JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **NON-PRECEDENTIAL / 2016-03-24-04**
ID: **P-13-058-H**
DATE: **MARCH 24, 2016**
DISPOSITION: **DENIED**
TAX TYPE: **INCOME**
APPEAL: **S. Ct. No. 114893/PENDING AS OF 07/12/2016**

ORDER

The above matter comes on for entry of a final order of disposition by the Oklahoma Tax Commission. Having reviewed the files and records herein, the Commission hereby adopts the Findings of Fact, Conclusions of Law and Recommendation made and entered by the Administrative Law Judge on the 1st day of March, 2016, appended hereto, together herewith shall constitute the Order of the Commission.

SO ORDERED.

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

NOW on this 1ST day of March 2016, the above-styled and numbered cause comes on for consideration pursuant to assignment regularly made by the Oklahoma Tax Commission to ALJ, Administrative Law Judge. PROTESTANT ("Protestant") appears through attorneys, ATTORNEY 1, ATTORNEY 2, and ATTORNEY 3, FIRM. The Compliance Division ("Division") of the Oklahoma Tax Commission appears through OTC ATTORNEY 1, Assistant General Counsel and OTC ATTORNEY 2, Interim General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On April 11, 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 April 13, 2013, the Court Clerk ("Clerk")[3] mailed the Introductory Letter to the Protestant's Counsel that ALJ, Administrative Law Judge ("ALJ") had been assigned to this matter, and docketed as Case Number P-13-058-H. The letter also advised the Protestant that a Prehearing Teleconference Notice 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 April 16, 2013, OTC ATTORNEY 1 filed an Entry of Appearance as Division's Counsel. On April 16, 2013, the Clerk mailed the Prehearing

[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) (August 27, 2015).

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

Teleconference Notice to Counsel, setting the Prehearing Teleconference for June 4, 2013, at 1:30 p.m.

On June 4, 2013, the parties filed a *Joint Motion to Hold in Abeyance* ("*Joint Motion*"), "…until the final decision, including the exhaustion of any appeals, is rendered in Case No. P-10-1649-H." On June 4, 2013, the ALJ struck the Prehearing Teleconference and issued the *Order Granting Joint Motion to Hold in Abeyance*.

On July 25, 2014, the Court of Civil Appeals of the State of Oklahoma, Division III, issued an "Unpublished Opinion" in P-10-1649-H/TC-111221, affirming in part, reversing in part, and remanding OTC Order 2012-10-11-04 (October 11, 2012).[5]

On May 11, 2015, the parties filed a *Joint Status Report* advising that "The parties believe that with an additional 30 days all currently pending matters involving the availability of the Oklahoma Capital Gain Deduction prior to 2008 with FIRM serving as counsel for the Taxpayers can either be resolved, or that a proposed procedural schedule can be presented to the Administrative Law Judge for moving these matters forward." On May 12, 2015, the ALJ directed the parties to file a status report on or before June 10, 2015.

On June 10, 2015, the parties filed a *Joint Status Report* advising that a proposed procedural schedule would file on or before June 19, 2015. On June 11, 2015, OTC ATTORNEY 3, Chief Deputy General Counsel, filed an *Entry of Appearance as Additional Counsel* for the Division. On June 11, 2015, the ALJ directed the parties to file a "proposed" scheduling order on or before June 19, 2015. On June 16, 2015, the parties filed a *Joint Proposed Scheduling Order*. On June 17, 2015, the ALJ issued the *Scheduling Order*, as follows, to-wit:

October	30, 2015	Discovery completion deadline, including Depositions, interrogatories, and requests for production of documents
November	17, 2015	If the parties are able to stipulate to certain facts or evidence, written stipulations are due
November	17, 2015	Statement of issues to be tried in the matter due
November	24, 2015	Final witness lists and exhibit lists
December	8, 2015	Pre-trial motions, if any, are due
January	7, 2016	Pre-trial briefs or position letters due
January	14, 2016	Hearing will be held 9:30 a.m. in the Courtroom

[5] The Court held that Wind Leases "…fall within the term 'real property' under § 2358(F)," which was in effect for the 2006 Tax Year, and "Because the 2007 Amendment effected a change in the law and there is no clear indication in the statute that the Legislature intended for the amended language to apply to the sale of intangible assets in years prior to its effective date, we hold it operated prospectively." The Courts holding is for informational purposes. Because the decision is unpublished, it cannot be cited as precedent. *See* Okla.Sup.Ct.R. 1.200. *See* Note 54, *infra*.

> Located at 3700 North Classen, Suite 260, Oklahoma City, Oklahoma, if the parties are unable to fully stipulate to the facts

On August 6, 2015, OTC ATTORNEY 3 filed a *Notice of Withdrawal as Co-Counsel of Record*.

On September 1, 2015, the Protestant filed a *Motion for Summary Disposition* ("*MSD*"), with Exhibits A through J, attached thereto. On September 11, 2015, the Division filed its *Motion for Extension of Time to File Response to Taxpayer's Motion for Summary Disposition* ("*Motion for Extension of Time*"),which states in pertinent parts, as follows, to-wit:

…

> 2. During the week of September 1, 2015, the Office of General Counsel was required to vacate its office in the First National Center without prior notice. Due to the move, the Office of the General Counsel was without telephone service or computer access for a period of three to four days. The move also disrupted mail service.
> 3. Because of the disruption to mail delivery to the Office of General Counsel, the binder containing Protestant's Motion with attached exhibits was not received …until September 10, 2015. A file stamped copy of the motion only, without exhibits, was received from the Court's clerk on September 8, 2015;
> 4. In addition to the above logistical issues caused by the move, Division's counsel returned to the office following her maternity leave on September 8, 2015;

…

On September 18, 2015, the ALJ issued the *Order Striking Protestant's Motion for Summary Judgment* filed September 1, 2015, and the Division's *Motion to Extend* as moot. On September 21, 2015, ATTORNEY 1 informed the Clerk that the Protestant intended to certify the issue concerning the September 18, 2015 *Order Striking Protestant's Motion for Summary Judgment*. On September 21, 2015, the parties filed the *Certification of Issue*, with Counsel and the ALJ signing.[6] On September 21, 2015, the Protestant filed the *Taxpayer's Brief on Question Certified to the Commissioners*, with Exhibits A through D, attached thereto. On September 21, 2015, the Protestant filed another *Motion for Summary Judgment*, with Exhibits A through J, attached thereto.[7] On September 21, 2015, the ALJ issued the Protestant's *Deposition of Subpoena*, as more fully set forth therein. On September 22, 2015, the Protestant filed a *Notice of Deposition…*, as more fully set forth therein, with the deposition set for October 23, 2015, at 1:30 p.m. On September 22, 2015, the Protestant filed copies of the *Deposition of Subpoena* and

[6] *See* OKLA. ADMIN. CODE § 710:1-5-34(b) (July 12, 1993). The Protestant filed a copy reflecting that the Protestant filed the Certification of Issue with the Vice Chairman's office.

[7] This MSD is identical to the MSD filed on September 1, 2015.

Notice of Deposition… reflecting that Protestant had filed both documents with the Vice Chairman's Office and copies delivered to OTC ATTORNEY 1. On September 29, 2015, the Division filed its *Motion to Quash Deposition … and to Stay Any Further Proceedings Pending a Hearing on this Motion* ("*Motion to Quash*").

