JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2005-08-16-15
ID:	P-04-035-H
DATE:	AUGUST 16, 2005
DISPOSITION:	SUSTAINED IN PART/DENIED IN PART
TAX TYPE:	SALES/WITHHOLDING
APPEAL:	NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPANY LLC. d/b/a BUSINESS, MEMBER A, MRS. MEMBER A, MEMBER Z and MRS. MEMBER Z as Members and Individuals ("Protestants") appear pro se[1] through MEMBER A. The In-House Audit Section, Audit Division ("Division") of the Oklahoma Tax Commission is represented by OTC ATTORNEY 1, and OTC ATTORNEY 2, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On March 23, 2004, the Division forwarded the audit file to the Office of the Administrative Law Judges for further proceedings consistent with the Uniform Tax Procedure Code[2] and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.[3] A Prehearing Conference was scheduled for April 27, 2004, at 1:30 p.m. The Notice of Prehearing Conference was mailed to the Protestants at their last known addresses.[4] The Protestants did not appear at the Prehearing Conference. Thereafter, 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. On July 15, 2004, the Division filed its Verified Response to Protest. No response was filed by the Protestants. The record was closed and the case submitted for decision on July 16, 2004.

On August 4, 2004, this office sent the Division's representatives a Memorandum as follows:

> During the initial preparation of the findings in this matter, it was noted that a protest was filed for both sales tax and withholding tax. However, our correspondence, as well as [the] Division's Verified Response, addressed the sales tax protest only. Therefore, to assure that the protest has been handled properly and there can be no challenge to due process, the case is being withdrawn from submission for decision. The protest will proceed as it would

[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 1099 (5th ed. 1979).

[2] OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

[3] OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47 (2004).

[4] OKLA. STAT. ANN. tit. 68, § 208 (West 2001).

from inception, but with the style correctly reflecting that the protest is for both sales tax and withholding tax.[5]

On August 19, 2004, the Notice of Prehearing Conference was mailed to the Protestants at their last known addresses by certified mail.[6] The Prehearing Conference was scheduled for September 15, 2004, at 3:30 p.m. On September 15, 2004, the Division requested that the Prehearing Conference be rescheduled in order for the Division to contact the Protestants. On November 12, 2004, the Notice of Prehearing Conference was mailed to the Protestants at their last known addresses. The Prehearing Conference was rescheduled for December 14, 2004, at 1:30 p.m. The Protestants did not appear at the Prehearing Conference. On December 15, 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.[7] On January 14, 2005, the Division filed its Verified Response to Protest. On January 19, 2005, the Division filed an "Addendum To Division's Verified Response" to correct the style of the case, which omitted the three other members of COMPANY, LLC.. On February 7, 2005, the Division filed a "Second Addendum To Division's Verified Response" to add the Division's Verification.[8] On March 30, 2005, the Division filed a "Motion To File Amended Verified Response."[9] On March 31, 2005, an "Order Granting Motion To File Amended Verified Response" was entered by this office. The Division was ordered to file an "Amended Verified Response" on or before April 29, 2005. The Protestants response was due on for before May 20, 2005. The parties were advised that after May 20, 2005, the case would be submitted for decision. On March 31, 2005, the Division filed a notice with this office advising the Account Maintenance Division to withdraw Tax Warrant No. 1, Tax Warrant No. 2, and Tax Warrant No. 3, which had been filed prematurely against MEMBER A. On April 29, 2005, the Division filed its [Amended] Verified

[5] The style also omitted the three (3) other members of COMPANY, LLC., and the response was not verified by the Division as required by OKLA. ADMIN. CODE § 710:1-5-28(c) (2004).

