

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2012-10-11-04 / NON-PRECEDENTIAL
ID: P-10-1649-H
DATE: OCTOBER 11, 2012
DISPOSITION: DENIED
TAX TYPE: INCOME
APPEAL: APPEAL PENDING; S. CT. 111,221

FINDINGS OF FACT AND CONCLUSIONS OF LAW

TAXPAYER and SPOUSE (“Protestants”) appear through attorneys ATTORNEY 1 and ATTORNEY 2, FIRM. The Income Tax Section, Compliance Division (“Division”) of the Oklahoma Tax Commission, appears through OTC ATTORNEY 1, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On December 20, 2010, the protest file was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*¹ and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.²

On January 10, 2011, a letter was mailed to ATTORNEY 1 stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-10- 1649-H. The letter also advised the Protestants that 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*.³ On January 19, 2011, OTC ATTORNEY 1 and OTC ATTORNEY 2 filed an Entry of Appearance as Co-Counsel for the Division. On January 19, 2011, the Notice of Prehearing Conference was mailed to the parties’ Counsel, setting the prehearing conference for January 31, 2011, at 10:30 a.m. On January 28, 2011, the parties filed a Status Report in Lieu of Prehearing Conference. The parties were working on a proposed scheduling order to submit this matter for decision. On January 31, 2011, Counsel were advised by letter that a status report was to be filed on or before March 2, 2011.

On February 25, 2011, a Joint Proposed Scheduling Order was filed by Counsel.

On March 9, 2011, the Scheduling Order was issued, as more fully set forth therein.

On July 20, 2011, OTC ATTORNEY 2 filed a Notice of Withdrawal as Co-Counsel of Record for the Division.

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

² OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

³ *Id.*

On August 2, 2011, the Division's Notice of Revision ("Notice") was filed, with Exhibit A, attached thereto. On August 5, 2011, the Notice was acknowledged and the Protestants were advised that a response to the Notice could be filed on or before August 16, 2011, limited to the issues addressed in the revision. On August 16, 2011, the Protestants' response to the Notice was filed with the Court Clerk.⁴ On August 16, 2011, a "Joint" Motion to Extend Deadline for Written Stipulations was filed by Counsel. On August 16, 2011, an Order Granting Motion to Extend Deadline for Written Stipulations was issued extending the time for filing stipulation of facts to August 26, 2011, with all remaining dates unchanged, as more fully set forth therein. On August 26, 2011, the Joint Stipulations of Facts and Issues were filed, with Exhibits A through J attached thereto.

On September 20, 2011, the Protestants' *Brief in Chief* was filed with a copy of SB 685 attached thereto.

On October 11, 2011, the Reply Brief of the Compliance Division ("*Reply Brief*") was filed with the Court Clerk. On October 11, 2011, the *Motion to Strike Portions of Protestants' Brief-In-Chief Referencing the Fiscal Impact Statement for SB 685* ("*Motion*") was filed by the Division. On October 21, 2011, the *Response to Division's Motion* ("*Response*") was filed by the Protestants. On October 21, 2011, the Protestant's [Response] to the [Reply Brief] ("*Response Brief*") was filed with the Court Clerk.

On November 3, 2011, the *Reply to Protestants' Response to Division's Motion* ("*Reply to Motion*") was filed with the Court Clerk. On November 4, 2011, a copy of the Protestants' Power of Attorney to ATTORNEY 2 was filed with the Court Clerk. On November 4, 2011, a letter was mailed to Counsel acknowledging receipt of the Division's *Reply to Motion* and advising no further filings were required and the Division's *Motion* was submitted for ruling. On November 4, 2011, the Order Sustaining in Part and Denying in Part Motion to Strike Portions of Protestants' Brief-In-Chief Referencing the Fiscal Impact Statement for SB 685 was issued in pertinent parts, as follows, to-wit:

THEREFORE, IT IS ORDERED the Division's *Motion* should be sustained as to the Administrative Law Judge taking judicial notice of the Impact Statement.

IT IS FURTHER ORDERED the Division's *Motion* as to the Protestants' Brief-In-Chief and the attachment of a copy of the Impact Statement to the Protestants' Brief-In-Chief should be sustained in part and denied in part, as follows, to-wit:

- Sustained as to the copy of the Impact Statement attachment to the Protestants' Brief-In-Chief. The copy of the Impact Statement shall be stricken from the record as stated herein.

⁴ OKLA. ADMIN. CODE § 710:1-5-10(c)(2) (June 25, 1999).

- Denied as to striking any reference to the Impact Statement in the Protestants' Brief-In-Chief.

IT IS ALSO ORDERED the Protestants may make a written "Offer of Proof" on or before November 14, 2011, which succinctly describes the substance of the Impact Statement and the purpose for which the Protestants sought to have the Administrative Law Judge take judicial notice of the Impact Statement. The Division may file an objection to the proposed written "Offer of Proof" on or before November 28, 2011. The Protestants may file a response to the Division's objection on or before December 5, 2011, at which time the objection and response will be submitted for ruling.

On November 14, 2011, Protestants' *Motion to Reconsider*, as more fully set forth therein, was filed with a copy of the Impact Statement attached thereto. On November 28, 2011, the Division's *Motion to Strike the Fiscal Impact Statement for SB 685 Attached to Protestants' Motion to Reconsider* was filed as more fully set forth therein. On November 28, 2011, the Division's *Reply to Protestants' Motion to Reconsider* was filed as more fully set forth therein.

On December 1, 2011, the Protestants' *Reply to the Division's Response to Protestants' Motion to Reconsider* was filed as more fully set forth therein. On December 5, 2011, the Protestants' *Response to the Division's Motion to Strike* was filed as more fully set forth therein. On December 6, 2011, the *Order Sustaining in Part and Denying in Part Protestants' Motion to Reconsider/Order Sustaining Division's Motion to Strike* was issued in pertinent parts as follows, to-wit:

THEREFORE IT IS HEREBY ORDERED ADJUDGED AND DECREED the Protestants' *Motion to Reconsider* is sustained in part and denied in part as follows, to-wit:

- To avoid any "misstatement" of the Protestants' position, the first sentence of #4 and the second sentence of paragraph two (2) of the "Discussion" in the *Order* are stricken.
- The remainder of the Protestants' *Motion to Reconsider* is denied.
- The Protestants failed to file a written "Offer of Proof" in accordance with the Order;⁵ therefore, the written "Offer of Proof" will be deemed waived, with exceptions noted for the record.

IT IS ALSO ORDERED ADJUDGED AND DECREED that the Division's *Motion to Strike* is hereby sustained. The copy of the Fiscal Impact Statement for Senate Bill 685 attached to the Protestants' *Motion to Reconsider* is stricken from the record.

⁵ See OKLA. STAT. ANN. tit. 12, § 2104 (West 2009).

A letter was mailed to Counsel advising that pursuant to the Scheduling Order issued March 9, 2011, the record in this matter was closed and this case was submitted for decision on December 14, 2011. On December 29, 2011, at 1:30 p.m., a teleconference was held with Counsel at the request of the undersigned resulting in the following letter of the same date, which states in pertinent parts:

The record in the captioned matter is reopened for the sole purpose of the Division filing a copy of the Purchase Agreement on "PROJECT 3," as ALJ's Exhibit 1. It is my understanding from the teleconference that the Division's August 3, 2011, "Revision" of the proposed income tax assessment was made because the Purchase Agreement for "PROJECT 3" was worded as the "sale of an interest in the business" versus the "sale of assets."

As explained during the teleconference, because the record in a pivotal convenience store case has closed within five (5) days of the record in this matter, I have realized that I cannot issue *Findings, Conclusions and Recommendations* ("*Findings*") on both cases simultaneously. Because all audits, hearings, issuance of *Findings*, and Commission Orders have been on hold since the end of September, I have reluctantly decided to go forward with issuing *Findings* on the convenience store case on or before February 17, 2012.

After the Division files ALJ's Exhibit 1, the record in this matter will be closed and this case put on hold until the *Findings* have been issued in the convenience store case. Upon issuance of the *Findings* in the convenience store case, I will notify Counsel in writing and advise the date this matter has been submitted for decision.

On December 30, 2011, the Division filed ALJ's Exhibit 1.

On February 29, 2012, a letter was mailed to Counsel advising that the *Findings, Conclusions and Recommendations* in the "pivotal" convenience store case had been issued and this matter would be resubmitted for decision on March 5, 2012.

On May 1, 2012, *Findings, Conclusions and Recommendations* ("*Findings*") were issued in this matter. On May 11, 2012, the Protestants' *Petition for Reconsideration* ("*Petition*") was filed, as more fully set forth therein. On May 29, 2012, the Division's *Response to Petition* was filed, as more fully set forth therein.

On June 13, 2012, an *Order Granting in Part and Denying in Part Protestants' Petition* (“*June 13th Order*”) was issued, which states in pertinent parts, as follows, to-wit:

THEREFORE IT IS HEREBY ORDERED ADJUDGED AND DECREED the Protestants’ *Petition* is granted in part and denied in part as follows, to-wit:

- The *Findings* issued on May 1, 2012, are withdrawn.
- The parties shall supplement Exhibit E to include “complete” and “legible” copies of all the leases listed on Schedule 1.1 to Exhibit B **on or before July 12, 2012.**
- The parties shall file Supplemental Briefs **on or before July 27, 2012, limited** to the issue of **“Whether the Wind Energy Ground Leases which met the five (5) year holding requirement of the Deduction in effect for the 2006 Tax Year are real or tangible personal property?,”** at which time the record in this matter will be closed and submitted for decision.
- The remainder of the Protestants’ *Petition* is denied. (Emphasis original).

