JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2015-08-18-04 / NON-PRECEDENTIAL**
ID: **P-11-537-K**
DATE: **AUGUST 18, 2015**
DISPOSITION: **SUSTAINED**
TAX TYPE: **INCOME**
APPEAL: **NONE TAKEN**

ORDER

This comes on before the Oklahoma Tax Commission pursuant to regular assignment on the agenda. The Commission, having reviewed the facts and authorities presented and being fully advised in the premises, finds and orders that the Application for Oral Argument Before the Oklahoma Tax Commission En Banc is hereby denied. 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 16th day of April, 2015, and the same, appended hereto, together herewith shall constitute the Order of the Commission.

STATEMENT OF THE CASE

The Division audited Protestant's Oklahoma Corporation Income Tax Returns for tax years 2007 through 2009, disallowed the venture capital credits claimed on the 2008 and 2009 returns and by letter dated April 26, 2011, proposed the assessment of additional income taxes, interest and penalties against Protestant. By letter dated June 20, 2011, Protestant timely protested the assessment. A hearing was requested in the letter of protest.

On August 24, 2011, the proposed assessment and audit work papers, protest and attachments, and audit summary sheets were referred to the Office of Administrative Law Judges for the appellate protest procedures mandated by the Uniform Tax Procedure Code[1] and the Rules of Practice and Procedure before the Office of Administrative Law Judges[2]. The protest was docketed as Case Number P-11-537-K and assigned to [ADMINISTRATIVE LAW JUDGE].[3]

A pre-hearing conference was scheduled for September 21, 2011, by *Prehearing Conference Notice* issued September 2, 2011.[4] Pursuant to the *Status Report in Lieu of Prehearing Conference* filed September 20, 2011, the pre-hearing conference was considered

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

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

[3] *OAC* 710:1-5-22(b).

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

held and the parties were directed to file a status report. Two additional status reports were requested and filed.

On March 8, 2012, the *Compliance Division's Notice of Revision* was filed advising that the penalty assessed under § 2357.8(C) had been removed from the proposed assessment. The withdrawal of the penalty assessment resolved all outstanding issues related to the 2007 tax year.

On May 4, 2012, *Protestant's Response to Compliance Division's Notice of Revision and Partial Concession* was filed reporting Protestant's concession of one of the remaining issues in the revised assessment. The partial concession, together with the Oklahoma County District Court's approval of a waiver of interest and the partial refund of the income taxes and interest previously paid resolved all outstanding issues related to the 2008 tax year.

By letter dated May 15, 2012, which was issued in response to the *Status Report* filed May 2, 2012, the parties were directed to file a proposed scheduling order. A *Scheduling Order and Notice of Hearing* was issued June 14, 2012, in conformity with the *Joint Status Report and Proposed Scheduling Order* filed June 1, 2012.

Pursuant to the *Joint Motion to Strike Scheduling Order and Enter New Discovery Deadline* filed August 30, 2012, an *Order Granting Request for Extension of Time and Amending Scheduling Order* was issued striking all remaining procedural dates inclusive of the October 30, 2012 hearing date. The order also directed the completion of discovery by November 14, 2012 and the filing of a proposed joint scheduling order.

By letter dated November 15, 2012, which was issued in response to the *Status Report* filed November 13, 2012, the report was accepted in lieu of the proposed scheduling order and the parties were directed to file a status report on or before February 11, 2013. Several additional status reports indicating that discovery was on-going were filed.

Pursuant to the *Joint Status Report and Proposed Scheduling Order* filed April 21, 2014, a *Scheduling Order and Notice of Hearing* was issued setting forth the procedure to be followed and scheduling the hearing for September 9 and 10, 2014.

On May 23, 2014, a *Joint Status Report* with exhibits A through K attached thereto was filed. The report summarized the parties' activities with respect to the protest and indicated that "[t]he only issue remaining before this Court relates to the 2009 tax year and the Sunset Issue". The sunset issue is described as "[t]he Division denied the credit claimed by [Protestant] in 2009 because the Division contended the credit was not available for investments made in [Protestant] prior to January 1, 2009, if subsequently invested in qualified business ventures after December 31, 2008, pursuant to 68 O.S. Supp. 2006, § 2357.7(A)." *Joint Status Report*, pp. 3 and 2, respectively. The amount of income tax at issue with respect to the sunset issue is $[OMITTED]. Exhibit F, *Compliance Division's Notice of Second Revision, Joint Status Report.*

A *Partial Joint Stipulation of Facts and Issue* ("*Stipulations*") was filed June 3, 2014 with Joint Exhibits 1 through 4 and 6 through 13 attached thereto. On June 20, 2014, the *Division's Motion for Summary Disposition and Brief in Support* ("*Motion*") was filed. By letter

dated June 24, 2014, the Court acknowledged receipt of the *Motion*, struck the remaining procedural dates contained in the *Scheduling Order and Notice of Hearing* issued on April 22, 2014, inclusive of the hearing scheduled for September 10, 2014, reserved the hearing scheduled for September 9, 2014, for oral argument and advised Protestant that a response to the *Motion* could be filed on or before July 7, 2014.

