JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2014-01-09-07 / NON-PRECEDENTIAL**
ID: **CR-13-011-K**
DATE: **JANUARY 9, 2014**
DISPOSITION: **DENIED**
TAX TYPE: **AIRCRAFT EXCISE**
APPEAL: **PENDING, S. CT. CASE NO. 112,549**

ORDER

Claimant, LLC is represented by ATTORNEY 1 and ATTORNEY 2, Attorneys at Law, FIRM. The Taxpayer Assistance Division of the Oklahoma Tax Commission ("Division") is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

On April 5, 2013, Claimant remitted aircraft excise tax in the amount of $100.00 in reference to an aircraft acquired on July 23, 2010. Whether the aircraft at issue is subject to aircraft excise tax or exempt therefrom was the subject of a protest to a proposed aircraft excise tax assessment in a prior case between the parties. Claimant's protest to the proposed assessment was denied by Oklahoma Tax Commission Order No. 2012 08 21 36 which is currently on appeal.

On May 29, 2013, Claimant filed a verified claim for refund. The refund claim not only sought the return of the $100.00, but a determination that aircraft excise tax is not due on the use of the aircraft in Oklahoma citing the Air Carrier Certificate obtained by the lessee of the aircraft. By letter dated June 10, 2013, the Division denied the claim as "unsubstantiated", citing the provisions of 68 O.S. 2011, § 227(f). Claimant timely protested the denial and requested a hearing.

On July 3, 2013, the protest and demand for hearing was referred to the Office of the Administrative Law Judges for further proceedings consistent with the Uniform Tax Procedure Code[1] and the Rules of Practice and Procedure before the Office of the Administrative Law Judges[2]. The protest was docketed as Case No CR-13-011-K and assigned to Kris D. Kasper, Administrative Law Judge.

In accordance with 68 O.S. 2011, § 227(e), a hearing was scheduled for September 3, 2013, by *Notice of Hearing* issued July 9, 2013. Pursuant to the *Division's Request for Continuance* which Claimant did not object to, the hearing was stricken and rescheduled for October 29, 2013, by *Notice of Hearing* issued August 30, 2013.

A closed hearing was held as rescheduled.[3] The parties stipulated to the admission of Exhibits A through F, sponsored by the Division and Exhibits A and 2(a) through 2(c), sponsored

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

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

[3] Confidentiality of the proceedings was invoked. 68 O.S. 2011, § 205.

by Claimant. SUPERVISOR, Supervisor of the Business Services Section of the Division testified with respect to the reason for the denial of the refund claim. Position statements were permitted. Upon conclusion of the hearing, the record was closed and the protest to the denial of the refund claim was submitted for decision.[4]

FINDINGS OF FACT

Upon review of the file and records, including the recording of the hearing, the exhibits received into evidence and the pleadings of the parties, the undersigned finds:

1. On April 5, 2013, Claimant remitted aircraft excise tax in the nominal amount of $100.00 in reference to a Cessna 560XL acquired on July 23, 2010. Division's Exhibit C.

2. Whether the aircraft at issue is subject to the levy of aircraft excise tax or exempt therefrom was the subject of a protest to the proposed assessment of aircraft excise tax, interest and penalty.[5] Division's Exhibit A.

3. Claimant's protest to the proposed aircraft excise tax assessment was denied by Oklahoma Tax Commission Order No. 2012 08 21 36. Division's Exhibit A.