On July 9, 2012, the parties filed their *Submission of Exhibits* in compliance with the *June 13th Order*. On July 27, 2012, the Protestants’ *Brief in Chief* and the Division’s *Supplemental Brief* were filed with the Court Clerk. On July 30, 2012, the parties were notified by letter acknowledging receipt of the briefs, the record in this matter was closed and this case was submitted for decision on July 30, 2012.

JOINT STIPULATION OF FACTS AND ISSUES

On August 26, 2011, the parties filed Joint Stipulation of Facts and Issues,⁶ with Exhibits A through J, attached thereto, as follows, to-wit:

I. STATEMENT OF THE ISSUE

Whether Taxpayers are eligible to receive the Oklahoma Capital Gains Deduction, 68 O.S. § 2358(F) (the “Deduction”), as claimed on their 2006 Oklahoma income tax return.

II. PROCEDURAL FACTS

1. Taxpayers claimed the Deduction on their 2006 Oklahoma Individual Income Tax Return for gains from the sale of PROJECT 1 and PROJECT 2. A copy of the Taxpayers’ Form 511, State of Oklahoma Income Tax Return, including Form 561, is attached hereto as Exhibit A.

⁶ The text of the stipulated facts is set out *in haec verba*. “*in haec vega*” (in heek v<<schwa>> r-b<<schwa>>). [Latin] In these same words; verbatim. BLACK’S LAW DICTIONARY (9TH ed. 2009), available at <http://web2.westlaw.com>.

2. The Division denied the Deduction and issued a proposed assessment dated June 30, 2010, assessing additional income tax in the amount of \$49,570.00, interest in the amount of \$25,036.25, and penalty in the amount of \$4,957.00. The June 30, 2010, assessment is attached hereto as Exhibit B.

3. Taxpayer timely protested the Division's adjustments by letter dated October 27, 2010 (resubmitted November 12, 2010). The protest letter is attached hereto as Exhibit C.

4. On August 3, 2011, the Division issued a revised proposed assessment of income tax in the amount of \$40,040.00, interest in the amount of \$26,788.41, and penalty in the amount of \$4,004.00. The revised proposed assessment is attached hereto as Exhibit D.

III. GENERAL FACTS

5. In 1982, Taxpayers formed CORPORATION (the "Corporation"), and have since remained the sole shareholders of the Corporation, which is a Subchapter S corporation for federal income tax purposes. Therefore, the Corporation's gains pass through to the Taxpayers' individual federal income tax returns.

6. In 2002, the Corporation formed LLC, an Oklahoma company, to own and operate wind power generation facilities in Harper County, Oklahoma, including Wind Energy Ground Leases which had been acquired by the Corporation during 2001 and 2002. The Wind Energy Ground Leases are attached hereto as Exhibit E.

7. The Corporation, through LLC, developed wind energy "Projects" including PROJECT 1 and PROJECT 2. The Projects were developed as qualifying small power production facilities through: (a) acquiring leases and easements covering the land upon which the wind generation facility will be located, (b) testing the wind conditions to determine the best way in which to utilize the land and the amount of power the facility could produce, (c) obtaining the interconnection and transmission agreements with Southwest Power Pool for connection to, and transmission over, the power grid, and (d) a power purchase agreement with a utilities purchaser.

8. LLC operated a qualifying small power production facility under the Public Utility Regulatory Policies Act of 1978. Attached hereto as Exhibit F are the self certifications for the qualifying facility filed with the Federal Energy Regulatory Commission.

9. PROJECT 1 and PROJECT 2 were sold pursuant to a Purchase and Sale Agreement dated March 1, 2006, by and between CORPORATION, an Oklahoma corporation, as seller, and BUYER, a Delaware limited liability company, as buyer (the "Purchase and Sale Agreement"). A copy of the Purchase and Sale Agreement is attached hereto as Exhibit G.

10. The proceeds received by the Corporation in 2006 for the sale of PROJECT 1 and PROJECT 2 resulted in a net capital gain, as defined in Section 1222(11) of the Internal Revenue

Code, for federal income tax purposes and were included in the Taxpayers' federal adjusted gross income for that year. A copy of the Corporation's 2006 Form 1120S, U.S. Income Tax Return for an S Corporation is attached hereto as Exhibit H. A copy of the Corporation's 2006 Oklahoma Form 512, Small Business Corporation Income Tax Return is attached hereto as Exhibit I. A copy of the Taxpayers' 2006, Form 1040, U.S. Individual Income Tax Return, including Form 4797, is attached hereto as Exhibit J.

ADDITIONAL FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, the Protestants' *Brief in Chief*,⁷ the Division's *Reply Brief*,⁸ the Protestants' *Response Brief*,⁹ the Protestants' *Petition*,¹⁰ the Division's *Response to Petition*,¹¹ the *June 13th Order*, the *Submission of Exhibits*,¹² the Protestants' *Brief in Chief*,¹³ and the Division's *Supplemental Brief*,¹⁴ the undersigned finds:

11. The Purchase and Sale Agreement dated August 18, 2006, of PROJECT 3 contains the following paragraph,¹⁵ to-wit:

WHEREAS, the Parties desire to enter into this Agreement for among other things: (i) the transfer of all Related Assets to the Project Company and (ii) the sale by the Seller, and the purchase by Buyer or its assignee, of *all of the issued and outstanding membership interests and ownership rights* in the Project Company (the "Interests") upon the terms and conditions hereof. (Emphasis added.)

12. Based upon the language contained in the Purchase and Sale Agreement for PROJECT 3, the Division treated the sale as a "sale of an interest in the business" versus the "sale of assets."¹⁶

⁷ Filed September 20, 2011.

⁸ Filed October 11, 2011.

⁹ Filed October 21, 2011.

¹⁰ Filed May 11, 2012.

¹¹ Filed May 29, 2012.

¹² Filed July 9, 2012.

¹³ Filed July 27, 2012.

¹⁴ Filed July 27, 2012.

¹⁵ ALJ's Exhibit 1.

¹⁶ *Id.*

13. On August 3, 2011, the Division issued an “Amended” assessment for the 2006 Tax Year, allowing the Deduction attributable to the Installment Sale Income (\$152,473.00) received by the Protestants from the sale of PROJECT 3.¹⁷

14. The Purchase and Sale Agreement dated March 1, 2006, of PROJECT 2 and PROJECT 1 contains the following paragraph,¹⁸ to-wit:

WHEREAS, Seller desires to sell and Purchaser desires to purchase all of the assets related to the development of the wind-powered generation projects known as PROJECT 2 and PROJECT 1 (“**Project Assets**”) in Harper County, Oklahoma on the terms and conditions set forth herein,...
(Emphasis original.)

15. On the Corporation’s Federal Return for the 2006 Tax Year, Installment Sale Income (Form 6252), the property for PROJECT 3 and PROJECT 2 is described as “Wind Leases.”¹⁹

16. Schedule 1.1 to Exhibit B of the Purchase and Sale Agreement incorrectly attributes certain dates for some of the “Wind Leases.”²⁰ The correct information for the seven (7) initial leases is as follows, to-wit:

Document: Wind Power Generation Lease²¹
Legal: Omitted herein
Lessor(s): TRUSTEE Living Trust, TRUSTEE, Trustee
Lessee: CORPORATION
Dated: 01/29/2001

¹⁷ *Id.* See Exhibit D and Exhibit H at 20.

¹⁸ Exhibit G.

¹⁹ Exhibit H at 19-20. See Exhibit G at 1.1 and Exhibit B to Exhibit G. The Project Assets include Related Rights, which are listed as follows, to-wit:

Two (2) MET Towers for Project in Secs. 7 and 15 T25N R22W
Exclusive right to MET Data for Project and any related studies for the Project.
Interconnection Feasibility, Impact and Facility Agreements for 130.5 MW (GEN2005-008)
Interconnection Queue position for 130.5 MW into OG&E Woodward District Substation
OGE PURPA Cases

However, a dollar value does not appear to have been assigned to the Related Rights. On the K-1s for the Protestants the entire amount of the capital gain is described as “Excludable gain from sale of Okla. real property.” See also Exhibit H at 53 and 60.

²⁰ Protestants’ *Petition* at 2. See Exhibit G, Schedule 1.1 to Exhibit B of Purchase and Sale Agreement. See also Exhibit E and *Submission of Exhibits*.

²¹ Exhibit E. Schedule 1.1 to Exhibit B and the *Submission of Exhibits* omit the second “TRUSTEE” lease.

