JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2015-03-05-04 / NON-PRECEDENTIAL**
ID: **P-13-181-H**
DATE: **MARCH 5, 2015**
DISPOSITION: **DENIED**
TAX TYPE: **INCOME**
APPEAL: **NONE TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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, including the Findings of Fact, Conclusions of Law and Recommendations made and entered by the Administrative Law Judge on the 4th day of December, 2014, the Commission makes the following Findings of Fact and Conclusions of Law and enters the following order.

PROCEDURAL HISTORY

On December 18, 2013, the protest file was received by the Office of 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 Administrative Law Judges*.[2] On December 18, 2013, the Court Clerk ("Clerk")[3] mailed the Introductory Letter to the Protestant that this matter had been assigned to ALJ, Administrative Law Judge ("ALJ"), and docketed as Case Number P-13-181-H. The letter also advised the Protestant that a Notice of Prehearing Teleconference 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 December 20, 2013, OTC ATTORNEY 1, filed an Entry of Appearance, as Division's Counsel of record. On December 23, 2013, the Clerk mailed the Notice of Prehearing Teleconference to the last-known address of the Protestant, setting the prehearing conference on February 13, 2014, at 9:30 a.m.[5]

On February 13, 2014, at 9:30 a.m. the ALJ held the Prehearing Teleconference as scheduled, with the parties appearing via telephone. On February 13, 2014, the ALJ directed the parties to file a status report on or before March 17, 2014.

On March 13, 2014, OTC ATTORNEY 2, Assistant General Counsel, filed an Entry of Appearance as Division's Additional Counsel of record. On March 17, 2014, OTC ATTORNEY 1 filed the Status Report, with the parties requesting a Scheduling Order for this matter to submit

[1] OKLA. STAT. ANN. tit. 68, § 201 *et seq.* (West 2014).

[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, 2009).
[4] *Id.* Unless otherwise noted herein, the ALJ notified the parties by letter.

[5] OKLA. STAT. ANN. tit. 68, § 208 (West 2014). The Clerk mailed the notice to the Protestant at ADDRESS.

on stipulations and briefs.[6] On March 18, 2014, the ALJ issued the Scheduling Order as requested by the parties.

On April 1, 2014, OTC ATTORNEY 2 filed a Notice of Withdrawal as Co-Counsel of Record for the Division.

On May 1, 2014, the parties filed Joint Stipulation of Facts and Statement of Issue, with Exhibits 1 through 5, attached thereto.
On June 2, 2014, the Division filed its Memorandum Brief with the Clerk. On June 3, 2014, the ALJ advised the parties as follows, to-wit:

> On May 1, 2014, the Court Clerk received the Joint Stipulation of Facts and Statement of Issue, and on June 2, 2014, the Compliance Division's Memorandum Brief.
>
> According to Stipulation 5, the Protestant timely protested the adjustments to the "Amended" Returns for the 2009 and 2010 tax years.
>
> On the "Amended" Return for the 2009 tax year, the Division adjusted the refund to zero, so it would appear that Section 207 of Title 68[7] applies, so the protest on the 2009 tax year can submit on Stipulations and Briefs.
>
> However, on the "Amended" Return for the 2010 tax year, the Division's adjustment resulted in the assessment of $50.00. It appears that the protest on the 2010 tax year falls under the provisions of Section 221 of Title 68,[8] and the Protestant did not timely filed the protest within the sixty (60) day period.
>
> The parties are to communicate regarding this matter and file a status report on or before **Monday, July 7, 2014**, informing the ALJ how they intend to proceed. (Emphasis original.)

On July 11, 2014, OTC ATTORNEY filed the Status Report, as follows, to-wit:

> This report is in response to the Administrative Law Judge's June 3, 2014 letter requesting the parties report how they intend to proceed with regard to a perceived timeliness of protest issue on the 2010 tax period.

[6] *See* Note 17, *infra.*
[7] OKLA. STAT. ANN. tit. 68, § 207 (West 2014).

[8] OKLA. STAT. ANN. tit. 68, § 221(E) (West 2014).

> Before filing its brief in this case, the Office of the General Counsel decided, after discussion and consideration, not to contest the timeliness of the protest to its actions on the 2009 and 2010 tax periods. This decision was based on (1) examination of the printout dates on the documents submitted by PROTESTANT as part of her protest and (2) the fact she transposed P.O. Box numbers in the OTC's address to which she was directed to mail her protest. Before filing the Division's brief, the undersigned spoke with PROTESTANT and advised her that, under these specific circumstances, the Division was not contesting timeliness.

On July 16, 2014, the ALJ acknowledged receipt of the Status Report and directed the Protestant to file a Response Brief on or before July 31, 2014, with the case submitting for decision in accordance with OTC Rule 710:1-5-38.[9]

On August 12, 2014, the ALJ advised that the Protestant failed to file a Response Brief, closed the record, and submitted this matter for decision as of August 12, 2014.

