JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2005-12-06-02
ID:	P-05-049-H
DATE:	DECEMBER 6, 2005
DISPOSITION:	DISMISSED
TAX TYPE:	SALES
APPEAL:	NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROTESTANT, as an Officer of COMPANY. d/b/a BAR, and as an Individual ("Protestant"), appears pro se.[1] The Field Audit Section of the Audit Division ("Division"), Oklahoma Tax Commission, appears through OTC ATTORNEY 1, and OTC ATTORNEY 2, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On April 25, 2005, the audit file was received from the Division for further proceedings consistent with the Uniform Tax Procedure Code[2] and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.[3] On April 27, 2005, a notice was mailed to the Protestant which stated that this matter had been assigned to ALJ, Administrative Law Judge, and the docket number of the case, enclosed a copy of the Rules of Practice and Procedure Before the Oklahoma Tax Commission, and advised that the Protestant would be receiving a notice setting the prehearing conference.[4]

On May 23, 2005, the notice setting the prehearing conference for June 15, 2005, at 2:30 p.m. was mailed to the parties.[5] At the request of the Protestant the prehearing conference was continued one (1) day and held on June 16, 2005, at 9:30 a.m. by telephone. It was brought to the attention of the parties during the prehearing conference that from the face of the record it

[1] "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).

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

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

[4] OKLA. ADMIN. CODE § 710:1-5-21. The initial notice was mailed to the Protestant at 1111 ANYROAD, SUBURB, Oklahoma 99999. The notice was returned undelivered by the U.S. Postal Service as "moved left no address/unable to forward." A second notice was mailed to the Protestant at 2222 RAMDOM ROAD, BIG CITY, Oklahoma 99999. The second notice was also returned as undelivered by the U.S. Postal Service. The Division provided the address that the Protestant used to file his 2004 Oklahoma Income Tax Return. The third notice was mailed to the Protestant at 3333 XYZ STREET, BIG CITY, Oklahoma 99999. This notice was not returned.

[5] The notice was mailed to the Protestant at 3333 XYZ STREET, BIG CITY, Oklahoma 99999.

appeared that the protest was not timely filed.[6] On June 17, 2005, the parties were advised to submit a status report on or before July 15, 2005.[7]

On July 15, 2005, the Division filed a Motion to Dismiss for lack of jurisdiction. On July 21, 2005, the Protestant was mailed a "Notice to Appear or Respond in Writing" for a hearing to be held on August 9, 2005, at 1:30 p.m. to show cause why the above-styled and numbered protest should not be dismissed for the untimely filing of the protest.[8]

The hearing on the Division's Motion to Dismiss was held on August 9, 2005, at 1:30 p.m. The Protestant failed to appear at the hearing or respond to the notice. It was noted for the record that the Protestant had not contacted the Division's representative or this office concerning the hearing. The Division called one witness, SUPERVISOR, Auditor Supervisor, who testified regarding the records of the Division. The Division's Exhibits A through D were identified, offered, and admitted into evidence. Upon conclusion of the hearing, the record was closed and the case was submitted for decision on August 9, 2005.

Subsequent to the hearing it was discovered that the service of the Division's Motion to Dismiss was insufficient.[9] On September 13, 2005, the Division re-filed its Motion to Dismiss and presented for signature a Notice of Hearing on Motion to Dismiss and Order Setting Hearing for October 13, 2005, at 1:30 p.m.[10] The Certificate of Mailing on the Division's Motion and Order reflect the Protestant's mailing address of 123 FAKE STREET, SMALLTOWN, Oklahoma 99999.

On October 13, 2005, at 1:30 p.m. the hearing on the Division's Motion to Dismiss was held as scheduled. The Protestant appeared at the hearing and testified, but did not introduce any exhibits into evidence. The Division called one witness, AUDITOR, Auditor, who testified regarding the records of the Division and described in detail the mailing procedure of the Division for assessments. The Division's Exhibits A and B were identified, offered, and admitted into evidence. Upon conclusion of the hearing, the record was closed and the case was submitted for decision on October 13, 2005.

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[6] During the prehearing conference, the Protestant provided a new mailing address of 123 FAKE STREET, SMALL TOWN, OK 99999 and phone number of (999) 999-9999.

[7] The notice was mailed to the Protestant at 123 FAKE STREET, SMALL TOWN, OK 99999. The notice was not returned.

