

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2013-01-08-05 / NON-PRECEDENTIAL
ID: P-12-133-K
DATE: JANUARY 8, 2013
DISPOSITION: DISMISSED
TAX TYPE: WITHHOLDING
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestant, PROTESTANT appears pro se. 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

In July, 2005, the Audit Division of the Oklahoma Tax Commission conducted an audit of Protestant’s withholding tax account for the period of June, 2000 through December, 2001 utilizing in-house records and records of the Oklahoma Employment Security Commission. The audit determined that Protestant was delinquent in reporting and remitting withholding tax for December, 2000, and the first through the fourth quarters of 2001. As a result of the audit, the Audit Division by letter dated August 10, 2005 and mailed to Protestant’s last known address, proposed the assessment of estimated withholding tax, interest and penalty against Protestant.

In attempts to collect the liability established by the proposed assessment, the law firm of FIRM, contacted Protestant by letters dated January 18, 2011 and March 23, 2012. By letters dated January 25, 2011 and April 3, 2012, Protestant responded to the letters “disput[ing] * * * the validity of the entire amount of the mentioned debt[.]” Also in response to the collection effort, Protestant by letter dated March 19, 2011, wrote: “I have no knowledge of any outstanding debt to the Oklahoma Tax Commission.”¹

On July 9, 2012, the audit file was referred by the Division to the Office of the Administrative Law Judges for further proceedings consistent with the Uniform Tax Procedure Code² and the Rules of Practice and Procedure before the Office of Administrative Law Judges³. The case was docketed as Case No. P-12-133-K and assigned to ALJ, Administrative Law Judge.⁴

¹ The address for Protestant listed on the collection letters and Protestant’s letters in response thereto are the same as appearing on the proposed assessment.

² 68 O.S. 2011, § 201 et seq., as amended.

³ Rules 710:1-5-20 through 710:1-5-47 of the *Oklahoma Administrative Code* (“OAC”).

⁴ OAC, 710:1-5-22(b).

A pre-hearing conference was scheduled for August 2, 2012, by *Prehearing Teleconference Notice* issued July 12, 2012.⁵ On July 16, 2012, the Division filed a *Motion to Dismiss*. By *Order Setting Hearing on Motion* issued July 17, 2012, the pre-hearing conference was cancelled and a hearing was scheduled for August 14, 2012, on the *Motion to Dismiss*.

A closed hearing⁶ on the *Motion to Dismiss* was held as scheduled. Protestant appeared and gave a statement. The Division called one (1) witness; SUPERVISOR, Supervisor of the Review Section of the Division, through whom Exhibit A was identified, offered and admitted into evidence. By order of the Court, the record was held open to review Protestant's documentation in regard to whether any withholding taxes during the audit period had in fact been paid.

The *Division's Status Report* was filed September 6, 2012. By letter dated September 11, 2012, Protestant was directed to file a response to the *Report*. Protestant's response was filed October 1, 2012. By letter dated October 2, 2012, the Division was directed to file a reply to Protestant's response. The *Division's Renewed Motion to Dismiss and Reply to Protestant's Response to Division's Status Report (Division's Renewed Motion to Dismiss)* was filed October 2, 2012. By letter dated October 8, 2012, Protestant was directed to file a response to the *Division's Renewed Motion to Dismiss*. Protestant's response was filed October 17, 2012. On October 24, 2012, the record was closed and the *Motion to Dismiss* was submitted for decision.

FINDINGS OF FACT

Upon review of the file and records, including the recording of the hearing, the *Motion to Dismiss*, the exhibit received into evidence and the subsequent filings of the parties, the undersigned finds:

1. On December 15, 2000, a Business Registration was filed by Protestant for her business known as BUSINESS, a sole-proprietorship. Protestant indicated on the Business Registration that Oklahoma income taxes would be withheld from the wages of her employees at more than \$500.00 per quarter, that she began withholding taxes as of July 1, 2000, and that she was responsible for remitting the Oklahoma income taxes withheld from the wages. Business Registration Packet.⁷

2. The address listed by Protestant for the business and herself on the Business Registration is 123 STREET NAME, CITY, OK, ZIP. The official address as recorded by the Oklahoma Tax Commission is 123 STREET NAME, AVE., CITY, OK ZIP-+4. See Note 7.

