**JURISDICTION:** **OKLAHOMA TAX COMMISSION**
**CITE:** **2012-07-26-20 / NON-PRECEDENTIAL**
**ID:** **P-12-034-H**
**DATE:** **JULY 26, 2012**
**DISPOSITION:** **DENIED**
**TAX TYPE:** **SALES**
**APPEAL:** **NO APPEAL TAKEN**

## ORDER

The above matters come 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 24th day of May, 2012, the Commission makes the following Findings of Fact and Conclusions of Law and enters the following order.

## PROCEDURAL HISTORY

After receipt of a protest letter mailed November 21, 2011, a file was opened on February 2, 2012, in 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 February 6, 2012, the Court Clerk[3] sent a memorandum to the Division requesting the protest file.[4] On February 8, 2012, OTC ATTORNEY filed an Entry of Appearance as Counsel for the Compliance Division of the Oklahoma Tax Commission. On February 23, 2012, a letter was mailed to the Protestant stating the matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-12-034-H. The letter also advised the Protestant 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 March 9, 2012, the Notice of Prehearing Conference was mailed to the Protestant's last-known address, setting the prehearing conference for March 29, 2012, at 9:30 a.m.[6] On March 12, 2012, the Division's *Motion* was filed, with Exhibits A through L, attached thereto. On March 15, 2012, the *Notice to Appear or Respond in Writing* ("*Notice*") was mailed to the

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

[4] OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999). *See* memorandum contained in the court file.

[5] *Id.*

[6] OKLA. STAT. ANN. tit. 68, § 208 (West Supp. 2012). The notice was mailed to Protestant at LOCATION 1 ADDRESS.

Protestant's last-known address advising the Division's *Motion* was set for hearing on April 10, 2012, at 9:30 a.m. at which time the Protestant should appear and show cause why the captioned matter should not be dismissed. The *Notice* also advised the Protestant the prehearing conference set for March 29, 2012, was stricken from the docket.[7] On March 15, 2012, the Court Clerk sent a second memorandum to the Division requesting the protest file.[8] On March 15, 2012, the Court Clerk received a phone call from the Division advising all documents had been provided.[9]

On April 2, 2012, a *Response to Motion to Dismiss* ("*Response*") was filed with an attachment thereto. On April 10, 2012, at 9:30 a.m., an open hearing[10] was held as scheduled. At the beginning of the hearing, PROTESTANT requested additional time to provide documentation as to the original field audit assessment. The "Abatement" protest is currently pending in the Office of General Counsel as File No. E-11-008.[11] PROTESTANT'S request was denied. The Division's first witness, AUDITOR, Auditor III ("Auditor"), Notice to Show Cause ("NTSC") Section, Compliance Division of the Oklahoma Tax Commission, testified about NTSC procedures and as custodian of the Division's records. The Division's second witness, ADMINISTRATOR, Administrator, Field Audit Section, Compliance Division, Oklahoma Tax Commission, testified about the Division's field audit practices and procedures and as custodian of the Division's records. The Division's Exhibits A through F, I, J, and L through P were identified, offered, and admitted into evidence. The Administrative Law Judge took official notice of Division's Exhibits G and H.[12] Upon conclusion of the hearing, the record in this matter was closed and this case was submitted for decision on April 10, 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*, the *Notice*, and the *Response*, the undersigned finds:

1. On November 30, 2007, the Protestant filed a Business Registration Application to operate convenience stores located at LOCATION 1 ADDRESS and LOCATION 2 ADDRESS,

---

[7] *Id.*

[8] *See* Note 5, *supra.*

[9] *See* memorandum to court file by the Court Clerk.

[10] The Protestant waived her right to a confidential hearing to allow OBSERVER to observe the hearing. OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2012). The Protestant also requested that her husband, HUSBAND speak for her at the hearing due to her limited ability to speak English.

[11] OKLA. ADMIN. CODE §§ 710:1-5-70 through 710:1-5-78.

[12] OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999).

with the start of business at both locations as December 1, 2007, but sales tax permit 502968 was issued on December 4, 2007.[13]

2. During June 2010, the Division conducted a sales tax field audit on the Protestant from December 4, 2007 through May 31, 2010 ("Field Audit Period"). The field audit revealed the Protestant had underreported taxable sales.[14]

3. On August 12, 2010, the Division issued a proposed sales tax assessment against the Protestant for the Field Audit Period,[15] as follows, to-wit:

| | |
|---|---|
| Tax Due: | $356,733.01 |
| Interest @15% through 10/15/10: | 82,211.03 |
| Tax & Interest due within 30 Days: | $438,944.04 |
| 30 day delinquent Penalty @ 10%: | 35,673.30 |
| Tax, Interest & Penalty due after 30 Days: | $474,617.34 |

The proposed sales tax assessment contained 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 sixty (60) day time period to file a timely protest to the Division's proposed sales tax assessment for the Field Audit Period expired on Monday, October 11, 2010. The Division did not receive a timely filed written protest.[16]

5. On January 14, 2011, the Division mailed a letter to the Protestant advising the sales tax account regarding the Field Audit Period had been assigned to the Division for collection.[17]

6. On May 11, 2011, the Division received an untimely protest to the August 12, 2010, sales tax assessment.[18]

---

[13] Testimony of Administrator. Division's Exhibit M. The Protestant's mailing address is reflected as LOCATION 1 ADDRESS.

