JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2006-08-08-04 (NON-PRECEDENTIAL)
ID:	P-05-091-K
DATE:	AUGUST 8, 2006
DISPOSITION:	DENIED
TAX TYPE:	WITHHOLDING
APPEAL:	NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATEMENT OF THE CASE

A withholding tax field audit for the period inclusive of April, 1998 through June, 2003 of the available records of the COMPANY (hereinafter referred to as "COMPANY") was performed by the Division. As a result of the audit, the Division by letter dated November 5, 2004, issued a proposed assessment of withholding tax, interest and penalty against Protestant, as a director of the COMPANY and as an individual, for the period inclusive of April, 1998 through December, 1999. Protestant timely protest the proposed assessment by letter dated January 4, 2005. Protestant did not request a hearing in the letter of protest.

Pursuant to information subsequently provided to the Division, the Division by letter dated April 29, 2005 issued a *revised* proposed withholding tax assessment against Protestant for the period inclusive of April, 1998 through December, 1999. The Division's file does not contain a letter of protest to the revised proposed assessment.

On July 27, 2005, the Office of the Administrative Law Judges ("ALJ's Office") received the Division's file which consisted of a cover memorandum, revised proposed assessment, protest letter and original proposed assessment. The file was forwarded for purposes of further proceedings in accordance with the Uniform Tax Procedure Code[1] and the Rules of Practice and Procedure Before the Oklahoma Tax Commission[2]. The protest was docketed as Case Nos. P-05-091-K and assigned to ALJ, Administrative Law Judge.[3]

A pre-hearing conference was scheduled in this cause for October 5, 2005, by *Notice of Prehearing Conference* issued August 23, 2005.[4] Pursuant to Protestant's request, the pre-hearing conference was conducted by telephonic means at the appointed date and time. As a result of the conference, the Division was directed to file a memorandum of authority, Protestant was given an opportunity to respond and the parties were directed to file a status report on or before January 3, 2006.[5]

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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*, 710:1-5-28(b).

By *Memorandum* filed January 3, 2006, a *Status Report* was filed by the Division. Pursuant to the *Status Report*, the parties were directed by letter dated January 4, 2006, to file an additional status report on or before February 2, 2006. A hearing was scheduled in this cause for March 8, 2006, by *Notice of Hearing* issued February 9, 2006.[6]

Prior to the start of the hearing, the representative of the Division and Protestant were contacted by telephone and they jointly agreed to the submission of this matter for decision by written presentation.[7] The case was submitted for decision on March 8, 2006, upon the previously filed written submissions of the parties.

FINDINGS OF FACT

Upon review of the file and records, including the *Brief of the Audit Division*, the exhibits attached thereto and Protestant's letter dated March 1, 2006, the undersigned finds:

1. The COMPANY, a domestic not-for-profit corporation, was authorized to do business in the State of Oklahoma on October 3, 1984[8], and operated under its federal employer identification number 12-3456789. Exhibits B-1 through B-12, C, D-3 and G.

2. At the time the audit was assigned to the Auditor, the COMPANY was closed and the Auditor was unable to locate anyone associated with the COMPANY who had records which could be reviewed. Testimony of AUDITOR in a related case. The audit of the COMPANY encompassed the period inclusive of April, 1998 through June, 2003, and was performed utilizing the records of the Oklahoma Employment Security Commission ("OESC") and a federal income tax return of the COMPANY which information was contained in the audit package provided to the Auditor. Exhibit D-3 and the Testimony of AUDITOR in a related case. Since the records of the Tax Commission for the YMCA did not report a list of officers, the Auditor determined which individuals to assess for the withholding tax liability of the YMCA from the federal income tax return which listed the members of the board of directors of the COMPANY. Testimony of AUDITOR in a related case.

3. Protestant was originally assessed for a portion of the audit period inclusive of April, 1998 through December, 1999. Exhibit G. The original proposed assessment was revised based on the submission of a Payroll Summary of the YMCA for the period ending December, 1998, which altered the withholding tax due for the 1998 tax year. Testimony of AUDITOR in a related case and Exhibits C, D-1 and D-2.

4. The Payroll Summary of the COMPANY reflects total Oklahoma withholding during the 1998 tax year of $6,333.22. Exhibit D-1. This amount less the amount of withholding taxes remitted by the COMPANY during 1998 of $5,530.32 resulted in a balance due of $802.90. Paragraph 6, Statement of Facts, *Brief of the Audit Division*. The COMPANY filed reports and

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

[7] *OAC*, 710:1-5-38.

