JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2012-05-01-19 / NON-PRECEDENTIAL**
ID: **P-11-408-K**
DATE: **MAY 1, 2012**
DISPOSITION: **DENIED**
TAX TYPE: **INCOME**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestant, PROTESTANT is represented by ATTORNEY, Attorney at Law. The Account Maintenance 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

Protestant filed Oklahoma Income Tax Returns for tax years 2008 and 2009 on or about July 13, 2010 and January 26, 2011, respectively. Upon receipt of additional information needed to process the returns, the Division adjusted the returns and by letter dated March 4, 2011, proposed the assessment of income tax against Protestant for the 2008 tax year in the amount of $20,262.00, and caused to be filed in XYZ County, State of Oklahoma an income tax warrant against Protestant for the 2009 tax year in a total amount of $24,078.70, inclusive of tax in the amount of $19,114.00. Protestant filed a combined timely written protest to the proposed assessment and issuance of the tax warrant. During the pendency of the protest, the tax warrant was rescinded and an adjustment letter dated July 8, 2011 was issued proposing the assessment of income tax against Protestant for the 2009 tax year in the amount of $19,114.00. Protestant filed a timely written response to the 2009 proposed assessment.

On May 10, 2011, the Division's file was referred 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 Administrative Law Judges[2]. The protests were docketed as Case No. P-11-408-K and assigned to ALJ, Administrative Law Judge.[3]

A pre-hearing conference was scheduled for June 27, 2011, by *Prehearing Conference Notice* issued May 26, 2011.[4] Pursuant to the conference, a *Prehearing Conference Order* was issued setting forth the procedure by which the protests would be submitted for decision.[5]

---

[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).

On July 18, 2011, the *Account Maintenance Division's Notice of Adjustment and Request for Modification of Prehearing Conference Order* ("*Division's Notice*") was filed advising that a request was made to cancel the income tax warrant previously filed for the 2009 tax year, that an adjustment was made to Protestant's 2009 tax return and that a proposed assessment was issued for the 2009 tax year based on the adjustment. The *Notice* also requested that the scheduling order be modified to allow time for Protestant to protest the 2009 adjustment.

The *Prehearing Conference Order* was cancelled pursuant to the *Division's Notice*. On September 2, 2011, *Protestant's Response to Account Maintenance Division's Notice of Adjustment Filed July 18, 2011* was filed protesting the *Division's Notice* and proposed assessment for the 2009 tax year.

The *Account Maintenance Division's Motion for Summary Disposition* ("*Motion*") was filed September 22, 2011.[6] A verification of the statement of material facts and Exhibits A through H are attached to the *Motion*. On September 23, 2011, a letter was issued advising Protestant's counsel that a response to the *Motion* could be filed on or before October 7, 2011. Pursuant to Protestant's request, the date for filing the response was extended to October 17, 2011. Protestant's response to the *Motion* was filed October 17, 2011. Exhibits A and B are attached to the response. Because Protestant did not waive his hearing request with respect to the protested matters, a hearing limited to oral argument was scheduled for November 21, 2011, by *Notice of Hearing* issued October 24, 2011.[7] Oral argument was held as rescheduled on November 21, 2011. On November 22, 2011, the record was closed and the protests were submitted for decision.[8]

FINDINGS OF FACT

Upon review of the file and records, including the recording of the oral argument, the *Motion* and attached exhibits, and Protestant's response and attached exhibits, the undersigned finds:

1. The facts material to the disposition of the protests are not in dispute and the issue is one of law.

2. The material facts as set forth in the *Motion*, STATEMENT OF MATERIAL FACTS[9], are:

> 1. On July 13, 2010, [Protestant] filed an original 2008 Oklahoma resident income tax return. The return included the phrase "See Attachment" on Line 1, Federal Adjusted Gross Income, with no amount reported. Either this notation or the numeral "zero" was included on each line of the return (including Schedules) with the exception of $4,000.00 on Line 11, Exemptions. Protestant calculated no tax due nor refund claimed. Attached to

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

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

[8] *OAC*, 710:1-5-38(b)(6) and 710:1-5-39(a).

