JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2016-06-07-03 / NON-PRECEDENTIAL**
ID: **P-15-168-K**
DATE: **JUNE 7, 2016**
DISPOSITION: **DENIED**
TAX TYPE: **INCOME**
APPEAL: **NONE**

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 10th day of May, 2015, appended hereto, together herewith shall constitute the Order of the Commission.

SO ORDERED

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

NOW on this 10th day of May, 2016, the above styled and numbered cause comes on for decision pursuant to assignment regularly made by the Oklahoma Tax Commission to ALJ, Administrative Law Judge. Protestants, SPOUSE 1 AND SPOUSE 2 appear pro se. The Account Maintenance Division ("Division") of the Oklahoma Tax Commission is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

On or about June 24, 2015, Protestants e-filed amended Oklahoma Resident Income Tax Returns for tax years 2012, 2013 and 2014 claiming the Credit for Employees in the Aerospace Sector and refunds in the amount of $5,025.00[1], $5,000.00 and $5,000.00, respectively. Upon audit, the Division disallowed the credit on each of the returns and by three separate adjustment letters, two (2) dated July 16, 2015, and the other dated July 15, 2015, notified Protestants of the denial of the refunds. Protestants timely protested the notices.

On October 8, 2015, the protest and concomitant records were referred to the Office of Administrative Law Judges to initiate appellate proceedings in accordance with the *Uniform Tax Procedure Code*[2] and the *Rules of Practice and Procedure before the Office of Administrative Law Judges*.[3] The protest was docketed as Case No. P-15-168-K and assigned to ALJ,

[1] A discrepancy of $487.00 exists between the amount of "deductions plus exemptions" as originally reported and as amended. This adjustment was not protested.

[2] 68 O.S. 2011, § 201 et seq., as amended.

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

Administrative Law Judge.[4]

A pre-hearing conference was scheduled for November 19, 2015, by *Prehearing Teleconference Notice* issued October 14, 2015. Pursuant to the conference, a *Prehearing Conference Order and Notice of Hearing* ("*Order*") was issued. The hearing was scheduled for March 17, 2016.

The *Division's Preliminary Witness and Exhibit List* was filed December 9, 2015. On January 26, 2016, Protestants' Witness and Exhibits list was filed. The *Division's Final Witness and Exhibit* List was filed February 3, 2016. The *Division's Motion to Strike Protestants' Exhibit List* was also filed on February 3, 2016. By letter dated February 3, 2016, Protestants were directed to file a response to the Division's motion on or before February 16, 2016. On February 18, 2016, an *Order Granting Division's Motion to Strike Protestants' Exhibit List* was issued.

A *Motion in Limine to Limit Witness Testimony* was filed by the Division on March 4, 2016. By letter dated March 7, 2016, Protestants were directed to file a response on or before March 14, 2016. On March 9, 2016, the *Trial Brief of Plaintiff [Protestants]* was filed. A *Joint Stipulation of Issue and Facts* ("*Joint Stipulation*") was filed March 10, 2016 with Exhibits A through G attached thereto. The *Division's Pretrial Brief* was also filed on March 10, 2016. On March 15, 2016, an *Order Granting Motion in Limine to Limit Witness Testimony* was issued.

An open hearing was held as scheduled.[5] As a preliminary matter, the Court acknowledged the filing of the *Joint Stipulation* and upon inquiry; all parties agreed that all relevant and material documentation regarding the case had been submitted for the Court's consideration. SPOUSE 1 was sworn and gave his statement in support of his claim to the credits. The Division solicited one answer to one question of SPOUSE 1, and stood on its pre-trial brief to support the denial of the credits. The Court directed the parties to file post-trial briefs with respect to whether the credit is being unfairly applied. Upon conclusion of the hearing, the record was closed. The post-trial briefs were filed April 18, 2016. On April 19, 2016, the protest was submitted for decision.[6]

FINDINGS OF FACT

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

A. The parties stipulate in the Statement of Facts to the following[7]:

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

[5] Confidentiality was waived. 68 O.S. 2011, § 205.

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

[7] The references to exhibits supporting the statements are omitted.

