JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2013-06-25-03 / NON-PRECEDENTIAL**
ID: **P-10-599-K**
DATE: **JUNE 25, 2013**
DISPOSITION: **DENIED**
TAX TYPE: **BUSINESS ACTIVITY**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestant, COMPANY is represented by ATTORNEY, Attorney at Law and ACCOUNTANT, Accountant. The Compliance Division of the Oklahoma Tax Commission ("Division") is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

On August 29, 2011, the Taxpayer Assistance Division of the Oklahoma Tax Commission received Protestant's letter of protest to the business activity tax law. On or about October 21, 2011, Protestant filed an *Oklahoma Annual Business Activity Tax Return* reporting a total due of $5,695.00 and remitting $2,847.50.

On October 31, 2011, the Division referred the protest to the Office of the 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 the Administrative Law Judges[2]. The protest was docketed as Case No. P-11-599-K.[3]

A pre-hearing conference was scheduled for December 6, 2011, by a *Prehearing Conference Notice* issued November 15, 2011.[4] The pre-hearing conference was cancelled and rescheduled for March 1, 2012, by a *Notice of Prehearing Conference* issued November 21, 2011. The discussion during the conference was memorialized in a letter issued March 2, 2012, which provides in part:

> Protestant intends to file an amended BAT report, calculating the tax that is believed to be due and owing on the assets held during 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).

[4] *OAC* 710:1-5-28(a).

> relevant period and requesting a refund of a portion of the taxes previously remitted on the original BAT report.

By letter dated July 2, 2012, Protestant's representative enclosed a copy of the amended Business Activity Tax return filed on behalf of Protestant for 2010 tax year reporting a tax due of $554.00 and requesting a refund of $2,303.50. By letter dated July 10, 2012, the Division was directed to advise whether the amended return had been accepted and whether further proceedings were required.

On August 13, 2012, a *Status Report and Request for Scheduling Order* ("*Report*") was filed inclusive of copies of Protestant's original and amended Business Activity Tax returns for tax year 2010, the Division's letter of July 31, 2012, denying the refund and Protestant's letter dated August 8, 2012, protesting the denial of the refund. The *Report* sets forth the parties' request for a scheduling order whereby the protest would be submitted for decision on written stipulations and briefs. See, 68 O.S. 2011, § 227.[5] Pursuant to the parties' request, a *Scheduling Order* was issued August 16, 2012.

The parties' *Joint Stipulation of Facts and Statement of Issue* was filed October 12, 2012. Attached thereto were Exhibits 1 through 6. Subsequent to this filing, Protestant's counsel entered an appearance and requested an enlargement of the time under the *Scheduling Order*. An *Order Granting Motion for Enlargement of Time* was issued October 25, 2012.

A *Status Report and Request for Vacation of Scheduling Order* was filed December 11, 2012, wherein the Division advised of the need to revise the assessment. An *Order Granting Request to Vacate Scheduling Order* was issued December 12, 2012, striking the scheduling order as amended and directing the parties to file a status report.

The *Compliance Division's Notice of Revision* was filed January 9, 2013, enclosing a letter dated January 9, 2013, wherein the Division again notified Protestant that the request for refund was denied and revised the amount which should have been due under the original return. A computer screen shot of Protestant's franchise tax account for the period ending June 30, 2010 was also enclosed with the *Notice of Revision*. By letter dated January 10, 2013, Protestant was notified that it could file a response to the revision.

A *Transmittal of Protestant's Response to Notice of Revision and Request for Scheduling Order* was filed February 8, 2013. Pursuant to this memorandum, a *Scheduling Order* was issued.

A *Joint Stipulation of Facts and Statement of Issue* was filed March 8, 2013. Attached thereto were Exhibits 1 through 9. Protestant did not file a brief in chief or reply brief. The *Compliance Division's Memorandum Brief* was filed April 5, 2013. By letter dated April 15, 2013, the parties were notified that the record was closed and the protest was submitted for decision.[6]

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[5] This provision generally provides that a hearing shall be scheduled upon a taxpayer's demand for hearing subsequent to a denial of taxpayer's refund request.