Filed: 01/29/2001
Book/Page: 561/731

Document: Wind Power Generation Lease²²
Legal: Omitted herein
Lessor(s): TRUSTEE 2 Living Trust, TRUSTEE 2, Trustee
Lessee: CORPORATION
Dated: 01/29/2001
Filed: 01/29/2001
Book/Page: 561/733

Document: Wind Power Generation Lease²³
Legal: Omitted herein
Lessor(s): LESSOR1 and/or LESSOR2, H&W
Dated: 01/31/2001
Filed: 01/31/2001
Book/Page: 561/761

Document: Wind Power Generation Lease²⁴
Legal: Omitted herein
Lessor(s): LESSOR 3 and LESSOR 4
Lessee: CORPORATION
Dated: 01/31/2001
Filed: 01/31/2001
Book/Page: 561/767

Document: Wind Power Generation Lease²⁵
Legal: Omitted herein
Lessor: LESSOR 5
Lessee: CORPORATION
Date: 03/05/2002
Signed: 03/28/2002
Filed: 04/05/2002
Book/Page: 572/492

Document: Wind Power Generation Lease²⁶
Legal: Omitted herein

²² *Id.* at D1A.

²³ *Id.* at C1A.

²⁴ *Id.* at B1A.

²⁵ *Submission of Exhibits* at A2A.

²⁶ *Id.* at A3A.

Lessor: LESSOR 6
Lessee: CORPORATION
Dated: 03/05/2002
Signed: 03/25/2002
Filed: 04/05/2002
Book/Page: 572/496

Document: Wind Power Generation Lease²⁷
Legal: Omitted herein
Lessor: LESSOR 7
Lessee: CORPORATION
Date: 03/05/2002
Signed: 04/10/2002
Filed: 06/12/2002
Book/Page: 574/303

17. The “Wind Leases”²⁸ contain the following language in pertinent parts, to-wit:

...has granted, demised, leased and let and by these presents does grant, demise, lease and let unto the said lessee a surface lease, for the sole and only purpose of wind power generation and power sales, and rights of egress and ingress, and for laying electrical transmission lines, and installation of overhead power transmission lines, and building power stations and structures thereon, to produce, save and take care of said products, all that certain tract of land, together with any reversionary rights...

It is agreed that this lease shall remain in force for a primary term of five (5) years from date and as long thereafter as wind power generation is produced and sold from said land by the lessee for a period of ninety-nine (99) years.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.²⁹

2. A corporation electing treatment as a Subchapter “S” Corporation under the Internal Revenue Code (“IRC”) is not subject to Oklahoma corporate income tax; however, a Subchapter “S” Corporation’s shareholders shall include their proportionate share of the

²⁷ See Exhibit E. See also *Submission of Exhibits* at A1A.

²⁸ *Id.* See *Submission of Exhibits*.

²⁹ OKLA. STAT. ANN. tit. 68, § 221 (West Supp. 2012). See OKLA. ADMIN. CODE § 710:1-5-38 (June 25, 2009).

corporation's federal income in each shareholder's taxable income in the same manner and to the same extent as provided by the Internal Revenue Service ("IRS"), subject to adjustments provided in the Oklahoma Income Tax Act³⁰ ("Act").³¹

3. The Act imposes an income tax upon the Oklahoma Taxable Income³² of every resident or non-resident individual who earns income within Oklahoma.³³

4. The beginning point of determining Oklahoma Taxable Income is Federal Adjusted Income.³⁴

5. Any term used in the Act shall³⁵ have the same meaning as when used in a comparable context in the IRC, unless a different meaning is clearly required. For all taxable periods covered by the Act, the tax status and all elections of all taxpayers covered by the Act shall³⁶ be the same for all purposes material hereto as they are for federal income tax purposes except when the Act specifically provides otherwise.³⁷

6. A taxpayer's income tax liability is determined in accordance with the law in effect at the time the income is received.³⁸

³⁰ OKLA. STAT. ANN. tit. 68, § 2351 *et seq.* (West 2001).

³¹ OKLA. STAT. ANN. tit. 68, § 2365 (West 2001).

³² OKLA. STAT. ANN. tit. 68, § 2353(12) (West 2008):

"Oklahoma taxable income" means "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;

³³ OKLA. STAT. ANN. tit. 68, § 2355 (West 2008).

³⁴ OKLA. STAT. ANN. tit. 68, § 2353(13) (West 2008):

"Oklahoma adjusted gross income" means "adjusted gross income" as reported to the federal government (or as would have been reported by the taxpayer had a return been filed), or in the event of adjustments thereby by the federal government as finally ascertained under the Internal Revenue Code, adjusted further as hereinafter provided;

³⁵ "Generally, when the legislature uses the term 'shall,' it signifies a mandatory directive or command." *See Keating v. Edmondson*, 2001 OK 110, ¶ 13, 37 P.3d 882.

³⁶ *Id.*

³⁷ OKLA. STAT. ANN. tit. 68, § 2353(3) (West 2008).

³⁸ *Affiliated Management Corp. v. Oklahoma Tax Commission*, 1977 OK 183, 570 P.2d 335; *Wootten v. Oklahoma Tax Com'n*, 1935 OK 54, 170 Okla. 584, 40 P.2d 672.

7. The text of Section 2358(F) of Title 68³⁹ (“Deduction”) for the 2006 tax year is as follows, to-wit:

For all tax years beginning after December 31, 1981, taxable income and adjusted gross income shall be adjusted to arrive at Oklahoma taxable income and Oklahoma adjusted gross income as required by this section.

...

F. 1. For taxable years beginning after December 31, 2004, a deduction from the Oklahoma adjusted gross income of any individual taxpayer shall be allowed for qualifying gains receiving capital treatment that are included in the federal adjusted gross income of such individual taxpayer during the taxable year.

2. As used in this subsection:

a. “qualifying gains receiving capital treatment” means the amount of net capital gains, as defined in Section 1222(11) of the Internal Revenue Code, included in an individual taxpayer's federal income tax return that result from:

- (1) the sale of real or tangible personal property located within Oklahoma that has been directly or indirectly owned by the individual taxpayer for a holding period of at least five (5) years prior to the date of the transaction from which such net capital gains arise, or
- (2) the sale of stock or the sale of a direct or indirect ownership interest in an Oklahoma company, limited liability company, or partnership where such stock or ownership interest has been directly or indirectly owned by the individual taxpayer for a holding period of at least three (3) years prior to the date of the transaction from which the net capital gains arise,

b. “holding period” means an uninterrupted period of time,

c. “Oklahoma company,” “limited liability company,” or “partnership” means an entity whose primary headquarters have been located in Oklahoma for at least three (3) uninterrupted years prior to the date of the transaction from which the net capital gains arise,

d. “direct” means the individual taxpayer directly owns the asset, and

³⁹ OKLA. STAT. tit. 68, § 2358(F) (West Supp. 2006). Although not at issue, the holding period for the sale of stock or ownership interest was changed from three (3) years to two (2) years by Laws 2006, c. 272, § 17 (repealed by Laws 2007, c. 1, § 59), and by Laws 2007, c. 1, § 57.

- e. “indirect” means the individual taxpayer owns an interest in a pass-through entity (or chain of pass-through entities) that sells the asset that gives rise to the qualifying gains receiving capital treatment.
- (1) With respect to sales of real or personal property located within Oklahoma, the deduction described in this subsection shall not apply unless the pass-through entity that makes the sale has held the property for not less than five (5) uninterrupted years prior to the date of the transaction that created the capital gain, and each pass-through entity included in the chain of ownership has been a member, partner, or shareholder of the pass-through entity in the tier immediately below it for an uninterrupted period of not less than five (5) years.
 - (2) With respect to sales of stock or ownership interest in an Oklahoma company, limited liability company, or partnership, the deduction described in this subsection shall not apply unless the pass-through entity that makes the sale has held the stock or ownership interest for not less than three (3) uninterrupted years prior to the date of the transaction that created the capital gain, and each pass-through entity included in the chain of ownership has been a member, partner or shareholder of the pass-through entity in the tier immediately below it for an uninterrupted period of not less than three (3) years.

8. The Deduction fails to define “Oklahoma Company,” but “company” is commonly defined as “A corporation, partnership, association, joint-stock company, trust fund, or organized group of persons, whether incorporated or not...”⁴⁰ There is no dispute “Oklahoma Company” includes a corporation under state law, including a corporation that has made an “S” Corporation election for income tax purposes.

9. 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.⁴¹

⁴⁰ *Id.* See also BLACK’S LAW DICTIONARY (9th ed. 2009), available at <http://web2.westlaw.com>.

⁴¹ OKLA. STAT. ANN. tit. 75, § 250 *et seq.* (West 2002). See *Toxic Waste Impact Group, Inc. v. Leavitt*, 1988 OK 20, 755 P.2d 626.

