

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2013-12-10-03 / NON-PRECEDENTIAL
ID: P-12-221-K
DATE: DECEMBER 10, 2013
DISPOSITION: SUSTAINED IN PART / DENIED IN PART
TAX TYPE: WITHHOLDING
APPEAL: NO APPEAL TAKEN

ORDER

Protestants, COMPANY (“Company”) and MEMBER (“Member”) appear by and through the Member. The Compliance Division of the Oklahoma Tax Commission (“Division”) is represented by OTC ATTORNEY, Assistant General Counsel, General Counsel’s Office, Oklahoma Tax Commission.

STATEMENT OF THE CASE

An audit of the withholding tax account of the Company and other available records was performed by the Division for the period inclusive of the months of February, 2004 through December, 2004. As a result of the audit, the Division by letters dated May 30, 2006 proposed the assessment of additional withholding tax, interest and penalty against Protestants. Protestants timely protested the proposed assessments by letter dated June 5, 2006.

On December 12, 2012¹, the Division referred the audit findings, protest and protest of tax lien to the Office of the Administrative Law Judges for further proceedings in accordance with the Uniform Tax Procedure Code² and the Rules of Practice and Procedure before the Office of the Administrative Law Judges³. The protest was docketed as Case No. P-12-221-K and assigned to ALJ, Administrative Law Judge.⁴

A pre-hearing teleconference was scheduled for January 15, 2013, by *Prehearing Teleconference Notice* issued December 19, 2013.⁵ A *Status Report in Lieu of Prehearing Conference* was filed January 11, 2013. Pursuant to this report and additional status reports, the parties were directed to file a proposed scheduling order.

¹ The protest file was retained by the Division due to the bankruptcy filings of Protestants.

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(a) and (b).

⁵ OAC 710:1-5-28(a).

Pursuant to the *Joint Proposed Scheduling Order* filed April 23, 2013, a *Scheduling Order and Notice of Hearing* was issued directing the parties to file pre-trial briefs or position letters on or before June 11, 2013 and scheduling the hearing for June 18, 2013.

The *Brief of the Compliance Division* was filed in accordance with the scheduling order. Protestants did not file a pre-trial brief or position letter.

Protestants' request for a continuance of the hearing was filed June 17, 2013. By *Order Granting Request to Continue Hearing*, the hearing scheduled for June 18, 2013 was stricken and rescheduled for August 20, 2013.

A closed hearing was held as rescheduled.⁶ Protestants did not appear. SUPERVISOR, Audit Supervisor of the Division testified with respect to the conduct of the audit, the records reviewed and the resulting assessments. Exhibits A through I were identified and admitted into evidence. Official notice of the assessment of the estimated withholding taxes issued against the Company was announced.⁷ Upon conclusion of the Division's presentation, the record was closed and the protest was submitted for decision.⁸

FINDINGS OF FACT

Upon review of the file and records, including the recording of the hearing, the exhibits received into evidence, the documentation officially noticed and the *Brief of the Compliance Division*, the undersigned finds:

1. The Company provides the following services: "Fire Stopping – Wall Sawing – Slab Sawing – Core Drilling – Removal – Pour back". Letter of Protest dated June 5, 2006.⁹
2. For the period of January, 2004, the Company timely filed a withholding tax report and remitted the reported amount due. Exhibits D and E.
3. During the periods of February, 2004 through July, 2004, and November and December, 2004, the Company filed withholding tax reports, but failed to remit the reported amounts due. The amounts reported, but unpaid totaled \$7,743.00. Exhibits B and C.

⁶ Confidentiality of the proceedings was invoked by the Court. 68 O.S. 2011, § 205.

⁷ OAC 710:1-5-36.

⁸ OAC 710:1-5-39(a).

⁹ Evidence by official notice, OAC 710:1-5-36.

