

**JURISDICTION:** OKLAHOMA TAX COMMISSION  
**CITE:** 2013-03-21-21 / NON-PRECEDENTIAL  
**ID:** P-12-027-K  
**DATE:** MARCH 21, 2013  
**DISPOSITION:** DENIED  
**TAX TYPE:** WITHHOLDING  
**APPEAL:** NO APPEAL TAKEN

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestants, HUSBAND and WIFE appear pro se. The Compliance Division of the Oklahoma Tax Commission ("Division") is represented by OTC ATTORNEY, Deputy General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

### STATEMENT OF THE CASE

An office audit of the withholding tax account of CORPORATION ("Corporation") and other available records was performed by the Division for the period inclusive of the months of March, 2008 through May, 2008 and August, 2008 through November, 2008. As a result of the audit, the Division by letters dated September 16, 2011 cause to be issued against the Corporation and Protestants, as officers of the Corporation and as individuals, proposed withholding tax assessments, inclusive of interest and penalty. Protestants timely protested the proposed assessments by letter dated November 11, 2011. A hearing was not requested in the protest.

On January 25, 2012, the Division referred the protest and audit findings to the Office of the Administrative Law Judges for further proceedings in accordance with the Uniform Tax Procedure Code<sup>1</sup> and the Rules of Practice and Procedure before the Office of the Administrative Law Judges<sup>2</sup>. The protest was docketed as Case No. P-12-027-K and assigned to ALJ, Administrative Law Judge.<sup>3</sup>

A pre-hearing conference was scheduled for March 19, 2012, by *Prehearing Conference Notice* issued February 16, 2012.<sup>4</sup> On March 12, 2012, this Office received a phone call from WIFE requesting that the pre-hearing conference be held by telephone which request was granted. A *Status Report in Lieu of Prehearing Conference and Request for Hearing* was filed March 19, 2012. A status conference was scheduled for April 3, 2012, by *Notice of Status Conference* issued March 20, 2012. Pursuant to the status conference, the parties were directed to file a status report upon revision of the proposed assessments, but no later than the date set for the filing of a status report in a related case.

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<sup>1</sup> 68 O.S. 2011, § 201 et seq., as amended.

<sup>2</sup> Rules 710:1-5-20 through 710:1-5-47 of the *Oklahoma Administrative Code* ("OAC").

<sup>3</sup> OAC 710:1-5-22(a) and (b).

<sup>4</sup> OAC 710:1-5-28(a).

The *Compliance Division's Notice of Revision* ("Notice of Revision") to the proposed assessments issued against Protestants was filed April 27, 2012. Protestants were directed to file a response to the revision on or before May 29, 2012. Protestants did not file a response. By *Procedural Scheduling Order* ("Order") issued June 27, 2012, the Division was directed to file a verified response to protest on or before July 27, 2012 and Protestants were advised that a reply to the response could be filed on or before August 16, 2012. The *Order* further directed that if an oral hearing was not requested, the record would be closed and the protest submitted for decision upon completion of the announced procedural schedule<sup>5</sup>. Protestants did not respond to the *Order*.

The *Compliance Division's Verified Response to Protest* ("Verified Response") and Exhibits A through F were filed July 18, 2012. Protestants did not file a reply to the *Verified Response* within the time allotted.

An *Order Reopening Record* was issued September 18, 2012. The *Compliance Division's Response to Order Reopening Record* ("Response") and Exhibits G through N were filed October 17, 2012. By *Order* issued October 23, 2012, Protestants were advised that they could file a reply to the *Response* on or before November 20, 2012. Protestants did not file a reply to the *Response*.

On January 17, 2013, a *Motion to Close Record* was filed by the Division. An *Order Closing Record and Protest Submitted for Decision* was issued January 18, 2013.<sup>6</sup>

### FINDINGS OF FACT

Upon review of the file and records, including the *Verified Response* and exhibits and *Response to Order Reopening Record* and exhibits, the undersigned finds:

1. The Corporation filed articles of incorporation with the Secretary of State of the State of Oklahoma on October 6, 2006 and was registered as a domestic for profit business corporation. Exhibits A and B to the *Verified Response*; Exhibits G, H and L to the *Response*. The Corporation elected to be treated as an S Corporation for income tax purposes. Exhibit B to *Verified Response*; Exhibit G to *Response*.
2. At all times relevant<sup>7</sup>, Protestants were shareholders and officers of the Corporation. Exhibits G and J to *Response*.