On October 1, 2014, the Protestant filed, what the ALJ deemed as a "Request to File Response Brief Out-of-Time," which is more fully set forth therein. The Division did not have an objection to the Request. On October 2, 2014, the ALJ issued an Order Granting Motion to Withdraw from Decision, Open Record, and File Response Brief on or before Monday, October 20, 2014. On October 16, 2014, the Protestant filed her response ("Response Brief"). On October 16, 2014, the ALJ acknowledged receipt of the Protestant's Response Brief, and the ALJ directed the Division to file a Reply on or before October 31, 2014.

On November 3, 2014, the Division filed its Reply Brief.[10] The ALJ acknowledged receipt of the Division's Reply Brief, closed the record, and submitted this matter for decision on November 4, 2014.

---

[9] *See* Note 17, *infra.*

[10] The ALJ, through the Clerk, granted an oral request for the Division to file its Reply Brief out-of-time.

STIPULATION OF FACTS

On May 1, 2014, the parties filed Joint Stipulation of Facts and Statement of Issue,[11] with Exhibits 1 through 5, attached thereto, as follows, to-wit:

1. On April 15, 2013, Protestant filed amended Oklahoma individual full year resident income tax returns (Forms 511X) for the tax years 2009 and 2010. During those years, Protestant was employed by EMPLOYER, Oklahoma, a public entity whose principal business activity involves the aerospace sector within the meaning of 68 O.S. Supp. 2008, § 2357.301. The returns claimed a Line 17 (Line 39, Form 511 CR) Oklahoma income tax credit, the "Credit for Employees in the Aerospace Sector" in the amount of $1,767.00 for 2009 and $2,122.00 for 2010, and claimed refunds for each year in those amounts. The "Credit for Employees in the Aerospace Sector" was substantiated by a Form 564 attached to each return. **(Exhibits 1 and 2.)**

2. The Division examined the returns, and by letters dated June 14, 2013, the Division notified Protestant that it had adjusted the returns to deny the "Credit for Employees in the Aerospace Sector" for the reason that Protestant was not a "qualified employee" inasmuch as she had been employed in the aerospace sector prior to January 1, 2009. **(Exhibits 3 and 4.)**

3. Protestant timely protested the adjustments. Attached to her letter of protest were documents from her personnel file with EMPLOYER outlining her employment history with that entity. In the letter, Protestant's argument was that because she was hired in 2008 as a "conditional employee" under a three year probationary period, she was not employed in the aerospace sector until the end of that probationary period. **(Exhibit 5.)**

4. Protestant's educational and employment history is as follows: On May 3, 2008, Protestant graduated from Oklahoma State University, an institution within the Oklahoma State System of Higher Education, with a degree in a "qualified program" within the meaning of 68 O.S. Supp. 2008, § 2357.301(6). On August 11, 2008, Protestant commenced full time employment as an industrial engineer with EMPLOYER, Oklahoma, where she has remained in continuous employment to this date. Protestant was hired as a "conditional employee" subject to a three year probationary period, after which, depending on job performance she would be classified as a permanent employee, which she became on August 11, 2011.

STATEMENT OF ISSUE

Whether Protestant was employed in the aerospace sector when hired August 11, 2008 so as to disqualify her for the "Credit for Employees in the Aerospace Sector," or was not employed in the aerospace sector until completion of her probationary period on August 11, 2011.

[11] 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), available at http://westlaw.com.

ADDITIONAL FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, the protest letter and the Division's Brief, the Protestant's Response Brief, and the Division's Reply Brief, the undersigned finds:

5. On June 14, 2013, the Division adjusted the Protestant's Amended Return for the 2009 Tax Year,[12] as follows, to-wit:

LINE NUMBER	***REASON FOR ADJUSTMENT***
	Return Disallowed. Qualified employee means any person newly employed by or contracting with a qualified employer on or after January 1, 2009.
26	Your refund has been corrected to $0.00

…

> If you do not agree with the adjustment(s) made on your amended return, you must file a written protest within sixty (60) days from the date of this notice. If you do not timely file a protest, the adjustment(s) will become final (68 O.S., SS221.c.).

6. On June 14, 2013, the Division adjusted the Protestant's Amended Return for the 2010 Tax Year, in pertinent parts,[13] as follows, to-wit:

LINE NUMBER	***REASON FOR ADJUSTMENT***
15D	Disallowed. Qualified employee means any person newly employed by or contracting with a qualified employer on or after January 1, 2009.
28	The amount reported as refund has been corrected to a tax due of $50.00. Additional penalty and/or interest may be assessed on this amount.

…

> If you do not agree with the adjustment(s) made on your amended return, you must file a written protest within sixty (60) days from the date of this notice. If you do not timely file a protest, the adjustment(s) will become final (68 O.S., SS221.c.).

