JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2004-07-13-05
ID: P-04-021-H
DATE: JULY 13, 2004
DISPOSITION: DENIED
TAX TYPE: INCOME INTERCEPT
APPEAL: NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A hearing was held in this matter on March 18, 2004, at approximately 9:30 a.m. The Protestant, pro se, did not appear at the hearing, but responded in writing. [1] Upon conclusion of the hearing the record in this matter was held open for ten (10) days for the Division to file a Supplemental Brief. The Division filed its Supplemental Brief on March 22, 2004. The record was closed and this case was submitted for decision March 22, 2004.

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence and the position letters, briefs and supplemental arguments of the parties, the undersigned finds:

FINDINGS OF FACT

1. The Protestant was listed on the Oklahoma Tax Commission Business Registration Application filed on or about March 12, 1990, as the owner of DAIRY STORE.[2]

2. On August 20, 1990, the Division issued a proposed sales tax assessment against the Protestant for April 1990 and June 1990, in the estimated amount of $1,935.00.[3]

3. On or about August 20, 1990, the proposed assessment was sent by certified mail to the last known address of the Protestant, according to the records of the Oklahoma Tax Commission.[4]

4. The proposed assessment was returned marked “Box Closed-No Order”.[5]

5. The Protestant did not timely protest the proposed assessment nor seek an abatement of the assessment within the time period allowed by statute.

6. On December 18, 2000, the Division filed Tax Warrant Number WARRANT 1 against Protestant in Hughes County, State of Oklahoma, for April 1990.[6]

7. The total amount of indebtedness of the Protestant represented by the warrant was as follows:

Sales Tax:	$ 850.00
Penalty:	85.00
Interest:	77.89
Tax Warrant Fees:	16.00
Total:	$1,028.89

8. On December 18, 2000, the Division filed Tax Warrant Number WARRANT 2 against the Protestant in Hughes County, State of Oklahoma, for June 1990.[7]

9. The total amount of indebtedness represented by the warrant was as follows:

Sales Tax:	$ 850.00
Penalty:	85.00
Interest:	56.58
Tax Warrant Fees:	16.00
Total:	$1,007.58

10. On April 15, 2003, the Protestant and her spouse, HUSBAND filed their income tax return with the State of Oklahoma for the 2002 tax year. The return was filed as "married filing joint" claiming a refund in the amount of $126.00.[8]

11. The W-2 Wage & Tax Statement attached to the 2002 return reflects that the refund is attributable solely to the employment and withholding of HUSBAND.[9]

12. On July 31, 2003, the Division notified the Protestant that her "Available Funds" income tax refund in the amount of $82.97 was to be applied to the sales tax liability represented by Tax Warrants WARRANT 1 and WARRANT 2, and further advised the Protestant of her right to protest the application of the refund to the outstanding sales tax liability.[10]

13. On September 5, 2003, the Division received a timely filed protest to the application of the 2002 refund to the outstanding sales tax liability.[11]

14. The records of the Division reflect that the balance of Sales Tax Warrants WARRANT 1 and WARRANT 2, through February 28, 2004, is as follows:

Sales Tax:	$1,700.00
Penalty:	170.00
Interest:	3,497.62
Tax Warrant Fees:	42.00
Total:	$5,409.62[12]

ADDITIONAL FINDINGS OF FACT

1. On March 11, 2004, the Protestant filed her Memorandum Brief, which attached a copy of cancelled check number 1032 dated May 15, 1990, in the amount of $438.75.[13]

2. According to the records of the Oklahoma Tax Commission check number 1032 was applied to the Protestant's sales tax account for March 1990, not April 1990.

3. On July 31, 2003, the Division sent HUSBAND, a notice as follows, to-wit:

> In accordance with Title 68 o.s. [sic] sect. [sic] 205.2, this is to notify you that your Available Funds income tax refund in the amount of $82.97 has been delayed due to a reported liability owed to the Oklahoma Tax Commission. The delay has occurred as a result of your having filed a joint income tax return with PROTESTANT against whom the Oklahoma Tax Commission has filed a tax warrant.
>
> The Oklahoma Tax Commission does not allege that there is a judgement [sic] against you and you may be entitled to a refund of your portion of the Available Funds income tax refund regardless of the debt or final judgement [sic] asserted against PROTESTANT. *In order to assert your claim to refund you must file the Oklahoma Tax Commission Injured Spouse Claim and Allocation form number 505 within sixty days of the mailing of this notice.* This form is available through our website at www.oktax.state.ok.us, or by calling the number listed above. Failure to respond within sixty days after the mailing of this notice will result in the waiver of your right to assert your claim for refund and will result in the transfer of your refund to the liabilities referenced below.[14]

4. HUSBAND did not file a protest or a response to the Division's notice of application of the 2002 refund to the sales tax liability of the Protestant.

