JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2005-01-25-10
ID: P-04-089-H
DATE: JANUARY 25, 2005
DISPOSITION: DENIED
TAX TYPE: FRANCHISE
APPEAL: NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A prehearing conference was scheduled in this matter on August 24, 2004. A Notice of Prehearing Conference was mailed to the Protestant's representative at his last known address.[1] The Protestant did not appear at the prehearing conference. Thereafter, on August 31, 2004, notice was served upon the parties that this cause would be closed, and the matter submitted for decision, upon the filing of a verified response to the protest by the Division.[2] The Division filed its Verified Response to Protest on October 28, 2004.[3] The Protestant filed a Rebuttal to the Division's Response to Protest on November 8, 2004. The record in this matter was closed and this case was submitted for decision on November 8, 2004.

FINDINGS OF FACT

Upon review of the file and records, the Division's Verified Response, and the Protestant's Rebuttal to Division's Response, the undersigned finds:

1. The Protestant is a foreign corporation located at 123 FAKE STREET, FAKEVILLE, Utah 99999.[4]

2. The Protestant is not, nor has it ever been, registered with the Oklahoma Secretary of State.[5]

3. The Protestant registered with the Oklahoma Tax Commission sometime in 1990 to collect and remit sales tax on its sales to Oklahoma customers.[6]

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[1] The notice was mailed to REPRESENTATIVE, CPA, TAX FIRM, 999 MADEUP ROAD, SOMEPLACE, Utah 99999.

[2] OKLA. ADMIN. CODE § 710:1-5-28(c) (2004).

[3] DIRECTOR, Deputy Director, Account Maintenance Division, Oklahoma Tax Commission verified the Division's response under oath on October 28, 2004.

[4] Division's Exhibit G.

[5] A search conducted on November 24, 2004, of the Oklahoma Secretary of State's official website, www.sos.state.ok.us, revealed that the Protestant is not a registered business entity. The Administrative Law Judge is taking judicial notice of the Oklahoma Secretary of State's website for the purpose of completing the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36. See also, the Protestant's November 10, 2003, letter. See Division's Exhibit Q.

4. By letter dated July 1, 2003, the Protestant filed Franchise Tax Returns for fourteen (14) years, beginning with the year ending June 30, 1990, through the year ending June 30, 2003, along with a check in the amount of $140.00, representing the total amount of franchise tax due.[7] The Protestant states in pertinent part:

> We do not feel that PROTESTANT CORPORATION. (the "Taxpayer") is liable for the Secretary of State fee pursuant to Title 18 § 1130, which requires certain foreign corporations to register with the Secretary of State. . . .
>
> Accordingly, this statute exempts the Taxpayer from the registration requirements of the Secretary of State as its sole contact with the State is respresented [sic] by infrequent visits by independent agents to solicit sales in interstate commerce. Paragraph B further supports the contention that mere registration with the Tax Commission, as necessitated to comply with the taxation laws of Oklahoma, will not override the express exemptions of Title 18 § 1132.
>
> Even if the Taxpayer had been required to register with the Secretary of State, Title 18 § 1142 expressly ties the imposition of the fee to "services performed" by the Secretary of State. . . .
>
> Nowhere does the statute suggest that the fee will apply to foreign corporations that were not registered with the Secretary of State, nor does it apply cumulatively and retroactively for 14 years.[8]

5. The Protestant filed a franchise tax report dated September 18, 2003, for the filing period of July 1, 2003, through June 30, 2004, along with a check in the amount of $10.00, representing the total amount of franchise tax due.[9]

6. The Division issued proposed assessments of the registered agent fees, plus penalty and interest on the franchise tax filing periods of July 1, 1989/June 30, 1990, through July 1, 2003/June 30, 2004,[10] *to wit*:

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[6] Division's Exhibit Q.

[7] Division's Exhibit P.

[8] Division's Exhibit P. In support of its argument the Protestant cited the provisions of OKLA. STAT. ANN. tit. 18, § 1130 (West 2001). In this letter the Protestant also requested a waiver of penalty and interest for all fourteen (14) periods.

[9] Division's Exhibit O.

