

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2013-09-17-01 / NON-PRECEDENTIAL
ID: P-10-342-H
DATE: SEPTEMBER 17, 2013
DISPOSITION: DENIED
TAX TYPE: INCOME
APPEAL: PENDING

ORDER

The above matter comes on for entry of a final order of disposition by the Oklahoma Tax Commission. Having reviewed the files and records herein, the Commission hereby adopts the Findings of Fact, Conclusions of Law and Recommendation made and entered by the Administrative Law Judge on the 6TH day of June, 2013, appended hereto, together herewith shall constitute the Order of the Commission.

SO ORDERED SEP. 17, 2013

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROTESTANT (“Protestant”) appears through attorneys, ATTORNEY 1, ATTORNEY 2, and ATTORNEY 3, FIRM. The Income Tax Section, Compliance Division (“Division”) of the Oklahoma Tax Commission appears through OTC ATTORNEY 1, Deputy General Counsel, OTC ATTORNEY 2, Assistant General Counsel, and OTC ATTORNEY 3, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On May 25, 2010, the Office of Administrative Law Judges received the *Protest Letter* and *Supplemental Protest* 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 June 1, 2010, the Court Clerk³ (“Clerk”) received the protest file from the Division. On June 2, 2010, the Clerk mailed Counsel the letter advising assignment of this matter to ALJ, Administrative Law Judge (“ALJ”), and docketed as Case Number P-10-342-H. The letter also advised Counsel 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*.⁴ On June 7, 2010, OTC ATTORNEY 1 and OTC ATTORNEY 2 filed an Entry of Appearance as Co-Counsel for the Division. On June 10, 2010, the Division filed a Status Report advising of the parties’ discussions regarding the resolution of some preliminary issues and requesting a

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

⁴ *Id.*

status report in ninety (90) days. On June 14, 2010, the Clerk received for filing a copy of a letter dated June 11, 2010, from ATTORNEY 1⁵ to OTC ATTORNEY 1 following their June 9th meeting that the protest did not discuss or cover the correct underlying issue(s). ATTORNEY 1 states his understanding of the Division's position "*at that time*" was as follows, to-wit:

The beneficiaries of DECEDENT do not qualify for the capital gain exclusion pursuant to *Okla. Stat. tit. 68, § 2358F*. DECEDENT died on July 30, 2005. On the date of his death, DECEDENT held virtually all of the stock of COMPANY ("COMPANY") and the interests of PARTNERSHIP, LP ("PARTNERSHIP") in his Revocable Living Trust with his wife, WIFE, and sons, SON 1 and SON 2, as his beneficiaries. The stock of COMPANY and the interests in PARTNERSHIP were sold to an unrelated third party on October 31, 2006. The application of 26 U.S.C. §1014 prevents the beneficiaries from tacking or adding the holding period of DECEDENT to their own holding period since the entities were (1) not sold within one year of the date of DECEDENT'S death, *i.e.*, July 30, 2006, and (2) the step up in basis granted by Section 1014 to the stock and partnership interest of the entities as of this same date of death creates a new holding period for this property in the hands of the beneficiaries under the Internal Revenue Code (26 U.S.C.). As a result, the beneficiaries have not held their interests in these entities for the requisite two or five year holding periods under Section 2358F.

On July 23, 2010, the Clerk mailed the Notice of Prehearing Conference to Counsel, setting the prehearing conference for August 25, 2010, at 9:30 a.m. On July 28, 2010, ATTORNEY 1 filed a Status Report in Lieu of Prehearing Conference ("*Report in Lieu*").

On August 2, 2010, this office acknowledged by letter the filing of the Report in Lieu and requested a status report on or before September 8, 2010. On August 11, 2010, ATTORNEY 1 filed the *Second Supplemental Protest*, with exhibits attached thereto. On August 16, 2010, ATTORNEY 1 filed a letter correcting a scrivener's error on page 4 of the Second Supplemental Protest, as more fully set forth therein.

On September 7, 2010, the Division filed the Status Report requesting sixty (60) days to review the *Second Supplemental Protest*. On September 13, 2010, the Clerk mailed a letter to the parties to file a status report on or before November 8, 2010.

On October 7, 2010, the parties filed a Joint Proposed Scheduling Order. On October 28, 2010, the ALJ issued the *Scheduling Order and Notice of Hearing* ("*Scheduling Order*") setting the hearing on June 9, 2011, at 9:30 a.m. On October 28, 2010, ATTORNEY 1 filed a letter requesting an Amended Scheduling Order to include "preliminary" in the November 15, 2010 discovery deadline and include "additional" discovery to be completed by the March 1, 2011, deadline. On October 28, 2010, the undersigned issued an "*Amended*" Scheduling Order as requested, there being no objection by the Division. On October 29, 2010, the Protestant filed her Preliminary Witness List and Preliminary Exhibit List.

⁵ All references to ATTORNEY 1 are to ATTORNEY 1, unless otherwise noted.

On November 1, 2010, the Division filed its Preliminary Witness and Exhibit List.

On February 7, 2011, the Clerk received the Protestant's Motion to Determine Sufficiency of Oklahoma Tax Commission's Responses to Requests for Admission ("*Motion*"), with exhibits attached thereto. On February 15, 2011, the Division filed its Response to [Motion] ("*Response*") and Supplemental Response to Protestant's Second Requests for Admission to the Oklahoma Tax Commission. On February 28, 2011, the Protestant filed her Reply to Division's Response to Motion ("*Reply*"), with attachments thereto.

On March 3, 2011, the parties filed a Joint Motion for Extension of Scheduling Order to extend the "*Amended*" Scheduling Order 120 days and a Joint Proposed Scheduling Order. On March 10, 2011, the ALJ issued the *Order Determining Sufficiency of Oklahoma Tax Commission's Responses to Requests for Admissions* ("*Order*"). The *Order* finds that the Division's Response to Protestant's Request No. 17 has already been admitted, the Division's Response to Protestant's Request No. 18 is sufficient, and the Protestant's request for reasonable expenses, including attorney's fees is denied. On March 10, 2011, the ALJ issued the *Order Granting Joint Motion for Extension of Scheduling Order* setting the hearing for October 27, 2011, at 9:30 a.m.

On June 8, 2011, the parties submitted an Amended Joint Proposed Scheduling Order. On June 15, 2011, the ALJ issued an *Amended Scheduling Order*. The date of hearing remained the same.

On July 18, 2011, the Protestant filed her *Third Supplemental Protest*, with attachments thereto.

On August 2, 2011, the Protestant filed her *Addendum to Third Supplemental Protest*, as more fully set forth therein. On August 5, 2011, the Protestant filed her *Second Addendum to Third Supplemental Protest*, as more fully set forth therein. On August 17, 2011, OTC ATTORNEY 3 filed an Entry of Appearance as Co-Counsel for the Division. On August 19, 2011, the parties filed a Joint Motion for Extension of Scheduling Order as set forth therein. On August 31, 2011, the ALJ issued the *Amended Scheduling Order* setting the hearing for December 13, 2011.

On September 2, 2011, ATTORNEY 3 filed an Entry of Appearance as Co-Counsel for the Protestant. On September 28, 2011, the Division filed the Status Report advising that "...in light of the Division's review of Protestant's second amended 2007 income tax return and supplemental protest, as well as more recent discussions between Protestant and Division, both parties plan to conduct additional written discovery that must be completed before depositions can be scheduled. In conducting additional discovery, as well as supplementing prior discovery responses, the parties are attempting to narrow the issues to be presented at the hearing in this matter. ...the Division hereby advises the Court that the parties plan to file a new proposed scheduling order extending the period for discovery and requesting a new hearing date."⁶

⁶ See Status Report filed September 28, 2011.

On October 3, 2011, the Clerk received an Entry of Appearance from ATTORNEY 2 as Co-Counsel for the Protestant. On October 5, 2011, the parties filed an Amended Joint Proposed Scheduling Order. On October 18, 2011, the ALJ issued the Second Amended Scheduling Order with a hearing date of May 22, 2012, at 9:30 a.m.

On December 9, 2011, the Division filed its Notice of Adjustment, with attachments thereto, to the Protestant's Second Amended Return filed on July 7, 2011. The adjusted income tax, exclusive of penalty and interest is \$7,306,716.00. The adjustment does not change the issues in the case. On December 12, 2011, the ALJ advised the parties that the Protestant could file a response to the Notice of Adjustment on or before January 9, 2012. On December 22, 2011, the Protestant filed her *Fourth Supplemental Protest*, with attachments thereto.

On March 9, 2012, at 1:45 p.m. the ALJ held a teleconference with Counsel to discuss the status of this matter, including the amount of the Capital Gain Exclusion at issue. On March 13, 2012, the ALJ advised the parties that pursuant to the teleconference, all remaining filing dates set by the Second Amended Scheduling Order dated October 18, 2011, were stricken, including the hearing set for May 22, 2012. The parties were to file a status report on or before April 23, 2012.

On April 23, 2012, the Division filed the Status Report advising that the parties were working to resolve the preliminary issue (the amount of Capital Gain Exclusion) as discussed with the Court on March 9, 2012. On April 24, 2012, the ALJ requested the parties to file a status report on or before June 7, 2012.

On June 7, 2012, the Division filed the Status Report requesting thirty (30) days for the parties to file a proposed scheduling order. On June 8, 2012, the ALJ requested the parties to file a proposed scheduling order on or before July 9, 2012.⁷ On June 15, 2012, the Clerk received a telephone call from OTC ATTORNEY 1 requesting a teleconference for Tuesday, June 19, 2012, at 9:30 a.m. OTC ATTORNEY 1 informed Protestant's Counsel of the date and time. On June 19, 2012, at 9:30 a.m. the ALJ conducted the teleconference, discussing the proposed scheduling order, including a statement of issues, which was to be included. ATTORNEY 1 stated that Protestant's Counsel were still not clear on the issue(s) to be tried. The ALJ informed Counsel to submit the proposed scheduling order on or before July 9, 2012. On June 28, 2012, the Division filed a Status Report discussing *inter alia*⁸ the parties differing opinions regarding the necessity of filing a separate statement of the issues. On June 28, 2012, the parties filed separate Proposed Scheduling Orders.⁹ On June 29, 2012, the Division filed a Status Report as an Addendum to the

⁷ On June 11, 2012, the Clerk re-mailed this letter.

⁸ "Inter alia (in-t<<schwa>>r ay-lee-<<schwa>>orah-lee-<<schwa>>), *adv.* [Latin] Among other things. Available at <http://web2.westlaw.com>. BLACK'S LAW DICTIONARY (9th ed. 2009).

⁹ The Protestant's Proposed Amended Scheduling Order, states in pertinent part, as follows, to-wit:

Further, after good faith efforts, the parties are unable to jointly stipulate to the legal issues to be tried. It is Protestant's position the Court directed the parties to include in the amended joint scheduling order the legal issues to be tried during telephone conference calls with the parties on March 9, 2012, and June 19, 2012. Protestant therefore sets forth hereafter the

Status Report filed June 28, 2012. The Division attached thereto its response to Protestant's Interrogatory No. 12, excerpted from Division's Supplemental Response to Protestant's Requests for Interrogatories and Production of Documents, sent to Protestant on September 28, 2011.¹⁰

On July 2, 2012, the ALJ issued the Third Amended Scheduling Order setting the hearing for December 11, 2012, at 9:30 a.m.

On September 14, 2012, the parties filed Joint Stipulation of Facts and Issues, with Joint Exhibits ("J-E") 1 through 44, in two (2) volumes. On September 21, 2012, the parties filed their Briefs-In-Chief with the Clerk.

On October 12, 2012, the parties filed Response Briefs to the respective Briefs-In-Chief.