[9] All references to exhibits are omitted.

the return was a Form 511TX *Credit for Taxes Paid to Another State.* On that form Protestant listed STATE A a [sic] the state to which taxes had been paid, but stated "See Attachment" on each line rather than any numerical amount. Included with the return was a narrative statement labeled "Attachment A". In this statement, Protestant asserted *inter alia* that he should have been classified as an employee by an entity named ENTITY rather than as an independent contractor. No W-2 or 1099 from this entity was attached to the return. A copy of Protestant's 2008 non-resident STATE A income tax return was attached to the Oklahoma return, which also stated "See Attachment" on each line except for claiming four exemptions and reporting $12,000.00 in alimony paid. On the STATE A return Protestant reported no Federal Adjusted Gross Income and calculated neither tax due nor refund claimed. (Emphasis original).

2. On January 26, 2011 Protestant filed an original 2009 Oklahoma resident income tax return. The return included the phrase "See Attachment" on Line 1, Federal Adjusted Gross Income, with no amount reported. Either this notation or the numeral "zero" was included on each line of the return (including Schedules) with the exception of $4,000.00 on Line 11, Exemptions. Protestant calculated no tax due nor refund claimed. Attached to the return was a Form 511TX *Credit for Taxes Paid to Another State.* On that form Protestant listed STATE A a [sic] the state to which taxes had been paid, but stated "See Attachment" on each line rather than any numerical amount. No copy of Protestant's 2009 STATE A income tax return was attached. Included with the return was a narrative statement labeled "Attachment A". In this statement, Protestant asserted *inter alia* that he should have been classified as an employee by an entity named ENTITY rather than as an independent contractor. No W-2 or 1099 from this entity was attached to the return. (Emphasis original).

3. The Division did not process either return. By letters dated February 16, 2011 the Division requested additional information from Protestant in the form of (1) copies of Federal Returns, (2) copies of returns filed in other states and (3) copies of W-2's or 1099's. By facsimile dated March 3, 2011, Protestant responded to the 2008 tax year request, transmitting (1) a copy of the Division's letter, (2) a 2008 Form 1099-MISC from ENTITY reporting $379,863.31 in non-employee contract labor compensation, (3) a 2009 Form 1099-MISC from ENTITY reporting $359,996.70 in non-employee contract labor compensation, (4) a copy of his 2009 Federal income tax return reporting no total income, Adjusted Gross Income, tax due or refund claimed and referencing the "Attachment" [sic] (5) a copy of his *2009* Oklahoma income tax return substantially similar to that filed and (6) a copy of his 2009 non-resident STATE A income tax return. This STATE A return also stated "See Attachment" on each line except for claiming four exemptions and reporting $12,000.00 in alimony paid, and on it Protestant

reported no Federal Adjusted Gross Income and calculated neither tax due nor refund claimed. (Emphasis original).

4. By facsimile dated March 3, 2011, Protestant responded to the 2009 tax year request, transmitting (1) a copy of the Division's letter, (2) a copy of his 2009 Federal income tax return reporting no total income, Adjusted Gross Income, tax due or refund claimed and referencing the "Attachment" and (3) another copy of his 2009 Oklahoma income tax return substantially similar to that filed.

5. The Division examined the 2008 Oklahoma income tax return and additional information submitted and by letter dated March 4, 2011 adjusted that return to include $379,863.00 in Federal adjusted [sic] Gross Income based on the 2008 1099-MISC, and proposed to assess income tax due in the amount of $20,262.00.

6. The Division examined the 2009 Oklahoma income tax return and additional information and adjusted that return to include $359,997.00 in Federal adjusted [sic] Gross Income based on the 2009 1099-MISC [sic] The Division did *not* at this time in writing proposed to assess income tax due, but filed Tax Warrant No. ITI 2011 158301 00 against Protestant on March 28, 2011. (Emphasis original).

