JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2010-06-01-02 / NON-PRECEDENTIAL**
ID: **P-09-212-H**
DATE: **JUNE 1, 2010**
DISPOSITION: **DISMISSED**
TAX TYPE: **INCOME**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Compliance Division's *Motion to Dismiss* ("*Motion*") for "lack of jurisdiction" pursuant to assignment regularly made by the Oklahoma Tax Commission to ALJ, Administrative Law Judge. PROTESTANT ("Protestant") appears pro se.[1] The Individual Income Tax Section of 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 December 16, 2009, the protest file was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*[2] and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.[3] On December 17, 2009, a letter was mailed to the Protestant stating that this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-09-212-H. The letter also advised the Protestant that a Notice of Prehearing Conference would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Office of Administrative Law Judges.*[4] On December 22, 2009, OTC ATTORNEY filed an Entry of Appearance as Counsel of record for the Division. On December 31, 2009, the Notice of Prehearing Conference was mailed to the parties setting the prehearing conference for January 26, 2010, at 10:30 a.m.[5]

On January 26, 2010, at 10:30 a.m. the prehearing conference was held as scheduled. OTC ATTORNEY appeared by telephone. The Protestant did not appear.

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[1] "[P]**ro 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*.

[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] *Id.*

[5] The notice was mailed to the Protestant at his last-known address ADDRESS. OKLA. STAT. ANN. tit. 68, § 208 (West Supp. 2010).

On March 3, 2010, the Division filed its *Motion to Dismiss* ("*Motion*"), with Exhibits A through C attached thereto. On March 8, 2010, the *Notice to Appear or Respond in Writing* ("*Notice*")[6] was mailed to the Protestant advising the hearing on the Division's *Motion* had been set for March 30, 2010, at 1:30 p.m. at which time the Protestant could appear and show cause why the above-styled and number protest should not be dismissed.

On March 30, 2010, at 1:30 p.m. the hearing was held as scheduled. The Protestant did not respond to the Division's *Motion* or appear at the hearing.[7] The Division called one (1) witness, AUDITOR, Auditor III, Individual Income Tax Section of the Compliance Division, Oklahoma Tax Commission, who testified about the audit procedures and as custodian of the Division's records. The Division's Exhibits A through D were identified, offered, and admitted into evidence. Upon conclusion of the hearing, the record in this matter was closed and this case was submitted for decision on March 30, 2010.

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*, and the *Notice*, the undersigned finds:

1. On March 22, 2004, the Protestant filed his 2003 Oklahoma Income Tax Return ("2003 Return").[8]

2. On June 18, 2008, the Division issued a proposed income tax assessment[9] for the 2003 Tax Year based upon information received from the Internal Revenue Service ("IRS") under the authority of Section 6103 of the Internal Revenue Code (Report No. CP2000, Date of Notice to taxpayer 03-07-05) as follows, to-wit:

Corrected Taxable Income-Method 2	$16,129.00
Total Tax as Adjusted:	880.00
Less Tax Previously Reported or Assessed:	226.00
Additional Tax Due:	654.00
Interest @ 15% from 04-15-04 to 08-18-08:	426.27
TAX AND INTEREST IF PAID WITHIN 60 DAYS:	$ 1,080.27
30 Day Delinquency Penalty @ 10%:	65.40
TAX, INTEREST & PENALTY IF PAID AFTER 60 DAYS:	$ 1,145.67

[6] The *Motion* and the *Notice* were mailed to the Protestant at his last-known address. *See* Note 5, *supra.*

[7] It was noted for the record that the Protestant had not contacted the Division or the Court Clerk about the hearing.

[8] Division's Exhibit A. Testimony of AUDITOR.

[9] Division's Exhibit B. Testimony of AUDITOR. The proposed assessment was mailed to the Protestant at ADDRESS. *See* Note 5, *supra.*

The proposed income tax assessment for the 2003 Tax Year contains the following paragraph in pertinent part, to-wit:

> …If you disagree with this assessment, you must file a written protest within sixty (60) days of the date of assessment. If you do not timely file a protest, this assessment will become final (68 O.S., sect 221.c).…

3. On August 13, 2009, the Division received an untimely filed protest to the income tax assessment for the 2003 Tax Year. The protest is dated August 10, 2009, there is no post-mark on the envelope, and is date-stamped as received by the Division on August 13, 2009.[10]

4. On August 20, 2009, AUDITOR mailed a letter to the Protestant at his last-known address, enclosed the IRS information on which the income tax assessment for the 2003 Tax Year was based, requested additional information to try and resolve this matter, and advised the Protestant that the December 15, 2005 payment was made to the IRS, not the Tax Commission. On October 9, 2009, AUDITOR mailed another copy of the letter to the Protestant at his last-known address, with no response.[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 taxpayer may file a written protest to the proposed assessment within sixty (60) days after the mailing of the proposed assessment.[13]

3. 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.[14]

4. 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.[15]

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[10] Division's Exhibit C. Testimony of AUDITOR. From the protest letter it is obvious the Protestant thinks he is being assessed by the IRS, instead of the Tax Commission. Attached to the protest letter is a copy of the Protestant's credit card statement from CREDIT Card Services which appears to reflect a payment to the U.S. Treasury of $753.55 on December 15, 2005.

[11] Division's Exhibit D. Testimony of AUDITOR.

[12] OKLA. STAT. tit. 68, § 221(D) (West Supp. 2007).

[13] OKLA. STAT. tit. 68, § 221(C) (West Supp. 2007).

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

[15] OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2002).

5. The Tax Commission is without jurisdiction to consider a protest that is not filed within the time provided by statute. The question of the Tax Commission's jurisdiction to consider a protest may be raised at any time, by a party, the Administrative Law Judge, or the Commission itself.[16]

6. 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.[17]

The Division's *Motion* and the *Notice* comply with the provisions of Tax Commission Rule 710:1-5-46(d). The protest was dated Monday, August 10, 2009, and date-stamped as received by the Division August 13, 2009, well after the sixty (60) day period provided by Section 221(E) of Title 68 had expired.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the Division's *Motion* 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.

NOTE: The distinction between a Commission Order designated as "Precedential" or "Non-Precedential" has been blurred because all OTC Orders resulting from cases heard by the Office of Administrative Law Judges are now published, not just "Precedential" Orders. *See* OKLA. STAT. ANN. tit.68, § 221(G) (West Supp. 2009) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002). *See also* OTC Orders 2009-06-23-02 and 2009-06-23-03 (June 23, 2009), which also conclude the language of the Statute is "clear and unambiguous."

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

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