

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2012-10-18-03 / NON-PRECEDENTIAL
ID: P-11-577-K
DATE: OCTOBER 18, 2012
DISPOSITION: DENIED
TAX TYPE: INCOME
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestants, TAXPAYER and SPOUSE appear pro se. The Account Maintenance Division of the Oklahoma Tax Commission (hereinafter "Division") is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

The Division audited Protestants' 2010 Oklahoma Resident Income Tax Return (Form 511), disallowed the out-of state income deduction claimed on the return, and by letter dated June 6, 2011 notified Protestants of the adjustment to the return, and the resulting reduction of the refund from the amount claimed of \$1,275.00 to \$21.00. Protestants timely protested the proposed adjustment.

On October 7, 2011, the Division referred the protest to the Office of the Administrative Law Judges for further proceedings in accordance with the Uniform Tax Procedure Code¹ and the Rules of Practice and Procedure before the Office of Administrative Law Judges². The protest was docketed as Case No. P-11-577-K and assigned to ALJ, Administrative Law Judge.³

A pre-hearing conference was scheduled for November 22, 2011, by *Prehearing Conference Notice* issued October 17, 2011.⁴ During the conference, Protestants submitted a letter from COMPANY advising that the \$26,271.19 paid in 2010 was an automobile voucher valued at \$15,500.00 which was grossed up by \$10,771.19 to cover federal, state, local and FICA taxes.

Pursuant to the prehearing conference, the parties were directed to file a status report. By letter dated November 22, 2011, Protestants sought clarification as to the Division's characterization of the income and the statutory authority for denying the deduction.

On January 19, 2012, Protestants filed a status report and a position statement with respect to the protest. By *Memorandum* filed January 20, 2012, the Division submitted a status report and a request for a scheduling order. Protestants were directed to respond to the *Memorandum* on or

¹ 68 O.S. 2011, § 201 et seq.

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

³ OAC, 710:1-5-22(b).

⁴ OAC, 710:1-5-28.

before February 7, 2012. By letter dated January 22, 2012, Protestants filed an addendum to their status report of January 19, 2012.

A *Scheduling Order* was issued February 9, 2012. By *Interim Status Report* filed May 31, 2012, the Division advised that the parties were unable to stipulate to the facts and requested that the alternative procedure of scheduling a hearing to receive evidence be invoked.

The *Account Maintenance Division's Motion for Summary Disposition* ("Motion") with Exhibits 1 through 8 attached thereto was filed June 14, 2012.⁵ By letter dated June 18, 2012, Protestants were notified that they could file a response to the *Motion*.⁶ Protestants did not file a response to the *Motion*. By letter dated August 8, 2012, the parties were advised that the dates for filing briefs as set forth in the *Scheduling Order* were cancelled and the *Motion* was submitted for decision.⁷

FINDINGS OF FACT

Upon review of the file and records, including the *Motion* and attached exhibits, the undersigned finds:

1. The facts material to the disposition of the protest are not in dispute and the issue is one of law.
2. The material facts as set forth in the *Motion*, STATEMENT OF FACTS⁸, are:
 1. On August 1, 2009 Protestant TAXPAYER retired from work at the COMPANY plant in CITY, STATE.
 2. On March 24, 2011 Protestants filed their 2010 Oklahoma full-year resident income tax return with a copy of the Federal return attached. On the return, they reported \$26,416.00 on line 4b "Out-of-state income, except wages" which they subtracted from Federal adjusted gross income for purposes of arriving at Oklahoma adjusted gross income. On the return they claimed a credit for taxes paid to another state of \$1,154.00. The return claimed a refund of \$1,275.00. Protestants also attached a copy of their STATE non-resident income tax return for that year upon which they reported as STATE adjusted

⁵ OAC, 710:1-5-38(b).

⁶ OAC, 710:1-5-38(b)(3)

⁷ OAC, 710-1-5-38(b)(6).

⁸ All references to exhibits are omitted.

gross income the \$26,416.00 (included in a gross reported amount of \$27,754.00), taxable as STATE source income.

