JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2006-10-07-02 (Non-Precedential)
ID	P-04-108-K
DATE:	OCTOBER 7, 2006
DISPOSITION:	SUSTAINED
TAX TYPE:	WITHHOLDING
APPEAL:	NONE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATEMENT OF THE CASE

A field audit of the payroll summary reports and Oklahoma Employment Security Commission ("OESC") records of COMPANY, LLC ("Company") was performed by the Division. The audit found that no withholding tax reports had been filed and no withholding tax remittances had been made during the periods inclusive of October, 2001 through October, 2003. As a result of the audit, the Division by letters dated June 3, 2004, proposed the assessment of withholding tax, interest and penalty against the Company and Protestants. The Company and Protestants timely protested the proposed assessments and each requested an oral hearing. The Company subsequently withdrew its protest to the proposed assessment.

On September 16, 2004, the Division's files were referred to the Office of the Administrative Law Judges ("ALJ's Office") for further proceedings consistent with the Uniform Tax Procedure Code[1] and the Rules of Practice and Procedure before the Oklahoma Tax Commission[2]. The cases were docketed as Case Nos. P-04-104-K ("ADMINISTRATOR") and P-04-108-K ("RECEIVER") and assigned to ALJ, Administrative Law Judge.[3]

Pre-hearing conferences with respect to each protest were scheduled for September 23, 2004, by *Notices of Prehearing Conference* issued August 16, 2004.[4] Pursuant to the pre-hearing conferences, status reports were directed to be filed no later than November 1, 2004.[5] As directed, status reports were filed advising that the parties were exchanging discovery requests. The reports requested additional time for the parties to attempt settlement or if settlements could not be reached to request hearings.

A hearing was scheduled in Case No. P-04-108-K for March 28, 2005, by *Notice of Hearing* issued March 7, 2005.[6] By *Order Granting Motion to Consolidate Cases* which *Motion* was filed March 28, 2005 and unopposed, the hearing was stricken and a hearing in both protests was

[1] 68 O.S. 2001, § 201 et seq.

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

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

[4] *OAC*, 710:1-5-28(a).

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

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

scheduled for March 31, 2005.[7] Upon *Joint Motions for Continuance* and for good cause shown, the hearing scheduled for March 31, 2005 was stricken and rescheduled for June 7, 2005.[8]

The hearing was held as scheduled. Protestants called seven (7) witnesses through whom Protestants' Exhibits 1 through 8, 8.1 through 8.9, 9 through 13 and 17 through 25 were identified, offered and admitted into evidence without objection, except for Protestants' Exhibit 7 which objection was overruled. The Division called one (1) witness AUDITOR, Auditor, Audit Division, who testified with respect to the records reviewed in performing the field audit. Division's Exhibits A through C, D-1 through D-3, E, G-1 and G-2, and I through K were identified, offered and admitted into evidence without objection. The parties were directed to file proposed findings, conclusions and recommendations in lieu of closing statements. *Proposed Findings of Fact and Conclusions of Law* were filed by the parties on January 17, 2006, whereupon the records in these causes were closed and the matters were submitted for decision.

FINDINGS OF FACT

Upon review of the files and records, including the transcript of the hearing, the exhibits received into evidence and the parties' *Proposed Findings of Fact and Conclusions of Law*, the undersigned finds:

1. At all times relevant, DELAWARE, LLC, a Delaware Limited Liability Company, owned the building housing LONG TERM CARE MANOR ("Manor"), a long-term care facility. Tr. 22, 36 50, 54 and 59-60. See, Protestants' Exhibit 18.

2. Prior to the audit period, DELAWARE, LLC had leased the Manor to MANAGEMENT CO., an Oklahoma for profit Business Corporation owned by OWNER, which managed the operations of the Manor and staff. Tr. 86 and 138. See, Protestants' Exhibit 18.

3. MANAGEMENT CO. was put into receivership by the Oklahoma County District Court upon its default of the lease agreement and subsequent liability lawsuit filed by DELAWARE, LLC. Tr. 36, 86 and 140-141. See, Protestants' Exhibits 18-20.

4. On October 24, 2001, Protestant RECEIVER was appointed and substituted as receiver "for the operation and management and for the preservation of the property and the funds of the [Manor] and to insure that [the Manor] will not be materially injured during the pendency of [the lawsuit]." Exhibit B to the Memorandum Brief of the Audit Division filed March 22, 2005. Protestants' Exhibit 18. Tr. 60, 66 and 141.

