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NOT FOR OFFICIAL PUBLICATION  
IN THE COURT OF CIVIL APPEALS  
OF THE STATE OF OKLAHOMA

DIVISION II

In the Matter of the )  
Income Tax Protest of )  
Randolph S. Baskins and )  
Beverly J. Baskins, )  
RANDOLPH S. BASKINS )  
and BEVERLY J. BASKINS, ) Case No. 115,947  
Appellants, )  
vs. )  
OKLAHOMA TAX COMMISSION, )  
Appellee. )

APPEAL FROM THE OKLAHOMA TAX COMMISSION

(Filed May 9, 2018)

HONORABLE JAY L. HARRINGTON,  
ADMINISTRATIVE LAW JUDGE

**AFFIRMED PURSUANT TO RULE 1.201**

Thomas G. Ferguson, Jr.  
WALKER, FERGUSON  
& FERGUSON  
Oklahoma City, Oklahoma

For Appellants

Lee Pugh  
GENERAL COUNSEL  
Elizabeth Field  
DEPUTY GENERAL COUNSEL

Darren Ferguson  
ASSISTANT GENERAL COUNSEL  
OKLAHOMA TAX COMMISSION  
Oklahoma City, Oklahoma                      For Appellee

OPINION BY JANE P. WISEMAN, PRESIDING JUDGE:

Randolph S. Baskins and Beverly J. Baskins (Taxpayers) appeal from a final order of the Oklahoma Tax Commission denying them a deduction for capital gains pursuant to 68 O.S.2011 § 2358(F). The parties entered into joint stipulations of fact before the OTC which provided that the stipulations would also apply to any appeal of the OTC's decision.

On September 29, 2006, Taxpayers acquired shares of stock of Primus International Holding Company. A few years later, Primus notified Taxpayers that the company would be sold to Precision Castparts Corp. The sale “was completed on or about August 9, 2011, and as part of that sale, [Taxpayers] sold their shares of Primus International holding Company stock” and reported a long-term capital gain deduction on their amended 2011 tax return. Taxpayers had owned the stock for more than two years prior to its sale. The OTC's Compliance Division denied Taxpayers' amended claim for the capital gains deduction because Primus International did not have its primary headquarters in Oklahoma, but in the state of Washington. On July 29, 2015, the OTC advised Taxpayers their claim for the capital gains deduction had been disallowed “because the capital gains were from a

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company whose primary headquarters were not located in Oklahoma for at least three uninterrupted years prior to sale.”<sup>1</sup> Taxpayers protested the OTC’s decision.

The issue for the ALJ to decide was “[w]hether [Taxpayers] qualify for the Oklahoma Capital Gains Deduction, 68 O.S.2011, § 2358(F), as claimed on their amended 2011 Oklahoma income tax return.” The more specific issue was whether “the Oklahoma Headquarters requirement contained in Section 2358(F)(2)(c) of Title 68 [is] a constitutional violation of the Commerce Clause to the United States Constitution.” (Footnote omitted.)

After a hearing, the ALJ concluded:

[Taxpayers’] position is the Oklahoma Headquarters requirement in Section 2358(F)(2)(c) of Title 68 constitutionally violates the Commerce Clause to the United States Constitution. The parties have briefed this matter extensively, but as the parties are aware it is a settled question[] of law in the State of Oklahoma, after [the] Supreme Court of Oklahoma’s decision in *CDR*, that the “Headquarters” requirement of Sections 2358(D)(2)(2)

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<sup>1</sup> Section 2358(F)(2) of Title 68 for taxable year 2011 allowed a capital gains deduction for the sale of stock in an Oklahoma company held for at least two years before the sale at issue. An “Oklahoma company” is defined in § 2358(F)(2)(c) as “an entity whose primary headquarters have been located in Oklahoma for at least three (3) uninterrupted years prior to the date of the transaction from which the net capital gains arise.” 68 O.S.2011 § 2358(F).

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[sic] and 2358(D)(2)(c) of Title 68 do[es] not violate the Dormant Commerce Clause. The Legislature used the same language in the provisions for Individual Taxpayers as it did for Corporations, Estates, or Trusts. The [Taxpayers] have not put forth any legal argument that would dictate a different result for Individual Taxpayers.

(Footnotes omitted.) The ALJ's findings and conclusions were later adopted by the OTC in "a final order of disposition."

After review of the record and relevant law, we affirm the OTC's order pursuant to Oklahoma Supreme Court Rule 1.201, 12 O.S. Supp. 2017, ch. 15, app. 1: "In any case in which it appears that a prior controlling appellate decision is dispositive of the appeal, the court may summarily affirm or reverse, citing in its order of summary disposition this rule and the controlling decision."

Taxpayers' primary argument on appeal is that "the Oklahoma Supreme Court improperly decided *CDR*" by finding "that the statute was not facially discriminatory" and that "the dormant commerce clause does not apply." Taxpayers argue we "must determine that the denial of Capital Gains Deduction to [Taxpayers] for the sale of stock in a non-Oklahoma headquartered company discriminates against interstate commerce and is therefore unconstitutional."

