

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

EDWIN J. FACKLER and JOAN A. FACKLER,)	
)	
Plaintiffs,)	TC-MD 030649F
)	
v.)	
)	
DEPARTMENT OF REVENUE, STATE OF OREGON,)	
)	
Defendant.)	DECISION

Plaintiffs appeal Defendant’s Notice of Refund Allocation, dated April 11, 2003. In its Answer filed May 19, 2003, Defendant made a motion to dismiss. This matter is before the court on Defendant’s motion.

I. STATEMENT OF FACTS

Edwin Fackler (Fackler) was chief executive officer (CEO) of Byers Industries, Inc. & Subsidiary (Byers). Byers was “closed down on April 16 [2002] by Wells Fargo and all of the assets of the Company were sold.” (Ptf’s Ltr dated Apr 19, 2003.) As CEO of Byers, Fackler filed Byers’ second quarter tax report on July 25, 2002. The report shows an amount due of \$3,164.96.¹

Because Byers was no longer operating and had unpaid tax liabilities, Defendant conducted an officers’ liability investigation to determine the individuals responsible for paying the tax. Based on information received from John Boire, President and Chief Operating Officer of Byers, as well as information provided by Fackler, Defendant determined that Fackler was personally responsible for the outstanding taxes owed by

¹ It is unclear how much of that amount, if any, was paid at the time of filing.

Byers. Defendant sent Fackler a Notice of Liability, dated December 10, 2002.² The Notice of Liability indicated \$1,390.11 in outstanding taxes remained. It also indicated that Fackler had 30 days to request a conference to review Defendant's decision and 90 days to appeal Defendant's decision to the Tax Court. On December 13, 2002, Fackler had a phone conversation with Jennifer Jolley, Revenue Agent for Defendant, about the closing of Byers. On April 11, 2003, Defendant issued the Notice of Refund Allocation indicating that \$1,440.50³ was deducted from the joint personal income tax refund due Plaintiffs as a result of unpaid tax liabilities. Simultaneously, Defendant issued a refund check to Plaintiffs for \$956.50. The Notice of Refund Allocation indicated that a spouse who is not responsible for the account listed in the notice may apply within 30 days for her share of the refund.

Plaintiffs filed an appeal with the court on April 18, 2003. Fackler denies personal responsibility for Byers' unpaid taxes, claiming that "[he] had nothing to do with the paying of the bills." (Ptf's Ltr dated Apr 19, 2003.) He "never saw the bills or the checks" and "had no 'say so' over what bills were paid." (*Id.*) He further claims that Wells Fargo "w[as] directed" to pay these taxes, but "THEY chose to withhold taxes the from the Department" upon the sale of Byers' assets. (Ptf's Ltr dated Oct 11, 2003.) (Emphasis in original.) Moreover, Fackler denies knowledge of Defendant's Notice, claiming "I only found out about it on April 14th 2003." (Ptf's Ltr dated Apr 19, 2003.) Finally, Fackler claims that a portion of the tax deducted belongs to his wife, Joan Fackler, "who had no connection with

² The Notice of Liability refers to unpaid withholding tax liabilities. However, it is clear from reviewing Byers' second quarter tax report that there were no unpaid withholding taxes. Instead, there were unpaid unemployment and TriMet taxes.

³ The difference in the amounts presumably relates to the interest that accrued between the date of the notice and the date the liability was paid.

the case whatsoever.” (Ptf’s Ltr dated Aug 7, 2003.) Joan Fackler applied for apportionment of the refund on July 11, 2003. Her request was denied as untimely.

II. ANALYSIS

There were actions Plaintiffs could have taken at different points during this dispute that may have resulted in at least partial relief. Unfortunately, those possibilities were all tied to strict statutory deadlines, which Plaintiffs missed. However, for reasons set forth below, Defendant’s motion to dismiss is denied. Notwithstanding the court’s denial of Defendant’s motion, the court is unable to grant Plaintiffs the relief they seek.

The first issue is the timeliness of Plaintiffs’ appeal of the Notice of Liability. ORS 316.207⁴ is the controlling statute. The pertinent section of the statute states:

“(3)(a) In the case of an employer that is assessed * * * the department may issue a notice of liability to any officer, employee or member * * * of such employer. * * * Within 30 days from the date the notice of liability is mailed to the officer, employee or member, such officer, employee or member shall pay the assessment, plus penalties and interest, or advise the department in writing of objections to the liability and * * * request a conference.

