JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2005-04-12-04
ID: JM-04-004-K
DATE: APRIL 12, 2005
DISPOSITION: DENIED
TAX TYPE: MOTOR VEHICLE
APPEAL: PENDING, CASE NO. TC-102111

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Division by letter dated January 10, 2003, assessed penalties of $9,515.46 against Respondent for the failure to timely file the semi-monthly reports of November 15, 2002, November 30, 2002 and December 15, 2002. Respondent responded to the assessment by letters dated January 15, 2003 and January 28, 2003.

By letter dated November 18, 2003, the Division notified Respondent that it was of the opinion that Respondent had not satisfied the criteria for waiving the penalties and demanded either payment of the penalties or a written appeal of the assessment within ten (10) days. A written appeal of the assessment of the penalties was filed by the Respondent on November 29, 2003.

The Division by *Office Correspondence* dated February 3, 2004, forwarded its file, inclusive of the assessment letter and subsequent correspondences, to the Office of the General Counsel for presentation of Respondent's waiver request to the Commission. The waiver request was presented to the Commission during its Executive Session of April 13, 2004. The request was denied by the Commission and by letter dated April 28, 2004, the Division demanded payment of the penalties. Further, the Division by letter dated June 1, 2004, notified Respondent that the matter of non-payment of the penalties was being referred to the Office of the General Counsel for appropriate collection action.

Respondent by letter dated June 28, 2004, made application for a hearing before the Administrative Proceedings Section of the Commission with respect to the assessment of the penalties, raising three (3) issues, to-wit:

1. Whether the Division erred in assessing the penalty in the amount of $9,515.46 for failure to file the semi-monthly reports as required by 47 O.S. 1142(B) and OAC § 710:60-9-70 when the requirement for such filings were satisfied by the daily electronic filing by the TAG AGENCY.

2. Whether the Division erred in assessing the penalty in the amount of $9,515.46 against [Respondent] for failure to file the semi-monthly reports when the culpable party responsible for failing to file the semi-monthly reports was EMPLOYEE X, an employee of [Respondent] who was directed by [Respondent] to promptly file the semi-monthly reports.

3. Whether under the facts of the case, the Commission erred in determining that it did not have the authority to waive the penalty against [Respondent].

On July 6, 2004, the Division forwarded its file regarding Respondent's protest to the assessment of the penalties to the Office of the Administrative Law Judges ("ALJ's Office") for further proceedings consistent with the Oklahoma Vehicle License and Registration Act[1], in particular the statutes governing Motor License Agent[2], and the Rules of Practice and Procedure Before the Oklahoma Tax Commission[3]. The protest was docketed as Case No. JM-04-004 and assigned to ALJ, Administrative Law Judge.[4]

A pre-hearing conference was scheduled in this cause for September 1, 2004, by *Notice of Prehearing Conference* issued July 15, 2004.[5] The pre-hearing conference was held at the appointed date and time with the parties' representatives in attendance. Pursuant to the pre-hearing conference, a *Prehearing Conference Order and Notice of Alternative Hearing Date* was issued setting forth dates for the parties to file a stipulation of facts and briefs in support of their respective positions or, in the event the parties could not stipulate to a full and complete factual record, a date for the parties to file pre-trial briefs and a trial date of November 4, 2004.

By *Memorandum* filed October 20, 2004, the Division's representative notified the ALJ's Office that the parties could not stipulate to a full and complete factual record and therefore, the parties would comply with the alternative procedural schedule. Due to a scheduling conflict, the hearing scheduled for November 4, 2004 was canceled and rescheduled for December 2, 2004, by *Notice of Hearing* issued October 22, 2004. Upon Respondent's request for a continuance of the hearing which request was unopposed by the Division, the hearing scheduled for December 2, 2004 was canceled and rescheduled for January 6, 2005, by *Notice of Hearing* issued December 1, 2004.

The hearing was held on the appointed date, with the parties present. One witness, MANAGER, Manager of TAG AGENCY, was called to testify on behalf of Respondent. The Division did not call any witnesses, since the Division's Exhibit A[6] was admitted into evidence by stipulation of the parties. ALJ's Exhibit 1, consisting of a Stipulation of Facts and Exhibits A[7], B[8] and C[9], was also admitted into evidence by stipulation of the parties. The Court examined DIVISION ADMINISTRATOR, Administrator for the Division, who was also examined by

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[1] 47 O.S. 2001, § 1102 et seq.

