

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 2003-03-25-009 / NOT PRECEDENTIAL
ID: P0200200
DATE: 03-25-03
DISPOSITION: SUSTAINED IN PART / DENIED IN PART
TAX TYPE: WITHHOLDING
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Now on this 25th day of February, 2003, the above styled and numbered cause comes on for decision pursuant to Section 221(d) of the Uniform Tax Procedure Code. Protestant appears pro se. The Account Maintenance Division of the Tax Commission (hereinafter "Division") is represented by AN Assistant General Counsel, General Counsel's Office of the Tax Commission.

Protestant did not appear at the Prehearing Conference scheduled in this cause for December 18, 2002. Thereafter, notice was served on the parties that the record in this cause would be closed and the case submitted for decision upon the filing of a verified response to protest by the Division. Protestant did not respond to this notice.

Upon review of the file and records, including the proposed assessment, the letter of protest, and the Division's Verified Response to Protest, the undersigned finds:

FINDINGS OF FACT

1. That the Protestant was listed as President of CORPORATION A d/b/a COMPANY ONE ("Corporation") on Schedule A of the Oklahoma Annual Franchise Tax Returns filed with the Oklahoma Tax Commission listing corporate officers as of June 30, 1999, 2000, and 2001.

2. That on or about September 28, 2000, the Protestant filed a quarterly Oklahoma employers withholding tax report for the period of April, 2000 through June, 2000 and submitted by check drawn on the Corporation's account, partial payment of the reported withholding taxes.

3. That the quarterly withholding tax report and accompanying corporate check were executed by the Protestant.

4. That the amount reported withheld and due for the second quarter of 2000 was \$9,791.00.

5. That two prior payments had been applied to the amount due for the second quarter of 2000.

6. That these payments were made on May 15, 2000 and June 15, 2000.
7. That the principal balance remaining due for the second quarter of 2000 is \$2,156.00.
8. That the Protestant filed "zero" tax due on withholding tax reports for the periods of November, 2001; January, 2002; March, 2002; and April, 2002.
9. That the reports for the periods of January, March and April, 2002 were filed subsequent to the issuance of the proposed assessment against the Protestant and were submitted along with her letter of protest.
10. That no withholding tax reports have been filed with the Tax Commission for the periods of December, 2001 and February, 2002.
11. That on March 29, 2002, the Division caused to be issued a proposed withholding tax assessment against the Protestant for the period of April, 2000 through June, 2000 and December, 2001 through February, 2002, in the total aggregate amount of \$13,302.57, inclusive of tax in the actual amount of \$2,156.00, for the period of April, 2000 through June, 2000, and the estimated amount of \$7,500.00, for the period of December, 2001 through February, 2002, interest accrued through July 7, 2002, in the amount of \$1,032.32, and penalty in the amount of \$2,614.25.
12. That by letter dated April 28, 2002, the Protestant timely protested the proposed assessment.
13. That in the letter, the Protestant stated that she did not agree with the assessment and requested that she be relieved of any tax obligation related CORPORATION A.
14. That accompanying the letter of protest was (1) a copy of an employment agreement between Protestant, as owner of the Corporation and a MR. Z showing MR. Z was employed as President of the Corporation as of November 15, 1999; (2) an offer of employment dated February 22, 2000, showing MR. Z, as President of the Corporation hired a MR. Y as Controller of the Corporation; (3) the withholding tax reports for the periods of January, March and April, 2002; (4) an Employers Annual Federal Unemployment (FUTA) Tax Return and payroll worksheet showing wages paid and FUTA tax due for the calendar year 2001; an Employers Quarterly Federal Tax Return and Employers Record of Federal Tax Liability for the Quarter ended December 31, 2001, showing zero wages paid and zero tax liability; and an Oklahoma Employment Security Commission Employers Quarterly Contribution Report showing total wages paid of zero during the fourth quarter of 2001.

CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter of law:

1. That the Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding. 68 O.S. 1991, § 207.

2. That a proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect, and in what respect. *Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission*, 768 P.2d 359 (Okl. 1988).

3. That the standard burden of proof in administrative proceedings is "preponderance of evidence". Oklahoma Tax Commission Order No. 91-10-17-061.

4. That "preponderance of evidence" means "[E]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; i.e., evidence which as a whole shows that the fact sought to be proved is more probable than not or that which best accords with reason and probability". *Black's Law Dictionary*, 1064 (5th ed. 1979).

5. That every employer who fails to pay to the Tax Commission any sums required to be paid under the Oklahoma Income Tax Act is personally and individually liable therefor to the State of Oklahoma. 68 O.S. 1991, § 2385.3(D).

6. That the term "employer" includes an officer or employee of a corporation who is under a duty to act for the corporation to withhold and remit withholding taxes. *Id.*

7. That any sums withheld are deemed to be held in trust and as trustee, the employer has a fiduciary duty to the State in regard to such sums and is subject to the trust laws of Oklahoma. *Id.*

8. That here the evidence proves the Protestant was an "employer" of the Corporation during the period of time for which the assessment was made. Further, the evidence shows the Corporation clearly did not have any employees during the period of December, 2001 and more probable than not, during the period of February, 2002, for which withholding and remittance of withholding taxes would have been required.

9. That the Protestant is personally and individually liable for the tax, penalty and interest assessed for the period of April, 2000 through June, 2000 and any additional accrued and accruing interest on the tax assessed for this period.

10. That the assessment of estimated withholding taxes for the period of December, 2001 through February, 2002 is erroneous.

11. That in accordance with the above, the Protestant's protest to the assessment of withholding tax, interest and penalty is sustained in part and denied in part.

DISPOSITION

THEREFORE, based on the above and foregoing findings and conclusions, it is DETERMINED that the protest be sustained in part and denied in part. It is further DETERMINED that the assessment of estimated withholding taxes for the period of December, 2001 through February, 2002, be found to be erroneous. It is further DETERMINED that the Protestant be found to be personally and individually liable for the tax, penalty and interest assessed for the period of April, 2000 through June, 2000 and any additional accrued and accruing interest on the tax assessed for said period.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are not generally applicable or are limited in time and/or effect. Non-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.