

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2015-09-10-13 / NON-PRECEDENTIAL
ID: P-14-105-K
DATE: SEPTEMBER 10,2015
DISPOSITION: DENIED
TAX TYPE: INCOME
APPEAL: NONE TAKEN

ORDER

The above matter comes on for entry of a final order of disposition by the Oklahoma Tax Commission. Having reviewed the files and records herein, the Commission hereby adopts the Findings of Fact, Conclusions of Law and Recommendation made and entered by the Administrative Law Judge on the 4th day of August, 2015, appended hereto, together herewith shall constitute the Order of the Commission.

SO ORDERED SEP. 10, 2015

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

NOW on this ____ day of August, 2015, the above styled and numbered cause comes on for decision pursuant to assignment regularly made by the Oklahoma Tax Commission to ADMINISTRATIVE LAW JUDGE, Administrative Law Judge. Protestant, COMPANY appears by and through PRESIDENT, Protestant's President. The Compliance Division of the Oklahoma Tax Commission ("Division") is represented by OTC ATTORNEY 1, Chief Deputy General Counsel and OTC ATTORNEY 2, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

On or about September 20, 2010, Protestant filed an original 2009 Oklahoma Corporation Income Tax Return reporting a balance due of \$OMITTED and remitting the same by check dated September 16, 2010. On August 22, 2014, Protestant filed a second original 2009 Oklahoma Corporation Income Tax Return reporting a carryback of a net operating loss generated in 2010 and zero Oklahoma taxable income. The Division by letter dated September 26, 2014, notified Protestant that the 2009 refund/overpayment had been adjusted and that all or part of the same had been barred by statute since the claim was not filed within the allowed time of three (3) years from the date the tax was paid. Protestant timely protested the Division's notice.

On November 5, 2014, the protest was referred to the Office of the Administrative Law Judges for the appellate procedures mandated by the Uniform Tax Procedure Code¹ and the

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

Rules of Practice and Procedure before the Office of Administrative Law Judges². The protest was docketed as Case No. P-14-105-K and assigned to ADMINISTRATIVE LAW JUDGE, Administrative Law Judge.³

A pre-hearing teleconference was scheduled for December 18, 2014, by the *Prehearing Teleconference Notice* issued November 10, 2014.⁴ Pursuant to the *Status Report in Lieu of Prehearing Conference* filed December 18, 2014, the pre-hearing conference was considered held and the parties were directed to file a status report. Pursuant to Protestant's facsimile transmission of February 19, 2015, and the *Status Report* filed March 23, 2015, a hearing was scheduled for May 21, 2015, by *Notice of Hearing* issued March 25, 2015.

An open hearing was held as scheduled.⁵ Protestant's representative appeared and gave a statement with respect to the reasons for filing the second original return and the amended return filed with the protest. The Division called one witness: ADMINISTRATOR, Administrator, Corporate Income Tax Section of the Division who testified with respect to the records of the Division and the reason for the Division's action. Division's Exhibits A through D were identified, offered and admitted into evidence. Upon conclusion of the hearing, the record was closed and the protest was submitted for decision.

On June 11, 2015, the record was reopened to receive evidence regarding whether "the second original U.S. Corporation Income Tax Return, Form 1120 for the 2009 tax year reporting the net operating loss carryback from the 2010 tax year or other 'amended' return for the 2009 tax year was filed with the Internal Revenue Service ('IRS') and whether the IRS accepted the same." On June 16, 2015, the *Notice of the Compliance Division* was filed with the *Affidavit of ADMINISTRATOR* attached thereto, identified as Exhibit E. Protestant did not file any pleading with respect to the reopening of the record. On July 14, 2015, the record was re-closed and the protest was re-submitted for decision.⁶

FINDINGS OF FACT

Upon review of the file and records, including the recording of the hearing, the exhibits received into evidence and the submission of the Division in response to the reopening of the record, the undersigned finds:

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 Confidentiality was waived. 68 O.S. 2011, § 205.

⁶ OAC 710:1-5-39.

1. On or about September 20, 2010, an original Oklahoma Corporation Income Tax Return, Form 512 for the 2009 tax year was filed by Protestant reporting a tax balance due of \$OMITTED. Testimony of ADMINISTRATOR; Exhibit A.

2. A check in remittance of the tax due and penalty and interest in the aggregate amount of \$OMITTED for a total of \$OMITTED accompanied the filing of the return. Testimony of ADMINISTRATOR; Exhibit A.

3. On August 22, 2014, a second original Oklahoma Corporation Income Tax Return, Form 512 for the 2009 tax year was filed by Protestant reporting a tax due of zero dollars. Testimony of ADMINISTRATOR; Exhibit B.

4. The second original return could not be processed as filed and was audited by the Section. Testimony of ADMINISTRATOR.

5. The audit determined that the second original return was not a duplicate of the original return, but an amendment to the same and treated the second original return as an amended return for the 2009 tax year. Testimony of ADMINISTRATOR.

6. In addition to the difference between the reported tax balances due on the two original returns, the second original return reported a carryback of a net operating loss ("NOL") generated in the 2010 tax year which was not reported on the original return. Testimony of ADMINISTRATOR; Exhibit B.

7. Although the second original return did not report an overpayment of tax and a refund of the same, the second return was treated as a claim for refund of taxes reported on and remitted with the original return since the second return reported no taxes due. Testimony of ADMINISTRATOR; Exhibit B.