[2] 47 O.S. 2001, §§ 1140 through 1150.

[3] Rules 710:1-5-20 through 710:1-5-47 of the Oklahoma Administrative Code ("*OAC*").

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

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

[6] A *Contract* by and between the Tax Commission and Respondent appointing Respondent as its Motor License Agent. OTC Form 700-R.

[7] The January 10, 2003 letter of assessment of the penalties against Respondent.

[8] The January 28, 2003, letter of protest.

[9] Waiver Fact Sheet dated April 8, 2004.

Respondent's representative. Closing statements were made, the record was thereafter closed and the hearing was concluded, whereupon this cause was submitted for decision.

FINDINGS OF FACT

Upon review of the file and records, including the record of the hearing and the exhibits received into evidence, the undersigned finds:

A. The parties stipulate to the following:

1. [Respondent] is a Motor License Agent appointed by the Oklahoma Tax Commission ("Commission") pursuant to 47 O.S. § 1140.

2. As a motor license agent, [Respondent] is required to submit semi-monthly reports and all documents of transactions to the Commission within a time period established by the Commission. 47 O.S. § 1142(B).

3. The deadline for filing the November 15, 2002 semi-monthly report was December 3, 2002. The deadline for filing the November 30, 2002 semi-monthly report was December 13, 2002. The deadline for filing the December 15, 2002 semi-monthly report was December 30, 2002.

4. On January 8, 2003, Division conducted a field audit of the books and records of [Respondent] and advised [Respondent] that the semi-monthly reports for November 15, 2002, November 30, 2002, and December 15, 2002 had not been filed.

5. [Respondent] filed the November 15, 2002 and November 30, 2002 semi-monthly reports on January 8, 2003 and filed the December 15, 2002 semi-monthly report on January 10, 2003.

6. By letter dated January 10, 2003, the Division notified [Respondent] by certified mail, that the semi-monthly reports for November 15, 2002, November 30, 2002 and December 15, 2002 were not filed within the time period established by the Commission and penalties of Nine Thousand Five Hundred Fifteen and 46/100 Dollars ($9,515.46) were being assessed against [Respondent]. Exhibit A to the Stipulation of Facts.[10]

7. By letter dated January 28, 2003, [Respondent] notified Division that he and his attorney, ATTORNEY., were of the opinion that the penalties assessed should be waived. Exhibit B to the Stipulation of Facts.[11]

8. A Waiver Fact Sheet was prepared and filed with the Commission. A hearing date concerning the waiver was set for 1:30 p.m. on April 13, 2004. The waiver was denied by the Commission. Exhibit C to the Stipulation of Facts.[12]

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[10] ALJ's Exhibit 1.

[11] See, note 11.

[12] See, note 11.

9. On June 28, 2004, [Respondent] filed a written protest with the office of the Administrative Law Judge asking that this matter be set for hearing.

10. It is admitted by [Respondent] that the Semimonthly Reports, at issue, were filed late by [Respondent]. It is further admitted that the Semimonthly Reports reporting times are governed by 47 O.S. § 1142; Oklahoma Tax Commission Rule 710:60-9-70, 72 & 73; and, the Operating Manual for Motor License Agents, page 8.11, 8.12 and 8.13.

B. Additional findings:

1. EMPLOYEE X was hired by Respondent as the Daily Operations Manager of the tag agency in June, 2002. Testimony of MANAGER.[13]

2. EMPLOYEE X'S duties included the preparation and filing of the semi-monthly reports of the tag agency. Testimony of MANAGER.

3. The semi-monthly reports for November 15, 2002, November 30, 2002 and December 15, 2002, were prepared by an employee of the tag agency and given to EMPLOYEE X for filing. Testimony of MANAGER.

4. According to MANAGER, he did not know the semi-monthly reports in question had not been filed prior to the field audit conducted by the Division on January 8, 2003.

5. Although EMPLOYEE X admitted he was at fault for not filing the semi-monthly reports in a timely manner, he never explained why the reports were not timely filed. Testimony of MANAGER.

6. According to MANAGER, daily reports of the tag agency's activities are provided to the Division.

7. The daily reports are compiled from information of transactions input into the Commission's computer system. Testimony of MANAGER.

8. Receipts collected by the tag agency are deposited into the Tax Commission's account on a daily basis. Testimony of MANAGER.