On October 26, 2012, the parties filed Reply Briefs to the respective Response Briefs, and the Protestant filed her Addendum to Reply Brief, with Exhibits 1 through 4, attached thereto.¹¹ On October 31, 2012, the Protestant filed her Motion for Leave to File Sur-Reply Brief ("*Motion*") in order to correct a "misstatement" made in the [Reply Brief] of the Division stating "The Reply Brief filed by the Division incorrectly asserts on page 2 that Protestant and the Division are in 'agreement' on certain factual statements. The ALJ should grant this motion to allow Protestant to correct these misstatements."¹² On October 31, 2012, the Protestant filed a Supplement to the Motion by replacing Exhibit 1 (Sur-Reply Brief) attached to the *Motion*.

legal issues she has identified to be tried.

The Protestant lists nine (9) legal issues to be tried, which are set out in full therein.

¹⁰ Interrogatory No. 12, states in pertinent parts, as follows, to-wit:

INTERROGATORY NO. 12: Do you contend that there are any other issues to be decided in this Protest other than the following: Does the application of 26 U.S.C. § 1014 prevent the beneficiaries [of the Revocable Inter Vivos Trust of DECEDENT u/a dated 06/11/04 ("Trust")] from tacking or adding the holding period of DECEDENT to their own holding period since the step up in basis granted by § 1014 to the stock and the partnership interest of the entities as of the date of death creates a new holding period for this property in the hands of the beneficiaries.

...

RESPONSE TO INTERROGATORY NO. 12:

...

The Division responds that in light of recent conversations with Protestant's counsel, it no longer contends that 26 U.S.C. § 1014 has any bearing on the issues to be decided in this matter, although the Division reserves the right to respond to any claim made by Protestant that section 1014 does impact the issue of whether Protestant qualified for the Oklahoma Capital Gain Deduction in 2007. Additionally reserving the right to supplement its response

...

¹¹ On October 26, 2012, the Protestant also filed an Addendum to her Reply Brief.

¹² *Motion* at 1.

On November 2, 2012, the Division filed its Responses and Objections to Protestant's *Motion*. On November 13, 2012, the ALJ issued the *Order Granting Protestant's Motion for Leave to File Sur-Reply Brief and Supplement to Motion for Leave to File Sur-Reply Brief* which states in pertinent part, "grants the Protestant's *Motion and Supplement*, that the parties do not have an 'agreement,' as a factual statement that 'Protestant must have held a direct or indirect ownership interest in the assets sold for a period of five (5) years prior to the date of the deemed sale of COMPANY's assets.'"¹³ On November 13, 2012, the Protestant filed the Sur-Reply Brief. On November 29, 2012, the Clerk received a correct copy of J-E 9 (PROTESTANT00388), which replaced PROTESTANT01961.¹⁴

On December 3, 2012, the Division filed an Unopposed Motion to Move Hearing Start Time, from 9:30 a.m. to 11:00 a.m., due to an unforeseen personal conflict. On December 3, 2012, the ALJ issued an *Order Granting Unopposed Motion to Move Hearing Start Time* to December 11, 2012, at 11:00 a.m. On December 4, 2012, the parties filed the Joint Statement of Issues and Witnesses to be presented at December 11, 2012, Hearing, and Supplement to Joint Stipulation of Facts in which the parties agree that J-E 45 through 48, shall be included on the Joint Exhibit List attached to the Stipulations as Appendix I. On December 11, 2012, at 11:00 a.m. the ALJ convened an open hearing.¹⁵ ATTORNEY 1 and ATTORNEY 3 appeared for the Protestant. OTC ATTORNEY 1, OTC ATTORNEY 2, and OTC ATTORNEY 3 appeared for the Division. The parties announced an additional stipulation to pages 33 and 34 of SUPERVISOR 1'S deposition taken on January 20, 2012.¹⁶ The Clerk will add these two (2) pages to J-E 46. ATTORNEY 1 requested the ALJ to take judicial notice of federal cases regarding the retro-activity of tax law not mentioned in the Protestant's briefs. The Division did not have any objection. The ALJ granted judicial notice to the cases.¹⁷ ATTORNEY 1 made a brief Opening Statement. The Division waived its Opening Statement. ATTORNEY 1 called one (1) witness, CPA, CPA and Co-Trustee of the Revocable Inter Vivos Trust of DECEDENT uta 06/16/04 ("Trust"), who testified about his professional relationship with DECEDENT,

¹³ *Order* at 2.

¹⁴ The undersigned noted for the record that the Clerk replaced J-E 9 (PROTESTANT01961) with PROTESTANT00388. Tr. at 4.

¹⁵ The Protestant, through ATTORNEY 1, waived her right to a confidential hearing as provided by the provisions of OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2013).

¹⁶ Tr. at 4-5.

¹⁷ Tr. at 5-6. See OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999). The cases judicially noticed are as follows, to-wit:

U.S. v. Darusmont, 449 U.S. 292, 101 S.Ct. 549
Wildman v. Commissioner of Internal Revenue, 78 T.C. 943
Fife v. Commissioner of Internal Revenue, 82 T.C. No. 1, 82 T.C. 1
Wiggins v. C.I.R., 904 F.2d 311
Canisius College v. U.S., 799 F.2d 18

COMPANY Oil Company, the formation of the Trust, and the operation of the Trust after DECEDENT'S death. The Division did not call any witnesses. Counsel waived Closing Statements. At the conclusion of the hearing, the ALJ kept the record open for purposes of receiving the hearing transcript and for the parties to submit proposed Findings of Fact and Conclusions of Law.¹⁸ On December 17, 2012, the Clerk received the transcript requested by the ALJ. On December 18, 2012, the Clerk mailed a letter to Counsel that proposed Findings of Fact and Conclusions of Law were due on or before January 31, 2013, at which time the record would close and the case submitted for decision.¹⁹ On January 31, 2013, the parties filed their respective "Proposed Findings of Fact and Conclusions of Law."

On February 4, 2013, the ALJ advised the parties the record was closed and this matter submitted for decision as of February 4th. On February 8, 2013, the Protestant filed a Motion to Strike and Brief in Support ("*Motion*"), requesting that the ALJ strike and disregard part of the Division's proposed conclusion of law number 16, because the portion, identified more fully therein, raised an issue which had not been raised by either party in this Protest, violating the ALJ's instructions to the parties at the end of the December 11, 2012 hearing. On February 8, 2013, the Protestant filed an Addendum to Motion, as more fully set forth therein. On February 11, 2013, by letter, the ALJ acknowledged the filing of the Protestant's *Motion*, withdrawing this matter from decision, and re-opening the record to consider the Protestant's *Motion* and the Division's response thereto. On February 25, 2013, the Division filed its Response to Motion, as more fully set forth therein. On February 26, 2013, the ALJ advised that the Protestant's *Motion* submitted for ruling as of February 26th.

On March 8, 2013, the ALJ issued an *Order Granting Protestant's Motion and Addendum to Strike*. By letter, the ALJ advised that the record was closed and this matter was re-submitted for decision on March 8, 2013.

On April 10, 2013,²⁰ at 2:30 p.m. the ALJ conducted a teleconference with Counsel for the parties to clarify Stipulation Nos. 8 and 49, and J-E 45. On April 11, 2013, because of the teleconference, the ALJ sent a letter to confirm the matters discussed as follows, to-wit:

The Court held a *Teleconference* in this matter on April 10, 2013, at 2:30 p.m. to clarify Stipulated Facts Nos. 8 and 49 filed September 14, 2012, and J-E 45 (PROTESTANT01961) filed September 14, 2012.

Stipulation No. 8 states in pertinent part, "The recapitalization of COMPANY was accomplished through a tax free reorganization pursuant to 26 U.S.C. § 368(a)(1)(E)."²¹ The ALJ questioned Counsel as to the basis for the stipulation stating

¹⁸ On December 12, 2012, the ALJ confirmed the announcements to Counsel by letter.

¹⁹ The Clerk enclosed copies of the hearing transcript for Counsel.

²⁰ The ALJ reopened the record for purposes of the teleconference and the April 11th letter.

²¹ 26 U.S.C. § 368(a)(1)(E) states:

(a) Reorganization.—

that the recapitalization was “tax free.” In summary, ATTORNEY 1 advised because the recapitalization occurred prior to DECEDENT’S death on July 30, 2005, after the Trust filed Form 1041 (and later an amended 1041), the IRS examined the returns and specifically examined the recapitalization to determine whether additional income tax should be assessed against DECEDENT’S Estate. The IRS determined the recapitalization was “tax free” and did not assess any additional income tax against the estate, and as a result, there is no issue regarding the “Holding Period” of the Trust’s stock resulting from the recapitalization. OTC ATTORNEY 2 confirmed that ATTORNEY 3’S representations were correct. Counsel has clarified for the record the questions concerning Stipulation No. 8.

Stipulation No. 49 states, “Should the Tribunal determine that the proceeds distributed by the Trust to Protestant from the deemed sale of COMPANY’S assets qualify for the Oklahoma Source Capital Gain Deduction, the additional adjustments done by Protestant as shown on PROTESTANT01961 (and supported by the schedules at PROTESTANT02054-02083) correctly calculate the amount of qualifying gains (held for at least five years) received by Protestant from the deemed sale of COMPANY’S real and tangible personal property on October 31, 2006.”

J-E 45 (PROTESTANT01961) reflects that the Trust’s “Revised Qualifying Oklahoma LTCG” is \$290,663,102.00. Protestant’s share of Trust Property is Fifty-five percent (55%) or \$159,864,706.00. However, Schedule D attached to Protestant’s Second Amended Federal Return limits the amount claimed to \$145,123,333.00 minus \$23,916.00 (Line 7 of Schedule D) or 145,099,417 plus \$5,324.00 (Allowed by the Division on Original Return) or \$145,104,741.00.²² J-E Exhibit 45 does not change the amount of the deduction claimed by the Protestant on Line 2 of the Second Amended Oklahoma Return. The ALJ requested the Protestant to file a status report as to this calculation, but that is no longer necessary.

This matter remains submitted for decision. *If this letter does not accurately reflect the understanding of the parties concerning the matters discussed during the Teleconference*, please inform the Court by written notification as soon as possible.

After the mailing of the letter, Counsel did not contact the ALJ regarding the matters set forth in the April 11th letter. The record reclosed April 8, 2013, but the case remained submitted for decision as of March 8, 2013.

On May 3, 2013, the ALJ mailed a letter to the parties, which states as follows, to-wit:

As you know, the *Findings, Conclusions and Recommendations* (“*Findings*”) are due to be issued on May 7, 2013, that being sixty (60) days from closing the record and submission of this matter for decision.

(1) In general.—For purposes of parts I and II and this part, the term “reorganization” means—
(E) a recapitalization

²² See J-E 32 and J-E 33.

However, due to my current caseload, I am unable to issue the *Findings* on May 7, 2013. This letter is to notify the parties that the *Findings* should issue in approximately thirty (30) days from May 7, 2013 or June 6, 2013, depending on how many of the protests for May go to hearing as scheduled.

This is the first time in nine and one-half (9½) years as an ALJ that *Findings* have failed to issue in sixty (60) days, but I will not shortcut the *Findings* simply to meet an “unofficial” deadline, which I have imposed on myself.

I apologize for any inconvenience and thank you in advance for your cooperation in this matter.

