

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2005-03-29-05
ID: P-04-134-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 register of the COMPANY. (hereinafter referred to as "COMPANY") was performed by the Division. By letter dated March 17, 2004, the Division assessed withholding tax, interest and penalty against the COMPANY and Protestant, as an officer of the Corporation (COMPANY) and as an individual. The letter of assessment was remailed to the representative of Protestant on August 2, 2004. Protestant, in an individual capacity, protested the assessment by letter dated August 8, 2004.

On March 2, 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 Code¹ and the Rules of Practice and Procedure Before the Oklahoma Tax Commission². The case was docketed as Case Nos. P-04-123-K and assigned to ALJ, Administrative Law Judge.³

A *Notice of Prehearing Conference* was issued September 29, 2004, scheduling the cause for a pre-hearing conference on October 21, 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 and time. Neither Protestant nor Protestant's representative responded to the notice or appeared at the hearing. Division's Exhibits A, B, C, 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

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.

court. At the conclusion of the hearing, the record was closed and the case was submitted for decision.

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. COMPANY was incorporated under the laws of the State of Oklahoma on June 30, 2000, by Protestant to operate and manage a nursing home care facility located in Binger, Oklahoma.⁶

2. At all times relevant, Protestant held the office of president of COMPANY. Exhibit A.

3. On May 5, 2000, the Oklahoma State Department of Health appointed Protestant temporary manager of the COMPANY'S nursing home, by Order Replacing and Appointing Temporary Manager filed May 5, 2000. Exhibit B.

4. As set forth in the Order, Protestant was to assume operating control of the facility and to ensure that the health and safety of the residents of the facility were protected and they received adequate care. Exhibit B.

5. Protestant's operating control of the facility included "purchasing any necessary insurance to cover the workers, hiring and firing of any staff, payment of services provided to the facility, purchasing goods and services necessary for provision of care and services to the residents, transferring or assisting in transferring any or all residents to other facilities and all other powers necessary to protect the health and safety of the residents." Exhibit B.

6. The Order provided that "[a]ll funds due and payable to the facility from any source shall be made available to [Protestant] who shall use the funds for the health and safety of the residents." Exhibit B.

7. The Order also required Protestant to "make weekly written reports to the Department * * * concerning the health and safety of the residents" and to "make monthly financial reports which shall include a detailed income and expense report detailing all sources of income and all recipients of expenditures." Exhibit B.

8. On or about July 9, 2001, Protestant filed a Business Registration form for NURSING HOME with the Tax Commission. Exhibit A.

9. As indicated on the form, it was filed for the reason of "Initial Franchise return." Exhibit A.

⁶ Oklahoma Secretary of State's official website, www.sos.state.ok.us.

10. Protestant listed himself as president of COMPANY and executed the form as president of COMPANY. Exhibit A.

11. Protestant was the only officer listed on the form. Exhibit A.

12. The form also indicated that Oklahoma income tax was withheld from the wages of the employees starting May 5, 2000 and Protestant identified himself as the officer or employee responsible for remitting the Oklahoma income tax withheld from employees. Exhibit A.

13. Attached to the form is a letter dated July 30, 2001, from Protestant to the Tax Commission, Taxpayer Assistance Division, indicating Protestant was "returning our business registration application/renewal forms because we did file and remit franchise tax for COMPANY * * *." Exhibit A.

14. The letter also indicated that Protestant was "sending copies of our Oklahoma Franchise Tax Return * * *." Exhibit A.

15. An Oklahoma Annual Franchise Tax Return for the reporting period of July 1, 2000 through June 30, 2001, was filed by Protestant on July 7, 2001 for COMPANY. Exhibit C.

16. A total amount of \$27.00, consisting of the minimum franchise tax of \$10.00, interest of \$1.00, penalty of \$1.00 and a reinstatement fee of \$15.00, was remitted with the return by check drawn on Protestant's personal account. Exhibit C.

17. The check indicates in the notation that it was drawn for "reinstate COMPANY". Exhibit C.

18. Protestant was listed as president of COMPANY on Schedule A of the franchise tax return. Exhibit C.

19. Protestant was the only officer listed on the return. Exhibit C.

20. A withholding tax field audit of the books and records of COMPANY was conducted by the Division for the period of May 1, 2000 through February 28, 2001, during which time withholding tax was not remitted by COMPANY. Exhibits D, E and F.

