JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2016-06-14-16 / NON-PRECEDENTIAL**
ID: **P-14-116-H**
DATE: **JUNE 14, 2016**
DISPOSITION: **DISMISSED**
TAX TYPE: **INCOME**
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 19TH day of May, 2016, appended hereto, together herewith shall constitute the Order of the Commission.

SO ORDERED.

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

NOW on this 19TH day of May 2016, the above-styled and numbered cause comes on for consideration of the Division's *Motion to Dismiss* ("*MTD*") for "lack of jurisdiction," under assignment regularly made by the Oklahoma Tax Commission to ALJ, Administrative Law Judge. SPOUSE 1 and SPOUSE 2 ("Protestants") appear pro se.[1] The Compliance Division ("Division") of the Oklahoma Tax Commission appears through OTC ATTORNEY 1, Assistant General Counsel, and OTC ATTORNEY 2, First Deputy General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On December 17, 2014, 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 December 17, 2014, the Court Clerk ("Clerk")[4] mailed the Introductory Letter to the Protestants that ALJ, Administrative Law Judge ("ALJ") had been assigned to this matter, and docketed as Case

[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://web2.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) (August 27, 2015).

Number P-14-116-H. The letter also advised the Protestants that a Prehearing Teleconference Notice 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 December 19, 2014, OTC ATTORNEY 1 filed an Entry of Appearance as Division's Counsel of record. On December 19, 2014, the Clerk mailed the Prehearing Teleconference Notice to the last-known address of the Protestants, setting the prehearing conference for February 17, 2015, at 10:30 a.m.[6] On December 19, 2014, the Division filed its Request to Stay Proceedings. The Protestants filed a Chapter 13 bankruptcy in the Northern District of Texas, Case No. 14-44293-RFN. On December 22, 2014, the ALJ issued an Order Granting Division's Request to Stay Proceedings, with a status report by Wednesday, June 17, 2015.

On June 17, 2015, the Division filed the Status Report advising on April 15, 2015, the Protestants converted the Chapter 13 bankruptcy to a Chapter 7, with the deadline of July 31, 2015, for creditors to object to a discharge. On June 17, 2015, the ALJ directed the parties to file a status report by September 15, 2015.

On September 15, 2015, the Division filed the Status Report advising that the Protestants bankruptcy completed on August 4, 2015, with a standard discharge. On September 18, 2015, the ALJ issued an Order Lifting Stay of Proceedings directing the parties to file a status report or a "proposed" scheduling order by Thursday, October 15, 2015.

On October 15, 2015, the Division filed the Status Report advising that the Protestants requested documentation from the IRS for the 2012 Tax Year. On October 19, 2015, the ALJ directed the parties to file a status report by December 14, 2015.

On December 14, 2015, the Division filed the Status Report advising the Protestants had provided an IRS Transcript for the 2012 Tax Year, but the Transcript did not resolve the issues in the protest. The Division requested additional documentation. On December 15, 2015, the ALJ directed the parties to file a status report by February 12, 2016.

On February 10, 2016, the Division filed the Status Report advising a review of the documentation submitted by the Protestants did not resolve the issues and the Division requested a Prehearing Teleconference to discuss this matter. On February 11, 2016, the ALJ issued the Prehearing Teleconference Notice for March 10, 2016, at 10:00 a.m.

On March 9, 2016, OTC ATTORNEY 2 filed an Entry of Appearance as Additional Counsel for the Division. On March 10, 2016, at 10:00 a.m. the ALJ held the Prehearing Teleconference as scheduled. The ALJ advised the parties that according to the court file, the Protestants filed the protest sixty-four (64) days after the Division issued its proposed income tax assessment for the 2012 Tax Year. The Protestants requested time to produce proof of mailing by certified mail, etc. The Protestants also advised of a new mailing address at NEW

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

[6] OKLA. STAT. ANN. tit. 68, § 208 (West 2014). The Clerk mailed the notice to the Protestants at ADDRESS.

ADDRESS. On March 10, 2016, the ALJ directed the parties to file a status report by April 11, 2016. On March 16, 2016, the Division filed its *Motion to Dismiss* ("*MTD*"), with Exhibits A through B, attached. On March 17, 2016, the ALJ issued the *Notice to Appear or Respond in Writing* ("Notice"), setting the Division's *MTD* for April 6, 2016, at 1:30 p.m.