[12] *See* Stipulated Exhibit 3.

[13] *See* Stipulated Exhibit 4.

7. On September 23, 2013, at 6:18 p.m., the Protestant sent the protest letter, by facsimile to the Division, for the 2009 and 2010 Tax Years ("Audit Periods"), with attachments thereto. The protest reflects the Division's address as P.O. Box 26960, Oklahoma City, OK 73126. In the protest letter, the Protestant states in pertinent part,[14] as follows, to-wit:

> "I am re-submitting this letter and supporting documentation, as I have been informed that it was never received at the P.O. Box shown above."

8. The Division's correct mailing address is P.O. Box 269060, Oklahoma City, OK 73126-9060, not P.O. Box 26960.[15]

CONCLUSIONS OF LAW

1. The Legislature vested the Oklahoma Tax Commission with jurisdiction over the parties and subject matter of this proceeding.[16]

2. 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.[17]

3. As used in the Aerospace Industry Act[18] ("Act"):

…

> 5. "Qualified employee" means any person employed by or contracting with a qualified employer on or after January 1, 2009, who has been awarded an undergraduate or graduate degree from a qualified program by an institution, and who was not employed in the aerospace sector in this state immediately preceding employment or contracting with a qualified employer;

…

4. The Act provides a "Credit for Employees," ("Aerospace Credit") as follows,[19] to-wit:

---

[14] *See* Stipulated Exhibit 5. The Protestant did not attach a copy of the protest letter referenced therein.

[15] *Id. See* Notes 13-14, *supra*.

[16] *See* OKLA. STAT. ANN. tit. 68, § 207 (West 2014). *See also* OKLA. STAT. ANN. tit. 68, § 221(C) (West 2014) and OKLA. ADMIN. CODE § 710:1-5-38 (July 11, 2013).

[17] 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.

[18] OKLA. STAT. ANN. tit. 68, §§ 2357.301 through 2357.304 (West 2014).

> A. Except as provided in subsection D of this section, for taxable years beginning after December 31, 2008, and ending before January 1, 2015, a qualified employee shall be allowed a credit against the tax imposed pursuant to Section 2355 of this title of up to Five Thousand Dollars ($5,000.00) per year for a period of time not to exceed five (5) years.
>
> B. The credit authorized by this section shall not be used to reduce the tax liability of the taxpayer to less than zero (0).
>
> C. Any credit claimed, but not used, may be carried over, in order, to each of the five (5) subsequent taxable years.
>
> D. No credit otherwise authorized by the provisions of this section may be claimed for any event, transaction, investment, expenditure or other act occurring on or after July 1, 2010, for which the credit would otherwise be allowable. The provisions of this subsection shall cease to be operative on July 1, 2011. Beginning July 1, 2011, the credit authorized by this section may be claimed for any event, transaction, investment, expenditure or other act occurring on or after July 1, 2011, according to the provisions of this section.

5. Tax Commission Rule 710:50-15-109 ("Rule") provides in pertinent parts,[20] as follows, to-wit:

> (b) **Definitions.** The following words and terms, when used in this Section, shall have the following meaning, unless the context clearly indicates otherwise:
>
> …
>
> (5) **"Qualified employee"** is any person newly employed by or contracting with a qualified employer on or after January 1, 2009 employed in Oklahoma. Further, the person must have been awarded an undergraduate or graduate degree from a qualified program by an institution. Qualified employees do not include person employed in the aerospace sector in this state immediately preceding employment or contracting with a qualified employer.
>
> …

[19] OKLA. STAT. ANN. tit. 68, § 2357.304 (West 2014).

[20] OKLA. ADMIN. CODE § 710:50-15-109 (June 25, 2012).

> (f) **Tax credit moratorium.**[21]
>
> …
>
> (2) No credit may be claimed for compensation paid to a qualified employee for the period of July 1, 2010 through June 30, 2011, for which the credit would otherwise be allowable. For example:
>
> …
>
> (B) Qualified employee is hired by qualified employer on July 1, 2010. Qualified employee may receive an income tax credit for tax years 2011, 2012, 2013 and 2014. Employee shall not receive a tax credit for tax years 2010 due to the tax credit moratorium. Employee shall not receive a tax credit for tax year 2015, or subsequent tax years, due to the five (5) year limitation.
>
> (3) No credit may be claimed by a qualified employee for the period of July 1, 2010 through June 30, 2011, for which the credit would otherwise be allowable. For example:
>
> (A) Qualified employee is hired by qualified employer on January 1, 2010. Qualified employee may receive an income tax credit for tax years 2010, 2011, 2012, 2013 and 2014. Employee shall not receive an income tax credit for tax year 2015, or subsequent tax years, due to the five (5) year limitation.
>
> (B) Qualified employee is hired by qualified employer on July 1, 2010. Qualified employee may receive an income tax credit for tax years 2011, 2012, 2013 and 2014. Employee shall not receive a tax credit for tax years 2010 due to the tax credit moratorium. Employee shall not receive a tax credit for tax year 2015, or subsequent tax years, due to the five (5) year limitation.

