

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2005-10-13-06
ID: P-05-047-H
DATE: OCTOBER 13, 2005
DISPOSITION: DENIED
TAX TYPE: FEDERAL OFFSET
APPEAL: NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HUSBAND and WIFE (“Protestants”) appear pro se¹ through HUSBAND. The Intercept Section of the Account Maintenance Division (“Division”), Oklahoma Tax Commission, appears through OTC ATTORNEY, Office of General Counsel, Oklahoma Tax Commission.

On April 19, 2005, this office received the protest file from the Division for further proceedings consistent with the Uniform Tax Procedure Code² and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.³ On April 27, 2005, a notice was sent to the Protestants at their last known address that this matter was set for hearing on May 19, 2005, at 1:30 p.m.⁴ On May 12, 2005, the Protestants filed a Motion for Continuance. The motion was granted and the scheduled hearing stricken and rescheduled for June 20, 2005, at 1:30 p.m.

The hearing was held on June 20, 2005, at 1:30 p.m. HUSBAND did not introduce any exhibits during the course of the hearing. The Division called one witness, AUDITOR, Auditor, Intercept Section, Account Maintenance Division of the Oklahoma Tax Commission, who testified regarding the records of the Division. The Division’s Exhibits A, B, C, D, E, G, H, and I were identified, offered, and admitted into evidence.

HUSBAND objected to the admission of the Division’s Exhibit F, based on his testimony that he had never received the notice but filed the protest based upon the notice from the Treasury Offset Program. The Division’s Exhibit F reflected that it had been sent by U.S. Certified Mail, Return Receipt Requested, in accordance with the requirements of TOP, but the “Return Receipt” was not available at the time of hearing.

Upon conclusion of the hearing, the record was held open for the parties to submit additional documentation. On June 21, 2005, the following notice was sent to the parties:

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 1099 (5th ed. 1979).

² OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

³ OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

⁴ The notice was sent to the business address of HUSBAND at 123 FAKE STREET, SUBURB, Oklahoma 99999.

A hearing in the above-referenced matter was held June 20, 2005. The record remains open until June 30, 2005, for the parties to submit additional documentation.

Protestants are to provide information concerning any funds they believe may have been misapplied, as referenced in the hearing.

The ruling on the admission of the "Notice of Intent to Offset Federal Income Tax Refund," identified as Division's Exhibit "F", is being held in abeyance until the Division provides a sworn affidavit, with documentation attached thereto, to prove that the Division has satisfied the requirement of the Treasury Offset Program that the notice be sent by certified mail, return receipt requested.

Upon receipt of the sworn affidavit and documentation, the undersigned will issue an Order on the admissibility of Division's Exhibit "F", along with a ruling on any additional evidence that may be submitted by the Protestant concerning the misapplication of funds by the Division.

On June 30, 2005, the Protestants filed a "Statement Regarding Search for Needed Documents." On June 30, 2005, the sworn "Affidavit of ADMINISTRATOR," with documentation attached, and the sworn "Affidavit of AUDITOR," with documentation attached, were filed by the Division. On July 13, 2005, the undersigned Administrative Law Judge issued an Order admitting into evidence the "Notice of Intent to Offset Federal Income Tax Refund" identified as the Division's Exhibit F, based upon the affidavits filed by the Division and the documentation attached thereto.

On July 20, 2005, the Protestants filed a Motion to Vacate Order to Admit Exhibit "F" on the grounds that "material portions of the evidence submitted in support of the order to admit this exhibit as evidence are hearsay and were not the result of lawfully valid submissions of evidence taken under oath. These material portions of the supporting evidence cited as hearsay include the 'Postal Fax' pages, and 'Web Page' printout." The Protestants stated that only the persons producing the evidence from the U.S Postal Service could submit the documentation under oath.

