JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2004-04-20-03 (Non-Precedential)
ID: P-01-249-H
DATE: APRIL 20, 2004
DISPOSITION: DENIED
TAX TYPE: INCOME
APPEAL: NONE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROTESTANT ("Protestant"), appears, pro se.[1] The Audit Division of the Oklahoma Tax Commission ("Division") is represented by OTC ATTORNEY, First Deputy General Counsel, Office of General Counsel, Oklahoma Tax Commission.

Upon review of the file and records, the undersigned finds:

FINDINGS OF FACT

1. On October 28, 1999, Protestant and WIFE, filed a State of Oklahoma Individual Income Tax Return for 1996.[2]

2. On November 29, 2000, the Internal Revenue Service ("IRS") issued Revenue Agent's Report ("RAR") No. XXX, reflecting adjustments to the Protestant's income for 1996.[3] For the

[1] "Pro se" is defined as "For himself; in his own behalf; in person.. Appearing for oneself, as in the case of one who does not retain a lawyer and appears for himself in court." Black's Law Dictionary 5th Edition 1099 (1979)

[2] *See* Division Exhibit "D-1". The 1996 return was filed as "married filing jointly", with a Federal Adjusted Gross Income of $14,766.00, and tax due of $128.00.

The court file contains an audit packet which was forwarded by the Division as part of the protest file on this matter. The Administrative Law Judge is taking judicial notice of the documents contained in the court file for the purpose of completing the factual background of this matter. *OAC 710:1-5-36*. Contained therein is a copy of the Protestant's Waiver File No. IW-99-2202. On September 25, 1999, the Protestant sent the Account Maintenance Division a "Request for Waiver" of penalty and interest on an assessment for the tax year 1994. (Protestant had underreported his income.) He did not dispute the amount due ($493.00 in tax), but did not understand why the Oklahoma Tax Commission had waited for 5 years to notify him and then add $49.50 for penalty, and $323.51 for interest. The Protestant explained that he had borrowed $500.00 to settel [sic] the tax and "ask you to please wave [sic] the penalty and interest". On October 27, 1999, the Account Maintenance Division sent the Protestant a letter that his waiver request had been reviewed and that $372.09 in penalty and interest on the 1994 assessment would be waived, conditioned upon the Protestant filing income tax returns for 1996, 1997 and 1998. The letter also advised him to pay in "certified funds". On October 28, 1999, the Protestant and WIFE, filed the requested returns and paid $188.00 by "cashier's check". On January 24, 2000, the Account Maintenance Division sent the Protestant another letter advising him that he still owed a $1.70 in tax on the 1998 return. On February 4, 2000, the Protestant paid the remaining $1.70 in tax by money order #38065745. The waiver was granted by the Account Maintenance Division on February 9, 2000, and the Protestant was sent a letter stating that the waiver had been approved, and enclosed a copy of the waiver for his records. *OAC 710: 1-5-36*.

1996 tax year, the IRS received copies of the following W-2s or 1099s[4] from Payers to the Protestant, individually, or as PROTESTANT d/b/a PAINTING COMPANY:

1099-Misc.	CONSTRUCTION CO.	$ 2,891.00
1099-Misc.	CHURCH	$ 1,400.00
1099-Misc.	PROPERTY CO.	$19,751.00
1099-Misc.	BUILDING CO.	$ 4,270.00
1099-Misc.	HOME CO..	$15,147.00
1099-Misc.	DEVELOPMENT CO.	$22,133.00
Total		$65,592.00

3. On March 26, 2001, an assessment for individual income tax for the tax year 1996 was issued against Protestant, based upon RAR No. XXX.[5] The assessment is against the Protestant only. The tax on the assessment for 1996 is calculated at the married filing separate rate[6], as follows, to-wit:

1996	
Additional Tax Due	$3,649.00
Interest (4/15/97 to 3/26/01)	$2,160.91
Penalty	$ 364.90
Total	$6,174.81

4. On October 28, 1999, Protestant and WIFE filed a State of Oklahoma Individual Income Tax Return for the tax year 1997.[7]

5. On November 29, 2000, the IRS issued RAR No. ZZZ, reflecting adjustments to the Protestant's income for 1997.[8]

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[3] *See* Division Exhibit "E". The RAR was issued against the Protestant only, with the tax calculated as "married filing separately", based upon adjustments to Protestant's W-2 and 1099-Misc. Nonemployee compensation.

