JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2011-01-04-02 / NON-PRECEDENTIAL**
ID: **P-10-344-K**
DATE: **JANUARY 4, 2011**
DISPOSITION: **DENIED**
TAX TYPE: **INCOME**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestants, HUSBAND and WIFE appear pro se. The Account Maintenance Division of the Oklahoma Tax Commission (hereinafter "Division") is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

On October 20, 2009, Protestant's faxed an unsigned copy of their original 2005 Oklahoma Income Tax Return to the Oklahoma Tax Commission. The return sought a refund of income tax in the amount of $633.00. By letter dated February 4, 2010, the Division notified Protestants that the refund had been denied as barred by statute. Protestants timely protested the refund denial.

On June 1, 2010, the Division referred the protest to the Office of the Administrative Law Judges for further proceedings pursuant to the Uniform Tax Procedure Code[1] and the Rules of Practice and Procedure before the Office of Administrative Law Judges[2]. The case was docketed as Case No. P-10-344-K and assigned to ALJ, Administrative Law Judge.[3]

A pre-hearing conference was scheduled for July 27, 2010, by *Prehearing Conference Notice* issued June 22, 2010.[4] Pursuant to the conference, the parties were directed to file a status report. By *Status Report* filed August 30, 2010, the parties requested additional time to submit and review additional information which request was granted by letter dated August 31, 2010. Pursuant to the *Status Report and Request for Hearing Date* filed October 1, 2010, a hearing was scheduled for October 26, 2010, by *Notice of Hearing* issued October 4, 2010.[5]

The hearing was held as scheduled. Protestants did not appear at the hearing nor respond to the notice. The Division called one witness: AUDITOR, Auditor, who testified with respect to the Division's records and the reason for the refund denial. Exhibits A through C were identified

[1] 68 O.S. 2001, § 201 et seq.

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

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

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

[5] *OAC*, 710:1-5-29.

by the witness, offered and admitted into evidence. Upon conclusion of the Division's presentation, the record in this cause was closed and the protest was submitted for decision.[6]

FINDINGS OF FACT

Upon review of the file and records, including the recording of the hearing and the exhibits received into evidence, the undersigned finds:

1. On October 20, 2009, Protestant's faxed an unsigned copy of their original 2005 Oklahoma Income Tax Return to the Oklahoma Tax Commission. The return was filed in response to a no file assessment letter sent to Protestants by the Compliance Division of the Oklahoma Tax Commission. The return sought a refund in the amount of $633.00. Testimony of AUDITOR and Exhibit A.

2. The Division by letter dated February 4, 2010, notified Protestants that their 2005 refund was denied as barred by statute because it was not claimed within the three year period of the due date. Exhibit B.

3. Protestants timely protested the denial of their 2005 income tax refund, asserting that they had previously filed a 2005 return which was lost by the Tax Commission. Exhibit C.

4. A review of Protestants' 2005 income tax records did not reveal the filing of a previous 2005 return by Protestants. Testimony of AUDITOR.

ISSUE

The issue presented for decision is whether Protestants' 2005 income tax refund claim is barred by the provisions of 68 O.S. 2001, § 2373.

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 ("Act")[7], 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.

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[6] *OAC*, 710:1-5-39(a).

[7] 68 O.S. 2001, § 2351 et seq.

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).

5. 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.

6. Tax year 2005 returns made on the basis of a calendar year were due and the estimated and/or withholding taxes remitted 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.

7. The burden of proof is on the taxpayer to show that the action of the Division is incorrect, and in what respect. *OAC*, 710:1-5-47. *See*, ***Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission***, 1988 OK 91, 768 P.2d 359, 362, citing *Continental Oil Co. v. Oklahoma State Bd. of Equalization*, 1976 OK 23, 570 P.2d 315, 317.

8. Protestants failed to present any evidence of a timely filed return for the 2005 tax year. Accordingly, Protestants' protest to the denial of their 2005 income tax refund claim should be denied.

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 Protestants, HUSBAND and WIFE, 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."