JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2011-11-15-04 / NON-PRECEDENTIAL**
ID: **P-11-236-H**
DATE: **NOVEMBER 15, 2011**
DISPOSITION: **DENIED**
TAX TYPE: **WITHHOLDING**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PRESIDENT, as President of COMPANY[1] and as an Individual ("Protestant"), appears pro se.[2] The Withholding Tax Section, Compliance Division ("Division") of the Oklahoma Tax Commission, appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On March 25, 2011, the protest file was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*[3] and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.[4] On March 31, 2011, OTC ATTORNEY filed an Entry of Appearance as Counsel of record for the Division.

On April 13, 2011, a letter was mailed to the Protestant stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-11-236-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.*[5] On April 19, 2011, the Division's *Motion for Summary Disposition* ("*Motion*") was filed, with Exhibits A through F attached thereto. The Verification attached to the Division's *Motion* was duly sworn under oath, on behalf of the Division, by AUDITOR, Field Auditor, Withholding Tax Section, Compliance Division of the Oklahoma Tax Commission.[6]

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[1] The Administrative Law Judge is taking judicial notice of the Oklahoma Secretary of State's website at https://www.sos.ok.gov to complete the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999). The correct name of the corporation is COMPANY and references herein have been corrected accordingly.

[2] "**[P]ro se"** (proh **say** *or* **see**), *adv.* & *adj.* [Latin] For oneself; on one's own behalf; without a lawyer <the defendant proceeded pro se> <a pro se defendant>. -- Also termed *pro persona*; *in propria persona*; *propria persona*; *pro per*. See PROPRIA PERSONA. BLACK'S LAW DICTIONARY (8th ed. 2004), available at *http://westlaw.com*.

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

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

[5] *Id.*

[6] OKLA. ADMIN. CODE § 710:1-5-38(b)(1) (June 25, 2009).

On April 25, 2011, a letter was mailed to the parties acknowledging the filing of the Division's *Motion* and advising the Protestant that a response could be filed on or before May 4, 2011, at which time the Division's *Motion* would be submitted for ruling.[7]

On May 4, 2011, a *Joint Application for Continuance of Deadline for Protestant's Response to Division's Motion for Summary Disposition* ("*Application*") was filed advising that the Division's *Motion* was not timely transmitted to the Protestant until May 3, 2011, which was timely communicated to OTC ATTORNEY by the Protestant. On May 13, 2011, a letter was mailed to the parties granting the *Application* advising that the Protestant could file a response to the Division's *Motion* on or before May 19, 2011, at which time the Division's *Motion* would be submitted for ruling. The Protestant did not file a response to the Division's *Motion*.

The record in this matter was closed and the Division's *Motion* was submitted for ruling on June 7, 2011.

FINDINGS OF MATERIAL FACTS AS TO WHICH THERE IS NO CONTROVERSY

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, the protest, and the Division's *Motion*, the undersigned finds:

1. On November 22, 2010, the Division issued a proposed assessment for withholding tax against the Protestant as President of COMPANY and as an Individual for January 1, 2009, through September 30, 2010 ("Audit Period"),[8] as follows, to-wit:

Tax Due	$ 9,998.30
Interest @ 15% through 01/21/11	1,305.34
Tax & Interest if paid within 60 Days	$11,303.64
30 Day Delinquent Penalty @ 10%	999.83
Tax, Interest & Penalty if Paid after 60 Days	$12,303.47

2. On January 21, 2011, the Division received a timely filed protest to the proposed withholding assessment. The basis for the protest is stated in pertinent part as, "I am protesting such individual assessment due to the fact that I did not oversee and was not involved in the area of the company dealing with withholding tax."[9]

3. During the Audit Period, the Protestant signed withholding tax reports and signed checks on behalf of COMPANY for withholding tax during the Audit Period.[10]

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[7] OKLA. ADMIN. CODE § 710:1-5-38(b)(3) (June 25, 2009).

[8] Division's Exhibit A.

[9] Division's Exhibit B. The Protestant acknowledges in the letter that he is an officer of COMPANY.