6. Effective November 1, 2014, the Legislature amended the definition of "Qualified Employee,"[22] ("Amendment") as follows, to-wit:

> 5. "Qualified employee" means any person, regardless of the date of hire, employed in this state by or contracting in this state with a qualified employer on or after January 1, 2009, who has been

[21] On April 4, 2011, Oklahoma Gov. Mary Fallin signed House Bill 1008, which removed the Aerospace Industry Engineer Tax Credit from the moratorium list that state lawmakers approved during the 2010 legislative session. The new law will allow new engineers who were hired by an Oklahoma aerospace company before July 1, 2010, to claim a state tax credit of up to $5,000 for tax years 2010 and 2011 so long as they were still employed on or after July 1, 2011.

[22] *See* 2014 Okla. Sess. Laws, c. 30, § 1, eff. Nov. 1, 2014.

> awarded an undergraduate or graduate degree from a qualified program by an institution, and who was not employed in the aerospace sector in this state immediately preceding employment or contracting with a qualified employer. Provided, the definition shall not be interpreted to exclude any person who was employed in the aerospace sector, but not as a full-time engineer, prior to being awarded an undergraduate or graduate degree from a qualified program by an institution or any person who has been awarded an undergraduate or graduate degree from a qualified program by an institution and is employed by a professional staffing company and assigned to work in the aerospace sector in this state;

7. An exemption statute is strictly construed against the person asserting an exemption.[23]

8. The fundamental rule and primary goal of statutory construction is to ascertain and give effect to legislative intent,[24] and that intent is first sought in the language of the statute.[25]

9. A 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.[26]

10. Only when legislative intent cannot be ascertained from language of statute, as in cases of ambiguity or conflict with other statutes is shown to exist, may rules of statutory construction be invoked. Whether language of statute is ambiguous is question of law.[27]

11. The test for ambiguity in a statute is whether statutory language is susceptible to more than one reasonable interpretation.[28]

12. 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.[29]

---

[23] *Magnolia Petroleum Co. v. Oklahoma Tax Commission*, 1958 OK 124, 326 P.2d 821.

[24] *Rogers v. Quiktrip Corp.*, 2010 OK 3, 230 P.3d 853.

[25] *Redmond v. Cauthen*, 2009 OK CIV APP 46, 211 P.3d 233. (Citations omitted.)

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

[27] *YDF, Inc. v. Schlumar, Inc.*, 2006 OK 32, 136 P.3d 656.

[28] *Id.*

[29] *Wilhoit v. State*, 2009 OK 83, 226 P.3d 682.

13. 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.[30]

14. 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.[31]

15. 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.[32]

16. 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.[33]

17. Tax statutes are penal in nature.[34] Penal statutes are to be strictly construed.[35] "Strict construction" with respect to a penal statute is that which refuses to extend the law by implication or equitable consideration and confines its operations to cases clearly within the letter of the statutes, as well as within its spirit of reason.[36]

18. Courts cannot enlarge the taxing act's ambit to make its provisions applicable to cases not clearly within the legislature's contemplation or to fill lacunae in the revenue law in a manner that would distort the enactment's plain language.[37]

19. Deductions [and credits against tax] are a matter of legislative grace rather than judicial intervention.[38] Deductions allowable in computing net income tax depend entirely upon legislative assent,[39] and none may be allowed in absence of statutory provision therefore.[40]

---

[30] *Tull v. Commissioner of Dept. of Public Safety*, 2008 OK CIV APP 10, 176 P.3d 1227.

[31] *Estes v. ConocoPhillips Co.*, 2008 OK 21, 184 P.3d 518.

[32] *Stump v. Cheek*, 2007 OK 97, 179 P.3d 606.

[33] *See* Note 31, *supra.*

[34] *Williams v. Smith & Nephew, Inc.*, 2009 OK 36, 212 P.3d 484. *See Globe Life and Acc. Ins. v. Oklahoma Tax Com'n*, 1996 OK 39, 913 P.2d 1322.

[35] *Mid-Continent Pipeline Co. v. Crauthers*, 1954 OK 61, 267 P.2d 568.

[36] *State ex rel. Allen v. Board of Ed. of Independent School Dist. No. 74 of Muskogee County*, 1952 OK 241, 246 P.2d 368.

[37] *See* Note 35, *supra.*

[38] *Matter of Income Tax Protest of Flint Resources*, 1989 OK 9, 780 P.2d 665. (Citations omitted.)

[39] *Home-Stake Royalty Corp. v. Weems*, 1935 OK 1043, 52 P.2d 806.

20. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[41] A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[42]

DISCUSSION

The Protestant states her position in pertinent part,[43] as follows, to-wit:

> I graduated from Oklahoma State University in 2008. I received an offer from EMPLOYER in 2008. Upon accepting that position, I was placed in a new hire program and received an appointment type of "Conditional". "Conditional" means that you are on probation, and therefore, not a permanent employee of the Department of Defense. As a "conditional" employee, the Government would have no obligation to hire me in a permanent, full-time position. The probation period was to last 3 years and was contingent on performance and compliance. I was to become a "permanent" employee when I was competent and able to excel in my performance and meet certain criteria. I did not become a "permanent" employee until 11 August 2011, well after January 1, 2009. From 11 August 2008 to 10 August 2011, I was still functioning under the requirements, terms, and conditions of the new hire program. It is my belief that I do qualify for this tax

---

[40] *Id. See New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 54 S.Ct. 788.

[41] 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.

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

[43] *See* Note 15, *supra*.

> credit, as I did, in fact, become "newly employed by…a qualifying employer on or after January 1, 2009.[44]

The Division states in pertinent parts,[45] as follows, to-wit:

> In summary, there are three requirements to qualify for the credit:
>
> (1) the claimant must be employed by a qualified employer, (2) the claimant must have been hired after January 1, 2009 and (3) the claimant must not have been employed in the aerospace sector in Oklahoma immediately preceding employment by the qualified employer. Protestant's claim was properly denied because she did not meet the second requirement.
>
> …
>
> The stipulated record in this case is clear that Protestant was employed by EMPLOYER in Oklahoma before January 1, 2009. Thus, under both pertinent statute and administrative rule, she was not a "qualified employee" to whom the credits were available. This conclusion is consistent with that reached in Oklahoma Tax Commission Order No. 2012-08-28-05,[46] issued in a case with nearly identical facts.
>
> In her protest letter, Protestant urges that she was not employed in the aerospace sector before January 1, 2009, because she was initially hired as a "conditional employee" on a three year probationary basis. The plain language of 68 O.S. Supp. 2009, §

---

[44] By the Protestant's own admission, she did not become a "qualified employee" until August 11, 2011, so if her position is correct, she cannot claim the Aerospace Credit for the 2009 and 2010 Tax Years.

[45] Division's Brief at 4-5.

[46] *See* OTC Order No. 2012-08-28-05 (August 28, 2012), which states in pertinent part:

> The public policy of Enrolled House Bill No. 3239 of the Second Regular Session of the 51st Oklahoma Legislature when taken as a whole is to promote the development of the aerospace industry in Oklahoma. The Legislature normally provides for tax credits in order to induce persons to either engage in or refrain from some specified type of behavior. The construction of the definition of "qualified employee" urged by the protestant would result in tax credits being given to employees hired by a qualified employer prior to the effective date of the act and would be giving a credit for something that was happening anyway and would not be inducing anyone to take any particular action. Such a construction would not promote the development of the aerospace industry in Oklahoma.

> 2357.301(5) and OAC § 710:50-15-109 defines a "qualified employee" as one who was not employed in the aerospace sector before January 1, 2009. The statute and the rule make no exception for the probationary nature of otherwise qualifying employment, or any other internal human resources policies of the qualified employer.[47] Furthermore, Protestant's employment from August 11, 2008 until August 11, 2011 was not as a pre-graduate intern—a type of prior aerospace sector employment which would ***not*** otherwise have disqualified her for the credits.[48] (Emphasis original.)

The Protestant responds in pertinent part,[49] as follows, to-wit:

> I am an eligible and qualified candidate for the tax credit that relates to engineers that work in the aerospace industry in the state of Oklahoma. Under Bill No. 2509, 68 O.S. Section 2357.301 was amended to read that a "'Qualified employee' means any person, **regardless of the date of hire**, employed in this state by or contracting in this state with a qualified employer on or after January 1, 2009, who has been awarded an undergraduate degree from a qualified program by an institution, and who was not employed in the aerospace sector in this state immediately preceding employment or contracting with a qualified employer…" Since the bill was modified to disregard or ignore the hiring date, I am entitled to receive the tax credit benefits for tax years 2009 and 2010. If it is found that I should not receive this tax credit for the 2009 and 2010 tax years, I would like to uphold that I will still be eligible to file for this credit for the 2014 and 2015 tax years since this credit is available for a period of five (5) years. (Emphasis original.)

The Division replies in pertinent part,[50] as follows, to-wit:

> …The amendment does not rescue her claim for two (2) reasons:

---

[47] According to the Protestant's Notification of Personnel Action, Block 24, Tenure has four classifications: (0) None, (1) Permanent, (2) Conditional, and (3) Indefinite. The Notice to Employee states, "Block 24 – Tenure – Identifies the nature of your appointment and is used to determine your rights during a reduction in force (RIF). …"

[48] *See* OTC (Non-Precedential) Order No. 2013-01-15-04 (January 15, 2013). 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 2014) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002).