1. On or about June 24, 2015, Protestants filed their amended 2012 Oklahoma income tax return, Form 511X and Form 564, claiming the Tax Credit.

2. On or about June 24, 2015, Protestants filed their amended 2013 Oklahoma income tax return, Form 511, Form 511CR, and Form 564, claiming the Tax Credit.

3. On or about June 24, 2015, Protestants filed their amended 2014 Oklahoma income tax return, Form 511, Form 511CR, and Form 564, claiming the Tax Credit.

4. On or about July 15, 2015[8], the Division mailed an adjustment letter to Protestants for tax year 2012. The Division disallowed the Tax Credit and adjusted Protestants' return to reflect the same.

5. On or about July 15, 2015, the Division mailed an adjustment letter to Protestants for tax year 2013. The Division disallowed the Tax Credit and adjusted Protestants' return to reflect the same.

6. On or about July 16, 2015, the Division mailed an adjustment letter to Protestants for tax year 2014. The Division disallowed the Tax Credit and adjusted Protestants' return to reflect the same.

7. On or about August 11, 2015, Protestants timely responded to the adjustment letters via facsimile protesting the disallowance of the Tax Credit for years 2012, 2013, and 2014.

8. Protestant, SPOUSE 1, admits that he graduated from the University of Oklahoma with a Bachelor of Science degree in Mechanical Engineering in May of 1984.[9]

9. Protestant, SPOUSE 1, admits that his date of hire with his current employer, EMPLOYER, was approximately June 6, 1984.

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[8] The mailing date as reflect on the letter is July 16, 2015.

[9] The date of June 24, 2015 reported as Protestant, SPOUSE 1'S graduation date from the University of Oklahoma on Forms 564 for the 2012 and 2013 tax years is a typographical error.

10. Protest is properly before the Administrative Law Judge.

B. Additional facts:

1. Protestant, SPOUSE 1 has worked in the State of Oklahoma throughout his employment. Testimony of SPOUSE 1.

2. The Division concedes that Protestant, SPOUSE 1 is employed by a qualified employer, was not employed in the aerospace sector in Oklahoma prior to employment with his current employer, and was awarded a qualifying degree. *Division's Pretrial Brief*, pp. 4.

3. The amount in controversy is $15,000.00.

ISSUES AND CONTENTIONS

In the Statement of Issue, the parties stipulate that the issue is:

Whether Protestant, SPOUSE 1, qualified as a "qualified employee" as defined under 68 O.S. Supp. 2014, § 2357.301 as claimed on Protestants' income tax returns for years 2012, 2013, and 2014, so that Protestants may claim the Credit for Employees in the Aerospace Sector ("the Tax Credit").

The Division contends that Protestants do not qualify for the Tax Credit because SPOUSE 1 hire date in Oklahoma with EMPLOYER was prior to January 1, 2009, and he was not newly employed in Oklahoma on or after January 1, 2009. In support of these contentions, the Division argues that a qualified employee for purposes of the Tax Credit is clearly either an employee hired on or after January 1, 2009, who was not employed in the aerospace sector as a full-time engineer in Oklahoma immediately preceding said employment, a new engineering graduate hired on as a full-time employee after obtaining a qualifying degree or existing employees of a qualified employer with a hire date prior to January 1, 2009, but beginning employment in Oklahoma on or after January 1, 2009. The Division further argues that to the extent the definition of "qualified employee" is ambiguous, the ambiguity must be resolved in its favor, citing ***Phillips Petroleum Co. v. Oklahoma Tax Commission***, 1975 OK 146, 542 P.2d 1303.

With respect to any alleged unfair application of the Tax Credit, the Division contends that the Oklahoma Tax Commission as an administrative agency is without power to decide the constitutional validity of a tax statute, citing ***Dow Jones & Co., Inc. v. Oklahoma Tax Commission***, 1990 OK 6, ¶ 6, 787 P.2d 843, 845. Notwithstanding, the Division argues that the Tax Credit does not violate the equal protection clause because it applies equally to all taxpayers. In support of this contention, the Division argues that the legislation was enacted to promote

growth in the aerospace industry in Oklahoma and the Tax Credit is reasonably related to achieving said goal. Further, the Division argues the Tax Credit does not discriminate against any taxpayers within the new classification, is neither arbitrary nor capricious, and is applied equally to all within the affected class.

