

IN THE MAGISTRATE DIVISION  
OF THE OREGON TAX COURT

Small Claims

Income Tax

NORMAN E. TARTER,	)	
	)	
Plaintiff,	)	
	)	No. 000089C
v.	)	
	)	
DEPARTMENT OF REVENUE,	)	
STATE OF OREGON,	)	
	)	<b>DECISION AND JUDGMENT OF</b>
Defendant.	)	<b>DISMISSAL</b>

The appeal involves plaintiff's personal income tax liability for the 1985 tax year. Defendant (hereinafter referred to as the department) requested in its Answer that the court dismiss the Complaint because the appeal was not timely filed, citing ORS 305.280(2). Plaintiff claims he timely filed his 1985 return and that the liability was, or should have been, discharged under his 1989 bankruptcy. Plaintiff initiated this action after the department sent him a collection notice in December 1999.

Evidentiary hearings were held on April 3 and May 22, 2000. Plaintiff appeared on his own behalf on each occasion. Defendant appeared through Ms. Fery, an auditor with the department. Ms. Fery participated in both hearings. Ms. Gloria Carter appeared at the April 3 proceeding and Mr. Keith Chermak appeared at the May 22 proceeding. Ms. Carter works in the Department of Revenue's (department) bankruptcy unit and Mr. Chermak was working as a Collector in the department's Pendleton Office from 1983 to 1989.

## STATEMENT OF FACTS

The facts are somewhat convoluted and after several proceedings involving three different department employees, certain facts remain unclear or unknown. The following relevant facts were presented.

Plaintiff insists he filed his 1985 state return. He claims it was completed by Mr. Chermak, a department employee, in 1986.

The department had no record of receiving the 1985 return. Accordingly, it issued a Notice of Assessment for that tax year on June 22, 1992. The department's assessment notice was mailed to PO Box 976, Elgin, OR. The Elgin address was obtained from plaintiff's most recent tax return. (Def's Ex J, at 1). Plaintiff received mail at that address at one time, although he testified that he moved to Washington in February 1991. Plaintiff did not respond to the department's assessment notice.

Prior to mailing the assessment in June 1992, the department issued two notices regarding the lack of a 1985 return. The first was a letter requesting that plaintiff file a return (or explain why he was not required to file one) and the second was a letter demanding plaintiff file a return. Plaintiff did not respond to these letters.

On April 1, 1992, the department received a typed letter signed by plaintiff stating that "a friend of mine did my 1985 return and he will testify if necessary." (Def's Ex E, at 1).

Plaintiff twice filed bankruptcy, once in December 1989 and again in April 1999. The first bankruptcy was not completed because plaintiff apparently did not meet the requirements of the Chapter 13 plan. His 1989 petition resulted in a hardship discharge. Ms. Carter testified that the 1985 state tax liability was not discharged

because the return had not been filed, citing Bankruptcy Code Sections 523 and 1228. Plaintiff asserts that by law all state and federal tax returns must be filed in order to complete a Chapter 13 bankruptcy. Furthermore, plaintiff submitted a document bearing the words "Amended Exhibit B" at the top, which purportedly reflects taxes owing to the state of Oregon for 1984 through 1988. Plaintiff claims that this exhibit was part of the original bankruptcy and includes figures given to his bankruptcy attorney from the department. From this he argues that the 1985 return must have been filed on time if the department knew his 1985 tax liability in 1989. The department denies any knowledge of the document (Amended Exhibit A) but insists that in 1989 it could not have given information on plaintiff's tax liability for 1985 because no return had been filed and it had not yet assessed the account.

### **COURT'S ANALYSIS**

The department argues the appeal is untimely and should be dismissed. Plaintiff contends he filed the return in 1986 and the liability was discharged in bankruptcy. Under current law, as amended by Congress in 1984, the bankruptcy courts have exclusive jurisdiction over discharge determinations under 11 USC § 523(a)(2), (4), (6), and (15). Thus, whether the 1985 state tax liability was in fact discharged is not for this court to decide. Accordingly, in addressing the department's Motion to Dismiss the court will only determine whether the department's notice was properly issued.

Looking at the question of whether the assessment was issued in accordance with applicable law, ORS 305.265 has for years required the department to send assessments to the taxpayer's last-known address. That was the law in 1991, the latest version of the Oregon Revised Statutes at the time of the 1992 assessment. ORS

305.265(11) (1991).<sup>1</sup> The evidence shows that the department's assessment was mailed to a post office box in Elgin, which was the address it had on record in June 1992. That address was obtained from plaintiff's most recent return. (Def's Ex J, at 1). Plaintiff testified that he lived in Elgin at one time and that he received mail at that address. However, plaintiff testified that he moved to Washington in February or March 1991. According to the departments records, returns filed by plaintiff in April of 1990 and April of 1992 both show the Elgin post office box as plaintiff's address. Based on this evidence, the court concludes the assessment was properly mailed.

There is conflicting evidence as to whether plaintiff received the assessment notice. Actual receipt, however, is not required. It is sufficient that the assessment notice was mailed to the "last known address of record." ORS 305.265(11) (1991).

The court need not decide whether plaintiff filed his 1985 return in before the department's June 1992 assessment because that would only render the assessment voidable and not void. As such, a timely appeal was required to contest the assessment. See *Arnold v. Dept. of Rev.*, 12 OTR 69, 71 (1991); *Barton v. Simmons*, 129 Or 457, 466, 278 P 83 (1929).

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From the facts in evidence, it is clear that the assessment was properly mailed by the department and it was likely received by plaintiff. It is the assessment that

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<sup>1</sup> Reference to the Oregon Revised Statutes (ORS ) will be indicated in parenthesis for the statute number each time cited.

ORS 305.265(11) (1991) provides:

"Mailing of notice to the person at the person's last-known address shall constitute the giving of notice as prescribed in this section (which deals with deficiencies, payments and assessments, etc.)."

triggers the right of appeal. Plaintiff had 90 days from the date of the assessment in June 1992 to file his appeal. ORS 305.280 (1991).<sup>2</sup> Plaintiff missed that deadline by roughly seven years.

### **CONCLUSION**

Based on the foregoing, the court concludes plaintiff's appeal is untimely and that the motion to dismiss should be granted. The department's assessment was properly mailed according to applicable law and plaintiff missed the 90-day appeal period.

IT IS THE DECISION OF THE COURT that the Complaint must be dismissed as untimely.

IT IS HEREBY ADJUDGED AND DECREED that the above-entitled matter be dismissed.

Dated this \_\_\_\_ day of May, 2000.

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DAN ROBINSON  
MAGISTRATE

**THIS DOCUMENT WAS SIGNED BY MAGISTRATE DAN ROBINSON ON  
MAY 31, 2000. THE COURT FILED THIS DOCUMENT ON MAY 31, 2000.**

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<sup>2</sup> The appeal in 1991 was to the Department of Revenue. ORS 305.280(2) (1991) provides in part:

"An appeal under ORS 323.416 or from any notice of assessment or refund denial issued by the Department of Revenue with respect to a tax imposed under ORS chapter 118, 119, 308, 310, 314, 316, 317, 318, 321 or this chapter, \* \* \* shall be filed within 90 days from the date of the notice."