STATEMENT OF THE CASE

This matter presents the issue of whether the Protestant was eligible to receive the Oklahoma Capital Gains Deduction (“Deduction”) as claimed on her Second Amended Oklahoma income tax return for the 2007 Tax Year pursuant to Subsections D or F.²³

The Deduction claimed relates to the October 31, 2006 sale of COMPANY (“COMPANY”).²⁴ The parties to the Securities Purchase Agreement for the sale of COMPANY’s stock elected to treat the stock sale as a “deemed sale of assets,” pursuant to 26 U.S.C. § 338(h)(10)(a).²⁵

The Revocable Inter Vivos Trust of DECEDENT utta dated 06/11/2004 (“Trust”),²⁶ owned a 99.9260% ownership interest in COMPANY immediately prior to the sale.²⁷ The Trust filed its U.S. Income Tax Return for Estates and Trusts for its 2006 Tax Year (07/01/2006-06/30/2007) making an election pursuant to 26 U.S.C. § 643²⁸ to distribute the gain on the “deemed sale of assets” to the Trust beneficiaries.²⁹ The Protestant received the capital gains (\$145,104,741.00) as a beneficiary of the Trust.³⁰ The Division adjusted the Protestant’s Second Amended Oklahoma income tax return for the 2007 Tax Year by disallowing the Deduction. The Division denied the Deduction because Protestant did not meet the five (5) year holding

²³ See Notes 63-66, *infra*.

²⁴ See Stipulation of Facts Nos. 18-21.

²⁵ *Id.*

²⁶ On July 30, 2005, the Trust became “Irrevocable” upon the death of DECEDENT. See Stipulation of Facts No. 10.

²⁷ See Stipulation of Facts No. 8. See also Note 44, *infra*.

²⁸ See Stipulation of Facts No. 22–23.

²⁹ *Id.*

³⁰ *Id.*

requirement required for a sale of assets under Section 2358(F) of Title 68.³¹ The adjustment changed an \$865,384.00 refund to a proposed assessment of \$7,306,716.00 in additional income tax, plus penalty, and interest.³²

The parties could not agree on the issue(s) to be decided in this matter. As a result, the parties stipulated to their respective positions and the issue(s) resulting from their respective positions, as set out hereinafter.

STIPULATION OF FACTS AND ISSUES

On September 14, 2012, the parties filed Joint Stipulation of Facts and Issues, with Joint Exhibits (“J-E”)³³ 1 through 44, in two (2) volumes, as follows, to-wit:

I. PREAMBLE

In accordance with the Rules of Practice and Procedure before the Oklahoma Tax Commission, the parties agree to this Stipulation of Issues and Facts pursuant to the general terms of this preamble unless specifically agreed otherwise.

- A. All stipulated facts shall be taken to be true for purposes of the resolution of this controversy, including appeals.
- B. The Exhibit List identifies exhibits. See Appendix I. Without further words of inclusion, all listed exhibits are expressly incorporated as part of this Stipulation.
- C. All objections to these Stipulations, except as to relevance, are waived.
- D. The parties agree that each of the exhibits identified in each of the below numbered paragraphs are authentic copies of the originals, but reserve all substantive objections to all such exhibits, except with regard to PROTESTANT02054-02083.
- E. This Stipulation of Issues and Facts shall not limit the parties’ right to present further evidence not inconsistent with the stipulations contained herein with respect to any issues relevant to this controversy.

II. STATEMENT OF THE ISSUES

³¹ See Note 23, *supra*.

³² See Stipulation of Facts No. 46.

³³ 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).

As the parties differ on the applicable law to be applied in this matter, the parties stipulate to the positions taken by each party and the issues resulting from such respective positions as follows:

1. Protestant asserts the outcome of this case is controlled by federal tax law, Oklahoma state tax law and decided cases. Oklahoma law unequivocally recognizes the primacy of federal tax law and, more particularly, federal tax elections on issues involving determinations under Oklahoma tax law. Similarly, *Okla. Stat. tit. 68* (2006), §§ 2358(D)(2)(a) and (b) and 2358(F)(2)(a) and (b) specifically recognized that the holding period of an asset, *e.g.*, stock or tangible personal property, shall include any additional holding period of any other individual if the additional holding period is included under the provisions of the Internal Revenue Code.³⁴ In this case, there were two key federal elections along with the tacking of additional holding periods which control the ultimate Oklahoma state tax treatment accorded to the proceeds received by Protestant from the deemed sale of assets of COMPANY (“COMPANY”) in 2006, pursuant to an election made under 26 U.S.C. § 338(h)(10).³⁵ These two federal elections³⁶ as well as tacking the holding period of DECEDENT to the stock of COMPANY establish that the gain from the deemed sale of assets are “qualifying gains receiving capital treatment” for purposes of the Oklahoma Source Capital Gain Deduction pursuant to *Okla. Stat. tit. 68*, § 2358(D) for the Revocable Inter Vivos Trust of DECEDENT u/a 6/14/2004 (“Trust”). In turn, the distribution of these same gains by the Trust pursuant to an election by the Trust under 26 U.S.C. § 643 likewise qualifies under *Okla. Stat. tit. 68*, § 2358(F)(2) for Protestant and the remaining beneficiaries of the Trust. Finally, Protestant asserts the Oklahoma Legislature’s subsequent amendments of *Okla. Stat. tit. 68*, § 2358(D) in 2006 cured and/or clarified the original intent of the “qualifying gains receiving capital treatment” to include these gains received by the Trust from the deemed sale of assets by COMPANY and that the resulting issues to be determined from this position are:

- a. Did the Oklahoma Legislature’s subsequent amendments of *Okla. Stat. tit. 68*, § 2358(D) in 2006 cure and/or clarify the original intent of the “qualifying gains receiving capital treatment” to include those qualifying gains received by the Trust, following the deemed sale of the assets of COMPANY on October 31, 2006, and thus were retroactive to December, 31, 2005?
- b. Did the Trust own the stock of COMPANY for a five-year period prior to October 31, 2006, and thereby qualify the proceeds received from the deemed sale of assets of COMPANY as “qualifying gains receiving capital treatment” under *Okla. Stat. tit. 68*, § 2358(D)?
- c. Assuming the gains received by the Trust were “qualifying gains receiving

³⁴ [1] The inclusion of an additional holding period [is commonly referred to as the “tacking” of an additional holding period in tax parlance.

³⁵ [2] There was a third election made in this case pursuant to 26 U.S.C. § 645 to have the Trust treated as the Estate of DECEDENT.

³⁶ [3] The two key federal elections noted above were made pursuant to 26 U.S.C. §§338(h)(10) and 643.

capital treatment” under *Okla. Stat. tit. 68, § 2358(D)*, did the subsequent distribution of this same gain pursuant to an election made by the Trust under 26 U.S.C. §643³⁷ allow the gain to retain the same characteristics, *i.e.*, capital gain and holding period, in the hands of Protestant and the remaining beneficiaries as it had in the Trust thereby allowing the gain distributed to qualify as “qualifying gains receiving capital treatment” for purposes of the Oklahoma Source Capital Gain Deduction calculated at the individual level pursuant to under *Okla. Stat. tit. 68, § 2358(F)(2)*?

d. Was Protestant’s position in this matter justified under the law and facts sufficient to support an abatement of all penalties and interest asserted against her?

2. The Division maintains that the Trust did not claim the Oklahoma Capital Gain Deduction, 68 O.S. Supp. 2006, § 2358(D), for proceeds it received from the sale of assets of COMPANY to PURCHASING COMPANY and thus § 2358(D) is inapplicable and irrelevant. Protestant claimed the Oklahoma Capital Gain Deduction, 68 O.S. Supp. 2007, § 2358(F), on her 2007 Oklahoma individual income tax return, original and amended, for proceeds she received as a distribution from the Trust. The distribution was for proceeds received from the sale of assets of COMPANY. Under the terms of section 2358(F), the gains Protestant claimed as qualifying under section 2358(F) did not qualify because Protestant had not held an interest in the Trust for a period of five years. The resulting issues to be determined from the Division’s position are as follows:

- a. Whether the gains Protestant received from the sale of COMPANY’s assets qualify for the Oklahoma Capital Gain Deduction, 68 O.S. Supp. 2007, § 2358(F)?
 - i. Whether Protestant held an interest in the Trust for at least five years prior to the deemed sale of COMPANY’s assets on October 31, 2006?
 - ii. Whether the Trust held an interest in COMPANY for at least five years prior to the deemed sale of COMPANY’s assets on October 31, 2006?
 - iii. Whether COMPANY held an interest in the real and tangible personal property sold for at least five years prior to the deemed sale of its assets on October 31, 2006?

III. FACTS

1. The Protestant in this Protest is PROTESTANT (hereinafter “Protestant”) who was married to DECEDENT (“DECEDENT”) at the time of his death.

³⁷ [4] The character and holding period of gain distributed to beneficiaries from a complex trust is specifically governed by 26 U.S.C. §§ 661 and 662 which are incorporated by reference in 26 U.S.C. § 643.

2. DECEDENT was a successful geologist for several years working in and around the State of Oklahoma. On October 11, 1956, DECEDENT, along with others, formed COMPANY ("COMPANY"). COMPANY was an Oklahoma corporation which engaged in oil and gas exploration and production activities primarily within the State of Oklahoma from October 11, 1956, through October 31, 2006.

3. COMPANY was headquartered in Oklahoma from its inception in 1956 through the date of the sale of COMPANY's assets on October 31, 2006.

4. On the date of the sale of COMPANY's assets on October 31, 2006, COMPANY held leasehold interests and improvements in New Mexico and Texas³⁸ as well as substantial leasehold interests and improvements in Oklahoma. *See* Joint Exhibit ("J-E") 1 (Detail of leasehold interests sold; PROTESTANT02054-02057); J-E 2 (Detail of lease equipment sold; PROTESTANT02058-002061); J-E 3 (Detail of land/vehicles sold; PROTESTANT02062-02065); J-E 4 (COMPANY Depreciation schedule; PROTESTANT02066-02083).

5. Since October 1, 1981, COMPANY has elected to be taxed as a Subchapter S Corporation, *i.e.*, a pass-through entity, for federal income tax purposes. *See* J-E 5 (Form 1120S, US Income Tax Return for COMPANY; PROTESTANT01878-01886 at 01878).

6. Since at least 1981 through 2000, DECEDENT was the sole shareholder of COMPANY. In 2000, BUYER purchased 18% of the outstanding stock of COMPANY from DECEDENT. In December 2002, COMPANY repurchased all of BUYER COMPANY stock leaving DECEDENT as the sole shareholder of COMPANY.

7. On June 11, 2004, DECEDENT created the Trust. During his lifetime, DECEDENT was the sole Trustee of the Trust, its beneficiary, and retained the exclusive right to revest title in himself of all or a portion of the property transferred to the Trust. *See* J-E 6 (Revocable Inter Vivos Trust of DECEDENT; PROTESTANT00012-00031); J-E 7 (First Amendment to the Revocable Inter Vivos Trust of DECEDENT; PROTESTANT00032-00033).

8. On or about October 1, 2004, the Trust was issued 2,000 shares of \$10.00 par value common stock of COMPANY. *See* J-E 8 (Certificate for shares of stock issued to the Trust; PROTESTANT01949-01950). This action was done at the direction of the sole shareholder of COMPANY, DECEDENT. *See* J-E 9 (Memorandum of Action of the Sale Shareholder and the Board of Directors of COMPANY; PROTESTANT000388). Immediately prior to the Trust receiving the shares, DECEDENT had tendered 2,000 shares of \$10.00 par value common stock of COMPANY held in his own name to the company in exchange for the shares issued to the Trust. *See* J-E 8 (Certificate for shares of stock issued to the Trust; PROTESTANT01949). The 2,000 shares of common stock constituted all of the issued and outstanding shares of COMPANY. COMPANY was subsequently recapitalized in 2005, but the Trust retained a 99.926% ownership interest in COMPANY. The recapitalization of COMPANY was accomplished through a tax free reorganization pursuant to 26 U.S.C. § 368(a)(1)(E). *See* J-E 41

³⁸ [5] The sale of any of COMPANY's assets located outside the state of Oklahoma is not at issue in this protest as gains resulting from the sale of those assets were not claimed as being eligible for the Oklahoma Capital Gains Deduction.

