JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2016-11-22-07 / NON-PRECEDENTIAL**
ID: **P-16-083-K**
DATE: **NOVEMBER 22, 2016**
DISPOSITION: **DENIED**
TAX TYPE: **INCOME / AEROSPACE CREDIT**
APPEAL: **NONE TAKEN**

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 18TH day of October, 2016, appended hereto, together herewith shall constitute the Order of the Commission.

SO ORDERED

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

NOW on this 18th day of October, 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, TAXPAYER and SPOUSE appear pro se. The Compliance Division ("Division") of the Oklahoma Tax Commission is represented by OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

On or about July 9, 2015, Protestants filed amended Oklahoma income tax returns for tax years 2013 and 2014 claiming the Credit for Employees in the Aerospace Sector and refunds in the amounts of $OMITTED and $OMITTED, respectively. The returns auto-processed and the refunds were paid. Upon audit, the Division disallowed the credits and by separate adjustment letters dated April 4 and May 23, 2016, proposed the assessment of additional income taxes, interest and penalties against Protestants in the aggregate amounts of $OMITTED for the 2013

tax year and $OMITTED for the 2014 tax year. Protestants timely protested the proposed assessments.

On May 31 and June 17, 2016, the protests and concomitant records of the Division were referred to the Office of Administrative Law Judges to initiate appellate proceedings under the Uniform Tax Procedure Code[1] and the Rules of Practice and Procedure before the Office of Administrative Law Judges.[2] The protests were docketed as Case No. P-16-083-K and assigned to ALJ, Administrative Law Judge.[3]

A pre-hearing conference was scheduled for July 28, 2016, by Prehearing Teleconference Notice issued June 7, 2016. Pursuant to the conference, a hearing was scheduled for October 6, 2016, by Notice of Hearing issued July 29, 2016.

An open hearing was held as scheduled.[4] AUDITOR, Auditor II testified in regard to the audit of the returns and the reasons for denying the credits. TAXPAYER gave a statement to support his claim to the credits. The Division solicited two answers from TAXPAYER, and stood on its pre-trial brief to support the denial of the credits. Upon conclusion of the hearing, the record was closed and the protest was submitted for decision.[5]

FINDINGS OF FACT

Upon review of the file and records, including digital recording of the hearing and the exhibits, the undersigned finds:

1. Protestant, TAXPAYER graduated from the University Federal De Minas Gerais in December, 1977 with a degree in Mechanical Engineering. Exhibit G.

2. In November, 2012, Protestant began employment with COMPANY in Oklahoma. Exhibits A and B.

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

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

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

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

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

3. The University Federal De Minas Gerais in the country of Brazil was not an accredited program by the Engineering Accreditation Commission of the Accreditation Board of Engineering and Technology (ABET) in 1977 when Protestant graduated, nor has the University ever received accreditation by ABET as confirmed by a search of ABET's records by college name and accredited Brazilian colleges. Testimony of Auditor.

4. On or about July 9, 2015, Protestants filed amended Oklahoma income tax returns for tax years 2013 and 2014 claiming the Credit for Employees in the Aerospace Sector and refunds in the amounts of $OMITTED and $OMITTED, respectively. Exhibits A and B.

5. The returns auto-processed and the refunds were paid. Exhibits C and D.

6. Upon audit of the returns, the Division disallowed the credits and by separate adjustment letters dated April 4 and May 23, 2016, proposed the assessment of additional income taxes, interest and penalties against Protestants as follows, to-wit:

2013 Tax Year

Additional Tax Due:	$OMITTED
Interest @ 15% to 7/22/2016:	988.14
Tax and Interest due within 60 days:	$OMITTED
30 Day Delinquent Penalty @ 10%:	292.00
Tax, Interest & Penalty if paid after 60 days:	$OMITTED

2014 Tax Year

Additional Tax Due:	$OMITTED
Interest @ 15% to 7/22/2016:	$OMITTED
Tax and Interest due within 60 days:	$OMITTED
30 Day Delinquent Penalty @ 10%:	$OMITTED
Tax, Interest & Penalty if paid after 60 days:	$OMITTED

Exhibits C and D.

7. Protestants timely protested the proposed assessments. Exhibits E and F.

ISSUES AND CONTENTIONS

The issue presented for decision is whether Protestant, TAXPAYER is a "qualified employee" as defined under 68 O.S., § 2357.301 and eligible for the Credit for Employees in the Aerospace Sector ("Tax Credit") as claimed on their amended returns for tax years 2013 and

2014.