[14] *Id.* Division's Exhibits A and N. On June 24, 2010, a Power of Attorney for REPRESENTATIVE was executed by the Protestant to represent her during the field audit. REPRESENTATIVE'S mailing address is REPRESENTATIVE'S ADDRESS.

[15] *Id.* The proposed sales tax assessment was mailed to the last-known address of the Protestant according to the records of the Tax Commission at LOCATION 1 ADDRESS.

[16] *Id. See* Note 20, *infra*.

[17] Testimony of Auditor. Division's Exhibit B and C. Exhibit C is a "recreation" of the original letter. The March 1, 2012, date is when the letter was "recreated," and the unrelated second name on the "recreated" letter is stricken from the record.

7. On May 19, 2011, the Division mailed a letter to the Protestant (c/o REPRESENTATIVE ) acknowledging the protest letter to the August 12, 2010, sales tax assessment,[19] which advised as follows, to-wit:

> The proposed assessment became final sixty (60) days after its issuance. Because your request was not received within the sixty day time period it cannot be considered under the provisions of 68 O.S., SS 221.c.
>
> A taxpayer may provide evidence that the assessment, or some portion thereof, is clearly erroneous up to one year from the date that the assessment becomes final (68 O.S., 221.e). As of this date, no such evidence has been presented. If you wish to provide such evidence, please forward your supporting documentation within thirty (30) days of the date of this letter to the post office box indicated above.
>
> Enclosed for your review is a copy of the above referenced statute and a copy of the Oklahoma Tax Commission's permanent rule[s] 710:1-5-70 through 710:1-5-78 pertaining to remedies and procedures for requesting abatement of erroneous assessments.

8. On June 20, 2011, AUDITOR 2, an OTC Auditor, wrote a memorandum indicating the Protestant brought in additional records in support of her Division level abatement request,[20] but the records were not useful for the following reasons, to-wit:

- The purchase invoices are dated outside the audit period.
- The DISTRIBUTOR 1 and DISTRIBUTOR 2 reports produced the same amount of beer purchases as what the auditor used.
- The only Z-Tapes given were outside the [Field Audit Period].
- The Bank Statements did not have any Food Stamp deposits.
- The Price List was not complete, as it contained only 109 items.

9. On September 9, 2011, the Division mailed a letter to the Protestant denying the Division level abatement request,[21] which states in pertinent parts, as follows, to-wit:

> The documentation you have submitted to substantiate your claim that the assessment, or some portion thereof, is clearly erroneous has been considered under the provisions of 68 O.S., 221.e. The [Compliance] Division has

---

[18] Testimony of Administrator. Division's Exhibit D. The return address on the protest letter is LOCATION 1 ADDRESS.

[19] *Id.* Division's Exhibit E.

[20] *Id.* Division's Exhibit O.

[21] *Id.* Division's Exhibit F.

> reviewed your documentation and determined it did not provide the evidence necessary to show the assessment was clearly erroneous.
>
> If you disagree with this determination, you may resubmit your request within thirty days of the date of this letter to the office of the General Counsel at:…
>
> Enclosed for you review is a copy of the above referenced statute and a copy of the Oklahoma Tax Commission's permanent rule[s] 710:1-5-70 through 710:1-5-78 pertaining to remedies and procedures for requesting abatement of erroneous assessments.

10. On October 5, 2011, the Protestant sent by certified mail return receipt requested (###) a timely protest to the Division's denial of the request for abatement to the Office of General Counsel.[22]

11. On September 27, 2011, the NTSC Section of the Division mailed a Notice to Appear and Show Cause Why Oklahoma Licenses and Permits Should Not Be Cancelled ("Notice to Appear") on the NTSC Docket set for October 19, 2011, at 10:00 a.m. By mistake, a "Notice of Proposed Assessment of Taxes" on the Field Audit Period, which had already been finalized, was also mailed to the Protestant,[23] which states in pertinent parts, as follows, to-wit:

> Records of the Oklahoma Tax Commission indicate[] STORE is delinquent in the payment of the following taxes. The Commission hereby proposes to assess these taxes, interest and penalty as shown below.

| Tax Types | Est. Amount | Delinquent Periods |
|---|---|---|
| Sales Tax | $516,650.00 | FA 12/07-05/03, 08/11 |

12. On October 19, 2011, according to the Division's Call Log, the NTSC Hearing was stricken.[24]

13. On October 21, 2011, the Office of General Counsel opened "Abatement" File E-11-008 on the protest to the Division's denial of the abatement request.[25]

---

[22] *Id.* Division's Exhibit G.

[23] *Id.* Testimony of Auditor. Division's Exhibits I and J. The period listed is incorrect. The correct Field Audit Period is December 4, 2007, through May 31, 2010. At the time the Notice of Proposed Assessment of Taxes was prepared, the Protestant's sales tax account was reflecting August 2011 as delinquent. The Tax Commission's records indicate the Protestant remitted sales tax for August 2011 on September 20, 2011, but the payment was not processed until October 7, 2011. *See* Division's Exhibit P.

