

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

GEORGE R. SULLIVAN)	
and SVITLANA SULLIVAN,)	
)	
Plaintiffs,)	TC-MD 080833C
)	
v.)	
)	
DEPARTMENT OF REVENUE,)	
State of Oregon,)	
)	
Defendant.)	DECISION

This matter is before the court on the parties’ request at the August 18, 2008, initial case management conference, that the court render a decision based on the pleadings, plus a few comments from George Sullivan (Sullivan), who appeared for Plaintiffs. Defendant was represented by Laurie Fery, auditor with the Department of Revenue (Department). Plaintiffs have appealed Defendant’s Notice of Deficiency Assessment for 2005, issued June 24, 2008.

I. STATEMENT OF FACTS

Defendant received Plaintiffs’ original state income tax returns for tax years 2002 through 2006 on February 6, 2008. The returns for 2002, 2003, and 2004 each reported refunds. Plaintiffs requested each of those refunds be applied to the following year as estimated tax payments. The 2002 return reported a \$489 refund, which Plaintiffs requested be applied to 2003 as an estimated payment. The 2003 return reported an estimated tax payment of \$489 (from the 2002 refund) and a refund of \$651, which Plaintiffs requested be applied to 2004 as an estimated tax payment. The 2004 return claimed an estimated tax payment of \$651 and a refund of \$748, which Plaintiffs requested be applied to 2005 as an estimated tax payment. Finally, the 2005 return claimed an estimated tax payment of \$748 (from 2004).

Defendant reviewed those returns and issued an assessment for 2005 which denied the \$748 estimated tax payment, and imposed a tax of \$651, plus a penalty of \$650.62, and accumulated interest of \$118.57, for a balance due as of June 24, 2008, of \$1,420.19. Defendant denied Plaintiffs' request that the \$489 reported refund for 2002 be applied to 2003 based on its understanding of ORS 314.415,¹ because the return was filed more than three years after the due date. Defendant made a similar determination for 2003 because of the three-year limitation in ORS 314.415. As a result, Defendant disallowed as an estimated tax payment for 2004 the \$651 refund Plaintiffs reported on their 2003 return that they requested be applied to 2004. That adjustment reduced Plaintiffs' 2004 reported refund from \$748 to \$97. Defendant applied the adjusted 2004 refund of \$97 to 2005 as a "regular payment" received February 6, 2008 (the date the return was received). Because the 2004 "refund" was reduced to \$97, and allowed as a payment as of February 6, 2008, Defendant did not allow the estimated payment of \$748 (the refund reported by Plaintiffs for 2004, and requested to be applied to 2005) but, instead, issued a deficiency in the amount of \$651, plus a 100 percent penalty and interest, as explained above.

Plaintiffs find it odd that, although they had refunds due, which they asked Defendant to apply to subsequent years, Defendant refused to allow the refunds as estimated payments and, instead, assessed a tax to pay for 2005 in the amount of \$651, plus penalty and interest. Sullivan concluded by stating his general objection, or at least surprise, that, not only do Plaintiffs not get their 2005 refund, but get penalized when, in fact, they really did not owe any money.

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¹ All references to the Oregon Revised Statutes (ORS) are to 2007.

II. ANALYSIS

A. Tax

ORS 314.415(2)(a) precludes the Department from making or allowing a refund where an original return is not filed within three years of the due date of the return, excluding extensions. The statute provides in relevant part as follows: “if the original return is not filed within three years of the due date, excluding extensions, of the return, the department may allow or make a refund only of amounts paid within two years from the date of the filing of the claim for refund.” Plaintiffs’ 2002 and 2003 returns were not filed within three years of the due date. The 2002 return was due April 15, 2003, and the 2003 return was due April 15, 2004. Both returns were filed February 6, 2008. The statutory three year deadline for a refund for the 2003 year was April 15, 2007. Plaintiffs missed that date by nearly a year. Moreover, Plaintiffs did not pay any amounts within two years from the date of filing their refund claims (returns), therefore, the exception to the refund limitation does not apply.

Plaintiffs did not actually request the refunds for 2002 and 2003, but instead asked that their 2002 and 2003 refunds be applied to the following years (2003 and 2004, respectively) as estimated tax payments. ORS 314.415(2)(a) bars that request. The relevant language of the statute provides: “[i]f a refund is disallowed for the tax year during which excess tax was paid for any reason set forth in this subsection, *the department may not allow the excess as a credit against any tax occurring on a return filed for a subsequent year.*” (Emphasis added.) Plaintiffs’ 2002 and 2003 refunds were disallowed, as explained above, and the amounts claimed cannot therefore be allowed as credits for 2003 and 2004, as Plaintiffs requested on their untimely returns.

