JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2010-06-08-05 / NON-PRECEDENTIAL**
ID: **P-09-086-H**
DATE: **JUNE 8, 2010**
DISPOSITION: **DISMISSED**
TAX TYPE: **SALES / WITHHOLDING**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

VICE PRESIDENT, as Vice President of COMPANY (A Suspended Corporation) ("Protestant") appears through attorneys ATTORNEY 1 and ATTORNEY 2, FIRM. The Field Audit Section, Compliance Division ("Division") of the Oklahoma Tax Commission appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On May 15, 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 Office of Administrative Law Judges*.[2] On May 21, 2009, a letter was mailed to Counsel stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-09-086-H. The letter also advised the Protestant's representative that 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.*[3] On May 28, 2009, OTC ATTORNEY filed an Entry of Appearance as Counsel of record for the Division.

On June 19, 2009, the Notice of Prehearing Conference was mailed to the last-known address of Protestant's Counsel, setting the prehearing conference for July 7, 2009, at 1:30 p.m.

On July 7, 2009, by agreement of Counsel, OTC ATTORNEY filed a Report In Lieu and requested that this matter be set for a status report in thirty (30) days. On July 8, 2009, a letter was mailed to Counsel advising the prehearing conference was considered held and a status report was to be submitted on or before August 6, 2009.

On August 6, 2009, OTC ATTORNEY filed a Status Report advising the Protestant's Counsel was continuing to provide information to the Division concerning the field audit conducted in 2007 and the field audit conducted in 2009. ATTORNEY 2 also filed a Status Report advising that the bookkeeper for COMPANY had been located and an affidavit was being prepared for signature, Counsel was attempting to obtain documentation to show the Protestant

[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.*

was not a signor on any banking account of the COMPANY, and Counsel was attempting to locate the former owner and President of the COMPANY. On August 7, 2009, a letter was mailed to Counsel stating a status report was due on or before September 8, 2009.

On September 8, 2009, OTC ATTORNEY filed a Status Report advising that documentation had been received from Counsel in support of the Protestant's position, and requesting an additional thirty (30) days for the Division to review the documentation. On September 9, 2009, a letter was mailed to Counsel directing them to submit a status report on or before October 8, 2009.

On October 8, 2009, Counsel filed a "joint" Status Report advising that Protestant's Counsel was attempting to get an affidavit from the former owner and President of COMPANY supporting the Protestant's position. The Status Report also advised the Division would file a motion to dismiss on jurisdictional grounds the protest to the 2007 Field Audit unless the Protestant conceded the issue. Due to a health issue, Protestant's Counsel requested that this matter be continued for an additional thirty (30) days. On October 9, 2009, a letter was mailed to Counsel that an additional status report was to be submitted on or before November 9, 2009.

On November 6, 2009, OTC ATTORNEY filed a Status Report advising the Division had not received the affidavit from the former owner and President of COMPANY and that a motion to dismiss would be filed as to the 2007 Field Audit. On November 23, 2009, the Division filed its *Motion* as to the 2007 Field Audit. On November 24, 2009, the *Notice to Appear or Respond in Writing* ("*Notice*") was mailed to Protestant's Counsel at his last-known address advising that the Division's *Motion* had been set for hearing on January 7, 2010, at 1:30 p.m., to show cause why [a portion of] the above-styled and number protest should not be dismissed.

On January 6, 2010, a conference call was held with OTC ATTORNEY, and ATTORNEY 1. ATTORNEY 1 advised he would be entering his appearance in this matter. ATTORNEY 1 also advised that the *Motion* should include the 2009 Field Audit. OTC ATTORNEY was in agreement. On January 6, 2010, ATTORNEY 1 filed an Entry of Appearance as Co-Counsel for the Protestant. On January 11, 2010, a letter was mailed to Counsel confirming the teleconference, and striking the hearing set for January 7, 2010, at 1:30 p.m. Counsel were also advised that the hearing on the *Motion* to dismiss the protest to the 2007 assessments and the hearing on the protest to the 2009 assessments had been set for March 2, 2010, at 9:30 a.m., with position letters or memorandum briefs due on or before February 23, 2010.

