JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2011-09-27-02 / NON-PRECEDENTIAL**
ID: **P-10-115-H**
DATE: **SEPTEMBER 27, 2011**
DISPOSITION: **DENIED**
TAX TYPE: **WITHHOLDING**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

TREASURER, as Treasurer of COMPANY and as an Individual ("Protestant"), appears through attorneys ATTORNEY 1 and ATTORNEY 2, FIRM. The Field Audit Section, Compliance Division ("Division") of the Oklahoma Tax Commission appears through OTC ATTORNEY 1, First Deputy General Counsel, and OTC ATTORNEY 2, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On April 13, 2010, the protest file was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*[1] and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.[2] On April 13, 2010, a letter was mailed to the Protestant stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-10-115-H. The letter also advised the Protestant that a Notice of Prehearing Conference would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Office of Administrative Law Judges.*[3] On April 15, 2010, OTC ATTORNEY 3, Assistant General Counsel, filed an Entry of Appearance as Counsel of record for the Division. On April 30, 2010, the Notice of Prehearing Conference was mailed to the last-known address of Protestant's Counsel, setting the prehearing conference for June 7, 2010, at 2:00 p.m.[4]

On May 27, 2010, the Division filed a Report-In-Lieu advising that COMPANY was in a Chapter 11 bankruptcy and there was an ongoing federal criminal investigation making the company's records inaccessible.

On June 2, 2010, a letter was mailed to Counsel advising that a status report was to be filed on or before August 27, 2010. The procedural history from August 27, 2010, to December 6, 2010, is omitted herein.

---

[1] OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

[2] OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

[3] *Id.*

[4] OKLA. STAT. ANN. tit. 68, § 208 (West Supp. 2011).

On December 7, 2010, OTC ATTORNEY 2 filed an Entry of Appearance as Co-Counsel of record for the Division. On December 10, 2010, the Division's Proposed Scheduling Order was filed with the Court Clerk.[5]

On January 10, 2011, the Scheduling Order and Notice of Hearing was issued setting the hearing in this matter for April 13, 2011, at 9:30 a.m., with position letters or pre-trial briefs due on or before April 6, 2011.

On February 17, 2011, a Notice of Substitution of Attorney and Entry of Appearance was filed by OTC ATTORNEY 1 and OTC ATTORNEY 2 as Co-Counsel of record for the Division.[6]

On March 31, 2011, the Division's Final Witness and Exhibit List was filed, with Exhibits A-1 through A-3 attached thereto.

On April 6, 2011, a Request for Extension/Continuance was filed by ATTORNEY 1 due to the on-going investigation by the Internal Revenue Service and Federal Bureau of Investigation, in addition to a pending civil action in Federal Court, which involves many of the same facts as those presented in this matter. On April 19, 2011, an Amended Scheduling Order and Notice of Hearing was issued setting the hearing for May 25, 2011, at 9:30 a.m., with position letters or pre-trial briefs due on or before May 18, 2011.

On May 11, 2011, the Division's Brief was filed, with Exhibits A-1 through B-3 attached thereto.[7] On May 18, 2011, the Protestant's Brief[8] was filed, with Exhibits 1 through 3 attached thereto. On May 25, 2011, an open hearing[9] was held as scheduled. ATTORNEY 1 announced that the Fifth Amendment reference in the brief concerns an on-going criminal investigation concerning fraud and should not interfere with the Protestant testifying in this matter.[10] Counsel waived opening statements. The Protestant testified on his own behalf about his employment, duties, and termination from COMPANY. The Protestant's Exhibits 2 through 3 were offered, identified, and admitted into evidence without objection. Counsel stipulated to the identification, offer, and admission into evidence of Division's Exhibits A-1 through D-2. The Division called AUDITOR, Field Auditor, Field Audit Section, Compliance Division of the Oklahoma Tax

[5] OKLA. ADMIN. CODE § 710:1-5-10(c)(2) (June 25, 1999).

[6] This filing serves as a withdrawal as Co-Counsel for OTC ATTORNEY 3.

[7] Counsel for the Protestant did not object to the additional exhibits.

[8] Protestant's Brief at 3. The brief incorrectly states "(See Affidavit of CONTROLLER, attached as Exhibit 2)." The statement is stricken for the record.

[9] The Protestant, through ATTORNEY 1, waived his right to a confidential hearing as provided by the provisions of OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2011).

[10] Protestant's Brief at 2. "Similarly, the federal criminal investigation, and Protestant's participation therein, has mandated that the Protestant exercise his Fifth Amendment right against self-incrimination, further constraining his ability [sic] defend himself in this matter."

Commission, who testified concerning the conduct of the audit and as custodian of the Division's records. The Quarterly Withholding Report for July 2009 through September 2009 was identified and admitted into evidence as ALJ's Exhibit 1. At the conclusion of the hearing, the record in this matter was held open for thirty (30) days in order for the Protestant to offer an additional exhibit and for the undersigned to make a ruling as to the admission of the exhibit.