After review, we conclude the Oklahoma Supreme Court's decision in *CDR Systems Corporation*

*v. Oklahoma Tax Commission*, 2014 OK 31, 339 P.3d 848, is dispositive of the issues presented by Taxpayers. In *CDR*, the Oklahoma Supreme Court determined that the “Headquarters” requirement of Section 2358(D) did not violate the Dormant Commerce Clause. It concluded:

We hold there is no discrimination against interstate commerce to which the dormant commerce clause applies, and that even if the dormant commerce clause applies in this case, the deduction does not facially discriminate against interstate commerce, it does not have a discriminatory purpose, and the deduction has no discriminatory effect on interstate commerce. The OTC properly denied the capital gains deduction to CDR.

*CDR*, 2014 OK 31, ¶ 37.

The Legislature used “Headquarters” language in its provision for individual taxpayers in Section 2358(F) identical to that for corporations, estates, and trusts in Section 2358(D), and we see no reason to draw a distinction in its application. The Oklahoma Supreme Court’s holding in *CDR* applies equally to Section 2358(F) for individual taxpayers. As the ALJ correctly noted, Taxpayers offer no argument on appeal warranting a different result for individual taxpayers than that promulgated in *CDR*. Unless and until the Oklahoma Supreme Court comes to a different conclusion, we are not at liberty, as Taxpayers urge, to find that *CDR* was improperly decided. “Simply stated, *stare decisis* means to abide by decided cases. This

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time-honored rule ‘serves to take the capricious element out of law’ and give it stability. . . . Unless precedents are ‘palpably bad,’ judicial surgery in upsetting them must be avoided.” *Rodgers v. Higgins*, 1993 OK 45, ¶ 28, 871 P.2d 398 (footnotes and citations omitted).

The decision of the Oklahoma Tax Commission is affirmed.

**AFFIRMED PURSUANT TO RULE 1.201.**

THORNBRUGH, C.J., and FISCHER, J., concur.

May 9, 2018

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**BEFORE THE OKLAHOMA TAX COMMISSION  
STATE OF OKLAHOMA**

**IN THE MATTER OF THE )  
INCOME TAX PROTEST )  
OF RANDOLPH S. AND )           **CASE NO.**  
BEVERLY J. BASKINS. )           **P-15-109-H****

**ORDER NO.** 2017 03 21 04

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 27th day of January, 2017, appended hereto, as amended to state the protest of Randolph S. and Beverly J. Baskins is denied, together herewith shall constitute the Order of the Commission.

SO ORDERED MAR 21 2017 .

OKLAHOMA TAX  
COMMISSION

/s/ Karisa Troutman  
ASSISTANT  
SECRETARY

/s/ Steve Burrage  
STEVE BURRAGE,  
CHAIRMAN

/s/ \_\_\_\_\_  
VICE-CHAIRMAN

/s/ Thomas E. Kemp, Jr.  
THOMAS E. KEMP, JR.,  
SECRETARY-MEMBER

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**BEFORE THE ADMINISTRATIVE LAW JUDGE  
OKLAHOMA TAX COMMISSION  
STATE OF OKLAHOMA**

**IN THE MATTER OF THE )  
INCOME TAX PROTEST )                   CASE NO.  
OF RANDOLPH S. AND )                   P-15-109-H  
BEVERLY J. BASKINS. )**

**FINDINGS, CONCLUSIONS  
AND RECOMMENDATIONS**

(Filed Jan. 27, 2017)

**NOW** on this 27<sup>th</sup> day of January 2017, the above-styled and numbered cause comes on for consideration under assignment regularly made by the Oklahoma Tax Commission to Jay L. Harrington, Administrative Law Judge. Randolph S. and Beverly J. Baskins (“Protestants”) appear through attorney, Thomas G. Ferguson, Jr. (“T. Ferguson”), WALKER, FERGUSON & FERGUSON. The Compliance Division (“Division”) of the Oklahoma Tax Commission appears through Elizabeth Field, Deputy General Counsel, and Darren Ferguson (“D. Ferguson”), Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

**PROCEDURAL HISTORY**

On August 10, 2015, the protest letter was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax*



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*Procedure Code*<sup>1</sup> and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.<sup>2</sup> On August 10, 2015, the Court Clerk (“Clerk”)<sup>3</sup> requested the Division’s file. On August 11, 2015, the Clerk mailed the Introductory Letter to Counsel that Jay L. Harrington, Administrative Law Judge (“ALJ”) had been assigned to this matter, and docketed as Case Number P-15-109-H. The letter also advised the Protestants that a Prehearing Teleconference Notice would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.<sup>4</sup> On August 12, 2015, Taylor P. Henderson, Assistant General Counsel, and Ms. Field filed an Entry of Appearance as Division’s Counsel. On August 12, 2015, the Clerk mailed the Prehearing Teleconference Notice to the parties, setting the Prehearing Teleconference for October 1, 2015, at 10:30 a.m. On August 13, 2015, T. Ferguson filed a Corrected Protest/Application for Hearing. On August 18, 2015, the Clerk received the Division’s file, On August 19, 2015, T. Ferguson filed an Entry of Appearance as Protestants’ Counsel. On August 25, 2015, T. Ferguson requested that the ALJ consolidate seven (7) other protests arising out of the same transaction.

On September 30, 2015, the Division filed a Status Report in Lieu of Prehearing Conference, advising that

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<sup>1</sup> OKLA. STAT. ANN. tit. 68, § 201 *et seq.* (West 2014).

<sup>2</sup> OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

<sup>3</sup> OKLA. ADMIN. CODE § 710:1-5-10(c)(2) (August 27, 2015).

<sup>4</sup> *Id.* Unless otherwise noted herein, the ALJ notified the parties by letter.