On February 22, 2010, the Court Clerk[4] received a call from ATTORNEY 1 advising the former owner and President of COMPANY had been located and Counsel intended to subpoena him for the hearing. On February 22, 2010, a Motion for Continuance was filed by OTC ATTORNEY with the Court Clerk. On February 23, 2010, the *Response of Protestant, VICE PRESIDENT, to Motion to Dismiss* ("*Response*") was filed with Exhibits 1 and 2, attached thereto. On February 24, 2010, an Order Granting Motion for Continuance was issued

[4] OKLA. ADMIN. CODE § 710:1-5-10(c)(2) (June 25, 1999).

continuing the hearing to April 6, 2010, at 1:30 p.m., with position letters or memorandum briefs due on or before March 30, 2010. On February 24, 2010, a Subpoena was issued at the request of ATTORNEY 1 for PRESIDENT to appear at the office of FIRM on the 16th day of March, 2010, at 9:30 a.m. to give a deposition in the above-entitled action.

On March 19, 2010, a Joint Motion to Strike Hearing on Protest to 2009 Field Audit and Request for Motion to Dismiss Protest to 2007 Field Audit to be Decided on Briefs was filed on the basis that the sales and withholding assessments under field audit number FA 09-10148, for the periods covering January-March 2007 had been withdrawn (2009 Field Audit).[5] On March 23, 2010, an Order was issued acknowledging the withdrawal of the assessments issued in the 2009 Field Audit (January-March 2007) and striking the hearing set for April 6, 2010. The parties were given until April 2, 2010, to file any additional evidence relating to the sales tax and withholding tax assessments issued in the 2007 Field Audit (July 2005-December 2006). Thereafter, the matter would be submitted for a ruling on the Division's *Motion.*

On April 1, 2010, the *Supplemental Response of Protestant, VICE PRESIDENT, to Motion to Dismiss* ("*Supplemental Response*") was filed with the Affidavit of PRESIDENT attached thereto. The record in this matter was closed and the Division's *Motion* was deemed submitted for decision on April 19, 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 Protestant's *Response* and *Supplemental Response*, the undersigned finds:

1. On May 3, 2007, the Division issued a proposed Withholding Tax Assessment[6] against the Protestant as an Officer of COMPANY, and as an individual for July 1, 2005, through December 31, 2006 ("2007 Field Audit") as follows, to-wit:

Tax Due:	$30,490.00
Interest @ 15% through 06/30/07:	5,534.42
Tax & Interest due within 60 Days:	$36,024.42
30 day delinquent Penalty:	3,049.00
Tax, Interest & Penalty due after 60 Days:	$39,073.42

[5] Attached as an Exhibit are copies of the letters from the Division dated March 19, 2010, for the sales and withholding tax for the period 01/01/07 through 03/31/07, stating in pertinent part as follows, to-wit:

> On January 30, 2009 you were assessed as Vice President of COMPANY for the above referenced period. Subsequent information received indicates that you were not an officer during this period. Therefore, we have withdrawn our assessment against you as an individual.

[6] Division's Exhibit A-1.

2. On May 3, 2007, the Division issued a proposed Sales Tax Assessment[7] against the Protestant as an Officer of COMPANY, and as an individual for the 2007 Field Audit as follows, to-wit:

Tax Due:	$16,697.49
Interest @ 15% through 06/30/07:	3,087.11
Tax & Interest due within 60 Days:	$19,784.60
30 day delinquent Penalty:	1,671.49
Tax, Interest & Penalty due after 60 Days:	$21,456.09

3. The proposed Sales Tax and Withholding Tax Assessments were mailed to the Protestant's last-known address according to the records of the Tax Commission at LAST-KNOWN ADDRESS, where the Protestant continues to reside.[8]

4. The Protestant did not file a timely protest (or request an extension of time to file a protest) to the proposed Sales Tax and Withholding Tax Assessments for the 2007 Field Audit. The assessments became final on July 2, 2007.