7. On May 2, 2011 7, 2010, [sic] the Division received Protestants' [sic] letter of protest to the Division's adjustments prepared by his attorney. In the letter, Protestant asserted (1) he should have been classified as an employee and had Oklahoma income tax withheld from his income by ENTITY, (2) he should be allowed a credit against Oklahoma income tax due in the amount of tax he "*would have been* subject to in STATE A (emphasis added) and (3) the Tax Warrant filed to secure any 2009 liability was prematurely filed as no written notice of proposed assessment for 2009 was sent. Attached to the letter were copies of the Division's 2008 adjustment letter, the recorded Tax Warrant, the 2008 and 2009 Oklahoma returns, the 2009 Federal return, a March 14, 2011 Internal Revenue Service "CP72" letter advising Protestant his 2009 Federal Return was unprocessible [sic] as frivolous and an April 1, 2011 Internal Revenue Service letter stating the "CP72" letter was sent in error.

8. By letter dated July 8, 2011 (after the docketing of this case [sic] a protest) the Division proposed in writhing [sic] to assess Protestant income tax for the 2009 tax year in the amount of $19,114.00. This letter was attached as an Exhibit to the Division's *Notice of Adjustment and Request for Modification of Prehearing Conference Order* filed in this case July 18, 2011, a copy of which was mailed to Protestant's attorney. The Tax Warrant

> previously filed to secure the 2009 assessed[10] liability was withdrawn. (Emphasis original).
>
> 9. Protestant responded to this Notice by response dated September 2, 2011 reasserting his protest to the 2009 adjustment and assessment, which response presumably has been filed in the case.
>
> 10. Protestant was a full-year resident of Oklahoma during 2008 and 2009.
>
> 11. According to the Division's examination of Protestant's 2008 and 2009 Internal Revenue Service "transcripts", no action has been taken with regard to Protestant's 2008 Federal return, and Protestant has filed a n [sic] amended 2009 Federal return and additional tax has now been assessed for that period.

3. Protestant disputes the statements in paragraph 11 of the *Motion*, STATEMENT OF MATERIAL FACTS, asserting "the IRS has assessed no "additional tax", and has made no claim that any deficiency exists with respect to either the 2008 or 2009 returns filed by Protestant with it". Protestant's response, paragraph 2, STATEMENT OF "MATERIAL FACTS" [SIC] CLAIMED TO BE INDISPUTABLE BY THE DIVISION WHICH ARE IN FACT BOTH DISPUTED AND FALSE. Protestant further asserts that "both the STATE A Revenue Department and the IRS have accepted [Protestant's 2008 and 2009 income tax returns filed with them] as filed". Protestant's response, paragraph 6, STATEMENT OF UNDISPUTED MATERIAL FACTS AS TO WHICH NO ISSUE EXISTS.

4. The statements contained in paragraph 11 of the *Motion*, STATEMENT OF MATERIAL FACTS are not material to the decision in this case.

5. The amount in controversy is $39,376.00, together with any penalty, and accrued and accruing interest. See, 68 O.S. 2011, § 217(A) and (D).

ISSUES AND CONTENTIONS

The dispositive issue is whether Protestant's income tax filing requirements were fulfilled by the filing of his 2008 and 2009 Oklahoma income tax returns, including the attachments. Two other issues are presented: (1) whether Protestant is entitled to the credit for taxes paid to another state; and (2) whether Protestant is entitled to an income tax withholding credit against the income taxes assessed.

Protestant contends that the adjustments to his 2008 and 2009 Oklahoma income tax returns have no basis in law or fact. In support of this contention, Protestant claims that because his "employer", ENTITY treated him as an independent contractor rather than an employee he is unable to render formal returns, but the returns and attachments he submitted are in substantial

[10] Although not relevant or material to the decision herein, the amount in controversy for the 2009 tax year was neither admitted nor assessed prior to the filing of the tax warrant.

compliance with the filing requirements since they correctly report all income received, including a gross-up of all taxes which his employer failed to withhold and pay over to all taxing authorities. Protestant further claims that the Internal Revenue Service and the STATE A Department of Revenue have accepted for filing similar, if not substantially identical returns with the attachments and accordingly have determine the returns are correct in all respects, including the reporting of no tax liability net of applicable withholding credits.

