JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2005-03-29-04
ID:	P-04-132-K
DATE:	MARCH 29, 2005
DISPOSITION:	DENIED
TAX TYPE:	WITHHOLDING
APPEAL:	NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A withholding tax audit of the payroll ledgers of NURSING HOME COMPANY, L.L.C. was performed by the Division. By letter dated June 3, 2004, the Division assessed withholding tax, interest and penalty against the limited liability company and Protestant, as manager and as an individual. Protestant, in an individual capacity, protested the assessment by letter dated August 5, 2004.

On September 16, 2004, the Division forwarded its file regarding the audit to the Office of the Administrative Law Judges ("ALJ's Office") for further proceedings consistent with the Uniform Tax Procedure Code[1] and the Rules of Practice and Procedure Before the Oklahoma Tax Commission[2]. The case was docketed as Case Nos. P-04-132-K and assigned to ALJ, Administrative Law Judge.[3]

A pre-hearing conference was scheduled in this cause for October 21, 1004, by *Notice of Prehearing Conference* issued September 29, 2004.[4] Neither Protestant nor Protestant's representative responded to the *Notice* or appeared at the conference.

A *Notice of Hearing* was issued on October 25, 2004, scheduling the cause for hearing on November 30, 2004.[5] Due to a scheduling conflict, the hearing scheduled for November 30, 2004, was rescheduling for December 1, 2004, by *Notice of Hearing* issued November 17, 2004.

The hearing was held on the appointed date. Neither Protestant nor Protestant's representative responded to the notice or appeared at the hearing. Division's Exhibits A-1, A-2, B-1, B-2, B-3, C-1, C-2, D, E, F and G were identified, offered and received into evidence as official records of the Tax Commission. OTC AUDITOR, Auditor, was questioned by the court. At the conclusion of the hearing, the record was closed and the case was submitted for decision.

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[1] 68 O.S. 2001, § 201 et seq.

[2] *OAC*, 710:1-5-20 through 710:1-5-47.

[3] *OAC*, 710:1-5-22(b).

[4] *OAC*, 710:1-5-28.

[5] *OAC*, 710:1-5-29.

FINDINGS OF FACT

Upon review of the file and records, including the record of the hearing, the exhibits admitted into evidence and the *Memorandum Brief* of the Division, the undersigned finds:

1. NURSING HOME is a nursing home care facility located in Sand Springs, Oklahoma. Exhibits A-2, B-1 and B-2.

2. The owner of NURSING HOME was NURSING HOME COMPANY, L.L.C.., a limited liability company, located in Chicago, Illinois. Exhibit A-2.

3. By a private Management Agreement executed October 26, 2001, RECEIVER Court Appointed Receiver, contracted with Protestant to be manager of NURSING HOME and to operate the nursing home care facility for the benefit of the receiver. Exhibit A-1.

4. The Management Agreement provided in part that during the term thereof, the "manager shall monitor revenues and expenses, related to the operation of the nursing home" and "shall assure the timely payment of any and all expenses, including but not limited to all rents, insurance, salaries, supplies, repairs and maintenance, and taxes (income, ad valorem and employee) * * *." Exhibit A-1.

5. A Disclosure Statement, ODH Form 953-B, filed with the Oklahoma State Department of Health on November 9, 2001, by RECEIVER indicates Protestant, an individual, was named manager/supervisor of NURSING HOME on October 24, 2001. Exhibit A-2.

6. The Disclosure Statement was filed as an amendment to a previous filing. Exhibit A-2.

7. By letter dated November 27, 2001, Protestant responded to a request from the Oklahoma State Department of Health for additional information concerning the NURSING HOME license application. Exhibit B-1.

8. The letter indicates that a licensure fee of $2,130.00 was enclosed along with ODH Forms 953-E and 953-D. Exhibit B-1.

