

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2012-12-13-02 / NON-PRECEDENTIAL
ID: P-12-116-H
DATE: DECEMBER 13, 2012
DISPOSITION: DISMISSED
TAX TYPE: SALES
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROTESTANT d/b/a BUSINESS (“Protestant”) appears pro se.¹ The Compliance Division (“Division”) of the Oklahoma Tax Commission, appears through OTC ATTORNEY 1, Assistant General Counsel, and OTC ATTORNEY 2, Deputy General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On June 11, 2012, 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 June 19, 2012, the Court Clerk⁴ mailed a letter to the Protestant’s representative of the case assignment to ALJ, Administrative Law Judge, and docketed as Case Number P-12-116-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 Office of Administrative Law Judges*.⁵ On June 20, 2012, OTC ATTORNEY 1 filed an Entry of Appearance as Counsel for the Division. On June 25, 2012, the Court Clerk mailed the Notice of Prehearing Conference to the Protestant’s representative, setting the prehearing conference for July 30, 2012, at 1:30 p.m.⁶

On July 10, 2012, OTC ATTORNEY 1 contacted the Court Clerk advising that he had been unable to contact REPRESENTATIVE of FIRM, who was no longer with the firm. On July 11, 2012, OTC ATTORNEY 1 filed a copy of the letter sent to PROTESTANT requesting clarification as to whether his representative was REPRESENTATIVE and/or FIRM and advising of the prehearing conference. On July 13, 2012, a letter was mailed to the Protestant

¹ “Pro 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 (9th ed. 2009).

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

⁵ *Id.*

⁶ OKLA. STAT. ANN. tit. 68, § 208 (West Supp. 2012). The Notice was mailed to REPRESENTATIVE, FIRM CPAS, ADDRESS.

acknowledging OTC ATTORNEY 1'S July 11th letter and requesting the Protestant to contact the Court Clerk by phone. On July 24, 2012, OTC ATTORNEY 1 filed a copy of a letter to the Protestant advising that REPRESENTATIVE had advised that she or FIRM no longer represented the Protestant. On July 30, 2012, the prehearing teleconference was held as scheduled. OTC ATTORNEY 1 appeared via telephone. The Protestant did not appear. On July 31, 2012, the Court Clerk mailed the Prehearing Conference Order to the parties advising that the Division was to file a Motion to Dismiss on or before August 15, 2012.

On August 15, 2012, the Division filed a *Motion to Dismiss* (“*Motion*”), with Exhibits A through C, attached thereto. On August 17, 2012, the Court Clerk mailed the *Notice to Appear or Respond in Writing* (“*Notice*”) to the parties setting the hearing on the Division’s *Motion* for September 24, 2012, at 1:30 p.m.⁷ On August 27, 2012, OTC ATTORNEY 1 filed a Status Report advising that he had spoken with the Protestant. The Protestant’s new mailing address is NORTH DAKOTA ADDRESS. The Protestant was aware of the pending hearing on the Division’s *Motion*. On August 31, 2012, this office received a letter from the Protestant requesting to appear via telephone for the hearing on the Division’s *Motion*.

On September 4, 2012, the undersigned advised the Protestant by letter that the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*⁸ do not allow a Protestant to appear by telephone for a substantive hearing and that he must either appear for the hearing or file a written response as provided in the *Notice*. On September 19, 2012, this office received a letter, by facsimile, from the Protestant requesting the hearing be rescheduled during October 17th through 19th, so he could appear in person. On September 21, 2012, the Protestant’s September 19th facsimile was acknowledged and the hearing was rescheduled for October 18, 2012, at 9:30 a.m.

On October 18, 2012, at 9:30 a.m. the hearing on the Division’s *Motion* convened as scheduled. Both parties appeared. The Division called SUPERVISOR, Supervisor (“Supervisor”), In-House (Office) Audit, Compliance Division of the Oklahoma Tax Commission, who testified about the audit, the Division’s audit procedures for the mailing of a proposed assessment, and as custodian of the Division’s records. The Division’s Exhibits A through C were identified, offered, and admitted into evidence without objection. The Protestant testified on his own behalf. The Protestant did not identify and offer any exhibits for admission into evidence. Upon conclusion of the hearing, the undersigned closed the record and this case submitted for decision on October 18, 2012.

