

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

PAUL J. FLOTO,)
)
 Plaintiff,) TC-MD 021095C
)
 v.)
)
 DEPARTMENT OF REVENUE,)
 STATE OF OREGON,)
)
 Defendant.) **DECISION**

Plaintiff has appealed Defendant’s Notice of Refund Denial for tax year 1994, dated March 4, 2002. The case management conference scheduled for December 10, 2002, was converted to a trial. Plaintiff appeared on his own behalf. Defendant appeared through Laurie Fery, an auditor with the Oregon Department of Revenue. For ease of reference the parties will be referred to as taxpayer and the department.

STATEMENT OF FACTS

The department had no record of receiving a state income tax return from taxpayer for 1994, which was due by April 17, 1995.¹ Some six years later, on August 24, 2001, the department sent taxpayer a letter requesting he file a return for 1994. Taxpayer did not respond. The department then issued a Notice and Demand to File on September 21, 2001. On October 11, 2001, the department received a return from taxpayer. The return reflected a refund and instructed the department to apply the refund to 1995. The department considered the return to be an original filing and refused to apply the refund to 1995 because the return was filed more than three years after the due date as provided in ORS 314.415. Taxpayer insists that the return was timely filed in 1995 and that

¹ April 15, 1995, was a Saturday.

the return he submitted to the department in October 2001 was only a copy of the original 1994 return.

COURT'S ANALYSIS

ORS 314.415(1)² provides in relevant part as follows:

“(b)(A) No refund shall be allowed or made after three years from the time the return was filed, or two years from the time the tax or a portion thereof was paid, whichever period expires the later, unless before the expiration of such period a claim for refund is filed by the taxpayer in compliance with ORS 305.270, **nor shall a refund claimed on an original return be allowed or made in any case unless the return is filed within three years of the due date, excluding extensions**, of the return in respect of which the tax might have been credited. If a refund is disallowed for the tax year during which excess tax was paid for any reason set forth in this paragraph, the excess shall not be allowed as a credit against any tax occurring on a return filed for a subsequent year.”

(Emphasis added.) It is clear from the statute that a taxpayer must file an original refund request within three years of the due date to prevail, whether the person desires to have the excess taxes remitted or applied to another tax year. Taxpayer in this case insists the 1994 return was timely filed and that he is entitled to the refund, which he would like applied to his 1995 state tax liability.

The general rule is that a return transmitted through the United States mail is considered to be filed “on the date shown by the cancellation mark.”

ORS 305.820(1)(a). Because the department did not receive the return there is no envelope and no postmark cancellation date. If the return was filed, it was lost in transmission. Under the statute, a return lost in transmission will be considered filed on the date it was mailed if the taxpayer: 1) “establish[es] by competent evidence satisfactory to the addressee that the [return] * * * was deposited on or before the [filing] date” in a

² All references to the Oregon Revised Statutes (ORS) are to 2001.

correctly addressed envelope; and 2) files a duplicate copy of the lost return with the department within 30 days of the date the department notifies the taxpayer it did not receive the return. ORS 305.820(1)(c)(A) & (B).

The department notified taxpayer on August 24, 2001, that it had not received a return. Taxpayer did not submit a duplicate copy of the lost return within 30 days. The return was sent in on or about October 11, 2001. Moreover, taxpayer was unable to satisfy the department that the return was filed timely. The department has promulgated an administrative rule setting forth the type of proof it will consider “satisfactory.” OAR 150-305.820(2)(b). Such proof includes a history of timely filing, proof of timely filed federal returns, and correspondence to the department about the refund. *Id.*

The court’s review is limited to whether the department abused its discretion. The court concludes it did not. By not submitting a duplicate of the return within 30 days taxpayer failed to comply with the statute. Furthermore, taxpayer did not provide any evidence of the type provided by the department’s rule to support the claim the return was timely. Taxpayer does not have a history of timely filing with the department, did not provide evidence the federal return was timely filed, and is not even certain the state return was timely filed. Taxpayer testified that he timely filed state tax returns before and after 1994 and that he made estimated payments in 1994. The department responded that taxpayer did not make estimated payments in 1994 and did not file returns in 1995 or 1996. Taxpayer countered that the 1996 return was not filed because he was suffering from clinical depression and that he assumes he timely filed the 1994 and 1995 returns because he found “copies” in his records. When questioned by the court as to whether it was possible that the returns were filled out but not filed, taxpayer testified that “in [his] state anything is possible.”

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CONCLUSION

The court concludes that the department did not abuse its discretion in determining that taxpayer's 1994 return claiming a refund was not timely filed because taxpayer did not provide a duplicate of the return within 30 days of the date the department notified taxpayer it had not received the return and taxpayer did not provide any evidence, competent or otherwise, that the return was timely filed. Taxpayer does not have a history of timely filing and is not certain himself the return was timely filed.

Based on the evidence, the court concludes taxpayer is not entitled to a refund for 1994.

Now, therefore,

IT IS THE DECISION OF THIS COURT that taxpayer's appeal, requesting that the refund for 1994 be applied to 1995, is denied.

Dated this _____ day of April, 2003.

DAN ROBINSON
MAGISTRATE

IF YOU WANT TO APPEAL THIS DECISION, FILE A COMPLAINT IN THE REGULAR DIVISION OF THE OREGON TAX COURT, FOURTH FLOOR, 1241 STATE ST., SALEM, OR 97301-2563. YOUR COMPLAINT MUST BE SUBMITTED WITHIN 60 DAYS AFTER THE DATE OF THE DECISION OR THIS DECISION BECOMES FINAL AND CANNOT BE CHANGED.

THIS DOCUMENT WAS SIGNED BY MAGISTRATE DAN ROBINSON ON APRIL 1, 2003. THE COURT FILED THIS DOCUMENT ON APRIL 1, 2003.