“(c) If neither payment nor written objection to the notice of liability is received by the department within 30 days after the notice of liability has been mailed, the notice of liability becomes final. In such event, the officer, employee or member may appeal the notice of liability to the tax court within 90 days after it became final * * *.”

ORS 316.207(3)(a), (c).

It is an “accepted rule of statutory construction that words of common usage be given their plain, natural, and ordinary meaning.” *State v. Langley*, 314 Or 247, 256, 839 P2d 692 (1992) citing *Perez v. State Farm Mutual Ins. Co.*, 289 Or 295, 299, 613 P2d 32 (1980). The statute allows a total of 120 days for a taxpayer to appeal a Notice of Liability.

⁴ All references to the Oregon Revised Statutes (ORS) are to 2001.

The taxpayer has 30 days to request a conference, and an additional 90 days to appeal to the Tax Court. If the time elapses without taxpayer action, the Department of Revenue's decision becomes final with no further appeal rights. The court has no authority to create an exception to the statute. *Arnold v. Dept. of Rev.*, 12 OTR 69, 72 (1991).

That is similar to the issue in *Glenn v. Dept. of Rev.*, OTC-MD No 021218B, WL 21675932 (July 8, 2003). In *Glenn*, the taxpayer filed her appeal two days after the time for filing an appeal from a Notice of Liability had elapsed. The court concluded there were "no exceptions that would extend or waive that strict statutory filing period." *Id.*, at *1.

In Plaintiffs' case, the Notice of Liability was dated December 10, 2002. Thirty days from the date of the notice was January 9, 2003. After that date, the Notice of Liability was final. Plaintiff had another 90 days to file an appeal with the court. That deadline fell on April 9, 2003. Plaintiffs' appeal was filed April 18, 2003. Plaintiffs missed the statutory deadline.

As this court has previously stated, "[i]t is unfortunate that taxpayers misunderstood the required appeal process, but that does not give this court a basis to ignore the statutory requirement." *Callahan v. Dept. of Rev.*, OTC-RD No 4303, WL 103416, at *2 (Feb 24, 1999). Plaintiffs claim ignorance of Fackler's liability for Byers' outstanding taxes until April 14, 2003. (Ptf's Ltr dated Apr 19, 2003.) However, Plaintiffs did not prove they did not receive the notice. See *Denney v. Dept. of Rev.*, 14 OTR 108 (1997) (discussing the burden of proof for lack of receipt).

Furthermore, Defendant has submitted evidence of a telephone conversation between Fackler and Defendant that occurred only three days after the date of the Notice of Liability. The only reasonable conclusion the court can draw is that Fackler did receive

the Notice of Liability and called Defendant in response. During that call, Fackler did not indicate a desire for a conference to contest liability. Plaintiffs did not follow the instructions listed in the notice and appeal within the time allowed. Therefore, the Notice of Liability is final. By not timely appealing Plaintiffs lost the opportunity to argue Fackler's liability for Byers' outstanding withholding taxes.

The second issue is whether Plaintiffs may appeal the Notice of Refund Allocation. ORS 305.275 is the statute that controls who may appeal to the Tax Court. Any person who is aggrieved and affected by an act, omission or determination of the Department of Revenue may appeal, if that act, omission or determination affects the property of the person making the appeal. ORS 305.275(1)(a)(A), (b). There must be no other statutory right of appeal for the grievance. ORS 305.275(1)(c). The appeal must be filed within 90 days from the act that caused the taxpayers to be aggrieved. ORS 305.280

Plaintiffs are, indeed, aggrieved and affected by an act of the Department of Revenue. The Notice of Refund Allocation reduced Plaintiffs' expected refund by \$1,440.50, money that would otherwise be Plaintiffs' property. Plaintiffs have no other statutory right of appeal. The Notice of Refund Allocation is dated April 11, 2003. Plaintiffs filed their appeal on April 18, 2003, well within the 90 days allowed by ORS 305.280. Therefore, Plaintiffs may appeal the Notice of Refund Allocation; Defendant's motion to dismiss is denied.

