

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2013-01-08-04 / NON-PRECEDENTIAL
ID: P-12-098-K
DATE: JANUARY 8, 2013
DISPOSITION: SUSTAINED
TAX TYPE: INCOME
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestants, HUSBAND and WIFE appear pro se. The Compliance Division (“Division”) of the Oklahoma Tax Commission is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

The Division audited Protestants’ 2011 Oklahoma resident income tax return, and by letter dated April 3, 2012, notified Protestants that the “Credit for Employees in the Aerospace Sector” claimed on the return in the amount of \$9,345.00 was disallowed. Protestants timely protested the credit disallowance.

On May 11, 2012, the protest was referred to the Office of Administrative Law Judges for further proceeding consistent 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 Number P-12-098-K and assigned to ALJ, Administrative Law Judge.³

A pre-hearing conference was scheduled for June 14, 2012, by *Prehearing Teleconference Notice* issued May 31, 2012. Pursuant to the conference, a *Prehearing Conference Order and Notice of Alternative Hearing Date* (“Order”) was issued setting forth the procedure for the submission of the protest for decision.

A *Joint Stipulation of Facts and Statement of Issue* (“Stipulation”) was filed August 16, 2012 with Exhibits 1 through 6 attached thereto. By letter dated August 17, 2012, the parties were notified that the alternative hearing scheduled for August 16, 2012 was stricken and the parties were directed to comply with the briefing schedule.

Protestants’ *Brief in Chief* was filed September 14, 2012. The *Compliance Division’s Reply Brief* was filed October 9, 2012. On October 24, 2012, the record was closed and the

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

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

³ OAC, 710:1-5-22(b).

protest was submitted for decision.⁴

FINDINGS OF FACT

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

A. The parties stipulate to the following⁵:

B.

1. On March 3, 2012, Protestants filed an original Oklahoma individual full-year resident income tax return (Form 511) for 2011. During that year, HUSBAND was employed by COMPANY, a corporation whose principal business activity involves the aerospace sector within the meaning of 68 O.S. Supp. 2008, § 2357.301. The return claimed a Line 17 (Line 39, Form 511 CR) Oklahoma income tax credit, the “Credit for Employees in the Aerospace Sector” in the amount of \$9,345.00 and a Line 23 credit for Oklahoma withholding in the amount of \$3,996.00. The “Credit for Employees in the Aerospace Sector” was substantiated by a Form 564 attached to the return. The return claimed a refund of \$3,944.00. The amount claimed as “Credit for Employees in the Aerospace Sector” resulted from the \$5,000.00 credit for 2011, plus a \$4,345.00 carryover credit from 2010, which resulted in part from a \$2,124.00 carryover credit from 2009, both of which claims were substantiated by Forms 564 attached to HUSBAND’S individual returns for those years and were granted by the Oklahoma Tax Commission. (Original footnote omitted.)
2. The Division examined the 2011 return, and by letter dated April 3, 2012, the Division notified Protestants that it had adjusted the return to deny the “Credit for Employees in the Aerospace Sector” for the reason that HUSBAND had been “employed in the aerospace sector in Oklahoma immediately preceding employment or contracting with a qualified employer.”
3. On April 10, 2012, the Division received Protestants’ April 6, 2012 letter of protest to the denial of the aerospace

⁴ OAC, 710:1-5-39(a).

⁵ The references to exhibits supporting the statements are omitted.

credit.

4. HUSBAND'S educational and employment history is as follows: From May 12, 2008 through August 8, 2008 HUSBAND was employed by INTERNSHIP EMPLOYER, a corporation engaged in the aerospace sector, as an intern while he was a student in Oklahoma, as reflected on a Form W-2 attached to his 2008 Oklahoma individual income tax return. From August, 2008 through December, 2008 he was unemployed and a full time college student. On December 13, 2008, HUSBAND was awarded a Bachelor of Science degree in Electrical Engineering from STATE University, CITY, Oklahoma. STATE University is an institution within the Oklahoma State System of Higher Education, and HUSBAND'S degree program was a "qualified program", both within the meaning of 68 O.S. Supp. 2008, § 2357.301. Following graduation, on January 4, 2009, HUSBAND accepted a full-time position of employment with COMPANY, a "qualified employer" within the meaning of 68 O.S. Supp., § 2357.301, and the employer he remains employed by in this position to this date.

