

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

SETH COHN,)	
)	
Plaintiff,)	TC-MD 031033A
)	
v.)	
)	
DEPARTMENT OF REVENUE,)	
State of Oregon,)	
)	
Defendant.)	DECISION

Plaintiff (taxpayer) appealed Defendant’s assertion of income tax liabilities for the 1999, 2000, and 2001 tax years. Taxpayer appeared and made his arguments. Defendant Department of Revenue (the department), through its counsel, Jerry Bronner, moved for summary judgment, damages, and attorney fees (motion).

The issue presented in this appeal is whether ORS 305.860 to 305.900,¹ known as the “Taxpayer Bill of Rights” shields taxpayer from the department’s assessment of tax, interest, and penalties for the years at issue.

I. STATEMENT OF FACTS

Taxpayer did not file Oregon personal income tax returns for the 1999, 2000, and 2001 tax years. On July 30, 2003, the department issued Notices of Determination and Assessment for each of those tax years. The notices declare that taxpayer had not responded to the department’s previous requests that taxpayer file a return or explain why no return is due. The notices state that the department has information in its possession that shows taxpayer received income subject to Oregon tax. The notices go on to identify taxpayer’s income, and present the corresponding tax, penalty, and interest calculated as due from taxpayer. The notices assert that

¹ All references to the Oregon Revised Statutes (ORS) are to 1997, the edition applicable to the first tax year at issue, as none of the statutes referenced in this Decision have been amended since 1995.

this was done with the best information available to the department. The notices explain that taxpayer may contact the department to either adjust the amounts or file returns. A statement of how to appeal that act of the department to the Tax Court was included as an integral part of each Notice of Determination and Assessment.

On September 24, 2003, the department sent taxpayer Demands for Payment and Intent to Take Levy Action for the amounts set out in the Notices of Determination and Assessment. Those Demands for Payment warned that if payment, or arrangements to make payment, were not made in 30 days, then the department intended to issue a Dstraint Warrant.

Taxpayer filed his Complaint with this court on October 20, 2003. Giving the allegations contained in the Complaint their broadest possible reading, taxpayer asserts he should be relieved from the assessments, interest, and penalties because of his rights and privileges under ORS 305.145; ORS 305.150; ORS 305.155; and ORS 305.860 to 305.900.

In the interval after the pleadings were filed, but before the department filed its motion, the court permitted taxpayer to access the department's materials through requests made under ORS chapter 192. Although taxpayer asserts he would discover more events if additional time and resources were brought to bear, at this point he is prepared to present two incidents as illustrative of the department's misconduct. The first is that the Demand for Payment did not inform taxpayer that the Dstraint Warrant would not issue if taxpayer appealed to the Tax Court. The second is that, on or about November 26, 2003, the department's employee is asserted to have told taxpayer that the department was going to take taxpayer's liabilities to warrant, despite the fact that the appeal to the Tax Court was pending.

II. ANALYSIS

In order to test the balance between taxpayer's prerogatives under "The Taxpayer Bill of Rights" and the department's assessment of tax, interest, and penalties, it is necessary to identify

precisely what rights the legislation confers. The rights given under the bill fall into the following groups.

1. *Rights to a written explanation:* taxpayers have the right to request and receive a written statement explaining their rights and the obligations of the department during an audit (ORS 305.860(1)(a)); appeal procedures (ORS 305.860(1)(b)); how to file refund claims and complaints (ORS 305.860(1)(c)); and the department's enforcement procedures (ORS 305.860(1)(d)). Those rights to an explanation are to be set out in a document that is available upon request, and also as part of any notices. ORS 305.860(2); ORS 305.875(1). A clear explanation is also required to accompany any asserted underpayment of tax, interest, or penalties whenever those amounts are first presented to the taxpayer. ORS 305.885.
2. *Rights during meetings:* taxpayers have a right to oral explanations by the department's officers and employees during audits, conferences, and meetings, including those regarding the collection process. ORS 305.875(1)(a) and (b). Other rights given to taxpayers include the right to recordings (ORS 305.875(2)(3)) and the right to be represented (ORS 305.875(4)(5)(6)).
3. *Rights as to manner of collection:* taxpayers have the right to satisfy their liabilities through installment payments. ORS 305.890. A warrant is typically required before the department may take collection action. ORS 305.895.
4. *Rights as to Department of Revenue personnel:* department employees cannot be evaluated on the basis of the amount of tax collected. ORS 305.870. A taxpayer has a right to a waiver of interest or penalties when an officer or employee of the department misleads that individual. ORS 305.880.