5. HUSBAND is not a debtor owing a debt to the Oklahoma Tax Commission under Tax Warrants WARRANT 1 and WARRANT 2.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this action.[15]

2. The Oklahoma Tax Commission is authorized to deduct from any state tax refund due to a taxpayer the amount of delinquent state tax, and penalty and interest thereon, which such taxpayer owes pursuant to any state tax law prior to payment of the refund.[16]

3. In the event of a protest to the application to deduct the delinquent taxes from the refund due the taxpayer, the only issues subject to determination are whether the claimed sum is correct or whether an adjustment to the claim shall be made.[17] No action shall be taken in furtherance of the collection of the debt pending final determination of the validity of the debt.[18]

4. A challenge to the validity of the debt requires a determination that the notice of assessment, which gave rise to the debt, was provided in a manner that satisfies due process requirements.[19]

5. 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.[20]

6. In all proceedings before the Oklahoma Tax Commission, the taxpayer has the burden of proof[21] to show the action of the Commission is incorrect, and in what respect.[22]

7. The Division complied with statutory due process requirements in providing the notice of the assessment to the Protestant. The assessment was final and absolute when it was not protested within thirty (30) days of the mailing of the proposed assessment.[23]

8. In this matter the Protestant has failed to meet her burden of proof. The Protestant has not presented any evidence or made any allegation that the sum claimed by Division is incorrect, or that the sum is not due and owing. No adjustment to the income tax refund claim is required and the balance due shall be a continuing debt until paid in full.[24]

9. The Oklahoma Tax Commission will intercept a refund from a joint Income Tax Return to offset a past due obligation if either spouse is legally responsible for the past due obligation.[25]

10. The Division must notify the taxpayer/debtor of an income tax refund intercept, pursuant to the provisions of the Administrative Procedures Act.[26]

11. The nondebtor spouse has the responsibility to protest to the referring agency within *thirty (30) days*[27] of his/her receipt of notice of intercept and his/her failure request a hearing, in writing, shall be considered a default. Any right to a portion of the intercepted refund shall be waived.[28]

12. The notice sent to HUSBAND substantially complies with the requirements of 68 O.S. 205.2(A)(3)(e), and provides sixty (60) days to protest the pending intercept.[29]

According to the records of the Oklahoma Tax Commission the check submitted by the Protestant was applied to the sales tax liability for the month of March 1990, not April 1990, as asserted by the Protestant. No other evidence was submitted by the Protestant to dispute the Division's testimony, and exhibits admitted into evidence. The records of the Oklahoma Tax Commission also reflect that the balance of Tax Warrants WARRANT 1 and WARRANT 2 was $5,409.62, with interest calculated through February 28, 2004. No adjustment should be made to the claim. The Division sent HUSBAND the required notice that it intended to apply the "Available Funds" refund to the Protestant's sales tax debt in accordance with 68 O.S. § 205.2(A)(3). HUSBAND did not file a protest with sixty (60) days after the mailing of the notice. HUSBAND has waived his right to the refund.

DISPOSITION

It is the ORDER OF THE OKLAHOMA TAX COMMISSION based on the specific facts and circumstances of this case that the protest be denied, and that the remaining 2002 "Available Funds" refund of $82.97 be applied to the outstanding sales tax obligation of the Protestant.

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.

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[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 appears for himself in court." Blacks Law Dictionary 5th Edition (1979).

[2]Exhibit "C".

[3]Exhibit "A".

[4]The assessment was sent to OKLAHOMA ADDRESS.

[5]Exhibit "B".

[6]Exhibit "D". This was a refiling of the tax warrant originally filed on January 10, 1991.

[7]Exhibit "E". See Note 6.

[8]Exhibit "H". The Division "snagged" and applied $43.03 of the 2002 refund to the joint income tax liability of the Protestant and HUSBAND for the 2000 tax year.

[9]See Note 8.

[10]Exhibit "F".

[11]Exhibit "G". The basis of the protest, as stated in the letter, was that the Protestant had paid all tax on the DAIRY STORE.

[12]Exhibit "I".

[13]The check was written on the DAIRY STORE checking account at STATE BANK, ANYTOWN, Oklahoma to the Oklahoma Tax Commission.

[14]Exhibit "J", filed with the Division's Supplemental Brief. HUSBAND'S notice was sent to OKLAHOMA ADDRESS. This was the address on the 2002 return. The address of the Protestant and HUSBAND changed subsequent to the filing of the protest, to NEW OKLAHOMA ADDRESS.

