JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2009-11-24-02 / NON-PRECEDENTIAL**
ID: **P-09-096-H**
DATE: **NOVEMBER 24, 2009**
DISPOSITION: **MOTION TO DISMISS DENIED / REMANDED**
TAX TYPE: **INCOME INTERCEPT**
APPEAL: **NO APPEAL TAKEN**

ORDER

The above matter comes on for consideration of the Motor Vehicle Division's Motion to Dismiss. Having reviewed the files and records herein, including the Findings of Fact, Conclusions of Law and Recommendations made and entered by the Administrative Law Judge on the 20th day of August, 2009, the Commission makes the following Findings of Fact and Conclusions of Law and enters the following order.

PROCEDURAL HISTORY

On June 4, 2009, the protest file was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*[1] and the *Rules of Practice and Procedure Before the Oklahoma Tax Commission*.[2] On June 12, 2009, a letter was mailed to the Protestant stating this matter had been set for hearing on July 8, 2009, at 3:00 p.m. before ALJ, Administrative Law Judge, and docketed as Case Number P-09-096-H. The letter also advised the parties that position letters or memorandum briefs were due on or before July 1, 2009, and enclosed a copy of the *Rules of Practice and Procedure Before the Oklahoma Tax Commission.*[3]

On June 12, 2009, OTC ATTORNEY filed an Entry of Appearance on behalf of the Division as its Counsel of record. On June 29, 2009, the *Motion* was filed with the clerk of the court ("Clerk").

On July 1, 2009, the *Notice to Appear or Respond in Writing* ("Notice") was mailed to the Protestant at his last-known address[4] advising a hearing to show cause why the Division's *Motion* should not be granted was set for July 28, 2009, at 9:30 a.m. The *Notice* also advised that the hearing on the merits previously set for July 8, 2009, at 3:00 p.m. was stricken from the docket, as well as the dates for the filing of briefs.

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

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

[3] *Id.*

[4] OKLA. STAT. ANN. tit. 68, § 208 (2009 Okla. Sess. Laws c. 426, § 4, emerg. eff. June 1, 2009). The *Notice* was mailed to the Protestant at LAST KNOWN ADDRESS.

On July 28, 2009, at 9:30 a.m., the hearing was held as scheduled with the parties in attendance. The Division called one (1) witness, SUPERVISOR, Supervisor, Accounting Section of the Motor Vehicle Division, Oklahoma Tax Commission, who testified about the intercept of the Protestant's refunds for the 2007 and 2008 tax years and as custodian of the Division's records. The Division's Exhibits A through G were identified, offered and admitted into evidence. The Protestant testified on his own behalf. No exhibits were offered, identified or admitted into evidence. At the close of the hearing, the record in this matter was closed and the case was submitted for decision on July 28, 2009.

FINDINGS OF FACT

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

1. On May 11, 2000, PROTESTANT'S FATHER, Driver's License Number XXX submitted check number 1106 ("Check 1106") for $262.50 to Motor Vehicle License Agent ("Agent") #5553 for payment of vehicle registration fees[5] for a 1982 Mercedes Benz (VIN #XYZ123).[6]

2. On May 18, 2000, PROTESTANT'S FATHER, submitted check number 1109 ("Check 1109") for $68.00 to Agent #5553 for payment of vehicle registration fees for a 1987 Mazda (VIN #ABC123).[7]

3. On or about May 11, 2000, the Agent presented Check 1106 to BANK for payment. BANK dishonored Check 1106, which was returned, bearing a stamp reading "NFS."[8]

4. Check 1106 was presented to BANK a second time for payment, as required by Section 1121, Title 47.[9] BANK dishonored Check 1106 for a second time.[10]

5. On or about May 18, 2000, the Agent presented Check 1109 to BANK for payment. BANK dishonored Check 1109, which was returned, bearing a stamp reading "NFS."[11]

6. Check 1109 was presented to BANK a second time for payment, as required by Section 1121, Title 47.[12] BANK dishonored Check 1109 for a second time.[13]

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[5] Division's Exhibit B.

[6] Division's Exhibits E and G. The driver's license number is obscured by the "NFS" stamp on Exhibit G.

[7] Division's Exhibits E through F.

[8] See Note 8, supra.

[9] OKLA. STAT. ANN. tit. 47, § 1121(A) (West 2001).

[10] Testimony of SUPERVISOR. See Note 8, supra.

[11] See Note 9, supra.