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the parties were drafting a “Proposed” Scheduling Order.

On October 1, 2015, the ALJ struck the Prehearing Teleconference and advised the parties to file a Status Report by October 30, 2015. On October 21, 2015, T. Ferguson filed Powers of Attorney for this matter and the seven (7) other protests arising out of the same transactions.<sup>5</sup> On October 29, 2015, the parties filed a Joint Proposed Scheduling Order. On October 30, 2015, the ALJ issued the Scheduling Order setting this matter for hearing on July 26, 2016, if the parties could not stipulate to the facts.

On December 3, 2015, the Division filed its Preliminary Witness and Exhibit List. On December 17, 2015, D. Ferguson filed a Notice of Substitution of Attorney and Entry of Appearance as Division’s Co-Counsel.<sup>6</sup>

On April 29, 2016, the Protestants filed their Final Witness & Exhibit List.

On May 5, 2016, the Division filed its Final Witness and Exhibit List.

On June 2, 2016, the Division moved for Summary Disposition and Brief in Support (“MSD”), with

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<sup>5</sup> On October 28, 2015, the parties filed Joint Motions to Hold in Abeyance P-15-134-H through P-15-140-H, until the final decision, including the exhaustion of any appeals in this matter. On October 29, 2015, the ALJ issued Orders Granting Joint Motions to Hold in Abeyance P-15-134-H through P-15-140-H, until final decision, including exhaustion of any appeals in this matter.

<sup>6</sup> The ALJ deems this filing as a Withdrawal by Ms. Henderson.

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Exhibits A through E, attached thereto. The Division did not attach the Verification to its MSD.<sup>7</sup> On June 16, 2016, the parties filed Joint Stipulation of Facts and Issues, with Exhibits A through E attached thereto. On June 21, 2016, the Protestants filed their Response to Division's Motion for Summary Disposition and Brief in Support ("Response and Counter MSD"). The Protestants did not attach the Verification to their Counter MSD.<sup>8</sup> On June 21, 2016, the ALJ acknowledged receipt of the Joint Stipulation of Facts and Issues, and struck the hearing set for July 26, 2016, at 9:30 a.m.

On July 6, 2016, the Division filed its Reply to Protestants' Response to Division's Motion for Summary Disposition and Counter Motion for Summary Disposition ("Response and Counter MSD"). On July 8, 2016, the ALJ acknowledged receipt of the Protestants' Response and Counter MSD, closed the record, and the case submitted for decision on July 6, 2016.

On August 25, 2016, the ALJ held a Teleconference with Counsel to advise that the parties failed to attach Verifications, required by Tax Commission Rule § 710:1-5-38.1, to their respective MSDs. The ALJ opened the record, so the parties could submit their Verifications.

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<sup>7</sup> See OKLA. ADMIN. CODE § 710:1-5-38.1 (July 11, 2013).

<sup>8</sup> *Id.*

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On September 9, 2016, the Division filed its Verification with the Clerk.<sup>9</sup> The Verification was duly sworn under oath, by Doug Ellis, Supervisor, Compliance Division, Oklahoma Tax Commission.<sup>10</sup> On September 12, 2016, the Protestants filed their Resubmitted Response and Counter MSD, with the Verification attached thereto. Mr. Baskins duly swore the Verification under oath.<sup>11</sup> On September 15, 2016, the ALJ acknowledged the parties' Verifications and directed the parties to file a Status Report by September 30, 201[6].<sup>12</sup> On September 22, 2016, Mr. Ferguson advised that the “. . . *Helmerich* gain was deducted on the original 2011 return. The Oklahoma Tax Commission properly allowed that deduction. The only deduction which was not allowed was on the *Primus* sale.”<sup>13</sup> On September 30, 2016, the Division filed a Status Report advising that it was finalizing an affidavit the Division would file with the Court confirming that the Division allowed the Oklahoma Capital Gains Deduction claimed by Protestants for the sale of Helmerich & Payne stock.

On October 20, 2016, the Division filed the Affidavit of Supervisor (“Affidavit”), which the ALJ marked as ALJ’s Exhibit 1 and admitted into evidence. On October 24, 2016, the ALJ acknowledged filing the Affidavit, and T. Ferguson’s Email of October 21, 2016 to

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> The ALJ conducted a Teleconference with Counsel to discuss the record in this matter.

<sup>13</sup> See September 21, 2016, letter filed herein.

the Clerk, advising that the Protestants do not intend to file a Response to the Division's Affidavit. The ALJ closed the record and submitted this matter for decision by October 24, 2016.

On December 15, 2016, the AD advised the parties:

Due to an unprecedented number of protests going to hearing, and submitting on stipulations and briefs in December, January, and February, and the protests, which have already submitted for decision, the ALJ is suspending the issue date on all *Findings, Conclusions, and Recommendations* for all cases submitted for decision, and all cases scheduled for hearing through the end of February 2017.

The ALJ has not made this decision lightly, but to give each case the attention it demands, it is essential the ALJ free himself from artificial deadlines, which the ALJ has imposed on himself.

The ALJ thanks the parties in advance for their patience and cooperation.

