JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2012-04-25-02 / NON-PRECEDENTIAL**
ID: **P-11-569-K**
DATE: **APRIL 25, 2012**
DISPOSITION: **DISMISSED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

ORDER

The above matter comes on for entry of a final order of disposition by the Oklahoma Tax Commission. Having reviewed the files and records herein, including the Findings of Fact, Conclusions of Law and Recommendations made and entered by the Administrative Law Judge on the 15th day of February, 2012, the Commission denies the request of the Ad Valorem Division for consideration en banc, and makes the following Findings of Fact and Conclusions of Law and enters the following order.

STATEMENT OF THE CASE

Protestant's *Application for Five-year Ad Valorem Tax Exemption for Oklahoma Manufacturing or Research & Development Facilities* ("*Application*") was filed with the Ad Valorem Division on June 14, 2011. By letters dated July 1, 2011, Protestant's representative and the XYZ County Assessor were notified that the *Application* had been denied due to an insufficient increase of payroll. A protest to the denial was filed on September 22, 2011.

The protest was referred to the Office of the 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]. It was docketed as Case No. P-11-569-K and assigned to ALJ, Administrative Law Judge.

A pre-hearing conference was scheduled for November 17, 2011, by *Prehearing Conference Notice* issued October 5, 2011.[3] At the conference, the Division gave notice of its intent to seek dismissal of the case on the grounds of an untimely filed protest. In accordance with the conference, a *Prehearing Conference Order* was issued setting forth the procedure by which the Division's challenge to the Oklahoma Tax Commission's jurisdiction would be submitted for decision.

The *Motion* was filed December 14, 2011. A *Notice to Appear or Respond in Writing* was issued December 16, 2011 scheduling a hearing on the *Motion* for January 11, 2012. Protestant did not appear at the scheduled hearing. A *Response to Motion to Dismiss: Lack of Jurisdiction*

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[1] 68 O.S. 2001, § 201 et seq.

[2] Rules 710:1-5-20 through 710:1-5-47 of the *Oklahoma Administrative Code* ("*OAC*").

[3] *OAC*, 710:1-5-28(a).

("*Response*") was mailed on the date of the hearing and received January 13, 2011. On January 17, 2011, the record was closed and the *Motion* was submitted for decision.[4]

FINDINGS OF FACT

Upon review of the file and records, including the *Motion* and *Response*, the undersigned finds:

1. Protestant's *Application for Five-year Ad Valorem Tax Exemption for Oklahoma Manufacturing or Research & Development Facilities* ("*Application*") was filed with the Division on June 14, 2011.

2. By letters dated July 1, 2011, the Division notified Protestant's representative and the XYZ County Assessor that the *Application* had been denied due to an insufficient increase of payroll.

3. A protest to the denial of the *Application* was filed on September 22, 2011.

ISSUE

The issue presented for decision is whether the Oklahoma Tax Commission lacks jurisdiction to consider the merits of protest because it was not filed within sixty (60) days of the date of mailing of the letters denying the *Application*.

The Division cites *OAC*, 710:10-7-15(c) and argues that the Oklahoma Tax Commission lacks jurisdiction to consider the protest because Protestant failed to file the protest within sixty (60) days of the mailing of the letters denying the *Application*.

Protestant does not dispute that the protest to the denial was mailed late. Protestant contends that they did not receive the notice and were unaware of the deadline for filing an appeal.

CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter of law:

1. Jurisdiction of the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S. 2011, § 207(c); *OAC*, 710:10-7-15 and 710:1-5-46[5].

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[4] *OAC*, 710:1-5-39(a).

[5] This rule provides in pertinent part:

> (c) **Dismissal for Lack of Jurisdiction**. 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. * * *

2. *OAC*, 710:10-7-15[6] provides:

Review; protest; appeal

(a) **Notice of erroneous exemption; assessment.** If the Commission determines that an ad valorem manufacturing exemption has been erroneously or unlawfully granted to a manufacturing concern, in whole or in part, [it] shall notify the appropriate county assessor, who shall, after notice to the applicant as required by law has been given, immediately value and assess the property and place the property on the tax rolls for Ad Valorem taxation.