On October 1, 2015, the Division filed its *Response to Taxpayer's Brief on Question Certified to the Commissioners.* On October 2, 2015, the Protestant file a *Response to Division's Motion to Quash Deposition …, and to Stay any Further Proceedings.* On October 6, 2015, the ALJ held a Teleconference with Counsel to discuss the pending matter. On October 6, 2015, the ALJ confirmed in writing the substance of the Teleconference, as follows, to-wit:

> This letter follow-ups and confirms the Teleconference held this morning at 10:30 a.m. concerning the Division's *Motion for Extension of Time to File Response to Taxpayer's Motion for Summary Disposition* ("*Motion for Extension 2*") filed October 5, 2015, the Protestant's *Motion for Summary Disposition* ("*MSD 2*"), with Exhibits A through J, attached thereto filed September 21, 2015, and the pending *Certification of Issue* filed September 21, 2015 with the Vice-Chairman's Office and the Office of Administrative Law Judges.
>
> Initially, the ALJ brought to Counsel's attention, what appears to be a copying error. Exhibit E (Allocation) to Exhibit B (Purchase and Sale Agreement) is missing from *MSD1* and *MSD2*. The ALJ discussed with Counsel that the filing of *MSD2* was an unnecessary duplication and the ALJ would issue an *Order Striking Protestant's Motion for Summary Disposition filed September 21, 2015*, and that the ALJ would order that the Protestant be prohibited from filing another Motion for Summary Disposition until the Commissioners had ruled on the Certification of Issue filed September 21, 2015.
>
> ATTORNEY 1 agreed to check on the missing Exhibit E to Exhibit B and provide a copy to OTC ATTORNEY 1. Please provide a copy to the Clerk so that the Clerk can add the missing exhibit to *MSD1*.
>
> The ALJ made the following proposal to Counsel in the interest of simplifying this matter:
>
> - Once ATTORNEY 1 provides the missing exhibit as set out above, the ALJ would be willing to withdraw the *Order Striking Protestant's Motion for Summary Disposition* issued September 18, 2015, which would eliminate the need for the *Certification of Issue.*
> - The ALJ would give OTC ATTORNEY 1 fifteen (15) days to file a *Response* and any other motions the Division intends to file regarding the *MSD1*. Ms. Field indicated the Division would file other motions relating to exhibits attached to *MSD1*.
> - Upon the ALJ submitting *MSD1* for ruling, the Scheduling Order issued June 16, 2015 would be stricken, thereby eliminating the October 15, 2015 hearing on the Division's *Motion to Quash Deposition of COMMISSIONER, Oklahoma Tax Commission, and to Stay any further Proceedings Pending a Hearing on this Motion* filed September 29, 2015. Submitting *MSD1* for ruling would also eliminate the need to depose COMMISSIONER.
> - Upon the ALJ ruling on the *MSD1*, either *Findings, Conclusions and Recommendations* would issue or an *Order Denying MSD1* would

> issue. If an *Order Denying MSD1* issued, the parties would submit a proposed Scheduling Order to continue the case.
> - The parties wished time to consider the ALJ's proposal.
>
> Enclosed please find the *Order Striking Protestant's Motion for Summary Disposition filed September 21, 2015*. If this was not Counsel's understanding of the Teleconference, please contact the Clerk immediately.

On October 6, 2015, the ALJ issued the *Order Striking Protestant's Motion for Summary Disposition Filed September 21, 2015*, as more fully set forth therein. On October 7, 2015, via email and regular mail, the ALJ received a letter from ATTORNEY 1, which states as follows, to-wit:

> Attached hereto is a Supplement to the Taxpayer's Motion for Summary Disposition which contains Exhibit E to the Purchase and Sale Agreement.[8]
>
> We are in receipt of your letter dated October 6, 2015, containing your proposal for hearing this matter. We are in agreement with your proposal, so long as there is no substantive ruling on the Division's Motion to Quash the Subpoena …, and Taxpayer can have another Subpoena issued should a hearing be scheduled in this matter.

On October 8, 2015, at 10:00 a.m., the ALJ held a Teleconference with Counsel to discuss the pending matter, and acknowledged the Teleconference, as follows, to-wit:

> This letter follow-ups and confirms the Teleconference held this morning at 10:00 a.m.
>
> On October 7, 2015, the Clerk received Exhibit E to Exhibit B to the Protestant's *Motion for Summary Disposition* filed September 1, 2015, which the Clerk will put in Exhibit B.
>
> Pursuant to the ALJ's discussion with Counsel this morning, enclosed please find the *Order Withdrawing Order Striking Protestant's Motion for Summary Disposition Filed September 1, 2015*, which renders the *Certification of Issue* moot.
>
> Upon receipt this afternoon from ATTORNEY 1, the *Withdrawal of Subpoena, and Notice of Deposition* on COMMISSIONER, the Division's *Motion to Quash* will also be moot. The ALJ will issue an order striking the Oral Argument on the *Motion to Quash* set for October 15, 2015, and strike the *Scheduling Order* issued June 17, 2015.
>
> OTC ATTORNEY 1 will have fifteen (15) days from the *Order Striking Oral Argument on Division's Motion to Quash* to file a *Response to the Protestant's Motion for Summary Disposition Filed September 1, 2015* ("*MSD*"), along with any motion(s) concerning the exhibits attached to the Protestant's *MSD*.
>
> ATTORNEY 1 will have fifteen (15) days to respond to any motion(s) filed by OTC ATTORNEY 1. Upon the ALJ's ruling on the evidentiary motion(s), the Protestant's *MSD* submits for decision.

[8] Attached is a Supplement to Taxpayer's Motion for Summary Disposition, with a Declaration of Taxpayer and a copy of Exhibit E to Exhibit B, which is an Allocation of Consideration table.

> If this was not Counsel's understanding of the Teleconference, please contact the Clerk immediately.

On October 8, 2015, the ALJ issued the *Order Withdrawing the Order Striking Protestant's Motion for Summary Disposition Filed September 1, 2015*, which rendered the *Certification of Issue* moot. On October 8, 2015, the Protestant filed a *Withdrawal of Subpoena and Notice of Deposition.*[9] On October 8, 2015, the ALJ issued an *Order Striking Oral Argument on Division's Motion to Quash*[10] *and Order Striking Scheduling Order Issued June 17, 2015*.[11] On October 8, 2015, the ALJ acknowledged the aforementioned, and advised the parties as follows, to-wit:

> The ALJ directs the Division to file a response to the Protestant's *Motion for Summary Disposition Filed September 1, 2015*, as well as any motion(s) concerning exhibits attached to the Protestant's *MSD* on or before **October 23, 2015**.
>
> Upon the filing of the Division's motion(s), the Protestant shall file a response fifteen (15) days from the date of filing.

On October 23, 2015, the Division filed its *Response to Taxpayer's Motion for Summary Disposition, Counter Motion for Summary Disposition, and Brief in Support* ("*Response and Counter MSD*"). On October 29, 2015, the ALJ acknowledged the Division's filing of its *Response and Counter MSD*, noted that the Division did not file any motion(s) regarding exhibits attached to the Protestant's *MSD* filed September 1, 2015, and directed the Protestant to file a reply to the Division's *Counter MSD* on or before Monday, November 9, 2015.