10. The Tax Commission Rule on the Deduction⁴² for the 2006 tax year is as follows, to-wit:

- (a) **General provisions.** For tax years beginning on or after January 1, 2005, individual taxpayers can subtract from the Oklahoma adjusted gross income, gains reported on their Oklahoma income tax return and included in federal taxable income receiving capital treatment. The gain must be realized on or after January 1, 2005, in order to be eligible for the Oklahoma exclusion. Effective for tax years beginning on or after January 1, 2006 corporate taxpayers can subtract from the Oklahoma taxable income, gains reported on their Oklahoma income tax return and included in federal taxable income receiving capital treatment. For corporate taxpayers the gain must be realized on or after January 1, 2006 in order to be eligible for the Oklahoma exclusion.
- (b) **Qualifying gains receiving capital treatment.** As used in this Section, “**qualifying gains receiving capital treatment**” means the amount of net capital gains, as defined under Internal Revenue Code Section 1222(11), [IRC §1222(11)]. The gain must be included in the federal income tax return of the taxpayer.
 - (1) **Sale of real or tangible personal property.** To qualify for the Oklahoma deduction, the gain must be earned as a result of the sale of real or tangible personal property located within Oklahoma. Taxpayers must have held the asset for not less than five (5) uninterrupted years prior to the date of the transaction that created the capital gain.
 - (2) **Sale of stock or ownership interest.** To qualify for the Oklahoma deduction, the gain must be earned as a result of the sale of stock or ownership interest in an Oklahoma company, limited liability company, or partnership and the stock or ownership interest must have been held by the taxpayer for at least three (3) uninterrupted years prior to the date of the transaction that created the capital gain.
 - (3) **Sale of real or tangible personal property by pass-through entities.** Net capital gains earned by member, partner, or shareholder of a pass-through entity as a result of the sale of real or tangible personal property located within Oklahoma, and included in the [sic] a taxpayer’s federal taxable income is excludable, provided that the taxpayer has been a member of the pass-through entity for an uninterrupted period of five (5) years and that the pass-through entity

⁴² OKLA. ADMIN. CODE § 710:50-15-48 (June 25, 2006).

has held the asset for not less than five (5) uninterrupted years prior to the date of the transaction that created the capital gain.

(4) **Sale of stock or ownership interests by pass-through entities.** Net capital gains earned by a member, partner, or shareholder of a pass-through entity as a result of the sale of stock or an ownership interest in an Oklahoma company, limited liability company, or partnership, is excludable, provided that the taxpayer has been a member of the pass-through entity for an uninterrupted period of three (3) years and that the pass-through entity has held the asset for not less than three (3) uninterrupted years prior to the date of the transaction that created the capital gain.

(5) **Installment sales.** Qualifying gains included in an individual taxpayer's federal taxable income for years after December 31, 2004, or a corporate taxpayer's federal taxable income for years after December 31, 2005, which are derived from installment sales are eligible for exclusion, provided the appropriate holding periods are met.

(c) **“Oklahoma company”, “limited liability company”, “partnership”.** An Oklahoma company, limited liability company, or partnership is one whose primary headquarters has been located in Oklahoma for at least three (3) years prior to the capital gain transaction. The Oklahoma company, limited liability company, or partnership must meet the three (3) year rule for an uninterrupted period.

11. 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. Statutes that provide an exemption from taxation are to be strictly construed against the claimant.⁴³ Statutory construction presents a question of law.⁴⁴

12. Tax exemptions, deductions, and credits depend entirely on legislative grace and are strictly construed against the exemption, deduction or credit.⁴⁵

⁴³ *Blitz U.S.A., Inc. v. Oklahoma Tax Com'n*, 2003 OK 50, ¶ 14, 75 P.3d 883. (Citations omitted).

⁴⁴ *Id.* at ¶ 6.

⁴⁵ *TPQ Inv. Corp. v. State ex rel. Oklahoma Tax Com'n*, 1998 OK 13, ¶ 8, 954 P.2d 139. (Citations omitted).

13. The Deduction is a tax exemption or deduction statute, not a tax levying statute; and as such, it must be strictly construed unless authority for the deduction is clearly expressed.⁴⁶

14. Statutes and statutory amendments are presumed to operate prospectively, and presumption is rebutted only where intention of the Legislature to give statutes retrospective effect is expressly declared or necessarily implied from the language of the statute.⁴⁷ Doubt as to whether statute was intended to be prospective or retrospective must be resolved against retrospective application.⁴⁸ As in other matters concerning statutory interpretation, whether to give prospective or retroactive effect should be controlled by the fundamental or transcendent canon of statutory construction of giving effect to legislative design.⁴⁹

15. Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears, and except also that the words hereinafter explained are to be understood as thus explained.⁵⁰

16. Whenever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.⁵¹

17. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.⁵² A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.⁵³

⁴⁶ *Id.*

⁴⁷ *Department of Human Services ex rel. Pavlovich v. Pavlovich*, 1996 OK 71, 932 P.2d 1080. (Citations omitted).

⁴⁸ *Fraternal Order of Police, Lodge No. 165 v. City of Choctaw*, 1996 OK 78, 933 P.2d 261.

⁴⁹ *Houck v. Hold Oil Corp.*, 1993 OK 166, 1993 OK 167, 867 P.2d 451. (Citations omitted).

⁵⁰ OKLA. STAT. ANN. tit. 25, § 1 (West 2008).

⁵¹ OKLA. STAT. ANN. tit. 25, § 2 (West 2008).

⁵² OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999):

In all administrative proceedings, unless otherwise provided by law, the burden of proof shall be upon the protestant to show in what respect the action or proposed action of the Tax Commission is incorrect. If, upon hearing, the protestant fails to prove a prima facie case, the Administrative Law Judge may recommend that the Commission deny the protest solely upon the grounds of failure to prove sufficient facts which would entitle the protestant to the requested relief.

OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999), provides in pertinent part:

18. The Oklahoma Constitution, Article V, § 33⁵⁴ provide as follows, to-wit:

- A. All bills for raising revenue shall originate in the House of Representatives. The Senate may propose amendments to revenue bills.
- B. No revenue bill shall be passed during the five last days of the session.
- C. Any revenue bill originating in the House of Representatives shall not become effective until it has been referred to the people of the state at the next general election held throughout the state and shall become effective and be in force when it has been approved by a majority of the votes cast on the measure at such election and not otherwise, except as otherwise provided in subsection D of this section.
- D. Any revenue bill originating in the House of Representatives may become law without being submitted to a vote of the people of the state if such bill receives the approval of three-fourths (3/4) of the membership of the House of Representatives and three-fourths (3/4) of the membership of the Senate and is submitted to the Governor for appropriate action. Any such revenue bill shall not be subject to the emergency measure provision authorized in Section 58 of this Article and shall not become effective and be in force until ninety days after it has been approved by the Legislature, and acted on by the Governor.

19. “Revenue Bills” are those that levy taxes in the strict sense of the word, and are not bills for other purposes which incidentally create revenue.⁵⁵

...“preponderance of the evidence” means the evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which as a whole shows that the fact sought to be proved is more probable than not.

⁵³ See *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com’n*, 1988 OK 91, 768 P.2d 359.

⁵⁴ OK Const. Art. V, § 33.

⁵⁵ *Anderson v. Ritterbusch*, 1908 OK 250, 98 P. 1002.

20. The Oklahoma Constitution, Article V, § 57⁵⁶ provide as follows, to-wit:

Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statutes; and no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length: Provided, That if any subject be embraced in any act contrary to the provisions of this section, such act shall be void only as to so much of the laws as may not be expressed in the title thereof.

21. Where the title of a statute calls attention to the general subject, there is no need of expressing the details or subdivisions in the title in order to comply with constitutional requirement that the subject of an act shall be clearly expressed in its title.⁵⁷

STIPULATED STATEMENT OF THE ISSUE

Whether Taxpayers are eligible to receive the Oklahoma Capital Gains Deduction, 68 O.S. § 2358(F) (the “Deduction”), as claimed on their 2006 Oklahoma income tax return.

DISCUSSION

PART ONE

THE PARTIES CANNOT CITE TO “UNPUBLISHED” DECISIONS OF THE OKLAHOMA COURT OF CIVIL APPEALS IN BRIEFS.

The Deduction continues to be a hot topic on the administrative level and the subject of numerous protests for the 2006 and 2007 Tax Years, despite the issuance of Tax Commission Order (Precedential) No. 2012-02-14-05 (February 14, 2012), Tax Commission Orders 2009-06-23-02 (June 23, 2009) and 2009-06-23-03 (June 23, 2009),⁵⁸ and the subsequent appeal in

⁵⁶ OK Const. Art. V, § 57.

⁵⁷ *Stewart v. Oklahoma Tax Commission*, 1946 OK 132, 168 P.2d 125.

⁵⁸ The distinction between a Tax Commission Order designated as “Precedential” or “Non-Precedential” has been blurred because all Tax Commission 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. 2012) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002).

*Crook*⁵⁹ which resulted in an “Unpublished” Opinion affirming Commission Order No. 2009-06-23-03 (June 23, 2009) by the Oklahoma Court of Civil Appeals.⁶⁰

The basis for rehearing the same core questions of law in this matter is Oklahoma Supreme Court Rule 1.200, Opinions of the Supreme Court and the Court of Civil Appeals (“Rule 1.200”), which states as follows, to-wit:

(a) Memorandum Opinions. An opinion shall be prepared in memorandum form unless it:

- (1) Establishes a new rule of law or alters or modifies an existing rule;
- (2) Involves a legal issue of continuing public interest;
- (3) Criticizes or explains existing law;
- (4) Applies an established rule of law to a factual situation significantly different from that in published opinions of the courts of this state;
- (5) Resolves an apparent conflict of authority; or
- (6) Constitutes a significant and non-duplicative contribution to legal literature:
 - (a) by an historical review of law; or
 - (b) by describing legislative history.

