

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2014-02-25-06 / NON-PRECEDENTIAL
ID: CR-13-021-K
DATE: FEBRUARY 25, 2014
DISPOSITION: DENIED
TAX TYPE: WITHHOLDING, CLAIM FOR REFUND
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant, CLAIMANT is represented by REPRESENTATIVE, DATA PROCESSING COMPANY. ("COMPANY"). The Account Maintenance Division of the Oklahoma Tax Commission ("Division") is represented by OTC ATTORNEY, Assistant General Counsel, General Counsel's Office, Oklahoma Tax Commission.

STATEMENT OF THE CASE

By facsimile sent July 30, 2013, Claimant filed an amended Oklahoma Employers Withholding Tax Return for the period ending December 31, 2008 requesting a credit of \$870.00. The Division by letter dated August 9, 2013, denied the request as untimely filed. Claimant, by and through its representative COMPANY timely protested the denial by facsimile sent August 23, 2013.

On September 12, 2013, the Division referred the protest to the Office of the Administrative Law Judges for further proceedings in accordance with the Uniform Tax Procedure Code¹ and the Rules of Practice and Procedure before the Office of the Administrative Law Judges². The protest was docketed as Case No. CR-13-021-K and assigned to ALJ, Administrative Law Judge.³

A hearing was scheduled for October 15, 2013, by *Notice of Hearing* issued September 17, 2013.⁴ The *Brief of the Account Maintenance Division* was filed October 7, 2013 in accordance with the notice. An *Amended Brief of the Account Maintenance Division* was filed October 10, 2013.

A *Status Report* was filed by the Division on October 15, 2013, with several correspondences attached one of which was a *Reporting Agent Authorization* (power of attorney) appointing COMPANY as representative of Claimant with respect to the protested matter. By

¹ 68 O.S. 2011, § 201 et seq., as amended.

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

³ OAC 710:1-5-22(a) and (b).

⁴ 68 O.S. 2011, § 227(e) and OAC 710:1-5-24.

Order Granting Motion to Strike Hearing and Reschedule issued October 15, 2013, the hearing was stricken and rescheduled for January 14, 2014.

The hearing was held as rescheduled. Neither Claimant nor Claimant's representative appeared. The Division's representatives, SUPERVISOR, Supervisor and AUDITOR, Auditor testified with respect to the records of the Division, their reviews of Claimant's withholding tax account and the reasons for the denial of the credit request. Exhibits A through F were identified and admitted into evidence. Upon conclusion of the Division's presentation, the record was closed and the protest was submitted for decision.⁵

FINDINGS OF FACT

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

1. On January 10, 2009, Claimant authorized an electronic funds transfer of \$870.00 to the Oklahoma Tax Commission in remittance of employer withheld income taxes for the reporting period of December 31, 2008. Exhibit C.
2. Automated reports of the remittance were generated by the withholding tax computer system to coincide with and track the payment. Exhibit B through D.
3. By facsimile sent July 30, 2013, Claimant filed an amended Oklahoma Employers Withholding Tax Return for the period ending December 31, 2008, requesting a credit of \$870.00. Exhibit A.
4. Because of the date of the facsimile, the assigned Auditor reviewed the Division's mail log to determine whether the request had been previously received. Testimony of AUDITOR.
5. Finding that the mail log did not contain a previously filed request, the Auditor concluded that the request was untimely. Testimony of AUDITOR.
6. By letter dated August 9, 2013, the Division denied the request on the grounds that the amended report was filed beyond the statute of limitations. Exhibit E.
7. By facsimile sent August 23, 2013, but stamped received by the Division on August 22, 2013, Claimant by and through its representative COMPANY timely protested the credit denial. Exhibit F.

⁵ OAC 710:1-5-39(a).

8. Upon receipt of the protest, the Auditor reviewed the “auditor lists” to determine whether the credit request was on the system, but had not been processed. Testimony of AUDITOR.

ISSUE AND CONTENTIONS

The issue presented for decision is whether Claimant has shown by a preponderance of the evidence that the credit request was timely filed.

Claimant contends that a timely refund claim was filed for the amount at issue. In support of this contention, Claimant’s representative produced a copy of a letter dated August 20, 2009 that was allegedly mailed in accordance with instructions received from the Division on August 14, 2009. Claimant would further show that its representative contacted the Division on January 28, 2013, and was instructed to file an amended return for the period at issue.

The Division contends that the refund was properly denied because the claim was untimely filed. In support of this contention, the Division would show that the funds at issue were remitted on January 10, 2009, and the refund claim was made on July 30, 2013, approximately a year and a half beyond the time allowed for the recovery of the payment. In reference to Claimant’s contention that a refund claim was submitted on August 20, 2009, the Division asserts that its records do not show the claim was received and argues that Claimant has not provided any documentation evidencing the letter was sent to the Division.

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. 2011, § 227(d)⁶ and (e)⁷.

⁶ This subsection provides:

If [a] claim for refund is denied, the taxpayer may file a demand for hearing with the Commission. The demand for hearing must be filed on or before the thirtieth day after the date the notice of denial was mailed. If the taxpayer fails to file a demand for hearing, the claim for refund shall be barred.