5. On October 26, 2001, Protestant RECEIVER entered into a Management Agreement pursuant to the receivership order with TEMPORARY CO., an Oklahoma for profit Business Corporation formed by MANAGER, to temporarily manage the operations of the Manor and staff during the pendency of the receivership which was pending the Certificate of Need application filed

[7] *OAC*, 710:1-5-30.

[8] *See*, note 7.

by the "Company" with the Department of Health. Protestants' Exhibit 12 and 13. Division's Exhibits B and C. Tr. 62-63, 71, 83, 87-88, 113, 141-144, 156 and 165.

6. A Certificate of Need is the authorization or approval of the Health Department for an individual or entity to operate a long-term care facility or nursing home. Tr. 38.

7. Essentially, MANAGER managed the operations of the Manor and staff from October 26, 2001 to April 26, 2002. Protestants' Exhibits 12, 13 and 23. Division's Exhibits B and C. Tr. 12, 15, 20, 29, 31, 34, 46, 62-63, 80, 84-85, 89, 141-144 and 156.

8. MANAGER hired Protestant ADMINISTRATOR as administrator of the Manor. Tr. 23, 29 and 101.

9. On April 26, 2002, the "Company" replaced MANAGER as temporary manager of the operations of the Manor and staff during the pendency of the Certificate of Need process, although MANAGER was still managing the operations. Protestants' Exhibit 4. Division's Exhibit D-2. Tr. 40, 42-45, 84-85.

10. According to MANAGER, the Department of Health allows an individual or entity to manage a nursing home for six months during the Certificate of Need process and if the Certificate of Need is not approved in those six months, someone else must be appointed as temporary manager. Tr. 60 and 83.

11. The "Company" was formed by MANAGER and CO-MANAGER to lease and manage the operations of the Manor and staff. Tr. 50, 54 and 61.

12. The "Company" managed the operations of the Manor and staff from April 26, 2002 through October, 2003. Division's Exhibit D-3. Tr. 42, 44-45 and 54.

13. The members of the "Company" were MEMBER, CO-MANAGER and Protestant ADMINISTRATOR. Division's Exhibit D-2. Tr. 55, 61, 81, 108 and 131.

14. Protestant RECEIVER was never a member, manager or owner of the "Company". Tr. 55, 62, 87-88.

15. Although a business registration for the "Company" was prepared by CO-MANAGER, it was never filed with the Tax Commission. Tr. 51 and 176.

16. A field audit of the payroll summary reports and Oklahoma Employment Security Commission ("OESC") records of the "Company" was performed by the Division. Division's Exhibits G-1 and G-2. Tr. 170-171 and 181-182.

17. The financials of the "Company" were reconstructed back to when MANAGER individually was the operating manager of the Manor. Tr. 46.

18. The audit found that no withholding tax reports had been filed and no withholding tax remittances had been made during the periods inclusive of October, 2001 through October, 2003. Tr. 174.

19. As a result of the audit, the Division by letters dated June 3, 2004, proposed the assessment of withholding tax, interest and penalty against the Company, Protestant ADMINISTRATOR, as Administrator of the "Company" and as an Individual, and Protestant RECEIVER, as Receiver of the "Company" and as an Individual. Division's Exhibits H, I and K.

20. The "Company" and Protestants timely protested the proposed assessments. Division's Exhibits J-1, J-2. Exhibit L to the Memorandum Brief filed by the Division on March 22, 2005.

21. The "Company" subsequently withdrew its protest. Tr. 168.

22. The amount in controversy with respect to Protestant ADMINISTRATOR is $175,683.67, consisting of tax for the periods inclusive of November, 2001 through October, 2003, in the amount of $117,199.00, interest accrued through July 15, 2004, in the amount of $29,184.92, and penalty in the amount of $29,299.75. Division's Exhibit I.

23. The amount in controversy with respect to Protestant RECEIVER is $185,718.14, consisting of tax for the periods inclusive of October, 2001 through October, 2003, in the amount of $123,281.00, interest accrued through July 15, 2004, in the amount of $31,616.89, and penalty in the amount of $30,820.25. Division's Exhibit K.

ISSUES AND CONTENTIONS

The issue presented for decision is whether either Protestant ADMINISTRATOR or Protestant RECEIVER is personally liable for the withholding taxes that TEMPORARY CO., MANAGER or the "Company" failed to report and remit to the Tax Commission during the periods inclusive of October, 2001 through October, 2003.