[8] The notice was mailed to the Protestant at the address provided during the prehearing conference.

[9] The motion was mailed to the former address of the business.

[10] Effective June 11, 2005, OKLA. ADMIN. CODE § 710:1-5-46(d) was amended. The Division followed the amended rule and presented the combined notice to set the hearing and order for the Administrative Law Judge's signature. The Division is now responsible for mailing the Protestant the motion and combined notice and order.

FINDINGS OF FACT

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

1. On October 1, 2004, the Division issued and mailed a proposed sales tax assessment[11] against the Protestant for the period of September 1, 2001, through July 1, 2004 ("Audit Period"). The assessment was mailed to the last known address of the Protestant, according to the records of the Oklahoma Tax Commission. The assessment was based upon a 3.2 beer depletion audit, and sales tax collected and not reported, as follows:

Sales Tax	$24,940.09
Interest @ 15% through 11/15/04	5,929.62
Penalty @ 10%	2,494.03
Total	$33,363.74

2. On December 3, 2004, the Division received a letter of protest. The Protestant mailed the protest through the U.S. Postal Service by Certified Mail No. 9999 9999 9999 9999 9999, with a receipt and postmark of December 1, 2004.[12] The protest was filed sixty-one (61) days from the date of the mailing of the assessment. The Division did not grant the Protestant an extension to file the protest. The protest was not timely filed.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[13]

2. The Oklahoma Tax Commission is vested with jurisdiction to consider the Motion to Dismiss.[14]

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[11] Division's Exhibit A. AUDITOR testified in detail describing the procedure the Division uses to mail assessments. AUDITOR'S testimony confirmed that the assessment was issued and mailed on October 1, 2004.

Paragraph number one (1) of the Motion to Dismiss states that a sales tax assessment and a tourism tax assessment were mailed to the Protestant, as an Officer and as an Individual. The record does not reflect that a tourism tax assessment was issued against the Protestant. Tourism is a non-trust tax and there is no indication in the court file that the corporation was suspended at any time during the Audit Period.

[12] Division's Exhibit B. The Protestant testified that his receipt was also stamped by the U.S. Postal Service on December 1, 2004. The Protestant mentions the tourism tax assessment in his letter of protest, but only the corporation was assessed tourism tax. *See* Note 11.

[13] OKLA. STAT. ANN. tit. 68, § 207 (West 2001).

[14] *See* Note 13. *See also* the amendment to OKLA. ADMIN. CODE § 710:1-5-46, which became effective June 11, 2005:

> (a) **Voluntary dismissal**. A protestant may dismiss his or her protest, or the tax division whose action or proposed action has been protested may withdraw its action or proposed

3. A taxpayer may file a written protest within sixty (60) days after the mailing of a proposed assessment.[15] In order for a protest to be considered timely,[16] it must be filed in

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action, without a motion therefor, at any time prior to the entry of a final order by the Commission.

(b) **Dismissal for mootness**. "Moot", for purposes of this Subchapter means that a case presents no actual controversy or that the issues have ceased to exist. A protest that is or has become moot may be dismissed by the Commission or by the Administrative Law Judge on their own motion or on the motion of a party. At least fifteen (15) days' notice of the motion or intent to dismiss shall be given to all parties, who shall have the opportunity to respond and show cause why the protest should not be dismissed. A dismissal by the Administrative Law Judge is appealable to the Commission in the same manner as appeals from other rulings by the ALJ.

(c) **Dismissal for lack of jurisdiction**. The Tax Commission is without jurisdiction to consider a protest that is not filed within the time provided by statute. The question of the Commission's jurisdiction to consider a protest may be raised at any time, by a party, the Administrative Law Judge, or the Commission itself. Questions as to the authority, propriety, or timeliness of the tax division's action or proposed action shall not be raised by a motion to dismiss, but shall be raised as defenses to such action or proposed action, as a part of or addition to the protest.

(d) **Motion to dismiss**. A motion filed by a party to dismiss a protest for lack of jurisdiction, or a notice by the Administrative Law Judge or the Commission of intent to dismiss a protest on jurisdictional grounds, shall state the reasons therefore, shall be filed in the case, and shall be mailed to all parties or their authorized representatives. The motion or notice of intent to dismiss shall be set for hearing, which shall not be less than fifteen (15) days after the filing of such motion or notice of intent, at which time any party opposing such motion or notice of intent may appear and show cause why the protest should not be dismissed. Notice of the date, time and place of the hearing shall be mailed to the parties or their representatives along with the motion or notice of intent to dismiss.