⁷ This subsection provides:

Upon the taxpayer’s timely filing of a demand for hearing, the Commission shall set a date for hearing upon the claim for refund which date shall not be later than sixty (60) days from the date the demand for hearing was mailed. The taxpayer shall be notified of the time and place of the hearing. The hearing may be held after the sixty-day period provided by the subsection upon agreement of the

2. The refund of erroneously paid taxes⁸ is governed by § 227 of the Uniform Tax Procedure Code⁹. Section 227 provides in pertinent part:
- (a) Any taxpayer who has paid to the State of Oklahoma, through error of fact, or computation, or misinterpretation of law, any tax collected by the Tax Commission may, as hereinafter provided, be refunded the amount of such tax so erroneously paid, without interest.
 - (b) Any taxpayer who has so paid any such tax may, within three (3) years from the date of payment thereof file with the Tax Commission a verified claim for refund of such tax so erroneously paid. The Tax Commission may accept an amended sales tax, withholding tax or other report or return as a verified claim for refund if the amended report or return establishes a liability less than the original report or return previously filed.
 - (c) Said claim so filed with the Tax Commission, * * * shall specify the name of the taxpayer, the time when and period for which said tax was paid, the nature and kind of tax so paid, the amount of the tax which said taxpayer claimed was erroneously paid, the grounds upon which a refund is sought, and such other information or data relative to such payment as may be necessary to an adjustment thereof by the Tax Commission. * * * It shall be the duty of the Commission to determine what amount of refund, if any, is due as soon as practicable after such claim has been filed and advise the taxpayer about the correctness of his claim and the claim for refund shall be approved or denied by written notice to the taxpayer.
3. “The state cannot be sued for the recovery of taxes paid in absence of legislative consent to such suit, and hence the right to recover taxes so paid must be found in a statute.” *Sullivan v. Oklahoma Tax Commission*, 1954 OK 266, 283 P.2d 521,

taxpayer.

⁸ The provisions of § 227 do not apply to: (1) refunds of income tax erroneously paid, (2) estate taxes, and (3) in any case where the tax is paid after an assessment thereof is made and the assessment has become final under § 221 of the Uniform Tax Procedure Code. 68 O.S. 2011, § 227(f).

⁹ 68 O.S. 2011, § 201 et seq., as amended.

head note 1. “When examining a statutory remedy to recover tax payments, we have said that ‘[g]enerally, when a statute creates both a right and a remedy for its enforcement the statutory remedy is exclusive.’” *Apache Corp. v. Oklahoma Tax Commission*, 2004 OK 48 at ¶ 10, 98 P.3d 1061, 1064, citing *R.R. Tway, Inc. v. Oklahoma Tax Commission*, 1995 OK 129, 910 P.2d 972, 978.

4. The language of § 227(b) is plain and unambiguous, and its meaning is clear. OTC Order No. 96-09-05-015. The provisions of § 227 restrict the refund of erroneously paid taxes to a three (3) year period commencing on the date of payment of the taxes.
5. The postmark date is deemed to be the date of delivery or payment. 68 O.S. 2011, § 221.1. Section 221.1 provides in pertinent part:
 - A. For any return, claim, * * * required to be filed or any payment required to be made within a prescribed period or on or before a prescribed date under authority of any provision of a tax law of this state, the date of the postmark stamped on the cover in which the return, claim, * * * or payment is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be.
 - B. The provisions of this section shall apply only if:
 1. The postmark date falls within the prescribed period or on or before the prescribed date for filing, including any extensions, of the return, claim, * * * or for making payment, including any extension granted for making such payment; and
 2. The return, claim, * * * or payment was, within the prescribed period or on or before the prescribed date for filing, deposited in the mail in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the Oklahoma Tax Commission, agency, officer, or office with which the return, claim, * * * is required to be filed, or to which the payment is required to be made.

6. By mailing a claim, statement, or other document, the sender assumes the risk that the postmark will bear a date, on or before the last date or day, of the period prescribed for filing the document. *OAC 710:1-3-31(a)*. “If the postmark on the envelope or wrapper is not legible or the envelope is unavailable, the person who is required to file the document has the burden of proving when the postmark was made”. *OAC 710:1-3-31(b)*.
7. Rules promulgated pursuant to the Administrative Procedures Act,¹⁰ are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court. 75 O.S. 2011, § 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. 2011, § 308.2(C).
8. In administrative proceedings, the burden of proof is on the taxpayer to show in what respect the action or proposed action of the Oklahoma Tax Commission is incorrect. *OAC 710:1-5-47*; *In re Adway Properties, Inc.*, 2006 OK CIV APP 14, 130 P.3d 302; *Geoffrey, Inc. v. Oklahoma Tax Commission*, 2006 OK CIV APP 27, 132 P.3d 632. Failure to provide evidence which is sufficient to show an adjustment to the proposed assessment is warranted will result in the denial of the protest. *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.
9. The burden of proof standard is “preponderance of evidence.” 2 Am.Jur.2d *Administrative Law* § 357; *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.*
10. Two Tenth Circuit United States Court of Appeals cases examining the language of the “timely filing” provisions of the Internal Revenue Code; IRC § 7502, are instructive as the language is identical to § 221.1. In *Crook v. Commissioner of Internal Revenue Service*, 173 Fed.Appx. 653, 2006 WL 766759 (C.A. 10), the Court found at 657:

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

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

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.’

* * *

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 v. Internal Revenue Service*, 383 F.3d 1187 (10th Cir. 2004), 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.

ANALYSIS

Claimant did not present any direct evidence of an actual postmark for the letter dated August 20, 2009. The statement of Claimant’s representative that the letter was mailed to the Division is uncorroborated and insufficient to create the rebuttable presumption of receipt.

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 claim for refund of Claimant, CLAIMANT 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.”