JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2004-07-13-04
ID:	P-03-123A, P-03-123B, P-03-125A, P-03-125B, P-03-127A, P-03-127B, P-03-129A, P-03-129B
DATE:	JULY 13, 2004
DISPOSITION:	DENIED
TAX TYPE:	MOTOR FUEL, GASOLINE AND DIESEL
APPEAL:	NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A hearing in this matter was scheduled for April 6, 2004, at 9:00 a.m. On April 5, 2004, the Protestants, through their ATTORNEY, filed a letter advising that the Protestants made no objection to the assessment of unpaid motor fuel taxes. At the request of the parties the scheduled hearing was cancelled and this matter was submitted for decision on briefs[1] on the sole issue of "Whether the penalties and interest assessed against CORPORATION could be assessed against the Protestants as officers of CORPORATION, and as individuals?". The protest files on CORPORATION were closed pursuant to counsel's letter of April 5, 2004.[2]

FINDINGS OF FACT

Upon review of the file and records, the exhibits received into evidence and the position letters, and briefs of the parties, the undersigned finds:

1. CORPORATION was licensed as a motor fuel eligible purchaser.[3] During the assessment period, the President of CORPORATION was PROTESTANT X ("Protestant").

2. During the assessment period, the Secretary of CORPORATION was PROTESTANT Z ("Protestant").

3. As an eligible purchaser, CORPORATION elected to defer the payment of motor fuel taxes to its suppliers by making an Electronic Funds Transfer ("EFT") on the 25th of each month.[4]

4. CORPORATION defaulted on an EFT payment to SUPPLIER 1 for January 2003 motor fuel tax due January 25, 2003.

5. On April 11, 2003, the Division issued proposed assessments for additional motor fuel tax against the Protestants, with interest calculated through May 30, 2003, in the following amounts:

	Gasoline	**Diesel**
Tax	$249,309.72	$57,631.19
Interest	9,630.87	2,226.30
Penalty	24,930.97	5,763.12
Total	$283,871.56	$65,620.61[5]

6. CORPORATION defaulted on an EFT payment to SUPPLIER 2 for February 2003 motor fuel tax due February 25, 2003.

7. On April 14, 2003, the Division issued proposed assessments for additional motor fuel tax against the Protestants, with interest calculated through June 30, 2003, in the following amounts:

	Gasoline	**Diesel**
Tax	$129,018.62	$30,418.30
Interest	8,165.29	1,925.10
Penalty	12,901.86	3,041.83
Total	$150,085.77	$35,385.23[6]

8. CORPORATION defaulted on an EFT payment to SUPPLIER 3 for February 2003 motor fuel tax due February 25, 2003.

9. On May 15, 2003, the Division issued proposed assessments for additional motor fuel tax against the Protestants, with interest calculated through July 16, 2003, in the following amounts:

	Gasoline	**Diesel**
Tax	$141,522.55	$39,974.15
Interest	6,572.07	1,856.33
Penalty	14,152.26	3,997.42
Total	$162,246.88	$45,827.90[7]

10. CORPORATION defaulted on an EFT payment to SUPPLIER 4. for February 2003 motor fuel tax due February 25, 2003.

11. On May 15, 2003, the Division issued proposed assessments for additional motor fuel tax against the Protestants, with interest calculated through July 16, 2003, in the following amounts:

	Gasoline	**Diesel**
Tax	$37,514.01	$8,463.67
Interest	1,742.09	393.04
Penalty	3,751.40	846.37
Total	$43,007.50	$9,703.08[8]

12. CORPORATION defaulted on an EFT payment to SUPPLIER 5, for the period from January 1, 2003, through February 28, 2003, due on January 25, 2003, February 25, 2003, and March 25, 2003, respectively.