9. Although MANAGER testified that the semi-monthly reports are compiled from the information of transactions input into the Commission's computer system on a daily basis and is a recap of the daily reports, he also testified that "it is not the procedure" to submit the title and registration documents which proves and verifies what they have already done on the computer, on a daily basis. Testimony of MANAGER.

[13] MANAGER identified himself as the Manager of the Quail Tag Agency.

10. MANAGER admitted that the semi-monthly reports not only contain the documents which are reported daily, but other documents (hard copy back ups of the titles and registrations).

11. DIVISION ADMINISTRATOR, Administrator, Motor Vehicle Division, testified that the semi-monthly reports not only contain copies of transaction receipts, but also the documentation supporting the receipts.

12. DIVISION ADMINISTRATOR stated that the purpose of the semi-monthly reports is to have a traceable recorded history of the title and registration to any particular vehicle.

ISSUES AND CONTENTIONS

Three issues are presented for decision. The issues are:

1. Whether the Division erred in assessing the penalty in the amount of $9,515.46 for failure to file the semi-monthly reports as required by 47 O.S. 1142(B) and OAC § 710:60-9-70 when the requirement for such filings were satisfied by the daily electronic filings by Respondent.

2. Whether the Division erred in assessing the penalty in the amount of $9,515.46 against Respondent for failure to file the semi-monthly reports when the culpable party responsible for failing to file the semi-monthly reports was EMPLOYEE X, an employee of Respondent who was directed by Respondent to promptly file the semi-monthly reports.

3. Whether under the facts of the case, the Commission erred in determining that it did not have the authority to waive the penalty against Respondent.

With respect to the first issue, Respondent contends that the semi-monthly report filing requirement is satisfied by the submission of daily reports and therefore, the assessed penalties are not appropriate. In support of this contention, Respondent argues two points, to-wit: (1) the requirement of periodic reports provides a method for the Tax Commission to verify the receipts of a tag agent and the accurate collection of taxes; and (2) with the advent of the computerized network system, the semi-monthly reports became nothing more than a paper back-up of the information which was already provided in the daily electronic transmissions. In support of the second argument, Respondent asserts that Section 1142 was enacted in 1985 when written reports were the only method available to track the collection of taxes, whereas now "real-time" reports as transactions occur are made. Respondent further asserts that the semi-monthly reports are compiled from the information submitted in the daily reports and are merely recaps of the daily reports.

The Division contends that the evidence as stipulated to proves Respondent failed to file the semi-monthly reports within the time prescribed and therefore, Respondent is liable for the penalties. In support of this contention, the Division cites Section 1142(B) and *OAC*, 710:60-9-72 and argues that the semi-monthly reports not only contain the information submitted on a daily basis, but all documents of all transactions performed by a tag agent. The Division further argues that the rule implementing the provisions of the statute was adopted and approved by the legislature in 1991 after the computerized network system was in place.

With respect to the second issue, Respondent contends that he can not be held liable for the penalties since the culpable party responsible for the failure to file the semi-monthly reports was EMPLOYEE X, an employee of Respondents. In support of this contention, Respondent argues that unless the statute imposing a penalty expresses a contrary intent, an employer is only liable for a penalty occasioned by the act or omission of an employee when the employer played some part in the culpable act or omission. In support of this argument, Respondent asserts that EMPLOYEE X, an employee of Respondent, was responsible for filing the reports, that EMPLOEE X admitted he was solely at fault for the failure to timely file the reports and that Respondent was not aware the reports had not been filed until after the prescribed time for filing the reports had elapsed.

The Division contends that Section 1142(E) does not excuse a motor license agent from the penalty imposed and therefore, Respondent is liable for the penalties. In support of this contention, the Division argues that Respondent failed to timely file the reports, although he was aware of the requirements for filing the reports.

With respect to the third issue, Respondent contends that under the facts of this case the Commission should waive the penalties. In support of this contention, Respondent argues that the funds to which the reports apply were properly deposited, that Respondent did not know the reports had not been filed and that once notice of the delinquencies was provided, the reports were filed. Respondent cites 68 O.S. 2001, § 220(A) and argues that the Commission may waive the penalties where the failure to file the report is satisfactorily explained or resulted from a mistake of facts.

The Division contends that the Commission did not err in finding that it did not have authority to waive the penalties assessed against Respondent since all of the conditions for waiver were not met. In support of this contention, the Division argues that the reports were not filed within a week of the date the reports were required to be filed.

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and the subject matter of this proceeding is vested in the Tax Commission. 47 O.S. 2001, §§ 1142 and 1149.