On November 6, 2015, the *Taxpayer's Reply to the Division's Response to Taxpayer's* [*MSD*], *and Response to the Division's* [*Counter MSD*] ("*Reply*") were filed. On November 12, 2015, the ALJ acknowledged the filing of the aforementioned, and submitted the Protestant's *MSD* filed September 1, 2015, and the Division's *Counter MSD* for ruling as of November 6, 2015. The ALJ advised the parties that the ruling on the Protestant's *MSD* and the Division's *Counter-MSD* would not issue on January 5, 2016, rather the ALJ would issue the rulings on the respective *MSDs* on or before March 7, 2016.

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO CONTROVERSY

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, the protest, the Protestant's *MSD* filed September 1, 2015, the Division's *Response and Counter-MSD*, and the Protestant's *Reply*, the undersigned finds:

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[9] The Protestant reserved the right to have another Deposition Subpoena issued in the future should the need arise.

[10] The ALJ had set Oral Argument for October 15, 2015, at 9:30 a.m.

[11] The ALJ had set the hearing in this matter for January 14, 2016, at 9:30 a.m.

In its *Response and Counter MSD*, the Division states, "The Division does not dispute Taxpayer's Fact Nos. 1-8. The Division further contends that Fact Nos. 1-8 as identified by Taxpayer are the *only* material facts necessary to make a determination in this matter."[12] The ALJ reproduced verbatim the Protestant's "Undisputed Material Facts" One (1) through Eight (8), unless otherwise noted herein.

1. The Taxpayer was President and two-percent (2%) owner of COMPANY, which was formed on April 21, 1976 by the Taxpayer's parents, FATHER and MOTHER. Taxpayer owned his 2% interest in COMPANY at all times since 1983, until September 10, 2007. Exhibits A and B.

2. The Taxpayer was President and two-percent (2%) owner of TRANSPORTATION COMPANY which was formed on December 19, 1989 by the Taxpayer's parents, FATHER and MOTHER. Taxpayer owned his 2% interest in TRANSPORTATION COMPANY at all times after the company was formed until September 10, 2007. Exhibits A and B.

3. On September 10, 2007, COMPANY and transportation company (together the "Companies") and the Taxpayer sold substantially all the assets used or held in connection with and necessary to the conduct of the Companies' business enterprises to energy partnership. Exhibit B, the terms of which are incorporated herein by reference.

4. As part of the sale of all or substantially all of the assets of the Companies, the Taxpayer sold all of his goodwill associated with the Companies resulting in $AMOUNT of net capital gain, as defined in Section 1222(11) of the Internal Revenue Code, which was included on Taxpayer's individual federal income tax return for the taxable year ending December 31, 2007. Exhibit C. (Emphasis added.)

5. Taxpayer originally reported and paid Oklahoma income tax on $AMOUNT of capital gain from the sale of goodwill associated with the Companies. Exhibit D. (Emphasis added.)

6. Taxpayer filed a 2007 Form 511X, Amended Resident Income Tax Return, which reduced the amount of total gains reported on the return by $AMOUNT ($AMOUNT from the sale of non-qualifying assets, and $AMOUNT from the sale of goodwill associated with the Companies), and claimed the Oklahoma capital gain deduction pursuant to 68 Okla. Stat. § 2358(F) for the <u>$AMOUNT ($AMOUNT - $AMOUNT)</u> of net capital gains from the sale of goodwill associated with the Companies. Exhibit D. (Emphasis added.)

7. By letter dated September 18, 2012, the Oklahoma Tax Commission ("Commission") granted a refund of $REFUND associated with the $875,000 adjustment described above, but denied $REFUND of the claim for refund associated with the claimed Oklahoma capital gain deduction of <u>$AMOUNT.</u> Exhibit E. (Emphasis added.)

[12] Division Response and Counter MSD at 2. (Emphasis original.)

8. On November 5, 2012, Taxpayer timely protested the denial of the $REFUND claim for refund associated with the claimed Oklahoma capital gain deduction. Exhibit F.

ADDITIONAL STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO CONTROVERSY

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, the protest, the Protestant's MSD filed September 1, 2015, the Division's Response and Counter MSD, and the Protestant's Reply, the undersigned finds:

9. The Purchase and Sale Agreement dated September 10, 2007, includes Exhibit E, which reflects the following,[13] to-wit:

EXHIBIT E
ALLOCATION OF CONSIDERATION

	OILFIELD CO.	COMPANY	COAL CO.	PROTESTANT	FATHER & MOTHER	HUSBAND & WIFE	Total
Personal Property	$AMOUNT	$AMOUNT	$ AMOUNT	0.00	0.00	0.00	$ TOTAL
Real Property:							
Land	0.00	$ AMOUNT	$AMOUNT	0.00	0.00	0.00	$ TOTAL
Buildings	0.00	$ AMOUNT	$ AMOUNT	0.00	0.00	0.00	$ TOTAL
Pits	0.00	$AMOUNT	$AMOUNT	0.00	0.00	0.00	$ TOTAL
Employment Agreement	0.00	0.00	0.00	$ AMOUNT	$ AMOUNT	$ AMOUNT	$ TOTAL
Personal Goodwill: (2)	0.00	0.00	0.00	$AMOUNT	$AMOUNT	$AMOUNT	$TOTAL
Other Intangibles	$ AMOUNT	$ AMOUNT	$ AMOUNT	0.00		0.00	$ TOTAL
TOTALS	$TOTAL	$TOTAL	$TOTAL	$TOTAL	$TOTAL	$TOTAL	$TOTAL

CONCLUSIONS OF LAW

A. MOTION FOR SUMMARY DISPOSITION

1. The Legislature vested the Oklahoma Tax Commission with jurisdiction over the parties and subject matter of this proceeding.[14]

2. A party may file a motion for summary disposition on any or all issues on the ground that there is no substantial controversy as to any material fact. The procedures for such motion are as follows,[15] to-wit:

[13] Protestant Exhibit B.

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

[15] OKLA. ADMIN. CODE § 710:1-5-38.1 (July 11, 2013).

(1) The motion for summary disposition shall be accompanied by a concise written statement of the material facts as to which the movant contends no genuine issue exists and a statement of argument and authority demonstrating that summary disposition of any or all issues should be granted. The moving party shall verify the facts to which such party contends no genuine controversy exists with affidavits and evidentiary material attached to the statement of material facts.

(2) If the protest has been set for hearing, the motion shall be served at least twenty (20) days before the hearing date unless an applicable scheduling order issued by the Administrative Law Judge establishes an earlier deadline. The motion shall be served on all parties and filed with the Office of the Administrative Law Judge.

(3) Any party opposing summary disposition of issues shall file with the Administrative Law Judge within fifteen (15) days after service of the motion a concise written statement of the material facts as to which a genuine issue exists and the reasons for denying the motion. The adverse party shall attach to the statement evidentiary material justifying the opposition to the motion, but may incorporate by reference material attached to the papers of the moving party. All material facts set forth in the statement of the movant which are supported by acceptable evidentiary material shall be deemed admitted for the purpose of summary disposition unless specifically controverted by the statement of the adverse party which is supported by acceptable evidentiary material.

(4) The affidavits that are filed by either party shall be made on personal knowledge, shall show that the affiant is competent to testify as to the matters stated therein, and shall set forth matters that would be admissible in evidence at a hearing. A party challenging the admissibility of any evidentiary material submitted by another party may raise the issue expressly by written objection or motion to strike such material.

