

**JURISDICTION:** OKLAHOMA TAX COMMISSION  
**CITE:** 2019-01-08-35 / NON-PRECEDENTIAL  
**ID:** P-18-011-K  
**DATE:** JANUARY 8, 2019  
**DISPOSITION:** DENIED  
**TAX TYPE:** INCOME/AEROSPACE CREDIT  
**APPEAL:** NONE

### **ORDER**

This comes on before the Oklahoma Tax Commission pursuant to regular assignment on the Agenda. The Commission, having reviewed the facts and authorities presented and being fully advised in the premises, finds and orders that the Application for Oral Argument Before the Oklahoma Tax Commission En Banc is hereby denied. Having reviewed the files and records herein, the Commission hereby adopts the Findings of Fact, Conclusions of Law and Recommendation made and entered by the Administrative Law Judge on the 18th day of november, 2018, and the same, appended hereto, together herewith shall constitute the Order of the Commission.

### **SO ORDERED**

#### **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION**

NOW on this 18<sup>th</sup> day of November, 2018, the above styled and numbered cause comes on for decision under assignment regularly made by the Oklahoma Tax Commission to ALJ, Administrative Law Judge. Protestants, TAXPAYER and SPOUSE are represented by ATTORNEY, Attorney at Law. The Account Maintenance Division of the Oklahoma Tax Commission (“Division”) is represented by AGC, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

#### **STATEMENT OF THE CASE**

Protestants filed an amended Oklahoma Nonresident/Part Year Income Tax Return for the 2015 tax year claiming the \$5,000.00 Credit for Employees in the Aerospace Sector (“Tax

Credit”) and a refund of \$4,039.00.<sup>1</sup> Protestants also filed an amended Oklahoma Resident Income Tax Return for the 2016 tax year claiming a carryforward of the unused portion of the Tax Credit from the 2015 tax year and a refund of \$829.00. Upon audit of the returns, the Division disallowed the Tax Credits and by letters dated September 13, 2017, notified Protestants that the refund for 2015 had been adjusted to zero and the returns of income for 2016 had been adjusted resulting in the assessment of income tax of \$5,661.00.<sup>2</sup> Protestants timely protested the proposed adjustments by letter dated November 8, 2017.

On January 24, 2018, the protest and Division records were referred to the Office of Administrative Law Judges to initiate proceedings under the *Uniform Tax Procedure Code*<sup>3</sup> and the *Rules of Practice and Procedure before the Office of Administrative Law Judges*.<sup>4</sup> The protest was docketed as Case No. P-18-011-K.

A pre-hearing teleconference was scheduled for March 29, 2018. A *Status Report in Lieu of Prehearing Conference* was filed requesting additional time for discussion. By letter dated March 29, 2018, the parties were instructed to file a status report by April 30, 2018. As directed, several status reports were timely filed.

By *Status Report* filed July 2, 2018, the parties announced they could not resolve the issues and agreed to prepare a joint proposed scheduling order. A *Scheduling Order* adopting the *Joint Proposed Scheduling Order* filed by the parties issued August 2, 2018. The *Scheduling Order* set a date for hearing of November 15, 2018.

The Division filed a *Motion in Limine to Limit Witness Testimony* (“*Motion*”) on October 22, 2018. As instructed, *Protestants’ Response to Motion in Limine to Limit Witness Testimony* was filed November 1, 2018. The parties also filed pre-trial briefs and a *Joint Stipulation of*

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<sup>1</sup> Protestants had not claimed the Tax Credit on the original or any previously filed amended returns. Joint Exhibits 1 and 3.

<sup>2</sup> The returns of income for the 2016 tax year auto-processed allowing refunds of the tax reported due. Joint Exhibits 2 and 4.

<sup>3</sup> 68 O.S. 2011, § 201 et seq., as amended.

<sup>4</sup> Rules 710:1-5-20 through 710:1-5-49 of the *Oklahoma Administrative Code* (“OAC”).

*Issue and Facts* (“*Joint Stipulation*”) on November 1, 2018. An *Order Granting Motion in Limine* issued November 9, 2018.

