JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2011-03-15-02 / NON-PRECEDENTIAL**
ID: **P-10-073-H**
DATE: **MARCH 15, 2011**
DISPOSITION: **DISMISSED**
TAX TYPE: **SALES**
APPEAL: **S. CT. APPEAL 109352; DISMISSED**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

OFFICER, as an Officer of COMPANY d/b/a BUSINESS, and as an Individual ("Protestant") appears by and through attorney, ATTORNEY, FIRM. The In-House Audit Section of the Compliance Division, formerly known as 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 March 18, 2010, 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 March 23, 2010, a letter was mailed to Counsel stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-10-073-H. The letter also advised 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.*[3]

On April 6, 2010, OTC ATTORNEY filed an Entry of Appearance as Counsel of record for the Division. On April 8, 2010, the Notice of Prehearing Conference was mailed to Counsel, setting the prehearing conference for April 26, 2010, at 11:00 a.m. On April 13, 2010, the Division filed a *Motion to Dismiss* ("*Motion*") on jurisdictional grounds, with Exhibits A through E attached thereto. On April 14, 2010, the Notice to Appear or Respond in Writing ("*Notice*") was issued setting the hearing on the Division's *Motion* for April 29, 2010, at 10:30 a.m. to show cause why this matter should not be dismissed. The *Notice* also advised that the prehearing conference set for April 26, 2010, at 11:00 a.m. was stricken from the docket. On April 28, 2010, the Division filed a Request for Continuance with the Court Clerk. On April 28, 2010, pursuant to an agreement of the parties, an *Amended Notice to Appear or Respond in Writing* ("*Amended Notice*") was issued wherein the hearing on the Division's *Motion* was stricken from the docket of April 29, 2010, and reset for June 8, 2010, at 1:30 p.m.

[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.*

On June 1, 2010, the Protestant's *Response to Motion to Dismiss* ("*Response*") was filed with the Court Clerk. On June 2, 2010, a Request to Have Case Decided on Briefs was filed by the Division, with the concurrence of ATTORNEY. On June 3, 2010, an Order Granting Request to Submit Case on Briefs was issued, striking the hearing from the June 8, 2010 docket and advising Counsel that response briefs and any additional exhibits must be filed on or before July 2, 2010, at which time this matter would be submitted for decision. On June 30, 2010, the *Division's Response* ("*Reply*") was filed with the Court Clerk. The Court Clerk did not receive any additional filings from the Protestant. The record in this matter was closed and the case was submitted for decision on July 8, 2010. On August 30, 2010, an Order Denying Motion to Dismiss was mailed to Counsel. On August 31, 2010, the Division's Motion for Reconsideration was filed with the Court Clerk. On September 3, 2010, a letter was mailed to Counsel acknowledging the Division's Motion for Reconsideration and advising that a response could be filed on or before September 15, 2010. On September 14, 2010, the Protestant's Response to the Division's Motion for Reconsideration was filed with the Court Clerk. On September 30, 2010, an Order Granting Division's Motion for Reconsideration was issued and mailed to Counsel. This matter was resubmitted for decision on September 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*, the *Response*, and the *Reply*, the undersigned finds:

1. The Division conducted a sales tax office audit on COMPANY d/b/a BUSINESS ("COMPANY") (FEI #123) utilizing the information from COMPANY'S Sales Tax Returns filed for October 2003 through February 2004 ("Audit Period"),[4] which reflected the following, to-wit:

PERIOD	PERIOD TYPE	PER DIEM	TAX	INTEREST	PENALTY	TOTAL
10/03	ACTUAL		0.00	529.38	3,179.94	3,709.32
11/03	ACTUAL		0.00	167.42	0.00	167.42
12/03	ACTUAL	9.67	23,538.41	6,621.39	2,353.84	32,513.64
01/04	ACTUAL	8.42	20,492.15	5,503.41	2,049.22	28,044.78
02/04	ACTUAL	8.66	21,073.74	5,399.79	2,107.37	28,580.90
TOTAL		26.75	65,104.30	18,221.39	9,690.37	93,016.06

[4] Division's Exhibit A. The interest is calculated through November 19, 2005.

2. On October 20, 2005, the Division issued a proposed sales tax assessment[5] against the Protestant for the Audit Period, as follows, to-wit:

Tax Due	65,104.30
Interest @ 15% through 11/19/05	18,221.39
Tax and Interest due within 30 Days	83,325.69
30 day delinquent Penalty	9,690.37
Tax, Interest and Penalty due after 30 Days	93,016.06

3. The proposed sales tax assessment was mailed to the Protestant's last-known address according to the records of the Tax Commission at PROTESTANT'S ADDRESS.[6] This was the address on the Protestant's income tax return for the 2004 Tax Year filed on October 14, 2005, and this is the address at which the Protestant still resides.[7]

4. On September 12, 2008, Tax Warrant STSXXXX was filed against the Protestant with the COUNTY Clerk for the Audit Period totaling $109,661.14, inclusive of tax, penalty, interest, warrant penalties, and filing fees.[8]

5. On September 30, 2008, the Division received by facsimile, a written protest to the proposed sales tax assessment for the Audit Period. The basis of the protest is that the Protestant was the President of SIMILARLY NAMED COMPANY (FEI######), an Oklahoma corporation with sales tax permit #999, which went out of business in September 2003; and that COMPANY (FEI ##123), a STATE corporation, with sales tax permit #123, was a different corporation with different Officers, namely PRESIDENT, and VICE PRESIDENT. The Protestant also states, "If I had received a letter back in October 2005, I would have responded to it stating the facts above in a timely matter."[9]

6. The Protestant signed COMPANY'S (a STATE Corporation) October 2003 and November 2003 sales tax reports. The remaining sales tax reports for the Audit Period were unsigned and filed as "no remits."[10]

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[5] *Id.*

[6] *Id. See* Division's Exhibit B.