## **JOINT STIPULATION OF FACTS AND ISSUES**

### **I. PREAMBLE**

**NOW, THEREFORE**, it is hereby stipulated for the purpose of the above-styled Protest by and between the parties hereto, through their respective representatives, that the facts contained herein shall be taken to be true for purposes of the resolution of this controversy, including appeals, if any, and for no other

purpose. The parties specifically reserve the right to offer such additional evidence as may from time to time be permitted by the authority having jurisdiction over this controversy. Unless otherwise stated, the parties waive all rights to object to any stipulation herein on any grounds, except as to relevancy. All Exhibits to the Stipulation are made a part of and incorporated into the Stipulation.

## **II. STATEMENT OF THE ISSUES**

The parties agree and stipulate that the issue to be determined in this matter is whether Protestants qualify for the Oklahoma Capital Gains Deduction, 68 O.S. 2011, § 2358(F), as claimed on their amended 2011 Oklahoma income tax return.

## **III. GENERAL BACKGROUND**

1. Protestants acquired 3,500,000 shares of stock of Primus International Holding Company on September 29, 2006. *See* Exhibit A (Acknowledgement and Agreement for acquisition of Primus International Holding Company Stock by [Protestants], as Co-Fiduciaries of the [Protestants] Trust u/t/a dated November 20, 1996).
2. Primus International Holding Company is a privately held company with its principal headquarters located in Washington.
3. By letter dated July 15, 2011, Primus International Holding Company informed its shareholders that the company would be sold to

Precision Castparts Corp. pursuant to an Agreement and Plan of Merger. *See* Exhibit A.

4. The sale of Primus International Holding Company was completed on or about August 9, 2011, and as part of that sale, Protestants sold their shares of Primus International Holding Company stock.
5. Protestants reported a long-term capital gain from the sale of their Primus International Holding Company stock in the amount of \$6,042,629.00.
6. Protestants had owned the Primus International Holding Company stock for more than two years prior to the sale of that stock.

#### **IV. PROCEDURAL FACTS**

7. On or about June 19, 2013, Protestants filed an Oklahoma Amended Resident Individual Income Tax Return for tax year 2011. *See* Exhibit B. The first page of the amended return was marked “Oklahoma Capital Gain Claim for Refund,” in accordance with the OTC’s published Instructions on How to File an Oklahoma Capital Gain Claim for Refund.
8. Protestants claimed the Oklahoma Capital Gains Deduction (the “Deduction”) on their amended 2011 return in the amount of \$5,954,814.00. Gains resulting from the sale of Primus International Holding Company stock were reported on line 2 of Protestants’ Form 561. *See* Exhibit B.

9. By letter dated July 29, 2015, the Division advised Protestants that their claim for the Deduction had been disallowed. *See* Exhibit C.
10. By letter dated August 7, 2015, Protestants timely protested the Division's disallowance of the Deduction. *See* Exhibit D.
11. The Protestants' protest is properly before the Administrative Law Judge.

#### **V. JOINT EXHIBITS**

The parties stipulate to the authenticity of the following exhibits while preserving all rights to object to any listed document on any grounds, including, but not limited to, the ground of relevancy.

1. July 15, 2011 letter from Primus International Holding Company letter to Stockholders advising of the sale of Primus International Holding Company to Precision Castparts Corp., with accompanying exhibits, attached hereto as **Exhibit A**.
2. Protestants' Oklahoma Amended Resident Individual Income Tax Return for tax year 2011, Form 511-X, with all accompanying forms and schedules, attached hereto as **Exhibit B**.
3. July 29, 2015 letter to Protestants from the Oklahoma Tax Commission disallowing their claim for the Deduction, attached hereto as **Exhibit C**.



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4. Protestants' Protest Letter dated August 7, 2015, attached hereto as **Exhibit D**.
5. Instructions on How to File an Oklahoma Capital Gain for Refund, attached hereto as **Exhibit E**.

**ADDITIONAL  
FINDINGS OF MATERIAL FACTS  
AS TO WHICH THERE IS NO CONTROVERSY**

Upon review of the file and records, the exhibits received into evidence, Division's MSD, Joint Stipulation of Facts and Issues, Protestants' Response and Counter MSD, Division's Reply, Protestants' Resubmitted Response and Counter MSD, and Affidavit of Supervisor, the undersigned finds:

1. On September 30, 2016, the Division filed the Affidavit of Supervisor, Compliance Division, Oklahoma Tax Commission, which states as follows,<sup>14</sup> to-wit:

1. My name is [Supervisor]. I am over eighteen years of age, suffer from no disabilities, and am competent to make this Affidavit.
2. I make this Affidavit based upon my personal knowledge.
3. I am currently employed by the Compliance Division ("Division") of the Oklahoma Tax Commission. In my

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<sup>14</sup> See Procedural History herein. See also ALJ-1.

capacity as an employee of the Oklahoma Tax Commission, I have the authority to give testimony regarding the above-referenced matter.

4. On or about June 14, 2013, [Protestants] filed an amended income tax return for tax year 2011. I understand this return to have been filed as a protective claim as the result of pending appeal in *CDR Systems Corp. v. Okla. Tax Comm'n*, 2014 OK 31. The amended return was filed for the purpose of claiming a deduction for capital gains for the sale of stock in Primus International.
5. In my capacity as an employee of the Division, I conducted a review of the protective claims filed pending the *CDR* decision, including the tax year 2011 amended income tax return filed by Protestants.
6. The Compliance Division denied Protestants' amended claim for the Oklahoma Capital Gains Deduction which included the sale of the Primus International stock. The claim was denied because Primus International did not have its primary headquarters located in Oklahoma.
7. In effect, the Division's denial of the amended claim was a denial of Protestants' amended 2011 return as a whole. The Division did not deny the

Oklahoma Capital Gains Deduction claimed on the Protestants' original 2011 Oklahoma income tax return. The original return has been accepted as filed, including the Oklahoma Capital Gains Deduction originally claimed for the sale of Helmerich & Payne in the amount of \$55,850.