Protestant's Response to Division's Motion for Summary Disposition, Counter Motion for Summary Disposition, and Brief in Support ("*Response*") was filed July 7, 2014. Attached to the *Response* are Exhibits A[5] through F. On July 15, 2014, an *Order Granting Submission of Issue for Decision by Summary Disposition* was issued finding that there is no substantial controversy or genuine issue as to the facts material to a decision on the stipulated issue and that the stipulated issue presented a question of law. *OAC* 710:1-5-38.1. The order also decreed that the hearing scheduled for September 9, 2014 would be limited to oral argument. *Id*.

Oral argument through closed session[6] was held as scheduled. At the conclusion of oral argument, the parties were directed to file proposed findings of fact and conclusions of law for the Court's consideration. On November 3, 2014, the *Compliance Division's Proposed Findings of Fact and Conclusions of Law* and *Protestant's Proposed Findings of Fact, Conclusions of Law and Recommendations to the Oklahoma Tax Commissioners* were filed. On November 4, 2014, the record was closed and the protest was submitted for decision.[7]

FINDINGS OF FACT

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

A. The parties stipulate to the "following undisputed facts and evidence"[8]:

PROCEDURAL FACTS

1. On April 26, 2011, the Division timely issued an assessment against [Protestant] for additional income taxes owed for the audit period of January 1, 2007, through December 31, 2009 (the "Assessment").

2. On June 20, 2011, [Protestant] timely protested the Assessment.

3. On June 20, 2011, [Protestant] paid the tax related to the

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[5] Deposition taken on behalf of Protestant on March 14, 2014 of DIRECTOR, Executive Director, Oklahoma Tax Commission. Attached to Exhibit A are Deposition Exhibits 1 through 57.

[6] Protestant invoked confidentiality. 68 O.S. 2011, § 205.

[7] *OAC* 710:1-5-38.1(6).

[8] *Stipulations*, pp. 1. The references to exhibits supporting the statements are omitted.

Assessment under protest.

4. On May 23, 2014, the Division filed a *Notice of Second Revision* ("*Second Revision*"), advising the Court that the Parties had resolved all issues except that the Division, under the *Second Revision*, continues to disallow Protestant's carryover of the Venture Capital Credit claimed in 2008 and continues to disallow the Venture Capital Credit claimed by Protestant in 2009.[9] The amounts in controversy under the *Second Revision* are:

Tax:	$[OMITTED]
Interest:	$[OMITTED]
Total:	$[OMITTED]

5. The parties submitted a Joint Status Report to the Administrative Law Judge on May 23, 2014, containing an accurate procedural history of this protest.

6. The protest of [Protestant] is properly before the Administrative Law Judge.

GENERAL FACTS

7. [Protestant] is a 'qualified venture capital company', as defined in Section 2357.7(B)(1) of Title 68, Oklahoma Statutes.

8. On October 20, 2008, [Protestant's] shareholder, PARTNERSHIP, contributed $[OMITTED] cash to [Protestant].

9. On December 31, 2008, PARTNERSHIP contributed $[OMITTED] cash to [Protestant].

10. After December 31, 2008, [Protestant] made a number of direct investments of debt and equity funds in 'Oklahoma business ventures' as defined in Section 2357.7 of Title 68, Oklahoma Statutes.

11. The Division has not evaluated the investments made after December 31, 2008, to determine whether the companies invested in meet the definition of 'Oklahoma business venture' as defined in Section 2357.7 of Title 68, Oklahoma Statutes.

12. On January 14, 2009, [Protestant] filed an original 2008 Form 518 reporting its receipt of the capital contribution of $[OMITTED] made by PARTNERSHIP , and attaching a schedule of investments in Oklahoma business ventures made on or before December 31, 2008, using contributions made to [Protestant]

[9] Emphasis original.

before January 1, 2009.

13. On January 14, 2009, [Protestant] also filed Form 518-A, reporting a credit under Section 2357.7 of Title 68, Oklahoma Statutes based upon investments by [Protestant] in Oklahoma business ventures made on or before December 31, 2008, using contributions made to [Protestant] by PARTNERSHIP before January 1, 2009.

14. On January 15, 2010, [Protestant] filed an amended 2008 Form 518. In addition to the $[OMITTED] capital contribution reported on the originally filed Form 518, [Protestant] also reported its receipt of the December 31, 2008, capital contribution of $[OMITTED] made by PARTNERSHIP. A statement attached to the amended 2008 Form 518 noted that the contributed funds were not used to generate any credits in 2008 but would be used to fund loans to or investments in Oklahoma business ventures in 2009 and later. The amended 2008 Form 518 and attached statement also corrected the date the $[OMITTED] capital contribution was made to [Protestant] to October 20, 2008.