3. In July, 2005, the Audit Division reviewed Protestant's Oklahoma Income Tax Withholding account because records of the Oklahoma Tax Commission indicated Oklahoma

⁵ OAC, 710:1-5-28.

⁶ Excepting of one identified person appearing with Protestant, confidentiality of the proceedings was invoked. 68 O.S. 2011, § 205.

⁷ The protest file received by this office from the Division contained the Business Registration Packet to which official notice is taken. OAC, 710:1-5-36.

income tax had been withheld from Protestant's wages and the wages of her employees, but no Oklahoma withholding tax reports had been filed for the periods of December, 2000, and the first through the fourth quarters of 2001. In House Audit Write Up and Auditor's Notes.⁸

4. The In House Audit Write Up and Auditor's Notes indicate that an audit notification letter was forwarded to Protestant on or about June 27, 2005, that Protestant did not respond to the notification and that an audit would be performed based on information from the records of the Oklahoma Employment Security Commission ("OESC") and the Oklahoma Tax Commission. See Note 8.

5. The December, 2000 audited withholding tax liability of \$410.72⁹ "was computed by subtracting the total Oklahoma income tax withholding liability remitted [for the period inclusive of the months of June, 2000 through November, 2000] from the total Oklahoma income tax withholding liability from the W-2 wage and tax statements" for tax year 2000 that were filed by Protestant and her employees with their 2000 Oklahoma income tax returns. See Note 8.

6. For the 2001 tax year, the audited withholding tax liability of \$978.00 "was computed by adding the Oklahoma income tax withholding liability from the W-2 wage and tax statements" which was broken into quarters because the wage amounts paid to Protestant alone would have qualified her as a quarterly filer. See Note 8. Protestant's quarterly estimated withholding tax liability of \$212.75 as established by her wages were entered as the audited withholding tax liability for the third and fourth quarters, and was added to the audited withholding tax liability of \$104.00 as established by the W-2 wage and tax statement of one employee issued for the first quarter of 2001 and to the audited withholding tax liability of \$23.00 as established by the W-2 wage and tax statement of another employee issued for the second quarter of 2001. See Note 8.

7. As a result of the audit, the Division by letter dated August 10, 2005, proposed the assessment of estimated withholding tax, interest and penalty against Protestant in the aggregate amount of \$2,623.36, inclusive of tax in the amount of \$1,388.72, interest at fifteen percent (15%) accrued through September 15, 2005, in the amount of \$887.45, and penalty¹⁰ in the amount of \$347.19. Exhibit A.

8. The last paragraph of the letter of proposed assessment provides:

⁸ The protest file also contained the In House Audit Write Up and Auditor's Notes to which official notice is taken.

⁹ Audit work papers which were also contained in the protest file to which official notice is taken.

¹⁰ Assessed pursuant to 68 O.S. 2001, § 2385.6(A). Amended by Laws 2005, c. 479, § 21, eff. July 1, 2005, to substitute a ten percent (10%) penalty on the amount of the underpayment of tax as opposed to the five percent (5%) penalty "for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent (25%) in the aggregate".

If you do not agree with this assessment, you must file a written protest within sixty (60) days from the date of assessment. If you do not timely file a protest, this assessment will become final (68 O.S., § 2385.6). Exhibit A.

9. The proposed assessment was mailed to Protestant at her last known address as reflected by the file and records of the Audit Division as verified by the internet web site "Reference USA". See Note 8.

10. Protestant testified that she has lived at the address to which the proposed assessment was mailed for 45 years and that she was residing there in August of 2005. Protestant does not specifically remember receiving the proposed assessment, but stated that if she had she would have taken it to her tax man because she knows nothing about taxes and doesn't want to know anything about taxes. Protestant further testified that she figured the payroll for her business and figured what should be withheld and what should be paid over to the State.