Protestants contend that they qualify for the Tax Credit. In support of this contention, Protestants argue that the changes to the definition of qualified employee, specifically inclusion of the phrase "regardless of date of hire" had an all-encompassing effect, provided that the engineer was working in the aerospace sector on or after January 1, 2009. In support of this argument, Protestants cite the four and five year limitation periods placed on the qualified employer's tuition reimbursement and compensation paid tax credits; respectively, whereas the employee tax credit does not mandate at what point in an employee's career, the credit must be claimed.

Protestants contend that the Division's interpretation of the Tax Credit "possibly violates" the uniformity clause of the Oklahoma Constitution, OK CONST. art. 10, § 5(B). Protestants argue that the language of the definition should be taken at face value for what it actually states and that regardless of the change to the definition, a beginning employment date has never been mandated, rather the only date specified is the date the credit may be claimed.

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, § 207.

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 Protestants' protest thereto are governed by the Aerospace Development Act of 2008[10] of the Oklahoma Income Tax Code[11] ("Act").

3. A taxpayer's income tax liability is determined in accordance with the law in effect at the time the income is received. ***Affiliated Management Corp. v. Oklahoma Tax Commission***, 1977 OK 183, 570 P.2d 335; ***Wootten v. Oklahoma Tax Commission***, 1935 OK 54, 170 Okla. 584, 40 P.2d 762.

4. A credit of up to $5,000.00 per year, but not to exceed five (5) years is allowed against the tax imposed by § 2355 of the Income Tax Code to a qualified employee for taxable years beginning after December 31, 2008. 68 O.S. Supp. 2010, § 2357.304(A).[12] The credit is a

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[10] Sections 2357.301 through 2357.304 of the code, as amended. Added by Laws 2008, c. 417, § 1, eff. Jan. 1, 2009. 2008 Okla.Sess.Laws Ch. 417 (H.B. 3239).

[11] 68 O.S. 2011, § 2351 et seq., as amended.

[12] A moratorium was placed on the allowance of the credit for the time period from July 1, 2010, through June 30, 2012. Laws 2010, c. 327, § 1, eff. July 1, 2010. Amended at

non-refundable credit and, if not used, may be carried over, in order, to each of the five (5) subsequent taxable years. 68 O.S. Supp. 2008, § 2357.304(B) and (C).

5. A "qualified employee" under the Act was originally defined to mean "any person employed by or contracting with a qualified employer on or after January 1, 2009, who has been awarded an undergraduate or graduate degree from a qualified program by an institution, and who was not employed in the aerospace sector in this state immediately preceding employment or contracting with a qualified employer[.]" 68 O.S. Supp. 2008, § 2357.301(5).

6. Pursuant to its authority to facilitate the administration, enforcement and collection of any taxes levied by the tax laws of the State of Oklahoma, the Tax Commission contemporaneous with the enactment of the Act promulgated *OAC* 710:50-15-109 which provides in pertinent part at 710:50-15-109(b)(5):

> "Qualified employee" is any person newly employed by or contracting with a qualified employer on or after January 1, 2009 employed in Oklahoma. Further, the person must have been awarded an undergraduate or graduate degree from a qualified program by an institution. Qualified employees do not included person [sic] employed in the aerospace sector in this state immediately preceding employment or contracting with a qualified employer.

Added at 26 Ok Reg 2330, eff 6-25-09.

7. The Act extends non-refundable income tax credits to a qualified employer beginning after December 31, 2008, "for tuition reimbursed to a qualified employee" and "for compensation paid to a qualified employee". 68 O.S. Supp. 2010, §§ 2357.302(A) and (D), and 2357.303(A) and (D).[13] The employee tuition reimbursement credit is only allowed to the qualified employer "if the qualified employee has been awarded an undergraduate or graduate degree within one (1) year of commencing employment with the qualified employer." 68 O.S. Supp. 2008, § 2357.302(B). The credit is equal to fifty percent (50%) of the tuition reimbursed to a qualified employee for the first through fourth years of employment". 68 O.S. Supp. 2008, § 2357.302(C). No tuition reimbursement credit may be claimed by the qualified employer "after the fourth year of employment." 68 O.S. Supp. 2008, § 2357.302(E).

