JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2006-02-23-04
ID: P-05-073-K
DATE: FEBRUARY 23, 2006
DISPOSITION: DENIED
TAX TYPE: WITHHOLDING
APPEAL: NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestant, PROTESTANT, appears pro se. The Audit Division of the Tax Commission (hereinafter "Division") is represented by OTC ATTORNEY 1 and OTC ATTORNEY 2, Assistant General Counsels, General Counsel's Office of the Tax Commission.

STATEMENT OF THE CASE

A withholding tax audit of the Oklahoma Employment Security Commission ("OESC") reports filed by CORPORATION. (hereinafter referred to as "Corporation") for the periods inclusive of August, 2000 through February, 2003, was performed by the Division. By letter dated November 10, 2004, the Division assessed withholding tax, interest and penalty for the period of June 30, 2002 through February 28, 2003 against Protestant, as President of the Corporation and as an individual. Protestant, in a letter marked received January 18, 2005, timely protested the proposed assessment.[1] Protestant did not request a hearing in the letter of protest.

On July 1, 2005, 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[2] and the Rules of Practice and Procedure Before the Oklahoma Tax Commission[3]. The case was docketed as Case Nos. P-05-073-K.[4]

A pre-hearing conference was scheduled in this cause for August 23, 2005, by ***Prehearing Conference Notice*** issued July 19, 2005.[5] By ***Prehearing Conference Notices*** issued August 16, 2005 and September 21, 2005, the pre-hearing conference was cancelled and rescheduled on two separate occasions and ultimately held on October 24, 2005. Protestant neither appeared at the pre-hearing conference nor responded to the ***Notice***. By letter dated October 25, 2005, the parties were notified that the record in this cause would be closed and the case submitted for decision upon the filing of a ***Verified Response to Protest*** by the Division.[6] Protestant did not respond to this notice.

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[1] The envelope is postmarked January 10, 2005. Exhibit F.

[2] 68 O.S. 2001, § 201 et seq.

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

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

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

[6] *OAC*, 710:1-5-28(c).

The ***Division's Verified Response to Protest*** was filed November 28, 2005. Attached to the ***Verified Response*** were Exhibits A through K. Protestant did not respond to the ***Division's Verified Response to Protest***. The record in this cause was closed and the case submitted for decision on January 13, 2006.

FINDINGS OF FACT

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

1. The Corporation, a foreign-for-profit business corporation, was authorized to do business in the State of Oklahoma on December 22, 1998[7], and operated under its federal employer identification number 99-9999999. Exhibits A, C and D.

2. The Business Registration filed by the Corporation on August 21, 2000, reports that the Corporation started a mattress and box springs manufacturing business in Oklahoma and began withholding Oklahoma income tax from the wages of employees in October, 1998. Exhibit A.

3. The Business Registration of the Corporation was executed by Protestant. Exhibit A. Protestant is not reported to be an officer of the Corporation on the Business Registration.

4. Protestant is listed as the President of the Corporation from June 30, 2002 to February 2, 2003, on the Oklahoma Tax Commission/Audit Division – Taxpayer's List of Principal Officers, Partners or Members (LLC), executed by TREASURER, Treasurer of the Corporation on October 26, 2004. Exhibit H.

5. A withholding tax audit was performed by the Division utilized the OESC reports of the Corporation which indicated the number of employees of the company and the amount of wages paid as reported by the Corporation for each quarter of the audit period. Exhibit D.

6. As a result of the audit, the Division by letter dated November 10, 2004 proposed the assessment of withholding tax, interest and penalty against Protestant, as President of the Corporation and as an individual, for the period inclusive of June 30, 2002 through February 28, 2003. Exhibit E.

7. The assessment proposed an aggregate amount due of $20,478.28, consisting of tax in the amount of $12,912.27, interest accrued through February 28, 2005, in the amount of $4,337.92, and a thirty-day delinquent penalty at five percent (5%) per month up to twenty-five percent (25%) in the amount of $3,228.09. Exhibits C and E.

8. Protestant timely protested the proposed assessment alleging he resigned from his position with Corporation in August, 2001. Division's Exhibit F. The purported letter of resignation reflects an effective date of August 1, 2001. Exhibit J.

[7] Oklahoma Secretary of State's official website, www.sos.state.ok.us.

9. The Oklahoma Annual Franchise Tax Return of the Corporation for the period of July 1, 2001 through June 30, 2002 was executed by Protestant on August 30, 2001. Exhibit G. Schedule A to the franchise tax return lists Protestant as President of the Corporation as of June 30, 2002. Exhibit I.

10. The amount in controversy is $20,478.28, plus accrued and accruing interest on the assessed withholding tax.

ISSUE AND CONTENTIONS

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

Protestant contends that he should not be held responsible for the withholding tax. In support of this contention, Protestant not only argues that he resigned from the Corporation, but that ANOTHER PERSON should be held responsible because he made all of the decisions regarding who got paid and no one could write checks without his approval.

The Division contends that Protestant should be held personally liable for the delinquent withholding tax. In support of this contention, the Division argues that Protestant not only failed to prove the withholding tax assessment is incorrect, but failed to provide sufficient evidence to show he should not be held personally liable for the withholding tax indebtedness.

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). *See*, *OAC*, 710:90-5-3(a). "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. See, OAC*, 710:90-5-3(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. 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 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. A Principal officer of a corporation is identified by the Commission as: (A) President, (B) Vice-President, (C) Secretary, (D) Treasurer, or (E) Secretary/Treasurer. *OAC*, 710:65-7-3(1). 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 (Bkrtcy.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. 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.

11. In administrative proceedings, the burden of proof standard is "preponderance of evidence." 2 Am.Jur.2d *Administrative Law* § 357. *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." Black's Law Dictionary 1064 (5th ed. 1979). 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.*

12. Here, Protestant failed to sustain his burden of proof. None of Protestant's statements are verified. Further, the evidence presented contradicts the basis of Protestant's utilization of the letter of resignation in this matter, if in fact the letter is genuine and veritable. Accordingly, Protestant should be held personally and individually liable for the assessed withholding tax.

13. 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, OFFICER, 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 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.