JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2015-06-16-12 / NON-PRECEDENTIAL**
ID: **P-15-005-H**
DATE: **JUNE 16, 2015**
DISPOSITION: **DISMISSED**
TAX TYPE: **SALES**
APPEAL: **NONE**

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, the Commission hereby adopts the Findings of Fact, Conclusions of Law and Recommendation made and entered by the Administrative Law Judge on the 14TH day of May, 2015, appended hereto, together herewith shall constitute the Order of the Commission.

SO ORDERED.

FINDINGS, CONCLUSIONS AND RECOMMENDATION

NOW on this 14th day of May, 2015, the above-styled and numbered cause comes on for consideration of the Compliance Division's *Motion to Dismiss* ("*Motion*") for "lack of jurisdiction" pursuant to assignment regularly made by the Oklahoma Tax Commission to ALJ, Administrative Law Judge. PROTESTANT ("Protestant") appears pro se.[1] The Compliance Division ("Division"), Oklahoma Tax Commission, appears by and through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On January 14, 2015, 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 January 15, 2015, the Court Clerk ("Clerk")[4] mailed the Introductory Letter to the Protestant advising that this matter had been assigned to ALJ, Administrative Law Judge ("ALJ"), and docketed as Case Number P-15-005-H.[5] The letter also advised the Protestant that a Prehearing Teleconference

[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), available at http://westlaw.com.

[2] OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2014).

[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, 2009).

[5] Unless otherwise noted herein, the ALJ notifies the parties by letter.

Notice would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.[6] On January 15, 2015, OTC ATTORNEY filed an Entry of Appearance as the Division's Counsel of record. On January 16, 2015, the Clerk mailed the Prehearing Teleconference Notice to the Protestant, setting the prehearing teleconference for March 10, 2015, at 11:00 a.m.

On March 10, 2015, the Division filed the Division's *Motion* and *Notice to Appear or Respond in Writing* ("*Notice*").[7] Upon the filing of the Division's *Motion*, the ALJ struck the Prehearing Teleconference.[8]

On May 12, 2015, at 9:30 a.m. the ALJ conducted the hearing as scheduled. The Protestant did not respond to the Division's *Motion*, nor did the Protestant appear at the hearing.[9] The Division called one (1) witness, UNIT MANAGER, Unit Manager, Compliance Division, Oklahoma Tax Commission, who testified about the audit procedures, the Protestant's last-known address according to the records of the Tax Commission, and as custodian of the Division's records. The Division identified and offered Exhibits A through C,[10] which the ALJ admitted into evidence. The Division's Exhibit C, as attached to its *Motion*, contained **Federal Tax Information** ("**FTI**"). This office did not make copies of Exhibit C containing **FTI** and the originals contained in a Tax Commission manila envelope with a sticker "**This file contains FTI**," will be returned to OTC ATTORNEY at the conclusion of this case. Upon conclusion of the hearing, the ALJ closed the record and submitted this case for decision on May 12, 2015.

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, as a Sole Proprietor, operated a "Used Merchandise" business located at BUSINESS ADDRESS, from January 1, 2001 through December 31, 2005 ("Audit Period").[11]

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[6] *Id. See* Note 3, *supra*.

[7] The Division mailed the Motion and the Notice to the Protestant at ADDRESS.

[8] The Protestant did not call in for the Prehearing Conference.

[9] The ALJ noted for the record that the Protestant had not contacted the Division or the Clerk about the hearing.

[10] The Division's Exhibits at hearing consisted of (1) Exhibit A, Inquiry Letter, (2) Exhibit B, Assessment, and (3) Exhibit C, the Protest Letter.

[11] Testimony of Unit Manager. The ALJ is taking judicial notice of the Audit Write-up contained in the court file and the Schedule C's for the Audit Period to complete the factual details and background of this matter. OKLA. ADMIN. CODE § 710:1-5-36 (July 11, 2013). OKLA. ADMIN. CODE § 710:1-5-36 (July 11, 2013).