15. In 2009, [Protestant] filed a 2008 Form 512, claiming a Venture Capital Credit in the amount of $[OMITTED] on line 6.

16. On January 15, 2010, [Protestant] filed a Form 518 with an attached schedule of venture capital invested in companies during 2009 and indicated the Form 518 was for tax year 2009.

17. On January 15, 2010 [Protestant] also filed a Form 518-A. [Protestant] indicated that this Form 518-A was for tax year 2009. [Protestant] reported a credit under Section 2357.7 of Title 68, Oklahoma Statutes based upon investments made by [Protestant] in Oklahoma business ventures on or after January 1, 2009, using contributions made to [Protestant] by PARTNERSHIP before January 1, 2009.

18. In 2010, [Protestant] filed a 2009 Form 512, claiming a Venture Capital Credit in the amount of $[OMITTED] on line 6.

ISSUE AND CONTENTIONS

The issue as framed by the parties is:

> May the credit described in Section 2357.7 of Title 68, Oklahoma Statutes be claimed for periods after December 31, 2008, where (i) the investments in or contributions to a qualified venture capital company were made prior to January 1, 2009, and (ii) the date on which the qualified venture capital company subsequently invests such amounts in qualifying Oklahoma business ventures is after December 31, 2008?

Protestant contends that because the investments in the qualified venture capital company were made prior January 1, 2009 and the invested funds were contributed to Oklahoma business ventures subsequent to December 31, 2008, it properly claimed the credits in the 2009 taxable year, and remains entitled to claim such credits in subsequent taxable years as additional qualifying contributions are made from the invested funds to Oklahoma business ventures. In support of this contention, Protestant argues that the statute clearly requires only that the investments in the qualified venture capital company be made prior to January 1, 2009, and is silent on when the subsequent loans of those funds in Oklahoma business ventures must be made. Protestant asserts that subsection (A) imposes a sunset date on investments made in qualified venture capital companies and does not address investments in Oklahoma business ventures at all, while subsection (C) establishes when the Credit can be claimed and does not contain any date or deadline. Protestant further asserts that although the sunset date by which it could receive investments that would generate new credits passed, credits may still be claimed in post-2008 tax years for the investments received prior to the sunset date and subsequently deployed into Oklahoma business ventures.

Citing the carry forward provision of § 2357.7(C) and the transferability provision of § 2357.7(F), Protestant contends that the fact the sunset date (December 31, 2008) was less than three (3) years from the effective date of SB 1577 (June 7, 2006) demonstrates the sunset date does not impose a limitation on the years in which credits may be claimed, but only the years in which investments made in a qualified venture capital company will be allowed to generate credits. In support of this contention, Protestant argues that the statute unambiguously distinguishes between credits allowed and claimed and argues that any other reading of the statute renders meaningless the expressly stated focus of subsection (A) on the date of the investment in a qualified venture capital company and creates a partial or complete nullity of the carry forward and transfer provisions of § 2357.7 for investments in qualified venture capital companies made subsequent to December 31, 2005. Protestant further argues that SB 1577 added the phrase "in the Oklahoma business venture" to § 2357.7(F) to make it clear that the credit transferability period was extended to allow a full three years from the first date the credit could be claimed, rather than from the date the funds were contributed to the qualified venture capital company.

Protestant further contends that the changes made to the Credit by SB 1577 in 2006 were directed at when the Credit could be claimed, but did not change the criteria for establishing the allowance to the Credit. In support of this contention, Protestant argues that SB 1577 simply substituted a delay in claiming the Credit for the previous recapture feature of the statute. Protestant asserts that the Legislature by eliminating the recapture provision could not have intended to reduce the time frame for fully earning the Credit from five (5) years to an ever-shrinking time interval starting at around 2½ years and ending with a millisecond. Protestant further asserts that the Legislature could not have expressly allowed credits for investments in qualified venture capital companies occurring on December 31, 2008 under subsection (A), while effectively disallowing a claim to the credits under subsection (C).

Protestant further contends that § 2357.8A(B) and (D) added by SB 1577 draws a distinction between authorized credits under § 2357.7(A) and credits that can be and have been claimed under § 2357.7(C) and argues that if the Division's position is correct, there would be no

need for the Legislature to carefully draw these distinctions and the language used would be either extraneous or needlessly ambiguous.

Finally, Protestant contends that the fact the Credit was not included in the 2010 moratorium on income tax credits has no bearing on the Legislature's intent four years earlier when SB 1577 was adopted. Protestant further contends the mere fact that not all credits were affected (or affected in the same way) by the moratorium in itself belies the Division's argument. In support of these contentions, Protestant argues that the Legislature knows the difference between credits allowed and credits claimed and by its silence chose not to disturb those credits allowed but not yet claimed under the Credit.