[6] The notices were mailed as follows: MEMBER A, 123 FAKE STREET, BIG CITY, MO; MRS. MEMBER A 123 FAKE STREET, BIG CITY, MO; MEMBER Z, 999 BOGUS BLVD., SUBURB, KS ; and MRS. MEMBER Z, 999 BOGUS BLVD., SUBURB, KS. The notices to MEMBER A and MRS. MEMBER A were returned as "Attempted Not Known." The return receipt cards to MEMBER Z and MRS. MEMBER Z were returned reflecting that MRS. MEMBER Z had signed for both notices on August 30, 2004.

[7] The notices to MEMBER A and MRS. MEMBER A were returned as "Not deliverable as addressed / Unable to forward." The return receipt cards to MEMBER Z and MRS. MEMBER Z were returned reflecting that MEMBER Z had signed for both notices on December 27, 2004.

[8] OKLA. ADMIN. CODE § 710:1-5-28(c) (2004). The Verification was not in compliance with the rule. The Verification was signed under oath by the Division's counsel, instead of a member of the Division.

[9] The motion stated that this office had "not been duly apprised of the facts and law" in the case. The Division advised that MEMBER A had not received copies of the pleadings and that he had requested that all subsequent filings be mailed to 111 IMAGINARY STREET, SMALL TOWN, KS.

All documents mailed to 111 IMAGINARY STREET, SMALL TOWN, KS were returned as "No such number." The Division attempted to contact MEMBER A at his work number of (999) 999-99999, but was informed that MEMBER A no longer worked there and his former employer would not release any contact information for him.

Response To Protest. The Protestants did not file a response on or before May 20, 2005. The record in this case was closed and submitted for decision on June 8, 2005.

FINDINGS OF FACT

Upon review of the file and records, and the [Amended] Verified Response To Protest, the undersigned finds:

1. On August 21, 2001, a Business Registration was filed on behalf of COMPANY, LLC. by MRS. MEMBER A, as a Member of COMPANY, LLC.. The Business Registration also listed MEMBER A, MEMBER Z, and MRS. MEMBER Z as members of COMPANY, LLC..[10]

2. MRS. MEMBER A designated herself on Line 9 of the Business Registration as being the Member of COMPANY, LLC. responsible for remitting Withholding Taxes.[11] During the audit period of September 1, 2001, through January 31, 2002, and March 1, 2002, through April 30, 2002, MRS. MEMBER A signed sales tax reports and withholding tax reports, along with checks written on the COMPANY, LLC. checking account.[12]

3. On May 2, 2003, the Division issued proposed sales tax assessments[13] against the Protestants, with interest calculated through May 30, 2003, as follows:

Actual/Estimate	Periods	Tax Due	Interest Due	Penalty	Total
Actual	09/01-01/02	$14,274.37	$3,449.61	$2,707.33	$20,431.31
Actual	03/02-04/02	6,846.48	1,136.99	684.65	8,668.12
					$29,099.43

[10] Division's Exhibit A. According to the Business Registration, MEMBER A is a/k/a MEMBER A WITH MIDDLE INITIAL, MEMBER Z is a/k/a MEMBER Z WITH MIDDLE INITIAL, and MRS. MEMBER Z is a/k/a MRS. MEMBER Z WITH MIDDLE INITIAL. The address for COMPANY, LLC., MEMBER A, and MRS. MEMBER A is 1234 SOME ROAD, FAKEVILLE, Oklahoma. The address for MEMBER Z and MRS. MEMBER Z is 999 BOGUS BLVD., SUBURB, Kansas.

[11] *See* Division's Exhibit A.

[12] Division's Exhibits B-1 through B-6. The withholding tax report for March 2002 and the sales tax report for April 2002 were submitted, but both are unsigned. *See* Division's Exhibits B-5 and B-6 respectively.

[13] Division's Exhibits D-1 through D-4.

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 (2004). The cover sheet for the sales tax audit reflects that the sales tax is paid in full for the months of September 2001 and October 2001, and that November 2001 was a partial remit in the amount of $804.44. The cover sheet indicates that September 2001 and October 2001 were filed late, leaving penalty and interest due on both months. According to the cover sheet, the sales tax assessments were calculated correctly.