(5) If the taxpayer has requested a hearing, the Administrative Law Judge will issue a notice to the parties scheduling the motion for a hearing limited to Oral Argument. If the taxpayer has not requested a hearing, the Administrative Law Judge will rule on the motion based on the submission of the parties, including the motion, opposition to the motion, and attachments thereto.

(6) If the Administrative Law Judge finds that there is no substantial controversy as to the material facts and that one of the parties is entitled to a decision in its favor as a matter of law, the Judge will grant summary disposition by issuing Findings of Fact, Conclusions of Law, and Recommendations. Such Findings of Fact, Conclusions of Law and Recommendations are subject to review by the Commission pursuant to OAC 710:1-5-10, 710:1-5-40 and 710:1-5-41. If a motion for summary disposition is denied, the Administrative Law Judge will issue an order denying such motion.

> (7) If the Administrative Law Judge finds that there is no substantial controversy as to certain facts or issues, the Judge may grant partial summary disposition by issuing an order which specifies the facts or issues which are not in controversy and directing that the action proceed for a determination of the remaining facts or issues. If a hearing of factual issues is required, evidentiary rulings in the context of the summary procedure shall be treated as rulings in limine. Any ruling on partial summary disposition shall be incorporated into the Findings of Fact, Conclusions of Law, and Recommendations issued at the conclusion of the proceedings before the Administrative Law Judge.

B. STANDARD OF REVIEW

3. An order that grants summary relief, in whole or part, disposes solely of law questions.[16]

4. Although a trial court in making a decision on whether summary judgment is appropriate considers factual matters, the ultimate decision turns on purely legal determinations, i.e. whether one party is entitled to judgment as a matter of law because there are no material disputed factual questions.[17]

5. Summary judgment should be granted only if it is perfectly clear that there is no material fact at issue. For summary judgment to be appropriate, the trial court must not only find there is no substantial controversy as to any material fact, but also that reasonable people could not reach differing conclusions from the undisputed facts.[18]

6. A fact is material for purposes of summary judgment if proof of the fact would establish or refute an essential element of a cause of action or a defense.[19]

C. INCOME TAX

7. The Act imposes an income tax upon the Oklahoma Taxable Income[20] of every resident or non-resident individual who earns income within Oklahoma.[21]

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[16] *Ashikian v. Oklahoma Horse Racing Commission*, 2008 OK 64, 188 P.3d 148. "Summary process is a special pretrial procedural track pursued with the aid of acceptable probative substitutes; it is a search for undisputed material facts which, sans forensic combat, may be utilized in the judicial decision-making process." *Id.* at ¶ 6.

[17] *Carmichael v. Beller*, 1996 OK 48, ¶ 6, 914 P.2d 1051. (Citations omitted.)

[18] *Fulton v. People Lease Corporation*, 2010 OK CIV APP 84, ¶ 52, 241 P.3d 255. (Citations omitted.) *See Winston v. Stewart & Elder, P.C.*, 2002 OK 68, ¶ 10, 55 P.3d 1063. "If reasonable minds might reach different conclusions when viewing the evidentiary materials (even those which are undisputed), summary judgment is inappropriate."

[19] *Id.* at ¶ 9. (Citations omitted.)

[20] OKLA. STAT. tit. 68, § 2353(12) (West Supp. 2007):

8. The beginning point of determining Oklahoma Taxable Income is Federal Adjusted Income.[22]

9. Any term used in the Act shall[23] have the same meaning as when used in a comparable context in the IRC, unless a different meaning is clearly required. For all taxable periods covered by the Act, the tax status and all elections of all taxpayers covered by the Act shall[24] be the same for all purposes material hereto as they are for federal income tax purposes except when the Act specifically provides otherwise.[25]

10. A taxpayer's income tax liability is determined in accordance with the law in effect at the time the income is received.[26]

11. The text of Section 2358(F) of Title 68[27] ("Deduction") for the 2007 Tax Year is as follows, to-wit:

> For all tax years, beginning after December 31, 1981, taxable income and adjusted gross income shall be adjusted to arrive at Oklahoma taxable income and Oklahoma adjusted gross income as required by this section.
>
> …
>
> F. 1. For taxable years beginning after December 31, 2004, a deduction from the Oklahoma adjusted gross income of any individual taxpayer shall be allowed for qualifying gains receiving capital treatment that are included

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> "Oklahoma taxable income" means "taxable income" as reported (or as would have been reported by the taxpayer had a return been filed) to the federal government, and in the event of adjustments thereto by the federal government as finally ascertained under the Internal Revenue Code, adjusted further as hereinafter provided;

[21] OKLA. STAT. tit. 68, § 2355 (West Supp. 2007).

[22] OKLA. STAT. tit. 68, § 2353(13) (West Supp. 2007):

> "Oklahoma adjusted gross income" means "adjusted gross income" as reported to the federal government (or as would have been reported by the taxpayer had a return been filed), or in the event of adjustments thereby by the federal government as finally ascertained under the Internal Revenue Code, adjusted further as hereinafter provided;

[23] "Generally, when the legislature uses the term 'shall,' it signifies a mandatory directive or command." *See Keating v. Edmondson*, 2001 OK 110, ¶ 13, 37 P.3d 882.

[24] *Id.*

[25] OKLA. STAT. tit. 68, § 2353(3) (West Supp. 2007).

[26] *Affiliated Management Corp. v. Oklahoma Tax Commission*, 1977 OK 183, 570 P.2d 335; *Wootten v. Oklahoma Tax Com'n*, 1935 OK 54, 170 Okla. 584, 40 P.2d 672.

[27] OKLA. STAT. tit. 68, § 2358(F) (West Supp. 2007).

in the federal adjusted gross income of such individual taxpayer during the taxable year.

2. As used in this subsection:

B. "qualifying gains receiving capital treatment" means the amount of net capital gains, as defined in Section 1222(11) of the Internal Revenue Code, included in an individual taxpayer's federal income tax return that result from:

(1) the sale of real or tangible personal property located within Oklahoma that has been directly or indirectly owned by the individual taxpayer for a holding period of at least five (5) years prior to the date of the transaction from which such net capital gains arise, or

(2) the sale of stock or the sale of a direct or indirect ownership interest in an Oklahoma company, limited liability company, or partnership where such stock or ownership interest has been directly or indirectly owned by the individual taxpayer for a holding period of at least three (3) years prior to the date of the transaction from which the net capital gains arise,

b. "holding period" means an uninterrupted period of time,

c. "Oklahoma company," "limited liability company," or "partnership" means an entity whose primary headquarters have been located in Oklahoma for at least three (3) uninterrupted years prior to the date of the transaction from which the net capital gains arise,

d. "direct" means the individual taxpayer directly owns the asset, and

e. "indirect" means the individual taxpayer owns an interest in a pass-through entity (or chain of pass-through entities) that sells the asset that gives rise to the qualifying gains receiving capital treatment.

(1) With respect to sales of real or personal property located within Oklahoma, the deduction described in this subsection shall not apply unless the pass-through entity that makes the sale has held the property for not less than five (5) uninterrupted years prior to the date of the transaction that created the capital gain, and each pass-through entity included in the chain of ownership has been a member, partner, or shareholder of the pass-through entity in the tier immediately below it for an uninterrupted period of not less than five (5) years.

