JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **89-05-09-30 / NON-PRECEDENTIAL**
ID: **P-87-121**
DATE: **MAY 9, 1989**
DISPOSITION: **DENIED**
TAX TYPE: **INCOME**
APPEAL: **NO APPEAL**

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 therein, and being fully advised in the premises, finds and orders that the Findings, Conclusions and Recommendations of the Administrative Law Judge, filed herein on the 11th day of April, 1989, marked as Exhibit "A", attached hereto and hereby incorporated by reference as though fully set out herein, be and the same are hereby adopted as the Order of the Commission.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Hearing was had, at which hearing Protestants were represented by CPA, C.P.A. The Income Tax Division of the Oklahoma Tax Commission ("Division") was represented by OTC ATTORNEY, Attorney, of the General Counsel's Office of the Oklahoma Tax Commission.

STATEMENT OF FACTS

Protestants are residents of the State of Oklahoma. For the tax year 1985, Protestants' amended individual income tax return indicated out-of-state income from the sale of Protestants' limited partnership interest in a real estate partnership in the State of Florida. Protestants purchased an interest in the partnership in 1981 for $150,000.00, reduced their basis in such interest to zero over the succeeding four years, and, in 1985, sold their partnership interest for $87,500.00. Protestants then sought to reduce their Oklahoma adjusted gross income by $36,142.00 on their 1985 individual income tax return. The Protestants sought to take advantage of the losses allowed them as a deduction on their federal return by excluding the partnership losses from their Oklahoma adjusted gross income. Protestants were allowed a deduction on their federal return in the amount of $36,142.00 as a long-term capital gain attributable to sale of the Florida partnership interest.

By letter dated April 28, 1987, the Division proposed to assess the Protestants additional income tax, including interest, in the amount of $1,553.00, based on the Division's position that the income from the sale of the interest in the partnership was income from intangible personal property taxable by Oklahoma. The Protestants timely protested the proposed assessment.

CONTENTIONS OF PROTESTANT

From the inception of the investment through the date of the sale of the partnership interest, substantial partnership losses were incurred, which were allowed as a federal income tax

deduction. During those years, no Oklahoma income tax benefits were received from any of the losses incurred by the partnership. Oklahoma should not subject the sales proceeds received from the sale of the partnership interest to income tax when Protestants' have not obtained an Oklahoma income tax benefit from the losses.

CONTENTIONS OF DIVISION

The proceeds realized from the sale of Protestant's limited partnership interest was income from intangible personal property and is allocable to the State of Oklahoma since the taxpayers are domiciliaries of this state.

ISSUE

Whether proceeds from the sale of a limited partnership interest in a Florida real estate partnership is taxable as income by the state of the owner's domicile under 68 O.S. Supp. 1988, §2358(A)(4)?

APPLICABLE LAW

The issue in this case arises under the Oklahoma Income Tax Code, 68 O.S. Supp. 1988, §§2353, 2358(A)(4), and the Oklahoma Tax Commission has jurisdiction to hear this protest under the Oklahoma Uniform Tax Procedure Code, 68 O.S. 1981, §207.

A limited partner's interest in a partnership is generally considered personal property. 68 C.J.S. Partnership, §471. Intangible personal property is distinguishable from tangible personal property in that ownership of intangible property is evidenced by a certificate indicating a proportionate ownership share in an entity rather than direct ownership of tangible property. See Black's Law Dictionary, (5th ed. 1979). Protestants' ownership in the partnership, based on these rules, is intangible personal property, which could be sold or transferred without affecting the disposition of the partnership's ownership of real property. The question presented herein is whether the income from the sale of intangible personal property is taxable by Oklahoma.

While Protestants' losses incurred from ownership in the limited partnership from 1981 through 1985 reduced Protestants' basis in the partnership to zero, Protestants reported on their 1985 federal individual income tax return income in the amount of $36,142.00, the proceeds realized from the sale of the Protestants' partnership interest. "Oklahoma adjusted gross income" means "adjusted gross income" as reported to the federal government. 68 O.S. Supp. 1988, §2353(13). Thus, the proceeds from the sale of the partnership interest were likewise reportable to Oklahoma as Oklahoma adjusted gross income.

Section 2358 of the Income Tax Code provides for adjustments to adjusted gross income. Subsection (A)(4)(b)(1) pertains to adjustments for income from intangible personal property:

> A. The taxable income of any taxpayer shall be adjusted to arrive at Oklahoma taxable income for corporations and Oklahoma adjusted gross income for individuals, as follows:

* * *

> 4. Items of the following nature shall be allocated as indicated. Allowable deductions attributable to items separately allocable in subparagraphs a, b and c hereof, whether or not such items of income were actually received, shall be allocated on the same basis as those items:
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> b. Income from intangible personal property, such as interest, dividends, patent or copyright royalties, and gains or losses from sales of such property, shall be allocated in accordance with the domiciliary situs of the taxpayer, except that:
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> (1) where such property has acquired a nonunitary business or commercial situs apart from the domicile of the taxpayer such income shall be allocated in accordance with such business or commercial situs; a resident trust or resident estate shall be treated as having a separate commercial or business situs insofar as undistributed income is concerned, but shall not be treated as having a separate commercial or business situs insofar as distributed income is concerned; . . . .

In Davis v. Oklahoma Tax Commission, 488 P.2d 1261 (Okl. 1971), taxpayer, an Oklahoma domiciliary, was the recipient of dividend income from his stock ownership in a Texas corporation. The question before the Court was whether the taxpayer's stock acquired a business or commercial situs in Texas apart from taxpayer's Oklahoma domicile. The business situs of intangibles, according to the Court, is determined by consideration of the facts of each case, and must satisfy the following:

> We have used the rule that in order to constitute a business situs where intangible property is taxable, other than the owner's domicile, 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. In re Harris, Upham & Co., 194 Okl. 155, 148 P.2d 191. See too Groseclose v. Sutherland, 194 Okl. 479, 153 P.2d 479, and Glen v. Buck, Okl., 272 P.2d 573.

Id. at 1264.

In Davis the Court held that there was no "outside" business to which the stock's substantial use and value primarily attached. Although the stock was stored in a vault in Texas, control remained in the taxpayer and could be exercised by him wherever he was.

To be successful in this protest, it was incumbent upon Protestants to present evidence establishing that the limited partnership interest had acquired a commercial situs outside of the State of Oklahoma. The argument was made by Protestant that a commercial situs for the partnership interest was in Florida where the realty in which the partnership invested was located. Evidence satisfying the criteria in Davis was not brought forth at the hearing, however, and accordingly, there is not a sufficient basis for concluding that the commercial situs of the intangible property interest is outside the state of the Protestant's domicile.

CONCLUSIONS

In view of the above and foregoing findings of fact and law applicable thereto, the undersigned Administrative Law Judge finds as follows:

1. The Oklahoma Tax Commission has jurisdiction in this matter. 68 O.S. 1981, §201 et seq.

2. Protestants are domiciliaries of the State of Oklahoma.

3. Income from intangible personal property, such as a limited partnership interest, is allocated to the domicile of the taxpayer unless the property has acquired a commercial situs apart from the taxpayer's domicile. 68 O.S. Supp. 1988, §2358(A)(4)(b).

4. Protestants did not meet the burden of proving that the limited partnership interest had acquired a commercial situs apart from the Protestants' domicile.

5. The protest of HUSBAND AND WIFE should be denied.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the protest of HUSBAND AND WIFE 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. 2009) 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.”