

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2019-07-09-06 / NON-PRECEDENTIAL
ID: P-18-160-K
DATE: JULY 9, 2019
DISPOSITION: DENIED
TAX TYPE: INCOME
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 19th day of June, 2019, appended hereto, together herewith shall constitute the Order of the Commission.

SO ORDERED

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

NOW on this 19th day of June, 2019, the above styled and numbered cause comes on for decision under assignment regularly made by the Oklahoma Tax Commission to ALJ, Administrative Law Judge. PROTESTANT (“Protestant”) and WIFE (“Protestant/Wife”), collectively referred to as Protestants are represented by ATTORNEY, Attorney at Law, FIRM. The Account Maintenance Division (“Division”), Oklahoma Tax Commission is represented by AGC, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

Protestants filed an Oklahoma Nonresident/Part-Year Income Tax Return for the tax year ended December 31, 2015. Upon review of the return, the Division noted that the tax form used for filing was incorrect, corrected the Oklahoma source income, and by letter dated February 21, 2017, proposed the assessment additional income tax against Protestants. Protestants timely protested the proposed assessment, by letter dated April 14, 2017.

On August 24, 2018, the protest and concomitant records of the Division were referred to the Office of the Administrative Law Judges to initiate proceedings under the Uniform Tax Procedure

Code¹ and the Rules of Practice and Procedure before the Office of Administrative Law Judges². The protest was docketed as Case No. P-18-160-K and assigned to the undersigned.

A pre-hearing conference was scheduled for October 25, 2018. A *Status Report in Lieu of Prehearing Conference* filed October 25, 2018. By *Joint Status Report* filed November 30, 2018, the parties requested the scheduling of a hearing. The hearing was scheduled for February 5, 2019, by *Notice of Hearing* issued December 3, 2018.

A *Joint Stipulation of Facts and Issues* (“*Joint Stipulation*”) and Exhibits A through P filed January 15, 2019. The *Brief of the Account Maintenance Division* and *Brief of the Protestants* filed January 28, 2019 and January 30, 2019, respectively.

An open hearing³ was held as scheduled. As a preliminary matter, the *Joint Stipulation* and Exhibits A through P were admitted into evidence. Protestant testified regarding the formation of the optometric company, his job duties with the company and the sale of the company. CPA, CPA testified regarding preparing Protestants’ 2015 Oklahoma income tax return. ALJ’s Exhibit 1 was admitted into evidence. AUDITOR, Auditor testified regarding her review of the adjustments to Protestants’ return and preparing a renewed adjustment letter, which more explicitly sets forth the adjustments and reasons therefor. Division’s Exhibit 1 was admitted into evidence. Upon conclusion of closing statements, the record closed and the protest submitted for decision.⁴

FINDINGS OF FACT

Upon review of the file and records, including the *Joint Stipulation*, the exhibits received into evidence, the digital recording of the hearing and the pleadings, the undersigned finds:

A. The parties stipulate to the following:⁵

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

² Rules 710:1-5-20 through 710:1-5-49 of the *Oklahoma Administrative Code* (“OAC”).

³ Confidentiality was waived. 68 O.S. 2011, § 205.

⁴ OAC 710:1-5-39(a).

⁵ References to the exhibits supporting the statements are omitted.

