JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2011-06-07-04 / NON-PRECEDENTIAL**
ID: **P-10-582-K**
DATE: **JUNE 7, 2011**
DISPOSITION: **DENIED**
TAX TYPE: **SALES / WITHHOLDING**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPANY ("Corporation") is represented by PRESIDENT; Corporation's President and VICE-PRESIDENT; Corporation's Vice-President, who also appear pro se ("Protestants"). The Compliance Division of the Oklahoma Tax Commission ("Division") is represented by OTC ATTORNEY, Assistant General Counsel, General Counsel's Office, Oklahoma Tax Commission.

STATEMENT OF THE CASE

Upon referral from the Bankruptcy Section of the General Counsel's Office, the Division conducted an out-of-business audit of the reports filed on behalf of the Corporation. As a result of the audit, the Division established estimates for the months and/or periods the Corporation was doing business, but had failed to file sales and withholding tax returns. By letters dated May 7, 2010, the Division issued proposed withholding tax assessments against the Corporation and the Officers as individuals for the periods of October, 2006, and December, 2006 through June, 2007. The Division also by letters dated May 7, 2010, issued proposed sales tax assessments against the Officers as individuals for the period of August, 2006 through June, 2007. The proposed assessments were timely protested by letter dated May 10, 2010.

On June 23, 2010, the Division referred the protest files to the Office of the Administrative Law Judges for further proceedings pursuant to the Uniform Tax Procedure Code[1] and the Rules of Practice and Procedure before the Office of the Administrative Law Judges[2]. The protests were docketed as Case No. P-10-582-K and assigned to ALJ, Administrative Law Judge.[3]

A Pre-hearing conference was scheduled for August 5, 2010, by *Prehearing Conference Notice* issued July 15, 2010.[4] A *Status Report in Lieu of Prehearing Conference* was filed advising that Protestants had submitted additional documentation in support of their protests which the Division needed time to review. By letter issued August 5, 2010, the parties were directed to file a status report on or before September 7, 2010.

The *Compliance Division's Notice of Revision of Withholding Tax Portion of Assessment* was filed August 13, 2010, advising that the Division had revised the assessment based on the withholding tax reports filed by Protestants for the delinquent periods. On October 18, 2010,

[1] 68 O.S. 2001, § 201 et seq., as amended.

[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).

Protestants submitted sales tax reports for the delinquent months. Protestants also advised that they intended to file amended sales tax reports for the months prior to the audit period to correct "multiple sales" which were originally listed as taxable by their point of sale software, but upon closer review should have been listed as non-taxable.

On November 22, 2010, Protestants submitted amended sales tax reports for the months of March, 2006 through July, 2006, which according to Protestants were the only reports that needed to be amended. The *Compliance Division's Notice of Revision of Sales Tax Portion of Assessment* ("*Notice*") was filed January 10, 2011, advising that the Division had revised the assessment based on the sales tax reports filed by Protestants for the delinquent months. The *Notice* further advised that:

> The amended returns for March, April, May, June and July, 2006 were not accepted because the statute of limitations for those periods had run. These periods were not part of the original field audit which is the subject of this protest. The original returns for the delinquent periods, August, 2006 through June, 2007, have been accepted as filed.

On January 10, 2011, the *Compliance Division's Second Notice of Revision of Withholding Tax Portion of Assessment* was filed for the sole purpose of correcting "a possible error in the certificate of mailing to the first notice." Based on the *Notices*, the parties were directed to report the status of the protests. By letter dated January 23, 2011, Protestants objected to the Division's refusal to accept the amended sales tax reports for filing, asserting that the reports should be accepted based on the doctrine of equitable recoupment. Pursuant to the *Status Report and Request for Scheduling Order* filed February 15, 2011, a *Scheduling Order and Notice of Hearing* was issued setting forth the procedure by which the protest would be submitted for decision, including the scheduling of an oral hearing for May 24, 2011.

The *Compliance Division's Motion for Summary Disposition* ("*Motion*") was filed February 25, 2010. Exhibits 1 through10 were attached to the *Motion*. By *Order* issued March 30, 2011, the parties were notified that the record was closed and the *Motion* was submitted for decision.[5]

FINDINGS OF FACT

Upon review of the file and records, including the Motion and attached exhibits, the undersigned finds:

1. The facts material to the disposition of the protests are not in dispute and the issues present questions of law.

2. The material facts as set out in the *Motion*, STATEMENT OF FACTS[6], are:

[5] *OAC*, 710:1-5-38(b)(6).

[6] References to exhibits are omitted.