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

FINDINGS OF FACT

Upon review of the file and records, including the *Joint Stipulation of Facts and Statement of Issue*, and the attached exhibits, the undersigned finds:

A. The parties stipulate to the following[7]:

1. Protestant is and was at all pertinent times an Oklahoma Domestic for-Profit Corporation. Protestant filed and paid Oklahoma Franchise Tax in the amount of $5,695.00 for the franchise tax period July 1, 2010 through June 30, 2011.

2. On or about November 10, 2011, Protestant filed an Oklahoma Annual Business Activity Tax Return for the 2010 tax year. The return reported $0.00 in total revenue and $688,510.00 in allowable ordinary trade or business expenses for a resulting negative $688,510.00 in net revenue. The return reported $5,695.00 in business activity tax ("BAT") due. Protestant remitted $2,847.50 with the return.

3. Previously, on August 29, 2011, the OTC's Taxpayer Assistance Division received a letter from Protestant's representative general protesting the Oklahoma BAT, which it referred to the Compliance Division, which received it on October 31, 2011.

4. No Division of the OTC had examined, audited or otherwise taken any action at this time with respect to Protestant's BAT return.

5. The above referenced letter was treated as a protest by the Compliance Division and was referred to and docketed as a protest before the OTC Office of the Administrative Law Judges on October 31. 2011.

6. During the pendency of this protest proceeding, on April 15, 2012, Protestant filed an amended Oklahoma Annual Business Activity Tax Return for the 2010 tax year. This amended return also reported $0.00 in total revenue and $688,510.00 in allowable ordinary trade or business expenses for a resulting negative $688,510.00 in net revenue, but reported $544.00 in BAT due. The amended return claimed a net refund of $2,303.50 out of the $2,847.50 paid with the original 2010 BAT return.

[7] The parties' references to exhibits in the stipulations are omitted.

7. The OTC Account Maintenance Division examined the amended return, and by letter dated July 31, 2012, denied the refund claim for the reason that the amount of BAT reported on the original return was correct because it equaled the amount of Oklahoma Franchise Tax paid by Protestant for the July 1, 2010 through June 30, 2011 franchise tax period. The letter proposed to assess additional BAT against Protestant in the amount of $2,874.50, exclusive of penalty and interest.

8. On August 8, 2012 the OTC Office of the General Counsel received Protestant's letter of protest to the refund claim denial, and on August 13, 2012 referred it to the Office of the Administrative Law Judges.

9. On January 9, 2013, the Division filed a *Notice of Revision*, in the protest case record, of the January 9, 2012 [sic] assessment.[8] Attached to the document was the letter dated January 9, 2013, which denied the refund claim for the reason that the amount of BAT reported on the original return was correct because it equaled the amount of Oklahoma Franchise Tax paid by Protestant for the July 1, 2009 through June 30, 2010 franchise tax period.[9] The letter proposed to assess additional BAT against Protestant in the amount of $3,088.75, exclusive of penalty and interest.[10]
Also attached to the Notice of revision was a copy of Protestant's Oklahoma franchise tax Period Detail Screen for the period July 1, 2009 through June 30, 2010 showing $5,936.25 in franchise tax due and paid for that period.

10. On February 7, 2013, the Division received Protestant's letter of protest to the January 9, 2013 assessment, which the Division forwarded to be filed [sic] in the protest case record.

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[8] Emphasis original.

[9] Protestant actually reported and paid franchise tax in the amount of $5,936.25 for the period ending June 30, 2010. The amount reported on the original BAT return of $5,695.00 was the amount of franchise tax reported and paid for the period ending June 30, 2011.

[10] The amount is the difference between the BAT reported on the original return of $5,695.00, less the amount remitted with the return of $2,847.50 and the amount the Division proposes is actually due on the original return of $5,963.25 which is the amount of franchise tax reported and remitted by Protestant for the period ending June 30, 2010.