The credit for compensation paid to a qualified employee is equal to "[t]en percent (10%) of the compensation paid for the first through fifth years of employment in the aerospace sector if the qualified employee graduated from an institution located in [Oklahoma]; or [f]ive percent

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Laws 2011, c. 5, § 3, to provide an end date for the credit of "before January 1, 2015" and lifting the moratorium as of July 1, 2011.

[13] A moratorium was placed on the allowance of the credits for the time period from July 1, 2010, through June 30, 2012. Laws 2010, c. 327, § 1, eff. July 1, 2010. Amended at Laws 2011, c. 5, § 3, to provide an end date for the credit of "before January 1, 2015" and lifting the moratorium as of July 1, 2011.

of the compensation paid for the first through fifth years of employment in the aerospace sector if the qualified employee graduated from an institution located outside [Oklahoma]." 68 O.S. Supp. 2008, § 2357.303(B)(1) and (2). In no event may the credit for compensation paid to a qualified employee be claimed "after the fifth year of employment." 68 O.S. Supp. 2008, § 2357.303(E).

8. In 2014, the aerospace credits were extended through the 2017 tax year and the definition of "qualified employee" was amended to provide (with the amended language underscored) as follows, to-wit:

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

Amended by Laws 2014, c. 30, § 1, eff. Nov. 1, 2014. 2014 Okla.Sess.Laws Ch. 30 (H.B. 2509).

9. Contemporaneous with the statutory amendment of the definition of qualified employee, the Tax Commission amended the language of *OAC* 710:50-15-109(b)(5) to provide as follows, to-wit:

> "Qualified employee" is any person, regardless of the date of hire by the qualified employer, newly employed by or contracting with a qualified employer in Oklahoma on or after January 1, 2009. Further, the person must have been awarded an undergraduate or graduate degree from a qualified program by an institution. Qualified employee does not include a person employed in the aerospace sector in this state immediately preceding employment or contracting with a qualified employer. Qualified employee may include a person who was employed in the aerospace sector, but not as a full-time engineer, prior to being awarded an undergraduate or graduate degree from a qualified program by an institution or any person who has been awarded an undergraduate or graduate degree from a qualified program by an institution and is employed by a professional staffing company and assigned to work in the aerospace sector in this state.

Amended at 32 Ok Reg 1354, eff 8-27-15.

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. When the words of a statute are plain and unambiguous, no occasion exists to employ the rules of construction, and the statute will be accorded its clear and definite meaning. *Id*.

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

In resolving an ambiguity in a statute, courts will look to the various provisions of the relevant legislative scheme to ascertain and give effect to the legislative intent and the public policy underlying that intent. ***Wilhoit v. State***, 2009 OK 83, 226 P.3d 682, corrected. In the interpretation of statutes, courts do not limit their consideration to a single word or phrase in isolation to attempt to determine their meaning, but construe together the various provisions of relevant legislative enactments to ascertain and give effect to the legislature's intention and will, and attempt to avoid unnatural and absurd consequences. ***Tull v. Commissioners of Dept. of Public Safety***, 2008 OK CIV APP 10, 176 P.3d 1227. It is important in construing the Legislative intent behind a word in a statute to consider the whole act in light of its general purpose and objective, considering relevant portions together to give full force and effect to each. ***Estes v. ConocoPhillips Co.***, 2008 OK 21, 184 P.3d 518. The words of a statute will be given their plain and ordinary meaning unless it is contrary to the purpose and intent of the statute when considered as a whole. ***Stump v. Check***, 2007 OK 97, 179 P.3d 606. The subject matter and purpose of a statute are material to ascertaining the meaning of a word or phrase used and that language should be construed to be harmonious with the purpose of the act, rather than in a way which will defeat it. ***Tull***, *supra*. Statutes are interpreted to attain that purpose and end championing the broad public policy purposes underlying them. ***Keating v. Edmondson***, 2001 OK 110, ¶ 8, 37 P.3d 882 (citations omitted).

