

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 2007-11-06-04 / NON-PRECEDENTIAL
ID: P-07-098-H
DATE: NOVEMBER 6, 2007
DISPOSITION: DENIED
TAX TYPE: INCOME
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HUSBAND AND WIFE (“Protestants”) appear by and through ACCOUNTANT, CPA. The Compliance Division (“Division”), Oklahoma Tax Commission, appears by and through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On June 15, 2007, the protest file was received by this office for further proceedings consistent with the Uniform Tax Procedure Code¹ and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.² On June 19, 2007, a letter was mailed to the Protestants stating that this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-07-098-H. The letter also advised the Protestants that a Notice of Prehearing Conference would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Oklahoma Tax Commission*. On July 5, 2007, the Notice of Prehearing Conference was mailed to the Protestants’ representative, setting the prehearing conference for July 18, 2007, at 2:30 p.m. On July 17, 2007, the parties filed a Status Report in Lieu of Prehearing Conference requesting that a Scheduling Order issue setting this matter for submission on stipulations and briefs.

On July 18, 2007, the Scheduling Order was issued directing that agreed stipulation of facts be filed on or before August 10, 2007.³ The Protestants’ position letter or brief was due on or before August 30, 2007, with the Division’s brief being due on or before September 13, 2007.

On August 14, 2007, the parties filed Agreed Stipulation of Facts and Statement of Issue, with exhibits attached thereto. The Protestants’ Brief in Chief was filed on August 29, 2007. The Compliance Division was permitted to file its Brief (out-of-time) on September 17, 2007. On September 27, 2007, the record in this matter was closed and this case was submitted for decision.

¹ OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

² OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

³ OKLA. ADMIN. CODE § 710:1-5-38 (June 25, 1999).

STIPULATION OF FACTS

On August 14, 2007, the parties filed “Agreed Stipulation of Facts and Statement of Issue, and also stipulate to the admissibility into evidence of the attached exhibits,”⁴ as follows, to-wit:

1. On or about October 10, 2006, Protestants filed their 2005 Oklahoma Non Resident Individual Income Tax Return. The return showed they were residents of the State of Texas. Attached to the return was a W-2 from Protestant HUSBAND’S employer showing that \$31,080.00 in Oklahoma income tax was withheld. The return called for a refund of that Oklahoma income tax. **Exhibit 1.**

2. By letter dated November 28, 2006 the Taxpayer Assistance Division of the Commission notified Protestants that it had examined and adjusted The [sic] 2005 return to reduce the refund from \$31,080.00 to \$5,400.00. The reason stated for the adjustment was “County of your residence. ***Tax Rate Error”. **Exhibit 2.**

3. By letter dated December 11, 2006 Protestants protested the adjustment. In the letter, Protestants representative stated that the refund represented Oklahoma withholding on severance pay from Protestant HUSBAND’S employer, that Protestants established permanent residence in Texas in late 2004 after having purchased a home in Texas on August 2, 2004. The letter stated that Protestants retained ownership of their Oklahoma residence, but cancelled the homestead exemption on it for the 2005 ad valorem tax year. The letter further stated that Protestant HUSBAND obtained a Texas Drivers’ License in 2004 and registered to vote in Texas at the new Texas address. Protestants’ argument in the letter was that the refund should be granted in full because they were residents of Texas during 2005 and so the income on which Oklahoma tax was withheld was not Oklahoma taxable income. **Exhibit 3.**

4. Attached to the letter were the aforementioned letter of adjustment and the W-2. Also attached to the protest letter was a copy of a Warranty Deed dated July 29, 2004 to Protestants for a home in CITY, Texas. The deed listed Protestants’ address on that date as one in CITY, Oklahoma. **Exhibit 4.**

5. Also attached to the protest letter was a copy of the COUNTY Assessor webpage for Protestants’ CITY residence, which webpage was generated on March 16, 2006. This record showed that while Protestants claimed an Oklahoma homestead exemption on the property in 2004, they revoked the exemption claim for 2005. **Exhibit 5.**

6. Also attached to the protest letter was a copy of Protestant HUSBAND’S Texas drivers license expiring October 31, 2010, and a copy of his Social Security card. **Exhibit 6.**

7. Also attached to the protest letter was a copy of Protestant HUSBAND’S Texas voter registration card, effective January 1, 2006 through December 31, 2007. **Exhibit 7.**

⁴ The text of the stipulated facts is set out *in haec verba*. “*in haec verba*” (in heek v<<schwa>>-b<<schwa>>). [Latin] In these same words; verbatim. BLACK’S LAW DICTIONARY (8TH ed. 2004), at <http://westlaw.com> (October 18, 2006).