4. On May 2, 2003, the Division issued proposed withholding tax assessments[14] against the Protestants, with interest calculated through May 30, 2003, as follows:

Actual/Estimate	Periods	Tax Due	Interest Due	Penalty	Total
Actual	01/02	$162.41	$65.95	$101.00	$329.36
Actual	03/02	141.00	23.75	35.25	200.00
Estimate	04/02	300.00	46.84	75.00	421.84
					$951.20

5. By letter dated June 5, 2003, the Division received a letter of protest for the proposed sales tax and withholding tax assessments from MEMBER A on behalf of the Protestants. MEMBER A denied that the amounts assessed by the Division were correct. MEMBER A further states that to the best of his knowledge as a member of COMPANY, LLC., all taxes have been paid in full and that Mr. and Ms. MEMBER Z were "totally inactive members of [COMPANY, LLC.], and have never in any way participated in the management, decision making or bill paying of [COMPANY, LLC.] in any way shape or form. These members were minority owners and never benefited in the ownership of their interests on [sic] [COMPANY, LLC.]."[15]

6. The Division received a sworn Affidavit dated November 13, 2004, from MEMBER Z and MRS. MEMBER Z reiterating the statements contained in the protest letter filed by MEMBER A[16]

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this action.[17]

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code.[18]

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[14] Division's Exhibits G-1 through G-4. 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 (2004).

The Division assessed COMPANY, LLC. for withholding tax for April 2002. A copy of the assessment was not attached to the Division's Verified Response, but a copy was in the court file. A copy of the assessment is being marked and admitted into evidence as Division's Exhibit C-5.

[15] Division's Exhibit E. MEMBER A sent the protest letter by certified mail (9999 9999 9999 9999 9999), return receipt requested, using the return address of 123 FAKE STREET, BIG CITY, MO. The protest also states that the Protestants did not own the business during all of the dates that taxes are being assessed, but he does not go into any detail as to who else owned the business during the audit period.

[16] Division's Exhibit F. MEMBER Z and MRS. MEMBER Z also state in the Affidavit that they were not signatories on the any of the bank accounts of COMPANY, LLC..

[17] OKLA. STAT. ANN. tit. 68, § 207 (West 2001).

[18] OKLA. STAT. ANN. tit. 68, § 1350 et seq. (West 2001).

3. Every employer is required to deduct and withhold tax and pay over the amount so withheld as taxes to the Oklahoma Tax Commission.[19]

4. A "limited liability company" means an organization other than a corporation or partnership that is organized under the "Oklahoma Limited Liability Company Act."[20]

5. Every employer, including a manager or member of a limited liability company, who is required to withhold and remit taxes to the Tax Commission, shall be held personally liable for failure to do so.[21]

6. When the Tax Commission issues a proposed assessment against a limited liability company for unpaid sales taxes or withholding taxes, the Commission shall file assessments against the managers or members of the limited liability company personally liable for the tax.[22] Managers or members of any limited liability company shall be liable for the payment of any tax prescribed by Section 253 if the managers or members were specified as responsible for withholding or collection and remittance of taxes during the period of time for which the assessment was made. If no managers or members were specified to be responsible for the duty of withholding and remittance of taxes during the period of time for which the assessment was made, then all managers and members shall be liable.[23]

7. In this case MRS. MEMBER A specified herself on Line 9 of the Business Registration as the member of COMPANY, LLC. responsible for the collection and remittance of sales and withholding taxes.[24]

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[19] OKLA. STAT. ANN. tit. 68, § 2385.3(A) (West 2001).

[20] OKLA. STAT. ANN. tit. 68, 202(j) (West 2001). *See also* OKLA. STAT. ANN. tit. 18, § 2000 et seq. (West 2001) for the provisions of the "Oklahoma Limited Liability Company Act."

[21] OKLA. STAT. ANN. tit. 68, § 2385.3(E) (West 2001).

