

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2011-01-11-03 / NON-PRECEDENTIAL
ID: P-10-651-K
DATE: JANUARY 11, 2011
DISPOSITION: DENIED
TAX TYPE: INCOME
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Several correspondences and notices regarding this proceeding have been served on Protestant, PROTESTANT, at her last known address¹. Protestant has not responded to any of these notices. 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 or about March 10, 2010, Protestant filed original 2004 and 2005 Oklahoma income tax returns claiming refunds of \$264.00 and \$142.00, respectively. The Division by letter dated April 14, 2010, denied as barred by statute the 2004 refund claim. The Division by letter dated April 13, 2010, disallowed the sales tax relief credit and Oklahoma withholding claimed on the 2005 return. The April 13, 2010 letter also proposed the assessment of income tax for the 2005 tax year in the amount of \$709.00. On April 14, 2010, the Collections Division of the Tax Commission mailed a collection letter to Protestant seeking to collect the amount of income tax assessed for the 2005 tax year, plus penalty and interest. The three (3) letters referenced above were returned to the Tax Commission on or about April 22, 2010, with the notation "Does Not Owe" on the letters regarding the 2005 tax year. The Division treated the return of the letters as a timely filed protest.

On July 23, 2010, the Division referred the protest to the Office of the Administrative Law Judges ("ALJ's Office") for further proceedings pursuant to the Uniform Tax Procedure Code² and the Rules of Practice and Procedure Before the Office of the Administrative Law Judges³. The protest was docketed as Case No. P-10-651-K and assigned to ALJ, Administrative Law Judge.⁴

A pre-hearing conference was scheduled for September 20, 2010, by *Prehearing Conference Notice* issued August 25, 2010.⁵ Protestant neither appeared at the conference nor responded to the *Notice*. By *Prehearing Conference Order* ("Order") issued September 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 was advised that a reply could be filed within thirty (30)

¹ 68 O.S. Supp. 2009, § 208.

² 68 O.S. 2001, § 201 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.

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 the protest submitted for decision upon completion of the procedural schedule⁶. Protestant did not file a response to the *Order*.

The *Division's Verified Response* (“*Verified Response*”) was filed October 8, 2010 with Exhibits A through D attached thereto. Protestant did not file a reply to the *Verified Response*. On November 12, 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. On or about March 10, 2010, Protestant filed an original resident Oklahoma income tax return for tax year 2004 claiming a refund of \$264.00. The claimed refund was calculated by subtracting the reported income tax due of \$89.00 from the reported payments and credits totaling \$353.00, consisting of Oklahoma withholding of \$193.00 and a Sales Tax Relief Credit of \$160.00. The signature block of the return reflects a date of April 21, 2010. See, 2004 State of Oklahoma Income Tax Return, Form 511, consisting of two (2) pages and the attached Department of the Treasury – Internal Revenue Service Form 4852 (Substitute for Form W-2, Wage and Tax Statement, or Form 1099-R, Distributions from Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, Etc.)⁸

2. By letter dated April 14, 2010, the Division notified Protestant of the denial of the refund claim, explaining that the refund was barred by statute since it was not filed within the allocated time of three years from the date due.⁹

3. On or about March 10, 2010, Protestant filed an original resident Oklahoma income tax return for tax year 2005 claiming a refund of \$142.00. The claimed refund was calculated by subtracting the reported income tax due of \$709.00 from the reported payments and credits totaling \$851.00, consisting of Oklahoma withholding of \$691.00 and a Sales Tax Relief Credit of \$160.00. The signature block of the return reflects a date of April 21, 2010. Exhibit A.

4. By letter dated April 13, 2010, Protestant was notified that the sales tax relief credit and Oklahoma withholding claimed on the 2005 return were disallowed, explaining that “does not qualify for sales tax credit under Oklahoma Statute Title 68-5011” and “W-2 S/1099 S were not provided/ or not in your name”. The April 13, 2010 adjustment letter proposed the assessment of income tax for the 2005 tax year in the amount of \$709.00. Exhibit B.

⁶ OAC, 710:1-5-28(b).

⁷ OAC, 710:1-5-39.

⁸ Included in the Division’s file and received into evidence by official notice. OAC, 710:1-5-36.

⁹ Received into evidence by official notice. See Note 8.

5. On April 14, 2010, the Collections Division of the Oklahoma Tax Commission mailed a collection letter to Protestant seeking to collect the amount of income tax assessed for the 2005 tax year, plus penalty and interest. Exhibit C.

6. The three (3) letters issued to Protestant with respect to the 2004 and 2005 tax years were returned to the Tax Commission on or about April 22, 2010, with the notation "Does Not Owe" on the letters regarding the 2005 tax year. Exhibits B and C, and April 14, 2010 Division letter.

7. The Division treated the return of the letters as a timely filed protest.

8. The Division by letter dated May 13, 2010, advised Protestant of the following:

We have reviewed your information on April 28, 2010, regarding the adjustment to your 2004 and 2005 forms 511.