8. By letter dated September 26, 2014, the Division notified Protestant that the 2009 refund/overpayment had been adjusted and that all of the same was barred by statute since the claim was not filed within the allowed time of three (3) years from the date the tax was paid. Exhibit C.

9. Protestant timely protested the Division's notice by letter dated October 21, 2014, and marked received October 27, 2014. Exhibit D.

10. Included with the letter of protest were copies of the Division's denial letter dated September 26, 2014, an Oklahoma Amended Corporation Income Tax Return, Form 512-X for the 2009 tax year executed by the Protestant's President on October 17, 2014, an Oklahoma Wage Withholding Tax Application for Protestant executed by Protestant's President on October 15, 2014, Oklahoma Quarterly Wage Withholding Tax Returns for the fourth quarter of 2010 through the fourth quarter of 2013, and a check in remittance of the balances reported due on the withholding tax returns less the income tax refund claimed on the 2009 512-X in the amount of \$OMITTED. Exhibit D.

11. Protestant on the 2009 amended return indicates that a 2009 amended federal return was not filed. Exhibit D.

12. In the *Affidavit*, ADMINISTRATOR states under oath: (1) that she has reviewed the records and files of the Oklahoma Tax Commission (“OTC”) to determine whether Protestant’s second original U.S. Corporation Income Tax Return for the 2009 year or any other “amended” return for the 2009 tax year was filed with the Internal Revenue Service (“IRS”) and whether the IRS accepted the same; and (2) that the OTC records contain no evidence Protestant’s second original U.S. Corporation Income Tax Return for the 2009 tax year or any other “amended” return for the 2009 tax year was filed with the IRS.

ISSUE AND CONTENTIONS

The issue presented for decision is whether Protestant’s 2009 income tax refund is statutorily barred.

Protestant contends that this case is different from others and because of that the refund should be allowed. In support of this contention, Protestant argues that the company was defrauded by an employee whom in the attempt to hide her embezzlement overstated the income of the company for the 2009 tax year. Protestant further argues that this employee did not follow through with the filing of several tax documents and therefore, unaware of the filing of the original 2009 return; the second original 2009 return was filed with the correct amount of income reported.

The Division contends that because the second 2009 return was filed after March 15, 2014, the return was untimely and the refund is statutorily barred. In support of this contention, the Division argues that § 2373 does delineate any exceptions under which Protestant’s reasons for relief apply.

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, § 207(c).

2. “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, head note 1. “When examining a statutory remedy to recover tax payments, [the court has] 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.

3. 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.

4. 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.

5. State income tax is due at the time of transmitting the return required under the Act. 68 O.S. 2011, § 2375(A). Failure to pay the tax on or before the date the return is due shall cause the tax to become delinquent. *Id.*

6. “Calendar year corporation returns * * * [are] due on or before the fifteenth day of March following the close of the taxable year.” 68 O.S. 2011, § 2368(G)(3); *OAC 710:50-3-3(c)*.

7. In general, a claim for credit or refund of an overpayment of the tax imposed by the Internal Revenue Code (“IRC”) in respect of which tax the taxpayer is required to file a return shall be filed within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever period expires the later. I.R.C. § 6511(a). A special limitation period applies with respect to a claim for credit or refund which relates to an overpayment attributable to a net operating loss carryback. I.R.C. § 6511(d)(2)(A). The limitation period is that period which ends 3 years after the time prescribed by law for filing the return (including extensions thereof) for the taxable year of the net operating loss which results in such carryback. *Id.*

8. The Division follows the IRC’s special limitation period for a claim for refund which relates to an overpayment attributable to a net operating loss carryback, with the exception that an extension of the time for filing the loss year return does not extend the provisions of § 2373. *Matlock v State, ex rel. Oklahoma Tax Commission*, 2001 OK CIV APP 104, 29 P.3d 614. See, 68 O.S. 2011, § 2353(3).⁷

⁷ This definition provides:

Any term used in the Oklahoma Income Tax Act shall have the same meaning as when used in a comparable context in the Internal Revenue Code, unless a different

9. General principles of equity may not override statutory requirements for timely filing of tax refund claims. See, *Duncan Medical Services v. State ex rel. Oklahoma Tax Commission*, 1994 OK 91, 911 P.2d 247, 250, citing *Western Auto Supply Company v. Oklahoma Tax Commission*, 1958 OK 144, 328 P.2d 414, 420. The three year deadline for filing an income tax claim for refund “applies regardless of whether it is the tax agency’s error or the taxpayer’s error which leads to the overpayment of taxes.” Oklahoma Tax Commission Precedential Order No. 2006 03 23 07, citing *Jones v. Liberty Glass Co.*, 332 U.S. 524, 531 (1947).

10. In all administrative proceedings the burden of proof is on Protestant to show in what respect the action or proposed action of the Oklahoma Tax Commission is incorrect. 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.

11. Protestant’s 2009 refund is barred since the return reporting the overpayment was not filed within three years of March 15, 2011, the due date of the loss year return.

RECOMMENDATIONS

Based on the above and foregoing findings of fact and conclusions of law, it is recommended that the protest of Protestant, COMPANY, 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. 2014) 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.”

meaning is clearly required. For all taxable periods covered by the Oklahoma Income Tax Act, the tax status and all elections of all taxpayers covered by the Oklahoma Income Tax Act shall be the same for all purposes material hereto as they are for federal income tax purposes except when the Oklahoma Income Tax Act specifically provides otherwise[.]