1. Protestants filed a joint Nonresident/Part-Year Resident Oklahoma Income Tax Return for the 2015 tax year (“2015 Return”) on or about October 17, 2016.
2. On February 21, 2017, the Division mailed an adjustment letter to the Protestants indicating that they had used the incorrect form when filing their 2015 Return and should have filed a Form 511 Resident Return rather than a Form 511-NR Part-Year Resident Return. The letter adjusted their Oklahoma source income in accordance with the Division’s residency determination.
3. By letter dated April 14, 2017, the Protestants timely protested the Division’s adjustment.
4. The 2015 Return lists the Protestants’ home address as an Oklahoma address.
5. The Protestants’ Oklahoma Income Tax Return filed for the subsequent tax period of 2016 lists the Protestants’ home address as the same Oklahoma address as the 2015 Return.
6. The Protestants’ Oklahoma Income Tax Return filed for the tax period of 2017 lists the Protestants’ home address as the same Oklahoma address as the 2015 Return.
7. The 2015 W-2 from husband’s employer EMPLOYER lists his home address as the same Oklahoma address as his 2015 Return.
8. The 2015 W-2 from husband’s employer 2 EMPLOYER lists his home address as the same Oklahoma address as his 2015 Return.
9. The 2015 W-2 from wife’s employer WIFE EMPLOYER lists her home address as the same Oklahoma address as the 2015 Return.
10. The 2015 W-2 from wife’s employer WIFE EMPLOYER 2 lists her home address as the same Oklahoma address as the 2015 Return.
11. The 2016 W-2 from husband’s employer EMPLOYER 2 lists his home address as the same Oklahoma address as the 2015 Return.
12. The 2016 W-2 from wife’s employer WIFE EMPLOYER 2 lists her home address as the same Oklahoma address as the 2015 Return.
13. The 2017 W-2 from husband’s employer EMPLOYER 2 lists his home address as the same Oklahoma address as his 2015 Return.
14. The 2017 W-2 from wife’s employer WIFE EMPLOYER 2 lists her home address as the same Oklahoma address as the 2015 Return.
15. In 2009, the Protestants began claiming and were granted the homestead exemption on the Oklahoma address listed on their 2015 Return.
16. Husband and Wife both hold Oklahoma Driver’s Licenses.
17. Husband and Wife are both registered to vote in Oklahoma.

18. PARTNERSHIP is a Texas-based Limited Partnership.

19. Husband lives and works at least four (4) days per week outside the state of Oklahoma, either within the state of Texas, or traveling throughout the country for PARTNERSHIP .

20. Husband reported capital gains to the Internal Revenue Service in the amount of \$5,349,810.00 related to the stock sale of COMPANY.

21. Husband operates an independent affiliate of PARTNERSHIP named AFFILIATE within the state of Oklahoma in which he works one (1) day per week.

22. Protestants reported \$688,303.00 in Oklahoma sourced income from wages, employment and business activities within the state of Oklahoma.

23. The Protestants' protest is properly before the Administrative Law Judge.

B. Additional findings:

1. PARTNERSHIP was a franchisor/licensor of OPTOMETRIC PRACTICES throughout the United States and Canada. Testimony of Protestant.

2. PARTNERSHIP was headquartered in Kingwood, Texas. *Id.*

3. Protestant was Senior Vice-President of clinical strategies for PARTNERSHIP. *Id.*

4. Protestant was a partner in PARTNERSHIP and one of three people that started PARTNERSHIP. *Id.*

5. COMPANY, a Texas corporation was formed in 2010 for the sole purpose of holding the partnership interests in PARTNERSHIP. *Id.*

6. Protestant was a minority shareholder owning three percent (3%) of the shares of stock in COMPANY. *Id.*

7. In 2015, Protestant sold his three percent (3%) interest in COMPANY in a stock sale for a capital gain of \$5,349,810.00. ALJ's Exhibit 1.

8. In 2015, Protestant spent 170 work days on the road for PARTNERSHIP, either in Texas or other states in the United States. Testimony of Protestant.

9. Protestant tries to be in Oklahoma on the weekends, sees patients at his practice on Mondays and then leaves Monday nights and is on the road. *Id.*

10. Protestant/Wife is Protestant's administrative assistant. She worked out of their home in Midwest City for PARTNERSHIP making Protestant's travel arrangements. *Id.*

11. The amount in controversy, exclusive of penalty and interest is \$277,565.00. Division's Exhibit 1.

ISSUE AND CONTENTIONS

The parties stipulate there are three issues to be decided. The stipulated issues are: (1) “[w]hether the Protestants qualify as ‘Resident Individuals,’ as defined in Section 2353(4) of Title 68 in the Oklahoma Statutes”; (2) “[w]hether [Protestant’s] wages earned from personal services provided in Texas are taxable by Oklahoma”; and (3) “[w]hether [Protestant’s] sale of his interest in COMPANY, a Texas corporation formed in 2010 for the sole purpose of holding partnership interests in PARTNERSHIP , is taxable by Oklahoma”.