(b) Publication of Memorandum Opinions and Unpublished Opinions.

- (1) Opinions shall be published in the official reports and on the Oklahoma Supreme Court World Wide Web site only when they satisfy the standards set out in this rule. *Disposition by memorandum, without a formal published opinion, does not mean that the case is considered unimportant. It does mean that no new points of law making the decision of value as precedent are believed to be involved. A memorandum opinion shall not be published unless it is ordered to be published by the Supreme Court.*
- (2) *A party or other interested person who believes that an opinion of either the Supreme Court or Court of Civil Appeals which has not been designated by the Court for publication has substantial precedential value may file a motion in the Supreme Court asking that it be published. The motion shall state the grounds for such belief,*

⁵⁹ *Crook v. Oklahoma Tax Commission*, Okla. Ct. App., Case No. 107,352. An extract of the decision was published in the Oklahoma Bar Journal, Vol. 81 – No. 15 – 5/29/10.

⁶⁰ In their respective briefs, the parties cite to *Crook* and a second unpublished Court of Civil Appeals decision, *In the Matter of the Estate of Ray Hester*, Okla. Civ. App., Case No. 106,023. An extract of the decision was published in the Oklahoma Bar Journal, Vol. 80 – No. 22 – 8/29/2009.

*shall be accompanied by a copy of the opinion, and shall comply with Rule 1.6.*⁶¹

- (3) Regardless of the foregoing, no opinion superseded by an opinion on rehearing shall be published in the official reports. An opinion that is modified on rehearing shall be published as modified if it otherwise meets the standards of this rule.
- (4) An opinion shall be published only if the majority of the justices or judges participating in the decision find that one of the standards set out in this rule is satisfied. Concurring and dissenting opinions shall be published only if the majority opinion is published.
- (5) *All memorandum opinions, unless otherwise required to be published, shall be marked: “Not for Official Publication.” Because unpublished opinions are deemed to be without value as precedent and are not uniformly available to all parties, opinions so marked shall not be considered as precedent by any court or cited in any brief or other material presented to any court, except to support a claim of res judicata,⁶² collateral estoppel,⁶³ or law of the case.⁶⁴ Opinions*

⁶¹ The Tax Commission did not file a motion in the Supreme Court requesting that *Crook* be published, even though it knew the importance of the decision and its impact on pending protests and audits.

⁶² “Res judicata” (rays joo-di-kay-t<<schwa>> or -kah-t<<schwa>>). [Latin “a thing adjudicated”] (17c) 1. An issue that has been definitively settled by judicial decision. [Cases: [Judgment 540, 584, 585.](#)] 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been — but was not — raised in the first suit. • The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties. [Restatement \(Second\) of Judgments §§ 17, 24 \(1982\)](#). — Also termed res adjudicata; claim preclusion; doctrine of res judicata. Cf. collateral estoppel. [Cases: [Judgment 540, 584, 948\(1\).](#)] “ ‘Res judicata’ has been used in this section as a general term referring to all of the ways in which one judgment will have a binding effect on another. That usage is and doubtless will continue to be common, but it lumps under a single name two quite different effects of judgments. The first is the effect of foreclosing any litigation of matters that never have been litigated, because of the determination that they should have been advanced in an earlier suit. The second is the effect of foreclosing relitigation of matters that have once been litigated and decided. The first of these, preclusion of matters that were never litigated, has gone under the name, ‘true res judicata,’ or the names, ‘merger’ and ‘bar.’ The second doctrine, preclusion of matters that have once been decided, has usually been called ‘collateral estoppel.’ Professor Allan Vestal has long argued for the use of the names ‘claim preclusion’ and ‘issue preclusion’ for these two doctrines [Vestal, [Rationale of Preclusion, 9 St. Louis U. L.J. 29 \(1964\)](#)], and this usage is increasingly employed by the courts as it is by Restatement Second of Judgments.” Charles Alan Wright, *The Law of Federal Courts* § 100A, at 722–23 (5th ed. 1994). BLACK’S LAW DICTIONARY (9th ed. 2009), available at <http://web2.westlaw.com>.

⁶³ “Collateral estoppel” (e-stop-<<schwa>>). (1941) 1. The binding effect of a judgment as to matters actually litigated and determined in one action on later controversies between the parties involving a different claim from that on which the original judgment was based. 2. A doctrine barring a party from relitigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one. — Also termed issue preclusion; issue estoppel; direct estoppel; estoppel by judgment; estoppel by record; estoppel by

marked Not For Official Publication shall not be published in the unofficial reporter, nor on the Supreme Court World Wide Web site, nor in the official reporter.

- (6) An opinion designated For Publication in O.B.J. Only shall be published in the unofficial reporter and on the Supreme Court World Wide Web site. Such an opinion shall not be published in the official reporter. An opinion designated For Publication in O.B.J. Only shall not be considered as precedent.
- (7) Disposition of cases by the Oklahoma Supreme Court in which there is no published opinion will be reported in the Oklahoma Bar Journal by brief reference to the case and the decision reached therein on appeal. The opinion in the matter shall not be published in the Oklahoma Bar Journal, or the official reporter, or on the Supreme Court World Wide Web site. The decision and reference may be published on the Oklahoma Supreme Court Web site as a Disposition of Cases Other Than by Published Opinion. The decision and reference shall not be in paragraph citation form and shall not be considered as precedential.
- (8) Disposition of cases by the Oklahoma Court of Civil Appeals in which there is no published opinion will be reported in the Oklahoma Bar Journal by brief reference to the case and the decision reached therein on appeal. The decision and reference shall not be in paragraph citation form and shall not be considered as precedential. The Chief Justice of the Oklahoma Supreme Court may designate a procedure for publishing such dispositions on the Supreme Court World Wide Web site.

(c) Effect of Publication of Formal Opinion.

- (1) Opinions of the Supreme Court designated For Official Publication when adopted will be published in the unofficial reporter, (Oklahoma

verdict; cause-of-action estoppel; technical estoppel; estoppel per rem judicatam. Cf. res judicata. [Cases: [Judgment 634](#), [713](#), [948\(1\)](#).] administrative collateral estoppel. Estoppel that arises from a decision made by an agency acting in a judicial capacity. [Cases: [Administrative Law and Procedure 501](#).] defensive collateral estoppel. (1968) Estoppel asserted by a defendant to prevent a plaintiff from relitigating an issue previously decided against the plaintiff. [Cases: [Judgment 632](#).] nonmutual collateral estoppel. Estoppel asserted either offensively or defensively by a nonparty to an earlier action to prevent a party to that earlier action from relitigating an issue determined against it. [Cases: [Judgment 632](#).] offensive collateral estoppel. (1964) Estoppel asserted by a plaintiff to prevent a defendant from relitigating an issue previously decided against the defendant. [Cases: [Judgment 632](#).] BLACK'S LAW DICTIONARY (9th ed. 2009), available at <http://web2.westlaw.com>.

⁶⁴ “Law of the case” (18c) 1. The doctrine holding that a decision rendered in a former appeal of a case is binding in a later appeal. [Cases: [Appeal and Error 1097](#); [Courts 99](#), 917.] 2. An earlier decision giving rise to the application of this doctrine. Cf. law of the trial; res judicata; stare decisis. BLACK'S LAW DICTIONARY (9th ed. 2009), available at <http://web2.westlaw.com>. See *Acott v. Newton & O'Connor*, 2011 OK 56, 260 P.3d 1271.

Bar Journal), on the Oklahoma Supreme Court World Wide Web site, and published after mandate in the official reporter (Pacific Reporter 2d). Such opinions may not be cited as authority in a subsequent appellate opinion nor may they be used as authority by a trial court until the mandate in the matter has been issued.

(2) Opinions of the Court of Civil Appeals which resolve novel or unusual issues may be designated for publication, at the time the opinion is adopted, by affirmative vote of at least two members of the division responsible for the opinion. Such opinions shall remain unpublished until after mandate issues, after which time they shall be published in the unofficial reporter, (Oklahoma Bar Journal), the Oklahoma Supreme Court World Wide Web site, and in the official reporter (Pacific Reporter 2nd). Such opinions shall bear the notation “Released for publication by order of the Court of Civil Appeals”, and shall be considered to have persuasive effect. Any such opinion, however, bearing the notation “Approved for publication by the Supreme Court” has been so designated by the Supreme Court pursuant to 20 O.S.1991 § 30.5,⁶⁵ and shall be accorded precedential value. The Supreme Court retains the power to order opinions of the Court of Civil Appeals withdrawn from publication. (Emphasis added.)

When the opinions in *Crook* and *Hester*⁶⁶ were issued they were marked as “NOT FOR OFFICIAL PUBLICATION,” so pursuant to Rule 1.200 neither *Crook* nor *Hester*⁶⁷ can be considered as precedent by any court or cited in any brief or other material presented to any court, “...except to support a claim of *res judicata*, *collateral estoppel*, or *law of the case*.” From a review of the record it does not appear that any of the three (3) exceptions cited in Rule 1.200 apply because each doctrine requires privity⁶⁸ of the parties. The parties cannot cite “any” unpublished decisions as having precedent in this matter.