[10] 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. OKLA. ADMIN. CODE § 710:1-5-36.
The audit file contains a cover memo dated July 30, 2004, from the Division stating that the assessments dated July 28, 2004, designated as Division's A through O, are reproductions of the assessments which were computer generated. According to the protest letter of November 10, 2003, the assessments for all fifteen (15) reporting

Period	Fees	Interest	Penalty	Total
89/90	$ 40.00	$ 20.69	$ 1.00	$ 61.69
90/91	40.00	19.19	1.00	60.19
91/92	40.00	17.69	1.00	58.69
92/93	40.00	16.19	1.00	57.19
93/94	100.00	14.69	1.00	115.69
94/95	100.00	13.19	1.00	114.19
95/96	100.00	11.69	1.00	112.69
96/97	100.00	10.19	1.00	111.19
97/98	100.00	8.69	1.00	109.69
98/99	100.00	7.19	1.00	108.19
99/00	100.00	5.69	1.00	106.69
00/01	100.00	4.19	1.00	105.19
01/02	100.00	2.69	1.00	103.69
02/03	100.00	1.19	1.00	102.19
03/04	100.00	0.01	1.00	101.01
TOTAL	$1,260.00	$185.17	$15.00	$1,428.17

7. The Protestant, through its representative, formally protested the October 28, 2003, assessment of the registered agent fees due the Oklahoma Secretary.[11] The Protestant states:

> Having learned of the obscure Oklahoma franchise tax, the Taxpayer is willing to comply with this filing requirement. However, the Taxpayer objects to the imposition of a 13 year look-back on the Secretary of State registered agent fee during a period when the Taxpayer was openly registered with the Commission and the State made no effort [to] notify the Taxpayer of its duty to register with the Secretary of State and of its duty to file a franchise tax return.[12]

8. On June 16, 2004, another letter was received from the Protestant's representative requesting the status of its pending appeal and the Tax Commission's attempt to collect the registered agent fees assessed against the Protestant.[13]

9. The Protestant timely protested the proposed assessments by the Division.[14]

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periods were generated and issued on October 28, 2003. Each reproduction reflects that the franchise tax reports upon which the assessments are based were received July 2, 2003. See Division's Exhibit's A through O.

[11] Division's Exhibit Q.

[12] Division's Exhibit Q.

[13] Division's Exhibit R.

[14] Division's Exhibits P, Q, and R.

10. On July 29, 2004, a Notice of Prehearing Conference was mailed to Protestant's representative advising that a prehearing conference was set for August 24, 2004, at 3:30 p.m.

11. No response to the notice was received and the Protestant's representative failed to appear at the prehearing conference.

12. On August 31, 2004, a Prehearing Conference Order was mailed to the Protestant's representative stating that the record in this matter would be closed and that the case would be submitted for decision on the merits upon receipt of the Division's Verified Response to Protest.[15]

13. October 28, 2004, the Division filed its Verified Response.

14. On November 8, 2004, the Protestant filed a Rebuttal to Division's Response to Protest, which restated Protestant's position but offered no additional evidence.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this action.[16]

2. "Doing business" is defined as each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organizations.[17]

3. Franchise tax is imposed on the privilege of doing business in Oklahoma.[18] Thus, no more than an active presence of the corporation in the state is required. "Doing business" need be no more than the act of solicitation by a corporation for franchise tax purposes.[19]

4. A "foreign corporation" means a corporation organized pursuant to the laws of any jurisdiction other than this state.[20]

5. No foreign corporation shall do business in Oklahoma until it shall have filed the statutorily specified documents[21] and paid to the Oklahoma Secretary of State the fees[22] prescribed by the "Oklahoma General Corporations Act."[23]

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[15] OKLA. ADMIN. CODE § 710:1-5-28(c) (2004).

[16] OKLA. STAT. ANN. tit. 68, § 207 (West 2001) and OKLA. STAT. ANN. tit. 68, § 1212 (West 2001).

[17] OKLA. STAT. ANN. tit. 68, § 1202 (West 2001).

[18] *Linear Films, Inc. v. Oklahoma Tax Commission*, 1994 OK CIV APP 20, ¶6, 876 P.2d 301.

[19] See Note 18.

[20] OKLA. STAT. ANN. tit. 18, § 1130(A) (West 2001).

[21] OKLA. STAT. ANN. tit. 18, § 1130(B) (West 2001).