[4] *See* Division Exhibit "J".

[5] *See* Note 3. The RAR was issued against the Protestant only, with the tax calculated as "married filing separately", based upon adjustments to Protestant's W-2 and 1099-Misc. Nonemployee compensation.

[6] *See* Division Exhibit "A" and Exhibit "B". The assessment letters were addressed to Protestant and WIFE, but the Division does not assert any liability against WIFE for the 1996 or 1997 tax years reflected by the assessments.

[7] *See* Note 2 and Division Exhibit "D-2". The return was filed "married filing jointly", with a Federal Adjusted Income of $11,472.00 and tax due of $56.00.

[8] *See* Note 3.

6. On March 26, 2001, the Division issued an assessment for individual income tax for the tax year 1997, based upon RAR No. ZZZ[9], against the Protestant only.[10] The tax on the assessment for 1997 is calculated at the married filing separate rate[11], as follows, to-wit:

1997	
Additional Tax Due	$3,598.00
Interest from4/15/98 to 3/26/01	$1,591.01
Penalty	$359.80
Total	$5,548.81

7. Subsequent to the IRS issuing RAR No. XXX and RAR No. ZZZ, the Protestant did *not* file Amended Oklahoma Individual Income Tax Returns for the tax years 1996 and 1997.

8. On April 25, 2001, the Division received a letter from the Protestant stating that he had requested a determination of his individual income tax status from the Internal Revenue Service. The Protestant's position is that his earnings are not "income" under federal law, and therefore, may not be used to calculate "Oklahoma taxable income".[12]

9. On October 26, 2001, tax warrant ITI-00, was inadvertently issued against Protestant and WIFE for the 1996 and 1997 assessments, which were still under protest.

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[9] *See* Note 3. Based on RAR No. XXX, the Protestant's Corrected Taxable Income-Method I, for 1996 is $59,033.00. The total tax as adjusted is $3,777.00, less tax previously reported or assessed ($128.00), leaving additional tax due of $3,649.00. The assessment letter advises the Protestant that "Oklahoma Statutes allow one (1) year from the date of final determination by the IRS for the taxpayer to file an amended return reporting the corrected net income (68 O.S. § 2375(H)(2)." The assessment letter also advises that the [taxpayer] also has the "right to file a written protest within (30) days of the date of the assessment ". 68 O.S. § 221(c).

[10] *See* Note 3. Based on RAR No. ZZZ, the Protestant's Corrected Taxable Income-Method I for 1997 is $57,285.00. The total tax as adjusted is $3,654.00, less tax previously reported ($56.00), leaving additional tax due of $3,598.00.

[11] *See* Note 4.

[12] See Division Exhibit "F", consisting of thirteen (13) pages. The letter does not specifically request a hearing or state that it is a protest. Initially the Division did not view the letter as a protest, but later in this matter the Division accepted the letter received April 25, 2001, as a timely filed letter of protest for purposes of this proceeding.

The letter explains that "Public Law (11)-23 states that I am not to file any forms until I receive the determination from the Assistant Chief Counsel for Income Tax and Accounting". Attached to the letter is a copy of an IRS Power of Attorney from the Protestant and his wife dated October 5, 2000, to NAME, ADDRESS and NAME 2, ADDRESS 2, to represent them in "Income Tax & Civil Penalty" tax matters before the IRS on 1040 for tax years 1985-2004. Also attached to this exhibit is a letter from NAME, Lawyer, to the Associate Chief Counsel (Income Tax and Accounting) for the IRS in Washington, D.C., making a "Written Request for Verified Determination of Status for Individual Income Tax Purposes, Prior to Filing of Tax Returns Pursuant to Public Law (11)-23."

10. On November 16, 2001, a letter was received by the Account Maintenance Division of the Oklahoma Tax Commission ("Account Maintenance") protesting the filing of tax warrant ITI-00.[13] Due to the pending protest, Tax Warrant ITI-00 was withdrawn by Account Maintenance.