(b) **Notice to applicant.** The Commission shall mail a copy of the notice pursuant to the terms of 68 O.S. § 208 to the applicant at the mailing address shown on the application. The copy shall notify the applicant of his right to protest the Commission's determination.

(c) **Protest.** Within sixty (60) calendar days after the mailing of the notice, the applicant may file with the Oklahoma Tax Commission, a written protest, under oath, signed by himself or his duly authorized representative, in the manner and subject to the requirements set out in 68 O.S. § 207 of the Uniform Tax Procedure Code. A copy of the protest shall
be mailed or delivered by the applicant to the county assessor.

(d) **Law governing protest procedure.** The Applicant's right of protest, hearing and procedure to be followed shall be governed by the provision of the Uniform Tax Procedure Code.

(e) **Appeal.** Appeals from the decision of the Oklahoma Tax Commission regarding any protest shall be made directly to the Supreme Court of Oklahoma, as provided by law.

(d) **Motion to Dismiss**. 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 reason 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.

[6] This rule was initially promulgated as Reg. 24-14 by Oklahoma Tax Commission Order No. 86-02-04-09 contemporaneously with the 1985 enactment of 68 O.S. Supp. 1985, § 2405.2, the predecessor to § 2902 of the Ad Valorem Tax Code, 68 O.S. 2001, § 2801 et seq. See, Oklahoma Tax Commission Order 2006-03-21-03. § 2405.2 was enacted by the legislature for the purposes of carrying out the provisions of OK CONST. art. X, § 6B, added by State Question No. 588, Legislative Referendum No. 252, adopted at election held on April 30, 1985. § 2405.2 was added by Laws 1985, c. 341, § 1, emerg. eff. July 30, 1985, and repealed by Laws 1988, c. 162, § 165, eff. January 1, 1992, and is currently codified at 68 O.S., § 2902. The Tax Commission was charged by the legislature with "the authority and duty to prescribe forms and to promulgate rules and regulations as may be necessary to carry out and administer the terms and provisions of [the ad valorem tax manufacturing exemption]"; 68 O.S. Supp. 1985, § 2405.2(G), currently codified at § 2902(H). *OAC*, 710:10-7-15, specifically subsection (c) was amended at 21 Ok Reg 2563, eff 6-25-04 by substituting a sixty (60) calendar day time period to protest a denial of an ad valorem tax manufacturing exemption application for the thirty (30) calendar day time period.

3. In Oklahoma Tax Commission Order No. 2000-09-19-041, the Commission was confronted with an issue similar to the issue presented in this cause. In that case, the taxpayers failed to timely protest the denial of their request to credit their overpayment of income taxes to their subsequent year estimated income tax payments. Taxpayers were not protesting a proposed assessment of taxes or additional taxes. The Commission determined that taxpayers' protest was not subject to dismissal because the statutory authority for taxpayers' action was set forth in the provisions of § 207 rather than § 221 of the Uniform Tax Procedure Code which governs the protest of proposed assessments of taxes or additional taxes, and § 207 as opposed to § 221 did not prescribe a time limit for filing a protest.

4. In this case, unlike the cited Commission decision, the Commission has promulgated a rule governing the procedure for protesting a notice of denial of an ad valorem tax manufacturing exemption application. *OAC*, 710:10-7-15. The rule explicitly provides "[w]ithin sixty (60) calendar days after the mailing of the notice, the applicant may file with the Oklahoma Tax Commission, a written protest, under oath, signed by himself or his duly authorized representative, in the manner and subject to the requirements set out in 68 O.S. § 207 of the Uniform Tax Procedure Code".

