JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2010-12-14-03 / NON-PRECEDENTIAL**
ID: **P-10-081-H**
DATE: **DECEMBER 14, 2010**
DISPOSITION: **DISMISSED IN PART, DENIED IN PART**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPANY d/b/a BUSINESS and PRESIDENT, as President and as an Individual ("Protestants") appear pro se.[1] 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 March 23, 2010, 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 March 30, 2010, a letter was mailed to the parties stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-10-081-H. The letter also advised the Protestants 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 March 31, 2010, OTC ATTORNEY filed an Entry of Appearance as Counsel of record for the Division.

On April 14, 2010, the Notice of Prehearing Conference was mailed to the last-known address of Protestants, setting the prehearing conference for May 24, 2010, at 10:00 a.m.

On May 12, 2010, the Division filed its *Motion* as to the Field Audit covering December 1, 2003, through December 31, 2004. On May 13, 2010, the *Notice to Appear or Respond in Writing* ("*Notice*") was mailed to Protestants' Representative (CPA) advising that the Division's *Motion* had been set for hearing on June 2, 2010, at 9:30 a.m., to show cause why [a portion of] the above-styled and number protest should not be dismissed.

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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.*

On May 17, 2010, a facsimile[5] was received from CPA, CPA, ACCOUNTING FIRM, to OTC ATTORNEY advising that he does not represent the Protestants and has never represented the Protestants. On May 24, 2010, a second *Notice to Appear or Respond in Writing* ("*Notice*") was mailed to Protestants at their last-known address[6] advising that the Division's *Motion* had been set for hearing on June 16, 2010, at 10:00 a.m., to show cause why [a portion of] the above-styled and number protest should not be dismissed.

On June 16, 2010, at 10:00 a.m. the hearing on the Division's *Motion* was held as scheduled. The Protestants did not appear at the hearing.[7] The Division called one (1) witness to testify. AUDITOR, Auditor III, Compliance Division, Oklahoma Tax Commission, testified concerning the audit of the sales tax period covering December 2003 through December 2004 and as custodian of the Division's records. The Division's Exhibits A through D were identified, offered, and admitted into evidence. At the conclusion of the hearing the record in this matter was closed and the Division's *Motion* was deemed submitted for decision on June 16, 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 second *Notice*, the undersigned finds:

1. On January 31, 2005, the Division issued proposed Sales Tax Assessments[8] against COMPANY d/b/a BUSINESS ("Corporation") and PRESIDENT, as President and as an Individual ("President") for December 2003 through December 2004[9] ("Audit Period") as follows, to-wit:

Tax Due:	$131,175.42
Interest @ 15% through 03/03/05:	11,542.03
Tax & Interest due within 30 Days:	$142,717.45
30 day delinquent Penalty:	12,013.04
Tax, Interest & Penalty due after 60 Days:	$154,730.50[10]

[5] On May 21, 2010, the facsimile was filed a second time with the Court Clerk.

[6] OKLA. STAT. ANN. tit. 68, § 208 (West Supp. 2010). The second *Notice* was mailed to the Protestants at PRESIDENT'S ADDRESS.

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

[8] Division's Exhibit A.

[9] The only "actual" sales tax is for March 2004. The remaining periods were estimated. This is why the assessment for the President is $9,680.42 more than the Corporation's assessment.

[10] There is a math error. The balance should be $154,730.49.

2. The proposed Sales Tax Assessments were mailed to the Corporation's physical address according to the records of the Tax Commission at ADDRESS, and to the President's mailing address of PRESIDENT'S ADDRESS, which is still the President's mailing address.[11]

3. The Protestants did not file a timely protest (or request an extension of time to file a protest) to the proposed Sales Tax Assessments for the Audit Period. The assessments became final on April 1, 2005.[12]

4. The Tax Commission filed Tax Warrants STS###### and STS###### against the Corporation and the President with the County Clerk of COUNTY, Oklahoma, in the amount of $176,026.76, inclusive of penalty, interest, tax warrant penalties, and filing fees. The Division mailed copies of the filed Tax Warrants to the Corporation at its mailing address of MAILING ADDRESS and to the President at PRESIDENT'S ADDRESS.[13]