## CONCLUSIONS OF LAW

### A. MOTION FOR SUMMARY DISPOSITION

1. The Legislature vested the Tax Commission with jurisdiction over the parties and subject matter of this proceeding.<sup>15</sup>

2. A party may file a motion for summary disposition on any or all issues on the ground that there is no substantial controversy as to any material fact.<sup>16</sup> The procedures for such motion are as follows:

(1) The motion for summary disposition shall be accompanied by a concise written statement of the material facts as to which the movant contends no genuine issue exists and a statement of argument and authority demonstrating that summary disposition of any or all issues should be granted. The moving party shall verify the facts to which such party contends no genuine controversy exists

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<sup>15</sup> OKLA. STAT. ANN. tit. 68, § 207 (West 2014) and OKLA. ADMIN. CODE § 710:1-5-38.1 (July 11, 2013).

<sup>16</sup> *Id.*

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with affidavits and evidentiary material attached to the statement of material facts.

(2) If the protest has been set for hearing, the motion shall be served at least twenty (20) days before the hearing date unless an applicable scheduling order issued by the Administrative Law Judge establishes an earlier deadline. The motion shall be served on all parties and filed with the Office of the Administrative Law Judges.

(3) Any party opposing summary disposition of issues shall file with the Administrative Law Judge within fifteen (15) days after service of the motion a concise written statement of the material facts as to which a genuine issue exists and the reasons for denying the motion. The adverse party shall attach to the statement evidentiary material justifying the opposition to the motion, but may incorporate by reference material attached to the papers of the moving party. All material facts set forth in the statement of the movant which are supported by acceptable evidentiary material shall be deemed admitted for the purpose of summary disposition unless specifically controverted by the statement of the adverse party which is supported by acceptable evidentiary material.

(4) The affidavits that are filed by either party shall be made on personal knowledge, shall show that the affiant is competent to testify as to the matters stated therein, and shall set forth matters that would be admissible in

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evidence at a hearing. A party challenging the admissibility of any evidentiary material submitted by another party may raise the issue expressly by written objection or motion to strike such material.

(5) If the taxpayer has requested a hearing, the Administrative Law Judge will issue a notice to the parties scheduling the motion for a hearing limited to oral argument. If the taxpayer has not requested a hearing, the Administrative Law Judge will rule on the motion based on the submission of the parties, including the motion, opposition to the motion, and attachments thereto.

(6) If the Administrative Law Judge finds that there is no substantial controversy as to the material facts and that one of the parties is entitled to a decision in its favor as a matter of law, the Judge will grant summary disposition by issuing Findings of Fact, Conclusions of Law, and Recommendations. Such Findings of Fact, Conclusions of Law and Recommendations are subject to review by the Commission pursuant to *OAC* 710:1-5-10, 710:1-5-40 and 710:1-5-41. If a motion for summary disposition is denied, the Administrative Law Judge will issue an order denying such motion.

(7) If the Administrative Law Judge finds that there is no substantial controversy as to certain facts or issues, the Judge may grant partial summary disposition by issuing an order which specifies the facts or issues which

are not in controversy and directing that the action proceed for a determination of the remaining facts or issues. If a hearing of factual issues is required, evidentiary rulings in the context of the summary procedure shall be treated as rulings in limine. Any ruling on partial summary disposition shall be incorporated into the Findings of Fact, Conclusions of Law, and Recommendations issued at the conclusion of the proceedings before the Administrative Law Judge.

3. The rules promulgated pursuant to the Administrative Procedures Act<sup>17</sup> are presumed to be valid and binding on the persons they affect and have the force of law.<sup>18</sup>

## **B. STANDARD OF REVIEW**

4. An order that grants summary relief, in whole or part, disposes solely of law questions.<sup>19</sup>

5. Although a trial court in making a decision on whether summary judgment is appropriate considers factual matters, the ultimate decision turns on purely

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<sup>17</sup> OKLA. STAT. ANN. tit. 75, § 250 *et seq.* (West 2002).

<sup>18</sup> *Id. See Toxic Waste Impact Group, Inc. v. Leavitt*, 1988 OK 20, 755 P.2d 626.

<sup>19</sup> *Ashikian v. Oklahoma Horse Racing Coma*, 2008 OK 64, 188 P.3d 148. “Summary process is a special pretrial procedural track pursued with the aid of acceptable probative substitutes; it is a search for undisputed material facts which, sans forensic combat, may be utilized in the judicial decision-making process.” *Id.* at ¶ 6.

legal determinations, i.e. whether one party is entitled to judgment as a matter of law because there are no material disputed factual questions.<sup>20</sup>

6. Summary judgment should be granted only if it is perfectly clear that there is no material fact at issue. For summary judgment to be appropriate, the trial court must not only find there is no substantial controversy as to any material fact, but also that reasonable people could not reach differing conclusions from the undisputed facts.<sup>21</sup>

7. A fact is material for purposes of summary judgment if proof of the fact would establish or refute an essential element of a cause of action or a defense.<sup>22</sup>

### **C. INCOME TAX**

8. The Legislature vested the Oklahoma Tax Commission with jurisdiction over the parties and subject matter of this proceeding.<sup>23</sup>

9. A corporation electing treatment as a Subchapter “S” Corporation under the Internal Revenue

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<sup>20</sup> *Carmichael v. Beller*, 1996 OK 48, ¶ 6, 914 P.2d 1051. (Citations omitted.)