> (2) With respect to sales of stock or ownership interest in an Oklahoma company, limited liability company, or partnership, the deduction described in this subsection shall not apply unless the pass-through entity that makes the sale has held the stock or ownership interest for not less than three (3) uninterrupted years prior to the date of the transaction that created the capital gain, and each pass-through entity included in the chain of ownership has been a member, partner or shareholder of the pass-through entity in the tier immediately below it for an uninterrupted period of not less than three (3) years. (Emphasis added.)

12. The text of Sections 2358(D) and 2358(F) of Title 68[28] effective January 1, 2006 is attached hereto as FCR Exhibits A through C.[29]

13. The text of Sections 2358(D) and 2358(F) of Title 68,[30] effective January 1, 2007 are attached hereto as FCR Exhibits A through C.

14. The text of Sections 2358(D) and 2358(F) of Title 68,[31] effective January 1, 2008 are attached hereto as FCR Exhibits A through C.

15. The Deduction fails to define "Oklahoma Company," but "company" is commonly defined as "A corporation, partnership, association, joint-stock company, trust fund, or organized group of persons, whether incorporated or not…"[32] There is no dispute "Oklahoma Company" includes a corporation under state law.

16. A corporation electing treatment as a Subchapter "S" Corporation under the Internal Revenue Code ("IRC") is not subject to Oklahoma corporate income tax; however, a Subchapter "S" Corporation's shareholders shall include their proportionate share of the corporation's federal income in each shareholder's taxable income in the same manner and to the same extent as provided by the Internal Revenue Service ("IRS"), subject to adjustments provided in the

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[28] OKLA. STAT. tit. 68, § 2358(D) and (F) (West Supp. 2006). *See* Laws 2005, c. 381, § 12, eff. Jan. 1, 2006. Although not at issue, the holding period for the sale of stock or ownership interest was changed from three (3) years to two (2) years by Laws 2006, c. 272, § 17 (repealed by Laws 2007, c. 1, § 59), and by Laws 2007, c. 1, § 57.

[29] The ALJ formatted the original legislation as FCR Exhibits in three (3) columns, landscape layout, with strike-through and underlines in bold. The FCR Exhibits can be joined together to reflect the Legislative amendments set forth herein. It is the ALJ's intent that the formatting of these exhibits will assist the reader of the discussion herein.

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

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

[32] *Id.* *See also* BLACK'S LAW DICTIONARY (9th ed. 2009), available at http://web2.westlaw.com.

Oklahoma Income Tax Act[33] ("Act").[34]

17. 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.[35]

18. The Tax Commission Rule on the Deduction[36] for the 2007 Tax Year is as follows, to-wit:

> **(a) General provisions.** For tax years beginning on or after January 1, 2005, individual taxpayers can subtract from the Oklahoma adjusted gross income, gains reported on their Oklahoma income tax return and included in federal taxable income receiving capital treatment. The gain must be realized on or after January 1, 2005, in order to be eligible for the Oklahoma exclusion. Effective for tax years beginning on or after January 1, 2006 corporate taxpayers can subtract from the Oklahoma taxable income, gains reported on their Oklahoma income tax return and included in federal taxable income receiving capital treatment. For corporate taxpayers the gain must be realized on or after January 1, 2006 in order to be eligible for the Oklahoma exclusion.
>
> **(b) Qualifying gains receiving capital treatment.** As used in this Section, **"qualifying gains receiving capital treatment"** means the amount of net capital gains, as defined under Internal Revenue Code Section 1222(11), [IRC §1222(11)]. The gain must be included in the federal income tax return of the taxpayer.
>
> > (1) **Sale of real or tangible personal property.** To qualify for the Oklahoma deduction, the gain must be earned as a result of the sale of real or tangible personal property located within Oklahoma. Taxpayers must have held the asset for not less than five (5) uninterrupted years prior to the date of the transaction that created the capital gain.
> >
> > (2) **Sale of stock or ownership interest.** To qualify for the Oklahoma deduction, the gain must be earned as a result of the sale of stock or ownership interest in an Oklahoma company, limited liability company, or partnership and the stock or ownership interest must have been held by the taxpayer for at least three (3) uninterrupted years prior to the date of the transaction that created the capital gain. For tax year 2006 and subsequent tax years, the

[33] OKLA. STAT. ANN. tit. 68, § 2351 *et seq.* (West 2001).

[34] OKLA. STAT. ANN. tit. 68, § 2365 (West 2001).

[35] 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.

[36] OKLA. ADMIN. CODE § 710:50-15-48 (June 25, 2007).

stock or ownership interest must have been held by the individual taxpayer for at least two (2) uninterrupted years prior to the date of the transaction that created the capital gain. Non individual taxpayer's stock or ownership interest must have been held for at least three (3) uninterrupted years prior to the date of the transaction that created the capital gain.

(3) **Sale of real or tangible personal property by pass-through entities.** Net capital gains earned by member, partner, or shareholder of a pass-through entity as a result of the sale of real or tangible personal property located within Oklahoma, and included in the a taxpayer's federal taxable income is excludable, provided that the taxpayer has been a member of the pass-through entity for an uninterrupted period of five (5) years and that the pass-through entity has held the asset for not less than five (5) uninterrupted years prior to the date of the transaction that created the capital gain.

(4) **Sale of stock or ownership interests by pass-through entities.** Net capital gains earned by a member, partner, or shareholder of a pass-through entity as a result of the sale of stock or an ownership interest in an Oklahoma company, limited liability company, or partnership, is excludable, provided that the taxpayer has been a member of the pass-through entity for an uninterrupted period of three (3) years and that the pass-through entity has held the asset for not less than three (3) uninterrupted years prior to the date of the transaction that created the capital gain. For tax year 2006 and subsequent tax years, the stock or ownership interest must have been held by the individual taxpayer for at least two (2) uninterrupted years prior to the date of the transaction that created the capital gain. Non individual taxpayer's stock or ownership interest must have been held for at least three (3) uninterrupted years prior to the date of the transaction that created the capital gain.

(5) **Installment sales.** Qualifying gains included in an individual taxpayer's federal taxable income for years after December 31, 2004, or a corporate taxpayer's federal taxable income for years after December 31, 2005, which are derived from installment sales are eligible for exclusion, provided the appropriate holding periods are met.

(c) Oklahoma company", "limited liability company", "partnership". An Oklahoma company, limited liability company, or partnership is one whose primary headquarters has been located in Oklahoma for at least three (3) years prior to the capital gain transaction. The Oklahoma company, limited liability

company, or partnership must meet the three (3) year rule for an uninterrupted period.

STATUTORY INTERPRETATION

19. The goal of any inquiry into the meaning of a legislative act is to ascertain and give effect to the intent of the legislature. The law-making body is presumed to have expressed its intent in a statute's language and to have intended what the text expresses. Hence, where a statute is plain and unambiguous, it will not be subject to judicial construction, but will be given the effect its language dictates. Only where the intent cannot be ascertained from a statute's text, as occurs when ambiguity or conflict (with other statutes) is shown to exist, may rules of statutory construction be employed. Statutes that provide an exemption from taxation are to be strictly construed against the claimant.[37] Statutory construction presents a question of law.[38]

20. Where the Legislature is made repeatedly aware of the operation of the statute according to the construction placed upon it by an agency and the Legislature has not expressed its disapproval with the agency's construction, the Legislature silence may be regarded as acquiescence in the agency's construction;[39] and the agency's construction is given controlling weight and will not be disregarded except in cases of serious doubt.[40]

21. Tax exemptions, deductions, and credits depend entirely on legislative grace and are strictly construed against the exemption, deduction or credit.[41]

22. The Deduction is a tax exemption or deduction statute, not a tax levying statute; and as such, it must be strictly construed unless authority for the deduction is clearly expressed.[42]

23. Statutes and statutory amendments are presumed to operate prospectively, and presumption is rebutted only where intention of the Legislature to give statutes retrospective effect is expressly declared or necessarily implied from the language of the statute.[43] Doubt as to whether statute was intended to be prospective or retrospective must be resolved against retrospective application.[44] As in other matters concerning statutory interpretation, whether to

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

[38] *Id.* at ¶ 6.

