JURISDICTION: **OKLAHOMA TAX COMMISSION DECISION**
CITE: **2008-07-01-04 / NON-PRECEDENTIAL**
ID: **P-08-036-H**
DATE: **JULY 1, 2008**
DISPOSITION: **DISMISSED**
TAX TYPE: **SALES / WITHHOLDING**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above styled and numbered cause comes on for consideration of the Compliance Division's *Motion to Dismiss* for "lack of jurisdiction" pursuant to assignment regularly made by the Oklahoma Tax Commission to ALJ, Administrative Law Judge. SECRETARY, as Secretary of COMPANY and as an Individual ("Protestant"), appears pro se.[1]

The In-House Audit Section of the Compliance Division f/k/a the Audit Division ("Division"), Oklahoma Tax Commission, appears by and through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On April 4, 2008, 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 April 8, 2008, a letter was mailed to the Protestant stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-08-036-H. The letter also advised the Protestant a Notice of Prehearing Conference would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Oklahoma Tax Commission.* On April 16, 2008, the Notice of Prehearing Conference was mailed to the Protestant's last known address, setting the prehearing conference for May 5, 2008, at 11:00 a.m.[4]

On April 17, 2008, the Division filed its *Motion to Dismiss* and *Notice to Appear or Respond in Writing* on May 12, 2008, at 1:30 p.m.[5] On April 18, 2008, the parties were notified by letter, pursuant to the filing of the *Motion to Dismiss*, the prehearing conference had been stricken from the docket.

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[1] "**pro se**" (proh **say** *or* **see**), *adv.* & *adj.* [Latin] For oneself; on one's own behalf; without a lawyer <the defendant proceeded pro se> <a pro se defendant>. -- Also termed *pro persona*; *in propria persona*; *propria persona*; *pro per*. See PROPRIA PERSONA. BLACK'S LAW DICTIONARY (8th ed. 2004), available at *http://westlaw.com*. (March 16, 2006).

[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).

[5] The motion and notice were mailed by the Division to the Protestant at ADDRESS.

The hearing was held as scheduled on May 12, 2008, at approximately 1:30 p.m. The Protestant did not respond to the Division's motion. Prior to the hearing, the Protestant informed the Division by telephone he did not intend to appear at the hearing.

The Division called one (1) witness, AUDITOR, Auditor, In-House Audit Section of the Compliance Division f/k/a the Audit Division, Oklahoma Tax Commission, who testified regarding the audit and as custodian of the Division's records. The Division's Exhibits A through F were identified, offered, and admitted into evidence. Upon conclusion of the hearing, the record was closed and the case was submitted for decision on May 12, 2008.[6]

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* and *Notice to Appear or Respond in Writing*, the undersigned finds:

1. On October 4, 2004,[7] the Division issued a proposed sales tax assessment[8] against the Protestant for January 2001 and September 2001 through December 2001 ("Audit Period"),[9] as follows, to-wit:

Tax Due:	$ 9,700.00
Interest @15% through 11/04/04:	4,298.64
Tax & Interest due within 30 Days:	$13,998.64
30 day delinquent Penalty @ 10%:	1,164.88
Tax, Interest & Penalty due after 30 Days:	$15,163.52

The proposed sales tax assessment contains the following paragraph, to-wit:

> If you do not agree with this proposed assessment, you must file a written protest, in triplicate, with the Tax Commission, Audit Division…within sixty (60) days from the date of mailing this letter. If you fail to file a written protest within the sixty day period, this proposed assessment will become final and absolute and a tax warrant will be issued….

2. On October 4, 2004,[10] the Division issued a proposed withholding tax assessment[11] against the Protestant for January 2002, March 2002, and September 2001 through December 2001 ("Audit Period"),[12] as follows, to-wit:

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[6] OKLA. ADMIN. CODE § 710:1-5-39 (June 25, 1999).

[7] Testimony of AUDITOR.

[8] Division's Exhibit A.

[9] January 2001 was an actual report. The remainder of the Audit Period is estimated. *See* Recap attached to Division's Exhibit A.

[10] Testimony of AUDITOR.

Tax Due:	$3,780.00
Interest @15% through 11/04/04:	1,599.77
Tax & Interest due within 30 Days:	$5,379.77
30 day delinquent Penalty @ 10%:	945.00
Tax, Interest & Penalty due after 30 Days:	$6,324.77

The proposed withholding tax assessment contains the following paragraph, to-wit:

> If you do not agree with this proposed assessment, you must file a written protest, in triplicate, with the Tax Commission, Audit Division…within sixty (60) days from the date of mailing this letter. If you fail to file a written protest within the sixty day period, this proposed assessment will become final and absolute and a tax warrant will be issued….