11. 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.

12. "Statutes exempting property from taxation are to be strictly construed against the claimant." ***American Airlines, Inc. v. Oklahoma Tax Commission***, 2014 OK 95, ¶ 30, 341 P.3d

56, 64, citing *Blitz U.S.A., Inc. v. Oklahoma Tax Commission*, 2003 OK 50, ¶ 14, 75 P.3d 883, 888. "Claims of exemption must be by express grant." *Id.*, citing *In re Noble's Estate*, 1938 OK 324, ¶ 7, 183 Okla. 148, 80 P.2d 243, 245. "An exemption cannot exist by implication and a doubt is fatal to the claim of exemption." *Id.*, citing *Oklahoma City v. Shields*, 1908 OK 195, ¶ 10, 22 Okla. 265, 100 P. 559

Tax exemption, deductions, and credits depend entirely on legislative grace and are strictly construed against the exemption, deduction or credit. ***TPQ Investment Corporation v. Oklahoma Tax Commission***, 1998 OK 13, ¶ 8, 954 P.2d 139, 141. In order to be allowed, authority for the deduction 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).

"The rule of strict construction comes into play only when the language, after analysis and subjection to the ordinary rules of interpretation, presents ambiguity." ***Colcord v. Granzow***, 1928 OK 211, ¶ 18, 137 Okla. 194, 278 P.2d 654, 660, citing *Ruling Case Law*, Volume 25, p. 1076. "Tax exemptions must be construed sensibly in order to give effect to the governing legislative scheme." ***American Airlines***, *supra* at ¶ 31, citing *Blitz*, *supra* at ¶ 16.

13. Whether language of statute is ambiguous presents questions of law. ***YDF, Inc.***, *supra*; ***State ex rel. Oklahoma Tax Commission v. Sun Co., Inc.,*** 2009 OK 11, 222 P.3d 1046.

14. Rules promulgated pursuant to the Administrative Procedures Act[14] are presumed to be valid until declared otherwise by a court of competent jurisdiction. 75 O.S. 2011, § 306(C). They are valid and binding on the persons they affect, have the force of law and are prima facie evidence of the proper interpretation of the matter to which they refer. 75 O.S. 2011, § 308.2(C). The legislature is deemed to have adopted an administrative construction of a statute when, subsequent to such construction, it amends the statute or reenacts it without overriding such construction. ***Branch Trucking Co. v. Oklahoma Tax Commission***, 1990 OK 41, 801 P.2d 686.

The rules and regulations of an administrative agency which implement the provisions of a statute are valid unless they are beyond the scope of the statute, are in conflict with the statute or are unreasonable. See, ***Arkansas Louisiana Gas Co. v. Travis***, 1984 OK 33, 682 P.2d 225; ***Boydston v. State***, 1954 OK 327, 277 P.2d 138. Agency rules need not be specifically authorized by statute, but must generally reflect the intent of the Legislature as expressed in the statute. ***Jarboe Sales Company v. Oklahoma Alcoholic Beverage Laws Enforcement Commission***, 2003 OK CIV APP 23, 65 P.3d 289. As a general rule, it is presumed that administrative rules and regulations are fair and reasonable and that the complaining party has the burden of proving the contrary by competent and convincing evidence. ***State ex rel. Hart v. Parham***, 1966 OK 9, 412 P.2d 142.

Great weight is accorded an agency's construction of a statute when the administrative interpretation is made contemporaneously with the enactment of the statute and the construction is longstanding and continuous by the agency charge with its execution. ***Schulte Oil Co., Inc. v.***

[14] 75 O.S. 2011, § 250 et seq., § 301 et seq.

Oklahoma Tax Commission, 1994 OK 103, 882 P.2d 65. 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's silence may be regarded as acquiescence in the agency's construction, ***R.R. Tway, Inc. v. Oklahoma Tax Commission***, 1995 OK 129, 910 P.2d 972; and the agency's construction is given controlling weight and will not be disregarded except in cases of serious doubt, ***Cox v. Dawson***, 1996 OK 11, 911 P.2d 272.