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<sup>5</sup> OAC 710:1-5-28(b).

<sup>6</sup> OAC 710:1-5-39(a).

<sup>7</sup> Originally, the proposed assessment issued against Protestants included: (1) the four (4) "no remit" periods of March through May, 2008, and September, 2008; and (2) the three (3) "delinquent" periods of August, 2008, and October and November, 2008. Field Audit Write Up dated August 22, 2011 to which official notice is taken, OAC 710:1-5-36. Based upon subsequent information and a decision by the Division, the assessment against Protestants as proposed by the *Notice of Revision* only includes the month of August, 2008. Exhibit F to *Verified Response*;

3. The office audit was initiated as a result of a referral by the Collection Section of the Division. Exhibit A to *Verified Response*; Field Audit Write Up. See, note 7. Based upon research of the Corporation's withholding tax account, the auditor determined that withholding tax reports had not been filed for three (3) periods: March, 2008, and October and November, 2008; and payments had not been made for the withholding tax reported for four (4) periods: March through May, 2008, and September, 2008. *Id.*
4. The auditor also compared the gross wages reported by the Corporation to the Oklahoma Tax Commission for 2008 with the wages reported to the Oklahoma Employment Security Commission ("OESC") for 2008 and the wages reported on the Corporation's State of Oklahoma Small Business Corporation Income Tax Return (Form 512-S) for the 2008 tax year and found that the wages reported to the Oklahoma Tax Commission on its withholding tax account were \$40,251.94 less than the wages reported to OESC and on its 2008 Oklahoma income tax return. Exhibit B to *Verified Response*, Comparison Work Sheet & ITW Calculations: 2008; Field Audit Write Up, Withholding Summary Sheets.
5. By letter dated September 16, 2011, the Division proposed the assessment of withholding tax, interest and penalty against the Corporation for the delinquent periods of August, 2008, and October and November, 2008 in the aggregate amount of \$3,441.79, inclusive of tax of \$2,213.85, interest accrued through November 21, 2011 of \$1,006.54, for a total of tax and interest due within sixty (60) days of \$3,220.39, and a thirty (30) day delinquent penalty of \$221.40.<sup>8</sup> Exhibit C to *Verified Response*.

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Response to Directive 7, *Response*, pp. 4-5 and footnote 5 to *Response*, pp. 5.

<sup>8</sup> Interest and penalty for the failure to pay over or file withholding tax reports are imposed by 68 O.S. 2011, § 2385.6(A) which provides:

If an employer fails to file a return or to pay to the Oklahoma Tax Commission the withholding tax within the time prescribed by this article, there shall be imposed on him a penalty equal to ten percent (10%) of the amount of tax, or ten percent (10%) of the amount of the underpayment of tax, if such failure is not corrected on or before the last day of the month when due. There shall also be imposed on such employer interest at the rate of one and one-quarter percent (1¼%) per month during the period such underpayment exists. For purposes of this paragraph 'underpayment' shall mean the excess of the amount of the tax required to be paid over the amount thereof actually paid on or before the date prescribed therefor. Such penalty and interest shall be added to and become a part of the tax assessed. However, the Tax Commission shall not collect the penalty assessed if the taxpayer remits the tax within sixty (60) days of the mailing of a proposed assessment or voluntarily pays the tax upon the filing of an amended return.

Laws 2005, c. 479, § 21, eff. July 1, 2005. See, 68 O.S. 2011, § 217(A), (B) and (D).

