

JURISDICTION: OKLAHOMA TAX COMMISSION DECISION
CITE: 2004-08-10-04 / PRECEDENTIAL
ID: P-03-147-H
DATE: 08/10/04
DISPOSITION: DENIED
TAX TYPE: INCOME TAX
APPEAL: NO APPEAL TAKEN

The above-named taxpayer protests the Audit Division’s reduction of his income tax refund on account of an error made by Tax Commission employees in the calculation of his tax. Taxpayer also protests the Auditor’s disallowance of Taxpayer’s claiming of a previously paid estimated tax underpayment penalty as a refund or credit against his amended tax liability. Finally, taxpayer protests the failure of the Commission to pay interest on the claimed refund. A hearing was held in this matter before one of the Commission’s administrative law judges, who made findings of fact, conclusions of law and recommendations regarding this protest.

Now, in accordance with OAC 710:1-5-41, having reviewed the files and records herein and being fully advised, the Commission makes and enters the following findings of fact, conclusions of law and order as to the final disposition of said protest.

FINDINGS OF FACT

1. On April 15, 2003, Taxpayer filed his original Oklahoma individual income tax return for the tax year 2002. The original return showed a tax due of \$1,212.00, plus a penalty of \$108.00 for underpayment of estimated tax, for a total due of \$1,320.00. The Taxpayer paid the tax due and underpayment penalty in full.

2. On May 7, 2003, with the assistance of Tax Commission employees, Taxpayer filed an amended Oklahoma individual income tax return (Form 511X) for the tax year 2002. (Taxpayer had amended his federal return to reflect a \$3,500.00 contribution to his IRA.) The amended return was filled out by an employee of the Commission’s Taxpayer Assistance Division, and approved by her supervisor. The Commission’s employee either erroneously calculated the tax or misread the Tax Tables applicable to the taxpayer’s amended taxable income, because she entered the tax under Method 1 as \$997.00, whereas the correct amount of tax was \$1,067.00. Further, in the payments and credits section of the amended return form, the employee inserted the \$108.00 Taxpayer had previously paid for estimated tax underpayment penalty, as a payment of estimated taxes. The amended return claimed a refund of \$423.00.

3. There is no space provided on Form 511X for entering a previous payment of estimated tax underpayment penalty. The instructions accompanying Form 511X inform taxpayers that “underpayment penalty and interest is based on the tax on the original return,” and instructs them not to include any such payment in their schedule of prior tax payments.

4. According to regular procedure, the amended return was forwarded to the Audit Division’s Amended Section for examination and audit. The Auditor contacted Taxpayer by phone sometime before July 14, 2003, and requested that Taxpayer provide verification of

acceptance by the Internal Revenue Service of his amended federal return. On July 14, 2003, the Taxpayer faxed the auditor a copy of his federal refund check as verification of acceptance of his federal return, which the auditor accepted.

5. On July 30, 2003, the auditor sent Taxpayer a letter, with a copy of the amended return and an explanation of all line item adjustments made to it. The Method I tax entry was adjusted to show the correct amount, \$1,067.00, and the resulting tax liability as \$1,060.00 (the lesser of the amounts calculated under Method 1 and Method 2). The claimed credit for refund of the \$108.00 underpayment penalty paid with the original return was disallowed, resulting in a refund of \$252.00. On August 15, 2003, a refund check was issued to Taxpayer in that amount, which was deposited in Taxpayer's account on August 19, 2003.

6. On August 19, 2003, a protest was filed to the adjustments made by the auditor to the amended 2002 return. The allowed refund was protested for the following reasons: (1) It was less than the tax refund shown on the amended return as filed; (2) It failed to include a refund of the penalty for underpayment of estimated tax; and (3) It contained no interest similar to that paid by the IRS on the federal refund.

7. On September 24, 2003, Division counsel sent Taxpayer a letter advising that the underpayment penalty of \$108.00 would be refunded, and that interest would be paid on the tax refund of \$252.00 *and* the underpayment penalty. The letter also stated, however, that a mistake had been made on the amount of tax due under Method 1, and that there was no statutory or regulatory authority for the Division to give a refund to which Taxpayer was not entitled by law.

