JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2005-02-08-23
ID:	P-04-093-H
DATE:	FEBRUARY 8, 2005
DISPOSITION:	DENIED
TAX TYPE:	INCOME INTERCEPT
APPEAL:	NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A hearing in this matter was originally set for August 25, 2004, at 9:30 a.m. On August 17, 2004, this matter was reassigned to OTC ATTORNEY, and by agreement of the parties the hearing was rescheduled for September 29, 2004, at 9:30 a.m. On September 21, 2004, Protestant, OFFICER, requested a continuance to retrieve additional documentation to provide the Division. On September 22, 2004, the Division filed its Memorandum Brief. At the request of the undersigned, a teleconference was held on September 27, 2004, at 11:00 a.m. By agreement of the parties, the hearing was rescheduled for October 28, 2004, at 1:30 p.m. The Protestants filed a Position Letter on October 13, 2004. The Division filed its Response Brief on October 21, 2004. The hearing was held on October 28, 2004, at approximately 1:30 p.m. The Division called one (1) witness, AUDITOR, Auditor, who testified regarding the records of the Division. The record was held open for 10 days to comply with the order of the undersigned to obtain legible documents to be substituted for the Division's Exhibits C, D-1, and E-1. The Division was ordered to submit a copy of the Division's mainframe printout of the Protestants' bankruptcy case detail, Bankruptcy Petition, and the Division's Proof of Claim, which are all designated as the Division's Exhibit I. The Division was also ordered to submit legible copies of the assessments issued by the Division dated August 27, 1986, with the certified mail green cards attached to each of the assessments. The Division complied with the orders on November 8, 2004. The record was closed and the case was submitted for decision on November 9, 2004.

FINDINGS OF FACT

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:

1. Franchise Tax Returns filed for 1985-86 and 1986-87, on behalf of RESTAURANT, INC. listed Protestant, OFFICER, as Secretary/Treasurer.[1]

2. The Protestant was listed as Secretary/Treasurer on an Application for Sales Tax Permit filed in August of 1985.[2] The application was signed by the Protestant and

[1] Division's Exhibit A-1 and A-2.

[2] Division's Exhibit B.

listed his address as OFFICER'S ADDRESS, Tulsa, Oklahoma. The business address for RESTAURANT, INC. was listed as BUSINESS ADDRESS, Tulsa, Oklahoma.[3]

3. On November 13, 1987, the Business Tax Division of the Oklahoma Tax Commission ("Business Tax Division") issued a notice to show cause proposed assessment for delinquent sales tax (estimated) for the period of January 1986 through May 1986[4] in the following amounts:

Tax	$15,250.00
Interest	4,575.00
Penalty	1,525.00
Total	$21,350.00

The assessment was sent by certified mail to the Protestant at his last-known address according the records of the Oklahoma Tax Commission, OFFICER'S ADDRESS, Tulsa, Oklahoma.[5] The microfilm copy of the certified mail green card was signed on November 19, 1987, by what appears to be the signature of Protestant, OFFICER'S WIFE.[6]

4. The assessment was not protested and became final, which resulted in the filing of Tax Warrants No. STS#1[7] and No. STS#2.[8] Both tax warrants were mailed to the Protestant at OFFICER'S ADDRESS, Tulsa, Oklahoma.[9]

5. On August 29, 1990, the Tax Commission's Proof of Claim was filed in the Protestants' Bankruptcy in the Northern District of Oklahoma, Case No. 90-#####, in the amount of $26,734.50.[10] Both Tax Warrants No. STS#1 and No. STS#2 were listed on the Tax Commission's Proof of Claim.[11]

---

[3] Division's Exhibit B.

[4] Division's Substituted Exhibit C.

[5] Division's Substituted Exhibit C. The Protestant also testified that the address to which the Division mailed the assessment was correct, but that he had not received it or signed the green card.

[6] Division's Substituted Exhibit C.

[7] Division's Substituted Exhibit D-1. This tax warrant was filed with the County Clerk of Tulsa County on April 19, 1988, in Book X, Page X, for the period of January 1, 1986, through February 1, 1986.

[8] Division's Exhibit D-2. This tax warrant was filed with the County Clerk of Tulsa County on April 19, 1988, in Book X, Page X, for the period of February 1, 1986, to June 1, 1986.

[9] Division's Substituted Exhibit D-1 and Exhibit D-2.

[10] Division's Exhibit D-3. At the time of the bankruptcy, the Protestants' address was still OFFICER'S ADDRESS, Tulsa, Oklahoma 12345.

[11] Division's Exhibits D-3.

6. RESTAURANT, INC., through PRESIDENT, its President, filed actual sales tax reports,[12] which took the place of the estimated amounts as follows, to-wit:

Tax Only	January 1986	$3,811.17
Tax Only	February 1986	$3,554.95
Tax Only	March 1986	$3,034.63

7. On August 12, 1993, the Tax Commission issued Commission Order No. 1993-08-12-025 in Case No. P-88-209, "In the Matter of the Sales Tax Protest of OFFICER, as an Officer of the RESTAURANT, INC.. d/b/a RESTAURANT."[13] The Commissioners found pursuant to a stipulation of the parties that the Protestant was terminated from RESTAURANT, INC. on or about March 31, 1986, and adjusted the proposed sales tax assessment, issued pursuant to a "field audit," to reflect the Protestant's date of termination.[14] The Protestant was found to be an officer of the RESTAURANT, INC. and liable for the collection and remittance of sales tax for the "field audit period" of August 12, 1985, through March 31, 1986.[15]

8. On October 17, 2003, the Protestants filed their 2002 joint Oklahoma Income Tax Return Form 511, which reflected a refund in the amount of $6,197.00.[16] The W-2 Wage and Tax Statement attached to the return indicates that the refund was attributable to the income of Protestant, OFFICER.[17] No evidence was presented that any portion of the refund was attributable to the income of Protestant, OFFICER'S WIFE.

