

**JURISDICTION:** OKLAHOMA TAX COMMISSION - DECISION  
**CITE:** 2000-11-16-016 / NOT PRECEDENTIAL  
**ID:** P9800291  
**DATE:** 11-16-00  
**DISPOSITION:** DENIED  
**TAX TYPE:** INCOME  
**APPEAL:** NO APPEAL TAKEN

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Audit Division researched the records of the Tax Commission and could not find any record of receiving a 1990 Oklahoma income tax return or income tax payment for PROTESTANT. The Division auditor testified that she searched the Tax Commission records for PROTESTANT'S name and social security number and for his spouse's name and social security number and found that there was no record of the filing of a 1990 income tax return with the Tax Commission.

2. PROTESTANT'S 1990 tax return was prepared by MR. TAXMAN. PROTESTANT testified that he relied on MR. TAXMAN to prepare and file his tax return for him and therefore had no knowledge of the actual filing of the return. PROTESTANT provided his tax information to MR. TAXMAN and signed the return prepared by MR. TAXMAN but left his return with MR. TAXMAN for filing. MR. TAXMAN testified that he had obtained an extension of time to file PROTESTANT'S 1990 return until October 15, 1991. MR. TAXMAN did not have personal knowledge of the filing of the 1990 return but testified that it was the policy of his office that the returns filed under extension on October 15, 1991, would have been hand delivered to the Oklahoma Tax Commission rather than mailed. There was no testimony concerning the identity of the person that actually filed the 1990 return by hand delivery. It was PROTESTANT'S personal belief that his 1990 income tax return was filed and the taxes shown to be due were paid by check. MR. TAXMAN provided Protestant's Exhibit 7 which is his copy of the 1990 return prepared for PROTESTANT. PROTESTANT had no record of the 1990 return or of his payment of taxes due on that return because he had destroyed his records for that year in 1997.

3. On or about September 23, 1994, the Oklahoma Tax Commission received a revenue agent's report from the Internal Revenue Service (admitted as Division's Exhibit 7) which stated that the IRS had made an adjustment to PROTESTANT'S 1990 federal income tax return. PROTESTANT and MR. TAXMAN both testified that PROTESTANT did not file an amended Oklahoma income tax return based on the changes made by the IRS after PROTESTANT'S federal 1990 return had been audited in 1994.

4. On March 3, 1998, the Division issued its proposed assessment of income tax to PROTESTANT for the year 1990 based on the IRS revenue agent's report. The Division assessed a tax of \$10,159.00 and did not give any credit for taxes paid. PROTESTANT timely protested this assessment by letter of April 27, 1998.

5. On July 15, 1998, the Division adjusted its previous assessment by crediting the account with the W-2 withholding of PROTESTANT in the amount of \$6,416.00. The adjusted tax assessed was \$3,743.00 reasserted his protest to the tax as adjusted by letter of July 29, 1998.

6. On January 4, 1999, the Division again adjusted the proposed assessment by allowing PROTESTANT'S itemized deductions instead of using the Oklahoma standard deduction to calculate taxable income. The income tax assessment stands as follows:

1990	Income tax	\$ 3,474.00
	Interest	3,976.11
	Penalty	347.40
	Subtotal	\$ 7,797.51
	Less: apply of 8/10/98	( <u>832.00</u> )
	TOTAL	\$ 6,965.51

PROTESTANT again reasserted his protest by letter of January 24, 1999.

### ISSUE

Whether PROTESTANT did in fact file his 1990 income tax return and pay the taxes due thereon to the Oklahoma Tax commission.

### CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission has jurisdiction of this protest, 68 O.S. § 207.
2. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect, and in what respect. *Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission*, 768 P.2d 359 (Okl. 1988). Failure to provide evidence which is sufficient to show an adjustment to the proposed assessment is warranted will result in the denial of the protest. *Continental Oil Company v. Oklahoma Tax Commission*, 570 P.2d 315 (Okl. 1977).
3. The standard burden of proof in administrative proceedings is "preponderance of evidence," see Oklahoma Tax Commission Order No. 91-10-17-061. *Black's Law Dictionary*, 1064 (5th ed. 1979) defines "preponderance of evidence" as "(E)vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Id.* It is also defined to mean "evidence which is more credible and convincing to the mind . . . (T)hat which best accords with reason and probability." *Id.*

4. The testimony and evidence presented at hearing in this case is equivocal and unconvincing. PROTESTANT firmly believes that he filed his return and paid his taxes for the 1990 tax year. However, he did not take personal responsibility to file his return himself, but relied on his tax preparer MR. TAXMAN. MR. TAXMAN did in fact prepare PROTESTANT'S 1990 Oklahoma income tax return but he did not personally file it. PROTESTANT has no records to actually prove that he filed his return or paid his taxes since they were destroyed in 1997. However, circumstantial evidence indicates that the Oklahoma return could have been filed since he had filed his return properly before 1990 and since that year as well as the fact that he filed his 1990 federal income tax return. We know he filed his 1990 federal return because the IRS audited the 1990 return and provided the revenue agent's report to the Division in September of 1994. It does not logically follow that PROTESTANT would fail to file the 1990 Oklahoma return when he filed his 1990 federal return. However, the Division auditor testified that she thoroughly reviewed the records of the Tax Commission and could find no record of a payment or a filed return. Therefore, neither side can offer a positive proof that the 1990 income tax was in fact paid or was in fact not paid, and the Tax Commission is left to consider a conundrum. Either PROTESTANT mishandled the filing of his 1990 return and failed to pay his taxes or the Division mishandled the recordation of PROTESTANT'S return and failed to account for his payment of taxes. Either conclusion calls for speculation based on the record before us.

5. Although it is unknown what the true facts are concerning the 1990 return, PROTESTANT had the last clear chance to set the record straight when he still possessed all of his records concerning the 1990 tax year when the IRS issued its revenue agent's report in 1994. State law at 68 O.S. § 2375(H) imposed a duty on PROTESTANT to file an amended Oklahoma income tax return within one (1) year of the IRS determination. PROTESTANT deliberately made the decision not to file an amended return to report the IRS audit to the Division. Because of PROTESTANT'S decision not to file an amended return, the statute of limitations for the Division to assess the 1990 taxes was tolled indefinitely. PROTESTANT testified that had the Division issued its assessment just a few months earlier in 1997, he would have had his records to prove his tax payment. Had PROTESTANT filed an amended return with the Tax Commission in September of 1994 when the IRS revenue agent's report was issued, the Division would have been compelled to issue its assessment within two years by September of 1996 or be statutorily barred from assessing taxes thereafter.

Therefore, PROTESTANT would either have his records to protect him in 1996 or the assessment made in 1998 would have been time barred. Section 2375 placed a responsibility on PROTESTANT which he chose to neglect to his own undoing. By assisting the Division in filing an amended return in 1994, PROTESTANT could have protected himself from the Division's assessment in 1998.

6. The Protestant herein has failed to carry his burden of proving in what respect the Division's assessment is incorrect and has failed to prove a prima facie case on the factual issue of his payment of income taxes for the tax year 1990, OAC 610:1-5-47. For these reasons the protest should be denied.

**DISPOSITION**

It WAS DETERMINED, based upon the specific facts and circumstances of this case, that the income tax protest of PROTESTANT be denied.

**OKLAHOMA TAX COMMISSION**

**CAVEAT:** This decision was **NOT** deemed precedential by the Commission. This means that the legal conclusions are not 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.