6. By letters dated September 16, 2011, the Division proposed the assessment of withholding tax, interest and penalty against Protestants for the delinquent periods of August, 2008, and October and November, 2008; and the no remit periods of March through May, 2008, and September, 2008 in the aggregate amount of \$6,760.89, inclusive of tax of \$4,260.85, interest accrued through November 21, 2011 of \$2,073.94, for a total of tax and interest due within sixty (60) days of \$6,334.79, and a thirty (30) day delinquent penalty of \$426.10. Exhibit C to *Verified Response*.
7. Protestants timely protested the proposed withholding tax assessments by letter dated November 11, 2011. Exhibit D to *Verified Response*. The protest letter is not verified. *Id.*
8. A revision to the audit was initiated based on “proof the [Corporation] was no longer in business after 09/08.” Exhibit F to *Verified Response*, Addendum to Field Audit Write Up. As noted by the auditor: “[t]he assessment total was moved to 08/08 as the basis is the difference between the gross wages reported to OTC ITW system & the gross wages on the 512-S \* \* \* [t]he difference is multiplied by the maximum ITW percentage allowed for the 2008 tax year.” *Id.*
9. The amount in controversy is \$3,634.36 and accruing interest, consisting of tax in the amount of \$2,213.85, interest accrued through April 30, 2012 of \$1,199.12, and penalty of \$221.39. Exhibit F to the *Verified Response*. See, note 7.

### ISSUE AND CONTENTIONS

The issue presented for decision is whether Protestants sustained their burden of proving they were not principal officers and “responsible persons” of the Corporation during the revised audit period.

In the letter of protest, Protestants contend they were not officers of the Corporation during the period of August 1, 2008 through November 30, 2008. In support of this contention, Protestants assert that “[d]uring a meeting on September 5, 2008, we were removed from the board by BOARD MEMBER ” and “BOARD MEMBER directed all financial business for the corporation before and after that meeting.”

The Division contends that Protestants do not dispute they were officers of the Corporation during the revised audit period. In support of this contention, the Division cites Protestants’ argument in the letter of protest that “they were removed as officers from [the Corporation] in September, 2008.” The Division further argues that Protestants have failed to provide evidence that they were not officers of the Corporation and have failed to show they were not responsible for the filing and remittance of withholding tax.

**CONCLUSIONS 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(D).
2. Any "employer" making payment of wages is under a duty to deduct and withhold a tax from the wages paid each employee. 68 O.S. 2001, § 2385.2(A). The amount of tax to be withheld is determined in accordance with the table establishing graduated rates of tax. *Id.*
3. An "employer" is any person, including a corporation who transacts business in or derives any income from sources within Oklahoma for whom an individual performs or performed any service, of whatever nature, as the employee of such person and who controls the payment of the wages for such services. 68 O.S. 2001, § 2385.1(b); *OAC 710:90-1-2.*
4. Every employer who fails to withhold or pay to the Oklahoma Tax Commission any sums required to be withheld or paid is personally and individually liable therefor to the State of Oklahoma. 68 O.S. Supp. 2005, § 2385.3(E). See, *OAC 710:90-5-3(a).* 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.* See, *OAC 710:90-5-3(b).*
5. "Any sum or sums withheld \* \* \* shall be deemed to be held in trust for the State of Oklahoma, and, as trustee, 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. Supp. 2005, § 2385.3(E).
6. The Oklahoma Tax Commission is required to file proposed assessments against the principal officers of a corporation personally liable for the tax when the Oklahoma Tax Commission files a proposed assessment against a corporation for unpaid withheld income taxes. 68 O.S. 2001, § 253. The liability of the corporation and any principal officers for withheld income tax is joint and several. *Id.*
7. The principal officers of any corporation are personally liable for the payment of any tax "if such officers were officers of the corporation during the period of time for which the assessment was made". 68 O.S. 2001, § 253. A principal officer of a corporation is identified as: (A) President, (B) Vice-President, (C) Secretary, (D) Treasurer, or (E) Secretary/Treasurer. *OAC 710:65-7-3(1).* The liability of a principal officer for withheld income tax is determined in accordance with the standards for determining liability for payment of federal withholding tax pursuant to the Internal Revenue Code. *Id.*