9. ODH Form 953-E reports the staffing projection and professional certification for the NURSING HOME. Exhibit B-2.

10. ODH Form 953-D is an Affirmation Attachment to the Disclosure Statement. Exhibit B-3.

11. The affiant for the Affirmation Attachment is Protestant who identifies himself as manager of the facility. Exhibit B-3.

12. A Disclosure Statement, ODH Form 953-B, filed with the Oklahoma State Department of Health on May 24, 2002, by RECEIVER indicates NURSING HOME COMPANY L.L.C., a for profit corporation, was named manager/supervisor of NURSING HOME with an effective date of change in manager/supervisor of April 26, 2001. Exhibit C-1.

13. The Disclosure Statement was filed as a renewal license. Exhibit C-1.

14. An Amended License Application for NURSING HOME was filed with the Oklahoma State Department of Health by RECEIVER (Receiver) on August 30, 2002. Exhibit C-1.

15. A letter accompanying the Amended License Application dated August 26, 2002, from ATTORNEY., Attorney at Law, indicates that Protestant "has no current role in the management/operation/ownership of [the] facility and was only consulted to assure a smooth change in management to assure that quality care was at all times rendered to all residents." Exhibit C-1.

16. A second letter from ATTORNEY dated December 9, 2002, to the Oklahoma State Department of Health purportedly enclosed a Management Agreement for NURSING HOME, executed by RECEIVER, Receiver, and NURSING HOME COMPANY, L.L.C., Lessee and or Manager, with an effective date of April 26, 2002. Exhibit C-2.

17. A withholding tax field audit of the payroll ledgers of NURSING HOME COMPANY, L.L.C. was conduct by the Division for the period of October 1, 2001 through October 31, 2003, during which time withholding tax reports were not filed by Protestant or NURSING HOME COMPANY, L.L.C. Statement of Counsel, Testimony of OTC AUDITOR and Exhibit D.

18. As a result of the audit, the Division on June 3, 2004 caused to be issued a proposed withholding tax assessment against Protestant, as manager and as an individual. Exhibit F.

19. The assessment only included the period Protestant was manager of NURSING HOME, October 26, 2001 through April 26, 2002. Exhibits E and F.

20. The assessment proposed an aggregate amount due of $54,368.46, consisting of tax in the amount of $33,561.00, interest accrued through July 15, 2004, in the amount of $12,417.21, and a thirty-day delinquent penalty at five percent (5%) per month up to twenty-five percent (25%) in the amount of $8,390.25. Exhibits E and F.

21. By letter dated August 5, 2004, Protestant's representative protested the proposed assessment issued against Protestant on behalf of Protestant in his individual capacity and requested a hearing. Exhibit G.

22. A "Verification Under Oath" by Protestant's representative was included in the letter of protest. Exhibit G.

23. In the letter of protest, Protestant's representative states as fact:

> The NURSING HOME COMPANY, L.L.C., a NHCF is a State and Federally mandated and regulated facility. This NHCF was incorporated in May of 2000 to comply with a Oklahoma State Department of Health Order (hereafter ODOH). The taxpayer was named as President and no other officers of the corporations were to be assigned.
>
> This systems structure and control is dictated through Oklahoma State statutory Order(s). Through order of the States control, the NHCF is required to submit weekly reports concerning the health and safety of the residents and a monthly report that covers the general conditions and financial state of affairs of the NHCF.
>
> This structured system that PROTESTANT was appointed to, is a process where payroll checks were prepared outside and rubberstamped by a payroll service and sent to the NHCF, tax returns were prepared by the payroll service and sent to the NHCF. There is an administrator of this NHCF that is in command of the NHCF operation. They keep their books on the facility, they manage the NHCF checking account and pay operating expenses and make financial reconciliations [sic].
>
> The NHCF of Oklahoma were in trouble, in May of 2000, the Federal Bureau of Investigation searched the Oklahoma Department of Health and arrested its Director, DIRECTOR for bribery. The manager of record was PERSON 1, but behind the scenes was PERSON 2 who could not be manager because of a history of neglect in nursing home operations. Since, PERSON 2 has been convicted for bribery relating to DIRECTOR.
>
> With huge sums of money diverted from the NHCF they were left in shambles and were being shut down all over the State. The particular NHCF in question here, were amidst these dire circumstances, when PROTESTANT was, appointed Temporary Manager by a State of Oklahoma Order on May 5, 2000. With these Homes on the verge of being shut down; the titled-owners of these properties and owner of each of[sic] these business (OWNER 1, OWNER 2 and others) called for the State and Federal authorities to do whatever is necessary to save these NHCF from closing. (Emphasis original).