The Division contends that the protest must be denied because the undisputed facts show Protestant claimed the Credit subsequent to the statute's expiration date. In support of this contention, the Division argues that the Credit was no longer available after the 2008 tax year citing the sunset date (January 1, 2009) contained in § 2357.7(A). The Division asserts that no other meaning can be ascribed to a statute's sunset date.

The Division further contends that the Credit could not be claimed after the 2008 tax year because both steps of the two-step process implemented by SB 1577 had to be taken prior to the end of 2008. In support of this contention, the Division argues the plain language of § 2357.7 undoubtedly provides that the requirements to claim the credit in subsection (C) must have been met during the period of time in which the credit was allowed, otherwise there simply was no credit provided for in subsection (A) to which a taxpayer could make a claim. The Division asserts that a credit cannot be claimed if the credit is not allowed.

The Division further contends that subsection (C) incorporates the dates the Credit is allowed. In support of this contention, the Division argues that subsection (C) specifically references subsection (A) in the opening phrase of the first sentence. The Division further argues that the Legislature did not carve out any other time frame in which the requirements to claim the Credit had to be performed, nor does the statute refer to any date other than January 1, 2009.

The Division further contends that Protestant's construction of § 2357.7 disregards the Legislature's clearly expressed intent that the Credit expire at the end of the 2008 tax year and effectively ignores the change made to the statute by SB 1577. In support of this contention, the Division argues that if the sunset date only applies to the date by which an investment must be made in the qualified venture capital company, the sunset date becomes irrelevant and the Credit would be extended beyond the expiration date of the statute.

The Division further contends that the fact the Legislature did not place a moratorium on the Credit in 2010 is attributable to the sunset of the Credit. In support of this contention, the Division argues that had the Legislature considered that the Credit was still available after January 1, 2009, it would have included the Credit in the moratoria given that the Legislature clearly expressed its intent to suspend credits against income tax for the period of July 1, 2010, through July 1, 2012, by placing moratoria on nearly every income tax credit.

The Division further contends that Protestant's claim that the addition of the phrase, "in the Oklahoma business venture" to § 2357.7(F) by SB 1577 is render meaningless if the Credit is required to be claimed prior to the sunset date disregards the requirements of subsection (A) which establishes the taxable year for which the Credit is available. The Division argues that the addition of the phrase is consistent with the two-step process implemented by SB 1577 and simply references which investment triggers the transferability of the Credit.

The Division contends that § 2357.8A(B) and (D) do not draw a distinction between authorized credits and claimed credits and that this position disregards the two-step process required to claim the Credit. In support of this contention, the Division argues that there is no conditional grant to the Credit, rather a taxpayer's investment either meets the overall requirements of § 2357.7 or it doesn't.

During oral argument held in this matter on September 9, 2014, Division's counsel made the following statement which contradicts the treatment of the carry forward of the unused portion of the 2008 Credit[10] in the *Second Revision*, to-wit:

> Now, [Protestant] also talks a lot about the Division's position violating some of these same cardinal rules of statutory construction. [Protestant] argues that the Division's position ignores and renders meaningless the carry forward provisions which are in Subsection C that kind of occur midway through that section, it's a heavy section, as well as Subsection F, which permits the credit to be transferred for up to three years.
>
> Now, those are correct recitations as far as what the statute provides for. The statute does provide that a taxpayer may carry forward for three years the unused portion of the credit claimed. It also states that a taxpayer may transfer for three years any unused portion of the credit claimed, and it also references the year in which the credit was claimed as the running of those three years begins from the date the credit was earned, the date that the capital company invested in the Oklahoma business venture.
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> Now, [Protestant] argues that the Division's position renders those provisions meaningless because they would be unavailable because at the time that the statute was amended by Senate Bill 1577, there would not have been a full three years for those provisions to be carried out. The plain language of both Subsection C and Subsection F allow for the carry forward or transfer of the unused portion of the earned credit so long as that unused credit was allowed at the time the credit was claimed. As long as it was allowed at the time it was earned and claimed, <u>it can be carried forward past that sunset date</u>, and that is because carry forwards and transfers relate back in time to the date that the credit was originally claimed. The statute tells us that because, again, the running of the clock

[10] The *Second Revision* continues to disallowance of the carry forward of the unused portion ($[OMITTED]) of the allowed 2008 Credit.

> begins from the date that the credit is earned or claimed.

TR.38-40, (emphasis added).

CONCLUSIONS OF LAW

1. Jurisdiction of the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S. 2011, § 221.

2. "Taxation is an exclusively legislative function that can be exercised only under statutory authority and in the manner specified by statute." ***State, ex rel. Oklahoma Tax Commission v. Texaco Exploration & Production, Inc.,*** 2005 OK 52, ¶ 7, 131 P.3d 705, 707. The basis for the Division's action and Protestant's protest thereto are governed by the provisions of the Oklahoma Income Tax Act ("Act")[11].