The Division contends that Protestants are not eligible to claim the Tax Credits. To support this contention, the Division argues that Protestants failed to show the program for TAXPAYER degree was accredited by the Engineering Accreditation Commission of the Accreditation Board of Engineering and Technology (ABET).

Protestants contend that the Tax Credits should be allowed. To support this contention, Protestants argue that the Tax Commission after review of the submitted information accepted the amended returns and granted the Tax Credits.

CONCLUSIONS OF LAW

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

2. "Taxation is an exclusively legislative function that can be exercised only under statutory authority and in the manner specified by statute." State, ex rel. Oklahoma Tax Commission v. Texaco Exploration & Production, Inc., 2005 OK 52, ¶ 7, 131 P.3d 705, 707. The basis for the Division's action and Protestants' protest thereto are governed by the Aerospace Development Act[6] of the Oklahoma Income Tax Code[7] ("Act").

3. A taxpayer's income tax liability is determined under 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).[8] The credit is a

[6] 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).

[7] 68 O.S. 2011, § 2351 et seq., as amended.

[8] 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 Laws 2011, c. 5, § 3, to provide an end date for the credit of "before January 1, 2015" and

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. 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).

7. Both the 2008 and 2014 definitions of "qualified employee" require the award to the employee of "an undergraduate or graduate degree from a qualified program by an institution". A "qualified program" under the Tax Credit is "a program that has been accredited by the Engineering Accreditation Commission of the Accreditation Board of Engineering and Technology (ABET)". 68 O.S. 2011, § 2357.301(6). An "institution" under the Tax Credit is "an institution within the Oklahoma State System of Higher Education or any other public or

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lifting the moratorium as of July 1, 2011.

private college or university that is accredited by a national accrediting body". 68 O.S. 2011, § 2357.301(3).

8. 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 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.

9. Tax statutes are penal . 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 regarding 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.

10. "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. 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.

11. 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.

12. Estoppel generally does not apply against the state acting in its sovereign capacity because of unauthorized acts of its officers, State ex rel. Cartwright v. Dunbar, 1980 OK 15, 618 P.2d 900; or because of mistakes or errors of its employees, State ex rel. Cartwright v. Tidmore, 1983 OK 116, 674 P.2d 14; State ex rel. Oklahoma Tax Commission v. Emery, 1982 OK CIV APP 13, 645 P.2d 1048. Application of estoppel is not allowed against state, political subdivisions, or agencies, unless the facts and circumstances implicate the interposition of estoppel would further some prevailing principal of public policy or interest. Tice v. Pennington, 2001 OK CIV APP 95, 30 P.3d 1164; Burdick v. Independent School District, 1985 OK 49, 702 P.2d 48, 26 Ed. Law Rep. 486. Where there is no power to act, a public official cannot bind a government entity even if he or she mistakenly or falsely asserts such authority. Hiland Dairy Foods Company, LLC. v. Oklahoma Tax Commission, 2006 OK CIV APP 68, ¶ 11, 136 P.3d

1072, citing Indiana Nat'l Bank v. State Dept. of Human Services, 1993 OK 101, 857 P.2d 53, 64.

13. 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 will 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. A taxpayer's income tax liability is determined under the law in effect at the time the income is received. Conclusions of Law, ¶ 3. The 2008 language of the definition of "qualified employee" applies to the 2013 tax year and the 2014 language of the definition applies to the 2014 tax year.

2. Both definitions using the same language require the employee to have an undergraduate or graduate degree from a qualified program of an institution. A qualified program is a program accredited by ABET.

3. Protestants failed to offer any evidence to show the mechanical engineering degree received from the University Federal De Minas Gerais is a program accredited by ABET.

4. Protestants contend that the Tax Credits should be allowed because the Tax Commission after review of the submitted information accepted the amended returns and granted the Tax Credits. The Tax Credit may not be extended by equitable considerations to include persons not clearly within the language of the credit. Conclusion of Law, ¶ 9. Estoppel does not apply against the state because of mistakes or errors of its employees. Conclusion of Law, ¶ 12. Further, upon disclosure from any source other than the return, the Tax Commission is not

precluded from making further adjustment, correction or assessment of a return. 68 O.S. 2011, § 221(B).

RECOMMENDATION

Based on the above and foregoing findings of fact and conclusions of law, the income tax protest of Protestants, TAXPAYER and SPOUSE should 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 2014) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002).