5. The Tax Commission filed Tax Warrants ITW2008XXX-02 and STS2008YYY-02 against the Protestant with the County Clerk of COUNTY, Oklahoma, in the amount of $70,022.27, inclusive of penalty, interest, tax warrant penalties and filing fees. The Division mailed copies of the filed Tax Warrants to the Protestant at his last-known address.[9]

6. On December 2, 2008, the Division received a protest to the 2007 Field Audit and 2009 Field Audit, stating that the Protestant was not a principal officer of COMPANY, and requesting that the Tax Warrants and proposed assessments issued as a result of the 2009 Field Audit be withdrawn.[10]

7. On December 16, 2008, the Division mailed letters[11] to Protestant's Counsel denying the request to withdraw the Tax Warrants filed as a result of the 2007 Field Audit or the

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[7] Division's Exhibit A-2. Each proposed assessment contained the following paragraph, 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., SS 221.c). Please enclose your payment or response with a copy of this notice and mail to the address above.

[8] Division's Exhibit B.

[9] Division's Exhibits C-1 and C-2. Both Tax Warrants were mailed to the Protestant at LAST-KNOWN ADDRESS.

[10] Division's Exhibit D. The court file 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 (June 25, 1999). The envelope containing the protest letter is post-marked November 25, 2008.

[11] Division's Exhibits E-1 and E-2.

proposed assessments issued as a result of the 2009 Field Audit. Each letter states as follows, to-wit:

> We have received your request for relief from the above referenced assessment issued against you on May 03, 2007. A taxpayer may provide evidence that the assessment, or some portion thereof, is clearly erroneous up to one year from the date that the assessment becomes final and absolute (68 O.S., 221.e). The assessment became final on July 02, 2007.
>
> If you believe that this decision is in error, you must file a written appeal within thirty days. The appeal should be sent to:
>
> Oklahoma Tax Commission
> Office of the General Counsel
> P.O. Box 269060
> Oklahoma City, OK 73126-9060
>
> Enclosed for your review is a copy of the above referenced statute and a copy of the Oklahoma Tax Commission's permanent rule 710:1-5-70 through 710:1-5-78 pertaining to remedies and procedures for requesting abatement of erroneous assessments.

8. On February 23, 2010, the Protestant filed the *Response*, which states that the Protestant was not a principal officer of COMPANY, with a sworn Affidavit of Protestant attached thereto, which states in pertinent part:

> When I received the May 3, 2007 Assessment by the Audit Division for the period covering July 1, 2005 through December 31, 2006, I gave it to PRESIDENT, the owner of COMPANY, who assured me that he would take care of the taxes. I did not become aware that he failed to take care of the taxes until I received notice that the Oklahoma Tax Commission had issued the October 9, 2008 Tax Warrants that are attached to the Compliance Division's Motion to Dismiss as Exhibits C-1 and C-2.

9. On March 15, 2010, the Protestant obtained the sworn Affidavit of PRESIDENT, the former owner and President of COMPANY,[12] which states as follows, to-wit:

> 1. I am a resident of COUNTY, State of Oklahoma.
> 2. I have personal knowledge of the facts set forth below.
> 3. During the period January 1, 2005 through December 31, 2007 ("Relevant Period"), I was the president and an owner of a ANYTOWN-based company named COMPANY ("COMPANY").
> 4. During the Relevant Period, [Protestant] held the title of Vice President of COMPANY but owned no interest in COMPANY.

[12] *See* Exhibit attached to Protestant's *Supplemental Response.*

5. During the Relevant Period, [Protestant] was not authorized to expend any of the funds of COMPANY. He was not authorized to sign any checks on the bank account of COMPANY and was not a signatory on the signature card for COMPANY's accounts at the bank.
6. During the Relevant Period, [Protestant] also had no responsibility to prepare any tax returns or reports on behalf of COMPANY and did not sign any tax returns or reports on behalf of COMPANY.
7. During the Relevant Period, [Protestant] and [sic] was not in any way responsible for the payment of COMPANY's taxes and had no authority to cause COMPANY to pay its taxes.