On April 6, 2016, the Division filed a *Motion for Continuance* due to insufficiency of service. On April 7, 2016, the ALJ issued an Order Striking Hearing set for April 6, 2016, at 1:30 p.m. On April 7, 2016, the ALJ issued a *Second Notice to Appear or Respond in Writing* ("*Second Notice*"), resetting the hearing for May 4, 2016, at 9:30 a.m. On April 15, 2016, the Division filed the *Transmittal of Protestants' Response to the Division's Motion to Dismiss* ("*Response*").

On May 3, 2016, the Division filed the *Transmittal of Protestants' Request to Strike Hearing* set for May 4, 2016, at 9:30 a.m. and to submit this matter on the Division's *MTD* and the Protestants' *Response.* On May 3, 2016, the ALJ issued an Order Striking Hearing set for May 4, 2016, at 9:30 a.m., and closed the record submitting this matter for decision as of May 3, 2016.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, the Division's *MTD*, Protestants' *Response*, and the *Second Notice*, the undersigned finds:

1. On September 9, 2013, the Division issued an assessment adjusting the Protestants' Oklahoma Income Tax Return for the 2012 Tax Year,[7] as follows, to-wit:

FORM 511 N		REPORTED	ADJUSTED
LINE 19	FEDERAL AGI	254,118.00	254,129.00
LINE 22	SUBTRACTIONS FROM FED AGI	122,008.00	0.00
LINE 23	OKLA AGI – OKLA SOURCE	0.00	122,008.00
LINE 25	OKLA AGI – ALL SOURCES**	132,110.00	254,129.00
LINE 27	INCOME AFTER ADJUSTMENTS	132,110.00	254,129.00
LINE 31	OKLAHOMA TAXABLE INCOME	0.00	111,351.00
LINE 32	OKLAHOMA INCOME TAX	0.00	5,453.00
LINE 34	NON-RESIDENT BASE TAX	0.00	5,453.00
LINE 36	NON-RESIDENT OKLAHOMA TAX	0.00	2,618.00
LINE 39	BALANCE	0.00	2,618.00
LINE 53	INCOME TAX DUE	0.00	2,618.00
LINE 58	TOTAL BALANCE DUE	0.00	2,618.00

** OKLAHOMA AGI FROM ALL SOURCES WAS CORRECTED.

[7] Division Exhibit A.

The proposed assessment contains these 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) OF THE DATE OF THIS NOTICE, OTHERWISE THE ACTION WILL BECOME FINAL. …

2. On November 12, 2013, the Division received an untimely protest to the adjustment of the Income Tax Return for the 2012 Tax Year. The Protestants asserted the Division based its adjustment upon multiple W-2Gs, totaling $122,008.00, which the Protestants assert were reported as a gambling loss on their Federal Income Tax Return for the 2012 Tax Year.[8]

3. On April 7, 2016, the Clerk mailed the *Second Notice* to the Protestants at their last-known address.[9]

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject of this proceeding.[10]

2. The taxpayer may file a written protest to the proposed assessment within sixty (60) days after the mailing of the proposed assessment.[11]

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.[12]

4. The rules promulgated under the Administrative Procedures Act are presumed to be valid and binding on the persons they affect and have the force of law.[13]

5. If any claim, statement, or other document required by law or agency Rule to be filed within a prescribed period, or by a prescribed date, is delivered after the prescribed period or date, by the United States Postal Service or other delivery service designated by OAC 710:1-3-33 to the Oklahoma Tax Commission, at 2501 Lincoln Boulevard, Oklahoma City, Oklahoma 73194; the date of the United States postmark, stamped on the cover in which the claim,

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[8] Division Exhibit B.

[9] *See* Procedural History herein.

[10] OKLA. STAT. ANN. tit. 68, § 221(D) (West 2014). *See* OKLA. ADMIN. CODE § 710:1-5-46 (June 11, 2005).

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

[12] OKLA. STAT. ANN. tit. 68, § 221(F) (West 2014).