3. On October 12, 2004, the Protestant's bankruptcy attorney mailed the Division a copy of the Protestant's bankruptcy filing in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 123ABC, which was discharged on November 12, 2002.[13]

4. On October 18, 2004, the Division mailed the Protestant a letter acknowledging receipt of the bankruptcy documents. The letter advised the Protestant withholding tax and sales tax are "trust" taxes, which cannot be discharged in bankruptcy. The letter also stated, "Based upon the above facts the assessment dated October 4, 2004 is still a valid assessment."[14]

5. On October 25, 2004, the Protestant contacted the Division by telephone to request the statutory authority supporting the Division's October 26, 2004, letter.[15]

6. On October 26, 2004, the Division mailed the Protestant a letter citing the statutory authority requested by telephone on October 25th. The letter also stated, "Based on the above facts the assessments dated October 4, 2004 are still valid assessments. However, the assessments were mostly estimates. I am enclosing forms for withholding and sales taxes. You may reduce your liability by filing the actual reports."[16]

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[11] Division's Exhibit B.

[12] The Audit Period is estimated. *See* Recap attached to Division's Exhibit B.

[13] Division's Exhibit C. There was no letter accompanying the bankruptcy documents, only copies of the two proposed assessments.

[14] Division's Exhibit D. The letter references both assessments.

[15] Testimony of AUDITOR.

[16] Division's Exhibit E.

7. On June 29, 2007, the Protestant mailed an untimely written letter of protest to the Division. The basis of the protest is "hardship" and "leniency."[17]

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[18]

2. The taxpayer may file a written protest to the proposed assessment within sixty (60) days after the mailing of the proposed assessment.[19]

3. A protest may be described as a formal, written challenge to a proposed tax assessment. There are several routes available, both formal and informal, to a taxpayer in objecting to an assessment. Prior to the filing of a protest, the issues may be resolved by further discussion with the assessing tax division. Should issues remain unresolved after consulting with the assessing division, the taxpayer may file written protest with the taxing division.[20]

4. If the taxpayer fails to file a written protest within the sixty-day period the proposed assessment, without further action of the Tax Commission, shall become final and absolute.[21]

5. The rules promulgated pursuant to the Administrative Procedures Act are presumed to be valid and binding on the persons they affect and have the force of law.[22]

6. 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

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[17] Division's Exhibit F. The address on the letter and the envelope is ADDRESS. The Protestant states in the letter records are not available to file actual sales tax and withholding tax reports for the Audit Periods.

The protest letter was received by the Division f/k/a Collections Division after a tax warrant was filed, which is referenced in the letter.

[18] OKLA. STAT. ANN. tit. 68, § 221(D) (West Supp. 2008).

[19] OKLA. STAT. ANN. tit. 68, § 221(C) (West Supp. 2008).

[20] OKLA. ADMIN. CODE 710:1-5-10 (July 11, 2003).

[21] OKLA. STAT. ANN. tit. 68, § 221(E) (West Supp. 2008). Section 221(E) also provides in pertinent part:

> A taxpayer who fails to file a protest to an assessment of taxes within the time period prescribed by this section may, within one (1) year of the date the assessment becomes final, request the Tax Commission to adjust or abate the assessment if the taxpayer can demonstrate, by a preponderance of the evidence, that the assessment or some portion thereof is clearly erroneous.

[22] OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2001).

protest may be raised at any time, by a party, the Administrative Law Judge, or the Commission itself.[23]

7. 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.[24]

The Division's *Motion to Dismiss* and *Notice to Appear or Respond in Writing* comply with the provisions of OAC 710:1-5-46(d).

After the proposed assessments were issued, the Protestant engaged in discussions with the Division, but after learning that sales tax and withholding tax were "trust" taxes, which could not be discharged in bankruptcy, there was no further communication with the Division, written or otherwise, until the Tax Commission filed a tax warrant and the collections process began. The protest was post-marked June 29, 2007, after the sixty (60) day period provided by Section 221(E) of Title 68 had run.

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* 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.

[23] OKLA. ADMIN. CODE § 710:1-5-46(c) (June 11, 2005). *See Request of Hamm Production Co.*, 1983 OK 92, 671 P.2d 50. *See also Oklahoma Tax Commission v. Oklahoma Coca-Cola Bottling Co.*, 1972 OK 20, 494 P.2d 312.

[24] OKLA. ADMIN. CODE § 710:1-5-46(d) (June 11, 2005).