IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Small Claims
Income Tax

JASON SHERRETT, Plaintiff, v. DEPARTMENT OF REVENUE, STATE OF OREGON, Defendant.	))))))))))	TC-MD 030097C **DECISION AND JUDGMENT OF DISMISSAL**

This matter is before the court on Defendant's motion to dismiss, included in the Answer filed March 19, 2003. Defendant requests that the case be dismissed as untimely. The request was addressed during the May 1, 2003, case management conference. Plaintiff appeared on his own behalf. Defendant appeared through Laurie Fery, an auditor with the Department of Revenue. For ease of reference the parties will be referred to as taxpayer and the department.

STATEMENT OF FACTS

The appeal involves the 1997 tax year, for which taxpayer timely filed a state income tax return as a part-year resident. After initially granting the requested refund, the department audited the return and determined that taxpayer was not entitled to a credit for taxes paid to another state. The department therefore issued a Notice of Deficiency on January 22, 2001, which was within the 3-year window for reviewing returns provided in ORS 314.410.[1] That notice was returned as undeliverable because taxpayer no longer lived at the California address provided on the 1997 return. (Taxpayer moved about two years after that return was filed.) The department then issued a Notice of Assessment on

[1] All references to the Oregon Revised Statutes (ORS) are to 2001.

March 27, 2001. That notice was sent to the same California address as the deficiency notice. It too was returned to the department as undeliverable. After the assessment notice was returned, the department made several unsuccessful attempts to determine taxpayer's current address. Taxpayer later learned of the deficiency and assessment through a collection agency. Taxpayer telephoned the department on September 11, 2002, objecting to the lack of notice and the department's untimely action. That call came nearly one and one-half years after the assessment. On October 17, 2002, taxpayer sent the department a letter of appeal to which the department responded by letter dated February 3, 2003. In that letter the department explained that an appeal of an assessment must be filed with the Magistrate Division of the Oregon Tax Court within 90 days of the date of the assessment. Taxpayer appealed to this court on February 28, 2003, nearly two years after the assessment was issued.

Taxpayer seems to acknowledge that he erred in claiming a credit for taxes paid to another state and that he owes the tax imposed by the assessment. Taxpayer's objection is that he did not receive either the notice of deficiency or assessment and that it was therefore impossible for him to appeal on time. Moreover, taxpayer is upset that it took the department nearly three years to audit his return and issue the assessment.

ANALYSIS

The department's action was timely under the law. The department has three years from the date a return is filed to issue a deficiency. ORS 314.410(1). The deficiency was issued within that time-frame. The assessment was issued two months later and was therefore within the one-year period provided in ORS 305.265(7).

As for taxpayer's notification concern, Oregon law does not require that an assessment be received by the taxpayer to be valid. Deficiencies and assessments are

governed by ORS 305.265, and subsection (11) 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."

For obvious reasons there is no requirement that the notice be sent to the taxpayer's current address. Such a rule would place a burden on the state to keep track of or locate persons who file returns for three or four years after a return is filed. *See* ORS 314.410(1) (providing for a three-year period during which a deficiency may be issued) and ORS 305.265(7) (requiring assessments be issued within one year of the date of the deficiency). This would be so regardless of the number of times a taxpayer moves, within or outside the state, and including cases where the taxpayer's name may change. The administrative rule requires the department to use the address on the most recent return unless the taxpayer has notified the department the address is incorrect. The rule provides in relevant part:

> "(1) Notices of Deficiency and Notices of Assessment are required to be mailed to the last known address.
>
> "(2) The department shall use the address on the most recently filed return as the last known address unless the taxpayer has notified the department in writing or through a documented phone call that this address is incorrect. A documented phone call is a contemporaneous record of the substance of the phone call, made by the taxpayer, the taxpayer's authorized representative or an employee of the department and must include the date and time of the call and the names of the parties involved in the conversation."

