JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2010-08-10-17 / NON-PRECEDENTIAL**
ID: **P-09-180-H**
DATE: **AUGUST 10, 2010**
DISPOSITION: **DENIED**
TAX TYPE: **INCOME**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROTESTANT (Deceased) ("Protestant") appears through CPA, CPA. The Account Maintenance Division ("Division"), Oklahoma Tax Commission, appears by and through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On October 20, 2009, the protest file was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*[1] and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.[2] On October 21, 2009, a letter was mailed to the Protestant's Representative stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-09-180-H. The letter also advised the Protestant's Representative a Notice of Prehearing Conference would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Office of Administrative Law Judges.*[3]

On October 22, 2009, OTC ATTORNEY 1 filed an Entry of Appearance as Counsel of record for the Division. On October 27, 2009, the Notice of Prehearing Conference was mailed to the parties setting the prehearing conference for December 10, 2009, at 2:00 p.m.

The prehearing teleconference was held as scheduled on December 10, 2009, at 2:00 p.m. On December 11, 2009, a letter was mailed to the parties pursuant to the prehearing teleconference, directing the parties to submit a proposed procedural schedule on or before December 21, 2009. On December 15, 2009, the parties submitted a proposed procedural schedule. On December 16, 2009, the Scheduling Order was mailed to the parties advising the Stipulation of Facts were due on or before January 6, 2010, with simultaneous briefs due on or before January 20, 2010, at which time the record in this matter would be closed and the case 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] *Id.*

On January 4, 2010, the parties filed the Joint Stipulation of Facts and Issues, with Exhibits A through E attached thereto. On January 19, 2010, the Division's Memorandum Brief and the Protestant's Position Letter were filed with the Court Clerk.[4] The record in this matter was closed and the case was submitted for decision on January 26, 2010.[5]

On March 3, 2010, a teleconference was initiated by the Administrative Law Judge with the parties' Representatives to inform them that there were insufficient facts in the record upon which to base findings of fact, conclusions of law, and recommendations to the Commissioners. On March 4, 2010, a letter was mailed to the parties' Representatives stating same and advising this case was pulled from submission for decision, the record was reopened, and a status report was to be filed on or before April 26, 2010.

On April 26, 2010, the Division filed the Status Report advising, "The Division has discovered information in the Mainframe system indicating that on or about January 23, 2008, the Protestant was mailed notice of the adjustments made to her 2006 Form 511." The Division attached a recreation of the letter and a screen print of the comment page as Exhibits thereto and further advised it was continuing to search its records to determine if the Protestant's 2005 Form 511 was received prior to June 2009. On April 27, 2010, a letter was mailed to the parties' Representatives directing a status report be filed on or before May 12, 2010.

On May 12, 2010, the Division filed the Status Report advising that according to the records of the Division the Protestant's 2005 Form 511 had not been received prior to June 2009, referenced the April 26, 2010, Status Report, and attached copies of the "Estimated Payment" screens as Exhibits A and B.

On June 3, 2010, at 10:00 a.m. a teleconference was initiated by the Administrative Law Judge with the parties' Representatives to inform them the Division could submit either a sworn affidavit from a representative for the Division detailing the matters contained in the Division's April 26th and May 12th Status Reports or this matter could be reset for hearing. The parties' Representatives opted for the sworn affidavit. On June 3, 2010, a letter was mailed to the parties' Representatives detailing same and advising the sworn affidavit was to be filed on or before June 14, 2010, at which time the record in this matter would be closed and this matter submitted for decision. On June 10, 2010, the Division filed the Affidavit, which was duly sworn under oath by SUPERVISOR, Account Maintenance Division of the Oklahoma Tax Commission. The record in this matter was closed and this case submitted for decision on June 10, 2010. On June 17, 2010, OTC ATTORNEY 2 filed a Notice of Substitution of Attorney with the Court Clerk.

[4] OKLA. ADMIN. CODE § 710:15-10(c)(2) (June 25, 1999).

[5] OKLA. ADMIN. CODE § 710:1-5-39 (June 25, 1999).

STIPULATION OF FACTS

On January 4, 2010, the parties filed Joint Stipulation of Facts and Issues,[6] as follows, to-wit:

1. On April 15, 2006, the Division received from the Protestant a Form 504 Application for Extension of Time to File an Oklahoma Income Tax Return ("extension") for the 2005 tax year. (Exhibit "A"). The extension was submitted by tax preparer PREPARER on behalf of the Protestant. The extension was accompanied by check number 1633 in the amount of $8,200.00 representing income tax due as calculated at Line 6 of the extension. (Exhibit "A").