[7] *Id.*

[8] Division's Exhibit C.

[9] Division's Exhibit D. The Administrative Law Judge is taking judicial notice of the Oklahoma Secretary of State's website at https://www.sos.ok.gov to complete the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999). SIMILARLY NAMED COMPANY is an Oklahoma "Domestic For Profit Corporation" formed July 9, 1999, with OFFICER listed as the Registered Agent. COMPANY is a STATE "Foreign For Profit Business Corporation" formed December 1, 2003, with VICE PRESIDENT listed as the Registered Agent.

[10] Division's Exhibit E. The Protestant signed the October 2003 sales tax report on December 19, 2003, and the November 2003 sales tax report on January 23, 2004.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[11]

2. Any notice required by the *Uniform Tax Procedure Code*,[12] 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 the *Uniform Tax Procedure Code*[13] 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 reasonable 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 by Section 208 of Title 68, failure of the person to receive such notice shall neither invalidate nor be grounds for invalidating any action taken pursuant thereto, nor shall failure relieve any taxpayer from any tax or addition to tax or any interest or penalties thereon.[14]

3. The taxpayer may file a written protest to the proposed assessment within sixty (60) days after the mailing of the proposed assessment.[15]

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.[16]

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.[17]

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

[12] *See* Note 1, *supra.*

[13] *Id.*

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

[15] OKLA. STAT. tit. 68, § 221(C) (West Supp. 2010). *See* OKLA. ADMIN. CODE § 710:1-5-71 (July 11, 2003).

[16] OKLA. STAT. tit. 68, § 221(E) (West Supp. 2010). 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.

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

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.[18]

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.[19]

DISCUSSION

The ground for the *Motion* is that the Division complied with the statutory requirement to mail a copy of the proposed sales tax assessment for the Audit Period to the Protestant at his last-known address according to the records of the Tax Commission. The mailing is "presumptive evidence" of the Protestant's receipt of that notification and the Protestant's failure to protest the proposed assessment within the sixty (60) day time period or request an abatement within one (1) year of the date of the assessment caused the assessment to become final by operation of law.[20]

The Protestant maintains that the Protestant is not a "Taxpayer," but that the corporation is the Taxpayer and the Division has failed to demonstrate the Protestant is a liable party in accordance with Section 253 of Title 68 or that the Division served the Protestant in accordance with Section 2004 of Title 12.[21] The Protestant further asserts that without proof of proper

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

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

[20] *See* Notes 11-16, *supra.*

[21] OKLA. STAT. ANN. tit. 68, § 253 (West 2001):

> 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 members shall be liable.

service, the Protestant is not a "Taxpayer" and the provisions of Section 221 of Title 68[22] do not apply to the Protestant.

The Protestant's reliance upon Section 2004 of Title 12[23] is misplaced. The "service" of a proposed assessment upon a taxpayer is governed by Section 208 of Title 68.[24] The Division was required to mail the proposed assessment to the Protestant's last-known address according to the records of the Tax Commission. On October 20, 2005, the proposed assessment was mailed to the Protestant at PROTESTANT'S ADDRESS, which was the last-known address of the Protestant according to the records of the Tax Commission and which is still the Protestant's address. Pursuant to Section 208 of Title 68,[25] "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 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."[26]

In *Peterson v. Oklahoma Tax Commission*, 1964 OK 78, 395 P.2d 388, the Court cited *Oral Roberts University*[27] 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.[28] The Tax Commission has a long-standing 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 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.

OKLA. STAT. tit. 12, § 2004 (West 2002).

[22] OKLA. STAT. ANN. tit. 68, § 221 (West Supp. 2010).

[23] *See* Note 21, *supra*.

[24] *See* Note 14, *supra*.

[25] *Id.*

[26] *Id.*

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

[28] *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.

The Division's mailing of the proposed sales tax assessment for the Audit Period to the Protestant's last-known address according to the records of the Tax Commission complies with the requirements of Section 208. The failure of the Protestant to file a protest within the sixty (60) day time period or request an abatement according to the provisions of Section 221(E) of Title 68[29] caused the proposed assessment to become final by operation of law. The Protestant's remaining arguments need not be addressed because the Tax Commission is without jurisdiction to consider Protestant's arguments, which would be considered at a hearing on the merits.

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.[30]

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."

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[29] *See* Note 16, *supra*.

[30] It may be possible for the Protestant to seek relief 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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> …
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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).