[13] OKLA. STAT. ANN. tit. 75, § 250 *et seq.* (West 2002). *See Toxic Waste Impact Group, Inc. v. Leavitt*, 1988 OK 20, 755 P.2d 626.

statement, or other document is mailed or the date recorded under OAC 710:1-3-33 by a designated delivery service shall be considered the date of delivery.[14]

6. By Tax Commission Rule, the Sender assumes risk of untimeliness of mail,[15] as follows, to-wit:

> (a) The sender who relies upon the applicability of the definition of timely filing in 710:1-3-30 by mailing a claim, statement, or other document, assumes the risk that the postmark will bear a date, on or before the last date or day, of the period prescribed for filing the document.
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> (b) If the postmark on the envelope or wrapper is not legible or the envelope is unavailable, the person who is required to file the document has the burden of proving when the postmark was made or when the claim, statement, or other document was placed for delivery with a designated delivery service. [**See:** *OAC* 710:1-3-33]

7. The Tax Commission is without jurisdiction to consider a protest 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.[16]

8. 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, 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 filing 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 with the motion or notice of intent to dismiss.[17] On April 7, 2016, the Division mailed the *Second Notice* to the Protestants over fifteen (15) days before the hearing scheduled for May 4, 2016.

9. If the taxpayer fails to file a written protest within the sixty-day period provided for or within the period as extended by the Tax Commission, or if the taxpayer fails to file the notice required by Section 226 of this title within thirty (30) days from mailing of an assessment, then the proposed assessment, without further action of the Tax Commission, shall become final and absolute. A taxpayer who fails to file a protest to an assessment of taxes within the time 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 erroneous. If

[14] OKLA. ADMIN. CODE § 710:1-3-30(b) (June 11, 2005).

[15] OKLA. ADMIN. CODE § 710:1-3-31 (June 11, 2005).

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

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

the Tax Commission determines that the proper showing has been made, the assessment or portion thereof determined to be erroneous shall be deemed not to have become final and absolute. No hearing to adjust or abate an erroneous assessment may be granted after the Tax Commission's denial of such a request. An order of the Tax Commission denying a taxpayer's request to adjust or abate an assessment alleged to be erroneous is not an appealable order under Section 225 of this title. No proceeding instituted by the Tax Commission to collect a tax liability may be stayed because of a request made by a taxpayer to adjust or abate an assessment alleged to be erroneous.[18]

DISCUSSION

On September 9, 2013, the Division issued the proposed income tax assessment for the 2012 Tax Year. On November 12, 2013, the Tax Commission received the protest, four (4) days after the sixty (60) day period (November 8, 2013) provided by Section 221(E) of Title 68 had run.[19] Once the sixty (60) days ran, the assessment became final and absolute. The ALJ is without jurisdiction to consider a protest not filed within the time provided by statute.[20]

However, because the Protestants filed their protest within one (1) year of the date the assessment became final, the Protestants may request the Division to adjust or abate the assessment if the Protestants can demonstrate, by a preponderance of the evidence, that the assessment or some portion thereof is erroneous.[21]

The Division's *MTD* and the *Second Notice* comply with Tax Commission Rule 710:1-5-46(d).[22]

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

[19] *Id. See* Notes 7-8, *supra*.

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

[21] *See* Note 18, *supra*.

[22] *See* Notes 16-17, *supra*.

RECOMMENDATIONS

The ALJ recommends granting the Division's *MTD* for "lack of jurisdiction," as more fully set forth herein.

OKLAHOMA TAX COMMISSION

ERRATA SHEET

NOW on this 13TH day of June 2016, the above-styled and captioned matter comes on for consideration of errors appearing in the *Findings, Conclusions and Recommendations* issued on May 19, 2016. The ALJ finds the following errors on pages 5 and 8, as follows, to-wit:

- Page 5, Footnote 12 should read "OKLA. STAT. ANN. tit. 68, § 221(E)(West 2014)."

- Page 8 should read:

  …No proceeding instituted by the Tax Commission to collect a tax liability may be stayed because of a request made by a taxpayer to adjust or abate an assessment alleged to be erroneous.[18]

DISCUSSION

On September 9, 2013, the Division issued the proposed income tax assessment for the 2012 Tax Year. On November 12, 2013, the Tax Commission received the protest, four (4) days after the sixty (60) day period (November 8, 2013) provided by Section 221(C) of Title 68 had run.[19] Once the sixty (60) days ran, the assessment became final and absolute.[20] The ALJ is without jurisdiction to consider a protest not filed within the time provided by statute.[21]

However, because the Protestants filed their protest within one (1) year of the date the assessment became final, the Protestants may request the Division to adjust or abate the assessment if the Protestants can demonstrate, by a preponderance of the evidence, that the assessment or some portion thereof is erroneous.[22]

The Division's MTD and the Second Notice comply with Tax Commission Rule 710:1-5-46(d).[23]

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).