[15]68 O.S. § 205.2(B):
If the district court or agency asserting the claim receives a written request from the debtor or taxpayer against whom no debt or final judgment is claimed requesting a hearing, the agency or the district court shall grant a hearing according to the provisions of the Administrative Procedures Act, Section 250 et seq. of Title 75 of the Oklahoma Statutes. It shall be determined at the hearing whether the claimed sum is correct or whether an adjustment to the claim shall be made. Pending final determination at the hearing of the validity of the debt or final judgment asserted by the district court or the agency, no action shall be taken in furtherance of the collection of the debt or final judgment. Appeals from actions taken at the hearing shall be in accordance with the provisions of the Administrative Procedures Act.

[16]68 O.S. § 205.2(E).

[17]See Note 15.

[18]See Note 15.

[19]See Note 15 and *Commission Order No. 2001-01-30-002*.

[20]68 O.S. § 208:
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]*OAC 710:1-5-200(f)*. The standard of review in an administrative proceeding is preponderance of the evidence. *Oklahoma Tax Commission Order No. 1999-04-08-003* (citing Oklahoma Tax Commission Order No. 1991-10-17-061. OAC 710:1-5-77(b) provides in pertinent part 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.

[22]*OAC 710:1-5-47*. See ***Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission***, 1988 OK 91, 768 P.2d 359.

[23]Prior to July 1, 2002, a taxpayer had thirty (30) days after a proposed assessment was mailed within which to file a written protest. 68 O.S. § 221 was amended, effective July 1, 2002, to provide a sixty (60) day protest period.

[24]68 O.S. §205.2(C) in pertinent part states:

However, if the tax refund due is inadequate to pay the collection expense and debt or final judgment, the balance due the state agency or the district court shall be a continuing debt or final judgment until paid in full.

[25]*OAC 710:50-11-4(a)*. See also *OAC 710:50-9-9.* Different spouse refunds, which provides: If a spouse, on a jointly filed income tax return, has a prior year liability, the amount of refund to be applied shall be the amount determined by a ratio computed by dividing the total income into the earnings by the spouse whose liability is outstanding. The same rules of construction apply to administrative rules and regulations as to statutes. See *Dolese Bros. v. State ex rel Oklahoma Tax Com'n*, 2003 OK 4, 64 P.3d 1093. "In the construction of …statutes, harmony, not confusion, is to be sought. The true rule has often been said to be that, where two acts or parts of acts are reasonably susceptible of a construction that will give effect to both and to the words of each, without violence to either, it should be adopted in preference to one which, though reasonable, leads to the conclusion that there is a conflict. *Blitz U.S.A., Inc. v. Oklahoma Tax Commission*, 2003 OK 50, 75 P.3d 883. *OAC 710:50-9-9* refers to a spouse on a jointly filed income tax return, which has a "prior year liability", which refers to a "prior year's *income tax* liability". In this matter the spouse's debt is a *sales tax* liability and this rule is not applicable.

[26]*OAC 710:50-11-2.* See also 75 O.S. § 309 et seq.

[27]68 O.S. 205.2(A)(3)(e) was amended effective July 1, 2003, to provide for a sixty (60) day protest period.

[28]*OAC 710:50-11-4(c)*. See also 68 O.S. § 205.2(A), which provides that in the case of a joint return, the notice shall state:

> a. the name of any taxpayer named in the return against whom no debt or final judgment is claimed,
> b. the fact that debt or final judgment is not claimed against the taxpayer,
> c. the fact that the taxpayer is entitled to receive a refund if it is due regardless of the debt or final judgment asserted against the debtor,
> d. that in order to obtain the refund due, the taxpayer must apply, in writing, for a hearing with the district court or the agency named in the notice within sixty (60) days after the date of the mailing of the notice, and
> e. if the taxpayer against whom no debt or final judgment is claimed fails to apply in writing for a hearing within sixty (60) days after the mailing of the notice, the taxpayer shall have waived his or her right to a refund.

[29]The notice sent to HUSBAND states that in order for the nondebtor spouse to assert their claim for refund they must file Oklahoma Tax Commission Injured Spouse Claim and Allocation Form Number 505. Notice of protest of a taxpayer to the taxing authority of his intention to protest the assessment of taxes need not be in any particular form. *Commission Order No. 95-11-02-011.* Oklahoma Tax Commission Form 505 is patterned after IRS Form 8379, Injured Spouse Claim and Allocation. The Division originally requested Form 505 in 1998, and the form has gone through several revisions, the last being in 2002. The 2002 version is still currently in use and available on the Tax Commission's website