11. On December 30, 2008 the Protestant's principals were granted a divorce and over the next year the majority of the assets in the corporation were removed from it and distributed to the two shareholders.

12. On or about May 30, 2012 Protestant filed a Form 1120S, U.S. Income Tax Return for an S Corporation for the period beginning October 1, 2010 and ending September 30, 2011.

ISSUE AND CONTENTIONS

As stipulated, the issue is:

> Protestant is entitled to a net refund of Oklahoma Business Activity Tax paid for the 2010 tax period, in the amount of $2,303.50, or whether the Division's proposed assessment of additional Oklahoma Business Activity Tax, in the amount of $3,088.75 is correct.

Protestant does not challenge whether it is required to file a BAT return for the 2010 tax year. Protestant contends that due to a change in its circumstances the tax levied by § 1218(C) is "unfair and unethical". Protestant argues that it should not be required to pay taxes on something it no longer owns, and in support thereof would show that the totality of assets which once comprised the business and resulted in the franchise tax due and payable for the period ending prior to December 31, 2010 are no longer associated with the business.

The Division contends that the adjustment to Protestant's 2010 BAT return and resulting assessment is correct. In support of this contention, the Division argues that because Protestant was doing business in Oklahoma in 2010, it was subject to business activity taxes for that period. The Division further argues that notwithstanding Protestant's change in circumstances, under the plain language of the Business Activity Tax Code, Protestant is liable for business activity taxes for the 2010 tax year in the same amount that Protestant was required to pay in franchise taxes for the taxable period ending prior to December 31, 2010.

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 protest 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 Protestant's protest and the

Division's action thereto are governed by the provisions of the Oklahoma Business Activity Tax Code ("Code")[11].

3. For tax year 2010[12], the Code levied a tax in the amount of $25.00 on each person[13] doing business[14] in Oklahoma, 68 O.S. Supp. 2010, § 1218(A); and "a tax equal to one percent (1%) of the net revenue[15] derived from business activity[16] that is

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[11] 68 O.S. Supp. 2010, § 1215 et seq., as amended; 2010 S.J.R. 61, §§ 2 through 16. Section 1 of the joint resolution provides in part:

> It is the intent of the Legislature through the enactment of this measure to place a moratorium on the levy of the franchise tax under Sections 1203 through 1205 of Title 68 of the Oklahoma Statutes and to levy a tax in lieu of ad valorem taxes on intangible personal property of all persons doing business in this state, except public service corporations, air carriers, and railroads.

[12] "Tax year" is defined for purposes of the Code to mean "the calendar year on the basis of which a person is required to pay the tax levied or imposed under this act[.]" 68 O.S. Supp. § 1217(8).

[13] "Person" is defined at 68 O.S. Supp. § 2010, 1217(7) to include a "corporation".

[14] "Doing business" is defined for purposes of the Code to mean and include "each and every act, power or privilege exercised or enjoyed in this state, as an incident to, or by virtue of the powers and privileges acquired by individual persons or entities[.]" 68 O.S. Supp. 2010, § 1217(3). "A person is doing business in this state if" the person:

> 1. Is domiciled in this state as an individual for business purposes or is domiciled in this state for corporate, commercial or other business purposes;
> 2. Owns or uses a part or all of its capital in this state;
> 3. Has at any time during the calendar year property in this state with an aggregate value of at least Fifty Thousand Dollars ($50,000.00)[;]
> 4. Has during the calendar year payroll in this state of at least Fifty Thousand Dollars ($50,000.00)[;]
> 5. Has during the calendar year sales in this state of at least Five Hundred Thousand Dollars ($500,000.00);
> 6. Has at any time during the calendar year within this state at least twenty-five percent (25%) of the person's total property, total payroll, or total sales; or
> 7. Otherwise has nexus with this state to an extent that the person can be required to remit the tax imposed under the Oklahoma Business Activity Tax Code under the Constitution of the United States.