15. The informal interpretations of a statute by the administrative agency charged with its implementation and enforcement are not entitled to deference, but are of assistance in ascertaining the purpose, policy, and meaning of a statute. ***Laws v. State ex rel. Oklahoma Dept. of Human Services***, 2003 OK CIV APP 97, 81 P.3d 78, certiorari denied. To have persuasive value, the administrative interpretation must be reasonable and not clearly wrong. ***Keating***, *supra* at ¶ 15.

The Oklahoma Aeronautics Commission, the agency charged with promoting and developing the aerospace industry in Oklahoma, provides information concerning the aerospace income tax credits.[15] The interpretations advanced by the Aeronautics Commission are similar to informal interpretations or program statements, and while the interpretations are not entitled to deference, they may be considered to the extent that the same are well-reasoned and have power to persuade. ***Hunnicutt v. Hawk***, 229 F.3d 997 (C.A. 10th, Okla. 2000).

In the frequently asked questions section to the Aeronautics Commission's website, the Commission in part opines that "[a] 'qualified employee' is any person hired by or contracting with a 'qualified employer' after December 31, 2008" in response to the question "[w]ho qualifies for these tax credits". Further, in the summary to HB 3239 Engineer Workforce Bill the Commission writes in part:

> *Growing, retaining and attracting an engineering workforce to support Oklahoma's largest industrial sector -- aerospace.*
>
> **The Problem**
>
> Oklahoma's aerospace sector is facing a critical shortage of engineering and technical talent. This lack of technical workers places the state's aerospace sector, private and public, at a competitive disadvantage when attempting to secure commercial and government contracts.
>
> **The Need**
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> Today, the global aerospace industry is undergoing record expansion. This expansion provides a 'window of opportunity' for state firms to win long-term contracts that will be sustained for many years to come.
>
> Engineering capability is of paramount importance to securing these contracts.
>
> There is a critical and immediate need for the state to provide a bold,

[15] http://www.ok.gov/OAC/Aerospace_Industry/index.html.

> innovative and audacious solution for this pressing issue.
>
> **The Solution**
>
> HB 3239 addressed this Critical Need by providing the following incentives, effective January 1, 2009:
>
> > Tax credits to engineering graduates who agree to work for an Oklahoma aerospace company, not to exceed $5,000 per year for the first 1-5 years of employment. Encourages engineers to go to work for aerospace companies in Oklahoma.
> >
> > Tax Credits to aerospace companies that hire engineers. Encourages aerospace companies to hire engineers in Oklahoma and to relocate their engineering services in Oklahoma.
>
> **The Result**
>
> The expected result from this legislation will be an enhanced ability to grow Oklahoma's intellectual capital base; job creation; sustainable economic development; protection of our largest industrial sector, the aerospace industry; and positive national and international attention from the aerospace community.

(Emphasis original).

16. Every statute is deemed constitutionally valid until a court of competent jurisdiction declares otherwise. ***State ex rel York v. Turpen***, 1984 OK 26, ¶ 10, 681 P.2d 763, 767. The Tax Commission is not empowered to decide the constitutional validity of a taxing statute. ***Dow Jones & Company, Inc. v. Oklahoma Tax Commission***, 1990 OK 6, 787 P.2d 843, 845. However, the Tax Commission is vested with the power under OK CONST. art. 7, § 1 to resolve, on a case-by-case basis, questions regarding the constitutional or unconstitutional application of a statute to a particular party in a proceeding before it with the decision binding only on the parties to the case. ***Robinson v. Fairview Fellowship Home for Senior Citizens, Inc.***, 2016 OK 42, ¶ 12, ___ P.3d ___.

17. "Taxes shall be uniform upon the same class of subjects." OK CONST. art. 10, § 5(B). The uniformity clause is applicable to property taxes only and not to privilege taxes. ***Matter of Gross Production and Petroleum Excise Tax Protest of Arkla, Inc.***, 1996 OK CIV APP 5, 919 P.2d 1151; ***Flint Resources, Inc. v. Oklahoma Tax Commission***, 1989 OK 9, 780 P.2d 665, 672; ***Johnston v. Oklahoma Tax Commission***, 1972 OK 88, 497 P.2d 1295, 1298. An income tax is a tax on income, not a property tax or tax on source of income. ***Canary v. Oklahoma Tax Commission***, 1956 OK 92, 295 P.2d 281. "'Income taxes' are direct taxes on income for a specific period of time." ***Twin Hills Golf & Country Club, Inc. v. Town of Forest Park***, 2005 OK 71, ¶ 12, 123 P.3d 5, 8.