1. PRESIDENT and VICE-PRESIDENT ("Protestants") were Vice-President and President of COMPANY, an Oklahoma domestic corporation, during the periods August 1. 2006 through June 30, 2007.[7] This corporation failed to file timely sales and withholding tax reports for these periods.[8]

2. Based on a referral/audit lead from the Bankruptcy Section of the Office of General Counsel, Oklahoma Tax Commission, the Division conducted a sales and withholding tax field audit of the corporation for the periods August 1, 2006 through June 30, 2007.[9] The sales tax portion of the audit was based on the Oklahoma Tax Commission's claim in the corporation's Chapter 7 bankruptcy case, Western District of Oklahoma Case No. 07-12781-RLB, filed August 6, 2007 and discharged ordered October 29, 2007. The withholding portion of the audit was based [on] reports the corporation filed with the Oklahoma Employment Security Commission and on the Schedule C of the corporation's income tax returns. The records of the Oklahoma Tax Commission were noted to show the corporation had an out-of-business date of June 30, 2007, based on the bankruptcy.

3. Based on the results of the sales tax audit, by letters dated May 7, 2010 and mailed to Protestants' last known address as reflected on the records of the Division and Oklahoma Tax Commission, the Division proposed to assess each of Protestants sales tax, interest and penalty for the periods August 1, 2006 through June 30, 2007 in the following estimated amounts in their capacities as officers of the corporation, and as individuals:

Tax	$19,187.44
Interest through 7/7/10	10,932.44
Penalty (12%)[10]	2,200.44[11]
Total	$32,320.32

4. Based on the results of the withholding tax audit, by letters dated May 7, 2010 and mailed to Protestants' last known address as reflected on the

[7] Exhibits 1 through 5 reflect PRESIDENT was President of the Corporation, and VICE-PRESIDENT was Vice-President of the Corporation during the audit period.

[8] The Field Audit Write-up and work papers reflect that withholding tax reports were not filed on behalf of the corporation for the periods of October, 2006, and December, 2006 through June, 2007.

[9] The withholding tax audit was limited to the periods of October, 2006, and December, 2006 through June, 2007. See note 8.

[10] The proposed sales tax assessments reflect the assessment of a "30 day delinquent Penalty @ 10%" which is in accordance with 68 O.S. Supp. 2004, § 217(C).

[11] The Sales Tax Summary Sheet from the audit work papers shows a total tax assessed of $22,004.00, inclusive of state, city and county taxes on gross sales for the audit period of $263,300.18. The difference in the tax amounts shown on the assessments ($19,187.44) and the Summary Sheet reflects payments made toward the balance owed in the amount of $2,816.56.

records of the Division and Oklahoma Tax Commission, the Division proposed to assess each of Protestants (and the corporation) withholding tax, interest and penalty for the periods October 1, 2006 through June 30, 2007[12] in the following estimated amounts in their capacities as officers of the corporation, and as individuals:

Tax	$5,228.00
Interest through 8/6/10	2,652.35
Penalty (10%)	522.80
Total	$8,403.15

5. On May 20, 2010, the Division received Protestants' letter of protest to the assessments. In the letter, Protestants argued that any tax liability resulting from the assessments was discharged in bankruptcy, and attached paperwork from the corporation's bankruptcy case.[13]

6. On or about July 30, 2010, Protestants submitted actual (no-remit) withholding tax reports for the periods October, 2006 and December, 2006 through June, 2007. The reports were accepted by the Division as filed.

7. On or about October 15, 2010, Protestants submitted actual (no-remit) sales tax reports for the periods August, 2006, through July, 2007. The reports were accepted by the Division as filed.

8. On or about November 20, 2010, Protestants submitted amended (no-remit) sales tax reports for the periods March, 2006, through July, 2006. The reports presumably reflected lower sales tax than originally reported for those periods. The reports were not accepted by the Division because the limitation period to claim a credit or refund had expired and the periods were not part of the field audit at issue in this case.

9. By *Notice of Revision*[14] filed in the Office of Administrative Proceedings on January 10, 2011 and mailed to Protestants at their current address reflected on the records of the Division and the Oklahoma Tax Commission, the Division revised the original sales tax assessment based on the actual reports, as follows:

Tax	$14,727.60
Interest (15% through 2/28/11)	9,008.25
Penalty (10%)	1,472.76
Total	$25,208.61

[12] See note 9.

[13] The attachment to the protest letter also includes the *Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines*, and the *Discharge of Debtor* for Protestants, PRESIDENT and VICE-PRESIDENT.

[14] Italicized emphasis original.