(Memorandum of Action of the Board of Directors and Sole Shareholder of COMPANY Oil Company dated Jan. 28, 2005; PROTESTANT02084-02088); J-E 42 (Amended and Restated Certificate of Incorporation for COMPANY; PROTESTANT02107-02110); J-E 43 (Jan. 28, 2005, Agreement for Purchase of Stock; PROTESTANT02089-02106); J-E 10 (Certificate issuing 5,200 shares of common stock to the Trust; PROTESTANT01951-01952); J-E 11 (Certificate issuing 20,000,000 shares of Class B common stock to the Trust; PROTESTANT01953-01954).

9. DECEDENT passed away on July 30, 2005. *See* J-E 12 (Form 706, United States Estate Tax Return; PROTESTANT00362).

10. Upon DECEDENT'S death on July 30, 2005, the Trust became an irrevocable trust. *See* J-E 6 (Revocable Inter Vivos Trust of DECEDENT; PROTESTANT00012-00031). The property which constituted the corpus of the Trust immediately prior to DECEDENT'S death on July 30, 2005, including COMPANY'S stock, did not change as a result of DECEDENT'S death. *See* J-E 6 (Revocable Inter Vivos Trust of DECEDENT; PROTESTANT00012-00031).

11. Article IV, Section 4.1 of the Trust provides that '[t]he final determination made in the proceedings to fix the liability of Grantor's estate for federal estate tax purposes shall be conclusive as to the value of ANN'S TRUST and THE FAMILY SHARE.'" *See* J-E 6 (Revocable Inter Vivos Trust of DECEDENT; PROTESTANT00012-00031, at 00018).

12. As provided in in Article V, Section 5.2 of the Trust:

The Trustee of this Trust may, in its sole and uncontrolled discretion, pay, compromise, settle or otherwise discharge any and all indebtedness existing against the Grantor's estate and all expenses of the administration of the Grantor's estate. The Trustee shall pay all death, succession, estate and inheritance taxes that shall become payable in respect of any property or interest passing under this Trust and such taxes, except as hereinafter specifically provided, shall be charged against the respective devisees, legatees, beneficiaries, transferees or other recipients according to the interest they received. It shall be charged against any property passing or which may have passed to any of them under this Trust and the Trustee shall seek reimbursement for such taxes from the persons benefitted or utilize the property in its possession to pay such taxes to the fullest extent permitted by any applicable law. The foregoing direction shall be applicable to property passing to my surviving spouse except cash in checking or time deposits, treasury obligations of the United States, securities listed on a national securities exchange, the proceeds of policies of insurance on the life of the Grantor passing to the Grantor's spouse as a beneficiary thereof, and household furniture and furnishings and items of personal adornment and all such property so passing to the Grantor's surviving spouse shall bear its share of such taxes even if such property shall qualify for the marital deduction under federal or state law. Notwithstanding the forgoing, such payments shall in no event be made

from any property for which a charitable deduction is allowed, or from employee death benefits not includable in the Grantor's gross estate.

See J-E 7 (First Amendment to the Revocable Inter Vivos Trust of DECEDENT; PROTESTANT00032-00033, at 00031).

13. The Trust did not provide for any fixed termination date within any of its provisions. *See* J-E 6 (Revocable Inter Vivos Trust of DECEDENT; PROTESTANT00012-00031); J-E 7 (First Amendment to the Revocable Inter Vivos Trust of DECEDENT; PROTESTANT00032-00033).

14. The Trust remains in existence to date.

15. Following DECEDENT'S death on July 30, 2005, Protestant and CPA became the Co-Trustees of the Trust. *See* J-E 6 (Revocable Inter Vivos Trust of DECEDENT; PROTESTANT00012-00031 at 00027).

16. Shortly thereafter, the Successor Trustees of the Trust elected pursuant to 26 U.S.C. § 645 to have the Trust treated as the Estate of DECEDENT (DECEDENT) for federal and state income tax purposes. *See* J-E 13 (Form 8855, Election to Treat a Qualified Revocable Trust as Part of an Estate; PROTESTANT01267-01268).

17. Pursuant to the 26 U.S.C. § 645 election, the Trust timely filed Form 513, State of Oklahoma Resident Fiduciary Return of Income for the year ending June 30, 2006, reporting total income applicable to Oklahoma of \$13,491,859, and a tax liability of \$150,771. *See* J-E 44 (Form 513, State of Oklahoma Resident Fiduciary Return of Income for DECEDENT Trust UTA 06/11/2004 for tax year ending 6/30/2006; PROTESTANT01778-01783).

18. On September 16, 2006, COMPANY, COMPANY 2, L.L.C., PARTNERSHIP, LP and those entities' respective owners entered into a Securities Purchase Agreement for COMPANY, COMPANY 2, L.L.C. and PARTNERSHIP, LP with PURCHASING COMPANY, Inc., a Delaware Corporation ("PURCHASING COMPANY").³⁹ These same parties entered into a First Amendment to Securities Purchase Agreement dated October 31, 2006. While the Agreement was styled as a securities purchase, the purchaser, PURCHASING COMPANY, with the agreement of the shareholders of COMPANY, elected pursuant to 26 U.S.C. § 338(h)(10) to have the COMPANY portion of the transaction treated as a deemed asset sale. *See* J-E 14 (Securities Purchase Agreement; PROTESTANT00034-00285); J-E 15 (First Amendment to Securities Purchase Agreement; PROTESTANT-00298); J-E 16 (Memorandum of Action of the Board of Directors of COMPANY; PROTESTANT000433).

19. The amended aggregate purchase price for the assets of COMPANY and the other entities was stated to be \$500,000,000, subject to adjustments to be made following the closing of the transaction. *See* J-E 15 (First Amendment to Securities Purchase Agreement; PROTESTANT00286-00298 at 00288).

³⁹ [6] Any gains which may have resulted from a sale of either the ownership interest in or assets of COMPANY 2, L.L.C. and PARTNERSHIP, LP are not at issue in this protest.

20. The transaction closed on October 31, 2006. PURCHASING COMPANY remitted the aggregate purchase price to the Trust in exchange for the COMPANY shares, assets and the other interests.

21. Subsequent to the closing, the aggregate purchase price was adjusted downward for the COMPANY assets. See J-E 14 (Securities Purchase Agreement; PROTESTANT00034-00285 at 00040); J-E 15 (First Amendment to Securities Purchase Agreement; PROTESTANT00286-00298 at 00288); J-E 16 (Memorandum of Action of the Board of Directors of COMPANY; PROTESTANT00433); J-E 17 (Unanimous Written Consent of the Board of Directors of COMPANY; PROTESTANT00435-00446).

22. Pursuant to the 26 U.S.C. § 645 election, the Trust timely filed a Form 1041, U.S. Income Tax Return for Estates and Trusts and later an Amended Form 1041X for the year ending June 30, 2007, in which the Trust elected on Line 6, Schedule B pursuant to 26 U.S.C. § 643 to distribute the gain on the deemed sale of COMPANY's assets to the Trust beneficiaries and, correspondingly, under 26 U.S.C. §§ 661 and 662 to reduce its taxable income by a like amount. All attributes associated with the distribution to be included in the gross income of Protestant and the other beneficiaries was determined under 26 U.S.C. § 662. See J-E 18 (Form 1041, U.S. Income Tax Return for Estates and Trusts for DECEDENT Trust UTA 06/11/2004 ("Original Federal Trust Return"); PROTESTANT01855-01877); J-E 19 (Amended Form 1041, U.S. Income Tax Return for Estates and Trusts for DECEDENT Trust UTA 06/11/2004, with Report of Estate Tax Examination Changes ("Amended Federal Trust Return"); PROTESTANT00299-00322.6).

23. The Trust subsequently filed all of its federal and Oklahoma state amended returns for the year ending June 30, 2007, consistent with making the 26 U.S.C. § 643 election to distribute the gain on the deemed sale of COMPANY's assets to Protestant and the remaining beneficiaries and correspondingly, under 26 U.S.C. §§ 661 and 662, to reduce its taxable income by a like amount.

24. Notwithstanding treating the sale of COMPANY as a deemed sale of assets, the stock of COMPANY was also transferred on the date of sale to PURCHASING COMPANY. See J-E 14 (Securities Purchase Agreement; PROTESTANT00034-00285); J-E 15 (First Amendment to Securities Purchase Agreement; PROTESTANT00286-00298); J-E 17 (Unanimous Written Consent of the Board of Directors of COMPANY; PROTESTANT00435-466). On its amended Form 1041, the Trust reported a loss on the sale of the stock in the amount of \$130,960,746. J-E 19 (Amended Federal Trust Return; PROTESTANT00299-00322.6 at 00304).

25. The Trust had previously elected a fiscal year ending June 30 for tax purposes. On the filed Form 1041 for the year ending June 30, 2007, the Trust reported a long term capital gain of \$397,125,364 from the sale of COMPANY's assets and certain other entities within the Trust. See J-E 18 (Original Federal Trust Return; PROTESTANT01855-01877 at 01859). There was also reported a net short term capital gain of \$1,434,266. *Id.* The Trust reported a total net gain of \$312,587,859. *Id.*

26. The Trust also timely filed its Form 513, State of Oklahoma Resident Fiduciary Return of Income, for the year ending June 30, 2007. On the filed Form 513, the Trust reported a net capital gain (long and short term capital gain on line 6) of \$312,587,859. *See* J-E 20 (Form 513, State of Oklahoma Resident Fiduciary Return of Income for DECEDENT Trust UTA 06/11/2004 (“Original Oklahoma Trust Return”); PROTESTANT01789-01797 at 01789).

27. The Trust issued an Oklahoma Beneficiary’s Information Fiduciary Return of Income form to Protestant reporting long term capital gains of \$171,134,476.⁴⁰ In addition, under the heading “Other Information,” this same form showed Oklahoma long term capital gains deduction in the amount of \$157,361,841. *See* J-E 20 (Original Oklahoma Trust Return; PROTESTANT01789-01797 at 01793).

28. Protestant filed her 2007 Form 511, State of Oklahoma Resident Income Tax Return, on or about October 15, 2008. In this return, Protestant reported federal adjusted gross income (Line 1) of \$212,520,972. From this amount, Protestant subtracted \$157,361,841 for the Oklahoma Capital Gain Deduction as calculated on Form 561 (Oklahoma Capital Gain Deduction for Residents Filing Form 511). Protestant also timely requested a refund of \$398,030 from the Oklahoma Tax Commission for the year 2007. *See* J-E 21 (Form 511, Oklahoma Resident Income Tax Return for PROTESTANT (“Original Oklahoma Return”); PROTESTANT00332-00338).

29. A Federal Estate Tax examination of the Trust/Estate was completed on July 8, 2009. J-E 22 (July 8, 2009, Estate Tax Closing Document; PROTESTANT00364-00366). The examination resulted in an increase in the value of the Estate in the amount of \$45,092,802, along with an increase in the deductions allowed to the Estate of \$15,343,277, or a net increase to the value of the Estate of \$29,749,525. Both prior to and following the Federal Estate Tax examination, the Trust paid and satisfied all Federal Estate Tax liabilities associated with the death of DECEDENT. *See* J-E 19 (Amended Federal Trust Return and Report of Tax Examination Changes; PROTESTANT00299-00322.6 at 00322.2-00322.5).

30. Following the Federal Estate Tax examination, the Trust filed an amended Form 1041 on or about August 13, 2009, and reported that the net capital gain was reduced from \$312,587,859 to \$263,109,546. On the amended Form 1041, the Trust reported a net long term capital gain of \$263,225,383, and a net short term capital loss of \$115,837. *See* J-E 19 (Amended Federal Trust Return; PROTESTANT00299-322.6 at 00303). The reduction in the net capital gain amount was due to the federal estate tax adjustment to the value of the COMPANY stock and the subsequent loss realized on the stock of COMPANY, which was increased from \$80,444,531 to \$130,960,746. *See id.* at 00303.