3. Oklahoma imposes an income tax on the "Oklahoma taxable income[12] of every corporation doing business within this state or deriving income from sources within this state[.]" 68 O.S. Supp. 2007, § 2355(D). A taxpayer's income tax liability on Oklahoma taxable income and eligibility to receive a credit or deduction from said taxable income are determined in accordance with the law in effect at the time the income is received and the credit or deduction is generated. ***Affiliated Management Corp. v. Oklahoma Tax Commission***, 1977 OK 183, 570 P.2d 335; ***Oklahoma Tax Commission v. Denver Producing & Refining Co.***, 1953 OK 247, 262 P.2d 413; ***Wootten v. Oklahoma Tax Commission***, 1935 OK 54, 170 Okla. 584, 40 P.2d 762.

4. At issue is the income tax credit for investment in qualified venture capital companies ("Credit"). 68 O.S., § 2357.7. The Credit was first enacted in 1986 and was operative for the 1987 through 1990 tax years. Laws 1986, c. 265, § 1, eff. Jan. 1, 1987. As originally enacted the Credit was allowed and could be claimed in the year an investment was made in a qualified venture capital company, 68 O.S. Supp. 1986, § 2357.7(A)[13] and (C)[14]; but was subject to

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[11] 68 O.S. 2001, § 2351 et seq., as amended.

[12] Defined as "'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." 68 O.S. Supp. 2006, § 2353(12).

[13] This subsection provided:

> For taxable years beginning after December 31, 1986, and before January 1, 1991, there shall be allowed a credit against the tax imposed by Section 2355 of Title 68 of the Oklahoma Statutes for investments in qualified venture capital companies whose purpose is to establish or expand the development of business and industry within Oklahoma.

[14] This subsection provided:

> The credit provided for in subsection A of this section shall not exceed twenty percent (20%) of the cash amount invested in qualified venture capital companies. If the tax credit allowed pursuant to subsection A of this section exceeds the amount of income taxes due or if there are no state income taxes due on the income of the taxpayer, the amount of the claim not used as an offset against the income taxes of a taxable year may

recapture if the qualified venture capital company did not contributed the invested funds in an Oklahoma business venture within three (3) years after receipt of the capital, 68 O.S. 1986, § 2357.8(D)[15] and § 2357.7(B)(1)(b)[16].

5. Section 2357.7 was amended several times to extend the Credit to additional tax years. Laws 1990, c. 328, § 14, eff. Sept. 1, 1990, extended the Credit through the 1995 tax year; Laws 1991, c. 188, § 13, eff. July 1, 1991, extended the Credit through the 1998 tax year; and Laws 1998, c. 226, § 1, eff. Jan. 1, 1999, extended the Credit through the 2003 tax year. In 2003, the credit was extended through the 2008 tax year. Laws 2003, c. 181, § 2, eff. Nov. 1, 2003.

6. In 2006, § 2357.7 was amended by SB 1577. Laws 2006, c. 281, § 2, emerg. eff. June 7, 2006. As amended, § 2357.7 provided in part:

> A. For taxable years beginning after December 31, 1986, and before January 1, 2009, there shall be allowed a credit against the tax imposed by Section 2355 of this title or Section 624 of Title 36 of the Oklahoma Statutes for investments in qualified venture capital companies whose purpose is to establish or expand the development of business and industry within Oklahoma. * * * * *
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> B. For purposes of this section:
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> 1. "Qualified venture capital company" means a C corporation, as defined by the Internal Revenue Code of 1986, as amended, incorporated pursuant to the laws of Oklahoma or a

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be carried forward as a credit against subsequent income tax liability for a period not to exceed three (3) years.

[15] This subsection provided:

> If a qualified venture capital company, in which investments were made for tax credit as provided for in this act, fails to comply with the provisions of this act, the Oklahoma Tax Commission shall be authorized to collect from the qualified venture capital company and the principal officers thereof or any taxpayer to whom the tax credit has been granted, the amount of any taxes which otherwise would have been paid had no tax credit been granted pursuant to the provisions of this act.