9. On February 11, 2004, the Division notified the Protestant that his 2002 refund had been delayed due to a reported liability owed to the Oklahoma Tax Commission based on the outstanding sales tax liability reflected by Tax Warrants No. STS#1 and No. STS#2, in the amount of $56,004.20.[18]

---

[12] Division's Exhibits D-4, D-5, and D-6.

[13] Division's Exhibit E-2. The Division attached a copy of the findings issued in the case. The Administrative Law Judge is taking judicial notice of the Commission Order issued in P-88-209. OKLAHOMA ADMIN. CODE § 710:1-5-36 (2004).

[14] Division's Exhibits E-1 and E-2.

[15] Division's Exhibit D-3.

[16] Division's Exhibit F.

[17] Division's Exhibit F.

[18] Division's Exhibit G.

10. On February 11, 2004, the Division notified Protestant, OFFICER'S WIFE, that the 2002 income tax refund in the amount of $6,197.00 had been delayed because of her filing a joint income tax return with Protestant, OFFICER.[19]

11. The Division received a protest letter from Protestant, OFFICER, on behalf of both Protestants.[20]

ADDITIONAL FINDINGS OF FACT

1. The records of the Division[21] reflect that the balance of Sales Tax Warrants, as of October 28, 2004, is as follows:

Tax	Penalty	Interest	Total	Amount Paid	Balance Due
STS#1		**January 1986**		(Actual Report)	
$ 3,811.17	$ 381.12	$ 8,981.91	$13,174.20	$1,235.00	$11,939.20
STS#2		**February 1986**		(Actual Report)	
$ 3,188.29	$ 318.83	$ 9,131.95	$12,639.07	$ 0.00	$12,639.07
		March 1986		(Actual Report)	
$ 3,034.63	$ 303.46	$ 8,645.44	$11,983.53	$ 0.00	$11,983.53
$10,034.09	$1,003.41	$26,759.30	$37,796.80	$1,235.00	$36,561.80

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this action.[22]

---

[19] Division's Exhibit G. The notice also advised Protestant, OFFICER'S WIFE, that "the Oklahoma Tax Commission does not allege that there is a judgement against you and you may be entitled to a refund of your portion of the 2002 refund. . . ."

[20] Division's Exhibit H. The Division did not challenge the timeliness of the protest letter, but it was not dated by the Protestants at the time the letter was written and was not dated stamped by the Division upon its receipt.

[21] Division's Substitute Exhibit E-3. The Division's Worksheet also reflects that the tax on STS#3, in the amount of $504.30, has been paid leaving a balance due of $605.70. This is the officer liability addressed by Commission Order No. 1993-08-12-025, which was not appealed.

[22] OKLA. STAT. ANN. tit. 68, § 205.2(B) (West 2001):

> 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

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.[23]

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.[24] No action shall be taken in furtherance of the collection of the debt pending final determination of the validity of the debt.[25]

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.[26]

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.[27]

> 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.

[23] OKLA. STAT. ANN. tit. 68, § 205.2(E) (West 2001):

> The Tax Commission shall 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 such refund.

[24] See Note 23.

[25] See Note 23.

[26] See Note 23 and *Commission Order No. 2001-01-30-002*.

[2727] OKLA. STAT. ANN. tit. 68, § 208 (West 2001):

> 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.

6. In all proceedings before the Oklahoma Tax Commission, the taxpayer has the burden of proof[28] to show the action of the Commission is incorrect, and in what respect.[29]

7. In this matter the Protestants have failed to meet their burden of proof. The Protestants have 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. No adjustment to the income tax refund claim is required and the balance due shall be a continuing debt until paid in full.[30]

8. In finding that 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[31] of the mailing of the proposed assessment.

9. In this matter no allegation was made or evidence submitted by the Protestants to dispute the Division's testimony and exhibits admitted into evidence. According to the records of the Oklahoma Tax Commission, the balance of Tax Warrants No. STS#1 and No. STS#2 is currently $36,561.80, and no adjustment should be made to the claim.[32] The Protestants' 2002 income tax refund in the amount of $6,197.00 is due solely to the income of Protestant, OFFICER, and the balance of the debt far exceeds the amount of the Protestant's 2002 refund.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the protest of OFFICER and

---

[28] 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*. OKLA. ADMIN. CODE § *710:1-5-77(b) (2004)* 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.

[29] See *Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission*, 1988 OK 91, 768 P.2d 359.

[30] OKLA. STAT. ANN. tit. 68, § 205.2(C) (West 2001) 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.

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

[32] Division Exhibit E-3.

OFFICER'S WIFE to the claim by the Account Maintenance Division to Protestants' income tax refund 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.