4. During the period of August, 2004 through October, 2004, the Company failed to file withholding tax reports. Exhibit C and *Field Audit Write Up* prepared on August 16, 2006, and audit work papers¹⁰.
5. In determining the amount of estimated withholding tax to be assessed for the delinquent reporting period of August, 2004 through October, 2004, the auditor compared the electronically filed W-2s of the employees of the Company with the filed withholding tax reports. *Field Audit Write Up* and audit work papers.
6. Twelve (12) employees of the Company electronically filed income tax returns for the 2004 tax year reporting total wages of \$100,510.00 and withholding taxes of \$3,697.00. Exhibit F and audit work papers. The number of employees of the Company for the audit period cannot be determined as the Division is unable to tie back to the Company employees who file paper returns. Testimony of SUPERVISOR. The filed withholding tax reports of the Company indicate a low of 5 and a high of 23 employees, with a mean of approximately 14 employees for the audit period.¹¹ Exhibits B and D.
7. The filed withholding tax reports indicated total wages paid of \$215,510.69 and total taxes withheld of \$9,011.00.¹² Exhibits B and D.
8. Total wages of \$256,216.00 were reported for the Company on Schedule C to the Member's 2004 Federal Income Tax Return. Exhibit G.
9. The total estimated withholding tax assessed of \$3,600.00 for the delinquent reporting period of August, 2004 through October, 2004, or \$1,200.00 per month was calculated by adding together the tax withheld as reported for the months of January, 2004 through July, 2004 (\$7,943.00) divided by the number of months (7) to arrive at an average of \$1,134.71, adding \$100.00 and rounding to the nearest \$100.00. Exhibit C and *Field Audit Write Up*.

¹⁰ Evidence by official notice, OAC 710:1-5-36.

¹¹ The May, 2004 report did not include the number of employees and was omitted in calculating the mean.

¹² The May, 2004 report did not include wages paid. Based on an approximate average withholding percentage of .037789, calculated by dividing the tax withheld (\$8,144.00), excluding May by the wages paid (\$215,510.69), the wages paid for May were approximately \$23,000.00.

10. By letters dated May 30, 2006, the Division caused to be issued proposed withholding tax assessments against the Company, as follows:¹³

Audit Period – 2/1/2004 through 9/16/2004

Tax:	\$ 8,515.00
Interest through 9/16/2004:	303.05
Penalty through 7/29/06:	<u>1,968.75</u>
Total:	\$10,786.80

Audit Period – 9/17/2004 through 12/31/2004

Tax:	\$2,828.00
Interest through 7/29/2006:	<u>706.15</u>
Tax & Interest due within 60 days:	\$3,534.15
Penalty:	<u>707.00</u>
Total after 60 days:	\$4,241.15

Official notice, *OAC 710:1-5-36*.

11. By letter dated May 30, 2006, a proposed withholding tax assessment was issued against the Member for the period of February, 2004 through December, 2004, in the aggregate amount of \$15,942.29, inclusive of tax in the amount of \$11,343.00, interest accrued through August 15, 2005, in the amount of \$1,763.54, and penalty in the amount of \$2,835.75.¹⁴ Exhibit A.
12. A timely written protest to the proposed assessments was filed. Official Notice, *OAC 710:1-05-36*.
13. The Supervisor identified W-2s issued by the Company for the 2005 tax year and testified that the Tax Commission does not have any records on its data base indicating that the Company ceased doing business after January, 2004. Exhibit H.

ISSUE AND CONTENTIONS

The issue presented for decision is whether Protestants have shown by a preponderance of evidence that the proposed withholding tax assessments are incorrect.

In the letter protesting the tax lien dated November 9, 2012, Protestants write in part:

¹³ The Company filed for bankruptcy on September 16, 2004. Two separate proposed assessments were issued to reflect the pre-petition and post-petition proposed liabilities. *Field Audit Write Up*.

¹⁴ The Member filed for bankruptcy on August 15, 2005.