When applying those rights to taxpayer's situation, the court cannot see where any violation occurred. ORS 305.885 requires the department to present its reasoning in its initial assertion that tax, interest, and penalties are owing. Taxpayer got that message when he was

informed by the department that he had undeclared Oregon income, had not filed returns, and ought to file returns and pay the tax or, in the alternative, show why no tax was due. That message was repeated in the department's requests that taxpayer file returns, and the department's Notices of Determination and Assessment declaring that, as taxpayer had not filed returns, the department had calculated a balance due and owing.

No other violation of taxpayer's rights to a written explanation occurred. Taxpayer did not request any statement from the agency, so there is no violation of ORS 305.860(1)(a)(b)(c) or (d). The Notices of Determination and Assessment for each year contain the explanatory statement as to how to appeal required by ORS 305.860(2). Taxpayer never met with the department prior to filing the appeals, so there was no violation of ORS 305.875 regarding the rights of taxpayers at meetings. As of yet, no collection action has been taken against taxpayer, so ORS 305.890 and ORS 305.895 do not apply.

There remains to be considered taxpayer's most specific complaints that the department misled taxpayer twice and so violated ORS 305.880. The first is taxpayer's assertion that he was misled insofar as the department's Demand for Payment did not inform taxpayer that the Distraint Warrant would not issue if taxpayer appealed to the Tax Court. The second is that, on or about November 26, 2003, the department's employee is asserted to have told taxpayer that the department was going to take taxpayer's liabilities to warrant, despite the fact that the appeal to the Tax Court was pending. In fact, no warrant issued.

Neither of those allegations are misleading. While the department's Demand for Payment did not explain that no warrant would issue if an appeal was taken to Tax Court, the reason that the warrant would not issue under those circumstances is because the underlying tax liability was disputed. The department had already given a comprehensive explanation as to how to appeal that liability as part of the Notices of Determination and Assessment. As to the remaining point,

that is best dealt with by reducing the situation to the statement that the department said it was going to take the matter to warrant, but did not. Although the statement of intended action may have been wrong, it did not lead taxpayer to engage in a detrimental course of conduct and was promptly cured by the department's own actions.

The essence of this case is that taxpayer, for reasons unknown to the court, did not file returns for a series of years. The department became aware of that and took action. Taxpayer did not respond until the department announced it would take the matter to warrant. At that point the appeal was filed with the Tax Court. The impression left with the court is not that taxpayer was a victim whose rights were violated by the department. Instead, taxpayer appears as a desperate individual looking for escape from a painful situation. ORS 305.860 to 305.900 do not provide that avenue.

Neither do the other statutes cited by taxpayer, ORS 305.145, ORS 305.150, and ORS 305.155. As ORS 305.145 is the companion statute to ORS 305.880, the previous analysis applies to both laws. As for ORS 305.150 and ORS 305.155, those are statutes that, if they apply at all, apply according to the department's discretion. The department has correctly applied its discretion here.

The department's motion for frivolous appeal damages and attorney fees remains. Under ORS 20.105 and ORS 305.437, damages and attorney fees must be awarded if the court finds that the appeal is frivolous. Although the preceding analysis shows that the department has a strong case, the court is struck that this is a matter of first impression. Counsel could not direct the court, nor could the court discover on its own, any authority discussing the Taxpayer Bill of Rights at all, let alone in the context of balancing those rights against Notices of Determination and Assessment. The court cannot, in good conscience, say any matter that requires as much discussion and analysis as that addressed in this decision was "frivolous," as that term is used in

the statutes. However, the court warns that a matter is a case of first impression only once. If faced with similar facts and argument during a subsequent appeal, the court may choose to agree with the department and follow the statute's mandatory award of damages and such attorney fees as are proper.

III. CONCLUSION

Now, therefore,

IT IS THE DECISION OF THIS COURT that the appeal is denied. Defendant's request for damages and attorney fees is also denied.

Dated this _____ day of July 2004.

SCOT A. SIDERAS
MAGISTRATE

THIS DOCUMENT WAS SIGNED BY MAGISTRATE SCOT SIDERAS ON JULY 28, 2004. THE COURT FILED THIS DOCUMENT ON JULY 28, 2004.

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.