⁶⁵ OKLA. STAT. ANN. tit. 20, § 30.5 (West 2002):

The Court of Civil Appeals shall effect disposition of cases assigned to it by a written opinion prepared in such form as the Supreme Court prescribes. No opinion of the Court of Civil Appeals shall be binding or cited as precedent unless it shall have been approved by the majority of the justices of the Supreme Court for publication in the official reporter. The Supreme Court shall direct which opinion or decision, if any, of the Court of Civil Appeals shall be published in the unofficial reporter. Opinions of the Court of Civil Appeals which apply settled precedent and do not settle new questions of law shall not be released for publication in the official reporter.

⁶⁶ See Notes 59-60, *supra*.

⁶⁷ *Id.*

⁶⁸ “Privity” (priv-<<schwa>>-tee). (16c) 1. The connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property); mutuality of interest <privity of contract>. [Cases: [Contracts 186](#); [Judgment 678\(2\)](#).] BLACK’S LAW DICTIONARY (9th ed. 2009), available at <http://web2.westlaw.com>.

PART II**THE CORE QUESTIONS OF LAW RAISED BY THE PROTESTANTS IN THIS MATTER ARE SETTLED QUESTIONS OF LAW ON THE ADMINISTRATIVE LEVEL AND BY THE TAX COMMISSION.**

The same core questions of law have been heard and reheard with each side rearguing essentially the same positions with the same inevitable outcome each time.⁶⁹ The Protestants' position that the "Amendment"⁷⁰ to the Deduction, which became effective January 1, 2008, was

⁶⁹ See FCR Exhibits A through C.

⁷⁰ See FCR Exhibit B at 15-16.

OKLA. STAT. tit. 68, § 2358(F) (West Supp. 2008) and SB 685 provides in pertinent parts:

SECTION 3. AMENDATORY 68 O.S. 2001, Section 2358, as last amended by Section 1 of Enrolled Senate Bill No. 854 of the 1st Session of the 51st Oklahoma Legislature, is amended to read as follows:

...

F. 1. For taxable years beginning after December 31, 2004, a deduction from the Oklahoma adjusted gross income of any individual taxpayer shall be allowed for qualifying gains receiving capital treatment that are included in the federal adjusted gross income of such individual taxpayer during the taxable year.

2. As used in this subsection:

a. "qualifying gains receiving capital treatment" means the amount of net capital gains, as defined in Section 1222(11) of the Internal Revenue Code, included in an individual taxpayer's federal income tax return that result from:

(1) the sale of real property or tangible personal property located within Oklahoma that has been directly or indirectly owned by the individual taxpayer for a holding period of at least five (5) years prior to the date of the transaction from which such net capital gains arise, ~~or~~

(2) the sale of stock or the sale of a direct or indirect ownership interest in an Oklahoma company, limited liability company, or partnership where such stock or ownership interest has been directly or indirectly owned by the individual taxpayer for a holding period of at least two (2) years prior to the date of the transaction from which the net capital gains arise, or

(3) the sale of real property, tangible personal property or intangible personal property located within Oklahoma as part of the sale of all or substantially all of the assets of an Oklahoma company, limited liability company, or partnership or an Oklahoma proprietorship business enterprise where such property has been directly or indirectly owned by such entity or business enterprise or owned by the owners of such entity or business enterprise for a period of at least two (2) years prior to the date of the transaction from which the net capital gains arise,

b. "holding period" means an uninterrupted period of time. The holding period shall include any additional period when the property was held by another individual or entity, if such additional period is included in the taxpayer's holding period for the asset pursuant to the Internal Revenue Code,

intended by the Oklahoma Legislature as merely a “clarification” of the Deduction and should be applied retroactively to “taxable years beginning after December 31, 2004”⁷¹ has been concluded as a matter of law to be incorrect by Tax Commission Order (Precedential) No. 2012-02-14-05 (February 14, 2012), Tax Commission Order 2009-06-23-02 (June 23, 2009), and Tax Commission Order 2009-06-23-03 (June 23, 2009), which are incorporated herein by reference, attached hereto in redacted form, and designated as FCR Exhibits A through C. Tax Commission Order 2009-06-23-02 (June 23, 2009) states in pertinent parts,⁷² as follows, to-wit:

...

The Division acknowledges, “When construing a statute which has been amended, [the Court is] mindful that the legislature may have intended either (a) to effect a change in the existing law, or (b) to clarify that which

c. “Oklahoma company,” “limited liability company,” or “partnership” means an entity whose primary headquarters have been located in Oklahoma for at least three (3) uninterrupted years prior to the date of the transaction from which the net capital gains arise,

d. “direct” means the individual taxpayer directly owns the asset, ~~and~~

e. “indirect” means the individual taxpayer owns an interest in a pass-through entity (or chain of pass-through entities) that sells the asset that gives rise to the qualifying gains receiving capital treatment.

(1) With respect to sales of real ~~or~~ property or tangible personal property located within Oklahoma, the deduction described in this subsection shall not apply unless the pass-through entity that makes the sale has held the property for not less than five (5) uninterrupted years prior to the date of the transaction that created the capital gain, and each pass-through entity included in the chain of ownership has been a member, partner, or shareholder of the pass-through entity in the tier immediately below it for an uninterrupted period of not less than five (5) years.

(2) With respect to sales of stock or ownership interest in or sales of all or substantially all of the assets of an Oklahoma company, limited liability company, or partnership or Oklahoma proprietorship business enterprise, the deduction described in this subsection shall not apply unless the pass-through entity that makes the sale has held the stock or ownership interest for not less than two (2) uninterrupted years prior to the date of the transaction that created the capital gain, and each pass-through entity included in the chain of ownership has been a member, partner or shareholder of the pass-through entity in the tier immediately below it for an uninterrupted period of not less than two (2) years. For purposes of this division, uninterrupted ownership prior to the effective date of this act shall be included in the determination of the required holding period prescribed by this division, and

f. “Oklahoma proprietorship business enterprise” means a business enterprise whose income and expenses have been reported on Schedule C or F of an individual taxpayer’s federal income tax return, or any similar successor schedule published by the Internal Revenue Service and whose primary headquarters have been located in Oklahoma for at least three (3) uninterrupted years prior to the date of the transaction from which the net capital gains arise.

⁷¹ See Protestants’ Brief in Chief at 3-5. See also Protestants’ Response Brief at 1-4.

⁷² See FCR Exhibit B at 16.

previously appeared doubtful,” but asserts the Protestants have failed to point to any clarifying language.

The Division points out the Amendment added an entirely new subsection, “2358(F)(2)(a)(3)”, which the Protestants contend qualify them for the Capital Gains Deduction for “Intangible” Personal Property attributable to goodwill. However, this subsection enlarged the Deduction’s scope to include a new category of personal property, which was not previously included in the Deduction, which indicates the Amendment is a substantive change in the law, not a clarification of the Deduction as asserted by the Protestants. Enlarging the scope of the Deduction to include assets which were not previously eligible for the Capital Gains Deduction is a change to the Deduction, not a Clarification.

The Protestants have failed to overcome the presumption that the Amendment to the Deduction is to be applied prospectively. As in *Wilson*, the Amendment sets forth the provisions of [Section 2358\(F\)\(1\)](#) in full, provisions of the Deduction which are repeated are to be considered as having been the law from the time it was first enacted, and the new provisions or changed portions are to be understood as enacted at the time the Amendment takes effect (January 1, 2008), and not to have any retroactive operation. (Original footnotes omitted.)

PART III

THE TAX COMMISSION DOES NOT HAVE THE AUTHORITY TO STRIKE DOWN A STATUTE ON CONSTITUTIONAL GROUNDS.

The Protestants’ fallback position is that if the Division’s position is correct, the “Amendment” to the Deduction, effective January 1, 2008, is unconstitutional for a variety of reasons, which will be addressed hereinafter.

First, the Supreme Court of Oklahoma held in *Dow Jones*,⁷³ “We agree with the Commission that, as an administrative agency, it is powerless to strike down a statute for constitutional repugnancy. Within the framework of Oklahoma’s tripartite distribution of government powers, the authority to invalidate an unconstitutional enactment resides *solely* in the judicial department. Art. 7, § 1, Okl. Const.⁷⁴ confers on administrative agencies only that

⁷³ *Dow Jones & Company, Inc. v. State ex rel. Oklahoma Tax Com’n*, 1990 OK 6, 787 P.2d 843. (Citations omitted).

⁷⁴ OK Const. Art. 7, § 1, (West 2006) states as follows, to-wit:

The judicial power of this State shall be vested in the Senate, sitting as a Court of Impeachment, a Supreme Court, the Court of Criminal Appeals, the Court on the Judiciary, the State Industrial Court, the Court of Bank Review, the Court of Tax Review, and such intermediate appellate courts as may be provided by statute, District Courts, and such Boards,

quantum of ‘judicial power’ which is necessary to support their exercise of adjudicative authority in individual proceedings brought before them. The power assigned to boards and commissions is not coextensive with that which is vested in the courts. Every statute is hence constitutionally valid until a court of competent jurisdiction declares otherwise.”

The “Amendment” to the Deduction is deemed constitutionally valid until a court of competent jurisdiction determines otherwise.

