

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

STEVEN M. JOSSI)	
and SARA E. JOSSI,)	
)	
Plaintiffs,)	TC-MD 040991E
)	
v.)	
)	
DEPARTMENT OF REVENUE,)	
State of Oregon,)	
)	
Defendant.)	DECISION OF DISMISSAL

This matter is before the court on Defendant’s request that the above-entitled matter be dismissed. During the case management conference held November 23, 2004, the parties agreed to submit the case to the court for decision. Steven M. Jossi (Jossi) appeared on behalf of Plaintiffs. Nancy Grigorieff appeared on behalf of Defendant.

I. STATEMENT OF FACTS

Plaintiffs have filed returns with the State of Oregon for many years. As testified to by Jossi, Plaintiffs typically file their returns late, but always within the three-year window for receiving refunds. Jossi explained that Plaintiffs’ income situation varies from year to year and, as a result, it is often unclear what their tax situation is from time to time. According to Jossi, Plaintiffs have always ensured they had enough money “on deposit” with the state to prevent them from being in a situation of owing money on a late return.

For 1999, Plaintiffs claim they filed their return in February 2002. Their return showed a refund due of \$6,297, which they requested be applied as a payment toward their 2000 liability. In May 2003, Plaintiffs filed their 2000 return. After reviewing the 2000 return, Defendant notified Plaintiffs it was reducing the requested refund by the amount claimed to have been carried forward from 1999. Defendant advised Plaintiffs that it had no record of a 1999 return

being filed. In response to Defendant's notice, Plaintiffs promptly filed a copy of their 1999 state return on September 9, 2003. After reviewing it, Defendant denied the refund as being made outside the three-year period allowed under ORS 314.415.¹ Defendant used the September 9, 2003, date as the filing date in its analysis.

Plaintiffs filed a written objection to Defendant's determination. Plaintiffs argued that they filed the return in February 2002 and, using that date, they were within the three-year window for receiving the refund. In a decision dated June 15, 2004, Defendant advised Plaintiffs that, under the provisions of ORS 305.820 and OAR 150-305.820, Plaintiffs failed to establish that the return had been filed in February 2002. As a result, Defendant affirmed its denial of the refund.

On September 15, 2004, Plaintiff mailed a Complaint to this court through a private carrier challenging Defendant's determination and requesting their refund for 1999 be allowed. Defendant claims its decision denying the refund should be affirmed. In addition, Defendant claims the court should dismiss the appeal because Plaintiffs failed to file the appeal within 90 days of Defendant's decision.

II. ANALYSIS

ORS 305.280(2) provides that an appeal from a refund denial "**shall** be filed within 90 days after the date of the notice." (Emphasis added.) Defendant issued its decision denying Plaintiffs' refund claim on June 15, 2004. The 90th day to appeal Defendant's decision fell on September 13, 2004. Plaintiffs did not mail their Complaint until September 15, 2004, and the court did not receive it until September 16, 2004.² Whether the court uses the mail date or the

¹ All references to the Oregon Revised Statutes (ORS) and Oregon Administrative Rules (OAR) are to 2003.

² Plaintiffs mailed their Complaint through a private delivery service rather than the United States mail. The court uses the date of mailing as the filing date only when the Complaint is submitted through the United States mail. See ORS 305.418. Otherwise, the filing date is the date the court receives the Complaint.

receipt date as the date of filing, the Complaint was filed after the 90-day appeal period had expired.

Jossi offers no reason for the late filing other than he miscounted the days. In any case, the 90-day appeal deadline is mandatory and the court is not allowed to deviate from it. As a result, the court finds it must dismiss Plaintiffs' appeal because they failed to file it within 90 days of Defendant's refund denial.

The court notes, however, that even if Plaintiffs had timely filed their appeal, they would not have received relief in this court. Plaintiffs are appealing Defendant's determination that Plaintiffs failed to establish through competent evidence that they had timely filed their 1999 return. Defendant made its determination under the provisions of ORS 305.820, which states, in pertinent part:

“(1) Any writing or remittance required by law to be filed with or made to the Department of Revenue * * * which is:

“* * * * *

“(c) Lost in transmission through the United States mail or private express carrier, shall be deemed filed and received on the date it was mailed or deposited for transmittal if the sender:

“(A) Can establish by **competent evidence satisfactory to the addressee** that the writing or remittance was deposited on or before the date due for filing in the United States mail, or with a private express carrier, and addressed correctly to the addressee; and

“(B) Files with the addressee a duplicate of the lost writing or remittance within 30 days after written notification is given by the addressee of its failure to receive such writing or remittance.”

(Emphasis added.)

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OAR 150-305.820 sets forth factors for Defendant to consider when determining whether a taxpayer has provided competent evidence of a timely filing. The rule states, in pertinent part:

“(2) If the department has no record of receiving a return, the taxpayer may be able to establish satisfactory proof of timely mailing. Examples of evidence the department will consider include:

“(a) A history of timely filing returns with the department;

“(b) Proof of timely filed federal returns;

“(c) Written documentation from the taxpayer which would indicate that the taxpayer had timely filed. Such documentation may include correspondence to the department about refunds not received, or about checks for payment of tax which remain uncashed.”

OAR 150-305.820.

The court reviews Defendant’s determination under ORS 305.820 for an abuse of discretion. *See Jackson County Tax Collector v. Dept. of Rev.*, 12 OTR 498, 500 (1993). As a consequence, the court is not evaluating de novo (or “anew”) whether Plaintiffs submitted satisfactory evidence that they mailed the return in February 2002. Instead, the court reviews only whether Defendant abused its discretion in determining satisfactory evidence was not provided. In doing so, the court is limited to determining whether Defendant “acted ‘capriciously or arrived at a conclusion which was clearly wrong.’” *Eyler v. Dept. of Rev.* 14 OTR 160, 162 (1997) (describing the court’s review of discretionary acts by the Department of Revenue) (citation omitted).

In review of the facts, Plaintiffs satisfied none of the rule requirements. Granted, by requesting that the refund be applied to their 2000 liability, Plaintiffs would have had no reason to look for cancelled checks or payments in the mail. However, they did not provide proof of a timely filed federal return and they do not have a history of timely filing returns with Defendant. Plaintiffs argue their history of filing late - but within three years of the due date - returns shows a pattern. It does, but not the pattern expected by the rule. As a result, Defendant did not abuse

its discretion in denying Plaintiffs' refund claim.

III. CONCLUSION

The court finds Plaintiffs failed to timely file their appeal with this court. As a result, the court finds the appeal should be dismissed. Now, therefore,

IT IS THE DECISION OF THIS COURT that the above-entitled matter be dismissed.

Dated this _____ day of December 2004.

COYREEN R. WEIDNER
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.

THIS DOCUMENT WAS SIGNED BY MAGISTRATE COYREEN R. WEIDNER DECEMBER 9, 2004. THE COURT FILED THIS DOCUMENT DECEMBER 9, 2004.