2. On October 4, 2007, the Division mailed the Protestant a letter stating her 2006 income tax return could not be processed as filed because of a difference in the amount of reported payments ($42,938.00) and the amount of payments appearing in the Division's records ($32,434.00). (Exhibit "B"). The difference in the amounts is $10,504.00. This is the same amount of overpayment claimed at Line 36 of the Protestant's 2005 income tax return, which is the return at issue. On that return, the Protestant indicates at Line 36 that the entire overpayment is to be applied to her 2006 estimated tax. The Protestant responded to the Division's letter by mailing a copy of same back to the Division with the following notations:

> "Mailed another copy of 05 with this letter"; "overpt 05 10,504.00 where is it"; "Post this if you don't find original return filed 9-28-06" (Exhibit "B").

3. On May 8, 2009, the Compliance Division mailed the Protestant a letter stating that she had failed to file a 2005 income tax return. (Exhibit "C"). On June 26, 2009, the Protestant responded to this letter by mailing a copy of the letter to the Compliance Division with the following notations: "we mailed the original return 9-28-06 then we mailed another copy in 08 – now again 6-22-09." (Exhibit "C"). In the upper right corner of the copy was written "mailed 6-23-09." This letter was received by the Division on June 26, 2009, and was accompanied by the Protestant's 2005 income tax return. (Exhibit "D"). This is the only 2005 income tax return for the Protestant appearing in the Division's records.

4. On July 17, 2009, the Division mailed notice to the Protestant that her 2005 income tax return was barred by statute. (Exhibit "E"). The Protestant responded to this notice by mailing the notice back to the Division with the following notations:

> "The 2005 overpayment is not barred by statute. 2005 Form 511 was extended to 10/15/06 with $8,200.00 payment with the extension Original return was filed 9/28/06 with $10,504 overpayment applied to the 2006 Form 511. (This return was apparently lost by the Okla Tax Commission before processing) The 2006 Form 511 was filed in September 2007 and claimed the 2005 overpayment as payment towards 2006 tax. The tax preparer (PREPARER) discoved [sic] the 2005 Form 511 was not in the OTC

[6] The text of the stipulated facts is set out *in haec verba*. "***in haec vega***" (in heek v<<schwa>>r-b<<schwa>>). [Latin] In these same words; verbatim. BLACK'S LAW DICTIONARY (8TH ed. 2004), available at http://westlaw.com.

computer and sent one copy to OTC on 7/30/08 & another in January 2009. The 2005 511 was finally put in system on 6/26/09 (After another copy was sent in June 2009.)" (Exhibit "E").

STATEMENT OF ISSUE

Is the overpayment claimed on the Protestant's 2005 income tax return barred by 68 O.S. § 2373 because it was not claimed within the statutory period allowed?

ADDITIONAL FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, the Division's Memorandum Brief, the Protestant's Position Letter, the Status Reports filed April 26th and May 12th, and the Affidavit filed June 10th, the undersigned finds:

5. On September 17, 2007, the Protestant filed the Oklahoma Income Tax Return for the 2006 tax year ("2006 Return") reflecting estimated tax payments on Line Twenty-Four (24) of $32,938.00 and $10,000.00 paid with the extension for the 2006 tax year. The Protestant also requested that the overpayment of $12,164.00 be applied to 2007 estimated tax.[7]

6. On January 28, 2008, the Division mailed a letter[8] to the Protestant's last-known address of ADDRESS, reflecting an adjustment to the Protestant's 2006 Return, as follows, to-wit:

		REPORTED	ADJUSTED
LINE 24	OKLA ESTIMATED TAX PAYMENT	32,938.00	22,434.00
LINE 30	TOTAL REFUNDABLE CREDITS	42,938.00	32,434.00
LINE 31	OVER PAYMENT OF INCOME TAX	12,164.00	1,660.00
LINE 32	AMT OF REFUND TO EST TAX	12,164.00	1,660.00

The Adjustment Letter detailed that the total Oklahoma estimated income tax payments reported on the Protestant's 2006 Return ($32,938.00) was adjusted in the amount of $10,504.00, resulting in total estimated income tax payments of $22,434.00. The adjustment was made because the Division had not received the Protestant's 2005 Return. As a result of the adjustment, the refund of estimated income tax for the 2006 Tax Year was adjusted from $12,164.00 to $1,660.00. The overpayment of $1,660.00 was included in the Protestant's 2007 estimated income tax payments.