<sup>21</sup> *Fulton v. People Lease Corp.*, 2010 OK CIV APP 84, ¶ 52, 241 P.3d 255. (Citations omitted.) See *Winston v. Stewart & Elder, P.C.*, 2002 OK 68, ¶ 10, 55 P.3d 1063. “If reasonable minds might reach different conclusions when viewing the evidentiary materials (even those which are undisputed), summary judgment is inappropriate.”

<sup>22</sup> *Id.* at ¶ 9. (Citations omitted.)

<sup>23</sup> OKLA. STAT. ANN. tit. 68, § 221 (West 2014).

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Code (“IRC”) is not subject to Oklahoma corporate income tax; however a Subchapter “S” Corporation’s shareholders shall include their proportionate share of the corporation’s federal income in each shareholder’s taxable income in the same manner and to the same extent as provided by the IRS, subject to adjustments provided in the Oklahoma Income Tax Act (“Act”).<sup>24</sup>

10. The Act imposes an income tax upon the Oklahoma Taxable Income<sup>25</sup> of every resident or non-resident individual who earns income within Oklahoma.<sup>26</sup>

11. The beginning point of determining Oklahoma taxable income is Federal Adjusted Income.<sup>27</sup>

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<sup>24</sup> See OKLA. STAT. ANN. tit. 68, § 2351 *et seq.* (West 2008). See also OKLA. STAT. ANN. tit. 68, § 2365 (West 2013).

<sup>25</sup> OKLA. STAT. ANN. tit. 68, § 2353(12) (West 2008):

“Oklahoma taxable income” means “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;

<sup>26</sup> OKLA. STAT. [sic] tit. 68, § 2355 (West Supp. 2008).

<sup>27</sup> OKLA. STAT. ANN. tit. 68, § 2353(13) (West 2008):

“Oklahoma adjusted gross income” means “adjusted gross income” as reported to the federal government (or as would have been reported by the taxpayer had a return been filed), or in the event of adjustments thereby by the federal government as finally ascertained under the Internal Revenue Code, adjusted further as hereinafter provided;



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12. Section 338 of Title 26 creates a legal fiction whereby a “purchasing corporation” in the case of a “Qualified Stock Purchase” transaction may treat the acquisition of the stock of a “Target Corporation,” if elected, as an acquisition of all of the assets of the Target Corporation at the Fair Market Value of the assets. If elected, the Target Corporation “recognizes gain or loss with respect to the transaction as if it sold all of its assets in a single transaction . . . and (to the extent provided in regulations) no gain or loss will be recognized on stock sold or exchanged in the transaction by members of the selling consolidated group.”<sup>28</sup>

13. Any term used in the Act shall<sup>29</sup> have the same meaning as when used in a comparable context in the IRC, unless a different meaning is clearly required. For all taxable periods covered by the Act, the tax status and all elections of all taxpayers covered by the Act shall<sup>30</sup> be the same for all purposes material hereto as they are for federal income tax purposes except when the Act specifically provides otherwise.<sup>31</sup>

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<sup>28</sup> 26 U.S.C.A. § 338(h)(10).

<sup>29</sup> “Generally, when the legislature uses the term ‘shall,’ it signifies a mandatory directive or command.” See *Keating v. Edmondson*, 2001 OK 110, ¶ 13, 37 P.3d 882.

<sup>30</sup> *Id.*

<sup>31</sup> OKLA. STAT. ANN. tit. 68, § 2353(3) (West 2008).

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14. A taxpayer's income tax liability is determined in accordance with the law in effect at the time the income is received.<sup>32</sup>

15. The text of Section 2358(F) of Title 68<sup>33</sup> for the 2011 Tax Year in pertinent parts is as follows, to-wit:

F.1. For taxable years beginning after December 31, 2004, a deduction from the Oklahoma adjusted gross income of any individual taxpayer shall be allowed for qualifying gains receiving capital treatment that are included in the federal adjusted gross income of such individual taxpayer during the taxable year.

2. As used in this subsection:

a. "qualifying gains receiving capital treatment" means the amount of net capital gains, as defined in Section 1222(11) of the Internal Revenue Code, included in an individual taxpayer's federal income tax return that result from:

(1) the sale of real property or tangible personal property located within Oklahoma that has been directly or indirectly owned by the individual taxpayer for a holding period of at least five (5) years prior to the date of the

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<sup>32</sup> *Affiliated Management Corp. v. Oklahoma Tax Commission*, 1977 OK 183, 570 P.2d 335; *Wootten v. Oklahoma Tax Com'n*, 1935 OK 54, 170 Okla. 584, 40 P.2d 672.

<sup>33</sup> OKLA. STAT. [sic] tit. 68, § 2358(F) (West 2011). See OKLA. ADMIN. CODE § 710:50-15-48 (June 25, 2007).