[15] The phrase "net revenue" is defined to mean "'total revenue' less all ordinary trade or business expenses other than interest, income taxes, depreciation and amortization." 68 O.S. Supp. 2010, § 1217(6). The phrase "total revenue" is defined in relevant part to mean "all revenues reportable by a person on the federal income tax return filed by such person", but excludes among other items "royalty interests or working interests in mineral rights[.]" 68 O.S. Supp. 2010, §§ 1217(10) and 1217(10)(d).

[16] In general, "business activity" is defined by the Code to mean and include "the conducting of an active trade or business" when the activities form a part of the process of attempting to earn income or profit. 68 O.S. Supp. 2010, § 1217(1).

allocated or apportioned to Oklahoma", 68 O.S. Supp. 2010, § 1218(B). The business activity tax of $25.00 for tax year 2010 was offset by a credit of $25.00 allowed against the income tax imposed against the person under § 2355 of the Oklahoma Income Tax Act[17]; provided, the business activity tax was timely paid. 68 O.S. Supp. 2010, § 1219. The tax levied by § 1218(B) was not required to be remitted for tax year 2010. 68 O.S. Supp. 2010, § 1218(D).

4. At issue herein is the language of § 1218(C) of the Code, which in 2010 provided:

> Notwithstanding the provisions of subsection B of this section for tax years 2010, 2011, and 2012, corporations and any other persons subject to the franchise tax levied under the provisions of Sections 1203, 1204 or 1205 of this title, the tax due under this section shall be equal to the amount such person paid or was required to pay for the taxable period ending prior to December 31, 2010.

An income tax credit for "any amount of the tax paid" under § 1218(C) was not allowed by the Code. 68 O.S. Supp. 2010, § 1219.

5. 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.

6. 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.

[17] 68 O.S. 2001, § 2351 et seq., as amended.

7. The power of taxation is the inherent power of the Legislature, and its discretion, when exercised within constitutional limits, is conclusive on courts. ***Excise Board of Stephens County v. Chicago, R.I. & P. Ry. Co.***, 1934 OK 389, 168 Okla. 523, 34 P.2d 268. The Legislature has broad power to select the subjects of taxation, and to make reasonable classifications among taxpayers. ***Fent v. State, ex rel. Oklahoma Tax Commission***, 2004 OK 59, ¶ 8, 99 P.3d 241, 245. The Legislature may substitute one form of taxation for another. ***Board of Commissioners of Oklahoma County***, 1932 OK 143, 155 Okla. 183, 8 P.2d 732.

8. Every statute is deemed constitutionally valid until a court of competent jurisdiction declares otherwise. ***State ex rel York v. Turpen***, 1984 OK 26, 681 P.2d 763, 767. The Tax Commission is not empowered to decide the constitutional validity of a taxing statute. ***Dow Jones & Company, Inc. v. Oklahoma Tax Commission***, 1990 OK 6, 787 P.2d 843, 845.

9. The language of § 1218(C) is plain and the meaning is unambiguous. It requires taxpayers that were subject to the provisions of the Oklahoma Franchise Tax Code to compute and report business activity taxes for the 2010 tax year in an amount equal to the franchise tax of the person for the taxable period ending prior to December 31, 2010. The legislature did not enact any exceptions to this provision. The mandate of the Oklahoma Tax Commission is to regulate and enforce the revenue laws as written. 68 O.S. 2011, § 203.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the Business Activity Tax protest of Protestant, COMPANY, be denied. It is further ORDERED that the revised amount in controversy, inclusive of penalty and accrued interest be fixed as the deficiency due and owing.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are generally applicable or are limited in time and/or effect. Non-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.

NOTE: The distinction between a Commission Order designated as "Precedential" or "Non-Precedential" has been blurred because all OTC Orders resulting from cases heard by the Office of Administrative Law Judges are now published, not just "Precedential" Orders. *See* OKLA. STAT. ANN. tit.68, § 221(G) (West Supp. 2009) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002). *See also* OTC Orders 2009-06-23-02 and 2009-06-23-03 (June 23, 2009), which also conclude the language of the Statute is "clear and unambiguous."