[7] The court file contains an audit packet, which was forwarded by the Division as part of the protest file on this matter. The Administrative Law Judge is taking judicial notice of the materials contained in the court file to complete the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999).

[8] *See* Status Reports filed April 26th and May 12th and the Affidavit filed June 10, 2010, herein. The adjustment was noted on January 23, 2008, on the Mainframe Comments Screen for the Protestant's 2006 Tax Return. The adjustment was not noted on the Mainframe Estimated Payments Inquiry Screen for the Protestant's 2006 Tax Return.

7. The Division did not receive a protest to the adjustment made to the 2006 Return from the Protestant.

8. On July 23, 2009, the Protestant filed the Oklahoma Income Tax Return for the 2007 tax year ("2007 Return")[9] reflecting estimated tax payments on Line Twenty-Four (24) of $35,209.00 and $8,387.00 paid with the extension for the 2007 Tax Year. The Protestant also requested that the overpayment of $8,351.00 be applied as follows, to-wit:

2008 estimated tax	$6,576.00
Refund	$1,775.00
	$8,351.00

9. On April 14, 2009,[10] the Protestant filed the Oklahoma Income Tax Return for the 2008 tax year ("2008 Return") reflecting estimated tax payments on Line Twenty-Four (24) of $8,076.00 with tax due and owing of $2,584.00.[11]

10. On Tuesday, October 13, 2009, at 12:41 p.m., DIRECTOR, Account Maintenance Division, sent an e-mail to AUDITOR, Auditor III, Account Maintenance Division, requesting AUDITOR check the records of the Tax Commission to verify that the Protestant's 2005 Return had not been received prior to 2009 and that all the estimated tax balanced out.[12]

11. On October 13, 2009, at 1:06 p.m., AUDITOR sent an e-mail to DIRECTOR stating, "Yes everything balances out. no indication of an 05 received prior to 09…I even searched profiles to see if we miskeyed the ssn I cant find anything were [sic] it came in or the tp ever responded to any correspondence."[13]

12. A search of the Division's records reveals no indication that the Protestant's 2005 Tax Return was received by the Division prior to June 2009.[14]

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[15]

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[9] *See* Notes 7-8, *supra.*

[10] The Income Tax Inquiry Browse Screen reflects the 2008 Return was received on April 14, 2009, but the return is date-stamped April 15, 2009.

[11] *See* Notes 7-8, *supra.*

[12] *Id.*

[13] *Id.* AUDITOR'S -mail is confirmed by a copy of the Income Tax Inquiry Browse Screen contained in the court file.

[14] *See* Note 8, *supra.*

[15] OKLA. STAT. ANN. tit. 68, § 207 (West 2001).

2. In the event that the completed return of the taxpayer discloses a refund to be due by reason of the credits for withholding and/or estimated taxes previously paid, the filing of such tax return shall constitute a claim for refund of the excess.[16]

3. The amount of an income tax refund shall not exceed the amount of tax paid during the three (3) years immediately preceding the filing of a claim for refund.[17]

4. For the 2005 tax year, "All returns, except corporate returns, made on the basis of the calendar year shall be made on or before the 15th day of April following the close of the taxable year."[18]

5. With exceptions not pertinent in this matter, when an original return has not been filed, the Tax Commission will not issue a refund on a return that is filed more than three (3) years after the original due date of the return.[19]

6. The Oklahoma Supreme Court held in *Neer v. State ex rel. Oklahoma Tax Com'n*, 1999 OK 41, 982 P.2d 1071, ¶ 11 as follows, to-wit:

> …§ 2373…is analogous to a statute of repose and the Legislature, by unmistakable language, intended § 2373 to act as a substantive limitation on the right to recover any amount as a refund when the claim for refund is filed more than three years after the date on which Oklahoma income tax is paid. In short, the relevant terms of § 2373 clearly evidence a legislative intent to craft an outer limit time boundary beyond which a taxpayer's right or ability to recover a refund no longer exists.

7. 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.[20]

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[16] OKLA. STAT. ANN. tit 68, 2385.10 (West 2001).