Exhibit G.

24. The amount in controversy is $54,368.46, plus accrued and accruing interest on the assessed withholding tax. Exhibits E and F.

ISSUE AND CONTENTIONS

The issue presented for decision is whether Protestant is personally liable for the withholding tax indebtedness of NURSING HOME for the period he was manager of the health care facility.

Protestant contends that he should not be held personally liable for the withholding tax. In support of this contention, Protestant argues that his position with the nursing home was entirely a product of Oklahoma statutes and the statutes were his sole source of authority. Protestant further argues the evidence proves that he did not have a duty nor was he in control of the facility's finances, that he acted under the dominion and control of others and that he was not in a position to make independent decisions on behalf of NURSING HOME. Protestant further asserts that the financial decisions of NURSING HOME, including the duty and responsibility for those decisions rested with and were exercised by the owners of the property.

The Division contends that Protestant should be held personally liable for the delinquent withholding taxes. In support of this contention, the Division argues that Protestant entered into an agreement to manage the facility and undertook the duty to act on its behalf. The Division also argues that as manager of the facility, Protestant was not only responsible for assuring the timely payment of all expenses, including taxes, he was clearly involved in the day to day affairs of the facility.

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. 2001, § 221(D).

2. "Every employer who fails to withhold or pay to the Tax Commission any sums * * * required to be withheld or paid shall be personally and individually liable therefor to the State of Oklahoma." 68 O.S. 2001, § 2385.3(D). "The term `employer' * * * mean[s] any person (including any individual * * * limited liability company or corporation) transacting business in or deriving any income from sources within the State of Oklahoma for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term `employer' shall mean the person having control of the payment of such wages." 68 O.S. 2001, § 2385.1(b).

3. "Any sum or sums withheld * * * shall be deemed to be held in trust for the State of Oklahoma, and, as trustee, the employer shall have a fiduciary duty to the State of Oklahoma in regard to such sums and shall be subject to the trust laws of this state." 68 O.S. 2001, § 2385.3(D). "Any employer who fails to pay to the Tax Commission any sums required to be withheld by such employer, after such sums have been withheld from the wages of employees, and appropriates the tax held in trust to the employer's own use, or to the use of any person not entitled thereto, without authority of law shall be guilty of embezzlement." *Id*.

4. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect, and in what respect. *OAC*, 710:1-5-47. *See*, ***Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission***, 1988 OK 91, 768 P.2d 359.

5. In administrative proceedings, the burden of proof standard is "preponderance of evidence." Black's Law Dictionary, 1064 (5th ed. 1979). *See*, *Oklahoma Tax Commission Order No.* 91-10-17-061. "Preponderance of evidence" means "[E]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Id.* It is also defined to mean "evidence which is more credible and convincing to the mind ... [T]hat which best accords with reason and probability." *Id.*

6. Here, Protestant has not presented any evidence to show he was not the "employer" of the staff of NURSING HOME during the period he was manager of the facility. Accordingly, Protestant should be held personally and individually liable for the delinquent withholding taxes.

7. Protestant's protest to the proposed withholding tax assessment should be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestant, PROTESTANT, be denied. It is further ORDERED that the amount in controversy, inclusive of any additional accrued and accruing interest, be fixed as the deficiency 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.