The hearing was held as scheduled. As a preliminary matter, the *Joint Stipulation* and Joint Exhibit 1 through 11 were admitted by stipulation. SPOUSE testified regarding her education, employment experiences and qualification for the Tax Credit. Protestants’ Exhibit A was identified, offered and admitted into evidence. AUDITOR, Auditor testified regarding the audit, records reviewed and the reasons for denying the Tax Credit. Upon conclusion of closing statements, the record closed and the protest submitted for decision.<sup>5</sup>

### FINDINGS OF FACT

Upon review of the file and records, including the digital recording of the hearing, the *Joint Stipulation*, the joint exhibits and the parties’ pleadings, the undersigned finds:

A. The parties stipulate to the following:<sup>6</sup>

1. On or about July 10, 2017, Protestants filed an amended 2015 Form 511-NR Oklahoma Nonresident/Part-Year Income Tax Return (“2015 Return”) claiming the Aerospace Credit.

2. On or about June 30, 2017, Protestants filed an amended 2016 Form 511 Oklahoma Resident Income Tax Return (“2016 Return”) claiming the Aerospace Credit.

3. By letter dated September 13, 2017, the Division adjusted the Protestants [sic] 2015 Return to disallow the Aerospace Credit.

4. By letter dated September 13, 2017, the Division adjusted the Protestants [sic] 2016 Return to disallow the Aerospace Credit.

5. On November 8, 2017, the Protestants mailed a letter (“Protest Letter”) to the Division protesting the adjustments to the 2015 and 2016 Returns.

6. On December 4, 2017, the Protestants mailed another letter (“Supplemental Protest Letter”) to the Division in response to a billing coupon sent to Protestants for the 2016 tax year. The Supplemental Protest letter [sic] clarified that the Protest Letter disputed adjustments to both the 2015 and 2016 Returns.

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<sup>5</sup> OAC 710:1-5-39(a).

<sup>6</sup> References to exhibits in support of the statements are omitted.

7. Protestant, SPOUSE, received a Master of Science degree in Metallurgy and Materials Engineering from the University of Connecticut on May 7, 2005.

8. Protestants' 2015 Return reflects that SPOUSE began employment in Oklahoma with Boeing on July 10, 2015.

9. Boeing meets the definition of a "qualified employer" under 68 O.S. Supp. 2014, § 2357.301(4).

B. Additional findings:

1. The University of Connecticut's metallurgical sciences courses were initially taught as a sub-unit within the Mechanical Engineering Department and later the Chemical Engineering Department. <https://www.engr.uconn.edu/brief-history/>.

2. In 1967, the subject was awarded its own department and offered a graduate curriculum and an undergraduate dual degree option pairing metallurgy with other engineering disciplines. *Id.*

3. The current title of the Metallurgy and Materials Engineering program at the University of Connecticut is Materials Science and Engineering. Joint Exhibit 11.

4. The Materials Science and Engineering program was reviewed by the Engineering Accreditation Commission of the Accreditation Board for Engineering and Technology ("ABET") in 2007 and accreditation was awarded, retroactively, from October, 2005 to present. Joint Exhibits 8, 10 and 11.

5. The Materials Science and Engineering program at the University of Connecticut is accredited at the Bachelors level only. Joint Exhibits 8, 9 and 10.

### ISSUES AND CONTENTIONS

The issue presented for decision as stipulated by the parties is "[w]hether Protestant, SPOUSE, qualifies as a 'Qualified Employee' as defined under 68 O.S. Supp. 2014, § 2357.301(5) as claimed on Protestants' income tax returns for 2015 and 2016, so that Protestants may claim the Credit for Employees in the Aerospace Sector ('the Tax Credit')."

The Division contends that Protestants are not eligible to claim the Credit, because SPOUSE is not a "qualified employee". In support, the Division argues that the degree awarded

to SPOUSE was not from a “qualified program”; first, because SPOUSE received a Masters degree, and second, because SPOUSE’S degree was awarded prior to ABET accreditation.

Protestants contend that the Credit should be allowed. In support, Protestants argue that the degree programs in Material Sciences and Engineering at the University of Connecticut have been accredited by ABET and the accredited programs award bachelors and master degrees. Protestants further argue that the area of study (metallurgical sciences) was previously a sub-unit of the Chemical Engineering Department and that department has been accredited by ABET from 1964 to present.

### CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter of law:

#### I. JURISDICTION AND BURDEN OF PROOF

1. Jurisdiction of the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S. 2011, §§ 207(c) and 221(D).<sup>7</sup>

2. The taxpayer has the burden of proof to show the action or proposed action of the Oklahoma Tax Commission is incorrect, and in what respect. *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. If the taxpayer fails to prove a prima facie case, the protest may be denied solely on the grounds of failure to prove sufficient facts which would entitle the taxpayer to the requested relief. *OAC 710:1-5-47; 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.