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transaction from which such net capital gains arise,

(2) the sale of stock or the sale of a direct or indirect ownership interest in an **Oklahoma company**, limited liability company, or partnership where such stock or ownership interest has been directly or indirectly owned by the individual taxpayer for a holding period of at least two (2) years prior to the date of the transaction from which the net capital gains arise, or

(3) the sale of real property, tangible personal property or intangible personal property located within Oklahoma as part of the sale of all or substantially all of the assets of an Oklahoma company, limited liability company, or partnership or an Oklahoma proprietorship business enterprise where such property has been directly or indirectly owned by such entity or business enterprise or owned by the owners of such entity or business enterprise for a period of at least two (2) years prior to the date of the transaction from which the net capital gains arise,

- b. “holding period” means an uninterrupted period of time. The holding period shall include any additional period when the property was held by another individual or entity, if such additional period is included in the taxpayer’s holding period for the asset pursuant to the Internal Revenue Code,
- c. “**Oklahoma company**,” “limited liability company,” or “partnership” means an entity whose

primary headquarters have been located in Oklahoma **for at least three (3) uninterrupted years prior to the date of the transaction from which the net capital gains arise**, (Emphasis added.)

- d. “direct” means the individual taxpayer directly owns the asset,
- e. “indirect” means the individual taxpayer owns an interest in a pass-through entity (or chain of pass-through entities) that sells the asset that gives rise to the qualifying gains receiving capital treatment,

(1) With respect to sales of real property or tangible personal property located within Oklahoma, the deduction described in this subsection shall not apply unless the pass-through entity that makes the sale has held the property for not less than five (5) uninterrupted years prior to the date of the transaction that created the capital gain, and each pass-through entity included in the chain of ownership has been a member, partner, or shareholder of the pass-through entity in the tier immediately below it for an uninterrupted period of not less than five (5) years.

(2) With respect to sales of stock or ownership interest in or sales of all or substantially all of the assets of an Oklahoma company, limited liability company, partnership or Oklahoma proprietorship business enterprise, the deduction described in this subsection shall not apply unless the pass-through entity that makes the sale has held the stock or

ownership interest for not less than two (2) uninterrupted years prior to the date of the transaction that created the capital gain, and each pass-through entity included in the chain of ownership has been a member, partner or shareholder of the pass-through entity in the tier immediately below it for an uninterrupted period of not less than two (2) years. For purposes of this division, uninterrupted ownership prior to the effective date of this act shall be included in the determination of the required holding period prescribed by this division, and

- f. “Oklahoma proprietorship business enterprise” means a business enterprise whose income and expenses have been reported on Schedule C or F of an individual taxpayer’s federal income tax return, or any similar successor schedule published by the Internal Revenue Service and whose primary headquarters have been located in Oklahoma for at least three (3) uninterrupted years prior to the date of the transaction from which the net capital gains arise.

16. Section 2358(F) of Title 68<sup>34</sup> fails to define “Oklahoma company,” but “company” is commonly defined as “A corporation, partnership, association, joint-stock company, trust fund, or organized group of persons, whether incorporated or not . . . ”<sup>35</sup> There is no dispute “Oklahoma company” includes a corporation

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* See also BLACK’S LAW DICTIONARY (10th ed. 2014).

(domestic or foreign) that has made an “S” Corporation election for income tax purposes.

17. The rules promulgated pursuant to the Administrative Procedures Act<sup>36</sup> are presumed to be valid and binding on the persons they affect and have the force of law.<sup>37</sup>

#### **D. STATUTORY INTERPRETATION**

18. The goal of any inquiry into the meaning of a legislative act is to ascertain and give effect to the intent of the legislature. The law-making body is presumed to have expressed its intent in a statute’s language and to have intended what the text expresses. Hence, where a statute is plain and unambiguous, it will not be subject to judicial construction, but will be given the effect its language dictates. Only where the intent cannot be ascertained from a statute’s text, as occurs when ambiguity or conflict (with other statutes) is shown to exist, may rules of statutory construction be employed. Statutes that provide an exemption from taxation are to be strictly construed against the claimant.<sup>38</sup> Statutory construction presents a question of law.<sup>39</sup>

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<sup>36</sup> See Note 17, *supra*.

<sup>37</sup> *Id.* See Note 18, *supra*.

<sup>38</sup> *Blitz U.S.A., Inc. v. Oklahoma Tax Com’n*, 2003 OK 50, ¶ 14, 75 P.3d 883.

<sup>39</sup> *Id.* at 6.

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19. Tax exemptions, deductions, and credits depend entirely on legislative grace and are strictly construed against the exemption, deduction or credit.<sup>40</sup>

20. Section 2358(F) of Title 68<sup>41</sup> is a tax exemption or deduction statute, not a tax levying statute; and as such, it must be strictly construed unless authority for the deduction is clearly expressed.<sup>42</sup>

21. Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears, and except also that the words hereinafter explained are to be understood as thus explained.<sup>43</sup>

22. Whenever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.<sup>44</sup>

23. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.<sup>45</sup> A proposed

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<sup>40</sup> *TPQ Inv. Corp. v. State ex rel. Oklahoma Tax Com'n*, 1998 OK 13, ¶ 8, 954 P.2d 139. (Citations omitted).

<sup>41</sup> See Note 33, *supra*.

<sup>42</sup> *Id.*

<sup>43</sup> OKLA. STAT. ANN. tit. 25, § 1 (West 2008).

<sup>44</sup> OKLA. STAT. ANN. tit. 25, § 2 (West 2008).