[16] Subsection B of Section 2357.7 defined a "qualified venture capital company" for purposes of the qualified venture capital credit provisions of the Act and in subparagraphs (a), (b) and (c) of paragraph 1 set forth criteria for the qualified venture capital company which provided in subparagraph (b):

> Having a purpose and objective of investing at least sixty-six and two-thirds percent (66 2/3%) of its funds in Oklahoma business ventures. Investment capital received by such venture capital company shall be invested pursuant to said objective within three (3) years after receipt of such capital. The temporary investment of funds by a qualified venture capital company in obligations of the United States, state and municipal bonds, bank certificates of deposit, or federally insured money market funds pending investment in Oklahoma business ventures is hereby authorized and such investments shall not be included in such calculation used to determine compliance with the requirements of this subparagraph[.]

registered business partnership with a certificate of partnership filed as required by law if such corporation or partnership is organized to provide the direct investment of debt and equity funds to companies within this state, with its principal place of business located within this state and which meets the following criteria:

a. capitalization of not less than Five Million Dollars ($5,000,000.00),

b. having a purpose and objective of investing at least seventy-five percent (75%) of its capitalization in Oklahoma business ventures. * * * * *

c. investment of not more than ten percent (10%) of its funds in any one company;

2. "Oklahoma business venture" means a business, incorporated or unincorporated, which:

a. has or will have, within one hundred eighty (18) days after an investment is made by a qualified venture capital company, at least fifty percent (50%) of its employees or assets located in Oklahoma,

b. needs financial assistance in order to commence or expand such business which provides or intends to provide goods or services,

c. is not engaged in oil and gas exploration, real estate developments, real estate sales, retail sales of food or clothing, farming, ranching, banking, or lending or investing funds in other businesses. Provided, however, businesses which provide or intend to provide goods or services, including, but not limited to, goods or services involving new technology, equipment, or techniques to such businesses listed in this subparagraph, and investments in the development of tourism facilities in the form of amusement parks, entertainment parks, theme parks, golf courses, or museums shall not be subject to said prohibition, and

d. expends within eighteen (18) months after the date of the investment at least fifty percent (50%) of the

proceeds of the investment for the acquisition of tangible or intangible assets which are used in the active conduct of the trade or business of the Oklahoma business venture. Provided, that the Oklahoma Tax Commission, upon request and demonstration of need by a qualified venture capital company or an Oklahoma business venture, may extend the eighteen-month period otherwise required by this subparagraph for a period not to exceed six (6) months. Provided, the expenditure of the invested funds by the Oklahoma business venture shall otherwise comply with the requirements applicable to the usage of tax credits for investment in the Oklahoma business venture. As used in this subparagraph, "tangible assets" shall include the acquisition of real property and the construction of improvements upon real property if such acquisition and construction otherwise complies with the requirements applicable to the usage of tax credits for investment in the Oklahoma business venture and "intangible assets" shall be limited to computer software, licenses, patents, copyrights, and similar items;

3. "Direct investment" means the purchase of securities of a private company, or securities of a public company if the securities constitute a new issue of a public company and such public company had previous year sales of less than Ten Million Dollars ($10,000,000.00); and

4. "Debt and equity funds" means investments in debt securities; including unsecured, under secured, subordinated or convertible loans or debt securities; and/or equity securities, including common and preferred stock, royalty rights, limited partnership interest, and any other securities or rights that evidence ownership in businesses; provided such investment of debt and equity funds shall not have a repayment schedule that is faster than a level principal amortization over five (5) years.

C. The credit provided for in subsection A of this section shall be twenty percent (20%) of the cash amount invested in qualified venture capital companies which is subsequently invested in an Oklahoma business venture by the qualified venture capital company and may only be claimed for a taxable year during which the qualified venture capital company makes an investment in an Oklahoma business venture. The credit shall be allowed for the amount of the investment in an Oklahoma business venture if the funds are used in pursuit of a legitimate business purpose of the Oklahoma business venture consistent with its organization instrument, bylaws or other agreement responsible for the governance of

> the business venture. * * * * * If the tax credit allowed pursuant to subsection A of this section exceeds the amount of taxes due or if there are no state taxes due of the taxpayer, the amount of the claim not used as an offset against the taxes of a taxable year may be carried forward as a credit against subsequent tax liability for a period not to exceed three (3) years. No investor in a venture capital company organized after July 1, 1992, may claim tax credits under the provisions of this section.
>
> D. No taxpayer may claim the credit provided for in subsection A of this section for investments in qualified venture capital companies made prior to January 1, 1987.
>
> E. No investor whose capital is guaranteed by the Oklahoma Capital Investment Board may claim or transfer the credit provided for in subsection A of this section for investments in such guaranteed portfolio.
>
> F. The credit provided for in subsection A of this section, to the extent not previously utilized, shall be freely transferable to and by subsequent transferees for a period of three (3) years from the date of investment in the Oklahoma business venture.
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> * * * * *

7. Section 2357.7 was also amended in 2008. Laws 2008, C. 440, § 1.[17] The 2008 amendments to the statute are not relevant to the issue presented in this proceeding.

