JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2009-12-03-10 / NON-PRECEDENTIAL**
ID: **P-08-107-K**
DATE: **DECEMBER 3, 2009**
DISPOSITION: **SUSTAINED IN PART / DENIED IN PART**
TAX TYPE: **WITHHOLDING**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestant, PROTESTANT is represented by REPRESENTATIVE 1 and REPRESENTATIVE 2, AGENCY. The Compliance Division of the Oklahoma Tax Commission ("Division") is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

During the period of January 1, 2001 through December 31, 2007, Protestant owned and operated a sole proprietorship known as BUSINESS. A withholding tax audit of Protestant's business was performed by the Division on the only records submitted with respect to a records request by the Division. As a result of the audit, the Division on July 30, 2008 cause to be issued against Protestant a proposed withholding tax assessment, inclusive of interest and penalty. By letter dated September 3, 2008, Protestant timely protested the proposed assessment.

On October 8, 2008, the Division referred the protest and the audit findings to the Office of the Administrative Law Judges for 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 No. P-08-107-K and assigned to ALJ, Administrative Law Judge.[3]

A pre-hearing conference was scheduled for November 12, 2008, by *Prehearing Conference Notice* issued October 20, 2008.[4] The pre-hearing conference was held as rescheduled on December 9, 2008, via telephone. Pursuant to the conference the parties were directed to file a status report on or before January 9, 2009. Following notice that the assessment remained unchanged after the Division's review of additional documentation submitted by Protestant and a second *Status Report* filed February 23, 2009, Protestant was directed to advise on or before March 23, 2009, how he wished to proceed. Protestant failed to respond and by *Notice of Hearing* issued April 2, 2009, the protest was scheduled for hearing for April 28, 2009.[5]

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[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(a) and (b).

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

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

The hearing was held as scheduled. Neither Protestant nor Protestant's representatives appeared at the hearing or responded to the notice. AUDITOR, Auditor testified with respect to the records of the Division and the conduct of the audit. Exhibits A-1 and A-2, B-1 through B-7, C-1 and C-2, and D through H were identified, offered and admitted into evidence. Upon conclusion of the Division's case, the record was closed and the protest was submitted for decision.

FINDINGS OF FACT

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

1. During all times relevant, Protestant owned and operated a sole proprietorship known as BUSINESS in ANY TOWN, Oklahoma. Exhibits B-1 through B-7.

2. Two (2) *Records Requests* were served on Protestant. Exhibits A-1 and A-2. The only records submitted pursuant to the requests were personal income tax returns for tax years 2001 through 2007, bank account statements for the period of January, 2006 through December, 2007, excluding the periods May, September, October and December, 2006 and March, 2007, and copies of checks written on the bank account. Exhibits B-1 through B-7, C-1 and C-2

3. In performing the audit, the expenses reported as "shoeing" and gallops" on Schedule C[6] of Protestant's 2001 through 2007 Federal income tax returns were subjected to withholding taxes as paid to employees. Since no expenses were reported for "gallops" in years 2001 and 2002, an estimated amount of $5,496.00 was projected to each of the years based on the total reported expenses for "gallops" over the remaining five (5) years divided by seven (7). Although no expense for "shoeing" was reported for the year 2002, an estimate for "shoeing" was not projected for 2002. Exhibit D; Testimony of AUDITOR.

4. The total expenses subjected to withholding taxes for the audit period are $68,324.00. Exhibits D and E.

5. On July 30, 2008, the Division caused to be issued against Protestant a proposed withholding tax assessment in the total amount of $3,145.71, inclusive of withholding tax of $1,836.00, interest accrued through September 30, 2008, of $957.81 and penalty of $351.90. Exhibits E and F.

6. By letter dated September 3, 2008, Protestant timely protested the proposed withholding tax assessment. Exhibit G.

7. On January 9, 2009, Protestant submitted four (4) notarized statements from individuals who state that they performed galloping/pony services or horseshoeing services for Protestant on a contract basis. Exhibit H.

[6] Profit or Loss From Business (Sole Proprietorship). The business name is reported as "PROTESTANT" and the principal business or profession is reported as "BUSINESS".

ISSUE AND CONTENTIONS

The issue presented for decision is whether Protestant sustained his burden of proving that the Division's action of subjecting the expenses reported as "shoeing" and "gallops" to withholding taxes as wages paid to employees is incorrect.

Protestant "strongly disagree[s] with the findings of the audit and request[s] further review". Exhibit G. Based on the notarized statements submitted by Protestant it appears that Protestant is arguing that he did not have any employees during the audit period, but rather contracted with individuals to perform the horseshoeing and galloping services.

The Division contends that Protestant has failed to sustain his burden of proving that the proposed assessment is incorrect. In support of this contention, the Division argues that Protestant has not provided any basis for his disagreement with the proposed assessment, nor has he challenged the accuracy of the assessment. The Division further argues that Protestant has failed to come forward with any evidence in support of the allegations in the notarized statements that the individuals who performed horseshoeing and galloping services were self employed contractors or that taxes were paid on the remunerations.

CONCLUSIONS OF LAW

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

2. Any "employer" making payment of wages is under a duty to deduct and withhold a tax from the wages paid each employee. 68 O.S. 2001, § 2385.2(A). The amount of tax to be withheld is determined in accordance with the table devised by the Tax Commission which table fixes the graduated rates of tax. Id.