31. The Trust also filed an amended Form 513 on or about August 13, 2009, reporting capital gain of \$263,109,546. J-E 23 (Amended Form 513, State of Oklahoma Resident Fiduciary Return of Income for DECEDENT Trust UTA 06/11/2004 (“Amended Oklahoma Trust Return”); PROTESTANT01800-01806 at 01800). The Trust issued an amended Oklahoma Beneficiary’s Information Fiduciary Return of Income form to Protestant reporting

⁴⁰ [7] Protestant’s share of the Trust gain was fifty-five percent (55%). Fifty-five percent of the Trust’s net capital gain of \$312,587,859 equals \$171,134,476.

long term capital gains of \$144,773,961. *See* J-E 23 (Amended Oklahoma Trust Return; PROTESTANT01800-01806 at 01804).

32. An amended Form 1040X was filed by Protestant on or about November 18, 2009. On Schedule D of this Form 1040X, Protestant reported total net long term capital gains of \$145,123,333 following the federal estate tax adjustments. *See* J-E 24 (Form 1040X, Amended U.S. Individual Income Tax Return for PROTESTANT; PROTESTANT01841-01854 at 01848).

33. Protestant reported her allocable share of the net capital gain on an amended 2007 Form 511X filed on or about November 18, 2009 (“First Amended Oklahoma Return”). The net Oklahoma Source Capital Gain Deduction was reduced from \$157,361,841 to \$130,996,104. The First Amended Oklahoma Return also timely requested a refund of \$77,281 from the Oklahoma Tax Commission. *See* J-E 25 (Form 511X, Amended Resident Individual Income Tax Return for PROTESTANT filed Nov. 18, 2009; PROTESTANT00340-00341); *See also* J-E 23 (Amended Oklahoma Trust Return; PROTESTANT01800-01806 at 01804).

34. On March 18, 2010, the Division denied the Oklahoma Capital Gain Deduction claimed by Protestant on her Original Oklahoma Return and proposed to assess Protestant additional income tax in the amount of \$8,857,746 for the tax year ending December 31, 2007. *See* J-E 26 (March 18, 2010, Assessment Letter; PROTESTANT00330).

35. On April 30, 2010, Protestant timely filed her letter of protest to the Division’s March 18, 2010, assessment. J-E 27 (April 30, 2010, Protest Letter; PROTESTANT01269-01320).

36. On May 18, 2010, the Division denied the Oklahoma Capital Gain Deduction claimed by Protestant on her First Amended Oklahoma Return and proposed to assess Protestant additional income tax in the amount of \$7,306,716 for the tax year ending December 31, 2007. In its letter of proposed assessment, the Division indicated that it was withdrawing its proposed assessment of Protestant’s Original Oklahoma Return issued on March 18, 2010, and that the additional tax assessed in the May 18, 2010, letter superseded the withdrawn assessment of March 18, 2010. *See* J-E 28 (May 18, 2010, Assessment Letter; PROTESTANT00339).

37. On May 24, 2010, Protestant filed an Addendum to Protest in response to the Division’s May 18, 2010, assessment, J-E 29 (May 24, 2010, Addendum to Protest; PROTESTANT01321-01378).

38. Protestant filed a Second Supplemental Protest on August 10, 2010, and sent a letter to the Division dated August 13, 2010, to correct a scrivener’s error in the Second Supplemental Protest. J-E 30 (August 10, 2010, Second Supplemental Protest; PROTESTANT01379-01445); J-E 31 (August 13, 2010, Letter from Protestant; PROTESTANT01446-01447).

39. On June 30, 2011, Protestant filed a second amended 2007 Form 511X (“Second Amended Oklahoma Return”) reporting capital gain for that year. On Form 561 of this return, Protestant reported the Oklahoma net capital gain from the sale of the assets of COMPANY in the amount of \$196,730,273. *See* J-E 32 (Form 511X, Amended Resident Individual Income

Tax Return for PROTESTANT filed June 30, 2011; PROTESTANT01900-01905 at 1902, 1905).

40. On the Second Amended Oklahoma Return, Protestant claimed on Form 561 an Oklahoma Source Capital Gain Deduction of \$145,099,417. The Second Amended Oklahoma Return reported an increase in the amount of the Oklahoma Source Capital Gain Deduction claimed by \$14,103,313 (\$145,099,417-\$130,996,104). The Oklahoma Source Capital Gain Deduction on the Second Amended Oklahoma Return was limited by the amount of net long term capital gain or loss appearing on Line 16, Schedule D of Protestant's amended 2007 Form 1040X. Increasing the Oklahoma Capital Gain Deduction by \$14,103,313, resulted in Protestant requesting an increased aggregate refund from the Commission in the amount of \$865,384. See J-E 24 (Form 1040X, Amended U.S. Individual Income Tax Return for PROTESTANT; PROTESTANT01841-01854); J-E 32 (Form 511X, Amended Resident Individual Income Tax Return for PROTESTANT filed June 30, 2011; PROTESTANT01900-01905).

41. By letter dated July 15, 2011, Protestant filed a Third Supplemental Protest as additional support for Protestant's position. J-E 33 (July 15, 2011, Third Supplemental Protest Letter; PROTESTANT01448-01493).

42. A follow up letter clarifying the position in the July 15, 2011, Third Supplemental Protest was sent on July 20, 2011. J-E 34 (July 20, 2011, Letter from Protestant clarifying Third Supplemental Protest; PROTESTANT02111-02112).

43. Protestant then filed an Addendum to Third Supplemental Protest on August 1, 2011, and a Second Addendum to Third Supplemental Protest on August 4, 2011. J-E 35 (August 1, 2011, Addendum to Third Supplemental Protest; PROTESTANT01494-01495); J-E 36 (August 4, 2011, Second Addendum to Third Supplemental Protest; PROTESTANT01496-01513).

44. By letter dated December 9, 2011, the Division issued an adjustment letter denying the Oklahoma Capital Gains Deduction claimed on Protestant's Second Amended Oklahoma Return, which stated in part as follows:

Reason for Adjustment

The Oklahoma capital gain deduction has been adjusted and/or disallowed. The deduction does not qualify. O.S. 68 § 2358 and Rule 710:50-15-48. The assets were not held by you, directly or indirectly, for the required five (5) years to qualify for the Oklahoma capital gain deduction. Further, the information submitted is insufficient to determine whether the individual assets sold were held by the selling entity for the required five (5) year period.

The amount reported as refund has been corrected to a tax due of \$7,306,716.00. Additional penalty and/or interest may be assessed on this amount. J-E 37 (December 9, 2011, Adjustment Letter; PROTESTANT02031-02033).

45. On December 20, 2011, Protestant filed her Fourth Supplemental Protest in response to the Division's December 9, 2011, letter. J-E 38 (December 20, 2011, Fourth Supplemental Protest; PROTESTANT02037-02053).

46. The proposed income tax assessment from the Division at issue is currently \$7,306,716, plus interest and penalty. Protestant asserts there is no income tax due and owing and requests a refund of \$865,384, plus interest. See J-E 37 (December 9, 2011, Adjustment Letter; PROTESTANT02031-02033); J-E 32 (Form 511X, Amended Resident Individual Income Tax Return for PROTESTANT filed June 30, 2011; PROTESTANT01900-01905).

47. There is an internal Division document entitled "Auditing the Oklahoma Capital Gain Deduction." This document was prepared by Division personnel for internal use by auditors in the spring of 2008. See J-E 39 (Auditing the Oklahoma Capital Gain Deduction; OTC00001-00003 at OTC0001 and OTC0003).

48. The instructions for preparing Form 561, Oklahoma Source Capital Gain Deduction, for the year 2007 include the following statements derived from § 2358 and Okla. Admin. Code § 710:50-15-48:

Line 5: Enter qualifying Oklahoma net capital gain or loss from Partnerships, S corporations, trusts and estates....

Line 9: The Oklahoma capital gain deduction may not exceed the Oklahoma net capital gain included in Federal adjusted gross income.

J-E 40 (Oklahoma Capital Gain Deduction for Residents Filing Form 511; Instructions).

49. Should the Tribunal determine that the proceeds distributed by the Trust to Protestant from the deemed sale of COMPANY's assets qualify for the Oklahoma Source Capital Gain Deduction, the additional adjustments done by Protestant as shown on PROTESTANT01961 (and supported by the schedules at PROTESTANT02054-02083) correctly calculate the amount of qualifying gains (held for at least five years) received by Protestant from the deemed sale of COMPANY's real and tangible personal property on October 31, 2006.

JOINT STATEMENT OF ISSUES AND WITNESS
TO BE PRESENTED AT DECEMBER 11, 2012, HEARING

I. PREAMBLE

In accordance with the Rules of Practice and Procedure before the Oklahoma Tax Commission as well as the *Third Amended Scheduling Order* issued by this Tribunal on July 2, 2012, the parties filed a *Joint Statement of Facts and Issues* on September 14, 2012. Thereafter, the parties filed their respective briefs-in-chief; response briefs, and reply briefs in accordance with the *Third Amended Scheduling Order*. On November 13, 2012, Protestant was granted leave to file a sur-reply brief and filed said *Sur-Reply Brief* on the same day.

The *Third Amended Scheduling Order* set a hearing date of December 11, 2012, for the presentation of any evidence regarding the issues to be tried as identified in the *Joint Statement of Facts and Issues*. Protestant has indicated a need for a limited hearing on December 11, 2012, to which the Division does not object. The issues to be covered at the hearing and the witnesses which the parties intend to present are identified below. To the extent evidence is not present at the December 11, 2012, hearing on issues identified in the *Joint Statement of Facts and Issues*, the parties stand on the *Joint Statement of Facts and Issues* as well as their respective briefs-in-chief, response briefs, reply briefs, and sur-reply brief filed in this matter.

II. STATEMENT OF THE ISSUES TO BE COVERED AT THE DECEMBER 11, 2012, HEARING

1. The holding period of the trust; and
2. The attributes/character of the gains distributed to Protestant.

These issues are not in addition to those issues previously identified in the *Joint Stipulations of Facts and Issues* filed by the parties on September 14, 2012. These issues and the testimony focus on specific points raised in the briefs filed by the parties.

III. WITNESSES TO BE CALLED AT THE DECEMBER 11, 2012, HEARING

1. PROTESTANT. Protestant has identified the following witnesses to be called at the December 11, 2012, hearing in this matter: CPA. CPA will testify as to the two issues identified in subpart II, above.

2. DIVISION. Division does not intend to call any witnesses at the December 11, 2012, hearing in this matter but does reserve the right to call witnesses to rebut the testimony of CPA, if needed. Such potential rebuttal witnesses are: SUPERVISOR 1, Supervisor, Compliance Division and SUPERVISOR 2, Supervisor, Compliance Division.

IV. EXHIBITS TO BE EXAMINED AT THE DECEMBER 11, 2012 HEARING

The parties may rely upon the exhibits identified in Appendix I to the *Joint Stipulation of Facts and Issues* as supplemented by the *Supplement to Joint Stipulation of Facts* filed December 4, 2012.