4. The Commission order denying the protest is currently on appeal. Division's Exhibit B.

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

[5] In the Matter of the Aircraft Excise Tax Protest of LLC, Case No. P-11-142-K. The essential facts as set forth in that decision are as follows (citation references are omitted):

> 1. [Claimant] purchased a Cessna Citation XLS+ aircraft from Cessna Aircraft Company of Wichita, Kansas for a total cost of $10,555,825.00.
> 2. On or about July 1, 2010, [Claimant] took possession of the aircraft and has based the aircraft at Wiley Post Airport in Bethany, Oklahoma since obtaining possession.
> 3. [Claimant] leases the aircraft on a nonexclusive basis to LESSEE ("LESSEE") for use predominantly in the conduct of its business.
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> 5. In late May or early June, 2010, LESSEE initially applied for a Part 135 Air Carrier Certificate with the Federal Aviation Administration ("FAA").
> 6. On July 23, 2010, [Claimant] filed an *Application for Registration of Aircraft and Report of Excise Tax for Calendar Year 2010* ("*Application*"), with the Taxpayer Assistance Division of the Oklahoma Tax Commission reporting that excise tax was not applicable to the purchase or use of the subject aircraft.
> 7. The Division conducted an audit of the *Application* and [Claimant's] records, and as a result thereof, the Division by letter dated November 17, 2010, proposed the assessment of aircraft excise tax, penalty and interest against [Claimant] in the aggregate amount of $388,171.86.
> 8. [Claimant] timely protested the proposed assessment.
> 9 'It is undisputed that neither [Claimant] nor LESSEE * * *, the lessee of the subject aircraft, possessed * * * a [Part 135] Certificate on the date of registration' of the aircraft.

5. On May 29, 2013, Claimant filed a verified claim for refund seeking not only the return of the $100.00, but a determination that aircraft excise tax is not due on the use of the aircraft in Oklahoma. Division's Exhibit D.

6. The basis of the refund claim is the Air Carrier Certificate obtained by the lessee of the aircraft effective February 22, 2013. Claimant's Exhibit A.

7. The Air Carrier Certificate obtained by the lessee is not specific to the aircraft at issue. Claimant's Exhibit A.

8. By letter dated June 10, 2013, the Division denied the claim as "unsubstantiated", citing the provisions of 68 O.S. 2011, § 227(f). Division's Exhibit E.

9. Claimant timely protested the denial and requested a hearing. Division's Exhibit F.

ISSUES AND CONTENTIONS

The issue presented for decision is whether the Division erred in denying the refund claim; or as the Division propounds, whether a taxpayer may maintain a claim for refund of a payment made toward an assessment that has become final under the law.

Protestant contends that the refund claim should be allowed to proceed so it may present the Air Carrier Certificate (new evidence) to the Appellate Court in its appeal of the Oklahoma Tax Commission order denying its protest to the proposed aircraft excise tax assessment. In support of this contention, Claimant argues that the proposed assessment litigated in the prior case is not "final" since it was timely protested and the Commission order denying the protest was timely appealed.

The Division contends that Claimant should not be allowed to maintain a refund claim for any payments made toward the proposed assessment since the assessment within the meaning of § 227(f) is final under the law. In support of this contention, the Division argues that the Commission order denying the protest is final otherwise the order would not be subject to an appeal. The Division further argues that Claimant cannot carry its burden of proof to show how the action of denying the refund claim is incorrect since the refund claim is an attempt to re-litigate the exemption argument denied by the Commission order.

CONCLUSIONS OF LAW

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

1. Jurisdiction of the parties and the subject matter of this proceeding is vested in the

Oklahoma Tax Commission. 68 O.S. 2011, § 227(d) and (e).

2. Any taxpayer who has paid any tax collected by the Oklahoma Tax Commission through an error of fact, or computation, or misinterpretation of law may file a verified claim for refund of the same within three (3) years of the payment thereof. 68 O.S. 2011, § 227(a) and (b). The claim shall specify the name of the taxpayer, the time when and period for which said tax was paid, the nature and kind of tax so paid, the amount of tax claimed to be erroneously paid, the grounds upon which a refund is sought, and such other information or data relative to such payment as may be necessary to an adjustment thereof. 68 O.S. 2011, § 227(c).