11. In an attempt to collect the liability established by the proposed assessment, the law firm of FIRM, contacted Protestant by letter dated January 18, 2011. By letter dated January 25, 2011, Protestant responded to the letter "disput[ing] * * * the validity of the entire amount of the mentioned debt[.]"

12. By letter dated March 23, 2012, a second attempt to collect the liability established by the proposed assessment was made by the law firm. Protestant responded to this attempt by letter dated April 3, 2012, wherein she "dispute[d] * * * the validity of the entire amount of the mentioned debt[.]"

13. In response to the collection effort by the law firm, Protestant in a letter dated March 19, 2011, wrote: "I have no knowledge of any outstanding debt to the Oklahoma Tax Commission."

14. At the hearing, Protestant was directed to submit any information she had which would show that the withholding taxes for the audit period had been paid; specifically any income taxes she might have paid on the wages she received from the business, and the Division was directed to review the information and submit a report of its findings.

15. On September 6, 2012, the *Division's Status Report* was filed advising in pertinent part:

Division has reviewed the aforementioned documents and determined that they have no effect on the underlying assessment. While Protestant has indeed paid One Thousand Two Hundred and Fifty-one (\$1,251.00) Dollars of withholding tax from wages earned, the W-2 associated with those funds show that said monies are no [sic] affiliation with DA Service [sic]. Furthermore, while Protestant claims that One Thousand Six Hundred and Nine (\$1,609.00) Dollars were paid in "payroll taxes," there is no evidence that these funds were actually remitted to the Oklahoma Tax Commission.

16. On October 1, 2012, Protestant submitted for consideration a worksheet for the period at issue showing gross wages; deductions for FICA, Federal income tax withheld, and state income tax withheld, and net wages paid. The worksheet indicates a withholding tax liability of \$1,051.00. Protestant also submitted payroll ledgers for certain periods in 2001, inclusive of the payroll ledger for December 27, 2001, and copies of two (2) checks written to the Oklahoma Tax Commission and a bank statement for the period ending January 1, 2001.

17. In response to Protestant's submission, check # 3960 in the amount of \$114.00 was written in remittance of the November, 2000 state withholding taxes and check # 4024 was written in remittance of the October, 2000 withholding taxes. There is no indication in the information submitted to show what check # 3986 in the amount of \$144.50 written to the Oklahoma Tax Commission paid. With respect to the worksheet and payroll ledgers, the state withholding tax total for 2001 shown on the worksheet of \$984.00 happens to correspond with the cumulative total shown for federal withholding tax on the payroll ledger of December 27, 2001. The state withholding tax is blank both under deductions and cumulative total on each of the payroll ledgers. Finally, although the numbers on the worksheet may be true and accurate, they do not constitute and Protestant has not filed withholding tax reports for the periods at issue.

18. In the last two correspondences with the Court, Protestant has indicated that she feels the penalty and interest is unfair.

19. The amount in controversy as set forth in the proposed assessment is \$2,623.36, exclusive of any additional accrued interest.

CONCLUSIONS OF LAW

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

1. The Oklahoma Tax Commission is vested with jurisdiction of the parties and subject matter of this proceeding, including the dismissal thereof. 68 O.S. 2011, § 207 and *OAC*, 710:1-5-46(b).