[49] Protestant's Response Brief at 1.

[50] *See* Division's Reply Brief at 1-2.

> First, the Legislature left in place the requirement that the term of employment be on or after January 1, 2009. The added language most likely was intended to operate in tandem with the extension of the term of the credit through 2018 (in the same Bill), to permit new qualified employees hired in 2014 to obtain their full five (5) years' of the credit.
>
> Second, the effective date of the amendment is November 1, 2014. Generally, a statute or its amendments will have only prospective effect unless clearly provided otherwise.[51] Statutes are to be interpreted based on the plain language therein. Where interpretation and construction is called for, tax credit statutes are to be strictly construed against the granting of the credit.[52]

Section 2357.301(5) of Title 68,[53] in effect during the Audit Periods, states as follows, to-wit:

> "Qualified employee" means any person employed by or contracting with a qualified employer *on or after January 1, 2009*, who has been awarded an undergraduate or graduate degree from a qualified program by an institution, and who was not employed in the aerospace sector in this state immediately preceding employment or contracting with a qualified employer; (Emphasis added.)

Statutes are interpreted to attain that purpose and end[54] championing the broad public policy purposes underlying them.[55] Only where the legislative intent cannot be ascertained from the statutory language, i.e. in cases of ambiguity or conflict, are rules of statutory construction employed.[56] However, where the statutory language is ambiguous or uncertain, a construction is applied to avoid absurdities.[57] Statutory construction presents a question of law.[58]

---

[51] *Hammons v. Muskogee Medical Center Authority*, 1985 OK 22, 697 P.2d 539, 542; *Williams Companies, Inc. v. Dunkelgod*, 2012 OK 96, ¶ 18, 295 P.3d 1107, 1113.

[52] *Phillips Petroleum Co. v. Oklahoma Tax Commission*, 1975 OK 146, 542 P.2d 1303.

[53] *See* Notes 17-19, *supra*. *See also* Division's Reply Brief at 5.

[54] *Keating v. Edmondson*, 2001 OK 110, 37 P.3d 882, ¶8. (Citations omitted).

[55] *Id.* at ¶8.

[56] *Id.* at ¶8.

[57] *See* Note 31, *supra.*

[58] *See* Note 28, *supra.*

Probationary periods are commonplace. If the Legislature intended to include an exception for a probationary employee from the definition of "Qualified Employee," it would have done so. The plain and unambiguous language of the statute supports the Division's reading of the Act in this matter. The Protestant was employed in the aerospace sector when hired August 11, 2008, which disqualifies her for the Aerospace Credit for the 2009 Tax Year.

As to the "Amendment" to the definition of "Qualified Employee," the language used by the Legislature is clear and unambiguous. The Protestant reads the phrase "regardless of the date of hire," in isolation. 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.[59] In order to put the Amendment in proper context, the ALJ must consider the language used by the Legislature with the pre-amendment definition of "Qualified Employee."

The Legislature inserted the highlighted language, as follows, to-wit:

> 5. "Qualified employee" means any person**, regardless of the date of hire,** employed **in this state** by or contracting **in this state** with a qualified employer on or after January 1, 2009, who has been awarded an undergraduate or graduate degree from a qualified program by an institution, and who was not employed in the aerospace sector in this state immediately preceding employment or contracting with a qualified employer. **Provided, the definition shall not be interpreted to exclude any person who was employed in the aerospace sector, but not as a full-time engineer, prior to being awarded an undergraduate or graduate degree from a qualified program by an institution or any person who has been awarded an undergraduate or graduate degree from a qualified program by an institution and is employed by a professional staffing company and assigned to work in the aerospace sector in this state;** (Emphasis added.)

When the Amendment is read in context, the legislative purpose of the Amendment is clear, to allow an employee working for or contracting with a Qualified Employer *in a state other than Oklahoma* to claim the Aerospace Credit as a Qualified Employee on or after January 1, 2009 in the State of Oklahoma.

Unfortunately, in this matter, the "Qualified Employer" hired the Protestant August 8, 2008 in the State of Oklahoma, which disqualifies the Protestant from claiming the Aerospace Credit.[60] This conclusion is consistent with OTC Order No. 2012-08-28-05 (August 28, 2012).[61]

---

[59] *See* Note 31, *supra.*

[60] *See* Notes 23 and 50, *supra.* The last sentence of the Amendment is not applicable to this matter.

CONCLUSION

The Protestant has failed to meet her burden of proof, by preponderance of the evidence, that the Division's disallowance of the Aerospace Credit for the 2009 and 2010 Tax Years was incorrect and in what respects.