11. On December 28, 2001, the Division filed a Motion to Dismiss on grounds that the Protest was not timely filed.[14]

12. On January 22, 2002, a response was received from the Protestant to the Division's Motion to Dismiss and the Notice of Hearing, which states in pertinent part, "We did not request or schedule a hearing before an administrative law judge or any other judicial or quasi-judicial officer".[15]

13. On January 25, 2002, the Division filed a Motion to Strike *its* Motion to Dismiss. Upon further review of the April 25, 2001, correspondence, the Division deemed the letter a timely filed protest of the assessments for tax years 1996 and 1997.[16]

14. On January 31, 2002, the Division filed the "Position Letter of the Audit Division".[17]

15. On February 15, 2002, the Protestant and WIFE were notified by letter, from PREVIOUS ALJ, Administrative Law Judge ("ALJ"), that the Division had filed a Motion to Strike and that the tax warrant had been withdrawn.[18] The letter further states that "[i]n your correspondence you state that you did not initiate a formal protest or request a hearing. Therefore, it is unclear how you wish to proceed in this matter. I am writing to advise of the options available if you intend to pursue your protest." The ALJ gave the Protestant the following options:

> One option is to have the matter submitted for decision pursuant to an administrative hearing. If you wish to appear for a hearing, please advise, and a date will be set.
>
> The other option for a determination in this cause without appearing for a hearing is to request that a decision be rendered on the file and records, with an additional

[13] *See* Division Exhibit "C", consisting of 78 pages. The letter was copied to RECIPIENT, COLLECTION AGENCY.

[14] *See* Note 10 and Division Exhibit "G".

[15] *See* Division Exhibit "H". The letter is dated January 18, 2002.

[16] *See* Division Exhibit "I".

[17] Attached to the Division's position letter are Division Exhibits "A" through "J". The Division mailed the Protestant a copy of the position letter on January 31, 2002.

[18] Attached to the correspondence is a copy of "Order Granting Motion To Strike" dated February 15, 2002.

> date set for filing briefs containing any additional facts or argument. If you wish to proceed in this manner, please send a letter so requesting.
>
> Absent any contact from you within thirty (30) days advising if or how you wish to proceed, the record in this matter will be closed and the case submitted for decision on the merits.

16. On March 21, 2002, the ALJ received a letter from the Protestant in response to the ALJ's correspondence of February 15, 2003, which in pertinent part states:

> I don't know that I can suggest a better course of action than my wife and I proposed in our January 18th letter to you. Remove the case from your docket but preserve original documents as you may eventually be a material witness.
>
> In the meantime, please provide the following items. I am making the request for documents under authority of the Oklahoma Open Records Act and the Oklahoma Administrative Procedures Act.
>
> 1. Provide a true and correct copy of your current constitutional oath of office for the office you currently occupt, [sic] as required by Article XV §§ 1 & 2 of the Constitution of the State of Oklahoma (I don't want your "loyalty" oath);
> 2. Provide a true and correct copy of your properly executed commission as administrative law judge;
> 3. Provide a true and correct copy of your bond posted as surety; and
> 4. Provide a comprehensive "docket" sheet or its equivalent that lists all documents, records and other matter [sic] in the case file.
>
> You may provide these items within a reasonable period of 20 business days from the date this request is received.

17. On April 1, 2002, the ALJ received a letter from the Protestant requesting that a "Request for Decision Concerning Income Tax Liabilities" to Commissioner, COMMISSIONER at the IRS be filed in this matter, and that a copy of the docket sheet be returned to the Protestant "so we have a complete record of what is in the case file". The letter also states in pertinent part:

> You obviously cannot proceed with an "administrative law judge decision" to the point counsel for the Oklahoma Tax Commission can establish taxing and liability statutes that make my wife and/or I "persons liable" for any given tax, persons required to file returns, establish the factual circumstance, activity or transaction the liability is predicated on, disclose competent witnesses with first-hand knowledge of the facts who can verify whatever circumstance, activity or

transaction is at issue, and demonstrate application of law to whatever circumstance, activity or transaction is at issue, and demonstrate application of law to whatever facts can be proven. To date, counsel for the Oklahoma Tax Commission hasn't met any of the essential criteria for a "case or controversy arising under the Constitution and laws of the State of Oklahoma," so there is obviously no legitimate basis of claim. Whatever decision Commissioner COMMISSIONER makes may shed light on the matter.