Protestants contend that Protestant is a part-year resident for Oklahoma income tax purposes. In support, Protestants argue that it has been stipulated Protestant resides in the aggregate less than seven (7) months of a taxable year in Oklahoma and therefore Protestant is a part-year resident of Oklahoma. Protestants further argue that the indicia of Protestant’s domicile do not change the fact that Protestant spent less than seven (7) months of the taxable year within Oklahoma.

Protestants further contend that regardless of Protestants’ residency, the capital gain from the sale of stock in COMPANY is not taxable by Oklahoma because the stock had a business or commercial situs in the State of Texas. In support, Protestants argue that the stock had no ties to the State of Oklahoma and resulted from Protestant’s active role in the management of his Texas partnership in the State of Texas.

The Division contends that Protestants are resident individuals for Oklahoma income tax purposes because their domicile is the State of Oklahoma. In support, the Division argues that the first sentence of § 2353(4) carves out two sets of individuals considered resident individuals: first, natural persons domiciled in Oklahoma; and second, any other people who spend over seven (7) months of the taxable year in Oklahoma.

The Division next contends that Protestant’s compensation for personal services performed in the State of Texas and elsewhere outside Oklahoma is taxable by Oklahoma. In support, the Division cites *Colchensky v. Oklahoma Tax Commission*, 1938 OK 612, 86 P.2d 329 and shows

Protestants are resident individuals of Oklahoma due to their domicile and Protestant's compensation was a wage or salary for the services performed outside Oklahoma.

The Division further contends that the capital gain from the stock sale is subject to Oklahoma income tax. In support, the Division cites *Davis v. Oklahoma Tax Commission*, 1971 OK 109, 488 P.2d 1261 and argues Protestants have not demonstrated that possession and control of the proceeds was localized in some independent business or investment outside Oklahoma or that substantial use and value attached to and became an asset of the outside business.

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, § 221.

2. The taxpayer must prove 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 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 (5th 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. ADMINISTRATIVE RULES AND REGULATIONS

1. Rules promulgated under the Administrative Procedures Act⁶ 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).

2. The rules and regulations of an administrative agency which implement a statute are valid unless they are beyond the scope of the statute, conflict with the statute or are unreasonable. *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*

⁶ 75 O.S. 2011, § 250 et seq., § 301 et seq.

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 the complaining party must prove the contrary by competent and convincing evidence. *State ex rel. Hart v. Parham*, 1966 OK 9, 412 P.2d 142.

3. 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. 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.

III. STATUTORY CONSTRUCTION

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. Legislative intent must be ascertained from the whole act, *Walls v. American Tobacco Co.*, 2000 OK 66, 11 P.3d 626; based on its general purpose and objective, *Comer v. Preferred Risk Mutual Ins. Co.*, 1999 OK 86, 991 P.2d 1006. Statutes must be read to render every part operative, and to avoid rendering any part superfluous or useless. *Bryant v. Commissioner of the Dept. of Public Safety, State of Okla.*, 1996 OK 134, 937 P.2d 496. The Legislature will not be presumed to have intended an absurd result, *In re Holt*, 1997 OK 12, 932 P.2d 1130; nor to have done a vain or useless act in the promulgation of a statute, *Comer, supra.*; or when creating law, *Purcell v. Santa Fe Minerals, Inc.*, 1988 OK 45, 961 P.2d 188. 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.*