5. The Division received a protest dated April 26, 2006,[14] from the President on behalf of the Protestants, stating that the Corporation "…is no longer in business and that such business ceased on or about December 31, 2003. The [Corporation] had no business in 2005 and has never received a notice of any delinquent taxes prior to the cease of business."[15]

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[16]

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.[17]

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[11] Division's Exhibit B. Testimony of AUDITOR. AUDITOR also testified that neither of the Sales Tax Assessments was returned to the Division as "undelivered."

[12] Testimony of AUDITOR. The Division's Brief incorrectly states the assessment became final on March 31, 2005.

[13] Division's Exhibit C.

[14] The protest letter is not date-stamped and is not accompanied by an envelope to reflect the date of mailing.

[15] Division's Exhibit D. The protest letter was written by the President on the Letterhead of CPA, CPA.

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

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

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.[18]

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.[19]

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.[20]

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.[21]

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.[22]

8. It is fundamental law that all persons are charged with knowledge of the laws that affect them.[23]

9. 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

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

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

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

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

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.[24]

DISCUSSION

On January 31, 2005, the Division mailed the proposed Sales Tax Assessments for the Audit Period to the Protestants' last-known addresses according to the records of the Tax Commission. AUDITOR testified that the assessments were not returned to the Division. The President does not acknowledge that the proposed assessments were received, but the President does not dispute that the addresses used by the Division are incorrect. The President also does not acknowledge that her mailing address has remained the same from the date the Division mailed the assessments to the present.

Pursuant to Section 208 of Title 68,[25] the Division met the mailing requirement to the last-known addresses of the Protestants according to the records of the Tax Commission, which creates presumptive evidence of receipt of the assessments by the Protestants. Because the proposed assessments were mailed as provided in Section 208, the failure of the Protestants to receive the proposed assessments shall neither invalidate nor be grounds for invalidating any action taken pursuant thereto, nor shall such failure relieve the Protestants from any tax or addition to tax or any interest or penalties thereon.[26]

The Division's *Motion* was filed on "jurisdictional" grounds, that pursuant to Section 221(E) of Title 68, the Protestants had failed to file the protest to the proposed Sales Tax Assessments for the Audit Period within the sixty (60) day statutorily prescribed period (April 1, 2005) or that the protest filed could be treated as a request for abatement, since the protest (dated April 26, 2006) was not received within one (1) year of the date the assessments became final (April 1, 2005).

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.

OKLAHOMA TAX COMMISSION

[24] OKLA. STAT. ANN. tit. 68, § 208 (West 2001).

[25] *Id.*

[26] *Id.*

PART TWO

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

SALES TAX ASSESSMENTS FOR JANUARY 2005 THROUGH JANUARY 2006

COMPANY d/b/a BUSINESS and PRESIDENT, as President and as an Individual ("Protestants") appear pro se.[27] 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

The procedural history of the *Findings, Conclusions and Recommendations* issued on July 20, 2010, are incorporated by reference herein.

On May 24, 2010, a Notice of Prehearing Conference was mailed to the parties setting the prehearing conference on the proposed sales tax assessment for January 2005 through January 2006 for June 16, 2010, at 11:30 a.m.

On June 16, 2010, at 11:30 a.m. the prehearing conference was held as scheduled. OTC ATTORNEY appeared for the Division. The Protestants did not appear in person or by telephone. On June 17, 2010, the Prehearing Conference Order was mailed to the parties advising that the Division's *Verified Response* was to be filed on or before July 16, 2010, and that the Protestants could file a written response on or before August 2, 2010.

On July 19, 2010, the Division filed its *Verified Response*, with Exhibits A through C-2 attached thereto.[28] The Verification attached to the Division's *Verified Response* was duly sworn under oath, on behalf of the Division, by AUDITOR, Compliance Division, Oklahoma Tax Commission.[29] The Protestants did not file a reply to the Division's *Verified Response*.