2. On May 31, 2006, the Division notified the Protestant that information made available to the Division indicated that the Protestant had a business filing requirement for the Audit Period, as follows,[12] to-wit:

> **OKLAHOMA SALES TAX**
>
> We have no record of these returns being filed. In order to resolve this matter; please take one of the following actions.
>
> 1. **File all required tax returns and pay the tax due.**
> All filings and payments for taxes due (including penalties and interest) should be included with a copy of this letter and mailed to the address provided below.
>
> 2. **Provide the Federal Identification Number for Oklahoma filings #[.]**
> If this business is in compliance, we appreciate your help in resolving this discrepancy. Please identify the tax identification number for your Oklahoma filings in the space above and return to the following address:

…

2. The Division conducted an office audit utilizing Schedule C (Profit or Loss From Business) from the Protestant's Federal income tax returns for the Audit Period. The Division utilized the amount of gross sales reported on Schedule C for the Audit Period to estimate the amount of gross sales the Protestant should have reported for the Audit Period.[13]

3. On August 21, 2006, the Division issued a proposed sales tax assessment against the Protestant for the Audit Period,[14] as follows, to-wit:

Tax Due:	$6,048.84
Interest @15% through 09/20/06:	$2,695.95
Tax & Interest due within 30 Days:	$8,744.79
30 day delinquent Penalty @ 10%:	$ 604.92
Tax, Interest & Penalty due after 30 Days:	$9,349.71

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[12] Id. Division's Exhibit A. The Division mailed the letter to the Protestant at BUSINESS ADDRESS.

[13] *Id. See* Note 11, *supra.*

The Protestants Gross Sales for the Audit Period:

2001	$12,905
2002	$14,944
2003	$13,145
2004	$16,348
2005	$16,572
Total	$73,914

[14] *Id.* Division's Exhibit B.

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).…

4. The Division mailed the proposed sales tax assessment to the Protestant at BUSINESS ADDRESS, which was the last-known address of the Protestant according to the records of the Tax Commission.[15]

5. After sixty-days had elapsed, the sales tax assessment went final. The Division filed a Tax Warrant STSXXXXXXXXXXXX, and the liability was turned over to one of the Tax Commission's collection agencies, with a balance through January 12, 2015,[16] as follows, to-wit:

Sales Tax:	$6,048.84
Interest through 01/12/15:	$8,855.84
Penalty:	937.33
Third Party Vendor Fee:	$4,241.85
Tax Warrant Penalty:	200.00
Filing Fee:	13.00
Release Fee:	13.00
Credit:	(417.05)
Total:	$19,892.81

6. On August 11, 2014, the Division received an untimely protest to the sales tax assessment. The Protestant dated the letter August 5, 2014, but the post-mark is illegible. The Division date-stamp is August 11, 2014.[17]

[15] *Id.* The Protestant's address is same address reflected on Schedule C for the Audit Period.

[16] *See* Note 12, *supra.* The ALJ is taking judicial notice of the materials contained in the court file to complete the factual details of this matter.

[17] Testimony of Unit Manager. *See* Division's Exhibit C.

CONCLUSIONS OF LAW

1. The Legislature vested the Oklahoma Tax Commission with jurisdiction over the parties and subject matter of this proceeding.[18]

2. The taxpayer may file a written protest to the proposed assessment within sixty-days after the mailing of the proposed assessment.[19]

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.[20]

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.[21]

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.[22]

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.[23]

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

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[18] OKLA. STAT. ANN. tit. 68, § 221(D) (West 2014).

[19] OKLA. STAT. ANN. tit. 68, § 221(C) (West 2014).

[20] OKLA. STAT. ANN. tit. 68, § 221(E) (West 2014).

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

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

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

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.[24]

DISCUSSION

The Division's *Motion* and *Notice* comply with the provisions of Tax Commission Rule 710:1-5-46(d).[25] The Protestant dated the protest letter August 5, 2014, and it is date-stamped by the Division on August 11, 2014, approximately eight (8) years after the sixty-day period provided by Section 221(E) of Title 68 had expired.[26]

CONCLUSION

The Tax Commission is without jurisdiction to consider the Protestant's untimely filed protest.

RECOMMENDATIONS

The ALJ recommends granting the Division's *Motion* for "lack of jurisdiction," based upon the facts more fully set forth herein.

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. 2014) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002).

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

[25] *Id.*

[26] *See* Notes 17 and 20, *supra*.