2. Each motor license agent is required to submit to the Tax Commission semi-monthly reports to properly account for all funds received by the agent in the performance of his duties. 47 O.S. 2001, § 1142(B). It is the responsibility of the motor license agent to mail or deliver the reports and all documents of all transactions to the Commission with the time period established by the Commission. Id.

3. The reporting duties of motor license agents include: (1) the preparation and filing of semi-monthly reports no later than ten (10) working days after the cutoff day of the report; and (2) the reporting on a daily basis, by entering into the Tax Commission computer system, all items issued, transactions completed and deposit information. *OAC*, 710:60-9-70(a) and (b).[14]

[14] Amended at 8 Ok Reg 3305, eff 7-8-91(emergency); Amended at 9 Ok Reg 2151, eff 6-12-92.

4. The semi-monthly report consists of the original copy of the computer generated report, completed remittance slip and all transaction documents. *OAC*, 710:60-9-72(a) and (b).[15] The transaction documents required to be submitted with the semi-monthly reports are title documents and registration documents. *OAC*, 710:60-9-72(b)(1) and (2).

5. Respondent initially contends that the semi-monthly reporting requirement is satisfied by the submission of daily reports to the Tax Commission. Respondent's contention does not consider all of the aspects of the requirement for semi-monthly reports. First, the purpose of the semi-monthly reporting requirement is not only to properly account for all funds received by the motor license agent, but also to construct a record of the title and registration to any particular vehicle "so that at all times it is possible to trace title to the vehicle designated." 47 O.S. 2001, § 1107. Second, Section 1142(B) mandates that the motor license agents "shall submit the appropriate reports designated by the Commission"[16] and specifically commands the filing semi-monthly reports.[17] Third, the semi-monthly reports not only contain the documents reported daily, but transaction documents - title and registration documents.

6. Respondent's contention that the culpable party in this case is his employee, EMPLOYEE X and that he can not be held liable for the penalties occasioned by the omission of his employee, unless the statute imposing the penalties expressly provides otherwise is inane. Section 1142 specifically provides that "[i]t shall be the responsibility of the motor license agent to mail or deliver [the semi-monthly] reports and all documents of all transactions to the Commission within a time period to be established by the Commission" and that "any motor license agent who fails to comply with any provision of this section shall pay a penalty to be imposed by the Commission." 47 O.S. 2001, § 1142(B) and (E). Acceptance of Respondent's contention would obviate the intent and purpose of the statutory provisions.

7. The Commission shall impose a penalty against any motor license agent who fails to comply with any provision of Section 1142. 47 O.S. 2001, § 1142(E). The penalty is one percent (1%) of the gross amount of the receipts received by the motor license agent for the report period if the agent fails to timely mail the required report and is three percent (3%) of the gross amount of the receipts received by the motor license agent for the report period that the agent fails to timely mail the required report if the motor license agent fails to fulfill these requirements within five (5) days. Id.

The time period established by the Commission for mailing or delivering the semi-monthly reports to the Commission is "no later than ten (10) working days after the cutoff date of the report." *OAC*, 710:60-9-72(c). Here, Respondent not only failed to file the semi-monthly reports in question within the time period established by the Commission, but within the additional five (5) day time period established by the statute. Accordingly, the Division did not err in assessing penalties in the

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[15] Added at 8 Ok Reg 3305, eff 7-8-91 (emergency); Added at 9 Ok Reg 2151, eff 6-12-92; Amended at 19 Ok Reg 1849, eff 6-13-02.

[16] *OAC*, 710:60-9-70(a) and (b) whereby the Commission has designated daily and semi-monthly reports.

[17] The legislature shall never be presumed to have done a vain or useless act. ***Globe Life and Acc. Ins. Co. v. Oklahoma Tax Commission***, 1996 OK 39, 913 P.2d 1322.

aggregate amount of $9,515.46 against Respondent for failing to file the semi-monthly reports in question within the required time periods.

8. The penalty for failing to timely file the accounting report required by Section 1142 may be waived if the Commission finds that: (1) the funds to which the report applies have been properly deposited; (2) the failure to timely file the report was due to emergency conditions beyond the control of the agent; and (3) the report has been filed within a week of the date on which it was required to be filed. 47 O.S. 2001, § 1142(E).