The record in this matter was closed and this case was submitted for decision on September 2, 2010.

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[27] "[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*.

[28] On July 15, 2010, OTC ATTORNEY orally requested, through the Court Clerk, until July 19, 2010, to file the Division's *Verified Response*. The request was granted by the undersigned.

[29] *See* OKLA. ADMIN. CODE § 710:1-5-28(c) (June 25, 1999).

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 *Verified Response*, the undersigned finds:

6. On November 18, 1986, COMPANY d/b/a BUSINESS ("Corporation") filed an Employer's Registration Report with the Tax Commission.[30]

7. On the Employer's Registration Report, Protestant, PRESIDENT ("President") listed herself as the sole officer and President of the Corporation. President signed the Franchise Tax Return for July 1, 2002, through June 30, 2003, as the sole officer of the Corporation and Withholding Tax Reports for October 2003, and December 2003 through March 2004 on behalf of the Corporation and Sales Tax Reports for July 2003 through September 2003 on behalf of the Corporation.[31]

8. On April 21, 2006, the Division issued proposed Sales Tax Assessments[32] against the Corporation and the Protestant as President of the Corporation and as an Individual for January 2005 through January 2006 ("Audit Period") as follows, to-wit:

Estimated Tax Due:	$143,585.00
Interest @ 15% through 05/19/06:	16,036.45
30 day delinquent Penalty:	14,358.50
Tax, Interest & Penalty due after 60 Days:	$173,979.95

9. The proposed Sales Tax Assessments were mailed to the Corporation's mailing address according to the records of the Tax Commission at MAILING ADDRESS, and to the President's mailing address of PRESIDENT'S ADDRESS, which is still the President's mailing address. Both assessments were sent by certified mail return receipt requested (XXXX and XXXX, respectively). On April 25, 2006, the President signed both the return receipts.[33]

10. The Division received a protest dated April 26, 2006, from the President on behalf of the Protestants, stating that the Corporation "…is no longer in business and that such business ceased on or about December 31, 2003. The [Corporation] had no business in 2005 and has never received a notice of any delinquent taxes prior to the cease of business."[34]

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[30] Division's Exhibit A.

[31] Division's Exhibit B-1 through B-3.

[32] Division's Exhibit C-1.

[33] *Id.*

[34] Division's Exhibit C-2. The protest letter is not date-stamped and is not accompanied by an envelope to reflect the date of mailing.

CONCLUSIONS OF LAW

10. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[35]

11. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Sales Tax Code").[36] The Sales Tax Code levies "upon all sales,[37] not otherwise exempted . . . an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds[38] of each sale of . . . tangible personal property. . . ."[39] Oklahoma Statutes authorize incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.[40]

12. A vendor who ceases doing business shall so indicate on the final sales tax report for the discontinued business, and surrender the sales tax permit to the Commission for cancellation, together with a remittance for any unpaid or accrued taxes. Reporting and remitting for the final business period shall be done in the manner prescribed and by the applicable date set out in 68 O.S. § 1365, or by the twentieth day of the month following the discontinuance of the business, whichever is earlier.[41]

13. Rules promulgated pursuant to the Administrative Procedures Act[42] are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court.[43] They

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[35] OKLA. STAT. tit. 68, § 221(D) (West Supp. 2010).

[36] OKLA. STAT. ANN. tit. 68, § 1350 *et seq.* (West 2008).

[37] OKLA. STAT. ANN. tit. 68, § 1352(22)(a) (West 2008):

> "Sale" means the transfer of either title or possession of tangible personal property for a valuable consideration regardless of the manner, method, instrumentality, or device by which the transfer is accomplished in this state, or other transactions as provided by this paragraph, including but not limited to:
>
> a. the exchange, barter, lease, or rental of tangible personal property resulting in the transfer of the title to or possession of the property,
>
> …

[38] OKLA. STAT. ANN. tit. 68, § 1352(12) (West 2008).