JURISDICTION TO HEAR PROTEST FOR THE 2010 TAX YEAR

Under the *Uniform Tax Procedure Code*,[62] a taxpayer must file a protest to a proposed assessment as follows,[63] to-wit:

> …
>
> C. Within sixty (60) days after the mailing of the aforesaid proposed assessment, the taxpayer may file with the Tax Commission a written protest under oath, signed by the taxpayer or the taxpayer's duly authorized agent, setting out therein:
>
> 1. A statement of the amount of deficiency as determined by the Tax Commission, the nature of the tax and the amount thereof in controversy;
>
> 2. A clear and concise assignment of each error alleged to have been committed by the Tax Commission;
>
> 3. The argument and legal authority upon which each assignment of error is made; provided, that the applicant shall not be bound or restricted in such hearing, or on appeal, to the arguments and legal authorities contained and cited in the application;
>
> 4. A statement of relief sought by the taxpayer; and
>
> 5. A verification by the taxpayer or the taxpayer's duly authorized agent that the statements and facts contained therein are true.
>
> …
>
> E. If the taxpayer fails to file a written protest within the sixty-day period herein provided for or within the period as extended by the Tax Commission, or if the taxpayer fails to file the notice required

---

[61] *See* Note 47, *supra.*

[62] *See* Note 2, *supra.*

[63] *See* Note 17, *supra.*

> by Section 226 of this title within thirty (30) days from the date of mailing of an assessment, then the proposed assessment, without further action of the Tax Commission, shall become final and absolute. A taxpayer who fails to file a protest to an assessment of taxes within the time period prescribed by this section may, within one (1) year of the date the assessment becomes final, request the Tax Commission to adjust or abate the assessment if the taxpayer can demonstrate, by a preponderance of the evidence, that the assessment or some portion thereof is clearly erroneous. If the Tax Commission determines that the proper showing has been made, the assessment or portion thereof determined to be clearly erroneous shall be deemed not to have become final and absolute. No hearing to adjust or abate a clearly erroneous assessment may be granted after the Tax Commission's denial of such a request. An order of the Tax Commission denying a taxpayer's request to adjust or abate an assessment alleged to be clearly erroneous is not an appealable order under Section 225 of this title. No proceeding instituted by the Tax Commission to collect a tax liability may be stayed because of a request made by a taxpayer to adjust or abate an assessment alleged to be clearly erroneous.
>
> …

When the Protestant filed the Amended Returns for the 2009 and 2010 Tax Years, the Division's adjustments yielded different results. The Division's adjustment for the 2009 Tax Year resulted in a zero refund, but the Division's adjustment for the 2010 Tax year resulted in an assessment of tax due for $50.00.[64]

Because the Division's adjustment for the 2009 Tax Year did not result in an assessment, the Protestant's failure to file the protest within sixty (60) days is not fatal to the untimely filed protest, which falls under the provisions of Section 207 of Title 68.[65]

However, because the Division's adjustment for the 2010 Tax Year resulted in an assessment, the protest falls under the provisions of Section 221(C) of Title 68,[66] which is fatal to the Protestant's failure to file the protest within sixty (60) days. The Division's adjustment letter is dated June 14, 2012,[67] but the Protestant did not file the protest, by facsimile, until September 23, 2013,[68] which is outside the sixty (60) day period provided by statute.

---

[64] *See* Notes 13-14, *supra.*

[65] *See* Note 17, *supra.*

[66] *Id.*

[67] *See* Note 14, *supra*.

[68] *See* Note 15, *supra.*

In the Status Report filed July 11, 2014, the Division states as follows,[69] to-wit:

> This report is in response to the Administrative Law Judge's June 3, 2014 letter requesting the parties report how they intend to proceed with regard to a perceived timeliness of protest issue on the 2010 tax period.
>
> Before filing its brief in this case, the Office of the General Counsel decided, after discussion and consideration, not to contest the timeliness of the protest to its actions on the 2009 and 2010 tax periods. This decision was based on (1) examination of the printout dates on the documents submitted by PROTESTANT as part of her protest and (2) the fact she transposed P.O. Box numbers in the OTC's address to which she was directed to mail her protest. Before filing the Division's brief, the undersigned spoke with PROTESTANT and advised her that, under these specific circumstances, the Division was not contesting timeliness.

Granted, the Protestant made a mistake, by putting the incorrect address for the Division on the protest letter (she states she previously submitted), and again on the protest letter submitted, by facsimile, September 23, 2013,[70] but the Protestant's failure to send the protest to the correct address is equitable in nature.[71] The Division is without authority to waive the statutory requirements of Section 221 (C) of Title 68 as assessments which are not protested within sixty (60) days become final and absolute. A taxpayer that fails to file a protest within sixty (60) days may challenge an assessment by submitting a request to the Tax Commission, within one (1) year of the date the assessment became final, for an adjustment or abatement of the assessment as provided in Section 221(E) of Title 68. The Division cannot modify statutory provisions to remedy procedural errors made by a Protestant.