13. On May 15, 2003, the Division issued proposed assessments for additional motor fuel tax against the Protestants, with interest calculated through July 16, 2003, in the following amounts:

	Gasoline
Tax	$73,990.50
Interest	3,436.00
Penalty	7,399.05
Total	$84,825.55[9]

14. The Protestants timely protested each of the proposed assessments.

15. All of the captioned protests filed were consolidated into one (1) proceeding for ease of administration.

16. The Protestants do not dispute the assessment of motor fuel taxes against them as officers of CORPORATION, and in their individual capacities. The Protestants also do not dispute that the taxes are owed or the amount of the motor fuel taxes assessed.

CONCLUSIONS OF LAW

1. The Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[10]

2. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[11] A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.[12]

3. A supplier of motor fuel shall pre-collect and remit motor fuel tax on behalf of and from the purchaser. The purchaser, after receiving written certification as an eligible purchaser from the Tax Commission, may elect to pay motor fuel tax by electronic funds transfer no later than the second preceding day (25th of the month) before the date remittance by the supplier is due to the Tax Commission (27th of the month).[13]

4. When the Tax Commission issues a proposed assessment for unpaid Motor Fuel Taxes, the Commission shall file assessments against the principal officers of the corporation as well. The principal officers of any corporation shall be liable for the payment of motor fuel tax if such officer held an officer position during the time period covered by the assessment. The liability of principal officers for motor fuel tax shall be determined in accordance with the standards used for determining officer liability for federal withholding tax.[14]

5. The Oklahoma Statutes provide for the collection of interest and penalty on delinquent tax.[15] "All penalties or interest imposed by Title 68, or any state tax law, shall be recoverable by the Tax Commission as a part of the tax with respect to which they are imposed."[16]

6. The Protestants have failed to meet their burden of proof in this matter. The Protestants have produced no authority that the Division's assessment of penalty and interest against them as officers of CORPORATION, and in their individual capacities, is incorrect or that the sums are not due and owing.

DISPOSITION

It is the ORDER OF THE OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case that the protests be denied, and that the total amount assessed for unpaid motor fuel taxes be fixed as the Protestants' deficiency and those amounts be determined as due and owing, including penalties and interest, accrued and accruing.
[1]

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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.

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[1] *OAC 710:1-5-38*, which states in pertinent part:

> "When …the parties agree that an oral hearing is not needed the Administrative Law Judge will base the Findings, Conclusions, and Recommendations on the position letters and briefs submitted by the parties."

[2] P-03-109, P-03-125, P-03-127, and P-03-129.

[3] 68 O.S.§ 500.23. After the suppliers in the captioned cases reported that CORPORATION had defaulted on the EFT payments and that a bad debt credit was being taking for the defaulted EFT, a Notice to Show Cause Hearing ("NTSC") was held. CORPORATION could not pay the motor fuel taxes due and its status as an eligible purchaser was terminated pursuant to the NTSC hearing.

[4] 68 O.S. § 500.22.

[5] P-03-123A and P-03-123B.

[6] P-03-125A and P-03-125B.

[7] P-03-125A and P-03-125B.

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[8]P-03-127A and P-03-127B.

[9]P-03-129A and P-03-129B.

[10]68 O.S. § 207.

[11]The standard of review in an administrative proceeding is preponderance of the evidence. *Oklahoma Tax Commission Order No. 1999-04-08-003* (citing *Oklahoma Tax Commission Order No. 1991-10-17-061). Oklahoma Administrative Code* ("*OAC*") *710:1-5-77(b)* provides in pertinent part that "preponderance of the evidence" means the evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which as a whole shows that the fact sought to be proved is more probable than not.

[12]*OAC 710:1-5-47. Enterprise Management Consultants, Inc. v. Oklahoma Tax Comm'n*, 1988 OK 91, 768 P. 2d 359.