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Moving on to 2004, Plaintiffs' return for that year claimed a \$651 estimated tax payment based on the 2003 refund they reported, which Defendant properly denied under ORS 314.415, as explained above. Accordingly, Plaintiffs' 2004 return had to be adjusted to remove the wrongly reported \$651 estimated tax payment. That adjustment reduced Plaintiffs' refund from \$748 to \$97.

That brings the court to 2005. Defendant correctly credited the adjusted 2004 refund of \$97 to 2005 as a "regular payment" rather than an "estimated tax payment" because estimated payments are those received on or before the due date of the return. ORS 316.563 to ORS 316.583. The \$97 was credited as of the date the 2004 return was *received*, which was February 6, 2008, as provided in ORS 316.583 and the corresponding administrative rule. ORS 316.583(3), which applies to untimely filed returns, provides that the taxpayer may elect "to have the overpayment credited against an installment of estimated tax for a subsequent taxable year, * * * [but] [t]he amount credited shall be deemed paid as estimated tax *on the date the return was filed.*" (Emphasis added.) *See also* OAR 150-316.583(2)(b) (providing that the "[o]verpayments shall be applied to the extent approved on review and *as of the date the return is filed*") (Emphasis added.)² Defendant therefore correctly applied the reduced 2004 refund of \$97 to 2005, as of February 6, 2008. Defendant correctly disallowed the 2005 estimated payment from 2004 in the amount of \$748 and, instead, applied only \$97. Accordingly, the difference of \$651³ was assessed for 2005.

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² All references to the Oregon Administrative Rules are to those in effect in 2008.

³ \$748 (claimed refund for 2005) less \$97 (2005 payment allowed) = \$651 (deficiency assessment).

B. *Penalties and Interest.*

Defendant imposed a penalty of \$650.62 for 2005. The tax Defendant assessed for 2005 was \$651. Defendant also imposed interest on the tax. Plaintiffs object to penalty and interest charges.

ORS 305.220 provides that “every deficiency or delinquency arising under any law administered by the Department of Revenue shall bear simple interest at the rate of five-sixths of one percent per month or fraction thereof.”⁴ The starting date for the imposition of interest is “one day after the due date of the return, excluding extensions.” OAR 150-305.220(1)-(2). Defendant issued a \$651 deficiency for 2005, which it subsequently assessed. There is no assertion, nor indication, that Defendant erred in the calculation of interest.

Defendant also imposed a penalty equal to 100 percent of the tax. Authority for that is found in ORS 305.992, which provides in relevant part, “[i]f any returns * * * are not filed for three consecutive years by the due date (including the extensions) of the return required for the third consecutive year, there shall be a penalty for each year of 100 percent of the tax liability determined after credits and prepayments for each such year.” ORS 305.992(1). Plaintiffs did not file returns for more than three consecutive years, and Defendant was statutorily required to impose the 100 percent penalty.

The court has concluded that Plaintiffs were subject to penalty and interest charges. Requests for discretionary waiver of penalty and interest charges cannot be heard by the court, but must be submitted to the Department. ORS 305.560 (1)(a) (precluding appeals for discretionary waiver of penalty or interest); *Pelett v. Dept. of Rev.*, 11 OTR 364, 366 (1990)

⁴ The Department’s rule provides that “[f]or interest periods beginning on or after January 1, 2007, unless otherwise provided by law, every deficiency and delinquency * * * will bear interest at the rate of .75 percent per month.” OAR 150-305.220(1)-(1).

(explaining that “[t]he clear import of [ORS 305.560] is that the legislature did not intend this court to review [the Department’s] discretion in waiving penalties and interest”).

III. CONCLUSION

For the reasons set forth above, the court concludes that Defendant correctly adjusted Plaintiffs’ 2005 return by denying the \$748 estimated tax payment Plaintiffs requested be carried forward from 2004, and assessing a \$651 tax, plus a penalty equal to 100 percent of the tax (\$651), plus statutory interest. Plaintiffs were not entitled to have refunds from 2002 through 2004 carried forward to subsequent years because the returns for those years were not filed within three years of the due dates. Denial of those amounts as estimated tax payments was appropriate and resulted in the adjustment to Plaintiffs’ 2005 return, generating the \$651 tax. Moreover, because Plaintiffs failed to file returns for three consecutive years by the due date of the return for the third year, a 100 percent penalty was required. Additionally, interest was imposed for 2005 because the return was not timely filed. Finally, the court does not have the legal authority to consider Plaintiffs’ request for discretionary waiver of penalty and interest. Now, therefore,

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

Dated this _____ day of September 2008.

DAN ROBINSON
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 Dan Robinson on September 19, 2008.
The Court filed and entered this document on September 19, 2008.*