8. At some time between December 11, 2006 and February 9, 2007, The [sic] Commission's Taxpayer Assistance Division verbally told Protestants' representative that the Commission would require a letter from the payor of the severance income certifying that Oklahoma income tax was improperly withheld from Protestant HUSBAND'S severance pay, or that the wages were improperly reported to the State of Oklahoma. This is evidenced by an email communication between Protestants' representative and the payor of the severance income. **Exhibit 8.**

9. On February 9, 2007 Protestants requested a Letter Ruling from the Commission's Tax Policy and Research Division asking whether severance pay received since a taxpayer's change of residence to Texas is taxable to the State of Oklahoma; and further asking whether the payor of such income is required to withhold Oklahoma income tax on the payments since the move. The Tax Policy and Research Division issued a Letter Ruling on February 27, 2007 answering both questions negatively. **Exhibit 9.**

10. On March 6, 2007 a Comment was placed on Protestants' account relating that the Taxpayer Assistance Division told Protestants' representative that the Commission would require a corrected W-2 or letter from the payor of the severance income stating that Oklahoma withholding was made in error. The payor declined to provide such W-2 or letter. That Division also acknowledged the existence and issuance of the Letter Ruling. **Exhibit 10.**

11. On April 4, 2007 Protestants' representative provided the Taxpayer Assistance Division with a copy of Protestant HUSBAND'S latest paystub for the severance pay, dated March 19, 2007, and showing that Oklahoma withholding on the income had been stopped. The letter accompanying transmittal of the paystub stated that the payor, upon receiving a copy of the Letter Ruling, had ceased withholding. **Exhibit 11.**

12. On April 5, 2007, the refund denial protest was referred to the Account Maintenance Division. That Division consulted with the Tax Policy and Research Division, which opined that the paystub was sufficient as a substitute for a letter from the payor.

13. By memorandum dated May 31, 2007, the Case Management Section of the Account Maintenance Division acknowledged receipt of the protest and directed the Supervisor of Income Tax Accounts to issue the remaining refund for the reason that Protestants had provided "rental documents" proving non-Oklahoma residency for 2005. Handwritten notes on the memorandum state this was completed on June 1, 2007, and that the remaining refund was issued June 2, 2007. **Exhibit 12.**

14. By letter dated June 7, 2007 The [sic] Account Maintenance Division informed Protestants that based on the April 4, 2007 correspondence it had corrected the 2005 account to show no tax due and stated the refund was issued on June 2, 2007. **Exhibit 13.**

15. The Protestants received the remaining refund of \$25,680.00 on or about June 13, 2007 and it cleared the Commission refund account on June 19, 2007.

16. By memorandum to the Office of Administrative Proceedings dated June 13, 2007, the Account Maintenance Division reported that Protestants had received the refund, but were claiming interest thereon. **Exhibit 14.**

STIPULATED STATEMENT OF ISSUE

Whether Protestants are due interest from the Commission on the \$25,680.00 portion of their 2005 refund under the terms of 68 O.S. § 217(H).

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.⁵

2. Section 217(H) of Title 68,⁶ Uniform Tax Procedure Code,⁷ provides:

Whenever an income tax refund is not paid to the taxpayer within ninety (90) days after the return is filed or due, whichever is later, with all documents as required by the Tax Commission, entitling the taxpayer to a refund, then the Tax Commission shall pay interest on the refund, at the same rate specified for interest on delinquent tax payments. The payment of interest on refunds provided for by this section shall apply to tax year 1987 and subsequent tax years...

For tax returns filed after January 1, 2004, whenever an income tax refund is not paid to the taxpayer within the following number of days after the income tax return is filed with all documents as required by the Tax Commission or after the income tax return is due, whichever is later, entitling the taxpayer to a refund, then the Tax Commission shall pay interest on the refund at the same rate specified for interest on delinquent tax payments:

1. For returns filed electronically, thirty (30) days; and
2. For all other returns, one hundred fifty (150) days.

3. The rules promulgated pursuant to the Administrative Procedures Act are presumed to be valid and binding on the persons they affect and have the force of law.⁸

⁵ OKLA. STAT. ANN. tit. 68, § 221(D) (West Supp. 2007).

⁶ OKLA. STAT. tit. 68, § 217(H) (West Supp. 2004).

⁷ OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

⁸ OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2001).