It is the responsibility of the Tax Commission, and consequently the ALJ to "examine into the merits" of any protest and enter an order accordingly.[72] The statutory mandate of the Tax Commission and the ALJ is to determine the facts and the correctness or incorrectness under the law of the Tax Commission's prior action, and to affirm, modify or vacate that action.[73] If the Tax Commission and the ALJ are to accomplish this task, the ALJ cannot be bound or restricted solely to the arguments of the parties. Stipulations between parties or their counsel cannot control the court's action in a matter of law.[74]

---

[69] *See* Procedural History herein.

[70] *See* Note 15, *supra.*

[71] *See* Note 37, *supra.*

[72] OKLA. STAT. ANN. tit. 68, § 221(D) (West 2014).

[73] *See* Note 17, *supra*.

[74] *First Nat. Bank of Cordell v. City Guaranty Bank of Hobart, et al.*, 1935 OK 1105, ¶ 5, 51 P.2d

The parties stipulated that "Protestant timely protested the adjustments,"[75] but the Protestant filed the protest for the 2010 Tax Year on September 23, 2013, which is outside the sixty (60) day period provided by Section 221(C) of Title 68.[76] The Division's assessment (June 14, 2013) for the 2010 Tax Year became final and absolute on Tuesday, August 13, 2013.[77] The Division should have moved to dismiss the 2010 tax protest for lack of jurisdiction and allowed the taxpayer the opportunity to proceed under Section 221(E) of Title 68.

The *Rules of Practice and Procedure Before the Office of Administrative Law Judges* provides in pertinent parts,[78] as follows, to-wit:

> …
>
> (c) **Dismissal for lack of jurisdiction.** The Tax Commission is without jurisdiction to consider a protest that is not filed within the time provided by statute. *The question of the Commission's jurisdiction to consider a protest may be raised at any time*, by a party, *the Administrative Law Judge*, or the Commission itself. Questions as to the authority, propriety, or timeliness of the tax division's action or proposed action shall not be raised by a motion to dismiss, but shall be raised as defenses to such action or proposed action, as a part of or addition to the protest.
>
> (d) **Motion to dismiss.** A motion filed by a party to dismiss a protest for lack of jurisdiction, or a notice by the Administrative Law Judge or the Commission of intent to dismiss a protest on jurisdictional grounds, shall state the reasons therefore, shall be filed in the case, and shall be mailed to all parties or their authorized representatives. The motion or notice of intent to dismiss shall be set for hearing, which shall not be less than fifteen (15) days after the filing of such motion or notice of intent, at which time any party opposing such motion or notice of intent may appear and show cause why the protest should not be dismissed. Notice of the date, time and place of the hearing shall be mailed to the parties or their representatives along with the motion or notice of intent to dismiss. (Emphasis added).

Although the Tax Commission is not required to comply with provisions of the Administrative Procedures Act ("APA"), including those, which address judicial review of final

---

573, 577.

[75] *See* Stipulation 3, *supra.*

[76] *Id. See* Note 17, *supra.*

[77] *Id. See Matter of Request of Hamm Production Co. for an Extension of Time in Which to Protest Gross Production Tax Assessments Issued on July 21, 1981*, 1983 OK 92, 671 P.2d 50.

[78] *See* Note 3, *supra. See also* OKLA. ADMIN. CODE § 710:1-5-46 (June 11, 2005).

agency orders, the due process standards embodied therein apply to all state agencies, including the Tax Commission.[79] Procedural due process of law contemplates a fair and open hearing before a legally constituted court or other authority with notice and an opportunity to present evidence and argument, representation by counsel, if desired, and information concerning the claims of the opposing party with reasonable opportunity to controvert them.[80] Failure to provide notice of the specific issues in administrative hearings violates procedural due process.[81]

The parties requested that this matter submit on stipulations and briefs,[82] but the ALJ put the parties on notice of the jurisdictional problem in the letter of June 3rd. However, the Division chose to proceed for the reasons set forth in the Status Report of July 11, 2014, and the Protestant does not dispute she mailed the protest to the wrong address.[83] Under these circumstances, the Commission deems the notice provided by the rules waived, as this is purely a question of law.

CONCLUSION

The Division lacks the authority to waive the requirements of Section 221(C) of Title 68 and the Commission does not have jurisdiction to consider the Protestant's un-timely protest for the 2010 Tax Year for the reasons set forth herein.[84]

The Oklahoma Tax Commission orders that the 2009 tax protest in this matter be denied and the 2010 tax protest be dismissed for lack of jurisdiction.

SO ORDERED _____.

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.

---

[79] *Grasso v. Oklahoma Tax Com'n*, 2011 OK CIV APP 37, 249 P.3d 1258. (Citations omitted.)

[80] *Id.*

[81] *Id.*

[82] *See* Procedural History herein.

[83] *Id.*

[84] *Id.*

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."