JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2010-10-14-03 / NON-PRECEDENTIAL**
ID: **P-10-090-K**
DATE: **OCTOBER 14, 2010**
DISPOSITION: **DENIED**
TAX TYPE: **INCOME**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestant, PROTESTANT is represented by ATTORNEY, FIRM. The Account Maintenance Division of the Oklahoma Tax Commission ("Division") is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

By letter dated July 22, 2009, the Division notified Protestant that the Division's records indicated she had not filed an Oklahoma income tax return for the 2005 tax year and that pursuant to § 238.1 of the Uniform Tax Procedure Code her occupational license would not be renewed until she came into compliance with the income tax laws of Oklahoma. On August 7, 2009, the Division received Protestant's 2005 Oklahoma income tax return. A refund of $347.00 was requested by the return. The Division by letter of August 11, 2009, notified Protestant that the refund was barred by statute. Protestant timely protested the Division's action by letter dated August 13, 2009. Protestant did not request a hearing in the protest letter.

On March 31, 2010, the Division's file was referred to the Office of the Administrative Law Judges for further proceedings pursuant to the Uniform Tax Procedure Code[1], the Oklahoma Income Tax Act[2] and the Rules of Practice and Procedure before the Office of Administrative Law Judges[3]. The case was docketed as Case No. P-10-090-K and assigned to ALJ, Administrative Law Judge.[4]

A pre-hearing conference was scheduled for May 20, 2010, by *Prehearing Conference Notice* ("*Notice*") issued April 20, 2010.[5] Neither Protestant nor Protestant's representative appeared at the conference or responded to the *Notice*. By *Prehearing Conference Order* ("*Order*") issued May 21, 2010, the Division was directed to file a verified response to protest no later than thirty (30) days from the date of the *Order* and Protestant's representative was advised that a reply could be filed within thirty (30) days of the filing date of the verified response. The *Order* further directed that if an oral hearing was not requested, the record would be closed and

[1] 68 O.S. 2001, § 201 et seq., as amended.

[2] 68 O.S. 2001, § 2351 et seq., as amended.

[3] Rules 710:1-5-20 through 710:1-5-47 of the *Oklahoma Administrative Code* ("*OAC*").

[4] *OAC*, 710:1-5-22(b).

[5] *OAC*, 710:1-5-28(a).

the protest submitted for decision upon completion of the announced procedural schedule[6]. Protestant's representative did not file a response to the *Order*.

The *Division's Verified Response to Protest* ("*Verified Response*") was filed June 14, 2010. The *Verified Response* with Exhibits A through D attached was re-filed on August 5, 2010. Neither Protestant nor Protestant's representative filed a reply to either *Verified Response*. On September 13, 2010, the record was closed and the case was submitted for decision.[7]

FINDINGS OF FACT

Upon review of the file and records, including the *Verified Response* and attached exhibits, the undersigned finds:

1. By letter dated July 22, 2009, the Division notified Protestant that the Division's records indicated she had not filed an Oklahoma income tax return for the 2005 tax year and that pursuant to § 238.1 of the Uniform Tax Procedure Code her occupational license would not be renewed until she came into compliance with the income tax laws of Oklahoma. Exhibit A.

2. On August 7, 2009, the Division received Protestant's 2005 Oklahoma income tax return. Exhibit B.

3. A search of the Division's records yields no evidence that Protestant's 2005 return was filed prior to August 7, 2009. Statement verified by OTC EMPLOYEE.

4. A refund of $347.00 was requested by the return. Exhibit B.

5. The Division by letter of August 11, 2009, notified Protestant that the refund was barred by statute. Exhibit C.

6. Protestant by letter dated August 13, 2009, timely protested the Division's action, asserting:

> Taxpayer swears under oath that the original 2005 Form 511 was filed on or about 2-23-06. Both federal and state returns were filed at this time. The check issued to the IRS for the 2005 balance due was cashed which confirms proof of filing. As a tax preparer, I can state with 100% authority that I 'always' file federal and state tax returns simultaneously. Therefore, if the federal was filed and accepted – the state was filed. Also, we have not received one notice from the OTC until 7-22-09 (copy attached0 indicating 2005 was unfiled. Not one. And then, presto!, after the 3 year statute for issuing refunds had expired by 90 days we are notified of the non-filing. This is unprofessional service by the OTC and has the effect of 'punishing' the

[6] *OAC*, 710:1-5-28(b).

[7] *OAC*, 710:1-5-39.

taxpayer. We challenge the OTC refusal to issue the $347.00 refund per the 2005 Form 511. Exhibit D.

7. Protestant did not request a hearing in the protest letter. Exhibit D.

CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter of law:

1. Jurisdiction of the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S. 2001, § 207(c).

2. The refund of state income taxes is governed by the provisions of the Oklahoma Income Tax Act, in particular § 2373, which provides in pertinent part:

> [T]he 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.

3. In ***Neer v. Oklahoma Tax Commission***, 1999 OK 41, 982 P.2d 1071, the Oklahoma Supreme Court considered the language of § 2373 and held at page 1073:

> § 2373 acts in a manner analogous to a statute of repose in that it acts 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 other words, as applicable here, § 2373 is a legislatively crafted outer limit time boundary beyond which taxpayers' right to recover a refund no longer exists.

4. State income tax is due at the time of transmitting the return required under the Act. 68 O.S. 2001, § 2375(A). "All 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." 68 O.S. 2001, § 2368(G). An extension of time for filing a return does not "extend the date on which any payment of a state tax is due", 68 O.S. 2001, §§ 216 and 2375(A), and Oklahoma Tax Commission Order Nos. 92-12-29-024 and 92-03-26-033[8]; and does not extend the provisions of § 2373, ***Matlock v State, ex rel. Oklahoma Tax Commission***, 2001 OK CIV APP 104, 29 P.3d 614.