[13]68 O.S. § 500.22 provides:

> Each supplier and bonded importer who sells motor fuel shall precollect and remit on behalf of and from the purchaser the motor fuel tax imposed under Section 4 of this act. At the election of an eligible purchaser, which notice shall be evidenced by a written statement from the Commission as to the purchaser eligibility status as determined under Section 23 of this act, the seller shall not require a payment of motor fuel tax on transport truck loads from the purchaser sooner than two (2) business days prior to the date on which the tax is required to be remitted by the supplier or bonded importer under Section 20 of this act. This election shall be subject to a condition that the remittances by the eligible purchaser of all amounts of tax due the seller shall be paid on the basis of ninety-eight and four-tenths percent (98.4%) for gasoline and ninety-eight and one-tenth percent (98.1%) for diesel fuel and which shall be paid by electronic funds transfer on or before the second preceding day prior to the date of the remittance by the supplier to the Commission, and the election by the eligible purchaser under this section may be terminated by the seller if the eligible purchaser does not make timely payments to the seller as required by this section.

[14]68 O.S. § 253 provides:

> When the Oklahoma Tax Commission files a proposed assessment against corporations or limited liability companies for unpaid sales taxes, withheld income taxes or *motor fuel taxes* collected pursuant to Article 5, 6 or 7 of this title, the Commission shall file such proposed assessments against the *principal officers* of the corporations or the managers or members personally liable for the tax. The *principal officers* of any corporation shall be liable for the payment of any tax as prescribed by this section if such officers were officers of the corporation during the period of time for which the assessment was made. Managers or members of any limited liability company shall be liable for the payment of any tax as prescribed by this section if the managers or members were specified as responsible for withholding or collection and remittance of taxes during the period of time for which the assessment was made. If no managers or members were specified to be responsible for the duty of withholding and remittance of taxes during the period of time for which the assessment was made, then all managers and members shall be liable.
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> The liability of a principal officer for sales tax, withheld income tax or promulgated motor fuel tax shall be determined in accordance with the standards for determining liability for payment of federal withholding tax pursuant to the Internal Revenue Code of 1986, as amended, or regulations pursuant to such section.

See also *Oklahoma Tax Commission Order No. 1996-12-17-037 (Prec.)*. In contrast to the IRC, 68 O.S. §2385.3(E) does not contain the words "willful" or "willfully". Consequently, the same standards for determining federal withholding tax liability are utilized up to the point required by Oklahoma Statutes. The Position Letter of the Protestants filed April 5, 2004 goes into a discussion of the willfulness component for determining withholding tax liability on the federal level, which is inapplicable in determining liability on the state level. Inasmuch as the Protestants have admitted liability for the assessment of the motor fuels taxes, the argument is moot.

[15] 68 O.S. § 217 provides in pertinent part:

> A. If any amount of tax imposed or levied by any state tax law, or any part of such amount, is not paid before such tax becomes delinquent, there shall be collected on the total delinquent tax interest at the rate of one and one-quarter percent (1 1/4%) per month from the date of the delinquency until paid.
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> B. Interest upon any amount of state tax determined as a deficiency, under the provisions of Section 221 of this title, shall be assessed at the same time as the deficiency and shall be paid upon notice and demand of the Oklahoma Tax Commission at the rate of one and one-quarter percent (1 1/4%) per month from the date prescribed in the state tax law levying such tax for the payment thereof to the date the deficiency is assessed.
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> C. If any tax due under state sales, use, tourism, mixed beverage gross receipts, or motor fuel tax laws, or any part thereof, is not paid within fifteen (15) days after such tax becomes delinquent a penalty of ten percent (10%) on the total amount of tax due and delinquent shall be added thereto, collected and paid. However, the Tax Commission shall not collect the penalty assessed if the taxpayer remits the tax within thirty (30) days of the mailing of a proposed assessment or voluntarily pays the tax upon the filing of an amended return.

[16] 68 O.S. § 217(G) provides:

> All penalties or interest imposed by this title, or any state tax law, shall be recoverable by the Tax Commission *as a part of the tax* with respect to which they are imposed, the penalties bearing interest as provided in this section for the tax, and all penalties and interest shall be apportioned as provided for the apportionment of the tax on which such penalties or interest are collected. (Emphasis added).