10. On March 19, 2010, the Division withdrew the proposed Sales Tax and Withholding Tax Assessments against Protestant, as Vice President of COMPANY and as an individual, for the 2009 Field Audit stating, "Subsequent information received indicates that you were not an officer during this period."[13]

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[14]

2. If the taxpayer fails to file a written protest within the sixty-day period herein provided for or within the period as extended by the Tax Commission then the proposed assessment, without further action of the Tax Commission, shall become final and absolute. A taxpayer who fails to file a protest to an assessment of taxes within the time period prescribed by Section 221(E) of Title 68 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.[15]

3. 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.[16]

4. In the event the person to whom a proposed assessment is issued acquiesces in the changes reflected on the proposed assessment, or fails to file a written protest within the sixty (60) days after the mailing of the proposed assessment (or any extensions allowable by Statute that have been granted by the Division), the proposed assessment becomes final.[17]

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[13] *See* attachments to the Joint Motion filed March 19, 2010.

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

[15] OKLA. STAT. tit. 68, § 221(E) (West 2002).

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

[17] OKLA. ADMIN. CODE § 710:1-5-71(a) (July 11, 2003).

5. In cases in which an extension has been granted for filing a protest, the proposed assessment becomes final at the expiration of the period as extended by the Division if no protest is filed.[18]

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 protest may be raised at any time, by a party, the Administrative Law Judge, or the Commission itself.[19]

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.[20]

8. Statutes are interpreted to attain that purpose and end[21] championing the broad public policy purposes underlying them.[22] Only where the legislative intent cannot be ascertained from the statutory language, i.e. in cases of ambiguity or conflict, are rules of statutory construction employed.[23] However, where the statutory language is ambiguous or uncertain, a construction is applied to avoid absurdities.[24] Statutory construction presents a question of law.[25]

9. It is fundamental law that all persons are charged with knowledge of the laws that affect them.[26]

DISCUSSION

On May 3, 2007, the Division issued the proposed assessments against the Protestant as a result of the 2007 Field Audit and mailed them to the Protestant's last-known address, which is still his current address. The Protestant acknowledges that he received the proposed assessments. He states in his sworn Affidavit that "When I received the May 3, 2007

[18] OKLA. ADMIN. CODE § 710:1-5-71(b) (July 11, 2003).

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

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

[21] *Id.* at ¶7.

[22] *Id.* at ¶7.

[23] *Id.* at ¶7.

[24] *Id.* at ¶7.

[25] *Blitz U.S.A., Inc. v. Oklahoma Tax Comm'n*, 2003 OK 50, 75 P.3d 883.

[26] OTC Precedential Order No. 2006-03-23-07 (March 23, 2006). *See Ponder v. Ebey*, 1944 OK 271, 152 P.2d 268.

Assessment [sic]…, I gave it to PRESIDENT, the owner of COMPANY, who assured me that he would take care of the taxes. I did not become aware that he failed to take care of the taxes until I received notice that the Oklahoma Tax Commission had issued the October 9, 2008 Tax Warrants that are attached to the Compliance Division's Motion to Dismiss as Exhibits C-1 and C-2." Upon receiving copies of the Tax Warrants (and the 2009 Field Audit Assessments), the Protestant retained Counsel, who filed the protest on December 2, 2008.

The Division's *Motion* was filed on "jurisdictional" grounds, that pursuant to Section 221(E) of Title 68, the Protestant had failed to file the protest to the 2007 Field Audit within the sixty (60) day statutorily prescribed period (July 2, 2007) or that the protest filed could be treated as a request for abatement, since the protest (December 2, 2008) was not received within one (1) year of the date the assessment became final (July 2, 2008).