On June 30, 2011, the Division filed a Notice of Acceptance of Affidavit and Withholding Tax Revision. The Affidavit of CONTROLLER is identified and admitted into evidence by agreement as Protestant's Exhibit 4.

On July 5, 2011, a letter was mailed to Counsel acknowledging the Division's filing. The record in this matter was closed, and this case submitted for decision on July 5, 2011.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, and the briefs, the undersigned finds:

1. The Division conducted an audit of COMPANY'S ("COMPANY") withholding tax account. COMPANY had filed withholding tax reports for February 2009 through September 2009,[11] but failed to remit withholding tax. COMPANY did not file withholding tax reports for October or November 2009.[12]

2. The Protestant served as the Treasurer and Chief Financial Officer ("Treasurer") for COMPANY from February 2009 through July 2009. As Treasurer, the Protestant had check signing authority on a daily and weekly basis. Sometime after July 31, 2009, the Protestant was removed as Treasurer for COMPANY and demoted to Vice-President of Finance.[13]

3. CONTROLLER was COMPANY'S Controller during the Audit Period and worked with the Protestant and COMPANY'S Account Payable Manager in preparing and/or issuing checks for payment on all accounts due and owing from COMPANY. According to the Affidavit[14] of CONTROLLER:

[11] ALJ's Exhibit 1. COMPANY'S Withholding Tax Report for the Third Quarter of 2009 was not signed by the Protestant, which was filed after the Protestant was demoted.

[12] Testimony of AUDITOR. AUDITOR has been employed by the Tax Commission for approximately twenty-eight (28) years and has been performing withholding tax audits since 1995.

[13] Testimony of ATTORNEY 1. *See* Protestant's Exhibits 3 through 4. *See also* Division's Exhibits C-1 through C-4.

[14] Protestant's Exhibit 4. CONTROLLER'S first recollection of the Protestant being removed as CFO and Treasurer was on or about September 15, 2009, and he has no independent knowledge of the Protestant's removal as CFO and Treasurer as early as July 2009.

> Between the beginning of June through Affiant's departure from [COMPANY] in October 2009, PRESIDENT[15] would at various times inform the Affiant and [Protestant] of his intentions to take over the signing of checks made payable on [COMPANY] accounts. These "takeover" periods would last for a week or two at a time and were generally based upon PRESIDENT'S intentions to pay creditors of his choosing.

4. The Protestant did not own any stock of COMPANY. The sole shareholder of COMPANY is SHAREHOLDER.[16]

5. On January 13, 2010, the Division issued a proposed withholding tax assessment against the Protestant, as Treasurer of COMPANY and as an Individual, for July 1, 2009, through November 30, 2009 ("Audit Period"),[17] as follows, to-wit:

Tax Due:	$179,453.50
Interest @ 15% through 03/15/2010:	10,651.45
Tax & Interest due within 60 Days:	$190,104.95
30 day delinquent Penalty:	17,945.35
Tax, Interest & Penalty due after 60 Days:	$208,050.30

6. On March 17, 2010, the Division received a timely filed protest to the proposed withholding assessment against the Protestant for the Audit Period. The basis of the protest is stated as "…we are challenging the assessment of [COMPANY'S] unpaid withholding taxes against [Protestant]. I am aware that as an officer of the company he would be personally responsible, [sic] however he was removed from the board before the dates in question."[18]

7. On June 30, 2011, the Division filed its Notice of Acceptance of Affidavit and Withholding Tax Revision for July 2009 ("Revised Audit Period"),[19] as follows, to-wit:

Withholding Tax:	$37,817.33
Interest to 06/30/11:	10,552.59
Penalty:	3,781.73
Total:	$52,151.65

[15] PRESIDENT is the son of SHAREHOLDER, the sole shareholder of COMPANY. PRESIDENT served as President and CEO of COMPANY during the Audit Period. Testimony of Protestant.

[16] *Id.*

[17] Division's Exhibits A-1 through A-2. The proposed assessment reflects the Audit Period as October 1, 2009, through November 30, 2009. This is incorrect. In the body of the letter the correct Audit Period is reflected as July 1, 2009, through November 30, 2009. The Protestant is not challenging the amount of the assessment, only whether the Protestant is a "responsible person."

[18] Division's Exhibits B-1 through B-3. The envelope containing the protest letter is post-marked March 12, 2010.

[19] *See* Note 14, *supra*.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[20]

2. Rules promulgated pursuant to the Administrative Procedures Act[21] are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court.[22] They are valid and binding on the persons they affect, have the force of law, and are prima facie evidence of the proper interpretation of the matter to which they refer.[23]

3. "Every person required to collect any tax imposed by [the Withholding Tax Code[24]], and in the case of a corporation, each principal officer thereof, shall be personally liable for the tax."[25]

4. The liability of a principal officer for withholding tax shall be determined in accordance with the standards for determining liability for payment of federal withholding tax.[26]

---

[20] OKLA. STAT. ANN. tit. 68, § 221(D) (West Supp. 2011).