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

3. Where ambiguity exists, the relevant legislative scheme must be reviewed to ascertain and give effect to legislative intent and the public policy underlying that intent. *Wilhoit v. State*, 2009 OK 83, 226 P.3d 682, corrected. In interpreting statutes, consideration is not limited to a single word or phrase in isolation to determine meaning, rather relevant legislative language is construed together 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 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 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, and 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. Taxing statute must describe with some certainty the transaction, service or object to be taxed, any ambiguity or doubt as to possible meaning of statute must be resolved in favor of the taxpayer and strictly construed against the state. *Samson Hydrocarbons Co. v. Oklahoma Tax Commission*, 1998 OK 82, 976 P.2d 532. Rule that taxing statutes are to be construed in favor of the taxpayer does not apply where the statute is plain and contains no inconsistent provisions, no ambiguities, and no uncertainties. *Neer v. State ex rel. Oklahoma Tax Commission*, 1999 OK 41, 982 P.2d 1071, corrected. Construction of taxing statutes requires that legislative intent be ascertained and given effect. *Wilson v. State ex rel. Oklahoma Tax Commission*, 1979 OK 62, 594 P.2d 1210.

IV. OKLAHOMA INCOME TAX

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 levy and collection of Oklahoma income tax is governed by the Oklahoma Income Tax Act ("Act").⁷

2. Oklahoma income tax is "imposed on the Oklahoma taxable income⁸ of every resident or nonresident individual". 68 O.S. 2011, § 2355(B). *See, OAC 710:50-3-1.*⁹ "Every resident

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

⁸ Defined to mean "'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".

⁹ This rule provides: "[a]ll taxpayers must file Oklahoma Income Tax Returns. 'Taxpayer' means any person subject to income tax imposed by Oklahoma Statutes, or whose income is in whole or in part, subject to income tax imposed by any provision of the Oklahoma Statutes."

individual having a gross income, or gross receipts, for the taxable year in an amount sufficient to require the filing of a federal income tax return” and “[e]very nonresident individual having Oklahoma gross income for the taxable year of One Thousand Dollars (\$1,000.00), or over” are required to “make a return stating specifically the taxable income and, where necessary, the adjusted gross income and the adjustments provided in the [Act] to arrive at Oklahoma taxable income and, where necessary, Oklahoma adjusted gross income”. 68 O.S. 2011, § 2368(A)(1) and (3). The starting point for determining the “Oklahoma adjusted gross income” of an individual taxpayer is the “taxable income” with respect to any taxpayer as defined in the Internal Revenue Code as it applies to such taxpayer. 68 O.S. 2011, §§ 2358(A) and 2353(10). *See, Ok. Const. Art. 10, § 12*¹⁰. *See also, General Accessory Manufacturing Company v. Oklahoma Tax Commission*, 2005 OK CIV APP 75, ¶ 9, 122 P.3d 476.

3. A "resident individual" and a "nonresident individual" are defined under the Act as follows, to-wit:

‘Resident individual’ means a natural person who is domiciled in this state, and any other natural person who spends in the aggregate more than seven (7) months of the taxable year within this state shall be presumed to be a resident * * * in the absence of proof to the contrary. A natural person who resides less than seven (7) months of the taxable year within this state is presumed to be a ‘part-year resident individual’ * * * in absence of proof to

¹⁰ This section provides:

The Legislature shall have power to provide for the levy and collection of license, franchise, gross revenue, excise, income, collateral and direct inheritance, legacy, and succession taxes; also graduated income taxes, graduated collateral and direct inheritance taxes, graduated legacy and succession taxes; also stamp, registration, production or other specific taxes.

In the exercise of the powers provided for in this section, and notwithstanding any other provision of this Constitution, the Legislature may, with or without exceptions, modifications, or adjustments, define the amount on, in respect to, or by which any such tax or taxes are imposed or measured (a) by reference to any provisions of the laws (including administrative regulations, determinations, and interpretations) of the United States, as such laws may be or become effective at any time or from time to time; (b) by reference to any amount or amounts finally ascertained in determining amounts subject to taxation by the United States; or (c) by reference to any amount or amounts of tax finally ascertained to be payable to the United States.

