JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2007-10-30-02 / NON-PRECEDENTIAL**
ID: **P-07-080-H**
DATE: **OCTOBER 30, 2007**
DISPOSITION: **DISMISSED**
TAX TYPE: **INCOME**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HUSBAND and WIFE ("Protestants") appear by and through TAX PREPARER, TAX FIRM.[1] The Compliance Division ("Division"), Oklahoma Tax Commission, appears by and through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On May 15, 2007, 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 May 17, 2007, the Protestants were notified by letter that this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-07-080-H. The letter enclosed a copy of the *Rules of Practice and Procedure Before the Oklahoma Tax Commission,* and the Protestants were advised that the notice of the prehearing conference would be mailed. On May 30, 2007, the Notice of Prehearing Conference was mailed to the last-known address of the Protestants.[4] The prehearing conference was set for June 26, 2007, at 10:30 a.m.

At the request of the Protestants, a thirty (30) day continuance of the prehearing conference was filed due to illness. The Division did not have an objection to the request. On June 27, 2007, a Notice of Prehearing Conference was mailed to the parties striking the prehearing conference set for June 26, 2007, at 10:30 a.m. and rescheduling the prehearing conference for August 2, 2007, at 1:30 p.m.

The prehearing hearing conference was held as scheduled by telephone on August 2, 2007, at 1:30 p.m. On August 3, 2007, the parties were notified by letter that a status report was to be submitted on or before September 4, 2007.

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[1] On June 21, 2007, the Protestants executed a "Power of Attorney" to TAX PREPARER. *See* letter from TAX PREPARER filed June 25, 2007.

[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 LAST KNOWN ADDRESS.

On August 3, 2007, the Division filed the Status Report advising that in addition to the proposed income tax assessment for the 2003 year, the tax years 2004 through 2006 were also at issue and requested that all of the pending protests be included in this matter. On August 14, 2007, an Order Consolidating Protests was issued and mailed to the parties, along with a letter advising the parties that it appeared that the protest for the 2005 tax year was not timely filed.[5]

On December 1, 2005, the Division filed a *Motion to Dismiss* for lack of jurisdiction. The hearing on the *Motion to Dismiss* was set for December 20, 2005, at 1:30 p.m. On December 2, 2005, the Division mailed the motion and order to the Protestants' representative. On September 6, 2007, the Protestants filed a response to the Division's *Motion to Dismiss*, which addressed the merits of the case, but did not address the untimely filing of the protest for the 2005 tax year.

On September 12, 2007, at approximately 1:30 p.m. the hearing on the Division's *Motion to Dismiss* was held as scheduled. The Protestants and their representative did not appear at the hearing. The Division called one (1) witness, AUDITOR, Auditor, Compliance Division, Oklahoma Tax Commission, who testified regarding the proposed assessments and as custodian of the Division's records regarding this matter. The Division's Exhibits 1 through 3 were identified, offered, and admitted into evidence. Upon conclusion of the hearing, the record was closed and the case was submitted for decision on September 12, 2007.

FINDINGS OF FACT

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

1. On April 23, 2007, the Division issued a proposed income tax assessment[6] against the Protestants for the 2005 tax year, as follows, to-wit:

Corrected Taxable Income-Method I:	$30,847.00
Total Tax as Adjusted:	$ 1,410.00
Less Tax Previously Reported or Assessed:	28.00
Additional Tax Due:	$ 1,382.00
Interest @ 15% from 04/17/06 to 06/22/07:	244.78
Tax and Interest if Paid Within 60 Days:	$ 1,626.78
60 Day Delinquency Penalty @ 10%:	138.20
Tax, Interest & Penalty if Paid After 60 Days:	$ 1,764.98

[5] The letter also advised the Division that the file contained a "Notice of Intent to Offset Federal Income Tax Refund" for the 2003 tax year, which is under protest. The Division was also directed to take the appropriate action to withdraw the offset from collection efforts as it did from OSI. On August 16, 2007, a copy of OTC ATTORNEY'S memorandum was filed with this office directing the Division to cease all collection efforts against Taxpayers for the income tax year 2003.

[6] Division's Exhibit 1. The Division adjusted the Protestant's return for the 2005 tax year for the reason "Oklahoma Indian employment exclusion is based on the federal credit not total wages."

2. The Protestants were advised in the proposed income tax assessment for the 2005 tax year that they had sixty (60) days to file a written protest under Section 221(C) of Title 68.[7]

3. On June 23, 2007 (postmark), a protest of the proposed income tax assessments for the 2003, 2004, 2005, and 2006 tax years was sent to the Division by certified mail.[8]

4. The Protestants did not request an extension of the time for filing the protest to the proposed income tax assessment for the 2005 tax year.[9]

5. On August 17, 2007, the Division filed its *Motion to Dismiss* the protest to the proposed assessment for the 2005 tax year for "lack of jurisdiction."

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[10]

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.[11]

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

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[7] Division's Exhibit 1. *See* OKLA. STAT. ANN. tit. 68, 221(C) (West Supp. 2007).

[8] Division's Exhibit 2 and Exhibit 3. The Division received the protest on June 25, 2007. The protest also mentions the 2002 tax year for which the Protestants received a refund, but the Division is past the statute of limitations to issue a proposed assessment.

[9] Testimony of AUDITOR.

[10] OKLA. STAT. ANN. tit. 68, § 207 (West 2001) and OKLA. ADMIN. CODE § 710:1-5-46 (June 11, 2005).

[11] 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.

taxpayer at the last-known address of the taxpayer as shown by the records of the Oklahoma Tax Commission.[12]

4. Documents which must be filed are considered filed on the date of personal service of such documents or upon the date of the postmark showing date mailed on the envelope containing such documents and must show a date on or before the last day of filing as defined hereinabove.[13]

5. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[14] A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.[15]

6. The protest to the proposed income tax assessment for the 2005 tax year was not received within the sixty (60) day provision provided by Oklahoma Statutes.

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[12] OKLA. STAT. ANN. tit. 68, § 221(C) (West Supp. 2007), 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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> 1. A statement of the amount of deficiency as determined by the Tax Commission, the nature of the tax and the amount thereof in controversy;
> 2. A clear and concise assignment of each error alleged to have been committed by the Tax Commission;
> 3. The argument and legal authority upon which each assignment of error is made; provided, that the applicant shall not be bound or restricted in such hearing, or on appeal, to the arguments and legal authorities contained and cited in the application;
> 4. A statement of relief sought by the taxpayer; and
> 5. A verification by the taxpayer or the taxpayer's duly authorized agent that the statements and facts contained therein are true.

[13] OKLA. ADMIN. CODE § 710:1-5-44(3) (June 25, 1999).

[14] OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999), 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) (June 25, 1999), 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.

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

7. The Protestants did not present any evidence in opposition to the Division's *Motion to Dismiss.* The Protestants have failed to meet their burden of proof that their protest to the proposed income tax assessment for the 2005 tax year was timely filed.

8. The failure to file a written protest within the sixty (60) day period from the date of mailing of an assessment, without further action of the Tax Commission, shall be final and absolute.[16]

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the Division's *Motion to Dismiss* the protest as to the income tax assessment for the 2005 tax year 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.

[16] OKLA. STAT. ANN. tit. 68, § 221(E) (West Supp. 2007).