

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Tobacco Tax

LAL SIDHU and M & S MARKET,)	
)	
Plaintiffs,)	TC-MD 050852E
)	
v.)	
)	
DEPARTMENT OF REVENUE,)	
State of Oregon,)	
)	
Defendant.)	DECISION OF DISMISSAL

This matter is before the court on the Department of Revenue’s Motion to Dismiss (Motion to Dismiss) filed November 8, 2005. Defendant claims Plaintiffs failed to file their appeal with the court within the time limited by statute. The court discussed the Motion to Dismiss with the parties during the case management conference held January 3, 2006. Ellen Bewley (Bewley), CPA, appeared on behalf of Plaintiffs. Joseph A. Laronge, Assistant Attorney General, appeared on behalf of Defendant. Following the conference, the court granted Plaintiffs time to file a written response to the Motion to Dismiss and allowed Defendant opportunity for reply. Plaintiffs filed their response January 9, 2006. Defendant did not file a reply. The matter is ready for ruling.

I. STATEMENT OF FACTS

On January 7, 2005, Defendant issued Notices of Tax Assessment, which assessed Tobacco Products Taxes for the third and fourth quarters of 2000 and the first quarter of 2001. The notices advised Plaintiffs that, if they disagreed with the assessments, they should file an appeal with the court. On January 21, 2005, Bewley sent a letter to Defendant contesting the assessments. On February 1, 2005, Fred Nichol, an auditor for Defendant, telephoned Bewley and explained that Plaintiffs must file their appeal with the court. Plaintiffs contend the

telephone call occurred not on February 1, 2005, but sometime after February 14, 2005, and that Nichol provided them with “further information.” (Ptf’s Resp at 1.)

On June 9, 2005, Plaintiffs filed another letter with Defendant. On July 29, 2005, Defendant responded with a letter explaining that an appeal must be filed with the court. The letter explained that Defendant did not have jurisdiction to hear appeals of assessments. On August 22, 2005, Plaintiffs telephoned Nichol to discuss the assessments. Nichol again explained the appeals process and faxed Plaintiffs information on appeals. According to Plaintiffs, Nichol advised them to send their appeal to Defendant. That same date, Plaintiffs filed another letter of appeal with Defendant. On September 15, 2005, Defendant once again responded with a letter outlining the history of the case and observing that Defendant would begin to pursue collection because Plaintiffs had not yet filed an appeal with the court. On September 23, 2005, Plaintiffs submitted their appeal to this court. In response, Defendant filed its Motion to Dismiss, claiming the appeal should be dismissed because Plaintiffs failed to appeal within the time limited by statute.

II. ANALYSIS

A person aggrieved by an act of Defendant may file an appeal with this court. *See* ORS 305.275.¹ The time limits for appealing to the court are found in ORS 305.280. Subsection two addresses when a taxpayer must file an appeal to the court from an assessment notice. The statute states, in pertinent part:

“(2) An appeal under * * * ORS 323.623 [relating to tobacco tax assessments] * * * *shall* be filed within 90 days after the date of the notice.”

ORS 305.280(2) (emphasis added).

¹ All references to the Oregon Revised Statutes (ORS) are to 2003.

Defendant issued the assessment notices January 7, 2005. Plaintiffs filed their appeal with this court September 23, 2005, several months after the appeal period had expired. As a result, Plaintiffs' appeal is not timely. Plaintiffs argue they timely appealed the assessments by sending letters to Defendant. However, once Defendant issues an assessment, Defendant no longer has authority to adjust it. Appeals *must* be filed with the court. Plaintiffs were advised of their appeal rights quite clearly on the assessment notices. On page two of each notice, it states:

“IF YOU DISAGREE WITH THIS NOTICE OF ASSESSMENT, YOU HAVE THE RIGHT TO APPEAL TO THE OREGON TAX COURT. You must appeal to the Magistrate Division of the Oregon Tax Court within 90 days from the date of the Notice of Assessment.

“You can appeal to the Magistrate Division by filing a written complaint. Visit the Oregon Tax Court Web site at www.oregon.gov/OJD or contact the Magistrate Division to get a complaint form. Mail a signed complaint form along with the filing fee and a copy of this notice to:

“Oregon Tax Court
Magistrate Division
1163 State Street
Salem, OR 97301-2563

503-986-5650 or TTY 503-986-5651
Internet: www.oregon.gov/OJD

“IF YOU DO NOT APPEAL ON TIME, YOUR APPEAL RIGHTS EXPIRE, AND THE ADJUSTMENTS ARE FINAL.”

(Notices of Tax Assessment at 2) (emphasis in original).

Plaintiffs claim the court should excuse their untimely filing because Defendant provided them with “wrong information regarding procedures.” (Ptf’s Resp at 1-2.) Plaintiffs, however, have provided no evidence to support their claim that Defendant provided them with wrong information. Instead, all of the documentary evidence suggests that, in fact, Defendant consistently provided Plaintiffs with the correct information for appeals. First, Plaintiffs received notice of their appeal rights on the assessment notices. As quoted above, the language is clear

that an appeal must be filed with the Oregon Tax Court. The notice also cautions that failing to file an appeal on time will result in a loss of those appeal rights. Second, Defendant's letter of July 29, 2005, instructs Plaintiffs to file their appeal with the court. Finally, Defendant's September 23, 2005, letter explains that an appeal should be filed with the court. All written correspondence advises Plaintiffs to appeal to the court.

Plaintiffs claim that, during the August 22, 2005, telephone discussion with Nichol, he told them to file their appeal with Defendant. That allegation, however, runs counter to Nichol's prior instructions to appeal to this court. There is no reason to believe Nichol would have advised differently at that time, particularly given the fact that he followed up with another letter advising them they should file their letter appeal with the court. Furthermore, any misadvice at that point was harmless because Plaintiffs were already past the appeal deadline.

Plaintiffs claim it was "pretty easy to get confused as to what step [they] were on and who needed what to resolve the problem." (Ptf's' Resp at 2.) Any confusion, however, was the result of Plaintiffs' simple failure to adequately read the appeal rights language on the notices and heed the warnings of Defendant's staff. Defendant caused no confusion in this matter. Plaintiffs' failure to timely file their appeal with the court was the result of their own inaction.

III. CONCLUSION

The court finds that Plaintiffs failed to timely appeal the assessment notices to this court. As a result, the court finds the appeal must be dismissed. Now, therefore,

///

///

///

///

///

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

Dated this _____ day of January 2006.

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 January 25, 2006 .
The Court filed and entered this document January 25, 2006.***