



FILED
GA. TAX TRIBUNAL

**BEFORE THE GEORGIA TAX TRIBUNAL
STATE OF GEORGIA**

JUN 03 2014

LEROY E. PARKER,

Petitioner,

v.

**DOUGLAS J. MACGINNITIE,
COMMISSIONER, GEORGIA,
DEPARTMENT OF REVENUE,**

Respondent.

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Yvonne Bouras
Yvonne Bouras
Tax Tribunal Administrator

**TAX TRIBUNAL DOCKET
NO.: TAX - IIT - 1422684**

DECISION

2014-8 Ga. Tax Tribunal, June 3, 2014

I. INTRODUCTION

This matter is before the Tax Tribunal with respect to taxes, penalties, and interest in the amount of \$41,496.18 asserted against Petitioner for the taxable years 1984, 1985, 1986, 1987 and 2000.

The Respondent has filed a Motion for Partial Summary Judgment and asked this Tribunal to enter a judgment in Respondent's favor on the following issues:

- (1) the statutes of limitations to collect Petitioner's outstanding income tax liabilities for the taxable years 1984, 1985, 1986, 1987 and 2000 are open because the Georgia Department of Revenue (the "Department") timely recorded state tax executions against Petitioner and *nulla bona* entries; and
- (2) Petitioner is not entitled to a refund of income taxes for the years 1984 through 1987 and 2000 because he did not timely file a claim for refund with the Department.

Respondent's Motion raises the important question of whether under Georgia law a taxpayer has any statute of limitations defense with respect to the issuance of an assessment for a year where the taxpayer has not filed an income tax return.

For the reasons discussed below, Respondent's motion is **GRANTED**, in part, and **DENIED**, in part.

II. FINDINGS OF FACT

The facts of this matter are not disputed and are so found.

There are two separate assessments at issue here. The first is with respect to Petitioner's liability for taxes, penalties and interest for the years 1984, 1985, 1986 and 1987 (the "1984-1987 Assessment") while the second is with respect to his liability for the year 2000 (the "2000 Assessment").

During all the years in issue, Petitioner was a full-time employee of a large national company headquartered in Atlanta.

The 1984 - 1987 Assessment. Petitioner did not file Georgia state income tax returns for the years 1984, 1985, 1986 and 1987. On October 22, 1997, which was over nine years after the due date for the last of Petitioner's tax returns for this four year period, the Department issued an Official Assessment and Demand for Payment Notice to Petitioner for these years. The amounts shown on this assessment for tax, before penalties and interest, are \$581 for 1984, \$881 for 1985, \$1,826 for 1986 and \$1,033 for 1987, respectively. There is nothing in the record to indicate why the 1984-1987 Assessment was issued more than nine years after the due dates for the returns.

On March 17, 1998, the Department issued a State Tax Execution against Petitioner based upon this assessment for the years 1984 through 1987. The Department recorded this State

Tax Execution on August 10, 1998. On November 19, 2004 and March 31, 2011, the Department recorded *nulla bona* entries with respect to this Execution.

The 2000 Assessment. Although it is clear that Petitioner filed his Georgia state income tax return for the taxable year 2000 during 2001, it is not clear exactly when in 2001 he did so.

On the copy of Petitioner's return supplied by the Department, it is difficult to make out the Department's stamped dates. The only dated signature on the return appears to be that of the preparer and this reflects a date for that signature of March 13, 2001. Respondent states that his records reflect that Petitioner filed his 2000 Georgia Income Tax return on November 1, 2001. This appears to be contradicted, however, by the fact that Respondent issued a Notice of Proposed Assessment with respect to Petitioner's 2000 Georgia income tax which bears a "Notice Date" of August 26, 2001 and which refers to Petitioner's "Per Return" calculations to which Respondent has added penalties and interest as the basis for the Proposed Assessment. This would indicate that Petitioner's return was filed before that date.

In any event, whenever in 2001 Petitioner filed his return, it is undisputed that Petitioner reported that he owed \$1,010 in Georgia income tax. Petitioner did not remit payment with the return, however. Therefore, subsequent to the issuance of the Notice of Proposed Assessment on August 26, 2001, on October 30, 2001, the Department issued an Official Assessment and Demand for Payment Notice to Petitioner for the taxable year 2000. The Department then issued a State Tax Execution against Petitioner for the taxable year 2000 on May 28, 2002. On July 2, 2002 the Department recorded this State Tax Execution. Finally, on August 22, 2008, the Department recorded a *nulla bona* entry on this State Tax Execution.