7. On April 15, 2008, the Division mailed the Protestant notice of its intention to intercept his 2007 ($192.00) income tax refund ("Intercept Notice") and apply the refund to the outstanding balances due to dishonored Checks 1106 and 1109 written for the vehicle registrations by PROTESTANT'S FATHER. The Intercept Notice was mailed to the Protestant at LAST KNOWN ADDRESS.[14] The Notice advised the protestant that he had 60 days from receipt of the letter in which to protest the Division's claim.

8. On June 23, 2008, the Protestant mailed a protest to the Division's proposed Intercept Notice of his 2007 income tax refund.[15]

9. On March 25, 2009, the Division mailed the Protestant notice of its intention to intercept his 2008 ($257.00) income tax refund ("Intercept Notice") and apply the refund to the outstanding balances due to dishonored Checks 1106 and 1109 written for the vehicle registrations by PROTESTANT'S FATHER. The Intercept Notice was mailed to the Protestant at LAST KNOWN ADDRESS.[16] The Notice advised the protestant that he had 60 days from receipt of the letter in which to protest the Division's claim.

10. On May 27, 2009, the Protestant mailed a protest to the Division's proposed Intercept Notice of his 2008 income tax refund.[17]

11. On June 29, 2009, the Division's *Motion* was filed with the Clerk. On July 1, 2009, the *Notice* was mailed to the Protestant's last-known address, LAST KNOWN ADDRESS.[18]

12. The amount[19] claimed by the Division consists of the following, to-wit:

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[12] OKLA. STAT. ANN. tit. 47, § 1121(A) (West2001)

[13] Testimony of SUPERVISOR. See Note 9, supra.

[14] Division's Exhibit A.

[15] Division's Exhibit B.

[16] Division's Exhibit C.

[17] Division's Exhibit D.

[18] *See* Note 6, *supra.*

[19] *See* Notes 16 and 18, *supra.* The court file also 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 to complete the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (July 11, 1996).

Check 1106	$262.50
Check 1109	68.00
Check Charges	100.00
Penalties	63.00
Total	$493.50

CONCLUSIONS OF LAW

1. The Tax Commission is vested with jurisdiction over the parties and subject matter of this action.[20]

2. 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.[21]

3. 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.[22] The Division's *Motion* and the *Notice* comply with the provisions of Tax Commission Rule 710:1-5-46(d).

4. Section 205.2(A)(2)(d) of Title 68[23] requires a state agency seeking to collect a debt through the intercept of an individual's state income tax refund to give notice to the debtor of its intent. The statute requires the notice to contain certain information including:

> That the debtor has the right to contest the claim by sending a written request to the state agency…for a hearing to protest the claim and if the debtor fails to apply for a hearing within sixty (60) days after the date of the mailing of the notice, the debtor shall be deemed to have waived his…opportunity to contest the claim.…

[20] OKLA. STAT. ANN. tit. 68, § 205.2(B) (West Supp. 2009).

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

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

[23] OKLA. STAT. ANN. tit. 68, § 205.2(A)(2)(d) (West Supp. 2009).

5. In all proceedings before the Tax Commission, unless otherwise provided by law, the taxpayer has the burden of proof.[24] The Division's action is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[25]

6. In a *Motion to Dismiss* filed by a party pursuant to the provisions of OAC 710:1-5-46, the burden of proof is on the party filing such Motion.

DISCUSSION

The Division mailed the Intercept Notice for the 2007 income tax refund on April 15, 2008. The protest to this Notice was postmarked June 23, 2008. The Division mailed the Intercept Notice for the 2008 income tax refund on March 25, 2009. The protest to this Notice was postmarked May 27, 2009. Each of these Intercept Notices informed the Protestant that he had 60 days from the receipt of the Notice to protest the claim of the Division. Section 205.2 of title 68 of the Oklahoma Statutes which authorizes the intercept of individual income tax refunds for a debt owed to the Tax Commission requires that notice be given to the debtor. The statute commands, by use of the word "shall," the notice to contain certain information. This information includes that the debtor has 60 days from the mailing of the notice to send a written request to protest the claim. The notices given by the Division in this matter did not accurately advise the protestant of the time period for making a written request to protest the claim and did not comply with the statutory requirements.

The Division's Motion asserts that the protests were submitted after the statutory period allowed for protests. The period allowed for protests by statute does not start running until Notice which complies with the requirements of the statute has been given. The Intercept Notices given by the Division in this matter do not comply with the statutory requirements and therefore do not serve to trigger the 60 day period allowed for filing of protests.

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

> 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.

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

DISPOSITION

The Oklahoma Tax Commission orders that the Division's *Motion to Dismiss* is denied and this matter is remanded to the Administrative Law Judge for further proceedings not inconsistent with this opinion.

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.