4. The Tax Commission has promulgated rules as provided by law to facilitate the administration, enforcement, and collection of taxes and other levies enacted by the Oklahoma Legislature with respect to income.⁹

5. The Tax Commission has construed the language of Section 217(H) to require a “processable” return.¹⁰ For purposes of Section 217(H), time periods shall be determined from the date a “processable” return is filed or due whichever is later. “To be ‘processable’, all information on the return, including the computations, must be correct and all documents required by the Tax Commission must be included....”¹¹

6. For the purposes of the Oklahoma Income Tax Act¹² "Resident individual" means a natural person who is domiciled in this state, and any other natural person who spends in the aggregate more than seven (7) months of the taxable year within this state shall be presumed to be a resident in absence of proof to the contrary.¹³

7. A natural person who resides less than seven (7) months of the taxable year within this state is presumed to be a "part-year resident individual" in absence of proof to the contrary.¹⁴ An Oklahoma Income Tax Return (Form 511 NR) must be completed and filed by those individuals who move into or out of the State of Oklahoma during the year.¹⁵

8. A "nonresident individual" means an individual other than a resident individual or a part-year resident individual.¹⁶ A “Nonresident” is required to file an Oklahoma Income Tax Return (Form 511 NR) if \$1,000.00 of gross receipts is from Oklahoma sources.¹⁷

9. An Oklahoma resident is a person domiciled in this state. “Domicile” is the place established as a person’s true, fixed, and permanent home. A domicile, once established, remains until a new one is established.¹⁸

10. One is presumed to retain his Oklahoma residency if he has:

⁹ OKLA. ADMIN. CODE § 710:50-1-1.

¹⁰ OTC Order No. 98-12-03-006 (December 3, 1998), 1998 WL 1039720 (Okl. Tax Com.).

¹¹ OKLA. ADMIN. CODE § 710:50-9-3(c) (June 11, 2005).

¹² OKLA. STAT. ANN. tit. 68, § 2351 et seq. (West 2001).

¹³ OKLA. STAT. tit. 68, § 2353(4) (West Supp. 2004).

¹⁴ See Note 13.

¹⁵ OKLA. ADMIN. CODE § 710:50-3-39 (June 25, 2000).

¹⁶ See Note 13.

¹⁷ OKLA. ADMIN. CODE § 710:50-3-38(a) (June 25, 2000).

¹⁸ OKLA. ADMIN. CODE § 710:50-3-36(a) (June 26, 1997).

- (1) An Oklahoma Homestead Exemption;
- (2) His family remains in Oklahoma;
- (3) He retains an Oklahoma drivers license;
- (4) He intends to return to Oklahoma; or
- (5) He has not abandoned his Oklahoma residence.¹⁹

11. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.²⁰

12. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.²¹

The parties have stipulated that the issue in this matter is “Whether Protestants are due interest from the Commission on the \$25,680.00 portion of their 2005 refund under the terms of 68 O.S. §217(H).” The dispositive issue is narrower in scope, “Whether the Protestants’ 2005 Oklahoma Income Tax Return (‘2005 Return’) was ‘processable’ as filed on October 10, 2006, and if not, on what date did the Protestants’ 2005 Return become ‘processable’.”

On October 10, 2006, the Protestants’ filed their 2005 Return as “nonresidents” (State of Residence: Texas), and checked the box on the return that they “d[id] not have an Oklahoma filing requirement and are filing for refund of state withholding.” The Protestants’ return address is TEXAS ADDRESS. The return reflects an Oklahoma Adjusted Gross Income (Oklahoma Source) of zero and a refund due the Protestants of \$31,080.00.²²

However, the 2005 W-2 Wage & Tax Statement for HUSBAND reflects Oklahoma source income of \$469,060.00, with Oklahoma withholding of \$31,080.00.

¹⁹ OKLA. ADMIN. CODE § 710:50-3-36(b) (June 26, 1997).

²⁰ OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999):

In all administrative proceedings, unless otherwise provided by law, the burden of proof shall be upon the protestant to show in what respect the action or proposed action of the Tax Commission is incorrect. If, upon hearing, the protestant fails to prove a prima facie case, the Administrative Law Judge may recommend that the Commission deny the protest solely upon the grounds of failure to prove sufficient facts which would entitle the protestant to the requested relief.

OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999), provides in pertinent part:

... “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.

²¹ See *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com’n*, 1988 OK 91, 768 P.2d 359.

²² Exhibit 1.

There does not seem to be any dispute that prior to the 2005 tax year the Protestants were Oklahoma residents and had established their “domicile” in the State of Oklahoma for a number of years.²³

“As a general principle, Oklahoma domicile, once established, is presumed to continue unless an individual can show that a change has occurred.”²⁴ The 2005 Return as filed October 10, 2006, was not “processable” pursuant to any one of a number of the rules cited herein. The Division adjusted the Protestants’ 2005 Return on November 28, 2006, to reflect the Oklahoma source income of \$469,060.00 resulting in a refund of \$5,400.00.²⁵

The Protestants, through their representative, filed a protest dated December 11, 2006, on the basis that HUSBAND had established permanent residence in the State of Texas in late 2004 and that the wages (severance pay) had been incorrectly reported to the State of Oklahoma.²⁶ The protest states the following grounds as to why the Division’s adjustment is incorrect, as follows, to-wit:

HUSBAND established permanent residence in the State of Texas in late 2004 after his employer was sold to another entity.