Procedural Posture of this Case. On October 21, 2013, the Department issued a Statement of Account to Petitioner that reflected that Petitioner owed \$41,596.18 for taxes,

penalties, and interest for the taxable years 1984, 1985, 1986, 1987 and 2000.

In response to this Statement of Account, Petitioner filed his Petition in the Georgia Tax Tribunal on December 11, 2013, designating his case as proceeding under the regular tax case procedures for the Tribunal. Petitioner is representing himself *pro se* in this matter.

In his Petition, Petitioner stated, that (1) Petitioner does not have records for the years in question; (2) Petitioner has contacted his former employer, the Internal Revenue Service (“IRS”), and the Department to secure copies of Forms W-2 to establish that state income taxes were withheld from his wages; (3) Petitioner’s employer, the IRS, and the Department do not have any records of the withholding taxes that Petitioner’s employer withheld from his wages during 1984, 1985, 1986, and 1987;¹ (4) even though Petitioner does not have records of the withholding taxes that he paid to the State of Georgia (other than for the year 2000 where he filed a return), Petitioner has asked the Tax Tribunal to “vacate the assessment since the circumstantial evidence indicates that the liability has been paid by un-credited withholdings,” and “the original assessment[s]” [are] “more than 10 years old.”

In his Answer to the Petition, Respondent affirmatively pled facts in support of his contention that the collection statutes of limitations are open. On April, 4, 2014, Respondent filed Commissioner’s Motion for Partial Summary Judgment and supporting documentation which is the subject of this decision. Petitioner has not responded to Respondent’s Motion and supporting documentation.

III. CONCLUSIONS OF LAW

A. Standard of Review on Summary Judgment. The standards governing summary judgment are well established. To prevail at summary judgment under O.C.G.A. § 9-

¹ Petitioner calculated the amount that he still owed the Department for the taxable year 2000 after he subtracted the taxes withheld from his wages.

11-56, the moving party must demonstrate that there is no genuine issue of material fact as to each element of its claim and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. O.C.G.A. § 9-11-56(c); Lau's Corp., Inc. v. Haskins, 261 Ga. 491 (1991); Gail K. and Paul T. Zantzinger, 2014-2 Ga. Tax Tribunal, January 31, 2014; Alice D. Doby, 2014-3 Ga. Tax Tribunal, February 17, 2014.

B. Jurisdiction. In his Petition, Petitioner listed the Statement of Account, dated October 21, 2013, as the basis for invoking the Tax Tribunal's jurisdiction. Petitioner also asked the Tax Tribunal to review an "Official Assessment and Demand for Payment," but the document he attached to his Petition is a "Notice of Proposed Assessment."

The Tax Tribunal does not have jurisdiction to review a proposed assessment (as distinguished from a final assessment). Terry E. Moon, 2013-2 Ga. Tax Tribunal, December 13, 2013. Respondent takes the position that a Statement of Account is also not subject to review because it is not a decision made by the Respondent but is, rather, merely a statement of the taxpayer's liability as of a particular date. We do not need to address the question of whether a Statement of Account creates jurisdiction for review in this Tribunal, however, because the Department has issued State Tax Executions against Petitioner. Respondent has correctly noted that this matter is therefore properly before this Tribunal as the Petition is in the nature of an Affidavit of Illegality over which this Tribunal has subject matter jurisdiction. O.C.G.A. § 48-3-1 ("Whenever any writ of execution has been issued by the Respondent for the collection of any tax, or any penalty, interest, or collection costs imposed with respect to any tax, the taxpayer may file a petition in the Georgia Tax Tribunal in accordance with Chapter 13A of Title 50 to obtain a determination of whether any such amounts are legally due.").

C. **Statutes of Limitation Issues.** For the reasons discussed below, the statutes of limitations to collect Petitioner's 2000 Assessment are open because the Department timely made an assessment, recorded a State Tax Execution and made *nulla bona* entries to extend that Execution. But significant legal and factual questions as to whether the statutes of limitations for the 1984-1987 Assessment are still open preclude the granting of summary judgment in favor of Respondent as to the 1984-1987 Assessment.

There are two distinct statute of limitations issues that must be examined to determine whether each of the two assessments and subsequent executions based upon those assessments are valid. The first is the statute of limitations on the issuance of the assessment itself. The second is with respect to limitations on the enforceability of an execution which is based upon a valid assessment.

1. Statute of Limitations on Tax Assessments. On its face, the issue of whether there is any statute of limitations protection for a taxpayer who has not filed an income tax return appears simple enough. "Except as otherwise provided by this title, *in the case of a false or fraudulent return or report filed with the intent to evade tax or a failure to file a return or report, the amount of any tax imposed by this title may be assessed at any time.*" O.C.G.A. § 48-2-49(c) (emphasis added).