[39] *R.R. Tway, Inc. v. Oklahoma Tax Commission*, 1995 OK 129, 910 P.2d 972.

[40] *Cox v. Dawson*, 1996 OK 11, 911 P.2d 272.

[41] *TPQ Inv. Corp. v. State ex rel. Oklahoma Tax Com'n*, 1998 OK 13, ¶ 8, 954 P.2d 139. (Citations omitted).

[42] *Id.*

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

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

give prospective or retroactive effect should be controlled by the fundamental or transcendent canon of statutory construction of giving effect to legislative design.[45]

24. Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears, and except also that the words hereinafter explained are to be understood as thus explained.[46]

25. Whenever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.[47]

D. REVENUE BILLS

26. The Oklahoma Constitution, Article V, § 33[48] provides as follows, to-wit:

> A. All bills for raising revenue shall originate in the House of Representatives. The Senate may propose amendments to revenue bills.
>
> B. No revenue bill shall be passed during the five last days of the session.
>
> C. Any revenue bill originating in the House of Representatives shall not become effective until it has been referred to the people of the state at the next general election held throughout the state and shall become effective and be in force when it has been approved by a majority of the votes cast on the measure at such election and not otherwise, except as otherwise provided in subsection D of this section.
>
> D. Any revenue bill originating in the House of Representatives may become law without being submitted to a vote of the people of the state if such bill receives the approval of three-fourths (3/4) of the membership of the House of Representatives and three-fourths (3/4) of the membership of the Senate and is submitted to the Governor for appropriate action. Any such revenue bill shall not be subject to the emergency measure provision authorized in Section 58 of this Article and shall not become effective and be in

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

[46] OKLA. STAT. ANN. tit. 25, § 1 (West 2008).

[47] OKLA. STAT. ANN. tit. 25, § 2 (West 2008).

[48] OK Const. Art. V, § 33.

> force until ninety days after it has been approved by the Legislature, and acted on by the Governor.

27. "Revenue Bills" are those that levy taxes in the strict sense of the word, and are not bills for other purposes, which incidentally create revenue.[49]

28. A constitutional provision must be construed considering the purpose and given a practical interpretation so that the manifest purpose of the framers and the people who adopted it may be carried out.[50]

29. The Oklahoma Constitution, Article V, § 57[51] provides as follows, to-wit:

> Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statutes; and no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length: Provided, that if any subject be embraced in any act contrary to the provisions of this section, such act shall be void only as to so much of the laws as may not be expressed in the title thereof.

30. Where the title of a statute calls attention to the general subject, there is no need of expressing the details or subdivisions in the title in order to comply with constitutional requirement that the subject of an act shall be clearly expressed in its title.[52]

STATEMENT OF THE ISSUE

Whether the Taxpayer is eligible to receive the Oklahoma Capital Gains Deduction, 68 O.S. § 2358(F) (the "Deduction"), as claimed on his Amended 2007 Oklahoma income tax return?

PROTESTANT'S MSD, DIVISION'S RESPONSE AND COUNTER MSD

On the Administrative Level, the following question of law has been litigated for almost

[49] *Anderson v. Ritterbusch*, 1908 OK 250, 98 P. 1002.

[50] *Fent v. Fallin*, 2014 OK 105, 345 P.3d 1113.

[51] Okla. Const. art. V, § 57.

[52] *Stewart v. Oklahoma Tax Commission*, 1946 OK 132, 168 P.2d 125.

seven (7) years, "Was the Amendment to the Deduction, effective January 1, 2008 (SB 685) intended by the Legislature to be applied *retrospectively as a clarification* (Protestant's Position) or *prospectively* (Division's Position)?"[53]

As stated in the 5th Order, "The Core Questions of Law … are settled questions of law on the Administrative Level, and by the Tax Commission.[54] The Tax Commission first spoke on the interpretation of the Deduction and the Amendment with the 1st and 2nd Orders, concluding, "The language of the [Deduction] is clear and unambiguous and its terms should be construed using their ordinary meaning as directed by the Legislature. Provisions of the [Deduction] cannot be read in isolation as suggested by the Protestants, but must be construed in its entirety."[55] The Protestants appealed the 2nd Order, which resulted in an "Unpublished Decision," by the Court of Civil Appeals of the State of Oklahoma, Division IV, finding, "…there is no ambiguity in the statute."[56] The Protestants appealed the 5th Order, which also resulted in an "Unpublished Decision," by the Court of Civil Appeals, Division III, which affirmed in part, reversed in part, and remanded. The Court held "Because the [Amendment] effected a change in the law and there is no clear indication in the statue that the Legislature intended for the amended language to apply to the sale of intangible assets in years prior to its effective date, we hold it operated prospectively."[57]

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[53] *See* Protestant MSD at 6, and Division Response and Counter MSD at 11. *See also* the following, to-wit:

Tax Commission Order No. 2009-06-23-02 (June 23, 2009) ("1st Order")
Tax Commission Order No. 2009-06-23-03 (June 23, 2009)/TC-107352 ("2nd Order"); *Crook v. State ex rel. Oklahoma Tax Commission*, Okla. Civ. App. Div. 4.
Tax Commission Order No. 2010-06-22-04 (June 22, 2010) ("3rd Order)
Tax Commission (Precedential) Order No. 2012-02-14-05 (February 14, 2012) ("4th Order")
Tax Commission Order No. 2012-10-11-04 (October 11, 2012)/TC-111221 ("5th Order"); *McAlpine v. Oklahoma Tax Commission*, Okla. Civ. App. Div. 3. On October 20, 2014, the Supreme Court of Oklahoma denied the Appellants' Petition for Certiorari on this question of law.
Tax Commission Order No. 2013-09-17-01 (September 17, 2013)/TC-112260 ("6th Order") (Appeal Dismissed) on Appellant's Motion.

The distinction between a Tax Commission Order designated as "Precedential" or "Non-Precedential" has been blurred because all Tax Commission 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).

[54] *See* 1st Order at 23 and 2nd Order at 17. (Footnotes omitted.)

[55] *Id. See Imaging Services, Inc. v. Oklahoma Tax Com'n*, Excise Tax Div., 1993 OK 164, 866 P.2d 1204; *Affiliated Management Corp. v. Oklahoma Tax Commission*, 1977 OK 183, 570 P.2d 335; *Wootten v. Oklahoma Tax Com'n*, 1935 OK 54, 40 P.2d 672.

[56] *See* Notes 5 and 54, *supra.* In Footnote 8, the Court states, "This conclusion makes it unnecessary to address Protestants' claim of error in denying admission of OTC interpretations alleged to be inconsistent with that taken by the OTC here. Any relevance of this evidence depends upon a finding that the statute is ambiguous. In the absence of such a finding, aids to construction of a statute do not become a factor in the review process." (Emphasis added.) In this matter, the ALJ notes and the Protestant acknowledges, "The [Protestant] is aware that the [Division] takes a narrower view of the [Deduction] prior to the adoption of Senate Bill 685." Protestant's MSD at 5.