The Protestant's position is stated in the *Response* as "There is no question that [Protestant] would not be liable for COMPANY's unpaid withholding and sales taxes for the [2007 Field Audit] were it not for the statute of limitation defense asserted by the Compliance Division." The Protestant also states, "In order to prevent a manifest and gross injustice, the Administrative Law Judge should toll[27] the statute of limitation period… The Commission should not now be permitted to force [Protestant] to pay what it knows he does not owe by playing a game of 'gotcha' with the procedural rules. If permitted, the Commission's game will burden an innocent retiree, in the autumn of his life, with a huge $70,000.00 tax that he can never hope to pay or even discharge in bankruptcy… This is a case that cries out for equitable relief."[28]

In *Peterson v. Oklahoma Tax Commission*, 1964 OK 78, 395 P.2d 388, the Court cited *Oral Roberts University*[29] for the proposition:

> … [W]here the legislature convened many times during this period of administrative construction without expressing its disapproval, such silence may be regarded as acquiescence in or approval of the administrative construction.

The substantive language of Section 221(E) has remained unchanged since the statute was amended by the legislature in 1989.[30] The Tax Commission has a long-standing

[27] [E]quitable tolling. 1. The doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired. • Equitable tolling does not require misconduct by the defendant. 2. The doctrine that if a plaintiff files a suit first in one court and then refiles in another, the statute of limitations does not run while the litigation is pending in the first court if various requirements are met. • Among those requirements are (1) timely notice to the defendant; (2) no prejudice to the defendant; and (3) reasonable and good-faith conduct on the part of the plaintiff. BLACK'S LAW DICTIONARY (8th ed. 2004), available at *http://westlaw.com*.

[28] *See Response*, which cites *Kelly v. Internal Revenue Service*, 171 B.R. 113, where the Court held that sales and withholding taxes were "trust" taxes and could not be discharged in bankruptcy pursuant to 11 U.S.C § 507(a)(7)(C).

[29] *Oral Roberts University v. Oklahoma Tax Com'n*, 1985 OK 97, 714 P.2d. 1013.

interpretation of Section 221(E), which is reflected in numerous Tax Commission Orders and in Tax Commission Rules 710:1-5-71 and 710:1-5-36.

The Tax Commission concluded in OTC Order No. 1997-06-24-007 (June 24, 1997), "A search of case law in Oklahoma does not reveal application or even recognition of the doctrine [equitable tolling] to state tax matters."[31]

The Protestant's "defense" to the Division's *Motion*, which is equitable in nature, does not override the filing requirements mandated by Statute.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the Division's *Motion* should be granted.[32]

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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[30] *See* 1989 Okla. Sess. Laws, c. 249, § 11, eff. July 1, 1989. S*ee also* 2002, Okla. Sess. Laws, c. 458, § 1, eff. July 1, 2002, where the time period was amended from thirty (30) days to sixty (60) days.

[31] *See Neer v. State of Oklahoma ex rel. Oklahoma Tax Com'n*, 1999 OK 41, 982 P.2d 1071, wherein the Supreme Court of Oklahoma affirmed the appeal of Tax Commission Order No. 1997-06-24-007 (June 24, 1997, 1997 WL 1048362 (Okl.Tax.Com.).

[32] It may be possible for the Protestant to seek relief from the 2007 Field Audit pursuant to the provisions of Section 219.1 of Title 68, which states in pertinent parts as follows, to-wit:

> A. In accordance with the provisions of the amendment to Section 5 of Article X of the Oklahoma Constitution as set forth in Senate Joint Resolution No. 32 of the 2nd Session of the 48th Oklahoma Legislature, the Oklahoma Tax Commission is hereby authorized to abate all or any portion of tax liability and interest and penalties accruing thereto, pursuant to a settlement agreement entered into with a taxpayer, if the Tax Commission finds, by clear and convincing evidence, that:
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> …
>
> 3. The tax liability is attributable to actions of a person other than the taxpayer and it would be inequitable to hold the taxpayer liable for the tax liability; or…

See Tax Commission website at http://www.oktax.state.ok.us/. The Application for Settlement of Tax Liability is under Forms and Publications. Then go to Individual Income Forms (Packet S).