On first blush, this would appear to dispose of the question as to the 1984-1987 Assessment. The difficulty is that our appellate courts—in a line of cases going back over a century—have interpreted the substantively similar statutory language in the predecessors to O.C.G.A. § 48-3-21(2) as imposing a seven year statute of limitations on the entry of *all* tax assessments *even when no return has been filed.* Suttles v. Dickey, 192 Ga. 382 (1941); Georgia Railroad & Banking Co. v. Wright, 124 Ga. 596 (1906); Darby v. DeLoach, 190 Ga. 499 (1940);

Reynolds v Hardin, 187 Ga. 40 (1938); Eckerd Corp. v. Fayette Cnty. Bd. of Tax Assessors, 220 Ga. App. 454 (1996).

Although most of these cases focus on whether there is a statute of limitations for ad valorem property tax assessments where no return is filed, the statutes in question by their terms apply to “all state tax executions.” This would include an assessment for income tax where no return was filed, as is the case here.

More generally, the over nine-year delay in issuing the 1984-1987 Assessment raises a host of unanswered factual questions. Why, for instance, did it take more than nine years to issue an assessment for a taxpayer that was employed in Georgia by a major corporation? What triggered the assessment? Were the notices regarding the assessment properly addressed and were they received by the Petitioner? What basis was used for calculating the assessment? What was the source of the information used? Although an assessment by the Department is presumptively correct, it must have some demonstrable basis. *cf* U. S. v. Janis, 428 U.S. 433 (1976); Fickling v. United States, 2006 U.S. Dist. LEXIS 13657, 9-10 (M.D. Ga. 2006). Here the record is devoid of any of this information.

Of course these issues are precisely the kinds of questions that statutes of limitation are designed to address. “Statutes of limitation are statutes of repose. They are intended to relieve against the hardships inevitably incident to the enforcement of demands of long standing, when the lapse of time would necessarily place against the person whom they are enforced at a disadvantage as to their defenses.” Georgia Railroad & Banking Co. v. Wright, *supra*, at 623. With respect to the 1984-1987 Assessment, the taxes on which that assessment is based are now *over 25 years old*. Thus, it is not surprising that the parties may find themselves bereft of information to address the issue.

The presence of these significant legal and factual issues regarding the 1984-1987 Assessment thus requires that Respondent's Motion for Partial Summary Judgment as to whether the statutes of limitations for the 1984-1987 Assessment are open must be denied.

These kinds of issues are not present with respect to the 2000 Assessment, however. The 2000 Assessment arises from a return filed by Petitioner. When the Petitioner filed his return for the year 2000, he reported owing taxes to the Department, but he failed to remit payment.² In the case where a return or report is filed, the amount of the tax "shall be assessed within three years after the return or report was filed." O.C.G.A. § 48-2-49(b). Within three years of the date that Petitioner filed his return for the taxable year 2000, the Department did indeed issue an Official Assessment and Demand for Payment Notice to Petitioner asserting tax, plus penalties and interest due from Petitioner for the year 2000.

2. Statutes of Limitations on Tax Executions. The law with respect to the statute of limitations on tax executions does not raise comparable issues.

Once a valid assessment is made, the Department has seven years from the date of the assessment to record a state tax execution. O.C.G.A. § 48-3-21(2) (all state tax executions shall be enforced within seven years from the date of issue or "the time of the last entry upon the tax execution by the officer authorized to execute and return the execution if the execution and entry are properly entered or reentered upon the execution docket or books in which executions issued on judgments and entries on executions issued on judgments are required to be entered or reentered."). Georgia law also permits the Department to extend the collection statute of

² "Except with regard to ad valorem property taxes, when an application or return is filed with the commissioner under the revenue or license laws or regulations of this state and an amount is shown on the application or return to be due or to become due, the person required to make the application or return shall remit the amount with the application or return without further assessment, notice, or demand to the commissioner or department at the time and place fixed for filing of the application or return. Upon any failure in this regard, the commissioner shall have the authority to issue forthwith a fi.fa. for the collection of the amount due." O.C.G.A. § 48-2-30(a).

limitations by timely recording a *nulla bona* entry, as the Department did here. O.C.G.A. § 48-3-23.³

Assuming without deciding that the 1984-1987 Assessment is not barred by the statute of limitations on assessments, the Department timely issued its State Tax Execution against Petitioner with respect to the 1984-1987 Assessment on March 17, 1998. The Department then timely recorded this State Tax Execution on August 10, 1998. Then on November 19, 2004 and March 31, 2011, the Department timely recorded *nulla bona* entries with respect to this Execution.