21. In performing the audit, the Division's auditor examined COMPANY'S payroll spreadsheet. Exhibit D.

22. As a result of the audit, the Division on March 17, 2004 caused to be issued against COMPANY and Protestant, as an officer of COMPANY and as an individual, a proposed withholding tax assessment.

23. The withholding tax assessment proposed an aggregate amount due for the audit period of \$27,255.84, consisting of tax in the amount of \$15,391.00, interest accrued through April 30, 2004, in the amount of \$8,017.09, and a thirty-day delinquent penalty at five percent (5%) per month up to twenty-five percent (25%) in the amount of \$3,847.75. Exhibits E and F.

24. The assessment issued against Protestant was mailed to Protestant's last known address as reflected by the records of the Division. Exhibit F.

25. The assessment was remailed August 2, 2004 to Protestant's representative.⁷ Exhibit F.

26. 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.

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

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

The COMPANY, 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,

⁷ As explained by counsel for the Division, the assessment was remailed upon Protestant's representative contacting the Division and requesting that he be personally notified of the assessment in order to file a response. Although not reflected in the file or records of this cause, Protestant by Power of Attorney dated October 20, 2003, appointed CONSULTING FIRM, LLC, REPRESENTATIVE X and REPRESENTATIVE Y as his Attorneys-in-Fact to represent him before the Tax Commission for all tax matters associated with COMPANY.

DIRECTOR for bribery. The manager of record was MANAGER, but behind the scenes was PERSON X who could not be manager because of a history of neglect in nursing home operations. Since, PERSON X 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 X, OWNER Y and others) called for the State and Federal authorities to do whatever is necessary to save these NHCF from closing. (Emphasis original).

Exhibit G.

29. The amount in controversy is \$27,255.84, plus accrued and accruing interest on the assessed withholding tax. Exhibit F.

ISSUE AND CONTENTIONS

The issue presented for decision is whether Protestant is personally liable for the withholding tax indebtedness of COMPANY.

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 COMPANY 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 COMPANY'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 COMPANY. Protestant further asserts that the financial decisions of COMPANY, 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 not only because he was the sole officer of COMPANY during the periods at issue, but because he listed himself on the business registration form "under penalty of perjury" as the person who would be responsible for remitting withholding tax for COMPANY. The Division further argues that any agreement which Protestant may have had with the property owners as to who would be responsible for the taxes is not binding on the State. The Division also argues that Protestant should be held responsible because he was involved in the day-to-day affairs of the businesses and demonstrated a duty to act on their behalf.

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' * * * includes an officer or employee of a corporation, * * * who as an officer or employee of a corporation, * * * is under a duty to act for [the] corporation, * * * to withhold and remit withholding taxes." *Id.*

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. The Tax Commission is required to file proposed assessments against the principal officers of a corporation who are personally liable for the tax when the Tax Commission files a proposed assessment against a corporation for unpaid withheld income taxes. 68 O.S. 2001, § 253. The liability of the corporation and any principal officers for withheld income tax is joint and several. *Id.*

5. The principal officers of any corporation are personally liable for the payment of any tax "if such officers were officers of the corporation during the period of time for which the assessment was made". 68 O.S. 2001, § 253. The liability of a principal officer for withheld income tax is 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 promulgated pursuant to such section. *Id.*

6. The courts have developed a two prong test for imposition of the penalty under the Internal Revenue Code. *In Re Bernard*, 130 B.R. 740, 745 (Bkrcty.W.D.La. 1991). See, *Cooke v. United States*, 796 F. Supp. 1298 (N.D. Cal. 1992) and *Feist v. United States*, 607 F.2d 954 (Ct. Cl. 1979). The first prong requires a finding that the person assessed is a "responsible person". The second prong requires the finding of a willful failure to collect, or truthfully account for, or pay over the tax. The burden of proof on each issue is borne by the taxpayer. *Id.*

7. The determination of liability under Section 253 is limited to the standards for determining who is a "responsible person". Oklahoma Tax Commission Order No. 96-12-17-037 (Prec.).