8. On September 26, the Division sent a Memo to Division's counsel, taking exception to the letter sent to Taxpayer on September 24, 2003, for the following reasons:

- If an individual files an amended return after his original return and before the due date for filing the original return (including extensions), the amended return is the "return for the taxable year", and the amount of tax thereon is used to determine the amount of any underpayment of estimated tax. If the amended return is filed after the due date, it is not the "return for the taxable year", and the tax shown on the amended return cannot be used to compute the amount of estimated tax underpayment. IRS Rev. Rul. 83-86, 1983-1 CB 358 (copy attached). *Since Oklahoma Income Tax Law does not address this issue, the OTC follows the IRS Code.*
- No interest is due because the \$108.00 is not refundable. (see #1)
- No interest is due as the return was not processible as submitted. Oklahoma Income Tax Rules, Title 710, Chapter 50 (710:50-9-3). Furthermore, the taxpayer did not furnish IRS acceptance until 07-14-03 at which time the taxpayer faxed this information. The return was processed on 08-22-03.

9. It has long been the Division's practice not to refund an underpayment penalty if it was paid on the original return. However, despite this objection, on October 3, 2003, upon the

advice of the Office of General Counsel, the Division issued a refund check payable to the Taxpayer for the underpayment penalty of \$108.00.

10. On October 14, 2003, the Division’s counsel mailed Taxpayer the underpayment refund of \$108.00. The Taxpayer was also informed that the letter of September 24, 2003, was in error, when it stated that interest would be paid on the tax refund of \$252.00. Counsel’s letter advised that the amended return was not processible until proof of acceptance of the federal amended return was provided to the auditor on July 14, 2003. The Taxpayer was also advised that no interest would be paid on the refund of the underpayment penalty because there was no statutory or regulatory authority permitting interest to be paid on it.

11. On October 16, 2003, the refund of the underpayment penalty was deposited in the Taxpayer’s bank account.

CONCLUSIONS OF LAW

1. The Tax Commission is vested with jurisdiction over the parties and subject matter of this action. 68 O.S. §§207, 221.

2. Taxpayer acknowledges that a mistake was made on his amended return as prepared by the Taxpayer Assistance Division, and that the correct amount of his tax refund is \$252.00. Taxpayer is not entitled to a larger refund because of the mistake made by Commission employees in calculating his amended tax, because the State, acting in its sovereign capacity, such as the area of taxation, is not bound by the mistakes or errors of its employees. *See, State ex rel. Oklahoma Tax Com’n v. Emery*, 645 P.2d 1048 (Okla. App. Div. 1 1982); *State ex rel. Cartwright v. Tidmore*, 674 P.2d 14 (Okla. 1983); *State ex rel. Com’rs of Land Office v. Shull*, 279 P.2d 339 (Okla. 1955). Additionally, the making of any refund is not a conclusive finding of the tax due by any individual, but is subject to the future audit of the individual’s return and the determination of his liability. 68 O.S. §2385.17.

3. Taxpayer asserts that, since his amended return was not processed and his refund check issued within ninety days from the date the return was filed, he is entitled to interest on his refund of \$252.00 from May 7, 2003 to August 15, 2003. Under the law applicable to this case, whenever an income tax refund is not paid to the taxpayer within ninety days after the return is filed or due, whichever is later, *with all documents as required by the Commission*, entitling the taxpayer to a refund, then the Tax Commission must pay interest on the refund, at the same rate specified for interest on delinquent tax payments. 68 O.S. 2001, §217(H). Consistent with this statute and the provisions of the Oklahoma Income Tax Act that Oklahoma taxable income “piggy-backs” on the federal, the Commission has promulgated OAC 710:50-9-3, which provides:

Interest will be paid on 1987 and subsequent years’ income tax refunds that are not processed within ninety (90) days from the date a processible return is filed or due, whichever is later. To be “processable”, all information on the return, including the computations, must be correct. In the case of an Amended Oklahoma Income Tax Return with a federal adjusted gross income change, the

return must be accompanied by documentation to substantiate that the I.R.S. accepted the requested change.

4. The provisions of 68 O.S. §217(H) and OAC 710:50-9-3(a) are clear and unambiguous. The ninety days does not start to run until the return is “*processable*”. In this case, that means that the ninety days did not start to run until Taxpayer provided verification of acceptance of his amended federal return to the auditor. Taxpayer’s federal refund check is dated July 11, 2003, and pursuant to the request of the auditor, Taxpayer faxed a copy of the refund check to the Division on July 14, 2003. The ninety days began to run on that date. Taxpayer deposited the tax refund of \$252.00 in his account on August 16, 2003, well within the ninety day period. No interest is due on the tax refund.

5. Finally, Taxpayer protests the Audit Division’s disallowance of Taxpayer’s claim for refund of his previously paid estimated tax underpayment penalty, by virtue of a lesser tax shown on his amended return. The Office of the General Counsel apparently agreed. We conclude that the Audit Division was correct.