[22] All of the sales tax reports and withholding tax reports were actual reports, with the exception of the April 2002 withholding report, which was estimated and assessed against COMPANY, LLC. and the members of COMPANY, LLC.. *See* Note 14.

[23] OKLA. STAT. ANN. tit. 68, § 253 (West 2001). *See* OKLA. STAT. ANN. tit. 68, 1361(A) (West 2001). *See also* OKLA. ADMIN. CODE § 710:65-5-5(d) (2004).

"A person who is a member or manager, or both, of a limited liability company is not liable for the obligations of a limited liability company solely by reason of being such member or manager or both." OKLA. STAT. ANN. tit. 18, § 2022 (West 2001). For a general discussion of the exceptions to liability under Section 2022 pursuant to various state and federal statutory provisions, *see* 3 A Vernon's Okla. Forms 2d Bus. Org. § 748.

[24] Division's Exhibit A. *See* OKLA. STAT. ANN. tit. 68, § 253 (West 2001). *See also* Oklahoma Tax Commission Order Nos. 2001-07-10-027 (July 10, 2001), 2001-08-01-013 (August 1, 2001), and 2002-04-17-004 (April 17, 2002) *available at* http://www.oktax.state.ok.us. Look under 1998-2004 Commission Decisions (Sales Tax Decisions). All three (3) Commission Orders hold that the member of the LLC that is designated on line nine (9) of the Business Registration Form is responsible for the collection and remittance of sales and withholding taxes for purposes of OKLA. STAT. ANN. tit. 68, § 253 and that the remaining members of the LLC are not held liable.

8. Oklahoma Statutes provide for the collection of interest and penalty on delinquent tax.[25] "All penalties or interest imposed by [Title 68], or any state tax law, shall be recoverable by the Tax Commission as a part of the tax with respect to which they are imposed. . . ."[26]

MEMBER A asserts in the protest letter that the amount of taxes in the proposed sales tax and withholding tax assessments is incorrect and that to his knowledge as a member of COMPANY, LLC. all taxes have been paid in full. These assertions are not supported by the evidence in the record. All of the sales tax reports and withholding tax reports are actual reports, with the exception of withholding tax for April 2002, which was estimated by the Division. The record also contains checks written on COMPANY, LLC.'s checking account paying the tax in full for some months and partially remitting the sales tax for November 2001. No evidence has been submitted by the Protestants to show in what respects that the proposed assessments are incorrect. The protest also asserts that COMPANY, LLC. did not own the business during all of the audit period. The record supports that COMPANY, LLC. did own the business during the entire audit period and the Protestants have not submitted any evidence to the contrary.

After reviewing the Division's [Amended] Verified Response filed April 29, 2005, there appears to be some confusion as to the subtleties between corporations, which have officers, and limited liability companies, which have members and managers or both. The Division correctly assessed the MEMBER As and the MEMBER Zs as *members of COMPANY, LLC., not as officers* as stated in the Division's [Amended] Verified Response.

The Division acknowledges that MRS. MEMBER A designated herself on the Business Registration (Line 9) as the individual [sic] responsible for withholding, but proceeds to use the standard analysis for determining *officer liability for a corporation to determine personal liability for the remaining members of COMPANY, LLC.* COMPANY, LLC. is a limited liability company, with members, not a corporation with officers. The analysis is inapplicable in this matter.

The Division states in its response that:

> MEMBER A appears to have been managing the affairs of the business and is the person who has been communicating with the OTC regarding this matter. He specifically states in the letter of protest that MRS. MEMBER Z and MEMBER Z were minority members only and "never in any way participated in the management, decision making or bill pay of COMPANY, LLC. Petroleum, LLC … and never benefited in the ownership of their interests." He does not likewise disclaim an active interest in COMPANY, LLC. for himself or MRS. MEMBER A. The inference then is the other members named in the assessment, MEMBER A and MRS. MEMBER A, did participate in such management, decision-making and bill paying.