[24] *Id.* Division's Exhibit K.

[25] *Id.* *See* Note 14, *supra.* Initially, the protest to the Division's denial of the abatement request was forwarded to the Court Clerk as a new protest. Case No. P-11-584-H was opened, but soon after it was discovered this was not a new protest and the file was closed on October 19, 2011. *See also* Division's Exhibit H. The Protestant is represented by attorney ATTORNEY, FIRM in the "Abatement" E-11-008 currently pending in the Office of General Counsel.

14. On November 21, 2011, the Protestant sent a protest by certified mail return receipt requested (###) to the NTSC Section's "Notice of Proposed Assessment of Taxes" on the Field Audit Period, which had already gone final.[26]

## CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[27]

2. The taxpayer may file a written protest to the proposed assessment within sixty (60) days after the mailing of the proposed assessment.[28]

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.[29]

4. No appeal to the Supreme Court of the State of Oklahoma may be taken from an Order denying taxpayer's request to adjust or abate an assessment. Furthermore, collection actions instituted by the Commission to collect a tax liability will not be stayed or continued as a result of the filing of a request for adjustment or abatement.[30]

5. A request for adjustment or abatement of an assessment does not extend the time in which a written protest can be timely filed. No request for adjustment or abatement of an assessment filed after a proposed assessment becomes final will be construed as amending the time in which a protest can be filed and a request for hearing submitted.[31]

---

[26] *Id.* Testimony of Auditor. Division's Exhibit L.

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

[28] OKLA. STAT. ANN. tit. 68, § 221(C) (West Supp. 2012).

[29] OKLA. STAT. ANN. tit. 68, § 221(E) (West Supp. 2012). 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.

[30] OKLA. ADMIN. CODE § 710:1-5-78 (June 25, 1999).

[31] OKLA. ADMIN. CODE § 710:1-5-72(c) (July 11, 2003)

6. 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.[32]

7. 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.[33]

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 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.[34]

## DISCUSSION AND ORDER

The Division's Motion to Dismiss requests that this protest be dismissed because the protest is untimely and lists 19 reasons why the protest should be dismissed. The Division cites the statutory requirement that a protest must be filed within sixty (60) days of a proposed assessment.[35] The Motion acknowledges that a proposed assessment was mailed to the protestant on August 12, 2010 and that a protest was filed which references such proposed assessment letter on May 11, 2011. The Motion also acknowledges that a Notice of Proposed Assessment of Taxes was sent to the protestant on September 27, 2011 and that a written protest which references such notice was filed by the protestant with the Division by mail dated November 19, 2011. Reason No. 19 of the Division's Motion is ambiguous as to which protest referenced in Division's Motion the Division is requesting to be dismissed. It provided as follows:

> PROTESTANT did not timely file a protest to the sales tax assessment which was a result of Field Audit No. 4863 for the Audit Period December 4, 2007 through May 31, 2010.

At the hearing on the Division's Motion to Dismiss the Administrative Law Judge made it clear that the Motion was not addressed to the protest of the original assessment sent out on August 24, 2010 but was only concerning the protest of the Proposed Assessment of Taxes sent out by the Show Cause Division on September 27, 2011. The Division was represented by

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

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

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

[35] *Motion* at 1; 68 O.S. §221.

counsel at that hearing and did not challenge or in any manner indicate it disagreed with the Administrative Law Judge's understanding that the Division's Motion to Dismiss only addressed the protest of the proposed assessment issued September 27, 2011.

The "Original" August 12, 2010, sales tax assessment on the Field Audit Period became final on October 11, 2010. The Protestant has properly followed the Tax Commission Rules and is currently pursuing her abatement request with the Office of General Counsel in Abatement File E-11-008. The August 12th assessment is not at issue in this matter as the Protestant did not timely file a protest of the August 12th assessment.

What is at issue in this matter is the "Notice of Proposed Assessment of Taxes" mailed to the Protestant on September 27, 2011, which purports to "reassess" the Field Audit Period, which had already been assessed and became final on October 11, 2010. Put in its simplest terms, the NTSC Section mistakenly included the Field Audit Period in its notice. The mistake of including the Field Audit Period in the NTSC Section's notice does not reopen the August 12, 2010, assessment for protest, according to the statutes and rules cited herein. The August 12th assessment has already gone final and it is being processed exactly as it should be under Tax Commission Rules, in the Office of General Counsel. A protest to the September 27, 2011 Notice of Proposed Assessment of Taxes was mailed by the protestant on November 19, 2011 and received by the Division on November 21, 2011 which is within the statutory sixty day limit for filing a protest.

The Division's Motion to Dismiss the protest is denied.

The testimony of the auditor for the Notice to Show Cause Section makes it clear that the Notice of Proposed Assessment of Taxes issued by the show Cause Section on September 27, 2011 was issued in error and should not have been issued. That proposed assessment is hereby ordered to be withdrawn. Withdrawal of that proposed assessment in no way affects the assessment issued August 12, 2010.

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."