JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **98-10-27-004 / NOT PRECEDENTIAL**
ID: **P9700088**
DATE: **10-27-98**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. ANONYMOUS ORGANIZATION was a veteran's organization located in ANYTOWN, Oklahoma.

2. The membership of the organization voted PROTESTANT during the audit period.

3. The organization operated a restaurant in ANYTOWN during the period of January, 1994 through October, 1994.

4. The restaurant was operated under sales tax permit no. XXX which was issued to the organization upon the business registration application filed by PROTESTANT.

5. The only officer listed on the registration was PROTESTANT.

6. PROTESTANT admits to preparing and signing the business registration application, but states that he only did so as a convenience to THE OPERATING MANAGER.

7. An organization check signed by PROTESTANT and THE OPERATING MANAGER was issued in remittance of the application fee.

8. PROTESTANT testified that he also applied for and obtained on behalf of the organization a beer permit issued by the County Clerk of AN ANONYMOUS County, State of Oklahoma.

9. The testimony at the hearing indicates that THE OPERATING MANAGER was voted by the membership of the organization as the sole operating manager of the restaurant.

10. According to the testimony, records of the restaurant's operations were requested from THE OPERATING MANAGER, but THE OPERATING MANAGER failed to produce the records.

11. Sales tax reports for the periods of January and February, 1994, were filed on behalf of the organization by THE OPERATING MANAGER.

12. Sales tax reports for the periods inclusive of the months of March, 1994 through October, 1994, were not filed by the organization.

13. The reports for January and February, 1994, show an aggregate sales tax liability of $850.64 and an average liability of $425.32.

14. An organization check signed by PROTESTANT and THE OPERATING MANAGER was issued in remittance of the January sales tax.

15. An organization check signed by PROTESTANT and AN ANONYMOUS PERSON was issued in remittance of the February sales tax.

16. PROTESTANT testified that upon THE OPERATING MANAGER'S request he would sign on a weekly basis eight to ten blank checks.

17. PROTESTANT testified that it was his understanding, it was his responsibility within the organization to make sure that THE OPERATING MANAGER had the supplies he requested.

18. On March 7, 1997, the Division caused to be issued against PROTESTANT, as an officer of the organization and as an individual, a proposed assessment of sales tax, interest and penalty for the period of March, 1994 through October, 1994.

19. The assessment is based on estimated sales tax liability of $400.00 per month.

20. The total amount assessed was $4,824.84, inclusive of sales tax in the amount of $3,200.00, penalty in the amount of $320.00 and interest accrued through April 18, 1997, in the amount of $1,304.84.

21. PROTESTANT timely protested the proposed assessment.

22. PROTESTANT testified that he did not become aware of the sales tax liability of the organization until approximately two (2) years subsequent to the close of the restaurant.

23. At the time of the hearing, PROTESTANT was no longer an officer or member of the organization.

24. PROTESTANT is deceased.

ISSUES AND CONTENTIONS

The issue presented for decision is whether PROTESTANT sustained his burden of proving that he was not a principal officer of the organization during the audit period.

PROTESTANT contended that he should not be held liable for the assessed sales tax. In support of this contention, PROTESTANT argued that as the sole operating officer of the restaurant, THE OPERATING MANAGER was answerable to no one within the organization including himself.

The Division contends that the evidence proved PROTESTANT was a "principal officer" of the organization during the audit period and therefore, the proposed assessment should be sustained.

APPLICABLE LAW

Each principal officer of a corporation is personally liable for the sales tax required to be collected by such corporation under the Oklahoma Sales Tax Code. 68 O.S. 1991, § 1361(A). Such liability shall be determined in accordance with the standards for determining liability for payment of federal withholding tax pursuant to the Internal Revenue Code. 68 O.S. 1991, § 253. Accordingly, the general standards or factors utilized by the federal courts for determining whether a particular person or persons are responsible persons for the failure to withhold or remit federal withholding taxes are consulted for guidance.

In ***White v. United States***, 372 F.2d 513, 516 (1967), the court held that 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 encompasses all those officers who are so connected with the corporation as to have responsibility and authority to avoid default. In ***Koegel v. United States***, 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. In ***Cellura v. United States***, 245 F.Supp. 379 (D.C. Ohio 1965), the Court held that a person who has or shares the final word as to what bills should or should not be paid is the responsible person.