6. A foreign corporation doing business in Oklahoma is required to maintain the Secretary of State as its registered agent.[24]

7. As compensation for services performed by the Secretary of State as the registered agent, foreign corporations are required to pay an annual registered agent fee in the amount of One Hundred Dollars ($100.00).[25] The registered agent fee is to be collected by the Oklahoma Tax Commission in conjunction with the audit and collection of franchise tax.[26] The Tax Commission shall suspend and forfeit the charter of delinquent corporations.[27]

8. If a franchise tax report is not filed and paid within the time provided by statute, the Tax Commission shall assess a penalty in the amount of ten percent (10%) of the franchise tax due and interest.[28]

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[22] OKLA. STAT. ANN. tit. 18, § 1142 (West 2001).

[23] OKLA. STAT. ANN. tit. 18, § 1001 et. seq. (West 2001). However, A foreign corporation is exempt from the filing requirement of Title 18, Section 1130 if its business activities within Oklahoma are limited to activities in interstate commerce. See OKLA. STAT. ANN. tit. 18, § 1132.

[24] OKLA. STAT. ANN. tit. 18, § 1022(B) provides in pertinent part:

> Every foreign corporation transacting business in this state shall have and maintain the Secretary of State as its registered agent in this state.

[25] OKLA. STAT. ANN. tit. 18, § 1142(A)(18) provides:

> The Secretary of State, for services performed in the Office of the Secretary of State and for expense of mailing, shall charge and collect the following fees:
>
> > For acting as the registered agent, a fee of One Hundred Dollars ($100.00) payable on the first day of July each year, and if not paid before the next ensuing September 1st, the Oklahoma Tax Commission shall suspend and forfeit the charter of the delinquent corporation pursuant to the procedures prescribed in Section 1212 of Title 68 of the Oklahoma Statutes. The Oklahoma Tax Commission shall collect and audit the registered agent fee authorized pursuant to this paragraph in conjunction with the collection and audit of franchise taxes as provided for in Sections 1201 through 1214 of Title 68 of the Oklahoma Statutes. All monies received by the Oklahoma Tax Commission pursuant to the provisions of this paragraph shall be paid to the State Treasurer for deposit in the General Revenue Fund.
>
> > The 1993 amendment, in subsection A.14, substituted "One Hundred Dollars ($100.00) for "Forty Dollars ($40.00)". 1993 Okla. Sess. Law Serv. C. 273, § 10 (West). The amendment had an emergency clause attached with an effective date of May 27, 1993.

[26] *Id.*

[27] *Id.*

[28] OKLA. STAT. ANN. tit. 68, § 1212(a) (West 2001).

9. After the issuance of an order of suspension and forfeiture by the Tax Commission, the charter may only be revived and reinstated upon the payment of the accrued fees and penalties and a reinstatement fee of Fifteen Dollars ($15.00).[29]

10. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[30] A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.[31]

Protestant contends that it is exempt from the filing requirements of Section 1130 of Title 18, and therefore, it is also exempt from paying the registered agent fee.[32] Protestant claims that its activities within Oklahoma are limited to the solicitation of orders within interstate commerce, and that the provisions of Title 18, Section 1132 exempts certain activities from the registration requirement.[33] However, the Protestant, upon the advice of its representative, voluntarily complied with the filing of fifteen (15) years of franchise tax returns. The protest goes to the Division's assessment of the registered agents fees due to the Secretary of State, not whether it was "doing business" in the State of Oklahoma during the years at issue and whether its owed franchise tax.

The Protestant states that it has been making sales to customers in the State of Oklahoma since 1990, when it registered with the Tax Commission to collect and remit sales taxes. The Protestant also states that it has independent manufacturer's representatives that may occasionally travel in the State of Oklahoma.

According to the standard announced by the Court in *Linear,* the Protestant has been "doing business" in the State of Oklahoma for the franchise filing years at issue, and the Protestant appears to have agreed by its voluntary filing franchise tax returns for all fifteen (15) filing periods at issue and remitting the franchise tax due for each period.

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[29] OKLA. STAT. ANN. tit. 68, § 1212(f) (West 2001). The 1985 amendment, in subsection (f), first sentence, substituted "Fifteen Dollars ($15.00)" for "Five Dollars ($5.00)." 1985 Okla. Sess. Law Serv. C, 356, § 12 (West). The amendment had an emergency clause attached with an effective date of July 30, 1985.

[30] 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*. OKLA. ADMIN. CODE § 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.

[31] OKLA. ADMIN. CODE § *710:1-5-47*. See *Enterprise Management Consultants, Inc. v. Oklahoma Tax Comm'n*, 1988 OK 91, 768 P.2d 359.

[32] *Petitioner's Rebuttal to Division's Response to Protest* filed November 8, 2004.