3. An "employer" is any person who transacts business in or derives any income from sources within Oklahoma for whom an individual performs or performed any service, of whatever nature, as the employee of such person and who controls the payment of the wages for such services. 68 O.S. 2001, § 2385.1(b); *OAC*, 710:90-1-2.

4. An "employee" is any "resident individual" performing services for an employer, either within or without, or both within and without Oklahoma, and every other individual performing services within Oklahoma, the performance of which services constitutes, establishes, and determines the relationship between the parties as that of employer and employee. 68 O.S. 2001, § 2385.1(c); *OAC*, 710:90-1-2.

5. OAC, 710:90-1-2 provides in pertinent part:

> (A) The term 'employee' includes every individual performing services if the relationship between him and the person for whom services are performed is the legal relationship of employer and employee, as follows:

(i) Generally, the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished.

(ii) An employee is subject to the will and control of the employer, not only as to what shall be done, but how it shall be done. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so. In general, if the individual is subject to the control or direction of another merely as to the result to be accomplished by the work, and not as to the means and methods for accomplishing the result, he is not an employee.

(iii) The existence of an employer-employee relationship shall be determined, when in doubt, by an examination of the particular facts of each case.

(iv) If an employer-employee relationship exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial.

(v) It is of no consequence that an employee is designated as a partner, coadventurer, agent, independent contractor, contract labor, or the like. It also does not matter how payments are made, what they are called or whether the service is performed full or part-time.

(B) Generally, persons who follow an independent trade, business, or profession, in which they offer their services to the public, such as physicians, attorneys, dentists, veterinarians, contractors and others, are not "employees."

* * *

(F) Although an individual may be an employee, the services performed may be of such a nature or be performed under such circumstance that the remuneration paid does not constitute wages within the meaning of 68 O.S. Section 2385.1(e) or the Internal Revenue Code.

5. 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***, 1988 OK 91, 768 P.2d 359. The burden of proof and the burden of persuasion on each issue are borne by the taxpayer, the proponent of the issues.

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 offered in opposition to it; that is, evidence which as a whole shows the fact sought to be proved is more probable than not * * *evidence which is more credible and convincing to the mind * * *that which best accords with reason and probability." Black's Law Dictionary 1064 (5th

ed. 1979). Each element of the claim must be supported by reliable, probative, and substantial evidence of sufficient quality and quantity as to show the existence of the facts supporting the claim are more probable than their nonexistence. 2 Am.Jur.2d *Administrative Law* § 357.

6. Protestant failed to sustain his burden of proving that the assessment of withholding taxes on the expenses reported as "shoeing" and "gallops" is erroneous. The statements from the four (4) individuals indicating they performed horseshoeing or galloping services on a contract basis do not set forth sufficient facts to support the conclusion that they are self employed contractors. See *OAC*, 710:90-1-2(A)(iii).

7. The Division proposed the assessment of withholding taxes on a combined estimated amount for "gallops" of $10,992.00 for 2001 and 2002. See, Exhibit D. Protestant reported net profits from the business in 2001 and 2002. Without some evidence to show Protestant incurred those expenses, but failed to report them; the assessment of withholding taxes on the estimated amounts is erroneous.

8. Protestant's protest to the proposed withholding tax assessment should be sustained in part and denied in part. The withholding tax audit should be revised to remove the estimated amounts for "gallops" for 2001 and 2002.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestant, PROTESTANT, d/b/a BUSINESS, be sustained in part and denied in part. It is further ORDERED that the proposed withholding tax assessment be adjusted in accordance herewith and that the resultant amount be fixed as the deficiency due and owing.

ADDENDUM TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

The *Findings, Conclusions and Recommendations* issued on June 2, 2009, in the above styled and numbered cause, comes on for consideration of a recommendation as to the amount of the deficiency which should be confirmed by an order of the Tax Commission.

The Division, as directed by the *Findings, Conclusions and Recommendations*, revised the proposed withholding tax assessment and provided notice of the revisions to Protestant. Protestant has not challenged the revisions proposed by the Division.

Upon consideration of the *Findings, Conclusions and Recommendations* and the *Notice of Corrected Withholding Tax Revision* filed September 30, 2009, the undersigned finds that the following findings should be added to and incorporated in the *Findings, Conclusions and Recommendations*:

1. That *Notice of Corrected Withholding Tax Revision* was filed of record in this cause on September 30, 2009.

2. That the Division revised the withholding tax assessment to an amount of $3,147.66, consisting of tax in the amount of $1,704.00, penalty in the amount of $318.90, and interest accrued through November 30, 2009, in the amount of $1,124.76.

3. That the revisions comply with the recommendation set forth in the *Findings, Conclusions and Recommendations*.

4. That Protestant was provided notice of the revisions.

5. That Protestant did not file a response to the revisions.

The undersigned further finds that the following should be added to and incorporated in the *Findings, Conclusions and Recommendations*:

> It is further ORDERED that the amount in controversy, as revised, inclusive of any additional accrued and accruing interest, be fixed as the deficiency due and owing.

THEREFORE, the *Findings, Conclusions and Recommendations* issued on June 2, 2009, is amended to include and incorporate the above and foregoing findings of fact and ORDER.

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.