With respect to the 2000 Assessment, the Department timely issued a State Tax Execution against Petitioner on May 28, 2002 and recorded this Execution on July 2, 2002. Then on August 22, 2008, the Department timely recorded a *nulla bona* entry on this State Tax Execution.

An entry on the execution and on the proper court records of a *nulla bona* prevents expiration of a tax execution. See Darby v. De Loach, 190 Ga. 499, 9 S.E.2d 626 (1940) (it was the intention of the General Assembly to provide that the mere entry of the tax execution itself on the general execution docket within the seven year period would prevent dormancy); see also Collins v. Tranakos, 222 Ga. App. 485 (1996) (tax executions can be enforced within seven years from the time of last entry upon the execution docket); First Nat'l Bank v. McCaskill, 27

³ It is undisputed that both the assessments in this case are more than 10 years old. Unlike the Internal Revenue Code, which requires the Internal Revenue Service to collect the taxes within 10 years of the date of an assessment, Georgia law allows the Department to collect taxes even if the assessments took place more than 10 years ago as long as the state tax executions and *nulla bona* entries are timely recorded. Compare 26 U.S.C. § 6502(a)(1) (“[w]here the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, *but only if the levy is made or the proceeding begun--within 10 years after the assessment of the tax.*”), with O.C.G.A. § 48-3-21 (state tax executions shall be enforced within seven years from the date of issue or “the time of the last entry upon the tax execution by the officer authorized to execute and return the execution if the execution and entry are properly entered or reentered upon the execution docket or books in which executions issued on judgments and entries on executions issued on judgments are required to be entered or reentered”), and O.C.G.A. § 48-3-23 (the timely recording of a *nulla bona* entry tolls or extends the collection statute of limitations).

Ga. App. 391 (1921) (dormancy is prevented either by public attempts to enforce the execution or by a proper entry into the execution docket); Pope v. U.S. Fidelity & Co., 200 Ga. 69, 74(1) (1945) (court dockets, being public records, “are to be taken as speaking the truth and as justifying an examiner to rely on their contents, as otherwise he might be misled to his injury and damage.”). Thus, the entries of *nulla bona* with respect to the Executions at issue here were sufficient to extend the statute of limitations on both of those Executions.

D. Possible Refund Claims Issue.


Although Petitioner appears to indicate in his Petition that he is not asking for a refund of income taxes for the years in dispute, he also alleges that he would be entitled to a refund “absent his failure to file.” Because the Petitioner filed a return for the year 2000, that year does not involve a “failure to file.” But even if the Petition is read as requesting a refund for some or all of the years reflected in the Statement of Account, the law is clear that any claimed tax refunds for withholding taxes deemed paid more than three years ago are barred because Petitioner did not file a claim within three years of the payment of the tax. See O.C.G.A. § 48-2-35(c)(1)(A) (“A claim for refund of a tax or fee erroneously or illegally assessed and collected may be made by the taxpayer at any time within three years after: (i) The date of the payment of the tax or fee to the commissioner; or (ii) In the case of income taxes, the later of the date of the payment of the tax or fee to the commissioner or the due date for filing the applicable income tax return, including any extensions which have been granted.”). Petitioner is therefore not entitled to a refund of taxes for the years 1984, 1985, 1986, 1987 and 2000 because he did not timely file a claim for refund for any of those years. Gail K. and Paul T. Zantzinger, 2014-2 Ga. Tax Tribunal, January 31, 2014.

CONCLUSION

In summary, there appear to be significant factual and legal questions as to whether the statutes of limitations for the 1984-1987 Assessment are open. Accordingly, Respondent's Motion for Partial Summary Judgment as to the issue of whether the statutes of limitations are open with respect to the 1984-1987 Assessment is **DENIED**.

By contrast, the undisputed facts establish that (i) the statutes of limitations to collect Petitioner's outstanding income tax liabilities for 2000 are open, and (ii) Petitioner is not entitled to a refund of income taxes for 1984, 1985, 1986, 1987 or 2000. Therefore Respondent's Motion for Partial Summary Judgment with respect to these two issues is **GRANTED**.

SO ORDERED, this 3rd day of June, 2014.


CHARLES R. BEAUDROT, JR.
Chief Judge
Georgia Tax Tribunal

LEROY E. PARKER, *PRO SE*

PETITIONER

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