Protestants contend that they should not be held liable for the amounts in controversy because MANAGER was the person solely responsible for the withholding and remittance of taxes from the wages of the employees of the Manor. In support of this contention, Protestants argue that MANAGER was exclusively and absolutely in control of the finances of each of the managing entities of the Manor and that without their knowledge he diverted the funds of these entities to his personal use. With respect to Protestant ADMINISTRATOR, she further argues that she was only responsible for the daily operations of the Manor, that she could only pay accounts payable to the vendors of the Manor and that she had no knowledge and no way of determining that the taxes were not being paid. With respect to Protestant RECEIVER, he further argues that he had no involvement whatsoever in the management of the Manor, that he had no economic ownership or financial interest in the managing entities and that his involvement was restricted to a title only which responsibility he executed by hiring MANAGER as the manager of the Manor.

The Division contends that Protestants should be held liable for the amounts in controversy. In support of this contention, the Division argues that Protestants failed to sustain their respective burdens of proof to show they were not responsible persons. With respect to Protestant

ADMINISTRATOR, the Division argues that she admitted she was responsible for the daily operations of the Manor, including payment of the staff, that she was an authorized signatory on the operating and payroll accounts of the managing entities and that she was a member of and had an economic or financial interest in the "Company". With respect to Protestant RECEIVER, the Division argues that he accepted the title of receiver of the Manor and as receiver he was obligated and required to take custody and control of the Manor, operate and manage the Manor, and safeguard and preserve the assets of the Manor.

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. Supp. 2002, § 221(D).

2. The term "employer" for purposes of the Withholding Tax Code, 68 O.S. 2001, § 2385.1 et seq., "mean[s] any person (including any individual, * * * limited liability company or corporation) transacting business in or deriving any income from sources within the State of Oklahoma for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term 'employer' shall mean the person having control of the payment of such wages." 68 O.S. 2001, § 2385.1(b).

3. "Every employer who fails to withhold or pay to the Tax Commission any sums herein 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). Section 2385.3(D) further provides in pertinent part, "[t]he term 'employer' as used in this subsection * * * includes an officer or employee of a corporation, manager or member of a limited liability company * * *, who as an officer or employee of a corporation, or manager or member of a limited liability company * * * is under a duty to act for a corporation, limited liability company * * * to withhold and remit withholding taxes * * *."

4. "When the Oklahoma Tax Commission files a proposed assessment against corporations or limited liability companies for unpaid * * * , withheld income taxes * * *, the Commission shall file such proposed assessments against the principal officers of the corporations or the managers or members personally liable for the tax." 68 O.S. 2001, § 253. Section 253 further provides that:

> 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 principal officer for * * * withheld income tax * * * shall be 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.

(Footnote omitted).

5. "[I]n the case of a limited liability company, Section 253 looks only to the manager or member specified as responsible (or in the case no manager or member is specified all managers or members) and does not require a determination of the responsible person in accordance with the standards of determining liability for payment of federal withholding tax because that standard is limited to determining liability of a principal officer of a corporation." Oklahoma Tax Commission Order No. 2001-07-10-027.

6. Here, the "employer" of the Manor's employees was MANAGER and/or TEMPORARY CO. during the periods inclusive of October, 2001 through April, 2002, and the "Company" during the periods inclusive of May, 2002 through October, 2003. Nothing submitted herein shows Protestants were officers or employees of TEMPORARY CO., a corporation. Accordingly, neither Protestant is personally liable for the withholding taxes attributable to the management of the Manor and staff by MANAGER and/or TEMPORARY CO. during the periods inclusive of October, 2001 through April, 2002. No managers or members of the "Company" were specified to be responsible for the duty of withholding and remittance of taxes during the periods inclusive of May, 2002 through October, 2003, therefore all managers and members are liable, including Protestant ADMINISTRATOR. Protestant RECEIVER was neither a manager nor member of the "Company", therefore he is not personally liable for the withholding taxes attributable to the management of the Manor and staff by the "Company".

7. Protestant ADMINISTRATOR'S protest to the proposed withholding tax assessment should be sustained in part and denied in part. Protestant RECEIVER'S protest to the proposed withholding tax assessment should be sustained.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestant, RECEIVER, be sustained. It is further ORDERED that the protest of Protestant, ADMINISTRATOR, be sustained in part and denied in part. It is further ORDERED that the withholding tax assessment issued against Protestant, ADMINISTRATOR, be revised in accordance herewith and that the resultant amount, inclusive of any additional accrued and accruing interest, be found due and owing by Protestant, ADMINISTRATOR.

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.