3. The Oklahoma Tax Commission is under the duty to review the refund claim as soon as practicable after the filing thereof, determine the amount due, if any, and by written notice advise the taxpayer regarding the correctness of the claim and whether the same is approved or denied. 68 O.S. 2011, § 227(c).

4. The provisions § 227 do not apply "in any case where the tax was paid after an assessment thereof was made by the Tax Commission which assessment became final under the law." 68 O.S. 2011, § 227(f). "[T]he refund provisions [of the tax statutes] shall be without application to taxes where the amount thereof has been determined by an assessment, other than an assessment designated as an 'office audit', that has become final." 68 O.S. 2011, § 221(I).

5. A "final assessment", other than an assessment proposed as the result of an office audit which has not been made the subject of a hearing; 68 O.S. 2011, § 221(B) and (I), or found to be clearly erroneous as the result of the abatement procedures; 68 O.S. 2011, § 221(E), is one which is not protested within the time permitted by law or as extended by the Commission. 68 O.S. 2011, § 221(E) and (F). A final assessment is subject to levy and execution. 68 O.S. 2011, § 221(H).

6. A "final order" of the Tax Commission is the cumulative result of the protest procedures of the Uniform Tax Procedure Code. See, 68 O.S. 2011, § 221(D)[6] and (G)[7]. "Any taxpayer * * * aggrieved by a final order of the Tax Commission issued pursuant to [§ 221(G)] may appeal therefrom directly to the Supreme Court of Oklahoma." 68 O.S. 2011, § 225(A). In the event the taxpayer fails to appeal the order of the Oklahoma Tax Commission within the time and manner allowed by § 225, "the order shall within thirty (30) days from the date a certified copy thereof is mailed to the taxpayer, become final." 68 O.S. 2011, § 221(G).

7. The fundamental rule and primary goal of statutory construction is to ascertain

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[6] This subsection provides in part: "[i]n the event an oral hearing is not requested [in the timely filed written protest], the Tax Commission shall proceed without further notice to examine into the merits of the protest and enter an order in accordance with its findings."

[7] This subsection provides in part: "[w]ithin a reasonable time after the hearing herein provide for, the Tax Commission shall make and enter an order in writing in which it shall set forth the disposition made of the protest * * * [t]he order shall contain findings of fact and conclusions of law."

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

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

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

8. The principle of issue preclusion (previously known as collateral estoppel) operates to bar the same parties or their privies from re-litigating an issue of fact or law necessary to a court's judgment subsequent to a court deciding that issue in a suit brought upon a different claim. ***Oklahoma Dept. of Public Safety v. McCrady***, 2007 OK 39, ¶ 7, 176 P.3d 1194, 1199. An issue is actually litigated and necessarily determined if it is properly raised in the pleadings, or otherwise submitted for determination, and judgment would not have been rendered but for the determination of that issue. *Id*. For invocation of issue preclusion there need not be a prior adjudication on the merits (as is often the case with res judicata) but only a final determination of a material issue common to both cases. *Id*. Issue preclusion is an affirmative defense and must be pleaded and proved. ***Nealis v. Baird***, 1999 OK 98, ¶ 51, 996 P.2d 438, 458.

ANALYSIS

A final order of the Oklahoma Tax Commission denying a protest to a proposed assessment and a final assessment are not one and the same. A final order is appealable. A final assessment is not. However, a final order and final assessment are sufficiently similar in that all administrative remedies have been exhausted to invoke the provisions of § 227(f) to deny a refund claim

attempting to re-litigate the same issue. The provisions of §§ 221(I) and 227(f) adequately express the Legislature's intent to preclude the institution of a claim for refund where the taxes were the subject of a protest to a proposed assessment which has been reduce to a final order of the Oklahoma Tax Commission. The denial of the refund claim preserves the time honored legal principles of collateral estoppel and res judicata. Accordingly, the Division did not err in denying Claimant's claim for refund.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the aircraft excise tax claim for refund of Protestant, LLC be denied.

OKLAHOMA TAX COMMISSION

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

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