ISSUES AND CONTENTIONS

The issue as stipulated by the parties is:

Whether HUSBAND was employed in the aerospace sector in Oklahoma immediately preceding his employment with a [sic] COMPANY so as to make him not a "qualified employee" within the meaning of 68 O.S. Supp., § 2357.301, and thereby disqualify Protestants from eligibility for the "Credit for Employees in the Aerospace Sector" claimed on Protestants' 2011 return.

The Division contends that Protestants are not eligible for the aerospace sector employees credit because HUSBAND was employed by a qualified employer during the year preceding his employment with COMPANY. Although the Division has taken this position it does not advance an argument in support of this contention. Instead, the Division refers to OAC, 710:50-15-109(b)(5) asserting *inter alia* that the Commission has not promulgated a rule providing a more detailed definition of "qualified employee" beyond that afforded by § 2357.301(5) and arguing that the Commission in its adjudicatory capacity is without authority to define the parameters of the word "immediately" as used in § 2357.301(5).

Protestants contend that they were wrongfully denied the aerospace sector employees credit. In support of this contention, Protestants point to the fact that immediately preceding his employment with COMPANY in January, 2009, he was an unemployed, full-time student in the electrical engineering program at Oklahoma State University. Further, Protestants argue that the phrase "immediately preceding" implies that a qualified employee can have previous

employment in the aerospace sector in Oklahoma if an unspecified length of time has passed. Protestants assert that the five (5) months he was an unemployed, full-time student should be more than a sufficient length of time.

CONCLUSIONS OF LAW

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

1. Jurisdiction of the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S. 2011, § 207.

2. “Taxation is an exclusively legislative function that can be exercised only under statutory authority and in the manner specified by statute.” *State, ex rel. Oklahoma Tax Commission v. Texaco Exploration & Production, Inc.*, 2005 OK 52, ¶ 7, 131 P.3d 705, 707. The basis for the Division’s action and Protestants’ protest thereto are governed by the Aerospace Development Act of 2008⁶ of the Oklahoma Income Tax Act (“Act”)⁷.

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

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

5. The Act extends non-refundable income tax credits to a qualified employer beginning after December 31, 2008, “for tuition reimbursed to a qualified employee” and “for compensation paid to a qualified employee”. 68 O.S. Supp. 2010, §§ 2357.302(A) and (D), and 2357.303(A) and (D).⁹ The employee tuition reimbursement credit is only allowed to the

⁶ Sections 2357.301 through 2357.304 of the Act. Added by Laws 2008, c. 417, § 1, eff. Jan. 1, 2009. 2008 Okla. Sess.Law Serv. Ch. 417 (H.B. 3239).

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

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

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

qualified employer “if the qualified employee has been awarded an undergraduate or graduate degree within one (1) year of commencing employment with the qualified employer.” 68 O.S. Supp. 2008, § 2357.302(B).

6. “The choice to proceed by general rulemaking or by individual ad hoc litigation lies primarily within the informed discretion of the agency.” *El Paso Natural Gas Company v. Oklahoma Tax Commission*, 1996 OK CIV APP 69, 929 P.2d 1002, 1007, citing 2 AmJur.2d *Administrative Law*, § 155 (1994). “While this discretion has limits, * * * an agency can make pronouncements of future applicability when deciding an adjudicatory matter.” *Id.* The question is whether the agency’s decision is interpretive and quasi-judicial, and properly done through an order as opposed to a rule.¹⁰ *Id.* “Ultimately, what counts is the character and the impact of the agency action.” *Id.*, citing *Grand River Dam Auth. v. State*, 1982 OK 60, 645 P.2d 1011, 1016.

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

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

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

¹⁰ The Court in *El Paso*, *supra* notes that “[r]ules’ are actions in which the agency’s legislative element predominates, while ‘orders’ involve more of the judicial function and deal with a particular present situation”, citing *State ex rel. Villines v. Freeman*, 1962 OK 77, 370 P.2d 307, 310-311.