The Division contends that the penalties assessed against Respondent can not be waived since all of the conditions for waiver were not met, arguing the semi-monthly reports in question were not filed within a week of the date the reports were required to be filed. Respondent admits the semi-monthly reports in question were filed late.[18]

Semi-monthly reports are required "to be received by the Oklahoma Tax Commission no later than ten (10) working days after the cutoff date of the report." *OAC*, 710:60-9-72(c).[19] The cutoff date of semi-monthly reports is the fifteenth day and last day of the month. 47 O.S. 2001, § 1142(B). A penalty of one percent (1%) of the gross amount of the receipts received for the report period is imposed if the report is not filed within "ten (10) working days after the cutoff date of the report." See, 47 O.S. 2001, § 1142(E) and *OAC*, 710:60-9-72(c). A penalty of three percent (3%) of the gross amount of the receipts received for the report period is imposed if the report is not filed within an additional five (5) days. See, 47 O.S. 2001, § 1142(E) and *OAC*, 710:60-9-72(c).

The one percent (1%) or three percent (3%) penalty may be waived if the accounting report is filed within a week of the required filing date. The required filing date is "ten (10) working days after the cutoff date of the report." *OAC*, 710:60-9-72(c). This provision permits a waiver of the penalty if the report is filed within seven (7) days of the required filing date.[20] Consequently, the Commission may always consider the waiver of the one percent (1%) penalty, but can only consider the waiver of the three percent (3%) penalty if the report is filed within two (2) days of the date the three percent (3%) penalty is to be imposed.

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[18] Stipulation of Fact, No. 10. The parties also stipulate to the "deadline" for filing the semi-monthly reports in question as December 3, 2002 for the November 15, 2002 report, December 13, 2002 for the November 30, 2002 report and December 30, 2002 for the December 15, 2002 report. See, Stipulation of Fact, No. 3. The undersigned is not certain what the parties intended by the term "deadline", but under any scenario the date selected is incorrect. The date for filing the November 15, 2002 report without penalty was either November 27 or 29, 2002, depending on whether Respondent was open for business on Saturdays. See, 47 O.S. 2001, § 1144(B). The date for filing the November 15, 2002 report without incurring the three percent (3%) percent penalty was either December 2 or 4, 2003, again dependent on whether Respondent was open for business on Saturdays. Taking into consideration all of the factors, the "deadline" for filing the November 30, 2002 report was either December 12 or 13, 2002 and December 17 or 18, 2002 and the "deadline" for filing the December 15, 2002 report was either December 26 or 27, 2002 and December 31, 2002 or January 2, 2003, considering the January 1, holiday. None of the above dates takes into consideration the additional time a report can be filed (two (2) days) and a waiver of the penalty may be considered.

[19] The time period established by the Commission for motor license agents to mail or deliver the semi-monthly reports and all documents of all transactions to the Commission as mandated by 47 O.S. 2001, § 1142(B).

[20] "Week" is defined as "[a] period of seven consecutive days of time; and, in some uses, the period beginning with Sunday and ending with Saturday. Black's Law Dictionary 1429 (5th ed. 1979).

Here, under the best case scenario, Respondent did not file the semi-monthly reports in question within a week of the required filing dates of the reports. Accordingly, the Commission did not err in determining it did not have authority under 47 O.S. 2001, § 1142(E) to waive the penalty against Respondent.

9. Respondent contends the Commission may waive the penalties by reason of 68 O.S. 2001, § 220(A). When a special statute clearly includes the matter in controversy, the special statute controls over a statute of general applicability. ***Davis v. GHS Health Maintenance Organization, Inc.***, 2001 OK 3, 22 P.3d 1204. See, ***Wagnon v. State Farm Fire and Cas. Co.***, 1997 OK 160, 951 P.2d 641. Here, Section 1142(E) clearly includes the matter in controversy and, therefore is controlling. Further, Section 220 is not applicable to this controversy since it only applies to interest or penalty accruing by reason of a taxpayer's failure to file a report or return as required by any state tax law or by this Code. See, 68 O.S. 2001, § 220(A). This controversy originates under the Oklahoma Vehicle License and Registration Act[21], and in particular the provisions governing Motor License Agent[22].

10. Respondent's protest to the assessment of the penalties imposed by 47 O.S. 2001, § 1142(E) and request for waiver of those penalties should be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Respondent, RESPONDENT d/b/a TAG AGENCY, be denied. It is further ORDERED that the penalties, as assessed by the Division, be found due and owing.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are 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.

[21] 47 O.S. 2001, § 1102 et seq.

[22] 47 O.S. 2001, §§ 1140 through 1150.