2. The authority of the Oklahoma Tax Commission to assess taxes or additional taxes as levied by any state tax law is set forth in § 221(A) of Title 68 of the Oklahoma Statutes which provides in part:

If any taxpayer¹¹ shall fail to make any report or return as required by any state tax law, the Oklahoma Tax Commission, from any information in its possession or obtainable by it, may determine the correct amount of tax for the taxable period. If , in cases where no report or return has been filed,

¹¹ Defined to "mean (1) Any person owing or liable to pay any state tax; (2) Any person required to file a report, a return, or remit any tax required by the provisions of any state tax law; (3) Any person required to obtain a license or a permit or to keep any records under the provisions of any state tax law[.]" 68 O.S. 2011, § 202(d).

the Tax Commission determines that there is a tax due for the taxable period, * * * it shall in writing propose the assessment of taxes or additional taxes, as the case may be, and shall mail a copy of the proposed assessment to the taxpayer at the taxpayer's last-known address. Proposed assessments made in the name of the 'Oklahoma Tax Commission' by its authorized agents shall be considered as the action of the Tax Commission.

3. In general, "[n]o assessment of any tax levied under the provisions of any state tax law except as provided in this section, shall be made after the expiration of three (3) years from the date the return was required to be filed or the date the return was filed, whichever period expires the later, and no proceedings by tax warrant or in court without the previous assessment for the collection of such tax shall be begun after the expiration of such period." 68 O.S. Supp. 2006, § 223(A).¹² Excepted from the general three (3) year statutory limitation on assessments are cases of "failure to file a report or return" which in those cases "the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time." 68 O.S. Supp. 2006, § 223(E). "A proposed assessment tolls the statute of limitations." *In re Income Tax Protest of F & M Bancorporation and Subsidiaries*, 2005 OK CIV APP 6, ¶ 3, 105 P.3d 837.

4. "Any notice required by [the Uniform Tax Procedure Code], or any state tax law, to be given by the Tax Commission shall be in writing and may be served personally or by mail." 68 O.S. 2001, § 208. Section 208 further provides:

If mailed, it shall be addressed to the person to be notified at the last-known address of such person. As used in this article or any other state tax law, 'last-known address' shall mean the last address given for such person as it appears on the records of the division of the Tax Commission giving such notice, or if no address appears on the records of that division, the last address given as appears on the records of any other division of the Tax Commission. If no such address appears, the notice shall be mailed to such address as may reasonably be obtainable. The mailing of such notice shall be presumptive evidence of receipt of the same by the person to whom addressed. If the notice has been mailed as provided in this section, failure of the person to receive such notice shall neither invalidate nor be grounds for invalidating any action taken pursuant thereto, nor shall such failure relieve any taxpayer from any tax or addition to tax or any interest or penalties thereon.

5. A taxpayer may file a written protest within sixty (60) days after the mailing of a proposed assessment. 68 O.S. Supp. 2002, § 221(C). "If the taxpayer fails to file a written protest within the sixty-day period herein provided * * * then the proposed assessment, without further action of the Tax Commission, shall become final and absolute." 68 O.S. Supp. 2002, § 221(E).

¹² Section 223(A) further provides that "[i]f the assessment has been made within the limitation period set forth in this subsection, the tax may be collected by tax warrant or court proceeding, but only if the tax warrant is issued or the proceeding begun within ten (10) years after the assessment of the tax has become final."

Where a taxpayer fails to preserve his or her administrative remedy within the sixty (60) day period by protesting the assessment, the Tax Commission is without jurisdiction to hear the protest. *Matter of Phillips Petroleum Co.*, 1982 OK 112, 652 P.2d 283.

6. 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; *Geoffrey, Inc. v. Oklahoma Tax Commission*, 2006 OK CIV APP 27, 132 P.3d 632. 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.

ANALYSIS

Here, the Division complied with the statutory requirements for proposing an assessment of state taxes when a taxpayer fails to make a required report or return of state taxes. The proposed assessment was timely made and mailed to Protestant’s last-known address.

The evidence shows Protestant did not file a protest to the proposed assessment within sixty (60) days of the mailing of the proposed assessment. Further, the information Protestant submitted does not prove that any withholding taxes have been paid for the audit period to offset the proposed assessment.

DISPOSITION

THEREFORE, based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestant, PROTESTANT, be dismissed. It is further ORDERED; without consideration of any interest and/or penalty waiver request¹³, that the amount in controversy 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-

¹³ See 68 O.S. 2011, § 220.

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.”