[10] Division's Exhibits C and D.

4. On August 4, 2008, the Tax Commission received COMPANY'S Business Registration Application, which reflects the Protestant as President and which is signed by the Protestant in his capacity as President of COMPANY.[11]

5. COMPANY'S Franchise Tax Return for January 1, 2008, through December 31, 2008, reflects that the Protestant is President.[12]

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[13]

2. A party may file a motion for summary disposition on any or all issues on the ground that there is no substantial controversy as to any material fact.[14] The procedures for such motion are as follows:

> (1) The motion for summary disposition shall be accompanied by a concise written statement of the material facts as to which the movant contends no genuine issue exists and a statement of argument and authority demonstrating that summary disposition of any or all issues should be granted. The moving party shall verify the facts to which such party contends no genuine controversy exists with affidavits and evidentiary material attached to the statement of material facts.
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> (2) If the protest has been set for hearing, the motion shall be served at least twenty (20) days before the hearing date unless an applicable scheduling order issued by the Administrative Law Judge establishes an earlier deadline. The motion shall be served on all parties and filed with the Office of the Administrative Law Judges.
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> (3) Any party opposing summary disposition of issues shall file with the Administrative Law Judge within fifteen (15) days after service of the motion a concise written statement of the material facts as to which a genuine issue exists and the reasons for denying the motion. The adverse party shall attach to the statement evidentiary material justifying the opposition to the motion, but may incorporate by reference material attached to the papers of the moving party. All material facts set forth in the statement of the movant

[11] Division's Exhibit E. The Protestant's signature matches the signatures on Division's Exhibits C and D.

[12] Division's Exhibit F.

[13] OKLA. STAT. ANN. tit. 68, § 221(D) (West Supp. 2011) and OKLA. ADMIN. CODE § 710:1-5-38(b) (June 25, 2009).

[14] *Id.*

> which are supported by acceptable evidentiary material shall be deemed admitted for the purpose of summary disposition unless specifically controverted by the statement of the adverse party which is supported by acceptable evidentiary material.
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> (4) The affidavits that are filed by either party shall be made on personal knowledge, shall show that the affiant is competent to testify as to the matters stated therein, and shall set forth matters that would be admissible in evidence at a hearing. A party challenging the admissibility of any evidentiary material submitted by another party may raise the issue expressly by written objection or motion to strike such material.
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> (5) If the taxpayer has requested a hearing, the Administrative Law Judge will issue a notice to the parties scheduling the motion for a hearing limited to oral argument. If the taxpayer has not requested a hearing, the Administrative Law Judge will rule on the motion based on the submission of the parties, including the motion, opposition to the motion, and attachments thereto.
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> (6) If the Administrative Law Judge finds that there is no substantial controversy as to the material facts and that one of the parties is entitled to a decision in its favor as a matter of law, the Judge will grant summary disposition by issuing Findings of Fact, Conclusions of Law, and Recommendations. Such Findings of Fact, Conclusions of Law and Recommendations are subject to review by the Commission pursuant to *OAC* 710:1-5-10, 710:1-5-40 and 710:1-5-41. If a motion for summary disposition is denied, the Administrative Law Judge will issue an order denying such motion.
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> (7) If the Administrative Law Judge finds that there is no substantial controversy as to certain facts or issues, the Judge may grant partial summary disposition by issuing an order which specifies the facts or issues which are not in controversy and directing that the action proceed for a determination of the remaining facts or issues. If a hearing of factual issues is required, evidentiary rulings in the context of the summary procedure shall be treated as rulings in limine. Any ruling on partial summary disposition shall be incorporated into the Findings of Fact, Conclusions of Law, and Recommendations issued at the conclusion of the proceedings before the Administrative Law Judge.