SUPPLEMENT TO JOINT STIPULATION OF FACTS

On December 4, 2012, the parties, through their respective attorneys, filed the Supplement to Joint Stipulation of Facts. “The parties agree that the exhibits identified below shall be included on the *Joint Exhibit List* attached to the Stipulations as Appendix I:

EXHIBIT NUMBER	DESCRIPTION	PAGE NUMBERS
J-E 45	Protestant's Calculation of Qualifying Oklahoma Capital Gain	PROTESTANT01961
J-E 46	Excerpt from Deposition of SUPERVISOR 1	5; 9; 40-47; 55; 57-59
J-E 47	Excerpt from Deposition of SUPERVISOR 2	5; 7-9; 42-46; 50; 52
J-E 48	OTC Internal Documents Regarding the Oklahoma Capital Gains Deduction	OTC[00004]-OTC00018

V. ADDITIONAL FINDINGS OF FACT

Upon review of the court file and records, including, but not exclusive of the following, the ALJ finds:

- Transcript of the December 12, 2012 hearing
- Joint Stipulation of Facts, with J-E 1 through 44
- Briefs-In-Chief
- Response Briefs
- Reply Briefs
- Protestant's Addendum to Reply Brief
- Joint Statement of Issues and Witnesses to be Presented at December 11, 2012, Hearing
- Supplement to Joint Stipulation of Facts
- J-E 45-48
- Proposed Findings of Fact and Conclusions of Law ("FCRs")
- April 11, 2013 letter confirming the April 10, 2013 Teleconference

1. On January 25, 2005, COMPANY recapitalized so the Protestant and DECEDENT'S two (2) sons could become minority shareholders.⁴¹

2. On February 28, 2005, COMPANY filed its Restated Certificate of Incorporation with the Oklahoma Secretary of State.⁴²

3. On February 28, 2005, COMPANY cancelled the share certificate representing 2,000 shares of COMPANY stock previously issued to the Trust. Simultaneously, COMPANY issued

⁴¹ See Stipulation of Facts No. 8, J-E 14, and J-Es 41-43. On January 28, 2005, the Board of Directors and Sole Shareholder (DECEDENT) authorized COMPANY to issue 30,000,000 shares of Class B Non-Voting Common Stock, but the Purchase Agreement indicates that only 20,000,000 shares issued at a par value of \$0.001 per share. See also Procedural History herein, specifically, the ALJ's April 11, 2013 letter.

⁴² *Id.*

a new certificate for 5,200 shares of \$1.00 par value Common Stock to the Trust. A second share certificate representing 20,000,000 shares of Class B Non-Voting Common Stock (par value \$0.001) was issued to the Trust on the same day.⁴³

4. On February 28, 2005, the Protestant and DECEDENT'S two (2) sons acquired by purchase 5,200, 4,800, and 4,800 shares respectively, of COMPANY stock. These same individuals did not receive any shares of the Class B Non-Voting Common Stock. Following these purchases, the combined ownership of the Voting and Non-Voting (Class B) Common Stock of COMPANY was as follows,⁴⁴ to-wit:

<u>Shareholders</u>	<u>Voting Stock</u>	<u>% Ownership</u>	<u>Class B Stock</u>	<u>Combined Ownership</u>
Trust	5,200	26%	20,000,000	99.9260%
Protestant	5,200	26%		0.0260%
Son One	4,800	24%		0.0240%
Son Two	4,800	24%		0.0240%
Totals	20,000	100%		100.000%

5. On December 9, 2011, the Division issued a proposed assessment against the Protestant based upon the Second Amended Oklahoma Return⁴⁵ for the 2007 Tax Year (filed on or about June 30, 2011) as follows,⁴⁶ to-wit:

LINE NUMBER REASON FOR ADJUSTMENT

2 The Oklahoma capital gain deduction has been adjusted and/or disallowed. The deduction does not qualify. O.S. 68 § 2358 and Rule 710:50-15-48.

2 The assets were not held by you, directly or indirectly, for the required five (5) years to qualify for the Oklahoma capital gain deduction. Further, the information submitted is insufficient to determine whether the individual assets sold were held by the selling entity for the required five (5) year period.

27 The amount reported as refund has been corrected to a tax due of \$7,306.716.00. Additional penalty and/or interest may be assessed on this amount.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See* Stipulation of Facts Nos. 39-40.

⁴⁶ *See* J-E 37. On the Original Oklahoma Return and Amended Oklahoma Return, the Division adjusted Line 2 to \$5,324.00. The return does not reflect an explanation for the adjustment.

6. On December 4, 2012, the parties filed the Supplement to Joint Stipulations of Fact, which recalculates the Oklahoma Capital Gain for the Trust as stated in Stipulation 49,⁴⁷ which is summarized as follows, to-wit:

Total (COC SCH K, L9):	382,581,388
Less New Mexico:	(222,970)
Less Texas:	(22,501,668)
Oklahoma Gain Qualifying For Exclusion >5yrs:	359,856,750
Trust Portion @ 99.926%:	359,590,456
Less Attributable to Assets Held <5yrs:	1,899,051
Qualifying Oklahoma LTCG:	357,691,405
Additional Adjustments 10/24/11:	<u>(3,224,207)</u>
Revised Qualifying Oklahoma LTCG (Pre-BUYER Stock Option Settlement:	354,467,198
Less Adjustment for BUYER Stock Sale @ 18%:	<u>(63,804,096)</u> ⁴⁸
Revised Qualifying Oklahoma LTCG:	290,663,102

7. Based upon the terms of the Trust,⁴⁹ the Protestant's share of the "Revised Qualifying Oklahoma LTCG" is Fifty-five percent (55%) or \$159,864,706,⁵⁰ but Schedule D attached to the Protestant's Second Amended Federal Return limits the amount claimed to \$145,123,333.00 minus \$23,916.00 (Line 7 of Schedule D) or \$145,099,417.00 plus \$5,324.00 (Allowed by the Division on the Original Return) or \$145,104,741.00.⁵¹ J-E 45 does not change the amount of the Deduction claimed by the Protestant on Line 2 of the Second Amended Oklahoma Return (\$145,104,741.00).⁵²

8. The Trust has never received any income or other distribution from a foreign trust since July 30, 2005, through December 11, 2012.⁵³

⁴⁷ See J-E 45.

⁴⁸ See Stipulation of Facts No. 6.

⁴⁹ See J-E 6 and JE-7.

⁵⁰ See Stipulation of Facts No. 49, J-E 6 and J-E 45.

⁵¹ See Stipulation of Facts Nos. 39-40.

⁵² *Id.* See Procedural History herein at 11-12.

⁵³ Tr. at 20.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.⁵⁴

2. The Oklahoma Income Tax Act (“Act”)⁵⁵ imposes an income tax upon the Oklahoma Taxable Income⁵⁶ of every resident or non-resident individual who earns income within Oklahoma.⁵⁷

3. The beginning point of determining Oklahoma Taxable Income is Federal Adjusted Income.⁵⁸

4. Any term used in the Act shall⁵⁹ 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 shall⁶⁰ be the same for all purposes material hereto as they are for federal income tax purposes *except when the Act specifically provides otherwise*.⁶¹

5. A taxpayer’s income tax liability is determined in accordance with the law in effect at the time the income is received.⁶²

⁵⁴ OKLA. STAT. ANN. tit. 68, § 221 (West Supp. 2013). See OKLA. ADMIN. CODE § 710:1-5-38 (June 25, 2009).

⁵⁵ OKLA. STAT. ANN. tit. 68, § 2351 *et seq.* (West 2008).

⁵⁶ 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;

⁵⁷ OKLA. STAT. ANN. tit. 68, § 2355 (West 2008).

⁵⁸ 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;

⁵⁹ “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.

⁶⁰ *Id.*

⁶¹ OKLA. STAT. ANN. tit. 68, § 2353(3) (West 2008).

⁶² *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. See Division’s Proposed FCRs.

6. The text of Sections 2358(D) and 2358(F) of Title 68⁶³ effective January 1, 2006 is attached hereto as FCR Exhibits A and B.⁶⁴

7. The text of Sections 2358(D) and 2358(F) of Title 68,⁶⁵ effective January 1, 2007 are attached hereto as FCR Exhibits A and B.

8. The text of Sections 2358(D) and 2358(F) of Title 68,⁶⁶ effective January 1, 2008 are attached hereto as FCR Exhibits A and B.

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.⁶⁷

10. 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.⁶⁸ Statutory construction presents a question of law.⁶⁹

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

⁶³ OKLA. STAT. tit. 68, § 2358(D) and (F) (West Supp. 2006). See Laws 2005, c. 381, § 12, eff. Jan. 1, 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.

⁶⁴ The ALJ formatted the original legislation as exhibits in landscape layout, with three (3) columns, with strike throughs and underlines in bold. The exhibits can be joined together to reflect the Legislative amendments set forth herein. The ALJ hopes that the format of these exhibits will assist the reader in understanding the discussion in Parts I and II herein.

⁶⁵ *Id.* See OKLA. STAT. tit. 68, § 2358(D) and (F) (West Supp. 2007). See also Laws 2006, c44, § 21, eff. Jan. 1, 2007.

⁶⁶ *Id.* See OKLA. STAT. tit. 68, § 2358(D) and (F) (West Supp. 2008). See also Laws 2007, c. 346, § 3, eff. Jan. 1, 2008.

⁶⁷ 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. See also OKLA. ADMIN. CODE § 710:50-15-48 (June 25, 2007). The Tax Commission repromulgated the OTC Rule to implement the statutory changes effective January 1, 2006, which added the deduction for "Corporations," as Subsection (D) and designating Subsection (E) to Subsection (F) for "Individual Taxpayers.

⁶⁸ *Blitz U.S.A., Inc. v. Oklahoma Tax Com'n*, 2003 OK 50, ¶ 14, 75 P.3d 883. (Citations omitted).

⁶⁹ *Id.* at ¶ 6.

12. The Capital Gains 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.⁷⁰

13. 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.⁷¹ Doubt as to whether statute was intended to be prospective or retrospective must be resolved against retrospective application.⁷² 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.⁷³

14. 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.⁷⁴

15. 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.⁷⁵

16. When construing a statute that has been amended, the Supreme Court considers that the legislature may have intended either (1) to effect a change in the existing law or (2) to clarify that which previously appeared doubtful.⁷⁶

17. When the Legislature has clearly expressed its intent, the use of additional rules of construction are almost always unnecessary and a statute will be applied as written. The plain meaning of a statute's language is conclusive except in the rare case when literal construction produces a result demonstrably at odds with legislative intent. If the earlier version of a statute definitely expresses a clear and unambiguous intent or has been judicially interpreted, a legislative amendment is presumed to change the existing law.⁷⁷

⁷⁰ *Id.*

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

⁷² *Fraternal Order of Police, Lodge No. 165 v. City of Choctaw*, 1996 OK 78, 933 P.2d 261.

⁷³ *Houck v. Hold Oil Corp.*, 1993 OK 166, 1993 OK 167, 867 P.2d 451. (Citations omitted).

⁷⁴ OKLA. STAT. ANN. tit. 25, § 1 (West 2008).

⁷⁵ OKLA. STAT. ANN. tit. 25, § 2 (West 2008).

⁷⁶ *American Airlines v. Hickman*, 2007 OK 59, 164 P.3d 146.

⁷⁷ *Samman v. Multiple Injury Trust Fund*, 2001 OK 71, 33 P.3d 302.

18. Presumption that statutes are generally prospective in application is rebutted when there is legislative intent expressly declared or necessarily implied from the language used; doubt must be resolved against retrospective application.⁷⁸

19. Intention of the legislature in amending a statute may be either to effect a change in existing law or clarify that which was previously doubtful, and in determining the purpose intended in a particular case, the courts may properly consider whether the statute before amendment was clear or ambiguous.⁷⁹

20. Estoppel generally does not apply against the state acting in its sovereign capacity because of the unauthorized acts of its officers,⁸⁰ or because of mistakes or errors of its employees.⁸¹ Application of estoppel is not allowed against state, political subdivisions, or agencies, unless the interposition of estoppel would further some principal of public policy or interest.⁸² Where there is no power to act, a public official cannot bind a government entity even if he or she mistakenly or falsely asserts such authority.⁸³

21. The interest or penalty or any portion thereof ordinarily accruing by reason of a taxpayer's failure to file a report or return or failure to file a report or return in the correct form as required by any state tax law or by this Code or to pay a state tax within the statutory period allowed for its payment may be waived or remitted by the Oklahoma Tax Commission or its designee provided the taxpayer's failure to file a report or return or to pay the tax is satisfactorily explained to the Tax Commission or such designee, or provided such failure has resulted from a mistake by the taxpayer of either the law or the facts subjecting him to such tax, or inability to pay such interest or penalty resulting from insolvency.⁸⁴

⁷⁸ *Autry v. Multiple Injury Trust Fund*, 2001 OK 79, 38 P.3d 213.