The mere holding of office, by itself, does not render one responsible for the collection and payment of withholding taxes. ***Bauer v. United States***, 543 F.2d 142, 149 (Ct. Cl. 1976). More than one individual may be found to be a "responsible person" for a particular tax period and liability may be imposed on both. ***Turner v. United States***, 423 F.2d 448, 449 (9th Cir. 1970). Responsibility is a matter of status, duty and authority, not knowledge. ***Mazo v. United States***, 591 F.2d 1151, 1156 (5th Cir. 1979). Reasonable cause may excuse responsible persons, but mere delegation of responsibility to another does not constitute reasonable cause. Id. The control necessary to support liability under federal law is the ability to control the payment of corporate funds. ***Wilson v. United States***, 250 F.2d 312, 316 (9th Cir. 1958).

In accordance with its authority under 68 O.S. 1991, § 203 to enforce the provisions of the Uniform Tax Procedure Code, and in particular Section 253 thereof, the Tax Commission adopted Rule 710:65-7-3 of the ***Oklahoma Administrative Code***, which provides:

Sales tax is paid by the consumer/user to the vendor as trustee for the state. Any person required to collect sales tax as a trustee for the state will be held personally liable for the sales tax due. In the case of a corporation each "principal" officer will be held personally liable for the sales tax due.
The Commission identifies "principal" officers as:

(A) President,
(B) Vice President,
(C) Secretary,
(D) Treasurer, or
(E) Secretary/Treasurer.

Some factors which may influence the identification of a person either as a "principal" officer of a corporation or not may be:

(A) limited responsibilities within the corporation (only responsibility is as keeper of the corporate seal),

(B) limited duties within the corporation (only duty is taking minutes at Board of Directors meeting), and

(C) limited authority within the corporation (could not write checks on the corporate account).

The decision as to whether an officer is a "principal" officer shall be made on an "individual case" basis. Once it is finally determined that a person is a principal officer, a tax warrant which has the force and effect of a judgment or lien will be filed against that person individually for the full amount of the liability, i.e. tax, interest and penalty.

The burden of proof in all proceedings before the Tax Commission, unless otherwise provided by law, is on PROTESTANT to show in what respect the action or proposed action of the Tax Commission is incorrect. Rule 710:1-5-47, ***Oklahoma Tax Commission Permanent Rules***. The denial of a protest to a proposed assessment is appropriate where the party opposing the proposed action fails to provide evidence which is sufficient to entitle the party to the relief requested. See, ***Continental Oil Company v. Oklahoma State Board of Equalization***, 570 P.2d 315 (Okl. 1977).

The standard burden of proof in administrative proceedings is "preponderance of evidence." ***Black's Law Dictionary***, 1064 (5th ed. 1979). 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." Id. 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. In Oklahoma the standard does not require the exclusion of every other reasonable conclusion. ***Chickasha Cotton Oil Co. v. Hancock***, 306 P.2d 330 (Okl. 1957).

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. 1991, § 207.

2. Every officer of a corporation may be liable for the sales tax required to be collected by the corporation pursuant to the provisions of the Oklahoma Sales Tax Code. 68 O.S. 1991, § 1361(A). See, Rule 710:65-7-3 of the ***Oklahoma Administrative Code***. Such liability is dependent upon a finding that the officer was a "principal officer" of the corporation. Id. See, 68 O.S. 1991, § 253. Whether an officer of a corporation is a "principal officer" is determined in accordance with the standards for determining liability for payment of federal withholding tax pursuant to the Internal Revenue Code. 68 O.S. 1991, § 253.

3. Personal liability of an officer is conditioned upon the officer's responsibility and authority over the financial affairs of the corporation and ability to direct or control the payment of corporate funds. ***White***, supra; ***Koegel***, supra; ***Wilson***, supra. Responsibility is a matter of status, duty and authority, not knowledge. ***Mazo***, supra.

4. Here, PROTESTANT failed to prove by a preponderance of the evidence that he was not a "principal officer" of the organization during the audit period. The record shows that on behalf of the organization, PROTESTANT assumed the responsibility of overseeing the management of the restaurant. Neglect of duty is not a defense to liability. ***Mazo***, supra.

5. PROTESTANT'S protest to the proposed sales tax assessment should be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it WAS DETERMINED that the protest of PROTESTANT, be denied. It WAS further DETERMINED that the amount in controversy, inclusive of any additional 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 not 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.