On July 28, 2005, the Division filed its response to the motion on the basis that the "Postal Fax" pages and the "Web Page" printout were both recognized exceptions to the hearsay

rule.⁵ Based upon the response filed by the Division, an Order Denying Motion was issued by the undersigned Administrative Law Judge on July 29, 2005.⁶

FINDINGS OF FACT

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

1. On January 31, 2000, the Protestants were assessed additional income tax for the 1993 tax year based upon information provided by the Internal Revenue Service pursuant to 26 U.S.C. § 6103, and contained in Revenue Agent's Report ("RAR") No. 99999-99. The assessment consisted of \$501.00 in tax, interest through 01/31/00 in the amount of \$435.27, and penalty in the amount of \$50.10, for a total amount of \$986.37.⁷ The assessment was not protested and is now final. As of December 31, 2004, the date of the Federal Offset, the tax penalty, and interest due totaled \$894.65. The assessment was received by the Protestants at their home address of 999 BOGUS BLVD., SUBURB, Oklahoma 99999-9999.⁸

2. On or about October 23, 2000, the Protestants filed a joint Oklahoma Individual Income Tax Return for the 1999 tax year, with an admitted liability in the amount of \$118.00.⁹ No remittance was filed with the return. As of December 31, 2004, the date of the Federal Offset, the tax, penalty, and interest totaled \$123.90.

⁵ In support of its position the Division cited OKLA. STAT. ANN. tit. 12, § 2803(6) (West 2001), which in pertinent part states:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(6) A record of acts, events, conditions, opinions or diagnosis, made at or near the time by or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the record, all as shown by the testimony of the custodian or other qualified witness, . . . unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation and calling of every kind, whether or not conducted for profit. . . .

⁶ See also OKLA. ADMIN. CODE § 710:1-5-34, the pertinent part of which states:

. . . evidence not admissible under the Rules of Evidence may be admitted, if it is of a type commonly relied on by reasonably prudent persons in the conduct of their affairs.

⁷ Division's Exhibit A.

⁸ HUSBAND testified that the Division's assessment was not protested. The Protestants objected to the basis of the Division's assessment, the RAR, which was also not protested. The Protestants did object to the penalty and interest assessed by the Division on the assessment for the 1993 tax year.

⁹ Division's Exhibit B.

3. On or about October 16, 2001, the Protestants filed a joint Oklahoma Individual Income Tax Return for the 2000 tax year, with an admitted liability of \$198.00.¹⁰ No remittance was made with the return. As of December 31, 2004, the date of the Federal Offset, the tax, penalty, and interest totaled \$207.90.

4. On or about October 16, 2002, the Protestants filed a joint Oklahoma Individual Income Tax Return for the 2001 tax *late*, with an admitted tax liability of \$154.00.¹¹ The tax was remitted with the return, but because the return was filed after its due date of April 15, 2000, by operation of law, a late file penalty of five percent (5%), and interest resulted in a balance due and owing. As of December 31, 2004, the date of the Federal Offset, the total penalty and interest due was \$19.34.

5. On October 3, 2003, the Division notified HUSBAND in writing of its intent to refer his outstanding liability to the Treasury Offset Program (“TOP”).¹² The Protestants’ joint and several liability for the 1993 assessment and 1999, 2000, and 2001 tax years were included in the notice.¹³ HUSBAND 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 mail, return receipt requested, and HUSBAND signed for the return receipt on October 6, 2003, at 10:46 a.m.¹⁴ The electronic signature of HUSBAND is attached as Exhibit 1 to the sworn “Affidavit of ADMINISTRATOR¹⁵

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

7. The Oklahoma Tax Commission made reasonable efforts to obtain payment of the Protestant’s Oklahoma income tax obligations, prior to submission of the debt to TOP.¹⁶

8. On December 31, 2004, TOP notified the Protestants of its intent to offset their Federal refund in the amount of \$1,234.56 to satisfy Oklahoma income tax liability.¹⁷

¹⁰ Division’s Exhibit C.

¹¹ Division’s Exhibit D.

¹² Division’s Exhibit F. 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.

¹³ See Note 12.

¹⁴ Division’s Exhibit F. The notice was sent to the Protestant at his home address of 999 BOGUS BLVD., SUBURB, Oklahoma 99999-9999. HUSBAND testified that this had been the Protestants’ home address since 1993.

¹⁵ ADMINISTRATOR is the Administrator of the Cashier and Mail-Out Control Section of the Management Services Division, Oklahoma Tax Commission. ADMINISTRATOR’S duties include administering the certified mailings for the Oklahoma Tax Commission.

¹⁶ Division’s Exhibit E.