8. The Legislature in SB 1577 for the first time tied the timing of or claim to the Credit to the taxable year the qualified venture capital company contributed the invested funds to an Oklahoma business venture. Laws 2006, c. 281, § 2, emerg. eff. June 7, 2006. The first sentence of Section 2357.7(C) as amended by SB 1577 expressly provided, "[t]he credit provide for in subsection A of this section shall be twenty percent (20%) of the cash amount invested in qualified venture capital companies which is subsequently invested in an Oklahoma business venture by the qualified venture capital company and may only be claimed for a taxable year during which the qualified venture capital company makes an investment in an Oklahoma business venture." *Id.* The Legislature also tied the penalty provisions of § 2357.8(C) and the recapture of the Credit after the effective date of SB 1577 to the expenditure of the funds by the Oklahoma business venture rather than the qualified venture capital company by amending the definition of "Oklahoma business venture" in § 2357.7(B)(2), amending the penalty provisions to include investments in a venture capital company made prior to the effective date of SB 1577, but which invested funds are contributed to an Oklahoma business venture after the effective

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[17] The Historical and Statutory Notes to § 2357.7 provides:

> Laws 2008, c. 440, § 1, in subsection B, in paragraph 2, in subparagraph d, in the first sentence, added 'or to provide working capital for the active conduct of such trade or business.' and inserted the second sentence; in subsection G, in the second sentence, substituted 'an unlimited and continuing' for 'a'.

OKLAHOMA STATUTES ANNOTATED, Title 68. Revenue and Taxation, §§ 1001 to 2357.205, 2015 Cumulative Annual Pocket Part, pp. 219.

date of SB 1577 and by adding § 2357.8A. Further, the Credit transfer provisions of § 2357.7(F) were amended to tie the three (3) year period of transferability to the date of the investment in the Oklahoma business venture. What was not changed by SB 1577 was subsection (A), in particular the sunset date of January 1, 2009, which was changed in 2003 and the carry forward provision of subsection (C).

9. Section 2357.8A is "only applicable to investments in qualified venture capital companies made on or after June 7, 2006, pursuant to Section 2357.7 of this title" and provides for the recapture of a claimed credit[18]. 68 O.S. Supp. 2008, § 2357.8A(A). Three provisions of § 2357.8A are worthy of note. Those provisions are and provide[19]:

> (B) If a recapture event occurs with respect to an investment for which a credit authorized by Section 2357.7 of this title was claimed, the tax imposed pursuant to the applicable provisions of Title 36 of the Oklahoma Statutes or this title shall be increased to the extent of the recaptured credit amount.
>
> (D) The tax for the taxable period shall be increased pursuant to this section only with respect to credits which were used to reduce tax liability. In the case of credits not used to reduce tax liability, the carryforwards allowed shall be adjusted accordingly.
>
> (E) For any transaction that is audited by the Tax Commission after such credits have been allowed, but which is subsequently determined to constitute a recapture event, the Tax Commission shall be required to disallow any and all credits claimed in violation of the requirements of this section or any other provision of Section 2357.7 or 2357.8 of this title for a period of ten (10) years after the date as of which any applicable tax report or return utilizing such credits is filed.

10. The fundamental rule and primary goal of statutory construction is to ascertain and give effect to legislative intent. ***Rogers v. Quiktrip Corp.***, 2010 OK 3, 230 P.3d 853. The starting point for any inquiry into legislative intent is the language of the statute. ***Redmond v. Cauthen***, 2009 OK CIV APP 46, 211 P.3d 233. Where a statute is unambiguous, statutory construction is unnecessary, and the terms of the statute must be given their plain meaning. ***Blitz U.S.A., Inc. v. Oklahoma Tax Commission***, 2003 OK 50, ¶ 14, 75 P.3d 883, 888.

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.

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[18] A "recapture event" is defined in respect to "an investment in an Oklahoma business venture by a qualified venture capital company[.]" *Id.*

[19] Text of the provisions as amended by Laws 2008, c. 440, § 2.

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*.

11. In amending a statute, the legislature may have intended either to effect a change in the existing law or to clarify that which previously appeared doubtful. ***Blitz***, *supra*, at ¶ 19. See, ***In re Protest of Betts Telecom Oklahoma, Inc***., 2008 OK CIV APP 19, 178 P.3d 197. Amendments to a statute can be used to ascertain the meaning of the prior statute. ***Quail Creek Golf and Country Club v. Oklahoma Tax Commission***, 1996 OK 35, ¶ 10, 913 P.2d 302, 304.

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

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

14. "Statutory construction presents a question of law." ***Blitz***, *supra*, at ¶ 6, (footnote omitted).

ANALYSIS

1. The disposition of this matter is governed by the provisions of § 2357.7 as amended in 2006 by SB 1577 and 2008 by Laws 2008, c. 440, § 1.

2. The language of the provisions of the Venture Capital Credit, §§ 2357.7 through 2357.8A as applicable to the issue in this cause is plain and unambiguous.