<sup>45</sup> OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999):

In all administrative proceedings, unless otherwise provided by law, the burden of proof shall be upon the protestant to show in what respect the action or proposed action of the Tax Commission is incorrect. If upon hearing, the protestant fails to prove a prima

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assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.<sup>46</sup>

### **STATEMENT OF THE ISSUE**

Whether Protestants qualify for the Oklahoma Capital Gains Deduction, 68 O.S. 2011, § 2358(F), as claimed on their amended 2011 Oklahoma income tax return?

### **CORE ISSUE**

Is the Oklahoma Headquarters requirement contained in Section 2358(F)(2)(c) of Title 68<sup>47</sup>

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facie case, the Administrative Law Judge may recommend that the Commission deny the protest solely upon the grounds of failure to prove sufficient facts[,] which would entitle the protestant to the requested relief.

OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999):

For purposes of Section 221(e) of Title 68 of the Oklahoma Statutes and Part 7 of [Abatement of Erroneous Tax Assessment] this Subchapter, “**preponderance of the evidence**” means the evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which as a whole shows that the fact sought to be proved is more probable than not. (Emphasis original).

<sup>46</sup> See *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

<sup>47</sup> See Note 33, *supra*.



a constitutional violation of the Commerce Clause to the United States Constitution?<sup>48</sup>

**DIVISION'S MSD, PROTESTANTS' RESPONSE AND COUNTER MSD, AND DIVISION'S REPLY**

The parties have entered Joint Stipulation of Facts and Issues, with Joint Exhibits A through E. The parties agree there is no dispute on the material facts in this matter.<sup>49</sup> For the Division's MSD and the Protestants' Counter MSD, the critical fact, which is not in dispute, is that Primus is a privately held company with its principal headquarters in Washington.<sup>50</sup> The Division denied Protestants' claim for the Oklahoma Capital Gains Deduction because Primus is not an "Oklahoma Company" as required by Sections 2358(F)(2)(a)(2) and 2358(F)(2)(c) of Title 68.<sup>51</sup>

Section 2358(F)(2)(c) of Title 68<sup>52</sup> states:

**"Oklahoma company," . . . means an entity whose primary headquarters have been located in Oklahoma for at least three (3) uninterrupted years** prior to the date of the transaction from which the net capital gains arise,

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<sup>48</sup> See Protestants' Response and Counter MSD.

<sup>49</sup> *Id.* See Division's MSD at 1, and Protestants' Response and Counter MSD at 1.

<sup>50</sup> See Stipulation of Facts and Issues at 2.

<sup>51</sup> See Note 33, *supra*.

<sup>52</sup> *Id.*

The Protestants' position is the Oklahoma Headquarters requirement in Section 2358(F)(2)(c) of Title 68<sup>53</sup> constitutionally violates the Commerce Clause to the United States Constitution.<sup>54</sup> The parties have briefed this matter extensively, but as the parties are aware it is a settled questioned [sic] of law in the State of Oklahoma, after Supreme Court of Oklahoma's decision in *CDR*,<sup>55</sup> that the "Headquarters" requirement of Sections 2358(D)(2)(2) and 2358(D)(2)(c) of Title 68 *do not* violate the Dormant Commerce Clause. The Legislature used the same language in the provisions for Individual Taxpayers as it did for Corporations, Estates, or Trusts. The Protestants have not put forth any legal argument that would dictate a different result for Individual Taxpayers.<sup>56</sup>

## RECOMMENDATIONS

### A. DIVISION'S MSD

Based upon the record, reasonable minds would reach the same conclusion, there is no substantial controversy on the material facts; the ALJ recommends

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<sup>53</sup> See Note 33, *supra*.

<sup>54</sup> See Protestants' Response and Counter MSD.

<sup>55</sup> *CDR Systems Corp. v. Oklahoma Tax Comm'n*, 2014 OK 31, 339 P.3d 848.

<sup>56</sup> "In *CDR*, the Court found that the 'Dormant Commerce Clause' does not apply to the facts set forth in that case and presumed would conclude that it would not apply to the taxpayers and the facts in the case at bar." See Protestants' Response and Counter MSD at 7.

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granting the Division's *MSD*, as a matter of law, as set forth.

**B. PROTESTANTS' COUNTER MSD**

Based upon the record, reasonable minds would reach the same conclusion, there is no substantial controversy on the material facts; the ALJ recommends denial of the Protestants' *Counter MSD*, as a matter of law, as set forth.

OKLAHOMA TAX  
COMMISSION

/s/ Jay L. Harrington  
JAY L. HARRINGTON  
ADMINISTRATIVE  
LAW JUDGE

[Certificate Of Service Or Mailing Omitted]

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**IN THE SUPREME COURT  
OF THE STATE OF OKLAHOMA**

**MONDAY, SEPTEMBER 24, 2018**

**THE CLERK IS DIRECTED TO ENTER THE  
FOLLOWING ORDERS OF THE COURT:**

115,947 In the Matter of the Income Tax Protest of  
Randolph S. and Beverly J. Baskins; Randolph  
S. Baskins and Beverly J. Baskins v. Okla-  
homa Tax Commission

**Petition for certiorari is denied.**

CONCUR: Gurich, V.C.J., Kauger, Winchester,  
Edmondson, Colbert, Reif, Wyrick  
and Darby, JJ.

DISSENT: Combs, C.J.

/s/ Douglas L. Combs  
**CHIEF JUSTICE**

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