[17] OKLA. STAT. ANN. tit. 68, § 2373 (West 2001), which states in pertinent part:

> …the amount of the refund shall not exceed the portion of the tax paid during the three (3) years immediately preceding the filing of the claim, or, if no claim was filed, then during the three (3) years immediately preceding the allowance of the refund…

See OKLA. ADMIN. CODE § 710:50-9-2:

> When an original return has not been filed, the Commission will not issue a refund on an original Individual Income Tax Return filed 3 years after the original due date of the return. A refund that is "barred by statute" cannot be used as payment on any delinquent account or applied to estimated tax. Exceptions to the statute of limitations set out in 710:50-5-13 also apply to certain refund situations. [See: 68 O.S. § 2373]

[18] OKLA. STAT. ANN. tit. 68, § 2368(G) (West 2001).

[19] *See* Note 17. *See also* OKLA. STAT. ANN. tit. 68, § 216 (West 2001).

8. General principles of equity may not override statutory requirements for timely filing of tax refund claims.[21]

9. The statute of limitations applies regardless of whether it is the tax agency's error or the taxpayer's error which leads to the overpayment of taxes.[22]

10. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[23]

DISCUSSION

The Protestant's position is that the 2005 Return was filed in September 2006, but that the Tax Commission apparently lost the 2005 Return. The Protestant asserts that another copy of the 2005 Return was mailed to the Division to assist in the processing of the Protestant's 2006 Return and that this copy was never processed even though the overpayment of $10,504.00 was supposed to be applied to the 2006 Tax Year.

It is the Division's position, that the original due date of the Protestant's 2005 Return was April 15, 2006,[24] pursuant to Section 2373(c) of Title 68 and Tax Commission Rule 710:50-9-2. The statutorily prescribed time period for the Protestant to request a refund on the 2005 return was April 15, 2009, and according to the Tax Commission's Income Tax Inquiry ("ITI") System the Protestant filed the 2005 Return on June 26, 2009, which is more than three (3) years from the due date of the 2005 Return.

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[20] OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2002).

[21] OTC Precedential Order No. 2006-03-23-07 (March 23, 2006). *See Republic Petroleum Corp. v. United States*, 613 F.2d 518.

[22] OTC Precedential Order No. 2006-03-23-07 (March 23, 2006). *See Jones v. Liberty Glass Co.*, 332 U.S. 524.

[23] 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.

[24] *Matlock v. Oklahoma Tax Com'n*, 2001 OK CIV APP 104, 29 P.3d 614, which held, "Three year period during which taxpayers could request refund commenced on original due date of tax return, not on extended date taxpayers received when they filed for an extension of time."

The Protestant's position is not supported by the record. The Protestant has not presented any evidence (such as proof of mailing or file-stamped copies) that the 2005 Return was filed in September 2006 or that another copy of the 2005 Return was mailed to the Division to assist in the processing of the 2006 Return.

The record supports the Division's position that the 2005 Return was not filed until June 26, 2009. The record also supports that on January 28, 2008, the Division mailed an adjustment letter to the Protestant's last-known address, which disallowed the $10,504.00 credit from the 2005 Return, because the Division had not received the 2005 Return, reducing the credit to the 2006 Return from $12,164.00 to $1,660.00. The overpayment of $1,660.00 was included in the Protestant's 2007 estimated tax payments of $35,209.00, which resulted in a refund of $8,351.00. As requested by the Protestant, the Division refunded $1,775.00 and $6,576.00 was applied to estimated tax for the 2008 Tax Year. The $6,576.00 overpayment from the 2007 Tax Year was included in the Protestant's estimated tax payments for the 2008 Tax Year totaling $8,076.00, with tax due and owing of $2,854.00.[25]

The Protestant has failed to meet its burden of proof that the Division's denial of the refund for the 2005 Return was incorrect and in what respects.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the protest to the Division's denial of the refund for the Protestant's 2005 Return 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.

NOTE: The distinction between a Commission Order designated as "Precedential" or "Non-Precedential" has been blurred because all OTC Orders resulting from cases heard by the Office of Administrative Law Judges are now published, not just "Precedential" Orders. *See* OKLA. STAT. ANN. tit.68, § 221(G) (West Supp. 2009) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002). *See also* OTC Orders 2009-06-23-02 and 2009-06-23-03 (June 23, 2009), which also conclude the language of the Statute is "clear and unambiguous."

[25] *See* Note 8, *supra.*