[33] OKLA. STAT. ANN. tit. 18, § 1132(A)(4), which in pertinent part states:

> No foreign corporation shall be required to comply with the provisions of Sections 130 and 131 of this act, if:
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> * * *
>
> (4) its business operations within this state are wholly interstate in character; or . . . .

The provisions of the Franchise Tax Code and General Corporations Act cited by the Protestant in support of its argument that it is exempt from registration and the payment of past registered agent fees is misplaced. The Protestant does not seem to grasp the importance of the Division's threshold determination of whether it was "doing business" in the State of Oklahoma or whether its business activities in the State exempted it from the Franchise Tax Code.

Without evidence to the contrary, the Protestant appears to be a foreign corporation that is "doing business" in the State of Oklahoma and is not in compliance with Oklahoma's filing requirements for qualification to do business in the State. The General Corporation Act clearly intended for all foreign corporations subject to the Act to file with the Secretary of State and pay a registered agent fee for each of years its has done business in the state without proper authority.

The Tax Commission is directed by statute to collect and audit the registered agent fee in conjunction with the collection and audit of franchise taxes.[34]

Statutes are presumed to be unambiguous and statutory constructions should be used only when a statute is ambiguous.[35] When statutory construction is relied upon, the statutory provision will be construed in view of the general purpose and objective of the Act in which it is contained.[36]

Before doing business in Oklahoma, foreign corporations are required to pay the appropriate fees to the Secretary of State.[37] Businesses that fail to pay the required fees and secure the necessary certificate are prohibited from maintaining legal actions in Oklahoma "unless and until such corporation has paid to the State all fees, penalties and franchise taxes for the years or parts thereof during which it did business in the state without proper authority."[38] There is no restriction to the retroactive application of the statute.

Clearly, an important purpose of the General Corporations Act is to require non-qualified corporations be in good standing and properly certified to do business. Interpreting Section 1142(A)(18) to require non-qualified corporations to be responsible for delinquent registered agent fees is reasonable and conforms to the overall purpose of the General Corporations Act.

Courts ascertain legislative intent from the whole act in light of its general provisions together to give full force and effect to each. The Legislature clearly intended to prevent unregistered foreign corporations from evading or circumventing the payment of the registered agent fee by the specific provisions of Section 1137.

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[34] OKLA. STAT. ANN. tit. 18, § 1142(A)(18) (West 2001).

[35] *United Design Corp v. State ex rel Oklahoma Tax Comm'n*., 1997 OK 43, 942 P.2d 725.

[36] *Sullivant v. City of Oklahoma City*, 1997 OK 68, 940 P.2d 220.

[37] OKLA. STAT. ANN. tit. 18, § 1130(B) (West 2001).

[38] OKLA. STAT. ANN. tit. 18, § 1137(A) (West 2001)

The Protestant has failed to meet its 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.

RECOMMENDATION

It is the recommendation of the undersigned Administrative Law Judge, based upon the specific facts and circumstances of this case, that the protest be denied and that the total amount of registered agent fees assessed be fixed as the Protestant's deficiency and that the amount be determined as due and owing, including penalty and interest on the franchise tax, which accrued to the date of payment by the Protestant.

The undersigned Administrative Law Judge is without the authority to address the Protestant's request for a waiver of the accrued penalty and interest, as the authority to grant such a request is in the sole discretion of the Commissioners or its designee.[39]

COMMISSION ORDER

The Commission adopts the above Findings of Fact, Conclusions of Law and Recommendations made and entered herein by the Administrative Law Judge, except insofar as said Findings, etc. may appear to conclude that Protestant is required to qualify to do business in this state as provided in 18 O.S. §1130. Protestant appears exempt from those requirements pursuant to 18 O.S. §1132. Notwithstanding, Protestant is transacting business in this state and is subject to service of process by serving the Secretary of State as its agent. 18 O.S. §1136. Protestant is not exempt from these provisions nor those of 18 O.S. §1022. Protestant is required by those sections to have and maintain the Secretary of State as its registered agent in this state, and accordingly, to pay the fees attendant thereto as provided by 18 O.S. §1142(A)(18).

We further find and conclude. Based upon the facts and circumstances hereof, that the penalty and interest assessed or ordinarily accruing herein, should be, and hereby are, waived pursuant to 68 O.S. §220

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[39] OKLA. STAT. ANN. tit. 68, § 220 (West 2001).