18. On April 16, 2002, the ALJ sent the Protestant, pursuant to his request of March 18, 2002, copies of the following documents:

- Docket Sheet in P-01-249-C
- August 19, 1997, Oklahoma Tax Commission Meeting Agenda and Minutes reflecting that the Commissioners appointed PREVIOUS ALJ, as Administrative Law Judge, effective September 1, 1997.

19. On April 19, 2002, the ALJ sent the Protestant a letter stating "The docket sheet sent to you April 16, 2002, failed to reflect that your case had been withdrawn from submission for a decision after your letter of March 21, 2002, was received. Please discard the previously sent docket sheet and replace it with the enclosed one."

20. On May 2, 2002, the Protestant sent a letter to the ALJ, which in pertinent part, concerns COLLECTION AGENCY'S attempt to collect the assessments for 1996 and 1997.[19]

21. On May 3, 2002, Counsel for the Division sent Protestant a letter that on May 2, 2002, the Protestant's account had been withdrawn from COLLECTION AGENCY, and that the account reflected a protest pending status.

22. On November 7, 2003, a notice was sent to the parties advising them that pursuant to *Oklahoma Administrative Code* ("*OAC*") *710:1-5-31*, this matter had been reassigned to ALJ, Administrative Law Judge.[20]

CONCLUSIONS OF LAW

1. That the Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this action.[21]

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[19]The 4 page letter was also sent to Account Maintenance and Counsel for the Division. A 24 page "Memorandum on Relation-Back Doctrine" was also enclosed.

[20]The notice was sent by mail to the Protestant and his wife addressed as follows, to-wit:

PROTESTANT . and WIFE
STREET ADDRESS
CITY, Oklahoma ZIP

[21]68 O.S. § 207.

2. In the event an oral hearing is not requested, the Tax Commission shall proceed without further notice to examine into the merits of the protest and enter an order in accordance with its findings.[22]

3. That rules promulgated pursuant to the Administrative Procedures Act are presumed to be valid and binding on the persons they affect and have the force and effect of law.[23]

4. "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States or any political subdivision thereof.[24]

5. "Taxpayer" means any person subject to a tax imposed by ths Article, or whose income is, in whole or in part, subject to a tax imposed by any provision of this article.[25]

6. If any taxpayer's Federal Income Tax Return is adjusted, an Amended Oklahoma Income Tax Return must be filed within one year. All supporting documentation must be enclosed with an Oklahoma Amended Income Tax Return for the tax year involved. Upon request, the taxpayer must furnish a complete copy of the Federal Income Tax Return, including all schedules, to enable the Tax Commission to determine the correct Oklahoma Tax.[26]

7. The Tax Commission is bound by the changes made by the IRS, except in those circumstances where an IRS revision affects items or matters relating to allocation or apportionment between the State of Oklahoma and some other state or the federal government.[27]

8. Assessments shall be made in accordance with the *Uniform Tax Procedure Code*. The Income information furnished by the IRS shall be that upon which any tax liability is computed. Unless otherwise indicated in the RAR, all income is considered to be from Oklahoma sources, as are all deductions and credit, to the extent that they are allowed by Oklahoma Statute.[28]

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[22] 68 O.S. § 221(D).

[23] 75 O.S. § 250 et seq., 75 O.S. § 308.2(c). *See* also 75 O.S. § 250 et seq.

[24] 68 O.S. § 2353(14).

[25] 68 O.S. § 2353(15).

[26] *OAC 710:50-3-8(a)*.

[27] *OAC 710:50-3-8(d)*.

[28] *OAC 710:50-5-10(a)*.