18. The Legislature, through tax statutes may "classify persons and the origin of their incomes, and may apportion deductions or exemptions". ***Fent v. Oklahoma Tax Commission***, 2004 OK 59, ¶ 9, 99 P.3d 241, 245, rehearing denied, citing *Walker v. Oklahoma Tax Commission*, 1945 OK 264, 164 P.2d 242, 243. The classifications and apportionment must be reasonable, relate to the object of taxation, and be designed to operate with reasonable uniformity

or equality on the classes created. *Id*., citing *McCutchan v. Oklahoma Tax Commission*, 1942 OK 416, 132 P.2d 337, 339. Large leeway is afforded states in making classifications for income tax purposes and drawing lines under their system of taxation, and the fact that it may favor a certain class does not demonstrate the arbitrary nature of the distinction if the distinction is reasonable or based on a difference in state policy. ***Oklahoma Tax Commission v. Smith***, 1980 OK 74, ¶ 14, 610 P.2d 794, 805. A state may select its subjects of taxation and classify them, taxing one subject or class and exempting other subjects or classes. ***Fent***, *supra* at ¶ 10, citing *In re Assessment of Sales Tax Against Knapp*, 1939 OK 428, 95 P.2d 92, 93-94.

The equal protection clause requires only that a classification rationally relate to a legitimate state interest. ***EOG Resources Marketing, Inc. v. Oklahoma State Board of Equalization***, 2008 OK 95, ¶ 34, 196 P.3d 511, 525. Unless a classification jeopardizes the exercise of a fundamental right or is based on an inherently suspect characteristic, a classification which rationally furthers a legitimate state interest will withstand an equal protection challenge. ***Oklahoma Association for Equitable Taxation v. City of Oklahoma City***, 1995 OK 62, 901 P.2d 800, 806. A tax classification is invalid only if it discriminates between persons or property in like situations, or is arbitrary, illusory or has no fair or substantial relation to the purpose for which it is made. ***Fent***, *supra* at ¶ 18, citing *Suglove v. Oklahoma Tax Commission*, 1979 OK 168, 605 P.2d 1315, 1320.

Classifications made by the legislature are presumed to be valid and constitutional. ***Fent***, *supra* at ¶ 10, citing *Knapp*, *supra* at 94, citing *In Re Gross Production Tax Of Wolverine Oil Co.*, 53 Okla. 24, 154 P. 362, 367. "In cases where the constitutionality of a state tax statute is at issue, the taxpayer bears the heavy burden of proving the statute is unconstitutional." ***CDR Systems Corporation v. Oklahoma Tax Commission***, 2014 OK 31, ¶ 10, 339 P.3d 848, 852, citing *EOG Marketing*, *supra* at ¶ 13. An equal protection challenge to an income tax statute shall be decided in reference to the general classification, rather than by the chance incidents of the tax in a particular situation on a certain taxpayer, for inequalities that result not from hostile discrimination but occasionally in the application of a system that is not arbitrary will not invalidate the act. ***Smith***, *supra* at ¶ 15. "Every presumption is to be indulged in favor of the constitutionality of a statute." *CDR, supra at ¶ 10*, citing *Thomas v. Henry*, 2011 OK 53, ¶ 8, 260 P.3d 1251, 1254.

19. In administrative proceedings, the burden of proof is on the taxpayer to show in what respect the action or proposed action of the Tax Commission is incorrect. *OAC* 710:1-5-47; ***In re Adway Properties, Inc.***, 2006 OK CIV APP 14, 130 P.3d 302; ***Geoffrey, Inc. v. Oklahoma Tax Commission***, 2006 OK CIV APP 27, 132 P.3d 632. Failure to provide evidence which is sufficient to show an adjustment to the action of the Division is warranted will result in the denial of the protest. ***Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission***, 1988 OK 91, 768 P.2d 359, 362, citing *Continental Oil Co. v. Oklahoma State Bd. of Equalization*, 1976 OK 23, 570 P.2d 315, 317.

