

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2004-11-23-23 (PRECEDENTIAL)
ID: P-04-046-H
DATE: NOVEMBER 23, 2004
DISPOSITION: DENIED
TAX TYPE: INCOME
APPEAL: NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROTESTANT (“Protestant”) appears *pro se*.¹ The Audit Division of the Oklahoma Tax Commission (“Division”) is represented by OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

A prehearing conference was scheduled in this matter on April 26, 2004, at 2:30 p.m. A Notice of Prehearing Conference was mailed to the Protestant at his last known address.² The Protestant did not appear at the prehearing conference. On June 4, 2004, notice was served upon the parties that this cause would be closed, and that the Division would submit this matter for decision upon the filing of a verified response to the protest. The Protestant did not respond to the notice. The Division filed its Verified Response to Protest on August 19, 2004, and the record was closed and this case was submitted for decision on August 23, 2004.

FINDINGS OF FACT

Upon review of the file and records, and the Division’s Verified Response, the undersigned finds:

1. The Protestant is a citizen of Bosnia. During the 2000 tax year, the Protestant was employed and earned income in the State of Oklahoma under an H-1B work visa issued by the United States Government. The Protestant filed a federal income tax return in regard to that income, but the Protestant did not file an Oklahoma income tax return.

2. Based upon a Revenue Agent’s Report (“RAR”), from the Internal Revenue Service (“IRS”), on June 12, 2003, the Division issued a proposed assessment of income tax for the 2000 tax year.³ The details of the proposed assessment issued by the Division are as follows:

¹ “Pro se” is defined as “For himself; in his own behalf; in person. Appearing for oneself, as in the case of one who does not retain a lawyer and appears for himself in court.” Black’s Law Dictionary 5th Edition 1099 (1979)

² The Protestant’s last known address is LAST KNOWN ADDRESS. No notices mailed to this address have been returned to the Office of the Administrative Law Judge as undeliverable.

³ Division’s Exhibit A.

Year	2000
Corrected Taxable Income-Method 1	49,735.00
Total Tax as Adjusted	3,027.00
Less Tax Previously Reported or Assessed	0.00
Additional Tax Due	3,027.00
Interest @ 15% from 04/15/01 to 07/12/03	1,017.57
Tax & Interest If Paid Within 30 Days	4,044.57
30 Day Delinquent Penalty @ 10%	302.70
Tax, Interest & Penalty If Paid After 30 Days	4,347.27

3. The RAR dated September 30, 2002, from the IRS provided information, based upon the Federal income tax return filed by the Protestant for the 2000 tax year, that the Protestant should have filed an Oklahoma income tax return for the 2000 tax year.⁴

4. On June 17, 2003, the Division received a timely protest of the proposed assessment for the 2000 tax year, on the basis that as a nonresident alien, with an H-1B visa, the Protestant is exempt from being taxed by the State of Oklahoma.⁵

5. A copy of a "Notice of Action" dated October 28, 2000, Receipt No. SRC-XXX, Petition For A Nonimmigrant Worker, filed by COMPANY, ADDRESS, as Petitioner, and the Protestant, as the Beneficiary, was provided by the Protestant.⁶ The "Notice of Action" was issued by the Department of Justice, Immigration & Naturalization Service, Texas Service Center, which extended the Protestant's H-1B visa from December 20, 2000 to August 12, 2003.⁷

6. On March 9, 2004, the Protestant sent the Division a copy of the W-2 Wage and Tax Statement for the 2000 tax year issued by the Protestant's employer [and Petitioner], COMPANY.⁸

⁴ Division's Exhibit A. The IRS also made adjustments to the Protestant's Federal return. The Division noted in the assessment that the IRS adjustments would change the Protestant's Oklahoma income.

⁵ Division's Exhibit B.

⁶ Division's Exhibit C.

⁷ Division's Exhibit C.

⁸ The court file contains an audit packet, which was forwarded by the Division as part of the protest file on this matter. The Administrative Law Judge is taking judicial notice of the materials contained in the court file for the purpose of completing the factual details and background of this audit. *OAC 710:1-5-36*. Contained in the court file is a letter from the Division dated June 23, 2003, which requests that the Protestant provide a copy of his 2000 Federal income tax return, with all the schedules. In response to the Division's request a letter was received March 9, 2004, which restates the Protestant's position, and encloses a copy of the Protestant's W-2 for the 2000 tax year from COMPANY, vis a, and passport. On wages of \$20,561.03, COMPANY withheld \$1,069.67 in Oklahoma income taxes. A copy of the Protestant's Federal income tax return was not provided. The Protestant did not provide copies of any other W-2's for the 2000 tax year. None of the documents provided indicate that the Protestant is exempt from paying state income taxes.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this action.⁹

2. The State of Oklahoma levies a tax upon the Oklahoma taxable income¹⁰ of every resident or nonresident individual, including nonresident aliens as defined in the Internal Revenue Code.¹¹

3. An individual is a nonresident alien if such individual is neither a citizen of the United States nor a resident of the United States¹²

4. The primary purpose of the H-1B visa is to admit aliens employed in “specialty occupations: to perform services in the U.S. In order to obtain an H-1B visa, a petition must be filed on behalf of the alien by the U.S. employer or the employer’s agent.”¹³

5. The employer must show that the position, which the alien will fill, is a “specialty occupation.”¹⁴ Any payer who fails to withhold or pay to the Tax Commission any sums required to be withheld or paid shall be personally and individually liable to the State of Oklahoma.¹⁵

⁹ 68 O.S. § 207.

