JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2004-08-10-03
ID: P-04-033-H
DATE: AUGUST 10, 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 April 6, 2004, at approximately 2:00 p.m. TAXPAYER ("Protestant"), *pro se*[1] did not appear at the hearing, but responded in writing. Upon conclusion of the hearing the record in this matter was closed and this case was submitted for decision April 6, 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. On February 28, 2001, the Protestant filed an Oklahoma individual income tax return for the 2000 tax year, with a tax due of $615.00.[2] The 2000 return is a joint return filed with the Protestant's spouse, WIFE. As of March 30, 2004, $224.54 remains unpaid.[3]

2. On March 19, 2001, the Protestant was assessed income tax (failure to file a return for the 1994 tax year) in the aggregate amount of tax, penalty, and interest of $2,036.10. The assessment was not protested and is now final. As of March 30, 2004, $1,535.15 in penalty and interest remains unpaid.[4]

3. On March 20, 2002, the Division notified the Protestant in writing of its intent to refer his outstanding liability to the Treasury Offset Program ("TOP").[5] The Protestant's joint and several liability for the 2000 tax year, and the Protestant's individual liability for the tax years1994, 1995, and 1996 were also included in the notice.[6] The Protestant was advised that he had sixty (60) days to request a review or the Division would submit the unpaid debt to TOP. The notice was sent by certified mailed and the green card was signed by the Protestant on March 21, 2002.[7]

4. No protest to the offset notice was received by the Division within sixty (60) days from the date it was mailed to the Protestant.

5. The Division made reasonable efforts to obtain payment of the Protestant's Oklahoma income tax obligation, prior to submission of the debt to TOP.

6. On February 27, 2004, TOP notified the Protestant and WIFE of its intent to offset their Federal refund in the amount of $1,753.00 to satisfy Oklahoma income tax liability.[8] WIFE did not file for *"Injured Spouse"* relief on the Federal level.

7. On March 5, 2004, the Division received a protest to the offset of Protestant's Federal refund on the basis that the State of Oklahoma was already garnishing the Protestant's wages and taking the maximum twenty-five percent (25%) allowed by law.[9]

8. On March 17, 2004, the Division received notice from TOP of the pending offset in the amount of $1,753.00.[10]

9. On April 6, 2004, the Protestant faxed a notice to the Office of the Administrative Law Judge that he would not attend the hearing set for April 6, 2004, at 2:00 p.m.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this action.[11] In all proceedings before the Oklahoma Tax Commission, the taxpayer has the burden of proof to show the action of the Commission is incorrect, and in what respect.[12]

2. 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, and the balance due shall be a continuing debt until paid in full.[13]

3. The IRS is authorized to deduct from any Federal overpayment due to a taxpayer the amount of delinquent state tax, and penalty and interest thereon, which such taxpayer owes pursuant to any state income tax law prior to refund of the overpayment.[14]

4. The State is required to provide a written notification to the debtor by certified mail, return receipt requested, informing the debtor that the State intends to refer the debt for collection by TOP. The advance notice must also give the debtor at least 60 days to present evidence, in accordance with procedures established by the State, that all or part of the debt is not past-due or not legally enforceable.[15]

5. For purposes of TOP, "debtor", means a person who owes a state income tax obligation.[16]

6. For purposes of TOP, a "past-due, legally enforceable State income tax obligation" means a debt[17] which resulted from:

> (1) A judgment rendered by a court of competent jurisdiction which has determined an amount of State income tax to be due,

> (2) A determination after an administrative hearing which has determined an amount of state income tax to be due and which is no longer subject to judicial review, or
>
> (3) A State income tax assessment (including self-assessments) which has become final in accordance with State law but not collected and which has not been delinquent for more than 10 years.[18]

7. The Protestant is a "debtor for purposes of TOP, who owes a "past-due, legally enforceable State income tax obligation".

8. Prior to submitting a debt to TOP, the State must make reasonable efforts to collect the debt.[19] The Division made reasonable efforts to collect the Protestant's debt prior to referring the debt to TOP.

9. The State shall, in the manner and in the time frames provided by TOP, notify TOP of any deletion or decrease in the amount of past-due, legally enforceable State income tax obligation referred to TOP for collection by tax refund offset. The State may notify TOP of any increases in the amount of the debt referred to TOP for collection by tax refund offset provided that the State has complied with the requirements of 26 U.S.C. § 6402(e)(4) with regard to those debts.[20]

10. If the person filing a joint return with a debtor owing the past-due, legally enforceable State income tax obligation takes appropriate action to secure his or her proper share of a tax refund from which an offset was made, the IRS will pay the person his or her share of the refund and request that TOP deduct that amount from future amounts payable to the State or that TOP otherwise obtain the funds back from the state. TOP, or the appropriate State, will adjust their debtor records accordingly.[21]

It is the Protestant's position that the proposed offset is illegal because the State of Oklahoma is already garnishing his wages and taking the maximum 25% of his disposable income.[22] "State and federal income tax refunds arising from amounts withheld from debtor's wages in 90 days preceding bankruptcy were not exempt as earned "wages" under Oklahoma statute exempting 75% of all current "wages" or earnings earned during the last 90 days." The Protestant's position is not supported by Oklahoma Statutes or case law in the State of Oklahoma.[23]

It is the Division's position that Federal law governs the procedures to be used by a State when seeking an offset of a debtor's Federal refund under TOP, and that the Protestant had sixty (60) days from receipt of the advanced notice to protest the Division's intent to refer the Protestant's state income obligation. The Division further asserts all that is required to be heard is evidence relating to the content of the advanced notice. The Division's position is correct in order to comply with the provisions of TOP, but under the provisions of 68 O.S. § 207, "[t]he argument and legal authority upon which each assignment of error is made …" by the Protestant, must still be examined for compliance

with Oklahoma law. In this matter the Protestant's assignment of error and legal authority were examined and found to be without merit.