PART IV

THE “AMENDMENT” TO THE DEDUCTION IS NOT A “REVENUE BILL” AND THE TITLE TO SB 685 GAVE SUFFICIENT NOTICE TO THE PUBLIC AND THE LEGISLATORS OF THE BILL’S SCOPE AND EFFECT.

The Protestants state, “First and foremost, the relevant amendments are contained in a Senate Bill. Article V, Section 33 of the Oklahoma Constitution requires ‘revenue bills’ to originate in the House of Representatives. ...Since this bill (SB 685) originated in the Senate, it must under the Oklahoma Constitution be an administrative measure without the purpose of increasing or decreasing taxes.”⁷⁵

While acknowledging that “Revenue Bills” must originate pursuant to Article V, Section 33 of the Oklahoma Constitution,⁷⁶ the Division responds, “The term ‘revenue bill’ only applies to bills ‘whose principal object is the raising of revenue, and not those under which revenue may incidentally arise.’”⁷⁷

The Division’s reading of the “Amendment” to the Deduction comports with the case law cited herein. The “Amendment” to the Deduction is a tax exemption or deduction statute, not a

Agencies and Commissions created by the Constitution or established by statute as exercise adjudicative authority or render decisions in individual proceedings. Provided that the Court of Criminal Appeals, the State Industrial Court, the Court of Bank Review and the Court of Tax Review and such Boards, Agencies and Commissions as have been established by statute shall continue in effect, subject to the power of the Legislature to change or abolish said Courts, Boards, Agencies, or Commissions. Municipal Courts in cities or incorporated towns shall continue in effect and shall be subject to creation, abolition or alteration by the Legislature by general laws, but shall be limited in jurisdiction to criminal and traffic proceedings arising out of infractions of the provisions of ordinances of cities and towns or of duly adopted regulations authorized by such ordinances.

⁷⁵ Protestants’ *Brief in Chief* at 5. (Citation omitted.)

⁷⁶ See Note 54, *supra*.

⁷⁷ Division’s *Response Brief* at 11. See *Wallace v. Gassaway*, 1931 OK 210, 298 P. 867, citing *Anderson v. Ritterbusch*, 1908 OK 250, 98 P. 1002.

tax levying statute. As such, it did not have to originate in the House; and because the “Amendment” to the Deduction is applied prospectively, having an effective date of January 1, 2008, the “Amendment” does not affect available deductions. The Protestants’ argument, which relates to their reading of the “Amendment” to the Deduction, also fails for the reasons already stated herein.

As the Supreme Court of Oklahoma states in *Stewart*,⁷⁸ “The title of a statute may be general and does not need to contain an abstract of the contents or specify each clause in order to comply with constitutional requirement that the subject of an act shall be clearly expressed in its title, and the title is sufficient if the clauses of the statute are referable and cognate to the subject expressed. The constitutional provision that the subject of an act shall be clearly expressed in its title is not to be applied so as to cripple legislation.”

The Title to SB 685 gave sufficient notice to the public and the legislators of the bill’s scope and effect.

PART V

DOES THE SALE OF THE “WIND LEASES” QUALIFY FOR THE DEDUCTION IN EFFECT FOR THE 2006 TAX YEAR?

The Protestants’ *Brief in Chief* and *Response Brief* are both written from the point of view that the “Amendment” to the Deduction, which became effective January 1, 2008, is applicable to this matter and is retroactive, as being merely a clarification of the Deduction.⁷⁹ For the reasons stated hereinabove, it is the position of the undersigned that the Protestants are incorrect, and the core questions of law raised by the Protestants in this matter are settled questions of law on the administrative level and by the Tax Commission.

As a result, the Protestants failed to analyze the sale of the “Wind Leases,” when read in conjunction with the Deduction in effect for the 2006 Tax Year.⁸⁰ The Deduction states in pertinent parts, as follows,⁸¹ to-wit:

2. As used in this subsection:
 - a. “qualifying gains receiving capital treatment” means the amount of net capital gains, as defined in Section 1222(11) of the Internal Revenue Code, included in an individual taxpayer’s federal income tax return that result from:

⁷⁸ See Notes 56-57, *supra*.

⁷⁹ See Protestants’ *Brief in Chief* and *Response Brief*.

⁸⁰ See Note 39, *supra*.

⁸¹ *Id.*

- (1) the sale of *real or tangible personal property* located within Oklahoma that has been directly or indirectly owned by the individual taxpayer for a holding period of at least five (5) years prior to the date of the transaction from which such net capital gains arise, or (Emphasis added).

The Deduction contains two (2) categories which are eligible for the Oklahoma Capital Gains Deduction: (1) the sale of property located in Oklahoma and (2) the sale of stock or ownership interest in an Oklahoma company, limited liability company, or partnership (which includes an “S” corporation).⁸²

The Deduction permits a deduction for the sale of two types of property: (1) real property and (2) tangible personal property. The Purchase and Sale Agreement dated March 1, 2006, states that this is a purchase of Project Assets,⁸³ which falls under the first category, property. However, it must first be determined whether the Project Assets and specifically, the “Wind Leases” meet the five (5) year holding requirement of the Deduction.

On March 1, 2006, the Protestants entered into the Purchase and Sale Agreement of the Project Assets (which include Related Rights). According to the Deduction in effect for the 2006 Tax Year, because Protestants indirectly owned the Project Assets through their ownership in the Corporation (Corporation in turn owned LLC, which developed PROJECT 3 and PROJECT 2).⁸⁴ The Corporation must have held the “Wind Leases” for an uninterrupted period of not less than five (5) years prior to the date of the transaction, which means that the Corporation must have held the “Wind Leases” at minimum on or before March 1, 2001.

The Protestants acknowledge that the “LESSEE 5”⁸⁵ and “LESSEE 6”⁸⁶ “Wind Leases” do not meet the five (5) year holding requirement. However, an examination of the “TRUSTEE 1 & 2,”⁸⁷ “LESSEE 1 & 2,”⁸⁸ and “LESSEE 3 & 4”⁸⁹ “Wind Leases” indicates that these four (4) leases meet the five (5) year holding requirement.

⁸² *Id.* It should be noted that the Protestants argue in their *Brief in Chief* at 10-12, that the Deduction, as it applied to the Amendment, which became effective January 1, 2008, “The Corporation sold substantially all of the assets of each business enterprise. See Stipulation Exhibit G.”

As to the Deduction in effect for the 2006 Tax Year, the Purchase and Sale Agreement clearly indicates that this transaction was structured as a “sale of assets.” The record does not support any argument that this transaction was the sale of an ownership interest (direct or indirect) owned by the Protestants.

⁸³ See Notes 18-19, *supra*. The Related Rights do not indicate the dates on which they were acquired to determine whether or not they meet the five (5) year holding requirement.

⁸⁴ See Stipulations 5-7.

⁸⁵ See Note 25, *supra*.

⁸⁶ See Notes 26-27, *supra*.

⁸⁷ See Notes 21-22, *supra*. There are two (2) “TRUSTEE” leases, not one (1).

⁸⁸ See Note 23, *supra*.

PART VI**WHETHER THE “WIND LEASES” WHICH MET THE FIVE (5) YEAR HOLDING REQUIREMENT OF THE DEDUCTION IN EFFECT FOR THE 2006 TAX YEAR ARE REAL OR TANGIBLE PERSONAL PROPERTY?**

The Protestants assert “The proceeds received by the Corporation in 2006 for the sale of [“Wind Leases”] resulted in a net capital gain, as defined in Section 1222(11) of the Internal Revenue Code, for federal income tax purposes, and that gain was included in the Taxpayer’s federal adjusted gross income for that year.”⁹⁰ “...The primary assets sold consisted of leases and easements covering real property, with the addition of improvements that enhanced the value of those leases and easements which were sold as qualifying small power production facilities.”⁹¹

In support of their position, the Protestants state “In defining ‘qualifying gains receiving capital treatment’ the Legislature directly incorporates federal law related to capital gain treatment.... For purposes of federal law, leasehold interests and easements constitute ‘real property,’ and are thus entitled to treatment as a capital asset.”⁹² Therefore, consistent with federal law, leasehold interests and easements should be treated as real property.”⁹³ “Under federal law, leases and easements constitute real property regardless of how state law would characterize such property.”⁹⁴ “Oklahoma law is otherwise consistent with federal law. The Oklahoma Supreme Court has held that leases and easements covering real property are ‘interests in real property’ and the common law basis for distinguishing interests as ‘chattel real’ (i.e., intangible for some purposes and real for others) is predicated upon ‘obsolete feudal land-law’ concepts.”⁹⁵ In Rev. Rul. 68-226,⁹⁶ cited by the Protestants, the IRS states “The various

⁸⁹ See Note 24, *supra*.

⁹⁰ Protestants’ *Brief in Chief* filed July 27, 2012 at 2.

⁹¹ *Id.* at 2-3. The Protestants seem to imply that some of the Related Assets were used to invest in and improve the “Wind Leases,” for which the Protestants cite the definition of real property for ad valorem purposes. See OKLA. STAT. ANN. tit. 68, § 2806(A) (West Supp. 2012).