8. The courts have also developed standards to be utilized in determining whether each prong of the test has been satisfied. The factors considered by the courts under the first prong include the individual's status as an officer or director, the individual's duties as outlined in the corporate bylaws, the individual's ownership of shares or possession of an entrepreneurial stake in the company, the individual's role in the day-to-day management of the company, the individual's ability to hire and fire employees, the individual's authority to sign checks of the corporation and the individual's control over the financial affairs of the corporation. See, *Rizzuto v. United States*, 889 F.Supp. 698 (S.D.N.Y. 1995); *United States v. Carrigan*, 31 F.2d 130 (C.A. 3rd 1994); *Hochstein v. United States*, 900 F.2d 543 (C.A. 2nd 1990).

9. The responsible person is frequently defined as the person who has the final word as to what bills or creditors should or should not be paid and when. *White v. U.S.*, 372 F.2d 513, 178 Ct. Cl. 765 (1967). In *Koegel v. U.S.*, 437 F.Supp. 176 (D.C. N.Y. 1977), the court held that the responsible person is the one who is so connected with the business as to be in the position to exercise full authority over the financial affairs, and therefore to be ultimately responsible for the decision as to the payment of the tax. The responsible person is a person who has or shares the final word as to what bills should or should not be paid. *Cellura v. U.S.*, 245 F.Supp. 379 (D.C. Ohio 1965).

10. "The State Commissioner of Health may place a qualified person in a facility as a temporary manager to assume operating control of the facility and to ensure that the health and safety of the residents of the facility are protected". 63 O.S. Supp. 1995, § 1-1914.2(A). Section 1-1914.2 further provides in pertinent part:

(D). All funds due or available to the facility from any source during the pendency of the temporary management shall be made available to the temporary manager who shall use the funds to ensure the health and safety of the residents of the facility.

(F). The temporary manager shall make provisions for the continued protection of the health and safety of all residents of the facility. The temporary manager appointed pursuant to the Nursing Home Care Act shall exercise those powers and shall perform those duties set out by the Commissioner in writing. The Commissioner shall provide for the temporary manager to have sufficient power and duties to ensure that the residents of the facility receive adequate care.

(G). If funds are insufficient to meet the expenses of performing the powers and duties conferred on the temporary manager, the temporary manager may borrow the funds or contract for indebtedness as necessary; * * * .

(I). A temporary manager may be held liable in a personal capacity only for his own gross negligence, intentional acts or breaches of fiduciary duty.

(L)(2). Within thirty (30) days after release, the temporary manager shall give the Department a complete accounting of all property of which the temporary manager

has taken possession, of all funds collected, and of the expenses of the temporary managership.

(L)(3). After a complete accounting, and payment of reasonable expenses incurred as a result of the temporary managership, the Commissioner shall order payment of the surplus to the owner. If funds are insufficient to pay reasonable expenses incurred as a result of the temporary managership, the owner shall be liable for the deficiency. Any funds recovered from the owner shall be used to reimburse any unpaid expenses due and owing as a result of the temporary managership.

(M). Nothing in the Nursing Home Care Act shall be deemed to relieve any owner, administrator or employee of a facility in which a temporary manager is placed of any civil or criminal liability incurred, or any duty imposed by law, by reason of acts or omissions of the owner, administrator or employee prior to the appointment of a temporary manager; provided, nothing contained in the Nursing Home Care Act shall be construed to suspend during the temporary managership any obligation of the owner, administrator or employee for payment of taxes or other operating and maintenance expenses of the facility or of the owner, administrator, employee or any other person for the payment of mortgages or liens.

11. 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.

12. 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.*

13. Here, Protestant has not presented any tangible evidence to show he should not be held personally liable for the assessment at issue. Moreover, Protestant's own admission on the Business Registration forms of COMPANY proves his liability. Lastly, notwithstanding whether the owners of the nursing facilities may be liable for the withheld income taxes, Protestant's liability for the taxes is not precluded. See, 68 O.S. 2001, §§ 253 and 2385.3(D). Accordingly, Protestant should be held personally and individually liable for the taxes to the State of Oklahoma.

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

NON-PRECEDENTIAL DECISION OKLAHOMA TAX COMMISSION
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.