⁷⁹ *Board of Educ., Vici Public Schools, Independent School Dist. No. I-5, Dewey County v. Morris*, 1982 OK 142, 656 P.2d 258.

⁸⁰ *State ex rel. Cartwright v. Dunbar*, 1980 OK 15, 618 P.2d 900.

⁸¹ *Id.* See *State, ex rel. Oklahoma Tax Com'n v. Emery*, 1982 OK CIV APP 13, 645 P.2d 1048. Any misstatements of law made by the Division cannot be used against the State of Oklahoma ex rel. Oklahoma Tax Commission in its sovereign capacity. See J-E 46 through 48. See also Protestant's Proposed FCRs at 10-12.

⁸² OTC Order No. 2003-12-16-06 (December 16, 2006). See *Burdick v. Independent School Dist. No. 52 of Oklahoma County*, 1985 OK 49, ¶5, 702 P.2d 48:

Generally, Oklahoma jurisprudence does not allow the application of estoppel against the state, the political subdivisions or agencies, unless its interposition would further some principle of public policy or interest. The rationale for recognizing a government shield from estoppel is to enable the state to protect public policies and interests from being jeopardized by judicial orders preventing full performance of legally-imposed duties.

⁸³ *Hiland Dairy Foods Co., LLC v. Oklahoma Tax Com'n*, 2006 OK CIV App 68, ¶ 11, 136 P.3d 1072, citing *Indiana Nat'l Bank v. State Dept. of Human Services*, 1993 OK 101, 857 P.2d 53.

⁸⁴ The Protest includes a request for abatement of penalties and interest. The Protestant cites two (2) cases to support its assertion that the ALJ has the authority to waive penalty and interest, but the Protestant's argument fails to recognize that administrative proceedings are "quasi-judicial" in nature. The ALJ does not have the authority to

22. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.⁸⁵ A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.⁸⁶

PRELIMINARY MATTERS

In this matter, the parties could not agree on the legal issue(s). As an alternative, the parties stipulated to their respective positions regarding which provision of the Deduction⁸⁷ was applicable to the resolution of this matter, Subsection (D) as asserted by the Protestant or Subsection (F), as asserted by the Division.⁸⁸

The Joint Stipulation of Facts and Issues did not answer several basic questions, which kept popping up during the review of the record. For purposes of clarifying the record, the ALJ poses the following questions, to-wit:

Question One (1): Who is claiming the Deduction in this matter, the Trust or PROTESTANT?

Answer: PROTESTANT is claiming the Deduction.⁸⁹

Question Two (2): Since, the Sale of COMPANY was on October 31, 2006, “Why did the Protestant claim the Deduction for the 2007 Tax Year,

waive penalty and interest. The authority to waive penalty and interest rests exclusively with the Commissioners or their designee, pursuant to OKLA. STAT. ANN. tit. 68, § 220 (West Supp. 2013). See *Rogers v. Oklahoma Tax Commission*, 1970 OK 11, 466 P.2d 650; *In re Woods Corp.*, 1975 OK 19, 531 P.2d 1381, where the Supreme Court of Oklahoma ordered remitter of penalty and interest.

⁸⁵ 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:

...“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.

⁸⁶ See *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com’n*, 1988 OK 91, 768 P.2d 359.

⁸⁷ See Note 23, *supra*.

⁸⁸ See Statement of the Issues No. 1(a)-(d).

⁸⁹ See Note 45, *supra*.

instead of filing an “Amended” Return for the 2006 Tax Year?”

Answer: The Trust is a fiscal year filer. Its 2006 Tax Year was from July 1, 2006 through June 30, 2007.⁹⁰ The Protestant is a calendar year filer.⁹¹ A taxpayer’s income tax liability is determined in accordance with the law in effect at the time the income is received,⁹² so the Protestant correctly claimed the Deduction on her Second Amended Return for the 2007 Tax Year.⁹³

The answer to Question One (1) is tied to the Protestant’s argument that all the amendments to Subsection D⁹⁴ “cure and/or clarify”⁹⁵ the Legislature’s original intent of the Deduction to include those qualifying gains received by the Trust, following the deemed sales of COMPANY’s assets on October 31, 2006. Further, that these “clarifying” amendments, coupled with the elections made by the Trust on the federal level (Primacy of Federal Law and Federal Elections)⁹⁶ qualify the Protestant to claim the Deduction under Subsection (F).⁹⁷

As to Question Two (2), the parties seemed to have glossed over the fact that the Protestant is a calendar year filer, who received her distribution of the capital gains from the Trust, which is a fiscal year filer. That is why the Protestant received the Deduction in 2007 (and claimed it on her Second Amended Return for the 2007 Tax Year).⁹⁸ However, the text of Subsection (F) for the 2007 Tax Year did not change from the 2006 Tax Year.⁹⁹

⁹⁰ See Stipulation of Facts No. 25.

⁹¹ See Stipulation of Facts No. 40.

⁹² See Note 62, *supra*.

⁹³ See Stipulation of Facts Nos. 39-40. “If the taxable year of a beneficiary is different from that of the estate or trust, the amount to be included in the gross income of the beneficiary shall be based on the distributable net income of the estate or trust and the amounts properly paid, credited, or required to be distributed to the beneficiary during any taxable year or years of the estate or trust ending within or with his taxable year.” 26 U.S.C. § 662(c).

⁹⁴ The Protestant asserts the amendments are retroactive to December 31, 2005, for the 2006, 2007, and 2008 Tax Years as to the Trust. See Note 89, *supra*.

⁹⁵ *Id.*

⁹⁶ See Protestant’s Brief-In-Chief at 36-40. See Part II herein.

⁹⁷ See Note 89, *supra*.

⁹⁸ See Stipulation of Facts Nos. 20-40.

⁹⁹ This fact also partially addresses the Protestant’s issue with the instructions for the 2007 Tax Year. See Statement of Facts No. 48. See Part II herein.

PART I.DISCUSSION OF PROTESTANT'S
THRESHOLD ISSUE

Did the Oklahoma Legislature's subsequent amendments of *Okla. Stat. tit. 68, § 2358(D)* in 2006 cure and/or clarify the original intent of the "qualifying gains receiving capital treatment" to include those qualifying gains received by the Trust, following the deemed sale of the assets of COMPANY on October 31, 2006, and thus were retroactive to December 31, 2005?¹⁰⁰

The analysis of the Protestant's threshold issue is essentially the same as positions taken by taxpayers in previous protests on the Deduction. All of these cases have a common theme, that for the 2006 Tax Year, the Oklahoma Legislature intended an amendment (or in this case amendments) as merely a "clarification" of the Deduction and should be applied retroactively to "taxable years beginning after December 31, 2005."¹⁰¹ In each of these cases, the Tax Commission concluded as a matter of law the language of the Deduction for the 2006 Tax Year to be unambiguous, and that the taxpayers failed to overcome the presumption that an amendment should be applied prospectively.¹⁰² Where a statute is unambiguous, statutory construction is unnecessary and the terms of the statute must be given their plain meaning.¹⁰³ Each of the aforementioned Tax Commission Orders utilizes the same time honored precepts of statutory interpretation echoed in decades of case law in the State of Oklahoma.

It is important to keep in mind that the Deduction depends entirely on legislative grace and must be strictly construed against the Deduction, unless authority for the Deduction is clearly expressed.¹⁰⁴ In other words, the Deduction is a statutory privilege created by the Legislature, so it is within the Legislature's authority to create and define the scope of the privilege, within

¹⁰⁰ Joint Stipulation II, Statement of the Issues, 1(a) at 3. Tr. at 21-23.

¹⁰¹ *Id.*

¹⁰² See Tax Commission Order (Precedential) No. 2012-02-14-05 (February 14, 2012), Tax Commission Order No. 2009-06-23-02 (June 23, 2009), Tax Commission Order No. 2009-06-23-03 (June 23, 2009), and most recently Tax Commission Order No. 2012-10-11-04 (October 11, 2012). The ALJ incorporates herein by reference the aforementioned Tax Commission Orders. The last Tax Commission Order is currently on appeal in Case No. TC-111221. This case has numerous issues, including the retroactivity argument. However, the appellate case may turn on the issue of whether "XXXXX" constitutes real or tangible person property under the Deduction in effect for the 2006 Tax Year.

As a side note, the Court of Civil Appeals of the State of Oklahoma, in Case No. TC-109,886, reversed Tax Commission Order No. 2011-08-30-06 (August 30, 2006), stating, "We hold 68 O.S. Supp. 2008 § 2358(D) to be unconstitutional as violative of the Commerce Clause of the U.S. Constitution, and we reverse the decision of the Oklahoma Tax Commission." The Tax Commission's Petition for Rehearing is currently pending as of May 29, 2013. The Appellate Court's ruling on Case No. TC-109,866 does not appear to affect this matter.

¹⁰³ *Id.* See Note 68, *supra*.

¹⁰⁴ See Notes 68-72, *supra*.

constitutional constraints.

The Protestant takes the position that this case is distinguishable from the previous protests on the Deduction because “No new statutory section was added when the phrase ‘estate or trust’ was added to the wording of *Okla. Stat. tit. 68, § 2358(d)*. The addition of this phrase was a clarification of the statute’s intent, which was to include estates and trusts as taxpayers.”¹⁰⁵

Legislative intent is the litmus test for determining whether the Legislature may have intended either (1) to effect a change in the existing law or (2) to clarify that which previous appeared doubtful.¹⁰⁶ The amendments to the Deduction illustrates how the Legislature has expanded the Deduction over the years, and why the Tax Commission has concluded as a matter of law that the language of Subsections D and F are unambiguous and why taxpayers have failed to overcome the presumption that the amendment(s) to the Deduction are to be applied prospectively.¹⁰⁷

A reading of each successive amendment reveals that the Legislature expanded the scope of the Deduction from the previous year, by adding new classes of taxpayers, categories of property, and expanding the scope of definitional sections.¹⁰⁸ At times, the Legislature accomplished the expansion of the Deduction by adding new subsections or adding new classes of taxpayers to existing subsections, such as the amendment adding two (2) new classes of taxpayers to Subsection D for the 2007 Tax Year (“estate or trust”).¹⁰⁹

As to the Protestant’s threshold question, the language of Subsection D of the Deduction for the 2006 Tax Year is plain and unambiguous.¹¹⁰ Subsection D of the Deduction for the 2006 Tax Year is limited to “Corporations.” The Amendment effective for the 2007 Tax Year expanded the scope of the Deduction adding two (2) new categories of taxpayers, “estate or

¹⁰⁵ See Protestant’s Brief-In-Chief at 19.

¹⁰⁶ See Note 77, *supra*.

¹⁰⁷ See Note 103, *supra*.

¹⁰⁸ See Notes 63-66 *supra*.