5. Rules promulgated pursuant to the Administrative Procedures Act[7] are presumed to be valid until declared otherwise by a court of competent jurisdiction. 75 O.S. 2001, § 306(C). They 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. 75 O.S. 2001, § 308.2(C). The legislature is deemed to have adopted an administrative construction of a statute when, subsequent to such construction, it amends the statute or reenacts it without overriding such construction. ***Branch Trucking Co. v. Oklahoma Tax Commission***, 1990 OK 41, 801 P.2d 686.

The rules and regulations of an administrative agency which implement the provisions of a statute are valid unless they are beyond the scope of the statute, are in conflict with the statute or are unreasonable. See, ***Arkansas Louisiana Gas Co. v. Travis***, 1984 OK 33, 682 P.2d 225; ***Boydston v. State***, 1954 OK 327, 277 P.2d 138. Agency rules need not be specifically authorized by statute, but must generally reflect the intent of the Legislature as expressed in the statute. ***Jarboe Sales Company v. Oklahoma Alcoholic Beverage Laws Enforcement Commission***, 2003 OK CIV APP 23, 65 P.3d 289. As a general rule, it is presumed that administrative rules and regulations are fair and reasonable, and that the complaining party has the burden of proving the contrary by competent and convincing evidence. ***State ex rel. Hart v. Parham***, 1966 OK 9, 412 P.2d 142.

6. In Order No. 86-02-04-09, the Tax Commission found that the regulations promulgated and issued in accordance with 68 O.S. Supp. 1985, § 2405.2(G) "shall remain in force and effect until changed by law or by Attorney General's Opinion or by the Commission." The Tax Commission is authorized to invalidate any rule it promulgates which is in conflict with the statute the rule interprets, especially where the invalidation does not operate to the prejudice of the taxpayer in any manner. Oklahoma Tax Commission Order No. 99-02-08-007.

[7] 75 O.S. 2011, § 250 et seq., § 301 et seq.

7. The Oklahoma Supreme Court has held that administrative rules, like statutes, should be given a construction which does not render a portion of the rule useless.[8]

APPLICATION

The Division cites § 221(E) of the Uniform Tax Procedure Code and Rules 710:1-5-10(a), 710:1-5-22(a) and 710:1-5-23 of the Oklahoma Administrative Code for the proposition that if a protest to the denial of an ad valorem tax manufacturing exemption application is not filed within sixty (60) days of the mailing of the denial notice, the denial of the application is final and absolute, and the Tax Commission is without jurisdiction to consider the merits of the protest. The provisions cited by the Division are not applicable to this matter as those provisions concern the filing of a protest to a tax assessment. This matter does not involve a protest to a proposed tax assessment.

OAC, 710:10-7-15(c) specifically provides that "the applicant may file with the Oklahoma Tax Commission, a written protest, * * * in the manner and subject to the requirements set out in 68 O.S. § 207 of the Uniform Tax Procedure Code." The provisions of § 207 do not prescribe a time limit for filing a protest. Oklahoma Tax Commission Order No. 2000-09-19-041. Further, unlike the provisions of §§ 221(E) and 227(d), the language of § 207 and 710:10-7-15(c) do not dictate a consequence for failing to file a protest within the prescribed time period.

OAC 710:10-7-15(c) clearly provides that an applicant may file a protest "[w]ithin sixty (60) calendar days after mailing of the notice . . ." A construction of this rule which ignores this language and renders it meaningless is prohibited by rules of construction endorsed by the Oklahoma Supreme Court. The only reasonable interpretation of this language is that the Tax Commission does not have jurisdiction to consider a protest filed more than sixty (60) days after the mailing of the notice of denial.

ORDER

The Oklahoma Tax Commission orders that the Division's Motion to Dismiss for Lack of Jurisdiction be granted and the protest be dismissed.

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.

[8] *Charlson v. State ex rel. Dept. of Public Safety*, 2005 OK 83, ¶10, 125 P.3d 672; *See Estes v. Conocophillips Co.*, 2008 OK 21, ¶16, 184 P.3d 518.

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."