3. The burden of proof standard is “preponderance of evidence.” 2 Am.Jur.2d *Administrative Law* § 357. “Preponderance of evidence” means “[e]vidence which is of greater weight or more convincing than the evidence offered in opposition to it; that is, evidence which as a

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<sup>7</sup> Although the audit of Protestants’ Oklahoma income tax returns resulted in an adjustment to each of the returns, the adjustment to the 2015 returns did not result in the assessment of tax, whereas the adjustment to the 2016 return resulted in the assessment of income tax and therefore, different applicable jurisdictional provisions.

whole shows the fact sought to be proved is more probable than not \* \* \* evidence which is more credible and convincing to the mind \* \* \* that which best accords with reason and probability.” BLACK’S LAW DICTIONARY 1064 (5<sup>th</sup> ed. 1979). Each element of the claim must be supported by reliable, probative, and substantial evidence of sufficient quality and quantity as to show the existence of the facts supporting the claim are more probable than their nonexistence. 2 Am.Jur.2d *Administrative Law* § 357.

4. An order of the Tax Commission must be supported by substantial evidence. *Dugger v. State ex rel. Oklahoma Tax Commission*, 1992 OK 105, 834 P.2d 964. Likewise, the audit upon which a portion of the record is formed and order issued, must be supported by substantial evidence. Oklahoma Tax Commission Order No. 2003-07-22-09, 2003 WL 2347117.

5. An audit is supported by substantial evidence when an evidentiary foundation for the audit has been established. Usually the evidentiary foundation will be established by the records reviewed by the auditor. Where an evidentiary foundation has been established, the taxpayer must prove the action of the Tax Commission in assessing the tax is incorrect, and in what respect. *OAC* 710:1-5-47; *Enterprise Management Consultants, Inc.*, supra. However, where an evidentiary foundation has not been laid or the records upon which the audit is based establish no basis for assessing a tax, the audit and assessment in the initial instance cannot be sustained as supported by substantial evidence. *Dugger*, supra.

## II. AEROSPACE EMPLOYEE INCOME TAX CREDIT

1. “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 the protest thereto are governed by the Aerospace Development Act (“Act”)<sup>8</sup> and Oklahoma Income Tax Code (“Code”)<sup>9</sup>.

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<sup>8</sup> 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).

<sup>9</sup> 68 O.S. 2011, § 2351 et seq., as amended.

2. 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 Code to a qualified employee for taxable years beginning after December 31, 2008. 68 O.S. Supp. 2014, § 2357.304(A).<sup>10</sup> The Tax Credit is a 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. 2014, § 2357.304(B) and (C).

3. 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).

4. The definition of “qualified employee” was amended in 2014. 68 O.S. Supp. 2014, § 2357.301(5).<sup>11</sup> The part of the definition pertinent to this protest provides:

“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.

*Id.*

5. Both the 2008 and 2014 definitions of “qualified employee” require the award of “an undergraduate or graduate degree from a qualified program by an institution”. A “qualified program” under the Act 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 Act is “an institution within the Oklahoma State System of Higher Education or any other public or private college or university that is accredited

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<sup>10</sup> Substituted “January 1, 2018” for “January 1, 2015” as the ending date of the credit. Laws 2014, c. 30, § 4, eff. Nov. 1, 2014. Amended at Laws 2017, c. 153, § 2, to provide an end date for the credit of “before January 1, 2026”.

<sup>11</sup> 2014 Okla.Sess.Laws Ch. 30 (H.B. 2509).

by a national accrediting body". 68 O.S. 2011, § 2357.301(3).

### III. STATUTORY CONSTRUCTION AND OPERATION

1. 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.*

2. 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.

3. In resolving an ambiguity in a statute, courts will look to 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 interpreting statutes, courts do not limit their consideration to a single word or phrase in isolation to determine their meaning, but construe together 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).

4. 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.

5. “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

6. “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.

**ANALYSIS**

1. The definitions of qualified employee using identical language plainly and unambiguously require the employee to have an undergraduate or graduate degree from a qualified program. Only those programs accredited by ABET are qualified programs.

2. Protestants have the burden of proof. *OAC 710:1-5-47*. Protestants failed to show SPOUSE'S degree is from a qualified program. The evidence shows the Metallurgy and Materials Engineering program at the University of Connecticut was not ABET accredited when SPOUSE was awarded her degree. SPOUSE is not a qualified employee under the Act.

**RECOMMENDATION**

The adjustments to Protestants' 2015 and 2016 Returns are statutorily correct and proper. Protestants' protest to the denial of the Tax Credits 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)*.