Amended by State Question No. 444, Legislative Referendum No. 160, adopted at election held Aug. 27, 1968. Amendment proposed by Laws 1967, p. 689, S.J.R. No. 30.

the contrary. A 'nonresident individual' means an individual other than a resident individual or a part-year resident individual.

4. Domicile is a proper basis for the assessment of state income taxes on an individual.¹¹

New York ex rel. Cohn v. Graves, 300 U.S. 308, 313 (1937); *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 279 (1932).

5. A person's domicile is the place where he has his true, fixed and permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. *Suglove v. Oklahoma Tax Commission*, 1979 OK 168, 605 P.2d 1315, citing *Jones v. Reser*, 1916 OK 809, 61 Okla. 46, 160 p. 58. Domicile forms the basis for imposition of state income tax on the income of an individual, whether the income is earned without the state. *Suglove, supra* at 1317. See, *Davis v. Oklahoma Tax Commission*, 1971 OK 109, 488 P.2d 1261 and *Colchensky v. Oklahoma Tax Commission*, 1938 OK 612, 184 Okla. 207, 86 P.2d 329.

6. In *Suglove*, the Court set forth the general principles which have evolved in the determination of domicile, to-wit:

First, a person may have only one domicile at a time. Second, domicile, once fixed is presumed to continue until a new one is established. Third, to effect a change of domicile, there must be (a) actual abandonment of the first domicile, coupled with (b) the intention not to return to it and (c) actual residence in another place with intention of making it a permanent home. Indicia of a changed domicile are to be found in the habits of the person, his business and domestic relations, declarations, exercise of political rights, community activities and other pertinent objective facts ordinarily manifesting the existence of requisite intent. As a general principle, Oklahoma domicile is presumed to continue unless an individual can show that a change has occurred.

¹¹ See, OAC 710:50-3-36 which provides:

(a) An Oklahoma resident is a person domiciled in this state. 'Domicile' is the place established as a person's true, fixed, and permanent home. A domicile, once established, remains until a new one is established.

(b) One is presumed to retain his Oklahoma residency if he has:

- (1) An Oklahoma Homestead Exemption;
- (2) His family remains in Oklahoma;
- (3) He retains an Oklahoma drivers license;
- (4) He intends to return to Oklahoma; or
- (5) He has not abandoned his Oklahoma residence.

The Court also recognized there is a reasonable basis for distinguishing between moves abroad and moves to another state and held that "[I]n absence of countervailing factors, it is not unreasonable to infer that such a move [from one state to another] is permanent and constitutes a change of domicile." *Id.*

7. Whether a change of domicile has occurred is a question of fact to be determined under the facts and circumstances of each individual case. ***Graham v. Graham***, 1958 OK 184, 330 P.2d 1046. The burden of proving a change of domicile is on the person attempting to show the same. ***McKiddy v. State***, 1961 OK 282, 366 P.2d 933; ***Jones v. Burkett***, 1959 OK 221, 346 P.2d 338.

8. Income received as compensation for personal services performed in another state by a resident of Oklahoma is subject to Oklahoma income tax. *See*, 68 O.S. 2011, § 2357(B)(1).¹² ***Colchensky v. Oklahoma Tax Commission***, 1938 OK 612, 86 P.2d 329. In ***Colchensky***, the Supreme Court of Oklahoma affirmed the judgement of the District Court of Oklahoma County sustaining the demurrer to the plaintiff's petition. *Id.*, at 331. Citing, *Lawrence et al. v. State Tax Commission of Mississippi*, 286 U.S. 276, 52 S.Ct. 556, 76 L.Ed. 1102, the Court quoted the holding: "A state has constitutional power to tax its own citizens on their net incomes though derived wholly from activities carried on by them outside of the State. Domicile in itself establishes a basis for taxation." *Id.*

9. Generally, the situs of intangible property for purposes of taxation is at the owner's domicile. ***Davis v. Oklahoma Tax Commission***, 1971 OK 109, 488 P.2d 1261. Income from intangible personal property, and gains or losses from sales of such property is allocated in accordance with the domiciliary situs of the taxpayer, unless such property has acquired a non-unitary business or commercial situs apart from the domicile of the taxpayer. 68 O.S. 2011, § 2358(A)(4)(b)(1).