10. By *Notice of Revision*[15] filed in the Office of Administrative Proceedings on January 10, 2011 and mailed to Protestants at their current address reflected on the records of the Division and the Oklahoma Tax Commission, the Division revised the original withholding tax assessment based on the actual reports, as follows:

Tax	$2,793.00
Interest (15% through 9/13/10)	1,897.94
Penalty (10%)	279.30
Total	$4,970.24

11. By letter dated January 23, 2011 and filed in the Office of Administrative Proceedings, Protestants protested the revised assessments. [I]n the letter, Protestants argued (1) the denial of the acceptance of the amended sales tax reports was incorrect on equitable grounds and (2) the assessment against them as officers and individuals was inequitable.

ISSUES

Two issues are presented for decision, to-wit: (1) whether the reported sales and withholding taxes were discharged by Protestants' bankruptcies, and (2) whether equitable recoupment is applicable to offset the overpaid sales taxes; if any, against the reported sales tax liability.

Protestants initially contended that the debt to the Oklahoma Tax Commission was discharged by the bankruptcy filings. Protestants now contend that the doctrine of equitable recoupment should be applied to allow an offset of the sales taxes overpaid on the amended sales tax reports against the reported sales tax liability.

The Division contends that "[t]he sales and withholding taxes could not have been discharged in bankruptcy because they are based on actual reports filed after two years before the commencement of the corporation's bankruptcy case, and are 'trust taxes'", citing 11 U.S.C. § 523(a). The Division also contends that the subject of taxation is purely statutory leaving no room for equitable considerations. The Division further contends with respect to the officers of the Corporation, that they were officers during the audit period and that they have not alleged nor presented any evidence to show they were not principal officers.

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.

[15] Italicized emphasis original.

2. Each and every vendor[16] in this state is required to collect from the consumer or user the full amount of tax levied by Oklahoma Sales Tax Code ("Code")[17], or an amount equal as nearly as possible or practicable to the average equivalent thereof. 68 O.S. 2001, § 1361(A)(1). Every person required to collect any tax imposed by the Code, and in the case of a corporation, each principal officer thereof, is personally liable for the tax. Id.

3. Every employer who fails to withhold or pay to the Oklahoma Tax Commission any sums required to be withheld or paid under the withholding provisions of the Oklahoma Income Tax Act[18] is personally and individually liable therefor to the State of Oklahoma. 68 O.S. Supp. 2005, § 2385.3(E). The term "employer" includes an officer or employee of a corporation, who as an officer or employee is under a duty to act for the corporation to withhold and remit withholding taxes. Id.

4. The Oklahoma Tax Commission is required to file proposed assessments against the principal officers of a corporation when it files a proposed assessment against the corporation for unpaid sales taxes or withheld income taxes. 68 O.S. 2001, § 253. The principal officers of any corporation are liable for the payment of the taxes if such officers were officers of the corporation during the period of time for which the assessment was made and the officers are determined to be "responsible persons". See I.R.C. §§ 6671 and 6672. The Tax Commission identifies the "President, Vice-President, Secretary, Treasurer, or Secretary/Treasurer as principal officers". *OAC*, 710:65-7-3(1).

5. "Any sum or sums collected or accrued or required to be collected or accrued" under the Oklahoma Sales Tax Code and "[a]ny sum or sums withheld" in accordance with the withholding provisions of the Oklahoma Income Tax Act are "deemed to be held in trust for the State of Oklahoma, and, as trustee", the collecting vendor or 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. §§ 1361(F) and 2385.3(E).

6. A discharge from Chapter 7 bankruptcy does not discharge an individual debtor from any debt for a tax required to be collected or withheld and for which the debtor is liable in whatever capacity; so called "trust fund taxes", whether or not a claim for such tax was filed or allowed. 11 U.S.C. §§ 523(a)(1)(A) and 507(a)(8)(C).

7. Any tax erroneously paid through error of fact, or computation, or misinterpretation of law may be refunded within three years from the date of payment thereof. 68 O.S. 2001, § 227(a) and (b). Section 227 is a statute of limitation that bars any refund for any period beyond the limitation period. ***Vinson Supply Co. v. State ex rel. Oklahoma Tax Commission***, 1988 OK 107, at ¶ 5, 767 P.2d 406, 408. The amended sales tax returns filed on or about November 20, 2010 for the months of March, 2006 through July, 2006 are untimely and the refund of taxes; if any, is barred.

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[16] Defined at 68 O.S. Supp. 2007, § 1352(28) to include: "any person making sales of tangible personal property or services in this state, the gross receipts or gross proceeds from which are taxed by the * * * Code.

[17] 68 O.S. 2001, § 1350 et seq., as amended.

[18] 68 O.S. 2001, § 2351 et seq., specifically § 2385.1 through § 2385.32, as amended.