We adjusted your 2005 return to reflect you're withholding of \$691.00, however, you had a tax due of \$709.00. This results in a tax due for 2005 of \$18.00.

Your sales tax credit for 2004 and 2005 were denied. In order to receive the sales tax credit, you must have a valid social security number.

The number that you are filing under is an Individual Taxpayer Identification Number (ITIN).

Exhibit D.

9. Protestant did not respond to the Division's May 13, 2010 letter and has not requested a hearing in any correspondences with the Tax Commission.

ISSUES

Three issues are presented for decision. The first issue is whether the Division's disallowance of the sales tax relief credit claimed on the 2004 and 2005 Oklahoma income tax returns is incorrect. The second issue is whether the 2004 and 2005 income tax refund claims are barred by statute. The third issue is whether the Division's assessment of income tax against Protestant for the 2005 tax year is timely.

CONCLUSIONS OF LAW

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

1. Jurisdiction of the parties and subject matter of this action is vested in the Tax Commission. 68 O.S. 2001, §§ 207 and 5015; 68 O.S. Supp. 2002, § 221(D).

2. Except for persons who: (1) receive temporary assistance for needy families for any month during the calendar year; (2) are convicted felons and in the custody of the Department of

Corrections as an inmate; or (3) are aliens living in Oklahoma under a temporary or restricted status, any individual who is a resident of and is domiciled in Oklahoma during the entire calendar year for which the filing is made and whose “gross household income”¹⁰ for such year does not exceed certain specified amounts may file a claim for sales tax relief. 68 O.S. Supp. 2004, § 5011(B), (C) and (E). See *OAC*, 710:50-15-96(b) and (g)(1), (3) and (4). If the credit is used to offset an individual’s income tax liability, the claim is required to be filed with the claimant’s income tax return on or before April 15 following the close of the taxable year; otherwise, the claim must be received by and in the possession of the Tax Commission on or before June 30 of each year for sales taxes paid for the preceding calendar year. 68 O.S. 2001, § 5013(A).¹¹ See *OAC*, 710:50-15-96(f)(1)(A) and (B).¹²

3. "Deductions [and credits against tax] are a matter of legislative grace rather than judicial intervention." *Flint Resources Company v. Oklahoma Tax Commission*, 1989 OK 9, 780 P.2d 665, 673. In order to be allowed, authority for the deduction or credit sought must be clearly expressed. *Home-State Royalty Corporation v. Weems*, 1935 OK 1043, 175 Okla. 340, 52 P.2d 806 (1935). None may be allowed in absence of a statutory provision therefor. *Id.* See, *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440, 54 S.Ct. 788, 78 L.Ed. 1348 (1934).

4. Rules promulgated pursuant to the Administrative Procedures Act,¹³ 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).

5. 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.

6. 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

¹⁰ Defined at 68 O.S. 2001, § 5012.

¹¹ Although not applicable herein, § 5013(A) was amended by Laws 2007, c. 155, § 15, eff. Nov. 1, 2007 to provide that when the credit is used to offset an individual’s income tax liability and the individual has been granted an extension of time in order to file an income tax return, the claim is timely if filed with the return filed pursuant to the extension.

¹² Added at 22 OK Reg 1543, eff 6-11-05; Amended at 19 Ok Reg 2056, eff 7-1-08.

¹³ 75 O.S. 2001, § 250 et seq., § 301 et seq.

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.

7. 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).

8. 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.

9. Tax year 2004 and 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 tax year were deemed paid on or about April 15, 2005 and April 15, 2006, respectively. See *OAC*, 710:50-3-3(a). To be timely, a claim for refund for the 2004 tax year was required to be filed on or before April 15, 2005 and a claim for refund for the 2005 tax year was required to be filed on or before April 15, 2006. 68 O.S. 2001, § 2373.

10. The Tax Commission is authorized to assess any tax levied under the provisions of any state tax law within the three (3) year period from the due date of the return or the actual date the return is filed, whichever period expires the later. 68 O.S. 2001, § 223(A).

11. 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.*

12. The Division did not err in disallowing the sales tax relief credits claimed by Protestant. The only evidence presented not only shows that Protestant is ineligible to claim the sales tax relief credit, but that the claims were untimely filed. Further, the only evidence presented shows that Protestant's 2004 and 2005 income tax refund claims were not timely filed and are barred by § 2373. Finally, the Division's assessment for the 2005 tax year was made within the three (3) year period following the filing of the 2005 return and is timely.

13. Protestant's protest should be denied.

DISPOSITION

WHEREFORE, based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestant, PROTESTANT be denied. It is further ORDERED that the adjusted amount of the assessment of income taxes for the 2005 tax year as reflected in the letter

of May 13, 2010, inclusive of penalty and any accrued and accruing interest, be fixed as the deficiency due and owing.

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.”