[8] Oklahoma Secretary of State's official website, www.sos.state.ok.us. The Corporation charter was changed to a "charitable organization" effective April 23, 1997.

remitted the withholding taxes due as shown by those reports for every month during the 1998 tax year except for April and May. Neither reports nor remittances of withholding taxes were made by the COMPANY for the months of April and May, 1998. Testimony of AUDITOR in a related case. The withholding tax balance due for the YMCA for the 1998 tax year was divided by two and applied to the delinquent months of April and May, 1998. Paragraph 6, Statement of Facts, *Brief of the Audit Division*.

5. Protestant was a member of the board of directors of the COMPANY for the portion of the audit period she was assessed (April, 1998 through December, 1999) and during the time to which the withholding tax liability assessed against her is attributed (April and May, 1998). Exhibits A[9] and E through E-3[10]. During the latter time period, the COMPANY did not have an executive director. Exhibit E-2. As a member of the board of directors, Protestant held the office of Treasurer and was involved in the financial operations of the COMPANY. Exhibits A and E-2.

6. Protestant had check signing authority on the operating account of the COMPANY and executed a number of checks made payable to the Tax Commission in remittance of the withholding taxes due from the COMPANY. Exhibits B-1 through B-12. Protestant's signature also appears on the withholding tax reports of the COMPANY during the periods of June, 1998, July, 1998 and December, 1998. Exhibits B-1, B-3 and B-7.

7. The revised amount assessed against Protestant as a director of the YMCA and as an individual for the period inclusive April, 1998 through December, 1999, is $1,847.49, consisting of withholding tax of $802.90, interest accrued through May 31, 2005, of $843.87 and penalty of $200.72. Exhibit C.

8. Protestant timely protested the original proposed assessment placing the entire amount of the assessment in controversy. Exhibit F.

ISSUE AND CONTENTIONS

The issue presented for decision is whether Protestant is personally liable for the withholding tax indebtedness of the COMPANY for the period she was a member of the board of directors of the COMPANY.

Protestant contends that it would be an injustice to hold her liable for something she had no ability to remedy during her service to the COMPANY. In support of this contention, Protestant argues that she was a volunteer board member in the position of Treasurer during the time the liability arose and that she had no knowledge that the withholding taxes had not been remitted to the Tax Commission. She further argues that the checks for payment of the withholding taxes had been written and recorded on the financial statements of the COMPANY. In her letter of January 15, 2006, Protestant writes:

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[9] Letters from Protestant dated January 15, 2006. Protestant also admits she was Treasurer of the board of directors of the COMPANY during April and May, 1998. Letter dated March 1, 2006.

[10] COMPANY Board Meeting Agenda dated July 29, 1998, reflecting the minutes of the June 24, 1998 meeting of the Board of Directors.

> The * * * COMPANY suffered from inadequate cash flow throughout my involvement in this organization and it was always a challenge to prioritize [sic] payment of liabilities. I understand the seriousness of not paying withholding taxes timely and during my watch, steps were put in place to insure compliance with tax laws including the hiring of an independent accountant for preparation of the financial statements that we reviewed on a monthly basis.

The Division contends that Protestant should be held personally liable for the delinquent withholding tax. In support of this contention, the Division argues that as a member of the board of directors, Protestant made decisions in regard to the payment of creditors and that she presented the finance report to the board members. The Division further argues that Protestant admits she was an officer of the COMPANY. Additionally, the Division argues that Protestant signed withholding tax reports and checks in remittance of withholding taxes of the COMPANY.

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 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. 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 voluntary member of any board of trustees or directors of a tax-exempt organization shall not be subject to the penalty imposed by IRC § 6672(a) if such member -- (1) is solely serving in an honorary capacity, (2) does not participate in the day-to-day or financial operations of the organization, <u>and</u> (3) does not have actual knowledge of the failure on which such penalty is imposed. IRC § 6672(e). The exception from the penalty for voluntary board members of tax-exempt organizations shall not apply if it results in no person being liable for the penalty imposed by § 6672(a). IRC § 6672(e).

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." 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.*

13. Here, Protestant failed to sustain her burden of proving she was not a responsible person for the withholding taxes of the COMPANY [under a duty to withhold and remit the withholding taxes of the COMPANY]. Although, in general, voluntary members of the board of directors of a tax-exempt organization are not subject to the penalty imposed by § 6672(a), and consequently the liability imposed by 68 O.S. 2001, § 2385.3(D)[11], the evidence shows Protestant participated in the day-to-day or financial operations of the organization. Further, the evidence shows Protestant had check signing authority on the operating account of the COMPANY and not only signed a few withholding tax reports of the YMCA, but a number of checks made payable to the Tax Commission in remittance of the withholding taxes due from the COMPANY. Accordingly, Protestant should be held personally and individually liable for the assessed withholding tax.

14. Protestant's protest to the proposed withholding tax assessment issued against her as a director of the COMPANY and as an individual 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 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.

[11] *See*, 68 O.S. 2001, § 253.