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

9. "Deductions [and credits against tax] are a matter of legislative grace rather than judicial intervention." *Flint Resources Company v. Oklahoma Tax Commission*, 1989 OK 9, 780 P.2d 665, 673. In order to be allowed, authority for the deduction sought must be clearly expressed. *Home-State Royalty Corporation v. Weems*, 1935 OK 1043, 175 Okla. 340, 52 P.2d 806 (1935). None may be allowed in absence of a statutory provision therefor. *Id.* See, *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440, 54 S.Ct. 788, 78 L.Ed. 1348 (1934).

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

11. The word "immediately" is an adverb modifying the adjective "preceding" which modifies the noun "employment". WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 601, 925 and 408 (1987). "Preceding" is defined as "that immediately precedes in time or place." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 925 (1987). "Precede" means "to be, go, or come ahead or in front of". *Id.* "Immediately" is defines to mean: 1 "in direct connection or relation"; 2 "without interval of time". WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 601 (1987).

12. In a recently decided protest, the Oklahoma Tax Commission took judicial notice of the website maintained by the Oklahoma Aeronautics Commission¹¹ to assist it in the interpretation of the word "employed" as used in the first part of the phrase defining "qualified employee" under § 2357.301(5). Oklahoma Tax Commission Order No. 2012 08 28 05. The Oklahoma Tax Commission is the agency charged with the administration of the tax credit program under its general authority to administer the provisions of the Act, not the Oklahoma Aeronautics Commission. 68 O.S. Supp. 2011, § 203. However, the interpretations of "qualified employee" advanced by the Oklahoma Aeronautics Commission are similar to informal interpretations or program statements, and while the interpretations are not entitled to deference from a court, they may be considered to the extent that the same are well-reasoned and have power to persuade. *Hunnicut v. Hawk*, 229 F.3d 997 (C.A. 10th, Okla. 2000).

¹¹ http://www.ok.gov/OAC/Aerospace_Industry/index.html

In addressing a frequently asked question, the Oklahoma Aeronautics Commission opined that a time lapse of two to three months would not violate the “immediately preceding” requirement in the definition of “qualified employee”. While the question is fraught with fraudulent motivations and is not in keeping with the general goal of a tax credit program, a two to three month time period of unemployment under a different scenario may be persuasive and well-reasoned.

13. In administrative proceedings, the burden of proof is on the taxpayer to show in what respect the action or proposed action of the Tax Commission is incorrect. *OAC*, 710:1-5-47. *In re Adway Properties, Inc.*, 2006 OK CIV APP 14, 130 P.3d 302; *Geoffrey, Inc. v. Oklahoma Tax Commission*, 2006 OK CIV APP 27, 132 P.3d 632. Failure to provide evidence which is sufficient to show an adjustment to the proposed assessment is warranted will result in the denial of the protest. *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission*, 1988 OK 91, 768 P.2d 359, 362, citing *Continental Oil Co. v. Oklahoma State Bd. of Equalization*, 1976 OK 23, 570 P.2d 315, 317.

ANALYSIS

The Division, without the citation of authority argues that the Oklahoma Tax Commission in its adjudicatory capacity is without authority to define the parameters of the word “immediately” as used in § 2357.301(5). On the contrary, due to the inconceivable number of life changing events, the language of the provision particularly “immediately preceding” demands construction on an ad hoc basis rather than by a rule of general application. The decision in this matter is both interpretative and as a precedent, quasi-judicial.

Because this protest can be decided without determining whether a paid internship in the aerospace sector in this state constitutes prior employment, that issue is not addressed. Here, the evidence shows that HUSBAND was a full-time student at STATE University immediately preceding his employment with COMPANY. Although, HUSBAND was employed as a paid intern by a qualified employer prior to his current employment the internship was not immediately preceding his current employment since his status as a full-time student came between the two.

DISPOSITON

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the income tax protest of Protestants, HUSBAND and WIFE be sustained.

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.”