ANALYSIS

1. The version of the definition of "qualified employee" prompting Protestants to claim the credit is not applicable to the 2012 and 2013 tax years. A taxpayer's income tax liability is determined in accordance with the law in effect at the time the income is received. Conclusions of Law, ¶ 3. The definition was amended in 2014 with an effective date of November 1, 2014. Accordingly, the amendment to the definition is applicable to the 2014 tax year and subsequent tax years.

2. With respect to the 2008 version of the definition of "qualified employee" which is applicable to the 2012 and 2103 tax years, the Tax Commission has determined that a degreed engineer hired by a qualified employer prior to January 1, 2009 is not a "qualified employee". Oklahoma Tax Commission Order No. 2012 08 28 05. In that case, the Commission concluded that the definition of "qualified employee" was ambiguous given the fact that the word "employ" had more than one accepted meaning by definition. The Commission construed the word "employed" as used in the definition to mean "hired"; citing with approval, conformity with the Oklahoma Aeronautics Commission website as to who qualifies for the credit, the public policy or purpose of the Act as being contrary to an all-encompassing definition and its own rule which had been in effect for three regular sessions of the Legislature at the time and no action had been taken to repeal the rule.

3. With respect to the 2014 version of the definition, the Tax Commission has determined that a degreed engineer hired by a qualified employer in the aerospace sector of Oklahoma prior to January 1, 2009 is not a "qualified employee". Oklahoma Tax Commission Order No. 2015 03 05 04. In that case, the Commission concluded that the legislative purpose of the amendment is clear when read in context and allows an employee working for or contracting with a qualified employer in a state other than Oklahoma to claim the credit as a qualified employee on or after January 1, 2009, when employed in the Oklahoma aerospace sector. This conclusion is buttressed by the predicate implied by the second sentence of the amended definition of qualified employee. The implication is when could a non-full-time engineer have been employed in the aerospace sector or an engineer have been assigned to work in the aerospace sector in this state and not be excluded from the definition. The only date referenced in the definition is "on or after January 1, 2009". Accordingly, a person could have been employed in the aerospace sector prior to January 1, 2009, but not as a full-time engineer and still qualify for the credit after obtaining the required degree. Similarly, an engineer could be assigned to work in the aerospace sector in this state on or after January 1, 2009, and not be excluded from the definition. However, any person employed in the aerospace sector in this state as a full-time engineer prior to January 1, 2009, is excluded from the definition.

4. Protestants contend that the Tax Credit is all-encompassing as long as you are working as an engineer in the aerospace sector after January 1, 2009, and that the Tax Commission's application of the credit to only those engineers hired in the aerospace sector in Oklahoma on or after January 1, 2009, is discriminatory.

Taxation is an exclusively legislative function that can be exercised only under statutory authority and in the manner specified by statute. ***Grasso v. Oklahoma Tax Commission***, 2011

OK CIV APP 37, ¶ 21, 249 P.3d 1258, 1263; Conclusions of Law, ¶ 2. The Legislature has the power to create the Tax Credit. ***Smith***, *supra* at ¶ 15. The Tax Commission is the Executive branch agency charged by the Legislature with the implementation, administration and enforcement of the revenue laws, inclusive of the income tax code. 68 O.S. 2011, § 203.

The Division has applied the law in accordance with the literal language of the Tax Credit. The Division's application of the law is in conformity with the Oklahoma Aeronautics Commission observation of who is entitled to the credit and presumably the public policy of the Tax Credit since no action has been taken to repeal *OAC* 710:50-15-109(b)(5). Protestants have failed to prove the Division's application of the Tax Credit is unconstitutional.

RECOMMENDATION

Based on the above and foregoing findings of fact and conclusions of law, it is recommended that the income tax protest of Protestants, SPOUSE 1 and SPOUSE 2 be denied.

OKLAHOMA TAX COMMISSION

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

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