[39] OKLA. STAT. ANN. tit. 68, § 1354(A)(1) (West 2008).

[40] OKLA. STAT. ANN. tit. 68, § 1370 *et seq.* (West 2008) and OKLA. STAT. ANN. tit. 68, § 2701 (West Supp. 2010).

[41] OKLA. ADMIN. CODE § 710:65-3-9 (June 11, 2005). *See* OKLA. STAT. ANN. tit. 68, §§ 1364-1365 (West 2008).

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

[43] OKLA. STAT. ANN. tit. 75, § 306(C) (West 2002).

are valid and binding on the persons they affect, have the force of law, and are prima facie evidence of the proper interpretation of the matter to which they refer.[44]

14. "Every person required to collect any tax imposed by [the Oklahoma Sales Tax Code ("Code")[45]], and in the case of a corporation, each principal officer thereof, shall be personally liable for the tax."[46]

15. When the Tax Commission issues a proposed assessment against a corporation for unpaid sales tax, the Commission shall file assessments against the principal officers of the corporation personally liable for the tax. The principal officers of the corporation shall be liable for the payment of sales tax during the period of time for which the assessment is made. The liability of a principal officer for sales tax shall be determined in accordance with the standards for determining liability for payment of federal withholding tax.[47]

16. In this matter the Protestant, as the President and sole officer of the Corporation, is a principal officer of the Corporation during the Audit Period. As a principal officer of Corporation the Protestant is a "responsible person" for the collection and remittance of sales tax.

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[44] OKLA. STAT. ANN. tit. 75, § 308.2(C) (West 2002).

[45] OKLA. STAT. ANN. tit. 68, § 1350 *et seq.* (West 2008).

[46] OKLA. STAT. ANN. tit. 68, § 253 (West 2001). The Tax Commission identifies the "President, Vice-President, Secretary, Treasurer, or Secretary/Treasurer" as principal officers. OKLA. ADMIN. CODE § 710:65-7-3-(1).

[47] The full text of OKLA. STAT. ANN. tit. 68, § 253 (West 2001) is as follows:

> When the Oklahoma Tax Commission files a proposed assessment against corporations or limited liability companies for unpaid sales taxes, withheld income taxes or motor fuel taxes collected pursuant to Article 5, 6 or 7 of this title, the Commission shall file such proposed assessments against the principal officers of the corporations or the managers or members personally liable for the tax. The principal officers of any corporation shall be liable for the payment of any tax as prescribed by this section if such officers were officers of the corporation during the period of time for which the assessment was made. Managers or members of any limited liability company shall be liable for the payment of any tax as prescribed by this section if the managers or members were specified as responsible for withholding or collection and remittance of taxes during the period of time for which the assessment was made. If no managers or members were specified to be responsible for the duty of withholding and remittance of taxes during the period of time for which the assessment was made, then all managers and member shall be liable.
>
> The liability of a principal officer for sales tax, withheld income tax or motor fuel tax shall be determined in accordance with the standards for determining liability for payment of federal withholding tax pursuant to the Internal Revenue Code of 1986, as amended, or regulations promulgated pursuant to such section.

Section 253 sets out the trust taxes (which cannot be discharged in bankruptcy) for which a principal officer of a corporation that is also a "responsible person" is held personally liable, regardless of whether a corporation is in good standing or suspended.

17. Oklahoma Statutes provide for the collection of interest and penalty on delinquent tax.[48] "All penalties or interest imposed by [Title 68], or any state tax law, shall be recoverable by the Tax Commission as a part of the tax with respect to which they are imposed …."[49]

18. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[50]

In this matter the Protestants have failed to sustain their burden of proof that the Corporation ceased doing business on or about December 31, 2003, and that the President was not a principal officer and "responsible person" for the collection and remittance of sales tax during the Audit Period.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the protest to the proposed sales tax assessments for the Audit Period should be denied.

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."

[48] OKLA. STAT. tit. 68, § 217 (West Supp. 2007).

[49] OKLA. STAT. tit. 68, § 217(G) (West Supp. 2007).

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