9. The assessment of taxes or *additional taxes* shall be proposed in writing and shall be mailed to the taxpayer at the taxpayer's last-known address in accordance with statutory due process requirements.[29]

10. The Oklahoma Income Tax Act imposes an income tax upon the Oklahoma taxable income of every resident or nonresident individual.[30]

11. Every Oklahoma resident individual is required to make an income tax return stating his or her taxable income,[31] and must transmit the return to the Tax Commission and remit the tax due.[32]

12. "Oklahoma taxable income" means "taxable income" as reported (or as would have been reported by the taxpayer had a return been filed) to the federal government, and in the event of adjustments thereto by the federal government as finally ascertained under the Internal Revenue Code, adjusted further as hereinafter provided.[33]

13. "Oklahoma adjusted gross income" means "adjusted gross income" as reported to the federal government (or as would have been reported by the taxpayer had a return been filed), or in the event of adjustments thereby by the federal government as finally ascertained under the Internal Revenue Code, adjusted further as hereinafter provided.[34]

14. Reliance upon federal law calculations of "income" is specifically authorized by the Oklahoma Constitution.[35]

15. In all administrative proceedings, unless otherwise provided by law, the burden of proof shall be upon the Protestant to show in what respect, the action or proposed action of the Tax Commission is incorrect.[36]

16. The standard of review in an administrative proceeding is preponderance of the evidence.[37]

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[29] 68 O.S. § 208.

[30] 68 O.S. § 2355.

[31] 68 O.S. § 2368.

[32] 68 O.S. §§ 2355 and 2375.

[33] 68 O.S. § 2353 (12). *See* also, 68 O.S. § 2353910), (11); 68 O.S. § 2355(A).

[34] 68 O.S. § 2353(13).

[35] Okla. Const., Art. 10, Sec. 12.

[36] *OAC 710:1-5-47*.

17. That "preponderance of the evidence" means the evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which as a whole shows that the fact sought to be proved is more probable than not.[38]

18. [The] [a]mounts received by the taxpayer from employers for labor was taxable income, rather than equal, nontaxable exchange of property.[39]

19. The [Protestant's] position is not warranted by existing law or a good faith argument for the extension, modification or reversal or existing law. A review of the record discloses no effort on the part of [Protestant] to distinguish existing case law, to bring about a reasoned extension or change in the law, or to point out actual errors in the [IRS] determination of the deficiency.[40]

20. That in this matter the Protestant has failed to meet his burden of proof. The Protestant has not presented any evidence or made any allegation that the sum claimed by the Division is incorrect, or that the sum is not due and owing.

On October 28, 1999, the Protestant and WIFE filed Oklahoma Individual Income Tax Returns for 1996, 1997, and 1998, as a condition to the waiver of penalty and interest on an assessment for the tax year 1994. On November 29, 2000, subsequent to the filing of the Oklahoma returns, the IRS made adjustments to the Protestant's income for tax years 1996 and 1997. The changes in Protestant's income, made by the IRS, were sent to the Tax Commission in RAR No. XXX and RAR No. ZZZ.

The Tax Commission examined the Protestant's Oklahoma returns for 1996 and 1997 and determined that the tax disclosed on the returns was less than the tax disclosed by examination. As a result of the examination of the Protestant's 1996 and 1997 returns, the Tax Commission sent, in writing, the proposed assessments of additional taxes by mail, to the Protestant, at the Protestant's last known address. The changes were based upon adjustments to income, as reflected by RAR No. XXX and RAR No. ZZZ. The Protestant has not offered any evidence to refute the amount of income reported by the IRS, and as reflected by the RARs. The Protestant has neither asserted any cognizable factual errors nor presented any justiciable issues of law in regard to the proposed action of the Division.

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[37] *Oklahoma Tax Commission Order No. 99-04-08-003* (citing *Oklahoma Tax Commission Order No. 91-10-17-061*).

[38] *OAC 710:1-5-77(b)*.

[39] *Casper v. C.I.R.*, 805 F.2d 902 (10th Cir. 1986).

[40] *See* Note 39.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the protest be denied. It is further ORDERED that the amounts assessed for tax years 1996 and 1997, be fixed as the amount in controversy, plus any additional accrued and accruing interest, be fixed as the deficiency due and owing.

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.