8. "The doctrine of equitable recoupment was first articulated in *Bull v. United States*, 295 U.S. 247, 55 S.Ct. 695, 79 L.Ed. 1421 (1935)." ***Rogers v. United States***, 281 F.3d 1108, 1128 (10th Cir. 2002). The Court in ***Rogers*** wrote: "*Bull* states that when the government uses inconsistent theories to obtain more money than it is fairly entitled to when examining a single transaction for tax purposes, a refund may be allowed in spite of the expiration of the statute of limitations." Id., citing also *United States v. Dalm*, 494 U.S. 596, 608, 110 S.Ct. 1361, 108 L.Ed.2d 548 (1990). The Court in ***Rogers*** further wrote: "that recovery using the doctrine of equitable recoupment is restricted to situations where a 'single transaction or taxable event ha[s] been subjected to two taxes *on inconsistent legal theories* * * *'", citing *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, 300, 67 S.Ct. 271, 91 L.ed. 296 (1946), (emphasis original); and "if the multiple bases for a tax assessment are not inconsistent, then there is no occasion to apply equitable recoupment." Id., at 1128-1129. Further, the Court in ***Rogers*** wrote: "cases applying this doctrine strongly suggest that 'if the subject transaction involves two or more taxpayers, equitable recoupment will not be available unless a sufficient identity of interests exists so that the taxpayers should, in equity, be treated as a 'single taxpayer'", citing principally *Parker v. United States*, 110 F.3d 678, 683 (9th Cir. 1997) which quoted *Stone v. United States*, 301 U.S. 532, 537-38, 57 S.Ct. 851, 81 L.Ed. 1265 (1937).

The Supreme Court of Oklahoma has applied the doctrine of equitable recoupment in an estate tax case, specifically citing the language of § 815(B) of the Oklahoma Estate Tax Code[19] which provides "the Commission may grant a hearing, and upon such hearing may adjust the matters in controversy and correct the assessment as justice may require." ***Estate of Kasishke v. Oklahoma Tax Commission***, 1975 OK 133, 541 P.2d 848, 853. In ***Kasishke***, the Court held that "the entire estate tax return should be treated as a single transaction for purposes of recoupment" allowing the taxpayer to offset taxes erroneously paid on the transfer of turnpike bonds; but for which taxpayer had failed to file a timely claim for refund, against the additional estate tax assessed on the improper treatment of three other items on the return.

9. In all administrative proceedings the burden of proof is on the taxpayer to show in what respect the action or proposed action of the Oklahoma Tax Commission is incorrect. *OAC*, 710:1-5-47. *See* ***Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission***, 1988 OK 91, 768 P.2d 359.

10. Protestants have not alleged nor come forward with any evidence to show they were not principal officers of the Corporation during the audit period.

11. The sales and withholding taxes levied by the State of Oklahoma are trust fund taxes; and as such, are not dischargeable in bankruptcy.

12. The doctrine of equitable recoupment is not applicable in this matter. First, neither the Oklahoma Sale Tax Code nor the withholding provisions of the Oklahoma Income Tax Act contains language similar to the language of § 815(B) cited by the Court in ***Kasishke***. Second, a single transaction or taxable event has not been subjected to two taxes on inconsistent legal theories. While the initial sales tax assessment utilized the gross sales reported on Protestants' previously

[19] 68 O.S. 2001, § 801 et seq.

filed sales tax reports and sales reported on Schedule C of the Corporation's income tax returns to arrive at an estimate for the audit period, the revised sales tax assessment is based on sales tax reports filed by Protestants. The initial assessment may have borne some inconsistencies since Protestants determined that during the period when sales tax reports were filed "many sale" listed as taxable were non-taxable. However, since the revised assessment is based on the sales tax reports filed by Protestants the possibility of any inconsistencies have been removed. Further, this case does not involve a "single transaction or taxable event". Assuming arguendo that a sales tax report constitutes a single transaction and not each sale, Protestants seek to offset refunds from six separate reporting periods against the taxes owed for a different twelve separate reporting periods. Third, any sales tax refund allowed could not be used to offset Protestants' sales tax liability, but would have to be returned to their customers who overpaid the taxes. *OAC*, 710:65-11-1(b)(6).

13. Protestants' protests should be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protests of Protestants, COMPANY, and PRESIDENT and VICE-PRESIDENT, be denied.

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.

NOTE: The distinction between a Commission Order designated as "Precedential" or "Non-Precedential" has been blurred because all OTC Orders resulting from cases heard by the Office of Administrative Law Judges are now published, not just "Precedential" Orders. *See* OKLA. STAT. ANN. tit.68, § 221(G) (West Supp. 2009) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002). *See also* OTC Orders 2009-06-23-02 and 2009-06-23-03 (June 23, 2009), which also conclude the language of the Statute is "clear and unambiguous."