Because Plaintiffs lost the opportunity to argue liability, the court is limited to examining whether Defendant acted properly in using Plaintiffs' personal income tax refund to satisfy Fackler's outstanding liability. Defendant's handling of personal income tax refunds is controlled by ORS 305.270. The pertinent portion of the statute states:

“Upon receipt of a claim for refund * * * the department shall either refund the amount requested or send to the claimant a notice of any proposed adjustment to the refund claim, stating the basis upon which the adjustment is made. A proposed adjustment may either increase or decrease the amount of the refund claim * * * [i]f the proposed adjustment results in a determination by the department that some amount is refundable, the department may send the claimant the adjusted amount with the notice.”

ORS 305.270(3).⁵

The statute uses common words of ordinary usage, therefore the court gives these words their plain, ordinary meaning. *Langley*, 314 Or at 256. Failure to refund the amount requested requires Defendant to send the claimant a notice of any proposed adjustment to the refund claim and state the basis upon which the adjustment is made. Defendant did that. The Notice of Refund Allocation clearly states the amount withheld and the account that was paid. Defendant has acted within the limits of statutory authority.

There is no exception to that statutory authority. As discussed, the court is without authority to make exceptions to statutory law. *Arnold*, 12 OTR at 72. As this court noted in *Phelps v. Dept. of Rev.*, 10 OTR 162, 163 (1985), “[t]here is great temptation to force the law in order to rescue the trapped plaintiffs. However, the court is unable to find a pry bar with which to force the door.” That is because “[t]he tax statutes, by design, restrict the period of time during which actions of the [Department of Revenue] officials can be questioned. There is a need for certainty in the ongoing process of government.”

Sanderson v. Dept. of Rev., 11 OTR 74, 77 (1988). Plaintiffs’ appeal of the Notice of Refund Allocation must be denied.

⁵ OAR 150-305.270(10)(3) indicates a “taxpayer must first file a request as described in subsection (2) before an appeal can be taken to the Magistrate Division.” However, that is apparently contradicted by ORS 305.270(10) which states “[t]he claimant may appeal any notice of proposed adjustment, refund denial or notice * * *. The failure to file written objections or to request or have a conference shall not affect the rights of appeal so provided.” “Administrative rules must be consistent with an agency’s statutory authority. The agency may not alter, amend, enlarge or limit the terms of an applicable statute by rule.” *Harrison v. Taylor Lumber & Treating, Inc.*, 111 Or App 325, 328, 826 P2d 75 (1992).

The court must similarly deny the appeal relating to Defendant's denial of Joan Fackler's request to apportion Plaintiffs' refund. The Notice of Refund Allocation is dated April 11, 2003. Joan Fackler had 30 days to file a written objection, as stated on the second page of the Notice of Refund Allocation. See ORS 305.270(4)(b). If no written objections are made, the Notice of Refund Allocation becomes final as to liability.⁶ ORS 305.270(5)(b). Joan Fackler applied for apportionment of the refund on July 11, 2003. Her request was denied for the lack of timely filing. Although it is unfortunate that Plaintiffs are now without recourse to contest the Notice of Refund Allocation, the court cannot create an exception.

III. CONCLUSION

Plaintiffs did not timely appeal Fackler's liability for Byers' unpaid tax liabilities. Defendant acted within the scope of its authority in issuing the Notice of Refund Allocation. Nor did Joan Fackler timely request apportionment. Now, therefore,

IT IS THE DECISION OF THIS COURT that Plaintiffs' appeal is denied.

Dated this _____ day of December, 2003.

SALLY L. KIMSEY
MAGISTRATE

IF YOU WANT TO APPEAL THIS DECISION, FILE A COMPLAINT IN THE REGULAR DIVISION OF THE OREGON TAX COURT, BY MAILING TO: 1163 STATE STREET, SALEM, OR 97301-2563; OR BY HAND DELIVERY TO: FOURTH FLOOR, 1241 STATE STREET, SALEM, OR. YOUR COMPLAINT MUST BE SUBMITTED WITHIN 60 DAYS AFTER THE DATE OF THE DECISION OR THIS DECISION BECOMES FINAL AND CANNOT BE CHANGED.

⁶ The only remaining issue is whether the Notice of Refund Allocation was properly issued. See above for a discussion of that issue.

**THIS DOCUMENT WAS SIGNED BY MAGISTRATE SALLY L. KIMSEY ON
DECEMBER 4, 2003. THE COURT FILED THIS DOCUMENT ON DECEMBER 4,
2003.**