[15] OKLA. STAT. ANN. tit. 68, § 221 (C) (West 2001), which states:

> Within sixty (60) days after the mailing of the aforesaid proposed assessment, the taxpayer may file with the Tax Commission a written protest under oath, signed by the taxpayer or the taxpayer's duly authorized agent, setting out therein:
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> * * *

[16] OKLA. STAT. ANN. tit. 68, § 221 (E) (West 2001), which in pertinent part states:

> If the taxpayer fails to file a written protest within the sixty-day period herein provided for or within the period as extended by the Tax Commission, or if the taxpayer fails to file the notice required by Section 226 of this title within thirty (30) days from the date of the mailing of an assessment, then the proposed assessment, without further action of the Tax Commission, shall become final and absolute. . . .

See also OKLA. STAT. CODE § 710:1-5-71. **When an assessment becomes final**.

(a) In the event the person to whom a proposed assessment is issued acquiesces in the changes reflected on the proposed assessment, or fails to file a written protest within sixty (60) days after the mailing of the proposed assessment (or any extensions allowable by Statute that have been granted by the Division), the proposed assessment becomes final.

writing pursuant to Oklahoma Statutes, within sixty (60) days[17] after the date of mailing of the Division's notice to the taxpayer by regular mail at the last known address of the taxpayer as shown by the records of the Tax Commission.[18]

4. If the written protest is sent by United States certified mail and the sender's receipt is postmarked by the postal employee, the date of the United States postmark on such receipt shall be treated as the postmark date of the document. Thus, the risk that the document will not be postmarked on the day that it is deposited in the mail may be overcome by the use of certified mail.[19]

5. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[20]

(b) In cases in which an extension has been granted for filing a protest, the proposed assessment becomes final at the expiration of the period as extended by the Division if no protest is filed.

[17] OKLA. STAT. ANN. tit. 68, 221(C) (West 2001).

[18] OKLA. STAT. ANN. tit. 68, § 208 (West 2001), which states:

> Any notice required by this article, or any state law, to be given by the Tax Commission shall be in writing and may be served personally or by mail. If mailed, it shall be addressed to the person to be notified at the last-known address of such person. As used in this article or any other state tax law, "last-known address" shall mean the last address given for such person as it appears on the records of the division of the Tax Commission giving such notice, or if no address appears on the records of that division, the last address given as appears on the records of any other division of the Tax Commission. If no such address appears, the notice shall be mailed to such address as may reasonably be obtainable. The mailing of such address shall be presumptive evidence of receipt of the same by the person to whom addressed. If the notice has been mailed as provided in this section, failure of the person to receive such notice shall neither invalidate nor be grounds for invalidating any action taken pursuant thereto, nor shall such failure relieve any taxpayer from any tax or addition to tax or any interest or penalties thereon.

[19] OKLA. ADMIN. CODE § 710:1-5-44 (3), which states:

> **Use of certified or registered mail**. If the document is sent by United States registered mail, the date of registration of the document shall be treated as the postmarked date. If the document is sent by United States certified mail and the sender's receipt is postmarked by the postal employee, the date of the United States postmark on such receipt shall be treated as the postmark date of the document. Thus, the risk that the document will not be postmarked on the day that it is deposited in the mail may be overcome by the use of registered mail or certified mail.

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

6. The protest in this matter was 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. The Protestant's certified mail receipt and the two (2) postmarks on the certified mail envelope are "December 1, 2004," sixty-one (61) days after the Division mailed the sales tax assessment.

7. The Protestant has failed to meet his burden of proof that the protest was 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, with the following caveat. The protest is dismissed, but not dismissed with prejudice as requested by the motion.[21]

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.

[21] The "Rules of Practice and Procedure Before the Oklahoma Tax Commission" do not provide that a Motion to Dismiss can be granted either "With Prejudice" or "Without Prejudice" unlike the provisions of the "Rules of Civil Procedure" for practice in the District Courts of the State of Oklahoma. *See* OKLA. STAT. ANN. tit. 12, §§ 683 and 684 (West 2001).