[57] *Id.*

Supreme Court Rule 1.200(5)[58] states, "Because unpublished opinions are deemed to be without value as precedent and are not uniformly available to all parties, opinions so marked shall not be considered as precedent by any court or cited in any brief or other material presented to any court, except to support a claim of res judiciata, collateral estoppel, or law of the case." Supreme Court Rule 1.200(1)[59] also states, "Disposition by memorandum, without a formal published opinion, *does not mean that the case is considered unimportant*. It does mean that no new points of law making the decision of value as precedent are believed to be involved." (Emphasis added.)

Opinions released by the Court of Civil Appeals have *persuasive authority only* and are not precedential.[60] (Emphasis added.) The aforementioned Court of Civil Appeals opinions are especially persuasive in this matter, because the question of law is the same, Counsel for the Protestant has access to the opinions, and the Supreme Court previously denied the Appellants' *Petition for Certiorari* in *McAlpine*.[61]

Divisions III and IV of the Court of Civil Appeals found in the Tax Commission's favor that the Amendment to the Deduction "…clearly added a new category of deduction, real property, tangible personal property, *or* intangible personal property meeting certain conditions. The amendment required two conditions: (1) the occurrence of sale of all or substantially all of the assets of the entity; and, (2) a two year period of ownership. Neither of these conditions were attached to a real property or tangible property disposition under Section 2358(F)(2)(a)(1). Therefore, this Court further concludes that the amendment to Section 2358(F), effective on January 1, 2008, does not meet the criteria for retroactive application. The ALJ, and ultimately the OTC, correctly ruled that the amendment did not result in the deduction sought by Protestants and correctly denied their protest."[62]

In this matter, the analysis of the Protestant's position is essentially the same as positions taken by taxpayers in the aforementioned Tax Commission Orders and the two (2) previous appeals.[63] The Protestant states, "From the date of its original adoption, the Oklahoma capital gain deduction included the operational date contained in the statutory text making it applicable '[f] taxable years beginning after December 31, 2004."[64]

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[58] *Id.*

[59] *Id.*

[60] *Id.* *State ex rel. Prater v. 2010 Toyota Corolla*, Okla. Civ. App. Div. 2, 350 P.3d 409 (2015), certiorari denied.

[61] Counsel for the Protestant and McAlpine, the most recent appeal, is the same.

[62] *See* Note 54, *supra*. *See also* Crook at 12 and McAlpine at 12.

[63] *Id.*

[64] *See* Protestant MSD at 3. *See also* Protestant Reply at 6.

Before and after the Deduction was amended ("Amendment"),[65] Section 2358(F)(1) read in pertinent part, as follows, to-wit:

> "For tax years beginning after *December 31, 2004*, a deduction from the Oklahoma adjusted gross income of any individual taxpayer shall be allowed for qualifying gains receiving capital treatment.…" (Emphasis added.)

In the *MSD*, the Protestant states, "Like the original version of the [Deduction] adopted by Oklahoma voters in 2004, the express terms of the statutory language reproduced above makes the amendments contained therein operational '[for] or taxable years beginning after December 31, 2004. Thus, the Legislature simply made clear that transactions like the [Protestant's] September 2007 sale already qualified for the Oklahoma capital gain deduction."[66] The Protestant emphasizes, "As Senate Bill 685 was adopted in 2007, the Division may be confusing the 'effective date' of a bill with an express 'operative date' chosen by the Legislature and included in the statute's text. The operative date included in the text of the statute controls."[67] The Protestant also states, "As written, the prior version of the statute is ambiguous as to what constitutes a sale of an indirect ownership interest in an Oklahoma company under Subsection (a)(2). …Thus, when an individual taxpayer owns an interest in a pass-through entity and sells that business through a sale of substantially all its assets, the sale is of an indirect ownership interest in an Oklahoma company under Section 2358(F) prior to the adoption of Senate Bill 685."[68]

The Division responds, as follows,[69] to-wit:

> …the Legislature clearly defined the types of assets eligible for the Deduction: real property, tangible personal property, and stock or an ownership interest in an entity.
>
> …
>
> Taxpayer is essentially arguing that the Legislature's retention of the original introductory language is sufficient to give the 2007 Amendment retroactive effect. This argument is simply not

[65] *See* Notes 28-32, *supra.*

[66] Protestant MSD at 8.

[67] Id. at 10. Cities Services Oil Co. v. Oklahoma Tax Commission, 1942 OK 307, 129 P.2d 597; Caywood v. Caywood, 1975 OK 177, 541 P.2d 188; Griggs v. State, ex rel. Oklahoma Department of Transportation, 1985 OK 51, 702 P.2d 1017

[68] See Protestant's MSD at 5. For the Protestant, the Allocation of Consideration table reflects an "Employment Agreement" at $975,000.00 and "Personal Goodwill" at $6,191,896.25, but no allocation to an indirect ownership interest. See Note 14, supra.

[69] Division's Response and Counter MSD at 9 and 13.

> supported by law. As the 2007 Amendment contained no express language indicating the Legislature's intent that it be applied retroactively, the original, preserved language of section 2358(F) operates from the time the language was first enacted. The new provisions, including the language in the 2007 Amendment which added a deduction for capital gains from the sale of intangibles, would be first available at the time the Amendment took effect (here, January 1, 2008). *See Wilson*, 1979 OK 62, ¶6, 594 P.2d at 1212 (new provisions or changed portions are to be understood as enacted at the time the amended act takes effect, and not to have any retroactive operation).

Legislative intent is the litmus test for determining whether the Legislature may have intended either (1) to effect a change in the existing law or (2) to clarify that which previous appear doubtful.[70] The amendments to the Deduction illustrates how the Legislature has expanded the Deduction over the years, and why the Tax Commission has concluded as a matter of law that the language of the Deduction is unambiguous and why taxpayers have failed to overcome the presumption that the Amendment to the Deduction is to be applied prospectively.[71]

A reading of each successive amendment reveals that the Legislature expanded the scope of the Deduction from the previous year, by adding new classes of taxpayers, categories of property, and expanding the scope of definitional sections.[72]

The language of the Deduction is plain and unambiguous, it will not be subject to judicial construction, but will be given the effect its language dictates. Only where the intent cannot be ascertained from a statute's text, as occurs when ambiguity or conflict (with other statutes) is shown to exist, may rules of statutory construction be employed. Statutes that provide an exemption from taxation are to be strictly construed against the claimant.[73] Statutory construction presents a question of law.[74] The Deduction does not include exclusion for "Intangible" Personal Property in the form of Goodwill for the 2007 Tax Year.[75]

Where the Legislature is made repeatedly aware of the operation of the statute according to the construction placed upon it by an agency and the Legislature has not expressed its disapproval with the agency's construction, the Legislature silence may be regarded as acquiescence in the agency's construction;[76] and the agency's construction is given controlling

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[70] *American Airlines v. Hickman*, 2007 OK 59, 164 P.3d 146.

[71] *See* Notes 28-32, *supra.*

[72] *Id.*

[73] *See* Note 38, *supra*.

[74] *See* Note 39, *supra*.