3. Attached to Protestants' Federal return supplied with their Oklahoma return was a Form W-2 from COMPANY, LLC, Vehicle Manufacturing reporting \$26,415.86, which is the item of income Protestant's [sic] sought to exclude from Oklahoma adjusted gross income. The W-2 also reported \$126.41 in local income tax paid, which constitutes taxes paid to another state for Oklahoma income tax purposes.
4. The Division examined Protestants' 2010 return, and by letter dated June 6, 2011 adjusted the return to deny the exclusion of the \$26,416.00, recalculate and give credit for the taxes paid to another state in the amount of \$1,180.00 and partially denied the refund, reducing it to \$21.00, which amount was paid to Protestants.
5. On June 10, 2011 the Division received Protestants' letter of protest to the June 6, 2011 adjustment letter. In this letter Protestants urged that the \$26,416.00 was not wages but rather was retirement income in the form of an award.
6. By letter dated June 20, 2011 the Division responded to the letter of protest explaining its position to be that the \$26,416.00 was taxable retirement income because Protestants were residents of Oklahoma at the time of its disbursement.
7. On June 25, 2011 Protestants filed an amended STATE income tax return. The return sought to exclude from STATE adjusted gross income the \$26,416.00 initially reported, leaving \$1,338.00 taxable by STATE. This return called for a refund of \$1,290.00.
8. On September 27, 2011 the Division received Protestants' letter dated September 23, 2011 transmitting documents from the STATE Department of Revenue effectively denying the \$1,290.00 refund claim for the stated reason that it was STATE source income.
9. Protestant TAXPAYER received \$36,955.11 in retirement income from his COMPANY Hourly Pension Plan which was reported in Protestants' 2010 Federal adjusted gross income.

10. A “Statement of Earnings and Deductions” provided Protestant TAXPAYER by COMPANY, LLC Vehicle Manufacturing describes a 2010 “Award Payment/Gross Pay” amount of \$26,271.19, the result of an Award Payment of \$15,500.00 plus a “gross up” for Federal FICA and state and local income taxes. This gross amount is part of that reported on the COMPANY, LLC Vehicle Manufacturing W-2.

3. The amount in controversy is \$1,254.00, the difference between the amount claimed as a refund and the amount refunded to Protestants.

ISSUES AND CONTENTIONS

The issue presented for decision is whether the “award payment” Protestant received in the form of an automobile voucher and gross up of that amount for taxes and FICA from his former employer upon exercising his option in 2010 after establishing Oklahoma as his domicile may properly be excluded from Oklahoma taxable income as out-of-state income.

The Division initially denied the out-of-state income deduction for the reason that “wages are not allowed” to be deducted as out-of-state income. In response to the denial, Protestants argued that the amount could not be deemed to be wages since the amount was an award for retirement that was exercised in 2010. In support of this argument, Protestants averred that “I at no time in 2010 visited, lived in, nor worked in STATE.”

In response to the protest, the Division wrote: “[r]etirement income is taxable to the taxpayer’s state of residence at the time of disbursement.” The Division further wrote:

Because you were a resident of Oklahoma in 2010, when you received the retirement income, it was taxed as such. You were given credit for taxes paid to another state in the amount of \$1,118.00⁹ instead of \$1,154.00 as previously reported.

In response to this letter, Protestants filed an amended 2010 STATE nonresident/part-year resident Individual Income Tax Return wherein they excluded the amount of the award from their STATE taxable income. The STATE Department of Revenue denied the exclusion stating: “[a]ll income earned by nonresidents from STATE sources and from property located in STATE is subjected to STATE income tax[.] [r]efund denied.”

In response to the STATE Department of Revenue denial of the exclusion and refund, Protestants wrote the Division in part:

⁹ The amount reported represents a typographical error. This should have reflected the amount of \$1,180.00 as reported on the adjustment letter (Exhibit 2 to the *Motion*).

I originally claimed this as STATE income. However, OK Tax Commission disallowed this. When I filed my written protest to this decision, I explained that I believe my returns were correctly filed. I maintain that my original OK return was correctly filed.

The income in dispute was paid to me as part of a retirement incentive. It was a car voucher from COMPANY. Because I retired from the CITY, STATE assembly plant (Aug. 1, 2009) the payment of the voucher was from that plant (STATE source). I did not exercise the voucher until Nov. 2010. When exercised, COMPANY processed the payment through COMPANY payroll. Which led to me receiving a W-2 for the amount of the voucher. However, this was not wages because I did not work for it. When I did my tax return with Turbo Tax, I entered the information as a W-2 because that is what came in the mail. Although it probably should have been entered somewhere else on my return. Where I don't know. It seems that it is not wages nor retirement income. I say it is not retirement income because I received a separate 1099-R for that income from Fidelity.

This seems to be a very unique circumstance. But I know that there should not be a tax liability to both Oklahoma and STATE.

In the position statement filed January 19, 2012, Protestants assert: (1) the income in dispute is not wages for the reasons stated, (2) the income in dispute was not retirement for the reasons stated, (3) the income was in fact STATE source income as evidenced by the state and local STATE income taxes withheld as shown on the W-2, (4) the income was reported as STATE income, (5) STATE says the income is taxable in STATE, and (6) the income is only attributable to one state, so Oklahoma has no rightful claim to tax on this income.

The Division contends that the amount of the award was properly included in Protestants' Oklahoma adjusted gross income for tax year 2010. In support of this contention, the Division argues that the award was received by Protestants after they became residents of Oklahoma and the award is not of a character which is allocable to another state for Oklahoma income tax purposes, citing 68 O.S. 2001, § 2358(A)(4).