5. Tax year 2005 returns made on the basis of a calendar year were due and the estimated and/or withheld income taxes paid with respect to the 2005 tax year were deemed paid on April 15, 2006. See, *OAC*, 710:50-3-3(a). To be timely, a claim for refund for the 2005 tax year was required to be filed on or before April 15, 2009. 68 O.S. 2001, § 2373.

[8] Estimated or withheld income taxes are deemed paid on the due date of the return notwithstanding a federal or Oklahoma extension, citing § 216.

6. The provisions of § 2373 apply to the filing of an original return where the return is not filed within three (3) years of the original due date of the return. *OAC*, 710:50-9-2. See, Oklahoma Tax Commission Order No. 91-06-06-04.

7. "To be considered timely filed, Income Tax Returns are to be filed with and received by the Oklahoma Tax Commission at 2501 Lincoln Blvd., Oklahoma City, Ok. 73194-0009 on or before the statutory filing date." *OAC*, 710:50-3-3(d). Dates placed on returns by the Oklahoma Tax Commission corresponding to postmarks that indicate timely mailing will be accepted as timely filed. Id.

8. "Any report, claim, tax return, statement or other document required or authorized to be filed with or any payment made to the Commission, which document or payment is transmitted through the United States mail, will be deemed to have been filed with and received by the Commission on the date shown by the post office cancellation mark stamped upon the envelope or other appropriate wrapper containing it." *OAC*, 710:65-3-2(a). "If mailed but not received by the Commission, or if received but the cancellation mark is illegible, erroneous or omitted, or envelope unavailable, the document or payment will be deemed to have been filed on the date it was mailed if the sender establishes by competent evidence that the document or payment was deposited in the United States mail on or before the date due for filing." Id.

9. Rules promulgated pursuant to the Administrative Procedures Act,[9] are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court. 75 O.S. 2001, § 306(C). They are valid and binding on the persons they affect, have the force of law and are prima facie evidence of the proper interpretation of the matter to which they refer. 75 O.S. 2001, § 308.2(C).

10. In administrative proceedings, the burden of proof standard is "preponderance of evidence." 2 Am.Jur.2d Administrative Law § 357. See, Oklahoma Tax Commission Order No. 91-10-17-061. "Preponderance of evidence" means "[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary 1064 (5th ed. 1979). It is also defined to mean "evidence which is more credible and convincing to the mind * * * [T]hat which best accords with reason and probability." Id.

11. The United States Court of Appeals for the Tenth Circuit examined the language of the "timely filing" provisions of the Internal Revenue Code; IRC § 7502, which are practically identical to *OAC*, 710:1-3-30(b) and the differing court decisions generated under those provisions in the case of ***Sorrentino v. Internal Revenue Service***, 383 F.3d 1187 (10th Cir. 2004). See, ***Crook v. Commissioner of Internal Revenue Service***, 173 Fed.Appx. 653, 2006 WL 766759 (C.A. 10), wherein the Court found at 657:

[9] 75 O.S. 2001, § 250 et seq., § 301 et seq.

> The Courts disagree as to the evidence required or permitted to prove timely mailing under § 7502. Some Circuits hold that actual delivery of an envelope with a legible postmark, or a receipt for registered or certified mail, constitute the only satisfactory forms of proof, and no extrinsic evidence of mailing can be considered. Other courts allow extrinsic evidence to demonstrate a document has been mailed, usually direct proof of the postmark. Under this view, the taxpayer is held 'to a strict standard of proof before invoking a presumption of receipt.'
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> * * *
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> Assuming we apply the more lenient standard, the taxpayer still bears the burden of proving compliance with the rule. 'Self-serving declarations of mailing, without more, are insufficient to invoke the presumption [of delivery].' Despite the disagreement between the circuits as to the type of proof which may be admitted to prove the date of mailing, no court has relied solely on the uncorroborated testimony of the taxpayer.
> (Citations omitted).

In ***Sorrentino***, the Court held at 1193-1194, that the language of § 7502 allowing a taxpayer to prove delivery to the IRS by producing registered, certified or electronic mail receipt did not abrogate the common law mailbox rule providing that proof of mailing of properly addressed communication bearing proper postage creates a rebuttable presumption that the communication was received. The Court denied taxpayer's claim in ***Sorrentino*** holding at 1195 that "absent some proof of an actual postmark or date receipt, a presumption that tax documents allegedly mailed to the IRS were in fact received does not arise based solely upon a taxpayer's self-serving testimony. Two (2) cases cited by the Court wherein taxpayer's appeal was upheld because the taxpayer produced corroborating evidence of an actual postmark and evidence of mailing apart from the taxpayer's self-serving testimony are noteworthy. In the first case, not only did the representative of the estate testify that "he watched the postmistress of a 'one-room' post office 'weigh the envelope, put postage on it, cancel it, and put it into the appropriate bundle of outgoing mail'", but the postmistress testified, "recalling she postmarked the envelope and placed it in the outgoing mail." ***Estate of Wood v. Commissioner***, 909 F.2d 1155 (8th Cir. 1990). In the second case, not only did the taxpayer testify that "she witnessed the postal clerk postmark her return and place the envelope in the mailing pouch", but "a friend who accompanied the taxpayer to the post office testified she saw the taxpayer go into the post office with the return and come out of the post office without the return". ***Anderson v. United States***, 966 F.2d 487 (9th Cir. 1992).

12. Here, Protestant did not present any direct evidence to support her self-serving declaration that the 2005 return was filed in 2006. Accordingly, Protestant's 2005 income tax refund claim is barred by § 2373.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest to the denial of the income tax claim for refund of Protestant, PROTESTANT, 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.