¹⁰⁹ *Id.* The Legislature added the Deduction for “Individual Taxpayers,” Laws 2004, c. 322, § 14 eff. Dec. 1, 2004. “Corporations” were added as Subsection D, Laws 2005, c. 381; § 12., eff. Jan. 1, 2006, with the Deduction for “Individual Taxpayers” re-designated as Subsection F, with numerous add-ons to the subsection, including the addition of (F)(2)(d) and (F)(2)(e)(1)-(2). The Legislature expanded Subsection D to include “Estates and Trusts,” Laws 2006; 2nd Ex. Sess., c. 44, § 21, eff. Jan. 1, 2007. There were no changes to Subsection F. The Legislature made substantive changes to Subsections D and F, Laws 2007, c. 346, §3, eff. Jan. 1, 2008, expanding the scope of the Deduction to include a new category of deduction “real property, tangible personal property, or intangible personal property” meeting the requirements contained therein. For the 2008 Tax year, the Legislature expanded the “holding period” to “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.”

¹¹⁰ See Note 103, *supra*.

trust.”¹¹¹ The Claimant’s threshold question does not meet the criteria for retroactive application rendering the remainder of the Protestant’s position moot.¹¹²

PART II.

DISCUSSION OF PROTESTANT’S POSITION ON THE PRIMACY OF FEDERAL TAX LAW AND FEDERAL TAX ELECTIONS AND ITS IMPACT, IF ANY, ON PART I AND ON THE DIVISION’S POSITION THE PROTESTANT CLAIMED THE DEDUCTION AS AN INDIVIDUAL TAXPAYER PURSUANT TO SUBSECTION F OF THE DEDUCTION

Although, the Claimant’s threshold question does not meet the criteria for retroactive application rendering the remainder of the Protestant’s position moot, the complexity of this matter warrants a discussion of the Protestant’s position concerning the “Primacy of Federal Law and Federal Elections” referenced in Part I, and what effect, if any, the argument has on the Division’s position that the Protestant claimed the Deduction as an “Individual Taxpayer” pursuant to Subsection F of the Deduction.

The Protestant asserts, “Oklahoma law unequivocally recognizes the primacy of federal tax law and, more particularly, federal tax elections on issues involving determinations under Oklahoma tax law.”¹¹³

The Protestant cites the “Piggy Back”¹¹⁴ provision of the Act,¹¹⁵ which states as follows,¹¹⁶ to-wit:

Any term used in Section 2351 *et seq.* of this title shall have the same meaning as when used in a comparable context in the Internal Revenue Code, unless a different meaning is clearly required. For all taxable periods covered by Section 2351 *et seq.* of this title, *the tax status and all elections of all taxpayers covered by Section 2351 et seq. of this title shall be the same for all purposes material hereto as they are for federal income tax purposes except when Section 2351 et seq. of this title specifically provides otherwise;* (Emphasis added.)

¹¹¹ See Note 65, *supra*.

¹¹² See Notes 77-80, *supra*.

¹¹³ See Statement of Issues, No. 1. The Protestant couples its retroactivity argument addressed in Part I, with the “Primacy of Federal Law and Federal Elections.”

¹¹⁴ See Note 61, *supra*.

¹¹⁵ See Note 55, *supra*.

¹¹⁶ See Protestant’s Brief-In-Chief at 28 and 37, Protestant’s Response Brief at 14, and Protestant’s Reply Brief at 15

However, the Protestant fails to recognize the significance of the highlighted language, which creates an exception when the Act “specifically provides otherwise.”¹¹⁷ For the 2007 Tax Year, the Subsection F provides “...a holding period of at least five (5) years prior to the date of the transaction from which such net capital gains arise...”¹¹⁸

As stated by the Court in *General Accessory*,¹¹⁹ “[T]he Legislature may, with or without exceptions, modifications, or adjustments, define the amount on, in respect to, or by which any such tax or taxes are imposed or measured (a) by reference to any provisions of the laws ... of the United States, as such laws may be or become effective at any time or from time to time; (b) by reference to any amount or amounts finally ascertained in determining amounts subject to taxation by the United States; or (c) by reference to any amount or amounts of tax finally ascertained to be payable to the United States.” Ok. Const. Art. 10, § 12. In this respect, “[t]he federal/state ‘piggy-back’ system has been in effect in Oklahoma since enactment of the 1971 income tax code, pursuant to constitutional amendment in 1968[,]and[t]he statutory definitions of ‘Oklahoma taxable income’ and ‘Oklahoma adjusted gross income’ mirror the constitutional language in Okla. Const., Art. 10, § 12.”¹²⁰ As in *General Accessory* and *Dugger*, the parties are not challenging the validity of Oklahoma’s federal/state “piggy-back” system or the Legislature’s authority to treat the distribution to the Protestant differently for state income tax purposes.

The Protestant further states, “Similarly, *Okla. Stat. tit. 68 (2006), §§ 2358(D)(2)(a) and (b) and 2358(F)(2)(a) and (b)* specifically recognized that the holding period of an asset, *e.g.*, stock or tangible personal property, shall include any additional holding period of any other individual if the additional holding period is included under the provisions of the Internal Revenue Code.”¹²¹ The viability of Protestant’s statement under either Subsections D or F of the Deduction, depends on the retroactivity argument *coupled with the “Primary of Federal Law and Federal Elections” argument in order for the Trust and/or the Protestant to meet the five (5) year holding requirement, either directly or indirectly.*¹²² In other words, in order for the Protestant’s argument to work with either Subsection of the Deduction, all of the amendments detailed in FCR Exhibits A and B have to be retroactive as a “clarification” of legislative intent for the Protestant to use the federal “Tacking Statute,”¹²³ so that the Trust and/or the Protestant

¹¹⁷ See Note 61, *supra*.

¹¹⁸ See Note 65, *supra*.

¹¹⁹ *General Accessory Mfg. Co. v. Oklahoma Tax Com’n*, 2005 OK CIV APP 75.

¹²⁰ *Dugger v. State ex rel. Oklahoma Tax Com’n*, 1992 OK 105, 834 P.2d 964.

¹²¹ *Id.* The original footnote states, “The inclusion of an additional holding period is commonly referred to as the ‘tacking’ of an additional holding period in tax parlance.” See FCR Exhibits A and B, attached hereto.

¹²² See Note 114, *supra*.

¹²³ *Id.* See 26 U.S.C. § 1223(2):

In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under

can meet the five (5) year holding requirement.

Subsection F of the Deduction for the 2007 Tax Year, states as follows,¹²⁴ to-wit:

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 analysis of the retroactivity argument of Subsection D for the 2006 Tax Year in Part I applies equally to the analysis under Subsection F of the Deduction for the 2007 Tax Year. The language of Subsection F of the Deduction for the 2007 Tax Year is plain and unambiguous.¹²⁵ The Legislature expanded the scope of “holding period,” with the amendment effective January 1, 2008, adding the sentence “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.”¹²⁶ The Claimant’s position does not meet the criteria for retroactive application of the Amendment effective January 1, 2008 to the 2007 Tax Year.

There is no dispute that the Protestant claimed the Deduction on her Second Amended Oklahoma Return for the 2007 Tax Year based upon the distribution from the Trust,¹²⁷ and that the Division denied the Deduction because the “The assets were not held by [Protestant], directly or indirectly, for the required five (5) years to qualify for the [Deduction].”¹²⁸ Based upon the stipulated facts, the Protestant did not hold the assets, directly or indirectly, for the required five (5) years to qualify for the Deduction.¹²⁹

CONCLUSION

The Protestant has failed to meet her burden of proof, by preponderance of the evidence, that the Division’s assessment is incorrect, and in what respects.

this chapter such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

¹²⁴ See Note 67, *supra*. See specifically OKLA. STAT. tit. 68, §§ 2358(F)(2)(a)(1), 2358(F)(2)(b)-(e) (West Supp. 2007).

¹²⁵ See Note 103, *supra*.

¹²⁶ See Note 66, *supra*.

¹²⁷ See Note 45, *supra*.

¹²⁸ See J-E 37, PROTESTANT02031.

¹²⁹ See Stipulations of Facts herein.

DISPOSITION

It is the ORDER of the undersigned OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case that the protest should be denied.¹³⁰

ERRATA SHEET

The above-styled and numbered cause comes on for consideration of omissions appearing in the *Findings, Conclusions and Recommendations* issued on June 6, 2013. The undersigned finds errors on page 36, in *Conclusions of Law* 6, 7, and 8.

Conclusions of Law 6, 7, and 8 should read as follows:

6. The text of Sections 2358(D) and 2358(F) of Title 68¹³¹ effective January 1, 2006 is attached hereto as FCR Exhibits A and C.¹³²

7. The text of Sections 2358(D) and 2358(F) of Title 68,¹³³ effective January 1, 2007 are attached hereto as FCR Exhibits A and C.

8. The text of Sections 2358(D) and 2358(F) of Title 68,¹³⁴ effective January 1, 2008 are attached hereto as FCR Exhibits A and C.

In addition, the undersigned finds an omission in Footnote 110 on page 45 of the Findings. Footnote 110 should read as follows:

¹¹⁰ *Id.* See FCR Exhibit B. The Legislature added the Deduction for “**Individual Taxpayers**,” Laws 2004, c. 322, § 14 eff. Dec. 1, 2004. “**Corporations**” were added as Subsection D, Laws 2005, c. 381; § 12., eff. Jan. 1, 2006, with the Deduction for “Individual Taxpayers” re-designated as Subsection F, with numerous add-ons to the subsection, including the addition of (F)(2)(d) and (F)(2)(e)(1)-(2). The Legislature expanded Subsection D to include “**Estates and Trusts**,” Laws 2006; 2nd Ex. Sess., c. 44, § 21, eff. Jan. 1, 2007. There were no changes to Subsection F. The Legislature made substantive changes to Subsections D and F, Laws 2007, c.

¹³⁰ The Protest includes a request for abatement of penalties and interest. *See* Note 85, *supra*.

¹³¹ OKLA. STAT. tit. 68, § 2358(D) and (F) (West Supp. 2006). *See* Laws 2005, c. 381, § 12, eff. Jan. 1, 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.

¹³² The ALJ formatted the original legislation as exhibits in landscape layout, with three (3) columns, with strike throughs and underlines in bold. The exhibits can be joined together to reflect the Legislative amendments set forth herein. The ALJ hopes that the format of these exhibits will assist the reader in understanding the discussion in Parts I and II herein.

¹³³ *Id.* *See* OKLA. STAT. tit. 68, § 2358(D) and (F) (West Supp. 2007). *See also* Laws 2006, c44, § 21, eff. Jan. 1, 2007.

¹³⁴ *Id.* *See* OKLA. STAT. tit. 68, § 2358(D) and (F) (West Supp. 2008). *See also* Laws 2007, c. 346, § 3, eff. Jan. 1, 2008.

346, §3, eff. Jan. 1, 2008, expanding the scope of the Deduction to include a new category of deduction “real property, tangible personal property, or intangible personal property” meeting the requirements contained therein. For the 2008 Tax year, the Legislature expanded the “holding period” to “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.”

Further, the undersigned withdraws the previously submitted FCR Exhibits A and B and substitutes FCR Exhibits A, B and C in their place, said Exhibits attached to this Errata Sheet.

POST ORDER ERRATA SHEET

In accordance with the *Order Granting in Part and Denying in Part Protestant’s Motion to Correct Transcript and Other Materials (“Order”)* issued November 12, 2013, in the above-styled and numbered cause, the ALJ finds errors appearing on page 8, footnote 14 in the *Findings, Conclusions and Recommendations (“Findings”)* issued on June 6, 2012, and adopted by the Commissioners in OTC Order No. 2013-09-17-01 (September 17, 2013).

The *Findings* on page 8, footnote 14 should read as follows, to-wit:

On November 29, 2012, the Clerk received a correct copy of J-E 9 (PROTESTANT00388), which replaced PROTESTANT00338.¹³⁵

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. 2014) 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.”

¹³⁵ The undersigned noted for the record that the Clerk replaced J-E 9 (PROTESTANT00338) with PROTESTANT00388. Tr. at 4.