9. On January 6, 2005, the Division received notice from TOP of the pending offset in the amount of \$1,234.56.¹⁸

10. On January 31, 2005, the Audit Division of the Oklahoma Tax Commission received a constituent inquiry letter from the Office of U.S. SENATOR.¹⁹ U.S. SENATOR enclosed a copy of the letter his office had received from HUSBAND questioning the validity of TOP.²⁰ The Audit Division forwarded the letter to the Division. The Division treated the letter from HUSBAND as a protest to the pending federal offset.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.²¹

2. 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.²²

3. 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.²³

¹⁷ Division's Exhibit G. The notice was sent to the Protestants at their home address of 999 BOGUS BLVD. SUBURB, Oklahoma 99999-9999. The notice enclosed an insert on Tax Refund Offsets for Additional Information. The payment before reduction was \$1,234.56, according to the notice. No adjustment was made.

¹⁸ Division's Exhibit H. The date of the notice was December 31, 2004.

¹⁹ U.S. SENATOR'S letter was sent to OTC EMPLOYEE (Audit Division) and requested that the letter from HUSBAND be reviewed and a response sent to the attention of U.S. SENATOR'S representative, REPRESENTATIVE, in his Tulsa Office. There is no indication whether anyone responded to U.S. SENATOR'S inquiry on behalf of his constituent.

²⁰ Division's Exhibit I.

²¹ OKLA. STAT. ANN. tit. 68, § 207 (West 2001).

²² 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) 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. OKLA. ADMIN. CODE § 710:1-5-47. *See Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission*, 1988 OK 91, 768 P.2d 359.

²³ At the hearing, HUSBAND testified that the Protestants did not challenge the assessment issued by the Oklahoma Tax Commission and that the Protestants did not file a protest to the assessment for the 1993 tax year. The Protestants still take issue with the 1993 tax year because the IRS disallowed "out-of-state" income. HUSBAND testified that the RAR was not protested on the federal level and became final. The Protestants' position has no bearing on the validity of the assessment issued by the Oklahoma Tax Commission. The remainder of the Protestants' liability is self-assessed. According to the records of the Tax Commission all monies paid by the Protestants has been properly credited to the respective periods. The Protestants *did object* to the amount of penalty

4. 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.²⁴

5. 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.²⁵

6. For purposes of TOP, “debtor” means a person who owes a state income tax obligation.²⁶

7. For purposes of TOP, a “past-due, legally enforceable State income tax obligation” means a debt²⁷ 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

and interest on their account, but this office does not have the jurisdiction to waive penalty and interest. That authority is granted to the Commissioners by OKLA. STAT. ANN. tit. 68, § 220 (West 2001).

²⁴ 26 U.S.C. § 6402. *See also* 31 C.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.

²⁵ *See* Note 24. *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.

²⁶ 31 C.F.R. § 285.8(a).

²⁷ “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).

(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.²⁸ (Emphasis added)

8. HUSBAND is a “debtor” for purposes of TOP, who owes a “past-due, legally enforceable State income tax obligation.”

9. Prior to submitting a debt to TOP, the State must make reasonable efforts to collect the debt.²⁹ The Oklahoma Tax Commission has made reasonable efforts to collect the Protestants’ debt prior to referring the debt to TOP.

10. 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.³⁰

11. 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.³¹

Federal law governs the procedures to be used by a State when seeking an offset of a debtor’s Federal refund under TOP. HUSBAND had sixty (60) days from receipt of the advanced notice to protest the Division’s intent to refer the Protestant’s state income obligation.

Pursuant to the provisions of OKLA. STAT. ANN. tit. 68, § 207 (West 2001), “[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 Protestants’ assignment of error and legal authority were examined and found to be without merit.

HUSBAND, 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

²⁸ See Note 26.

²⁹ “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).

³⁰ See also 31 C.F.R. § 285.8(c)(4).

³¹ 31 C.F.R. § 285.8(f).

TOP. Although HUSBAND argued to exclude his electronic signature, HUSBAND never challenged that the electronic signature was not his or that he had not signed for the notice. The same arguments made by HUSBAND for not admitting the “Postal Fax” pages and “Web Page” printout could be made if the Division was relying on the traditional method of sending the notice of offset by “Green Card, Return Receipt Requested.” This new method available through the U.S. Postal Service is just as reliable as the traditional method and gives the Division and the Protestant even more information as to the notice’s delivery. Having the Protestant sign an “electronic clipboard” is an inevitable advance in postal technology.

HUSBAND 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. HUSBAND 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 upon the above and foregoing findings and conclusions, that the protest should be denied.

OKLAHOMA TAX COMMISSION