With respect to the other issues, Protestant contends that all income received by him was earned in the State of STATE A, thus he is entitled to a credit for all STATE A income taxes paid, or deemed paid. Protestant further contends that he is entitled to a withholding tax credit for any withholding taxes his "employer" should have paid over to the Oklahoma Tax Commission since the Commission routinely permits an "employee" to claim a credit for withholding taxes despite the fact the employer fails to remit the withholding taxes.

The Division contends that the adjustments to Protestant's 2008 and 2009 Oklahoma income tax returns are proper and correct as a matter of law. In support of this contention, the Division argues that Protestant did not meet his filing requirements as the returns he filed are deficient since they neither report Oklahoma taxable income nor the tax on said income. The Division further argues that Protestant's federal returns have not been accepted by the Internal Revenue Service and that Protestant's employment status has not been reclassified by the Internal Revenue Service. With respect to the other issues, the Division contends that Protestant is not entitled to claim either the credit for taxes paid to another state or the withholding tax credit because no income taxes have been paid to another state and no taxes were withheld from his compensation.

CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter of law:

1. Jurisdiction of the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S. 2011, § 221(C) and (D).

2. "Taxation is an exclusively legislative function that can be exercised only under statutory authority and in the manner specified by statute." ***State, ex rel. Oklahoma Tax Commission v. Texaco Exploration & Production, Inc.,*** 2005 OK 52, ¶ 7, 131 P.3d 705, 707. Accordingly, the basis for assessing income tax must be found in the Oklahoma Income Tax Act ("Act")[11].

3. Every resident individual[12] having a gross income, or gross receipts, for the taxable year in an amount sufficient to require the filing of a federal income tax return is required to

[11] 68 O.S. 2001, § 2351 et seq., as amended.

[12] Defined to mean "a natural person who is domiciled in this state, and any other natural person who spends in the aggregate more than seven (7) months of the taxable year within this state shall be presumed to be a resident for purposes of [the Act] in absence of proof to the contrary." 68 O.S. 2001, § 2353(4).

make an Oklahoma income tax return stating specifically the taxable income[13] and, where necessary, the adjusted gross income[14] and the adjustments[15] provided in the Act to arrive at Oklahoma taxable income and, where necessary, Oklahoma adjusted gross income. 68 O.S. Supp. 2007, § 2368(A)(1). "Every return required by the Act shall be in such form as the Tax Commission may, from time to time, prescribe." 68 O.S. Supp. 2007, § 2368(I).

4. The Internal Revenue Code ("IRC") in general defines "taxable income" as "gross income minus the deductions allowed by [Chapter 1 of the IRC] (other than the standard deduction)."[16] IRC, § 63(a). Gross income is defined to mean "all income from whatever source derived, including (but not limited to) * * * [C]ompensation for services, including fees, commissions, fringe benefits, and similar items". IRC, § 61(a)(1).

5. "Oklahoma taxable income" and "Oklahoma adjusted gross income" are defined by the Act, respectively to mean "'taxable income' and 'adjusted gross income' as reported to the federal government (or as would have been reported by the taxpayer had a return been filed), and in the event of adjustments thereto by the federal government as finally ascertained under the [I.R.C.], adjusted further as hereinafter provided". 68 O.S. 2001, § 2353(12) and (13).

6. Oklahoma income tax is imposed on the Oklahoma taxable income of every resident or nonresident individual. 68 O.S. 2001, § 2355(B). State income tax is due at the time of transmitting the return required under the Act. 68 O.S. 2001, § 2375(A). Any person subject to a tax imposed by the Act, or whose income is, in whole or in part, subject to a tax imposed by any provision of the Act is defined as a "taxpayer". 68 O.S. 2001, § 2353(15).