I am protesting the field audits for 2004 (attached). [sic] [Company] on the basis that it amended it [sic] articles of incorporation changing the name to T & M Investment Management Company LLC on May 7th 2003 (articles attached) and also applied for and was issued new FEIN # (attached). I have also attached an account transcript of both my personal tax return and business return for the period in question. I have also attached a Certificate of Release of Federal Tax Lien for years 2003 and 2008 which should clearly indicate I had no tax liability with the IRS for the period of time in question. As well I was in bankruptcy in 2003 and was performing no work as [Company], it was closed in 2003 and T & M only had a skeleton crew while I tried and successfully reorganized the company coming out of the Bankruptcy in 2005. After careful review of the documents you provided it appears to me that the signatures are not mine on the documents (attached a sample of my signatures) that you provided to me and some are not signed as well so I'm not sure who filed them while our work was being subcontracted out. I have had a couple of instances where my company identity both [Company] and T & M were comprised [sic] and company checks in both names were counterfeited and written at a Wal-Mart in Muskogee using a little old lady from Yukon's ID. It is also unusual the large number of employees that are indicated on the receipts at the time I only had 3 including myself.

The Division contends that the protest should be denied because Protestants have failed to show the assessments are incorrect. In support of this contention, the Division argues that Protestants have not shown that the reported amounts are incorrect or otherwise erroneous, nor provided any wage statements for the unreported periods. The Division further argues that Protestants have failed to present any evidence that the tax assessed has been paid or that the assessments do not reflect the taxes withheld, but not remitted.

The Division further contends that the Member should be held personally liable for the taxes assessed. In support of this contention, the Division in the Statement of the Facts¹⁵ avers that the Member is the sole member of the Company and argues that he was responsible for the duty of withholding and remittance of the taxes during the audit period.

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.
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

¹⁵ *Brief of the Compliance Division*, pp. 1.

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 limited liability company 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. 2003, § 2385.3(E). See, *OAC* 710:90-5-3(a). The term "employer" includes a manager or member of a limited liability company, who as a manager or member is under a duty to act for the limited liability company to withhold and remit withholding taxes. *Id.* See, *OAC* 710:90-5-3(b). "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. 2003, § 2385.3(E).
5. An employer is not relieved of his liability for payment of the tax required to be withheld unless the employer can show that the tax of each employee in question has been paid. *OAC* 710:90-5-2.
6. The Oklahoma Tax Commission is required to file proposed assessments against the managers or members of a limited liability company who are personally liable for the tax when the Oklahoma Tax Commission files a proposed assessment against a limited liability company for unpaid withheld income taxes. 68 O.S. 2001, § 253. The liability of the limited liability company and the managers or members for withheld income tax is joint and several. *Id.*
7. The managers or members personally liable are those "specified as responsible for withholding or collection and remittance of taxes during the period of time for which the assessment was made." 68 O.S. 2001, § 253. All managers and members of a limited liability company are liable for the payment of the tax assessed if no managers or members are specified as responsible for the duty of withholding and remittance of the taxes during the period of time for which the assessment is made. *Id.*
8. 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.

9. 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 (5th 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.*

ANALYSIS

The evidence presented refutes some of the statements made by Protestants and calls into question the veracity of the remaining statements. Specifically, the evidence shows the Company was doing business during the audit period and employed more than three (3) individuals.

Further, the Member has not alleged in any pleadings that he was not a member of the Company during the audit period and was not responsible for the duty of withholding and remittance of the withheld income taxes. The fact that the Member included the Company on his personal income tax return for the 2004 tax year as the sole proprietor thereof shows his responsibility for the Company.

Notwithstanding, the Division cannot ignore the evidence of the amount of wages paid in calculating the estimated amount due for the delinquent reporting periods. The evidence shows wages of \$256,216.00 for the 2004 tax year. Taking into account wages of approximately \$23,000.00 for the period of May, 2004, leaves wages of approximately \$18,000.00 for the three month delinquent reporting period and withholding taxes of approximately \$700.00. This result gives consideration to and is borne out by the Company filing for bankruptcy on September 16, 2004.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestants, COMPANY and MEMBER, be sustained in part and denied in part. It is further ORDERED that the assessments be revised in accordance herewith, and that the resultant amount be jointly and severally 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.”