¹² This section provides in part:

There shall be allowed as a credit against the tax imposed by Section 2355 of this title the amount of tax paid another state by a resident individual, as defined in paragraph 4 of Section 2353 of this title, upon income received as compensation for personal services in such other state * * *. The credit shall not exceed such proportion of the tax payable under Section 2355 of this title as the compensation for personal services subject to tax in the other state and also taxable under Section 2355 of this title bears to the Oklahoma adjusted gross income as defined in paragraph 13 of Section 2353 of this title.

(Emphasis added).

Where intangible personal property has acquired a business or commercial situs apart from the domicile of the taxpayer, the income and gains or losses from the sale of such property is allocated to the business or commercial situs. *Id.*

10. No single concise rule with general application has been laid down to determine the business situs of intangible property. *Davis, supra* at 1264, citing *Thompson v. Bankers Investment Company*, 1955 OK 263, 288 P.2d 364. The conclusion regarding the business situs of intangible property must be drawn from a consideration of the material facts of each individual case. *Id.*

11. To constitute a taxable business situs for intangible property, other than the owner's domicile, the *Davis* Court ruled that "it must be shown that possession and control of the property has been localized in some independent business or investment away from the owner's domicile so that its substantial use and value attaches to and becomes an asset of the outside business, and that in order to establish a 'commercial domicile' and to give a business situs, for purposes of taxation, to intangibles which are used in the business or are incidental to it, they must become integral parts of some local business." *Id.*, at 1264.

ANALYSIS

1. Are Protestants residents of Oklahoma? A person domiciled in Oklahoma is a resident of Oklahoma. *OAC 710:50-3-36(a)*. No evidence whatsoever has been presented to suggest Protestant/Wife is anything other than domiciled in Oklahoma and a resident of Oklahoma. Further, the evidence overwhelmingly shows Protestant is domiciled in Oklahoma and a resident of Oklahoma. Protestants are required to file an Oklahoma resident return reporting their income.

2. Is the income Protestant received as compensation for personal services performed in the State of Texas and elsewhere outside Oklahoma subject to Oklahoma income tax? Protestant is domiciled in Oklahoma. Domicile establishes the basis for taxing said income. *Colchensky, supra* at 331. The salary or wages Protestant received for the personal services performed outside of Oklahoma are subject to Oklahoma income tax. 68 O.S. 2011, § 2357(B)(1).

3. Is the capital gain from the sale of stock subject to Oklahoma income tax? The evidence only shows that COMPANY was formed to hold the partnership interests in

PARTNERSHIP. No evidence has been presented to show possession and control of Protestant's shares of stock in COMPANY was localized in an independent business or investment away from Protestant's Oklahoma domicile. Protestant may have held the shares of stock in Oklahoma. If the stock remained with COMPANY, this only benefitted Protestant and Protestant retained control of the shares which control he could exercise wherever he might be.

Further, the evidence shows no outside business to which the stock's substantial use and value primarily attached. COMPANY was formed solely to hold the partnership interests in PARTNERSHIP. Since the evidence does not demonstrate that the stock acquired a business or commercial situs apart from the domicile of Protestant, the gain from the sale of the stock is allocable to Protestant's domicile (Oklahoma) and subject to Oklahoma income tax.

4. Protestants have the burden of proof. *OAC 710:1-5-47*. Protestants failed to show the adjustment to their 2015 Oklahoma income tax return and resulting assessment are incorrect.

RECOMMENDATIONS

The protest should be denied. The amount in controversy, inclusive of penalty and interest should be fixed as the deficiency due and owing.

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).*