3. The overarching proposition for the denial of Protestant's claim to the Credit is the Credit expired and was no longer available after the 2008 tax year. In support of this proposition, the sunset date of January 1, 2009 contained in § 2357.7(A) is cited and the argument that "[n]o other meaning [except the expiration of the Credit] can be ascribed to a statute's sunset date" is made. No authority is cited for the proposition that "no other meaning can be ascribed to a statute's sunset date".

The plain and unambiguous language of § 2357.7 ascribes its meaning. Section 2357.7(A) provides that an income tax credit shall be allowed for investments in qualified venture capital companies made on or before January 1, 2009. Subsection (A) and the sunset date only apply to the allowance of the Credit. Subsection (C) provides that the Credit allowed in subsection (A) shall be twenty percent (20%) of the cash amount invested in qualified venture capital companies which is subsequently invested in Oklahoma business ventures and may only be claimed in the taxable year the qualified venture capital company makes the investment in the Oklahoma business venture. Subsection (C) controls the claim to the Credit and doesn't contain an expiration date.

The conclusions that subsection (A) and the sunset date only apply to the allowance of the Credit and that subsection (C) controls the claim to the Credit and doesn't have an expiration date are made clear by the changes made to § 2357.7 by SB 1577. Prior to SB 1577, § 2357.7(A) not only granted the allowance of the Credit, but the claim to the Credit. The Credit was claimed at the time it was allowed. Subsection (A) and the sunset date applied to both the allowance of the Credit and the claim to the Credit. In SB 1577, the Legislature changed the timing of or claim to the Credit and provided for the same in subsection (C) of § 2357.7. Subsequent to SB 1577, the Credit could not be claimed when it was allowed. The Legislature took the timing of the Credit out of subsection (A) and placed the same in subsection (C), thus removing the restriction (sunset date) to the timing of the Credit, but maintaining the same for the allowance of the Credit. The language of subsection (A) was not amended by SB 1577. The Division's contention that the Credit expired and was no longer available after December 31, 2008, ignores the changes made to § 2357.7 by SB 1577.

Further, the Legislature in SB 1577 tied the penalty provisions of § 2357.8(C) and the recapture of the Credit after the effective date of SB 1577 to the expenditure of the funds by the Oklahoma business venture rather than the qualified venture capital company by amending the definition of "Oklahoma business venture" in § 2357.7(B)(2), amending the penalty provisions to include investments in a venture capital company made prior to the effective date of SB 1577, but which invested funds are contributed to an Oklahoma business venture after the effective date of SB 1577 and by adding § 2357.8A which is expressly applicable only to investments made in qualified venture capital companies on or after the effective date of SB 1577 and provides for the recapture of claimed credits. In addition, the three (3) year periods for the carry

forward (§ 2357.7(C)) and transfer of the Credit (§ 2357.7(F)) were not modified by SB 1577 notwithstanding less than three (3) years remained on the life of the Credit (December 31, 2008) at the effective date of SB 1577 (June 7, 2006) and the Credit transfer provision of § 2357.7(F) was amended to tie the three (3) year period of transferability to the date of investment in the Oklahoma business venture (the date the Credit could be claimed). The Legislature's treatment of each of these provisions shows the Legislature knew and intended that the Credit live on for the Credits allowed in subsection (A), investments made in qualified venture capital companies on or before January 1, 2009; and that only the allowance of the Credit in subsection (A) was subject to the sunset date.

4. The Division argues that if the sunset date only applies to the date by which an investment must be made in the qualified venture capital company, the sunset date becomes irrelevant and the Credit would extend beyond the expiration date of the statute. First, the sunset date is not irrelevant because the sunset date fixes the outer time limit by which investments in qualified venture capital companies are allowed to generate the Credit. The sunset date has meaning. Second, nothing in the language of the statute indicates that the sunset date establishes the expiration date of the Credit. To the contrary, the amendment of § 2357.7 by SB 1577 makes clear that the sunset date only applies to the requirements needed to gain allowance to the Credit, not to claim the Credit.

5. The stipulated facts show that Protestant is a qualified venture capital company, that the investments resulting in the Credits at issue for the 2009 tax year were made in Protestant prior to January 1, 2009, and that the invested funds were invested by Protestant in Oklahoma business ventures subsequent to December 31, 2008. Whether the Oklahoma business ventures Protestant invested in are qualified Oklahoma business ventures has not been audited and determined. However, with respect to the issue presented Protestant properly claimed the Venture Capital Credit for the 2009 tax year and remains entitled to claim such Credits in subsequent taxable years as additional qualifying investments are made in qualifying Oklahoma business ventures from the invested funds. Further, Protestant's carry forward of the 2008 Credit to the 2009 tax year was proper since the Venture Capital Credit did not expire at the end of the 2008 tax year.

RECOMMENDATION

Based on the above and foregoing findings of fact and conclusions of law, it is recommended that the income tax protest of Protestant, PROTESTANT be sustained.

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 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."