

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2011-09-27-03 / NON-PRECEDENTIAL
ID: P-11-462-H
DATE: SEPTEMBER 27, 2011
DISPOSITION: DISMISSED
TAX TYPE: INCOME
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HUSBAND AND WIFE (“Protestants”) appear through CPA, CPA. The Case Management Section, Account Maintenance Division (“Division”) of the Oklahoma Tax Commission appears by and through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On June 20, 2011, 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 June 27, 2011, OTC ATTORNEY filed an Entry of Appearance as Counsel of record for the Division.

On July 5, 2011, the Division filed its *Motion*, with Exhibits A and B attached thereto. On July 13, 2011, the *Notice to Appear or Respond in Writing* (“*Notice*”) setting the hearing on the Division’s *Motion* for July 28, 2011, at 2:00 p.m. was mailed to CPA at her last-known address.³

On July 28, 2011, at 2:00 p.m. the hearing was held as scheduled. CPA did not respond to the Division’s *Motion* or appear at the hearing.⁴ OTC ATTORNEY appeared on behalf of the Division and announced that the Division stood on its *Motion* as filed, which was verified. The Verification attached to the Division’s *Motion* was duly sworn under oath, on behalf of the Division, by SUPERVISOR, Case Management Section, Account Maintenance Division of the Oklahoma Tax Commission.⁵ The Division offered a copy of a letter dated July 5, 2011,⁶ from OTC ATTORNEY to CPA, which was identified, offered, and admitted into evidence as ALJ’s

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 The *Motion* and the *Notice* were mailed to CPA at ADDRESS.

⁴ It was noted for the record that CPA had not contacted the Division or the Clerk regarding the hearing.

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

⁶ The letter was mailed to CPA at ADDRESS, and also included a copy of the *Motion*.

Exhibit 1.⁷ Upon conclusion of the hearing, the record in this matter was closed and this case was submitted for decision on July 28, 2011. On July 29, 2011, at approximately 2:00 p.m. CPA appeared before the Court Clerk,⁸ for the hearing which had been set for and held the day before, and provided a copy of HUSBAND'S earning statement. The Court Clerk pointed out to CPA that the *Notice* stated that the hearing had been set for July 28, 2011, at 2:00 p.m. CPA reviewed her *Notice* and confirmed the date and time of the hearing as stated by the Court Clerk. CPA was referred to OTC ATTORNEY, who was provided a copy of the earning statement by electronic transmission.⁹

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 or about May 2010, the Tax Commission processed the Protestants' Oklahoma Part Year Income Tax Return for the 2009 Tax Year. The return reflected that the Protestants were part year residents from September 1, 2009, to December 31, 2009, and attached to the Protestants' return was Form 564 (Credit for Employees in the Aerospace Sector) claiming a \$5,000.00 credit.¹⁰

2. On July 12, 2010, the Division mailed a letter¹¹ to the Protestants denying the credit as follows, to-wit:

Form 511N		Reported	Adjusted
Line 38	Other Credits (511CR)	5,000.00	0.00
Line 39	Balance	0.00	1,313.00
Line 42	Okla. Income Tax Withheld	2,438.00	0.00
Line 46	Total Refundable Credits	2,438.00	0.00
Line 47	Overpayment of Income Tax	2,438.00	0.00
Line 51	Refund	2,438.00	0.00
Line 52	Income Tax Due	0.00	1,313.00
Line 55	Total Balance Due	0.00	1,313.00
	Balance Due After Adjustments		1,313.00

⁷ The letter states in pertinent part, "Your client's protest can be treated as a request for abatement informally at the Division level..."

⁸ OKLA. ADMIN. CODE § 710:1-5-10(c)(2) (June 25, 1999).

⁹ See email filed herein.

¹⁰ 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).

¹¹ Division's Exhibit A.

The proposed income tax assessment contains the following paragraph, to-wit:

If you disagree with the adjustments made to this return, you may submit a written protest document in accordance with OS 68 Section 221(C) within sixty (60) days of the date of this notice; otherwise the action will become final....

3. On December 7, 2010, the Division received an untimely written protest to the proposed income tax assessment from CPA. The protest is dated November 14, 2010, and date-stamped December 7, 2010.¹²

4. On July 13, 2011, the *Motion* and *Notice* were mailed to CPA at her last-known address.¹³

5.

CONCLUSIONS OF LAW

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

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

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.¹⁶

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.¹⁷

¹² Division's Exhibit B. Attached to the protest letter is a copy of the Power of Attorney to CPA from HUSBAND, which is dated November 9, 2010.

¹³ See Note 3, *supra*.

¹⁴ OKLA. STAT. ANN. tit. 68, § 221(D) (West Supp. 2011). OKLA. ADMIN. CODE § 710:1-5-46(d) (June 11, 2005).

¹⁵ OKLA. STAT. ANN. tit. 68, § 221(C) (West Supp. 2011).

¹⁶ OKLA. STAT. ANN. tit. 68, § 221(E) (West Supp. 2011). 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).

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 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

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.¹⁹

The Division's *Motion* and the *Notice* comply with the provisions of Tax Commission Rule 710:1-5-46(d).²⁰ The proposed income tax assessment is dated July 12, 2010. The Protestants had sixty (60) days from July 12, 2010, or September 10, 2010, to file a timely written protest. The protest was date stamped December 7, 2010, after the sixty (60) day period provided by Section 221(E) of Title 68 had run.

DISPOSITION

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

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* Note 14, *supra*.