⁹² *Id.* Rev. Rul. 59-121 (Easement constitutes an interest in real property), Rev. Rul. 60-4 (Superceded by Rev. Rul. 72-85), Rev. Rul. 68-226 (Interest of Lessee in oil and gas lease held for more than six (6) months qualifies as real property), Rev. Rul. 72-85. See *Metropolitan Bldg. Co. v. C.I.R.*, 282 F.2d 592 (9th Cir. 1960).

⁹³ *Id.*

⁹⁴ *Id.* See specifically Rev. Rul. 68-226, *supra*.

⁹⁵ *Id.* at 4. See *In re Oneok Field Services Gathering, LLC*, 2001 OK 116, 38 P.3d 900. “Taxpayer’s pipeline rights of way were rights and privileges appertaining to land, and fell within statutory definition of real property, rather than within the definition of personal property, for purposes of ad valorem tax assessment by a county assessor; fact that pipeline rights of way did not add value to the land did not exclude them from legislatively designed definition of real property.” See Note 91, *supra*, for the definition of real property for ad valorem purposes.

⁹⁶ See Note 92, *supra*. (Citations omitted).

state jurisdictions are not in agreement as to the characterization of such a leasehold as real property, personal property, or some other type of interest. The Federal revenue laws, however, are not to be deemed subject to state law unless the express language or necessary implication of the section involved so requires.”

In response, the Division states “The Division does not dispute that the gains realized by Protestants are capital gains—however, that is only one piece of the puzzle. The Deduction itself requires not just that the gains qualify for capital treatment at the federal level, but also meet the additional requirements enumerated in the statute, including the requirement that the gains must be derived from the sale of real or tangible personal property.”⁹⁷

Any term used in the Act shall⁹⁸ have the same meaning as when used in a comparable context in the IRC, unless a different meaning is clearly required. For all taxable periods covered by the Act, the tax status and all elections of all taxpayers covered by the Act shall⁹⁹ be the same for all purposes material hereto as they are for federal income tax purposes except when the Act specifically provides otherwise.¹⁰⁰

The Division acknowledges that the four (4) “Wind Leases” meet the five (5) year holding requirement, but asserts that the “Wind Leases” are intangible assets which are not eligible for the Deduction for 2006 Tax Year.¹⁰¹ The Division cites to the Purchase and Sale Agreement, Article I, Section 1.1,¹⁰² which states in pertinent parts, as follows, to-wit:

(a) the lease, option, easement and other agreements set forth in Schedule 1.1 to Exhibit B [to the Agreement] creating rights with respect to the Property...and

(b) any and all contractual rights, approvals, governmental orders, tax abatement agreements, development rights, permit applications, zoning applications, permits, licenses, access rights, wind and other meteorological data, transmission studies, electrical interconnection rights, studies and study agreements, electrical transmission rights, environmental diligence, land, title and abstract files, surveys, maps, and all other files, records, rights or assets of any kind owned by Seller...pertaining to the Project, the Property or the development, acquisition, ownership, or operation of a wind energy project on the Property.

⁹⁷ Division’s *Supplemental Brief* at 6.

⁹⁸ See Note 35, *supra*.

⁹⁹ *Id.*

¹⁰⁰ See Note 37, *supra*.

¹⁰¹ See Division’s *Supplemental Brief* at 1.

¹⁰² See Exhibit G at 1.

The Division states, “As the wind energy industry is still a relatively new industry, there is little to no existing case law regarding the treatment of wind energy leases. However, oil and gas mining leases provide a useful analogy, as both involve the right to enter property and construct a facility with the goal of extracting an energy source.”¹⁰³ In support of its position the Division’s cites to *Shamblin*¹⁰⁴ for the proposition that “There is longstanding precedent in Oklahoma that an oil and gas mining lease is considered a chattel real,¹⁰⁵ and is therefore personal property. The *Shamblin*¹⁰⁶ Court stated:

It has been consistently held by this court that an oil and gas mining lease is not real property nor a freehold or corporeal interest therein, and that the execution of such a lease does not constitute a conveyance of lands, tenements or other realty, or of a freehold or corporeal interest therein. ...It has also been held repeatedly and consistently held that such oil and gas mining leases are chattels real and are therefore personal property.

The Division further states “Like an oil and gas lease, the wind energy leases convey upon the lessee a right to use the property for the specific purpose of producing wind energy, but do convey a fee simple interest in the land itself. Once it is determined that the leases constitute personal property, one must then determine whether the personal property is tangible¹⁰⁷ or intangible.”¹⁰⁸

In *Globe Life*,¹⁰⁹ the court held “At common law ‘tangible personal property; refers to rights in tangible physical things of the world over which *possession* may be taken. ‘Intangible

¹⁰³ See Division’s *Supplemental Brief* at 3.

¹⁰⁴ *State v. Shamblin*, 1939 OK 244, 90 P.2d 1053. (Citations omitted.) See *Tupeker v. Deaner*, 1915 OK 287, 148 P. 853. See also *Standolind Crude Oil Purchasing Co. v. Busey*, 1939 OK 1939, 90 P.2d 876.

¹⁰⁵ See Note 103, *supra*. “Chattel real.” (16c) A real-property interest that is less than a freehold or fee, such as a leasehold estate. The most important chattel real is an estate for years in land, which is considered a chattel because it lacks the indefiniteness of time essential to real property. — Also termed real chattel. BLACK’S LAW DICTIONARY (9th ed. 2009) available at <http://web2.westlaw.com>. See also 63C Am.Jur.2d Property, § 20, available at <http://web2.westlaw.com>, which states in pertinent part, as follows, to-wit:

A “chattel real” is an interest in real estate having the character of immobility, which is less than a freehold and is personal property. Chattels real are to be distinguished, on the one hand, from things which have no concern with the land, such as mere movables and rights connected with them, which are chattels personal, and on the other hand, from a freehold, which is realty. (Citations omitted.)

¹⁰⁶ See Note 104, *supra*.

¹⁰⁷ “Tangible” adj. (16c) 1. Having or possessing “physical form; corporeal. 2. Capable of being touched and seen; perceptible to the touch; capable of being possessed or realized. 3. Capable of being understood by the mind. BLACK’S LAW DICTIONARY (9th ed. 2009), available at <http://web2.westlaw.com>.

¹⁰⁸ Division’s *Supplemental Brief* at 4. “Intangible” adj. (17c) Not capable of being touched; impalpable; incorporeal. BLACK’S LAW DICTIONARY (9th ed. 2009), available at <http://web2.westlaw.com>.

¹⁰⁹ *Globe Life and Acc. Ins. Co. v. Oklahoma Tax Com’n*, 1996 OK 39, 913 P.2d 1322. (Emphasis original.) See *In re Assessment of Osage & Oklahoma Gas Co.*, 1912 OK 803, 128 P. 692.

personal property’ encompasses property rights which-though represented by tangible object (e.g., stock certificates, bonds and notes)-are essentially incorporeal in that they have limited intrinsic value and *ultimately* can only be claimed or enforced by a legal action.”

“By the mandate of 12 O.S.1991 § 2 *the common law remains in full force unless a statute explicitly provides to the contrary.* The common law’s legislative abrogation may not be effected by mere implication.”¹¹⁰ The rights conferred by the “Wind Leases” include a variety of common-law interests in the land, including the right to access the property and to make use of the surface as set forth herein.¹¹¹ “Early common law classified personal property by examining the rights which were being asserted in the *thing*. While *possession* is the key to enforcement of rights in *tangible personal property*, rights in *intangible personal property* are enforceable *only by a claim or an action.*”¹¹²

The four (4) “Wind Leases” grant the Lessee “...a surface lease, for the sole and only purpose of wind power generation and power sales, and the rights of egress and ingress, and for laying electrical transmission lines, and installation of overhead power transmission lines, and building power stations and structures therein.”¹¹³ The personal property at issue in this matter are the “Wind Leases,” the rights in which are enforceable only by a claim or an action, classifying them as “Intangible Personal Property,” not “Tangible Personal Property,” as specifically provided by the Deduction in effect for the 2006 Tax Year.

The Statute is a tax exemption or deduction statute, not a tax levying statute and as such must be strictly construed against the Protestants unless authority for the deduction is clearly expressed.¹¹⁴ The language of the Deduction is clear and unambiguous; the Deduction does not contain exclusion for “Intangible Personal Property” in the form of “Wind Leases” for the 2006 Tax Year.

¹¹⁰ *Id.* (Emphasis original). (Citations omitted.) See OKLA. STAT. ANN. tit. 12, § 2 (West 2000):

The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall be liberally construed to promote their object.

¹¹¹ *Id.* See *Hinds v. Phillips Petroleum Co.*, 1979 OK 22, 591 P.2d 697.

¹¹² *Id.* (Citation omitted).

¹¹³ See *Panhandle Eastern Pipe Line Co. v. U.S.*, 408 F.2d 690. See also *Pennsylvania Power & Light Co. v. U.S.*, 411 F.2d 1300.

¹¹⁴ See Notes 45-46, *supra*. See also FCR Exhibit C at 9 and Notes 59 and 62, therein.

CONCLUSION

The Protestants have failed to meet their burden of proof that the Division's disallowance of the Deduction for the 2006 Tax Year attributable to "Intangible Personal Property" in the form of "Wind Leases" was incorrect and in what respects.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the protest should be denied.

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."