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

[76] *See* Note 40, *supra*.

weight and will not be disregarded except in cases of serious doubt.[77]

Beginning in 2009, the Tax Commission concluded as a matter of law, the language of the Deduction to be unambiguous, and that taxpayers failed to overcome the presumption that Division should apply the Amendment to the Deduction prospectively.[78] The Legislature is well aware of the Tax Commission's construction of the Deduction and the Amendment, through the aforementioned Tax Commission Orders, and two (2) appellate cases, but the Legislature has remained silent. The Legislature's silence may be regarded as acquiescence in the Tax Commission's construction.[79]

In the *MSD*, the Protestant states, "In December 2014, the Oklahoma Supreme Court overturned the longstanding definition of what constitutes a 'revenue bill' for purposes of Article 5, Section 33 of the Oklahoma Constitution. *Fent v. Fallin*, 2014 OK 105, 345 P.3d 1113. Now, the term 'revenue bill' only applies to bills that increases taxes. *Id.* However, the Oklahoma Supreme Court recognized that the original definition of 'revenue bill' included 'bills that both increase and decrease revenue.' *Id.* at ¶ 13. Thus, under the original definition, the Oklahoma Constitution would have prohibited a bill that granted new deductions from originating in the Senate, and would have required a vote of the people if not passed by a supermajority of the Oklahoma Legislature. Okla.Const.Art.5, §33."[80]

In *Fent v. Fallin*,[81] the Court reviewed the history of Article 5, Section 33, as follows, to-wit:

> The Okla. Const. art 5, §33 concerns "revenue bills. At statehood, it provided only three requirements:
>
> 1. All bills for raising revenue shall originate in the House of Representatives.
> 2. The Senate may propose amendments to revenue bills.
> 3. No revenue bill shall be passed during the last five days of the session.
>
> The Oklahoma Supreme Court considered this constitutional provision and defined "raising revenue" a year after statehood on December 21, 1908, in Anderson v. Ritterbusch, 1908 OK 250, 98 P. 1002, 22 Okla. 761.
>
> Anderson did not involve a bill which decreased revenue but it did involve a challenge to a state statute which concerned the collection of taxes. The Court

[77] *See* Note 41, *supra*.

[78] *See* Note 54, *supra*.

[79] *Id.*

[80] Protestant MSD at 13-14.

[81] *Fent v. Fallin*, 2014 OK 105, 345 P.3d 1113.

defined the use of the word "revenue" as a law in which taxes are levied for state purposes. However, it excluded from the definition laws which incidentally created revenue, if the primary purpose of the law was not revenue raising. In deciding the case, the Court did not define "revenue" as a decrease in taxes but it discussed the history of the origin of governmental "revenue" raising, describing the word "revenue" as:

1. laws made for the direct and avowed purpose of creating and securing revenue or public funds for the service of the government;
2. bills which impose taxes upon the people, either directly or indirectly, or lay duties, imposts, or excises for the use of the government;
3. confined to bills to levy taxes in the strict sense of the word, and has not been understood to extend to bills for other purposes which may incidentally create revenue.

The Court decided that the precise meaning of the term "raising revenue" as used in the Okla. Const. art. 5, § 33 was to levy a tax to collect revenue; and that if the purpose of the act is to levy or collect taxes for the State, it must comply with the Okla. Const. art. 5, §33. The Anderson Court, quoting a frequently cited Alabama case,[82] said that:

> It is clear to our minds that 'increase of revenue' is not implied in the language 'to raise revenue.' The transitive verb 'to raise' in this connection means 'to bring together; to collect; to levy; to get together for use or service, as to raise money. *** (Webster's Dictionary.) The precise meaning of this clause is to levy a tax as a means of collecting revenue. See Harper v. Commissioners of Elberton, 23 Ga. 566. The act in question in one sense reduced the taxes, for it assumed to relieve certain railroad property from county taxation. But it was nevertheless a bill to raise revenue.

This is the only reference to the suggestion that the definition of "raise" used was meant to include a "decrease" in revenue, nor have we had a case since Anderson which directly concerned a revenue bill which "decreased" taxes.

…

To the extent Anderson v. Ritterbusch, 1908 OK 250, 98 P. 1002, 22 Okla. 761 *implies otherwise*, it is expressly overruled. (Emphasis added.)

The Amendment to the Deduction is a tax exemption or deduction statute, not a tax levying statute. As such, it did not have to originate in the House; and, because the Amendment applies prospectively, having an effective date of January 1, 2008, the Amendment does not affect available deductions for the 2007 Tax Year.

[82] Footnote 4 in opinion. *Perry County et al. v. Selma, etc., Railway Company*, 58 Ala. 546.

RECOMMENDATIONS

A. PROTESTANT'S MSD

Based upon the record, reasonable minds would reach the same conclusion, that there is no substantial controversy as to the material facts; the ALJ recommends denial of the Protestant's *MSD*, as a matter of law, as more fully set forth herein.

B. DIVISION'S COUNTER MSD

Based upon the record, reasonable minds would reach the same conclusion, that there is no substantial controversy as to the material facts; the ALJ recommends granting the Division's *Counter MSD*, as a matter of law, as more fully set forth herein.

OKLAHOMA TAX COMMISSION

ERRATA SHEET

NOW on this 3RD day of March 2016, the above-styled and captioned matter comes on for consideration of an error appearing in the *Findings, Conclusions and Recommendations* issued on March 1, 2016. The ALJ finds an error on page 10. Material Fact No. 9 should read as follows, to-wit:

> 9. The Purchase and Sale Agreement dated September 10, 2007, includes Exhibit E, which reflects the following,[83] to-wit:

EXHIBIT E
ALLOCATION OF CONSIDERATION

	OILFIELD CO..	COMPANY	COAL COMPANY	PROTESTANT	FATHER AND MOTHER	HUSBAND AND WIFE	Total
Personal Property	**$AMOUNT**	**$AMOUNT**	**$ AMOUNT**	**0.00**	**0.00**	**0.00**	**$ TOTAL**
Real Property:							
Land	**0.00**	**$ AMOUNT**	**$AMOUNT**	**0.00**	**0.00**	**0.00**	**$ TOTAL**
Buildings	**0.00**	**$ AMOUNT**	**$ AMOUNT**	**0.00**	**0.00**	**0.00**	**$ TOTAL**
Pits	**0.00**	**$AMOUNT**	**$AMOUNT**	**0.00**	**0.00**	**0.00**	**$ TOTAL**
Employment Agreement	**0.00**	**0.00**	**0.00**	**$ AMOUNT**	**0.00**	**$ AMOUNT**	**$ TOTAL**
Personal Goodwill: (2)	**0.00**	**0.00**	**0.00**	**$AMOUNT**	**$AMOUNT**	**$AMOUNT**	**$TOTAL**
Other Intangibles	**$ AMOUNT**	**$ AMOUNT**	**$ AMOUNT**	**0.00**		**0.00**	**$ TOTAL**
TOTALS	**$TOTAL**	**$TOTAL**	**$TOTAL**	**$TOTAL**	**$TOTAL**	**$TOTAL**	**$TOTAL**

OKLAHOMA TAX COMMISSION

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

NOTE: The distinction between a Commission Order designated as "Precedential" or "Non-Precedential" has been blurred because all OTC Orders resulting from cases heard by the Office of Administrative Law Judges are now published, not just "Precedential" Orders. *See* OKLA. STAT. ANN. tit.68, § 221(G) (West Supp. 2014) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002).

[83] Protestant Exhibit B.