7. A credit against the tax imposed by the Act is allowed for withheld taxes and estimated taxes paid. 68 O.S. 2001, § 2357(A). In addition, a credit against the tax imposed by the Act is allowed for "the amount of tax paid another state by a resident individual * * * upon income received as compensation for personal services in such other state * * *." 68 O.S. 2001, § 2357(B)(1). The credit for taxes paid another state "shall not exceed such proportion of the tax payable under [§ 2355 of the Act] as the compensation for personal services subject to tax in the other state and also taxable under [§ 2355] bears to the Oklahoma adjusted gross income * * *." Id.

---

[13] Defined by the Act "with respect to any taxpayer" to mean "the 'taxable income' * * * and any other 'taxable income' as defined in the Internal Revenue Code as applies to such taxpayer or any other income of such taxpayer * * *". 68 O.S. 2001, § 2353(10).

[14] Defined by the Act to mean "'adjusted gross income' as defined in the Internal Revenue Code." 68 O.S. 2001, § 2353(11).

[15] The adjustments allowed by the Act are set forth in § 2358 of the Act, which provides in part:

> For all tax years beginning after December 31, 1981, taxable income and adjusted gross income shall be adjusted to arrive at Oklahoma taxable income and Oklahoma adjusted gross income as required by this section.
>
> A. The taxable income of any taxpayer shall be adjusted to arrive at * * * Oklahoma adjusted gross income for individuals, as follows:

[16] The general definition excludes individuals who do not itemize their deductions. IRC, § 63(b).

8. In cases where a report or return has been filed, the Tax Commission is authorized as it deems necessary to examine, audit or investigate such report or return. 68 O.S. Supp. 2002, § 221(A). The Commission is also authorized to propose the assessment of taxes or additional taxes; as the case may be, where it is determined that the tax disclosed by the report or return is less than the tax disclosed by its examination. Id.

9. Protestant has the burden of proof to show the action or proposed action of the Division is incorrect, and in what respect. *OAC*, 710:1-5-47. *See*, ***Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission***, 1988 OK 91, 768 P.2d 359. The burden of proof standard is "preponderance of evidence." 2 Am.Jur.2d *Administrative Law* § 357. "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. If the taxpayer fails to prove a prima facie case, the protest may be denied solely on the grounds of failure to prove sufficient facts which would entitle the taxpayer to the requested relief. *OAC*, 710:1-5-47; ***Continental Oil Company v. Oklahoma Tax Commission***, 1976 OK 23, 570 P.2d 315.

APPLICATION

The Act requires every resident individual having sufficient gross income or gross receipts to require the filing of a federal income tax return to file an Oklahoma income tax return. The required return shall specifically report taxable income, adjusted gross income and the adjustments to arrive at Oklahoma taxable income. The Oklahoma taxable income of a taxpayer is subject to Oklahoma income tax at the time of transmitting the return.

In this matter it would be disingenuous of Protestant to argue that he did not have income sufficient to require the filing of federal income tax returns for the years at issue; and in fact, Protestant filed federal income tax returns for those tax years. Further, Protestant's situation is not unique so as to obviate the rendering of an Oklahoma income tax return, as many taxpayers operate as independent contractors and are able to specifically report their taxable income, adjusted gross income and the adjustments to arrive at Oklahoma taxable income. Unless and until Protestant's job with ENTITY is reclassified, he is required to report his income under the method utilized by independent contractors.

Protestant is not entitled to the credit for taxes paid to another state because he has not shown that any income taxes have been paid to another state or that the compensation for personal services is subject to both STATE A and Oklahoma income taxes. In addition, Protestant is not entitled to the withholding tax credit because he has not shown that income taxes were withheld from the compensation he received.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the income tax protests of Protestant, PROTESTANT be denied. It is further ORDERED that amounts in controversy inclusive of any accrued and accruing interest be fixed as the deficiency due and owing.

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."