The Protestant, as the "debtor" referred to TOP, was given an advance written notice by certified mail, return receipt requested, that the Division intended to collect the debt through TOP. The Protestant was given sixty (60) days to present evidence, in accordance with procedures established by the State, that all or part of the debt was not past-due or not legally enforceable. The Protestant failed to file a protest within the sixty (60) days. The Division's advanced notice is in compliance with the provisions of TOP.

DISPOSITION

It is the ORDER OF THE OKLAHOMA TAX COMMISSION, based on the above and foregoing findings and conclusions, that the protest 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.

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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 and appears for himself in court." Black's Law Dictionary 5th Edition 1099 (1979).

[2]Exhibit "A".

[3]Exhibit "F".

[4]Exhibit "G".

[5]Exhibit "B". The notice advised that TOP is authorized by federal law, and will cause any federal tax overpayments or refunds paid by the IRS to be applied to state tax liability identified in the notice. The notice also states that the state tax liability will remain eligible for the TOP until paid in full.

[6]See Note 5. The Protestant's individual liability for the 1995 tax year is an assessment and the Protestant's liability for the 1996 tax year is a balance due on the return filed by the Protestant.

[7]*See* Note 5. The notice was sent to the Protestant at 123 FAKE STREET, ANYTOWN OK.

[8]Exhibit "C". The notice was sent to Protestant and WIFE at 123 FAKE STREET, ANYTOWN, OKLAHOMA. The notice enclosed an insert on Tax Refund Offsets for

Additional Information. The payment before reduction was $1,753.00 and remained $1,753.00 according to the notice. No adjustment was made.

[9]Exhibit "E". *State of Oklahoma ex rel Oklahoma State Regents for Higher Education v. TAXPAYER*, filed In The District Court of Canadian County, Case No. CJ-92-285, with Yukon Public Schools, as Garnishee. The Plaintiff is garnishing the maximum 25% of Protestant's current wages (disposable income). 12 O.S. § 1173(I)(1).

[10]Exhibit "D".

[11]68 O.S. § 207.

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

[13]68 O.S. § 205.2(c) in pertinent part states: "[i]f the tax refund due is inadequate to pay the collection expense and debt … balance due the state agency … shall be a continuing debt or final judgment until paid in full."

[14]26 U.S.C. § 6402. See also 31C.F.R. § 285.8(b)(3). The Financial Management Service ('FMS") will only offset a tax refund payment if the address shown on the Federal tax return for the taxable year of the overpayment is an address within the State seeking the offset.

[15]See Note 14. See also 31 C.F.R. § 285.8(c)(3)(i), and 31 C.F.R. § 285.8(c)(3)(ii), which provides:

> The State must, in accordance with procedures established by the State, consider any evidence presented by a debtor in response to the notice described in paragraph (c)(3)(i) of this section and determine whether an amount of such debt is past-due and legally enforceable. In those cases where a debtor claims that he or she is immune from State taxation by reason of being an enrolled member of an Indian tribe who lives on a reservation and derives all of his or her income from that reservation. State procedures shall include consideration of such claims *de novo* on the merits unless such claims have been previously adjudicated by a court of competent jurisdiction.

[16]31 C.F.R. § 285.8(a).

[17]"Debt as used in this section means past-due, legally enforceable State income tax obligation unless otherwise indicated." 31 C.F.R. § 285.8(a).

[18]See Note 16

[19]"Reasonable efforts" include making written demand on the debtor for payment and complying with any other prerequisites to offset established by the State. 31 C.F.R. § 285.8(c)(3)(iii).

[20]See also 31 C.F.R. § 285.8(c)(4).

[21]31 C.F.R. § 285.8(f). The appropriate action to be taken by the non-debtor spouse is to file IRS Form 8379 (*Injured Spouse*). To be considered an *Injured Spouse*, you must have filed a joint return, received income (such as wages, interest, etc.), made tax payments (such as federal income tax withheld from wages or estimated tax payments) or claimed a refundable credit (such as earned income credit), and reported the income and tax payments on the joint return. WIFE did not file for "Injured Spouse" relief with the IRS.

[22]See Note 9. See also 12 O.S. § 1173(I)(1).

[23]See 12 O.S. § 1173 and 31 O.S. § 1(A)(18). See also *In re Miles*, 153 B.R. 72 (Bankr. N.D. Okla. 1993). See also *In re Annis*, 229 B.R. 802 (B.A.P. 10th Cir. 1999).