definition of the word "employ" supports a finding that the statute is ambiguous.

The Commission takes judicial notice that the website maintained by the Oklahoma Aeronautics Commission, the agency charged with promoting and developing the aerospace industry in this state, provides information concerning these tax credits.[15] Their website indicates that a qualified employee is a person "hired by" or contracting with a qualified employer after December 31, 2008. Although the interpretation of the statutory language by another state agency is not evidence of legislative intent, it is evidence that the word "employed" may be thought to have the same meaning as the word hired.

The goal of any inquiry into the meaning of a legislative act is to ascertain and give effect to the intent of the legislature. The law-making body is presumed to have expressed its intent in a statute's language and to have intended what the text expresses. Hence, where a statute is plain and unambiguous, it will not be subject to judicial construction, but will be given the effect its language dictates. Only where the intent cannot be ascertained from a statute's text, as occurs when ambiguity or conflict (with other statutes) is shown to exist, may rules of statutory construction be employed.[16]

The public policy of Enrolled House Bill No. 3239 of the Second Regular Session of the 51st Oklahoma Legislature when taken as a whole is to promote the development of the aerospace industry in Oklahoma. The Legislature normally provides for tax credits in order to induce persons to either engage in or refrain from some specified type of behavior. The construction of the definition of "qualified employee" urged by the protestant would result in tax credits being given to employees hired by a qualified employer prior to the effective date of the act and would be giving a credit for something that was happening anyway and would not be inducing anyone to take any particular action. Such a construction would not promote the development of the aerospace industry in Oklahoma.

Administrative Rules have the force and effect of law and are prima facie evidence of the proper interpretation of the matter to which they refer. The Oklahoma Tax Commission promulgated Administrative Rule OAC 710:50-15-109 to aid in implementing the aerospace tax

[14] http://www.google.com/
[15] http://www.ok.gov/OAC/Aerospace_Industry/index.html
[16] Blitz U.S.A., Inc. v. Oklahoma Tax Com'n, 2003 OK 50, 75 P.3d 883.

credits in Enrolled House Bill No. 3239 of the Second Regular Session of the 51st Oklahoma Legislature. This rule clarifies the definition of "qualified employee" with the following language.

> 5) **"Qualified employee"** is any person newly employed by or contracting with a qualified employer on or after January 1, 2009 employed in Oklahoma. Further, the person must have been awarded an undergraduate or graduate degree from a qualified program by an institution. Qualified employees do not include person employed in the aerospace sector in this state immediately preceding employment or contracting with a qualified employer.
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> OAC 710:50-15-109 was submitted to the Governor, the Senate and the House of Representatives on March 12, 2009. It was finally adopted on May 7, 2009 and became effective June 25, 2009. The Legislature has met for three regular sessions since this rule was adopted and has not taken any action to repeal the rule.

Here, the evidence proves PROTESTANT has been a full-time employee of COMPANY since January 12, 2008. Exhibit 11 to the *Stipulations*, inclusive of employment history and W-2s[17]. Since PROTESTANT was employed by the same employer prior to January 1, 2009, he cannot be a qualified employee under the Act.

ORDER

The Oklahoma Tax Commission orders that the income tax protest of Protestants, PROTESTANT and SPOUSE be denied.

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."

[17] The same federal employer identification number is reflected on each of the W-2s.