¹⁰ 68 O.S. § 2353(12), which states:

“Oklahoma taxable income” means “taxable income” as reported (or as would have been reported by the taxpayer had a return been filed) to the federal government, and in the event of adjustments thereto by the federal government as finally ascertained under the Internal Revenue Code, adjusted further as hereinafter provided;

¹¹ 68 O.S. § 2355(A) and (B). See also 68 O.S. § 2368.

¹² 26 U.S.C.A. § 7701(B). For tax purposes, an alien is an individual who is not a U.S. citizen. Aliens are classified as nonresident aliens and resident aliens. IRS Publication 519 (12/31/02).

¹³ 8 C.F.R. § 214.2(h)(4)(ii).

¹⁴ 8 C.F.R. § 214.2(h)(4)(ii). A “specialty occupation” is defined as an occupation that requires the theoretical and practical application of a body of highly specialized knowledge, and a bachelor’s degree or higher in the specialty (or its equivalent) as a minimum to entry into the occupation in the U.S. “Specialty occupations” include occupations in the fields of (i) architecture, (ii) engineering, (iii) mathematics, (iv) physical sciences, (v) social sciences, (vi), medicine and health, (vii) education, (viii) business specialties, (ix) accounting, (x) law, (xi) theology and (xii) the arts.

The H-1B visa is subject to a maximum 6-year duration. Once the alien has been in the U.S. for six years under any category of H (or L) visa, he must spend at least one year outside the U.S. before he is eligible for a new visa. 8 C.F.R. § 214.2(13).

¹⁵ 68 O.S. § 2355(B).

6. Under federal law, nonresident aliens are taxed on their income from sources within the United States and on certain income connected with the conduct of a trade or business in the United States.¹⁶

7. Oklahoma law imposes a tax of eight percent (8%) on the taxable income of nonresident aliens.¹⁷

8. Oklahoma taxable income is calculated based on Federal AGI.¹⁸

9. Income information furnished by the IRS *shall* be that upon which any tax liability is computed.¹⁹

10. If any tax due under any state tax law is not paid within thirty (30) 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.²⁰

¹⁶ See Note 12.

¹⁷ 68 O.S. § 2355(B), which states:

Nonresident aliens. In lieu of the rates set forth in subsection A above, there shall be imposed on nonresident aliens, as defined in the Internal Revenue Code, a tax of eight percent (8%) instead of thirty percent (30%) as used in the Internal Revenue Code, with respect to the Oklahoma taxable income of such nonresident aliens as determined under the provisions of the Oklahoma Income Act.

Every payer of amounts covered by this subsection shall deduct and withhold from such amounts paid each payee an amount equal to eight percent (8%) thereof. Every payer required to deduct and withhold taxes under this subsection shall for each quarterly period on or before the last day of the month following the close of each such quarterly period, pay over the amount so withheld as taxes to the Tax Commission, and shall file a return with each such payment. Such return shall be in such form, as the Tax Commission shall prescribe. Every payer required under this subsection to deduct and withhold a tax from a payee shall, as to the total amounts paid to each payee during the calendar year, furnish to such payee, on or before January 31, of the succeeding year, a written statement showing the name of the payer, the name of the payee and his social security account number, if any, the total amount paid subject to taxation, and the total amount deducted and withheld as tax and such other information as the Tax Commission may require. Any payer who fails to withhold or pay to the Tax Commission any sums herein required to be withheld or paid shall be personally and individually liable therefor to the State of Oklahoma.

See also *OAC 710:90-1-2 and OAC 710:90-1-8.*

¹⁸ 68 O.S. § 2353.

¹⁹ *OAC 710:50-5-10.*

²⁰ 68 O.S. § 217(D). However, § 217 also states that “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.” The record does not indicate that the Protestant has filed an amended return.

11. The Tax Commission shall also collect interest at the rate of one and one-quarter percent (1¼%) per month from the date prescribed by state law.²¹

12. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.²² A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.²³

13. The Protestant has failed to meet his burden of proof in this matter. The Protestant has produced no authority that the Division's assessment is incorrect or that the sum is not due and owing.

14. The Protestant acknowledges his duty to file a return and pay federal income tax on his earnings in the United States under an H-1B work visa, but argues that he is not required to file or pay state income tax because he is not a "permanent resident" of the United States. The Protestant cites no legal authority for this contention, and the undersigned is aware of none.

15. Contrary to the Protestant's argument, Oklahoma law specifically includes a nonresident's income from a business, trade, profession or occupation carried on in this state or compensation for services performed in this state, as includable in determining adjusted gross income from Oklahoma sources,²⁴ and specifically imposes a tax on the Oklahoma taxable income of nonresident aliens.²⁵ The Protestant's argument is without merit and is squarely rejected.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the protest be denied and that the total amount of income tax assessed for the 2000 tax year be fixed as the Protestant's deficiency and that amount be determined as due and owing, including penalty and interest, accrued and accruing.

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²¹ 68 O.S. § 217(B).

²² 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") 710:1-1-77(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.

²³ OAC 710:1-5-47. See *Enterprise Management Consultants, Inc. v. Oklahoma Tax Comm'n*, 1988 OK 91, 768 P.2d 359.

²⁴ 68 O.S. § 2362(2).

²⁵ 68 O.S. § 2355(B).