CONCLUSIONS OF LAW

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

1. Jurisdiction of the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S. 2011, § 207.
2. An income tax is imposed upon the "Oklahoma taxable income" of every resident individual. 68 O.S. 2001, § 2355(A). "Oklahoma taxable income" is defined to mean "'taxable income' as reported (or as would have been reported by the taxpayer had a return been filed) to the federal government, and in the event of adjustments

thereto by the federal government as finally ascertained under the Internal Revenue Code, adjusted further as hereinafter provided.” 68 O.S. 2001, § 2353(12).

3. The provisions of § 2358 of the Oklahoma Income Tax Act¹⁰; in general, specify the adjustments to the taxable income of any taxpayer to arrive at the Oklahoma adjusted gross income for individual taxpayers. 68 O.S. 2001, § 2358(A). None of the adjustments permit the deduction or subtraction of wages or salary earned by an individual for services performed either partly or wholly outside the state from taxable income to arrive at Oklahoma adjusted gross income.
4. "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).
5. Income received by a resident of Oklahoma for services performed wholly without the state is subject to Oklahoma income tax. *Davis v. Oklahoma Tax Commission*, 1971 OK 109, 488 P.2d 1261; *Colchensky v. Oklahoma Tax Commission*, 1938 OK 612, 184 Okla. 207, 86 P.2d 329. See, *Oklahoma Tax Commission v. Benham*, 1947 OK 104, 198 Okla. 384, 179 P.2d 123. In *Colchensky*, the Oklahoma Supreme Court cited the holding of the U.S. Supreme Court in *Lawrence et al. v. State Tax Commission of Mississippi*¹¹, wherein it held: “[a] state has constitutional power to tax its own citizens on their net incomes though derived wholly from activities carried on by them outside of the State. Domicile in itself establishes a basis for taxation” and said “[e]njoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government.”
6. “Income tax statutes are not invalid simply because they may exact what is popularly called double taxation, even assuming that term should apply to a factual situation where two separate governmental entities exact a tax on income of the same individuals.” *Oklahoma Tax Commission v. Smith*, 1980 OK 74, 610 P.2d 794, 805. Neither the Federal Constitution nor the Fourteenth Amendment prevents the state from imposing double taxation, or any other form of unequal taxation, so long as the inequality is not based upon arbitrary distinctions. *Shaffer v. Carter*, 252 U.S. 37, 40 S.Ct. 221, 64 L.Ed. 445 (1920), citing *St. Louis S.W. Railway v. Arkansas*, 235 U.S. 350, 367, 368, 35 S.Ct. 99, 104, 59 L.Ed. 265 (1914).

¹⁰ 68 O.S. 2001, § 2351 et seq., as amended.

¹¹ 286 U.S. 276, 52 S.Ct. 556, 76 L.Ed. 1102, 87 A.L.R. 374.

7. Protestants have the burden of proof to show the action or proposed action of the Division is incorrect, and in what respect. *OAC*, 710:1-5-47; *Geoffrey, Inc. v. Oklahoma Tax Commission*, 2006 OK CIV APP 27, 132 P.3d 632. The burden of proof standard is “preponderance of evidence.” 2 Am.Jur.2d *Administrative Law* § 357. “Preponderance of evidence” means “[e]vidence which is of greater weight or more convincing than the evidence offered in opposition to it; that is, evidence which as a whole shows the fact sought to be proved is more probable than not * * * evidence which is more credible and convincing to the mind * * * that which best accords with reason and probability.” Black’s Law Dictionary 1064 (5th ed. 1979). Each element of the claim must be supported by reliable, probative, and substantial evidence of sufficient quality and quantity as to show the existence of the facts supporting the claim are more probable than their nonexistence. 2 Am.Jur.2d *Administrative Law* § 357. If the taxpayer fails to prove a prima facie case, the protest may be denied solely on the grounds of failure to prove sufficient facts which would entitle the taxpayer to the requested relief. *OAC*, 710:1-5-47; *Continental Oil Company v. Oklahoma Tax Commission*, 1976 OK 23, 570 P.2d 315.
8. The award in this case represents an “unfunded deferred compensation arrangement”; i.e., the unsecured promise (not represented by a note) of an employer to pay compensation for current services at some time in the future. The amount promised is not includible in the employee’s gross income until it is received or made available. 2010 U.S. Master Tax Guide, CCH ¶ 723. Since Protestants were residents of the State of Oklahoma at the time the award was exercised and the income was received, the amount of the award was properly included in Protestants’ Oklahoma taxable income. *Davis, supra*; *Colchensky, supra*.

DISPOSITION

THEREFORE, based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestants, TAXPAYER 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.”