6. The Oklahoma Income Tax Act, 68 O.S. §2351 *et seq.*, levies a tax upon the Oklahoma taxable income of resident individuals. 68 O.S. §2355. The Act further provides that every taxpayer, except estates and certain individuals who derive at least two-thirds of their income from farming, is required to make estimated tax payments if, in the case of individuals, their tax liability can reasonably be expected to be \$500.00 or more in excess of taxes withheld from wages. 68 OS. §2385.7.

7. Section 2385.9 of the Act provides that the required annual payment of estimated tax shall be the lesser of either 70% of the tax shown on the “return for the taxable year,” or 100% of the tax shown on the return for the preceding taxable year. In the case of any underpayment of this required estimated tax payment, the Act provides that “there shall be added to the amount of the underpayment interest thereon at an annual rate of twenty percent (20%) for the period of the underpayment. 68 O.S. §2385.13. This is the “underpayment penalty.” An exception is provided to the imposition of the underpayment penalty “if the tax shown on the return for the taxable year is less than” \$1,000.00. *Id.*

8. The resolution of this question obviously depends upon the meaning to be given the term “the return for the taxable year.” The Oklahoma Income Tax Act does not specifically define the term, nor do the Rules promulgated by the Oklahoma Tax Commission. However, the Act does mandate that “**Any term used in Section 2351 et seq. of this title shall have the same meaning as when used in a comparable context in the Internal Revenue Code, unless a different meaning is clearly required.**” 68 O.S. §2353(3).

9. The provisions regarding penalty for underpayment of estimated income tax in the Internal Revenue Code, 26 U.S.C. §6654, and those in the Oklahoma Income Tax Act, 68 O.S. §§2385.9 and 2385.13, are virtually identical, and clearly used in the same context. Nothing in the Oklahoma Act suggests that these identical terms should be given a different meaning.

10. The IRS has determined that, “To be considered the return for the year for purposes of computing the penalty for underpayment of estimated tax under section 6654(b) of the Code, an amended return must be filed by the due date of the original return.” Rev. Rul. 83-36, 1983-1 C.B. 358. Further, the Ruling states:

If an individual taxpayer files an amended return after filing the original return and before the due date for filing the original return (including extensions), the amended return constitutes “the return for the taxable year” under section 6654(b) of the Code. The amount shown on the amended return is used to determine the amount of underpayment. If the amended return is filed after the due date it is not the return for the taxable year for purposes of section 6654(b). In that case, the tax shown on the amended return cannot be used to compute the amount of underpayment.

Id. The federal courts have reached the same conclusion as to “the statutory meaning of” this language, *Evans Cooperage Co., Inc. v. U.S.*, 712 F.2d 199 (5th Cir. 1983), and denied the taxpayer’s claim for refund of the penalty it had paid on the original return. *Id.* Other states have followed suit. *See, e.g.*, Missouri: *Ferris v. Director of Rev.*, No. 95-002850RI, Mo. Admin. Hearing Com’n (Oct. 9, 1996); California: *In re Risser*, 84-SBE-044, Calif. St. Bd. Equal. (Aug. 1, 1984); *In re McEwen*, 85-SBE-091, Calif. St. Bd. Equal. (Aug. 20, 1985); Illinois: Private Letter Ruling No. IT 90-0174-PLR (June 20, 1990); Arizona: Individual Income Tax Ruling No. ITR 02-4 (Jul. 15, 2002); Connecticut: Conn. Agencies Regs. §12-701(a)(12)-1.

11. By virtue of the provisions of 68 O.S. §2353(3), the same meaning must be applied. The Audit Division’s disallowance of Taxpayer’s claim for recalculation or refund of the underpayment penalty he had paid on his original return was correct, and his protest should be denied.

WAIVER

The conclusions reached herein are compelled by Oklahoma statutes. However, it is equally clear that not all of the Commission’s Divisions interpreted the statutory language in the same way, and the taxpayer received conflicting advice. This, coupled with the fact that neither we nor the Oklahoma Courts had previously addressed the specific question, convinces us that it would be appropriate to waive and remit the underpayment penalty of \$108.00 pursuant to 68 O.S. §220.

ORDER

IT IS, THEREFORE, ORDERED that the within and foregoing protest is hereby denied. It is further ordered that the penalty paid by TAXPAYER in the amount of \$108.00 for underpayment of estimated taxes for 2002 is hereby waived.