8. The courts have developed a two prong test for imposition of the penalty under the Internal Revenue Code. *In Re Bernard*, 130 B.R. 740, 745 (Bkrcty.W.D.La. 1991). See, *Cooke v. United States*, 796 F. Supp. 1298 (N.D. Cal. 1992) and *Feist v. United States*, 607 F.2d 954 (Ct. Cl. 1979). The first prong requires a finding that the person assessed is a “responsible person”. The second prong requires the finding of a willful failure to collect, or truthfully account for, or pay over the tax. The burden of proof on each issue is borne by the taxpayer. *Id.*
9. The determination of liability under § 253 is limited to the standards for determining who is a “responsible person”. Oklahoma Tax Commission Order No. 96-12-17-037 (Prec.).
10. The courts have also developed standards to be utilized in determining whether each prong of the test has been satisfied. The factors considered by the courts under the first prong include the individual's status as an officer or director, the individual's duties as outlined in the corporate bylaws, the individual's ownership of shares or possession of an entrepreneurial stake in the company, the individual's role in the day-to-day management of the company, the individual's ability to hire and fire employees, the individual's authority to sign checks of the corporation and the individual's control over the financial affairs of the corporation. See, *Rizzuto v. United States*, 889 F.Supp. 698 (S.D.N.Y. 1995); *United States v. Carrigan*, 31 F.2d 130 (C.A. 3rd 1994); *Hochstein v. United States*, 900 F.2d 543 (C.A. 2nd 1990).
11. The responsible person is frequently defined as the person who has the final word as to what bills or creditors should or should not be paid and when. *White v. U.S.*, 372 F.2d 513, 178 Ct. Cl. 765 (1967). In *Koegel v. U.S.*, 437 F.Supp. 176 (D.C. N.Y. 1977), the court held that the responsible person is the one who is so connected with the business as to be in the position to exercise full authority over the financial affairs, and therefore to be ultimately responsible for the decision as to the payment of the tax. The responsible person is a person who has or shares the final word as to what bills should or should not be paid. *Cellura v. U.S.*, 245 F.Supp. 379 (D.C. Ohio 1965).
12. In 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*; *In re Adway Properties, Inc.*, 2006 OK CIV APP 14, 130 P.3d 302; *Geoffrey, Inc. v. Oklahoma Tax Commission*, 2006 OK CIV APP 27, 132 P.3d 632. Failure to provide evidence which is sufficient to show an adjustment to the proposed assessment is warranted will result in the denial of the protest. *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission*, 1988 OK 91, 768 P.2d 359, 362, citing *Continental Oil Co. v. Oklahoma State Bd. of Equalization*, 1976 OK 23, 570 P.2d 315, 317.

13. The burden of proof standard is “preponderance of evidence.” 2 Am.Jur.2d *Administrative Law* § 357. See, *Oklahoma Tax Commission Order No. 91-10-17-061*. “Preponderance of evidence” means “[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” BLACK’S LAW DICTIONARY 1064 (5<sup>th</sup> ed. 1979). It is also defined to mean “evidence which is more credible and convincing to the mind ... [t]hat which best accords with reason and probability.” *Id.*
14. The record indicates that Protestants were named as officers of the Corporation on the initial “Your Business Registration Application” filed for the Corporation and on the Franchise Tax Returns of the Corporation for the periods of July 1, 2007 through June 30, 2008, and July 1, 2008 through June 30, 2009, executed by WIFE on August 11, 2007 and March 30, 2008, respectively. Exhibits I, J and L to *Response*. Further, the record shows that WIFE signed the withholding tax reports of the Corporation for the periods of March and April, 2008. Exhibit K to *Response*. Protestants’ assertion that they were removed from the board of the Corporation on September 5, 2008, is unverified. Further, Protestants have not presented any evidence to show they were not principal officers of the Corporation during the revise audit period and that they were not responsible for the withholding and remitting of the withholding taxes of the Corporation.

### DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestants, HUSBAND and WIFE, as officers of CORPORATION, and as individuals, be denied. It is further ORDERED that the amount in controversy, inclusive of any accrued and accruing interest, be jointly and severally fixed as the deficiency due and owing by Protestants.

### 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.”