JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2006-01-24-05
ID:	P-05-127-H
DATE:	JANUARY 24, 2006
DISPOSITION:	DISMISSED
TAX TYPE:	SALES/MIXED BEBERAGE/TOURISM
APPEAL:	NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROTESTANT ("Protestant") appears pro se.[1] The Audit Division ("Division"), Oklahoma Tax Commission, appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On September 8, 2005, the protest file was received by this office 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 September 23, 2005, the Protestant was notified by mail that this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-05-127-H. The letter enclosed a copy of the *Rules of Practice and Procedure Before the Oklahoma Tax Commission,* and the Protestant was advised that the notice of the prehearing conference would be mailed. On October 4, 2005, the Notice of Prehearing Conference was mailed to the last-known address of the Protestant.[4] The prehearing conference was set for November 7, 2005, at 10:00 a.m. The Protestant did not appear.

On December 1, 2005, the Division filed a *Motion to Dismiss* for lack of jurisdiction. The Division set the hearing on the *Motion to Dismiss* for December 20, 2005, at 1:30 p.m. On December 2, 2005, the Division mailed the motion and order to the Protestant.

On December 20, 2005, at 1:30 p.m. the hearing on the Division's *Motion to Dismiss* was held as scheduled. The Protestant appeared, but did not present any evidence in opposition to the Division's motion. The Division called one witness, AUDITOR, Auditor, Audit Division, Oklahoma Tax Commission, who testified regarding the records of the Division. The Division's Exhibits A through G were identified, offered, and admitted into evidence.[5] Upon conclusion of

[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. STAT. ANN. tit. 68, § 208 (West 2001). The notice was mailed to P.O. Box 9999, ANYTOWN, Oklahoma, 99999.

[5] Page 3 of the Division's Exhibit D was stricken at the request of the Division.

the hearing, the record was closed and the case was submitted for decision on December 20, 2005.

FINDINGS OF FACT

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

1. On November 21, 2001, the Division issued a proposed Sales Tax assessment[6] against the Protestant for the period of January 11, 2000, through May 31, 2001, ("Audit Period") as follows:

Sales Tax Due	$ 9,271.41
Interest through 12/31/01	1,008.64
Delinquency Penalty	927.16
Total Amount Due	$11,207.21

2. On November 21, 2001, the Division issued a proposed Mixed Beverage Tax assessment[7] against the Protestant for the Audit Period as follows:

Mixed Beverage Tax Due	$ 6,447.36
Interest through 12/31/01	527.27
Delinquency Penalty	644.74
Penalty @ $5.00 a day	4,800.00
Total Amount Due	$12,419.37

3. On November 21, 2001, the Division issued a proposed Tourism Tax assessment[8] against the Protestant for the Audit Period as follows:

Tourism Tax Due	$ 168.57
Interest through 12/31/01	14.15
Delinquency Penalty	14.65
Total Amount Due	$ 197.37

4. The Division mailed the proposed assessments to the last-known address of the Protestant according to the records of the Oklahoma Tax Commission.[9]

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[6] Division's Exhibit B.

[7] Division's Exhibit C.

[8] Division's Exhibit D.

[9] Division's Exhibits B, C, and D. The proposed assessments were sent by certified mail, return receipt requested, to the address on the Protestant's returns for the 2000 tax year, HC 99, Box 999, FAKE CITY, Oklahoma 99999. The certified mailing was returned as "Moved Left No Address/Unable To Forward/Return To Sender." *See* Division's Exhibit C-3. *See also* Division's Exhibits E, F, and G. The Division's Exhibit G reflects that the

5. On July 18, 2005, the Division received an untimely filed letter of protest[10] to the assessments.[11]

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[12]

2. The assessment of taxes or additional taxes shall be proposed in writing and shall be mailed to the taxpayer at the taxpayer's last-known address in accordance with statutory due process requirements.[13]

3. In order for a protest to be considered timely, it must be filed in writing pursuant to Oklahoma Statutes, within thirty (30) days after the date of mailing of the Division's notice to the taxpayer at the last-known address of the taxpayer as shown by the records of the Oklahoma Tax Commission.[14]

Protestant filed the Initial Return for the 2000 tax year on February 20, 2001, and the Amended Return for the 2000 tax year on July 22, 2002.

[10] Division's Exhibit A.

[11] The Protest includes a request for "abatement of penalty and interest." This office does not have the authority to waiver penalty and interest. The authority to waive penalty and interest rests exclusively with the Commissioners or their designee, pursuant to OKLA. STAT. ANN. tit. 68, § 220 (West 2001).

[12] OKLA. STAT. ANN. tit. 68, § 207 (West 2001) and OKLA. ADMIN. CODE § 710:1-5-46.

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

> Any notice required by this article, or any state tax 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 notice 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.

[14] OKLA. STAT. ANN. tit. 68, § 221 (West 2001). Prior to July 1, 2002, a taxpayer had thirty (30) days after a proposed assessment was mailed within which to file a written protest. OKLA. STAT. ANN. tit. 68, § 221 was amended, effective July 1, 2002, to provide a sixty (60) day protest period.

4. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[15] A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.[16]

5. The protests in this matter were not received within the thirty (30) day provision provided by Oklahoma Statutes.

6. The Protestant did not present any evidence in opposition to the Division's *Motion to Dismiss* and has failed to meet his burden of proof that his protests 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, with the following caveat. The protest is dismissed, but not with prejudice as requested by the motion.[17]

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.

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[15] 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 grounds of failure to prove sufficient facts which would entitle the protestant to the requested relief.

OKLA. ADMIN. CODE § 710:1-5-77(b), provides in pertinent part:

> . . . "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.

[16] *See Enterprise Management Consultants, Inc. v. State ex rel Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

[17] 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).