[21] OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2002).

[22] OKLA. STAT. ANN. tit. 75, § 306(C) (West 2002).

[23] OKLA. STAT. ANN. tit. 75, § 308.2(C) (West 2002).

[24] OKLA. STAT. ANN. tit. 68, § 2385 et seq. (West 2008).

[25] OKLA. STAT. ANN. tit. 68, § 2385.3(A) (West Supp. 2011). The Tax Commission identifies the "President, Vice-President, Secretary, Treasurer, or Secretary/Treasurer as principal officers." OKLA. ADMIN. CODE § 710:65-7-3-(1).

[26] The full text of OKLA. STAT. ANN. tit. 68, § 253 (West 2001) is as follows:

> When the Oklahoma Tax Commission files a proposed assessment against corporations or limited liability companies for unpaid sales taxes, withheld income taxes or motor fuel taxes collected pursuant to Article 5, 6 or 7 of this title, the Commission shall file such proposed assessments against the principal officers of the corporations or the managers or members personally liable for the tax. 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 member shall be liable.
>
> The liability of a principal officer for sales tax, withheld income tax or motor fuel 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.

5. In this matter the Protestant, as Treasurer of COMPANY, was a principal officer of COMPANY during the Revised Audit Period.

6. Oklahoma Statutes provide for the collection of interest and penalty on delinquent tax.[27] "All penalties or interest imposed by [Title 68], or any state tax law, shall be recoverable by the Tax Commission as a part of the tax with respect to which they are imposed …."[28]

7. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[29]

DISCUSSION

The Protestant asserts that beginning in July 2009, he was demoted from Treasurer of COMPANY to Vice President of Finance and that the duties of Treasurer were assumed by COUNSEL, COMPANY'S General Counsel. Following his demotion the Protestant states that he reported to COUNSEL and PRESIDENT on a daily basis and that PRESIDENT directed the Protestant and other members of the accounts payable department to prepare all checks to be paid to creditors and then submit them to him for approval. PRESIDENT would then pay the debts based upon his own personal preference.[30]

The Division responds that the Protestant has been unable to secure documentation that would indicate that he was not the Treasurer of COMPANY during the Revised Audit Period or that the Protestant was not a "responsible person" for the collection and remittance of withholding tax during the Revised Audit Period. Based upon the Protestant's testimony, which is corroborated in part by CONTROLLER'S Affidavit, the Division revised the proposed assessment from the Audit Period to the Revised Audit Period.

The Division agreed with the Protestant's position as to the months of August 2009 through November 2009, but the Protestant does not have any documentation to corroborate his claim that he was removed as Treasurer for the Revised Audit Period. CONTROLLER'S Affidavit clearly states "…that his first recollection of [Protestant] being removed as CFO and Treasurer was on or about September 15, 2009 and he has no independent knowledge of

---

Section 253 sets out the trust taxes (which cannot be discharged in bankruptcy) for which a principal officer of a corporation that is also a "responsible person" is held personally liable, regardless of whether a corporation is in good standing or suspended.

[27] OKLA. STAT. ANN. tit. 68, § 217 (West Supp. 2011).

[28] OKLA. STAT. ANN. tit. 68, § 217(G) (West Supp. 2011).

[29] *See Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

[30] Testimony of Protestant. Protestant's Brief at 2-3. *See* Note 14, *supra.*

[Protestant's] removal as CFO and Treasurer as early as July 2009."[31] PRESIDENT'S *Responses to BANK'S First Set of Interrogatories, Requests for Admissions, and Requests for Production of Documents* ("*Responses*") filed in Case No. 10-CV-XXX GKF-PJC in the United States District Court of Oklahoma[32] indicate that the Protestant was demoted sometime after July 2009 and eventually terminated in December 2009, which corroborates CONTROLLER'S Affidavit. Unfortunately, the Protestant does not have any documentation which affirmatively establishes the date that he was demoted or that he was not Treasurer of COMPANY and a "responsible person" for the Revised Audit Period. From the *Responses*, it does not appear that PRESIDENT'S control of COMPANY'S day-to-day finances became the norm until approximately September 2009, although CONTROLLER'S Affidavit does indicate "These 'takeover' periods (by PRESIDENT) would last for a week or two at a time and were generally based upon PRESIDENT'S intentions to pay creditors of his choosing" as early as June 2009.[33]

The Protestant has failed to meet his burden of proof, by preponderance of the evidence, that the Division's proposed assessment for withholding tax for the Revised Audit Period is incorrect and in what respect.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case that the protest should be denied as to the Revised Audit Period.

It is further ORDERED that the total amount of withholding tax and penalty for the Revised Audit Period be fixed as the Protestant's deficiency and that those amounts should be determined as due and owing, including interest, accrued and accruing.

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."

---

[31] *See* Note 11, *supra*.

[32] Division's Exhibit C-1 through C-4. The Protestant characterized PRESIDENT'S responses as being "inaccurate."

[33] *See* Note 14, *supra*.