3. The rules promulgated pursuant to the Administrative Procedures Act are presumed to be binding on the persons they affect and have the force of law.[15]

4. Every employer is required to deduct and withhold tax and pay over the amount so withheld as taxes to the Oklahoma Tax Commission.[16]

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

5. Every employer, including an officer or employee of a corporation, who is required to withhold and remit taxes to the Tax Commission, shall be held personally liable for failure to do so.[17]

6. Whether a "principal officer" or an "employer" is personally liable for the taxes of the corporation is determined in accordance with the standards for determining liability for payment of federal withholding tax pursuant to the Internal Revenue Code.[18]

7. Section 2385.3 of Title 68 does not contain a "willfulness" component and therefore, the determination of liability under Section 253 is limited to the standards for determining who is a "responsible person."[19]

8. The "reasonable cause" exception is applicable to the "willfulness" component of IRC § 6672, which is not a consideration for the determination of who is a principal officer under Section 253.[20] Notwithstanding, the Court in *Finley* observed that a lenient reasonable cause exception should not be adopted, but instead narrowly construed the exception in order to further the basic purpose of protecting government revenue, discouraging corporations from self-executing government loans using trust fund money and avoiding the potential of making the government an unwilling partner in a floundering business. The Court concluded that the reasonable cause exception should be limited to two (2) elements; i.e., where taxpayer has shown by sufficient evidence that reasonable efforts were made to protect the trust funds and those efforts were frustrated by circumstances outside the taxpayer's control.[21]

9. The state is statutorily restricted as to whom or from whom it can seek liability for ITW (trust fund taxes). The vendor and/or employer are the fiduciary and have the duty to the state, as trustee, concerning ITW funds.[22]

10. The long continuing construction of a statute by an agency charged with its administration carries great weight and should not be disturbed unless clearly erroneous, especially when the legislature has convened several times and has not expressed its disapproval of such construction.[23]

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[16] OKLA. STAT. ANN. tit. 68, § 2385.2(A) (West 2001).

[17] OKLA. STAT. ANN. tit. 68, § 2385.3(E) (West Supp. 2011).

[18] OKLA. STAT. ANN. tit. 68, § 253 (West 2001).

[19] OTC Precedential Order No. 96-12-17-037 (December 17, 1996), 1997 WL 201593 (Okl.Tax.Com.).

[20] *Finley v. United States*, 123 F.3d 1342 (10th Cir. 1997).

[21] *Id.*

[22] OKLA. STAT. tit. 68, § 2385.3(E) (West Supp. 2004). *See* OTC Order No. 2001-04-10-008 (April 10, 2001), 2001 WL 664973 (Okl.Tax.Com.).

[23] *Schulte Oil Co. v. Oklahoma Tax Com'n*, 1994 OK 103, 882 P.2d 65.

11. Each withholding tax return requiring a signature must be signed by the President, Vice President, or other principal officer or employee who has the duty to withhold and remit Oklahoma Income Tax from the wages of employees, if the business is a corporation.[24]

12. Individuals or employees who sign returns shall be deemed the responsible authorized agent in the absence of documentation to the contrary.[25]

DISCUSSION

The Protestant does not dispute that he is the President of COMPANY and a principal officer liable for the remittance of withholding tax during the Audit Period, nor does he dispute the Division's mathematical calculation of the proposed withholding tax assessment. The Protestant asserts that "…I did not oversee and was not involved in the area of the company dealing with withholding tax."[26]

The Protestant's statement is not supported by any evidence in the record. To the contrary, the record reveals that the Protestant signed the Business Registration Application as President of COMPANY, the Protestant was listed as President on COMPANY'S Franchise Tax Return, and the Protestant signed Withholding Tax Reports and checks on behalf of COMPANY during the Audit Period.[27] The evidence supports the finding that the Protestant is a "responsible person" for the collection and remittance of withholding tax.

Based upon the record, there is no substantial controversy as to the material facts and the Division is entitled to a decision in its favor as a matter of law.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case that the Division's *Motion* should be granted.

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.

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[24] OKLA. ADMIN. CODE § 710:90-3-3(a).

[25] OKLA. ADMIN. CODE § 710:90-3-3(f).

[26] *See* Note 9, *supra.*

[27] *See* Notes 10 through 11, *supra*.

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."