JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2005-09-13-04
ID:	P-05-056-H
DATE:	SEPTEMBER 13, 2005
DISPOSITION:	MOTION GRANTED
TAX TYPE:	INCOME INTERCEPT
APPEAL:	NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

TAXPAYER[1] ("Protestant"), appears pro se.[2] The Account Maintenance Division ("Division"), Oklahoma Tax Commission, appears through OTC ATTORNEY 1, and OTC ATTORNEY 2, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On May 9, 2005, the Division forwarded the audit file to the Office of Administrative Law Judges for further proceedings consistent with the Uniform Tax Procedure Code[3] and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.[4] On June 9, 2005, the parties were sent a notice setting this matter for hearing on July 6, 2005, at 2:00 p.m. In preparation for the pending hearing, it came to the attention of the undersigned Administrative Law Judge that the Division's notice of intent to intercept the Protestant's refund was dated February 11, 2005, and that the protest e-mailed to the Division was dated and filed with this office on May 12, 2005, ninety (90) days after the date of the Division's notice.

On July 1, 2005, the parties were notified by letter and e-mail that from the information in the court file (the Division's Memorandum Brief filed June 28, 2005) it did not appear that this office had the jurisdiction to hear this matter. The hearing set for July 6, 2005, at 2:00 p.m. was stricken and the parties were given ten (10) days from the date of the letter to either provide proof that the protest was timely or the Division was directed to file a Motion to Dismiss in accordance with OKLA. ADMIN. CODE § 710:1-5-46.

On July 6, 2005, the Division filed a Motion to Dismiss for lack of jurisdiction. A Notice to Appear or Respond in Writing was issued setting this matter for hearing on July 27, 2005, at 1:30 p.m. No response was received from the Protestant, nor did the Protestant appear at the hearing. The Division did not call a witness to testify, but relied on the provisions of OKLA. ADMIN. CODE § 710:1-5-46.

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[1] TAXPAYER is a/k/a TAXPAYER NAME W/ MIDDLE INITIAL and f/k/a TAXPAYER MAIDEN NAME.

[2] "Pro se" is defined as "For himself; in his own behalf; in person. Appearing for oneself, as in the case of one who does not retain a lawyer and appears for himself in court." BLACK'S LAW DICTIONARY 1099 (5th ed. 1979).

[3] OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

[4] OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, the position letters, and the Division's Motion to Dismiss, the undersigned finds:

1. On February 11, 2005, the Division mailed a notice to the Protestant at her last known address according to the records of the Oklahoma Tax Commission advising that her 2004 refund in the amount of $358.00 had been delayed due to a reported sales tax liability owed to the Oklahoma Tax Commission by the Protestant as the Secretary/Treasury of XYZ BUSINESS., and as an individual.[5] The notice contained the following language in bold type and all capitals, as follows:

> **ANY DISAGREEMENT WITH THIS NOTICE MUST BE HANDLED IN WRITING WITHIN SIXTY (60) DAYS. FAILURE TO RESPOND WITHIN THE SIXTY DAY PERIOD WILL RESULT IN THE TRANSFER OF YOUR INCOME TAX REFUND TO THE ABOVE MENTIONED LIABILITIES.**

2. On April 15, 2005, the Protestant faxed a copy of a Journal Entry of Judgment to the Division in response to the Division's notice of intent to intercept the Protestant's 2004 refund.[6] If this action by the Protestant is considered a protest, it was received by the Division sixty-three (63) days after the Division's notice of February 11, 2005.

3. On May 12, 2005, the Protestant sent a letter of protest via e-mail, which was filed by the Division with this Office the same day.[7] This protest was received by the Division ninety (90) days after the Division's notice of February 11, 2005.

4. On July 6, 2005, the Division filed a Motion to Dismiss on the basis that the Protestant had filed her protest out of time. The protest had not been filed within sixty (60) days after the mailing of the Division's notice of intent to intercept the Protestant's 2004 refund.

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[5] See Division's Exhibit F attached to the Division's Memorandum Brief filed June 28, 2005. The notice was mailed to the Protestant at the address on her 2004 Income Tax Return as follows: RR9, BOX 999, SMALL TOWN OK 99999. *See* Division's Exhibit E attached to the Division's Memorandum Brief filed June 28, 2005.

[6] The court file contains an audit packet, which was forwarded by the Division as part of the protest file on this matter. The Administrative Law Judge is taking judicial notice of the materials contained in the court file for the purpose of completing the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (2004). *See* Division's Exhibit H attached to the Division's Memorandum Brief filed June 28, 2005. The Journal Entry of Judgment was entered September 22, 1999. The Journal Entry of Judgment covered a foreclosure, including tax warrants that were disposed of by the case and not the liability included in the Division's notice.

[7] See Division's Exhibit G attached to the Division's Memorandum Brief filed June 28, 2005. The e-mail reflects that the Protestant sent the protest to the Division on May 12, 2005, at 9:10 a.m. from the following e-mail address: [USERNAME@DOMAIN.net].

5. On July 11, 2005, this office sent the parties a Notice to Appear or Respond in Writing for a hearing set for July 27, 2005, at 1:30 p.m. and show cause why the protest should not be dismissed for failure to give notice of appeal within the time allowed under state law.

6. The Division's Motion to Dismiss was heard on July 27, 2005, at 1:30 p.m.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[8]

2. The Oklahoma Tax Commission is vested with jurisdiction to consider the Motion to Dismiss.[9]

3. In order for a protest to be considered timely, it must be filed in writing pursuant to Oklahoma Statutes, within sixty (60) days after the date of mailing of the Division's notice to the debtor by regular mail at the last known address of the debtor as shown by the records of the Tax Commission.[10]

4. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[11]

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[8] OKLA. STAT. ANN. tit. 68, § 205.2 (West 2001).

[9] *See* Note 8. *See also* OKLA. ADMIN. CODE § 710:1-5-46, which states:

> (a) Who may file. A Motion to Dismiss may be filed by with either party in an administrative proceeding related to a tax protest, and the Administrative Law Judge, upon his or her own motion, may give notice of intent to dismiss, stating grounds for dismissal.
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> (b) Procedure in dismissal. Notice of a Motion to Dismiss filed by the tax division or the taxpayer, or an intent to dismiss issued by the Administrative Law Judge shall be sent to all parties or their authorized representatives by mail. A notice to appear at a certain time, date and place and show cause why such case should not be dismissed should be sent with the dismissal. Notice shall be given at least fifteen (15) days prior to the show cause hearing. If taxpayer fails to appear at the hearing or to respond to the notice, the Administrative Law Judge may recommend to the Commission that an order of dismissal be entered fixing the deficiency as the amount determined by the Tax Commission or that an order be entered disposing of the case consistent with the position last taken by the tax division.

[10] OKLA. STAT. ANN. tit. 68, § 205.2(A)(2) (West 2001).

[11] OKLA. ADMIN. CODE § 710:1-5-47 (2004), which states:

> 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 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) (2004), provides in pertinent part:

5. The protest(s) in this matter were not received within the sixty (60) day provision provided by Oklahoma Statutes, and the Protestant did not request an extension within the sixty (60) day period.

6. The Protestant has failed to meet her burden of proof that her protest(s) were timely filed.

DISPOSITION

It is the ORDER OF THE OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the Division's Motion to Dismiss for lack of jurisdiction should be granted

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.

. . . "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.