HUSBAND purchased a residence in CITY, Texas, on August 2, 2004, and the homestead exemption was claimed on the Texas property for the 2005 tax year.²⁷

HUSBAND retained ownership of his former residence in CITY IN OKLAHOMA, but the records of the COUNTY Assessor reflect that the homestead exemption was not claimed on the CITY IN OKLAHOMA residence for the 2005 tax year.²⁸

A Texas driver’s license was issued to HUSBAND on October 31, 2004, with an expiration date of October 31, 2010.²⁹

²³ See Stipulation of Facts filed herein.

²⁴ *Suglove v. Oklahoma Tax Commission*, 1979 OK 168, 605 P.2d 1315.

²⁵ Exhibit 2.

²⁶ Exhibit 3. The protest was not date-stamped by the Division.

²⁷ Exhibit 4. The Cash Warranty Deed is dated July 29, 2004, and was filed with the County Clerk of COUNTY IN TEXAS on August 5, 2004. The return address for the Protestants on the Cash Warranty Deed is the address of the CITY IN OKLAHOMA residence.

²⁸ Exhibit 5.

²⁹ Exhibit 6. The driver’s license lists HUSBAND’S address as TEXAS ADDRESS.

A Voter Registration Card was issued by COUNTY, Texas, to HUSBAND, which was valid from January 1, 2006, and has an expiration date of December 31, 2007.³⁰

Pursuant to the Tax Commission's rule on residency,³¹ one is presumed to retain his Oklahoma residency if he has:

- An Oklahoma Homestead Exemption;
- (1) His family remains in Oklahoma;
 - (2) He retains an Oklahoma drivers license;
 - (3) He intends to return to Oklahoma; or
 - (4) He has not abandoned his Oklahoma residence.

The letter of protest dated December 11, 2006, indicates that the Protestants did not claim the homestead exemption on their CITY IN OKLAHOMA residence for the 2005 tax year, but the record is silent as to whether HUSBAND'S family remained in Oklahoma, if HUSBAND retained his Oklahoma driver's license, or whether HUSBAND intended to return to Oklahoma. The protest indicates that only HUSBAND established permanent residence in the State of Texas.

However, the record does not reflect HUSBAND'S intention not to return to Oklahoma or that the Protestants had abandoned their CITY IN OKLAHOMA residence. The Protestants did not provide sufficient proof of a change in residency.

After receiving the protest, the Division verbally requested, through the Protestants' representative, a letter from HUSBAND'S former employer that the W-2 incorrectly reported his severance pay as Oklahoma source income.³² HUSBAND was unable to obtain a letter from his former employer, so the Protestants, through their representative, requested a letter ruling³³ from the Tax Policy and Research Division.

On February 27, 2007, the Tax Policy and Research Division issued a letter ruling to the Protestants' representative, which in general addresses the "taxability of income from a severance package received while a specific person was not an Oklahoma resident." The letter ruling responds in pertinent part by stating:

The issue of when income is taxable is determined by when the payment (income) is received. If a person becomes a non resident after termination, any severance payments received after termination of Oklahoma residency is

³⁰ Exhibit 7. The address on the card is TEXAS ADDRESS.

³¹ OKLA. ADMIN. CODE § 710:50-3-36(b) (June 26, 1997).

³² Exhibit 8.

³³ See OKLA. ADMIN. CODE § 710:1-3-73(e) (June 25, 1999).

not taxable in Oklahoma. Further, Oklahoma income tax withholding is not required on severance payments made to non-residents.³⁴

The letter ruling does not answer the question of whether the Protestants changed residency from the State of Oklahoma to the State of Texas for the 2005 tax year. The change in residency was a fact assumed by the Protestants' representative for purposes of requesting the letter ruling.

On April 4, 2007, the Division received a letter from the Protestants' representative advising that based upon the letter ruling HUSBAND'S former employer stopped withholding Oklahoma income tax from HUSBAND'S severance pay, and attaching a recent paystub.³⁵

Based upon the paystub information, coupled with the information previously provided, the Protestants' 2005 Return was "processable", with "all documents required by the Tax Commission," on April 4, 2007. The 150 day time limit to issue the remaining refund started to run under Section 217(H).

On June 2, 2007, the remaining refund of \$25,680.00 was issued to the Protestants. The refund cleared the Tax Commission's refund account on June 19, 2007, well within the 150 day time limit under Section 217(H). The Protestants have failed to meet their burden of proof in this matter that they are entitled to interest on the refund based on the 2005 Return as filed on October 10, 2006.

DISPOSITION

It is the ORDER of the undersigned OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the protest should be denied.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are 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.

³⁴ Exhibit 9, LR-07-035; Income Tax – Severance Pay.

³⁵ Exhibit 11. The Division deemed the paystub as an acceptable substitute for the letter that HUSBAND was unable to obtain from his former employer.