JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2003-09-09-03 / NOT PRECEDENTIAL**
ID: **P0200154**
DATE: **09-09-03**
DISPOSITION: **DENIED**
TAX TYPE: **WITHHOLDING**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Now on this 6th day of August, 2003, the above styled and numbered cause comes on for decision pursuant to a hearing held on March 20, 2003. 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.

A Pre-hearing Conference was initially scheduled in this cause for October 9, 2002. By letter dated October 7, 2002, Protestant requested a continuance of the Pre-hearing Conference. Pursuant to Protestant's request, the Pre-hearing Conference was rescheduled for October 23, 2002. By memorandum filed in this cause on October 22, 2002, the parties requested a thirty (30) day continuance to allow Protestant time to obtain documentation which Protestant believed would resolve the matter. By letter dated October 24, 2002, the parties were notified that the memorandum was accepted as a report in lieu of the Pre-hearing Conference and were directed to file a status report on or before December 2, 2002. By memorandums dated December 2, 2002, January 15, 2003 and February 19, 2003, the parties requested additional continuances to allow Protestant time to obtain the documentation. The first two requests were granted by letters dated December 3, 2002 and January 17, 2003. The third request was denied and a Notice of Hearing dated February 20, 2003, was issued scheduling this cause for hearing for March 20, 2003. Protestant did not appear at the hearing or respond to the notice. The Division presented its portion of the case by standing on its Position Statement filed in this cause on March 7, 2003, and offering three (3) exhibits; the business registration form for THE CORPORATION, the proposed assessment and Protestant's protest. These exhibits were accepted into evidence. At the close of the Division's portion of the case, the record was closed, the hearing was concluded and this matter was submitted for decision.

Upon review of the record of the hearing and the exhibits received into evidence, the undersigned finds:

1. That as indicated on the Business Registration Form of THE CORPORATION, Protestant was President of THE Corporation.

2. That the Business Registration Form was dated August 25, 1999, and executed by MR. A , Executive Director of the Corporation.

3. That the form indicates the Corporation began withholding Oklahoma income tax from employees on April 15, 1998.

4. That the reason indicated for filing the Business Registration Form was an "[i]nitial Franchise return".

5. That based on the Business Registration Form of the Corporation, the Division by letter dated May 24, 2002, caused to be issued against Protestant a proposed assessment of withholding tax, interest and penalty for the periods of August, 1998, April, 2000 through September, 2000[1] and October, 2000 through January, 2002, in the aggregate amount of $11,731.15[2], consisting of estimated tax for the period of August, 1998 in the amount of $460.00, estimated tax for the period of October, 2000 through January, 2002 in the amount of $7,360.00, interest accrued through August 16, 2002 in the amount of $1,608.45 and penalty in the amount of $2,302.70.

6. That Protestant timely protested the proposed assessment, asserting that he has not served as the President of the Corporation since October, 1998.

7. That Protestant has submitted evidence to show his term as President of the Corporation ended as of December 15, 1999.

8. That the Division amended the assessment against Protestant to exclude the tax, penalty and interest assessed for the periods subsequent to December, 1999.

9. That the amount in controversy is $905.63, consisting of the estimated tax, interest accrued through June 30, 2003 and penalty assessed for the period of August, 1998.

10. That by a Status Report Memorandum filed in this cause on July 21, 2003, Counsel for the Division advised, "[r]epresentatives for [sic] the company also have contacted our office per an agreement with [Protestant] to request the amount due, however, no payment has been made to date."

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[1]Only interest and penalty was assessed for this period.

[2]By mathematical error the proposed assessment erroneously indicates that the aggregate amount due is $10,520.59.

CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter of law that the Tax Commission is vested with jurisdiction over the parties and subject matter of this action, 68 O.S. 2001, ϶ 221(D); 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); 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. 2001, ϶ 2385.3(D); 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.; that when the Tax Commission files a proposed assessment against a corporation for unpaid withheld income taxes, the Commission shall file such proposed assessment against the principal officers of the corporation, 68 O.S. 2001, ϶253; that the principal officers of any corporation shall be liable for the payment of the tax if such officers were officers of the corporation during the period of time for which the assessment was made, Id.; 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, 68 O.S. 2001, ϶ 2385.3(D); that the evidence proves Protestant served as President of the Corporation during the period which is the subject of the amended assessment; that Protestant failed to come forward with sufficient evidence to overcome his burden of proving he was not an "employer" of the Corporation during the period which is the subject of the amended assessment; and that Protestant's protest insofar as it relates to the period which is the subject of the amended withholding tax assessment is denied.

DISPOSITION

THEREFORE, based on the above and foregoing findings and conclusions, it is DETERMINED that the protest of Protestant, insofar as it relates to the period which is the subject of the amended withholding tax assessment, be denied. It is further DETERMINED that the amount in controversy, i.e. the estimated tax, interest and penalty assessed for the period of August, 1998, plus any additional accrued and accruing interest, be fixed as the deficiencies due and owing.

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.