OAR 150-305.265(11). Here the department used the address on the return and taxpayer did not notify the department the address was incorrect. Taxpayer argues the department should have contacted the Internal Revenue Service (IRS) for a newer address, particularly after the deficiency was returned. The department's rule does authorize it to contact the IRS or the Postal Service for an address. Specifically, the rule provides:

> "(3) When the department receives information that the last known address is incorrect or outdated, the department may use the following to determine the last known address:
>
> "(a) Address Information Request which is a letter sent to the United States Postal Service by the Department of Revenue verifying the taxpayer's address.
>
> "(b) IRS information when the date of the IRS information is more recent than the department's information.
>
> "(c) Address information received from the United States Postal Service or from a service using an address-updating method approved by the United States Postal Service.
>
> "(d) Any other third party information can be accepted only after contact is made with the taxpayer and the taxpayer has verified that it is a permanent address."

OAR 150-305.265(11).

Although the department may use various methods to determine a current address, it is not required to do so. As the department points out in its Answer, the rule set forth above provides that "the department **may** use" certain methods to verify an address. *See* OAR 150-305.265(11)(3). The court understands that a taxpayer often would not think to notify the revenue department in a state of former residence of an address change two years after the last return is filed with that state. However, in balancing these differing considerations, the legislature has not imposed further obligations on the department for taxpayer notification of adjustments to returns.

Having established that the assessment is valid, the court returns to the question of whether the appeal should be dismissed as untimely, as urged by the department. In response, taxpayer argues lack of receipt of the notice. The appeal of an assessment is not contingent upon receipt of the notice. The 90-day appeal period commences with the issuance of the notice. The statute provides in relevant part:

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> "(2) 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, 308, 308A, 310, 314, 316, 317, 318, 321 or this chapter, or collected pursuant to ORS 305.620, shall be filed **within 90 days after the date of the notice**."

ORS 305.280 (emphasis added). Thus, a properly "issued" notice, one sent to the taxpayer's last-known address, is final if not appealed within 90 days, unless the taxpayer chooses to pay the disputed tax and proceed with an appeal under subsection (3) within two years.[2] Taxpayer does not dispute the additional tax assessed, and proceeding under the pay and appeal provision in subsection (3) would therefore be pointless because if taxpayer paid the tax and appealed within the two year period there would be no issue to argue at trial (i.e., the tax itself is not disputed). In fact, as the court pointed out during the hearing on the department's motion, taxpayer has nothing to gain by challenging the motion because if he were to succeed in defeating the request to dismiss, the case would move forward to a consideration of the underlying action of the department and taxpayer acknowledges that he claimed the disputed credit in error. It appeared to the court during the hearing that taxpayer's real objective was to be relieved of the additional assessment, or at least the interest, because of the time it took the department to audit the return, especially when coupled with the lack of actual notice by the department. In other words, taxpayer felt that, viewing the situation in its entirety, some concession was in order.

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[2] The statute provides:

> "(3) Notwithstanding subsection (2) of this section, an appeal from a notice of assessment of taxes imposed under ORS chapter 314, 316, 317 or 318 may be filed within two years after the date the amount of tax, as shown on the notice and including appropriate penalties and interest, is paid."

ORS 305.280.

As explained more fully above, the court finds that a concession is not appropriate. The deficiency was timely, as was the assessment, the notice was mailed as required by statute, and taxpayer failed to timely appeal. Moreover, taxpayer does not dispute the tax itself. As for interest, ORS 305.220(1) provides that every deficiency or delinquency "shall bear simple interest" at the specified rate. The department's representative informed taxpayer that he could make an administrative request of the department to have all or a portion of the interest waived.

CONCLUSION

The court concludes that the department's request to dismiss taxpayer's appeal should be granted because the Complaint was not filed within the 90 day period required by statute and the notices of deficiency and assessment were timely and properly issued under governing law. Now, therefore,

IT IS ADJUDGED AND DECREED that this matter be dismissed.

Dated this ____ day of May, 2003.

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DAN ROBINSON
MAGISTRATE

THIS DOCUMENT WAS SIGNED BY MAGISTRATE DAN ROBINSON ON MAY 20, 2003. THE COURT FILED THIS DOCUMENT ON MAY 20, 2003.