[25] OKLA. STAT. ANN. tit. 68, § 217 (West 2001).

[26] OKLA. STAT. ANN. tit. 68, § 217(G) (West 2001).

There is no evidence in the record to suggest that MEMBER A was managing the affairs of COMPANY, LLC. and the mere fact that MEMBER A filed a letter of protest on behalf of himself and the other Protestants does not make him personally responsible for collecting and remitting sales tax or withholding tax as a member of COMPANY, LLC..

However, the record does support the Division's position that MRS. MEMBER A, as a member of COMPANY, LLC., is personally responsible for the collection and remittance of sales tax and withholding tax. MRS. MEMBER A specified herself on the Business Registration and she is the member of COMPANY, LLC. who signed reports and remitted sales tax and withholding tax written on the checking account of COMPANY, LLC..

Section 253 of the Oklahoma Uniform Tax Procedure Code sets out the procedure to be followed by the Tax Commission when proposed assessments are issued against corporations or limited liability companies as follows:

> When the Oklahoma Tax Commission files a proposed assessment against corporations or *limited liability companies for unpaid sales taxes, withheld income taxes or motor fuel taxes* collected pursuant to Article 5, 6 or 7 of this title, the Commission *shall* file such proposed assessments against the principal officers of such corporation *or the managers or members personally liable for the tax.* The principal officers of any corporation shall be liable for the payment of any tax as prescribed by this section if such officers were officers of the corporation during the period of time for which the assessment was made. *Managers or members of any limited liability company shall be liable for the payment of any tax as prescribed by this section if the managers or members were specified as responsible for withholding or collection and remittance of taxes during the period of time for which the assessment was made. If no managers or members were specified to be responsible for the duty of withholding and remittance of taxes during the period of time for which the assessment was made, then all managers and members shall be liable.*
>
> The liability of a <u>principal officer for sales tax, withheld income tax or motor fuel tax shall be determined in accordance with the standards for determining liability for payment of federal withholding tax</u> pursuant to the Internal Revenue Code of 1986, as amended, or regulations promulgated pursuant to such section.[27] (Emphasis added)

The Tax Commission has consistently upheld the standard set out in Section 253 for determining the personal liability for the members of a limited liability company. As in this matter, MRS. MEMBER A specified herself as the member of COMPANY, LLC. responsible for the collection and remittance of sales tax and withholding tax, and the record reflects that

[27] OKLA. STAT. ANN. tit. 68, § 253 (West 2001). *See* OKLA. STAT. ANN. tit. 68, § 1361(A) (West 2001), which restates the test contained in Section 253. *See also* OKLA. ADMIN. CODE § 710:65-5-5(d), which also restates the test contained in Section 253.

MRS. MEMBER A was the only member of COMPANY, LLC. that filed and remitted sales tax and withholding tax during the audit period.

The record does not support a finding that MEMBER A, MEMBER Z, or MRS. MEMBER Z, as members and as individuals of COMPANY, LLC., were personally responsible for the collection and remittance of sales tax and withholding tax during the audit period.

DISPOSITION

It is the ORDER OF THE OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the protests of MEMBER A, MEMBER Z, and MRS. MEMBER Z, as Members and as Individuals, should be sustained.

It is further the ORDER OF THE OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the protest of COMPANY, LLC. d/b/a BUSINESS to the withholding tax assessment for April 2002 be denied, and that the total amount assessed for unpaid withholding tax be fixed as the Protestant's deficiency and that those amounts be determined to be due and owing, including penalties and interest, accrued and accruing.

It is also the ORDER OF THE OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the protest of MRS. MEMBER A, as a Member and as an Individual should be denied, and that the total amounts assessed for unpaid sales tax and withholding tax be fixed as the Protestant's deficiency and that those amounts be determined to be due and owing, including penalties and interest, accrued and accruing.

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.