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. The Protestant was a sole proprietor. The Division conducted an In-House (Office) audit for sales tax utilizing the information from copies of the Protestant’s Federal income tax

⁷ The Court Clerk mailed the *Motion* and the *Notice* to the Protestant at LAST KNOWN ADDRESS.

⁸ See Note 3, *supra*.

returns (Schedule C's) for the 2004 and 2005 Tax Years, attached to his Oklahoma income tax returns (No Federal Tax Information). The Division compared the amount of gross sales reported on the Schedule C's with the Oklahoma sales tax reports filed by the Protestant for the August 1, 2004 through December 31, 2005 ("Audit Period"). The audit revealed that the Protestant had underreported sales (estimated).⁹

2. On August 22, 2007, the Division issued a proposed sales tax assessment against the Protestant for the Audit Period,¹⁰ as follows, to-wit:

Tax Due:	\$5,246.44
Interest @15% through 09/24/07:	1,949.45
Tax & Interest due within 30 Days:	\$7,195.89
30 day delinquent Penalty @ 10%:	<u>524.65</u>
Tax, Interest & Penalty due after 30 Days:	\$7,720.54

The proposed sales tax assessment contains 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)....

3. The Division mailed the proposed sale tax assessment to the Protestant at his last-known address according to the records of the Tax Commission.¹¹

4. On October 22, 2007, REPRESENTATIVE ("REPRESENTATIVE") of FIRM, e-mailed a request to the Division requesting an extension to respond to the proposed sales tax assessment. The Division did not respond to the request. The e-mail states in pertinent part, "[Protestant] has faxed me a Power of Attorney which I am attaching, as well as a copy of The [sic] audit assessment he received."¹²

5. On February 17, 2012, the Division received an untimely written protest from the Protestant.¹³

⁹ The court file contains an audit packet 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).

¹⁰ Testimony of Supervisor. Division's Exhibit A.

¹¹ *Id.* The Division mailed the assessment to the Protestant at LAST KNOWN ADDRESS. *See* Note 18, *infra*.

¹² *Id.* Division's Exhibit B. REPRESENTATIVE made the request sixty-one (61) days from the date of mailing. The request must be made before the sixty (60) day time period expires. *See* OKLA. STAT. ANN tit. 68, § 221(E) (West Supp. 2012).

¹³ *Id.* Division's Exhibit C. The envelope is post-marked February 17, 2012. The last line of the protest states "...if you need anything further, feel free to call REPRESENTATIVE, FIRM, at anytime I would like to get

6. At the hearing, the Protestant did not dispute that the protest was filed out-of-time.¹⁴

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.¹⁵

2. The taxpayer may file a written protest to the proposed assessment within sixty (60) days after the mailing of the proposed assessment.¹⁶

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.¹⁷

4. 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 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.¹⁸

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.¹⁹

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

this matter taken care of."

¹⁴ Testimony of Protestant.

¹⁵ OKLA. STAT. tit. 68, § 221(D) (West Supp. 2012). OKLA. ADMIN. CODE § 710:1-5-46 (June 11, 2005).

¹⁶ OKLA. STAT. tit. 68, § 221(C) (West Supp. 2012).

¹⁷ OKLA. STAT. tit. 68, § 221(E) (West Supp. 2012).

¹⁸ OKLA. STAT. ANN. tit. 68, § 208 (West 2001).

¹⁹ OKLA. STAT. ANN. tit. 75, § 250 *et seq.* (West 2002).

protest may be raised at any time, by a party, the Administrative Law Judge, or the Commission itself.²⁰

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.²¹

CONCLUSION

The Division's *Motion* and the *Notice* comply with the provisions of Tax Commission Rule 710:1-5-46(d). The protest was post-marked February 17, 2012, after the sixty (60) day period provided by Section 221(E) of Title 68²² expired, which was not disputed by the Protestant at hearing.

DISPOSITION

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

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

²¹ OKLA. ADMIN. CODE § 710:1-5-46(d) (June 11, 2005).

²² *See* Note 17, *supra*.