

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 99-03-23-004 / NOT PRECEDENTIAL
ID: P9600086 / P9600088
DATE: 03-23-99
DISPOSITION: DENIED
TAX TYPE: SALES / WITHHOLDING
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon review of the file and records, including the record of the hearing and the exhibits received into evidence, the undersigned finds:

1. Protestants were hired as sales and marketing representatives of THE CORPORATION (hereinafter "Corporation") on November 1, 1991.

2. In March, 1992, Protestants were offered and accepted positions as officers of the Corporation. Protestant OFFICER "A" held the office of President of the Corporation. Protestant OFFICER "B" held the office of Secretary/Treasurer of the Corporation.

3. Protestants admit that they assisted in operating and running the Corporation during the period in question. Protestants also admit that they each owned one-third of the voting stock of the Corporation and were authorized signatories on the operating account of the Corporation.

4. Protestants admit that the sales and withholding tax amounts assessed against them are correct and reflect the amounts reported by them on the sales and withholding tax returns filed for the periods at issue.

5. The amounts assessed against Protestants are as follows:

SALES TAX

Tax:	\$4,751.13
Interest(11/6/95)	1,784.30
Penalty:	<u>831.11</u>
TOTAL:	\$7,366.54

WITHHOLDING TAX

Tax:	\$ 120.95
Interest(9/30/96):	41.35
Penalty:	<u>30.24</u>
TOTAL:	\$ 192.54

6. Protestants timely protested the proposed assessments.

7. The sales tax reports filed for the months of September and November, 1992, were filed on the 31st day of the succeeding calendar month.

8. Protestants admit that they collected the majority of the reported sales taxes.

ISSUES AND CONTENTIONS

Two issues are presented for decision. The first issue is whether Protestants sustained their burden of proving that they were neither "principal officers" nor "employers" of the Corporation during the relevant time period. The second issue is whether the evidence supports any adjustments to the proposed assessments.

Protestants contend that they should not be held personally liable since they did not start the company, did not put any money into the company and did not take any money out of the company except for their pay checks.

Protestants also contend that the company was grossly undercapitalized and that they did everything they could to collect the sales proceeds and pay the taxes reported. Protestants also argue that penalty and interest should not be assessed on the sales tax reports filed on the 31st day of the month following the month of the sales and that the withholding taxes have been paid.

In support of these arguments, Protestants assert they were advised by the Commission that if they filed the reports by the last day of the month, penalty and interest would not be due. Protestants also assert that they reported the income for which withholding taxes have been assessed as nonemployee compensation on their 1993 income tax return and paid tax on such income. Finally, Protestants request a waiver of the penalty and interest.

The Division contends that Protestants should be held personally liable. In support of this contention, the Division argues that the evidence supports a finding that Protestants were principal officers and employers of the Corporation during the audit period. The Division further contends that penalty and interest are due on the sales tax reports filed late and that Protestants' 1993 income tax return does not report the income for which withholding tax was assessed.

APPLICABLE LAW

The relevant provisions of the Oklahoma Statutes are Section 1361(A)¹ and Section 2385.3(d)² of Title 68. In furtherance of these provisions, Section 253 of the Uniform Tax Procedure Code, 68 O.S. 1991, § 201 et seq., provides:

When the Oklahoma Tax Commission files a proposed assessment against corporations for unpaid sales taxes, withheld income taxes or motor fuel taxes collected pursuant to Article 5, 6 or 7 of this title, the Commission shall file such proposed assessments against the principal officers of such corporations personally liable for the tax. The principal officers of any corporation shall be liable for the payment of any tax as prescribed by this section if such officers were officers of the corporation during the period of time for which the assessment was made.

The liability of a principal officer for sales tax, withheld income tax or motor fuel tax shall be determined in accordance with the standards for determining liability for payment of federal withholding tax pursuant to the Internal Revenue Code of 1986, as amended, or regulations promulgated pursuant to such section.³

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 (Bkrtcy.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).

¹This subsection provides in pertinent part:

Every person required to collect any tax imposed by this article, and in the case of a corporation, each principal officer thereof, shall be personally liable for said tax.

²This section provides in pertinent part:

Every employer who fails to withhold or pay to the Tax Commission any sums herein required to be withheld or paid shall be personally and individually liable therefor to the State of Oklahoma. The term "employer" ... includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer or employee ... is under a duty to act for a corporation or partnership to withhold and remit withholding taxes....

³Amended by Laws 1989, c.249, § 16, eff. July 1, 1989. Prior to the amendment this section provided:

When the Oklahoma Tax Commission files a proposed assessment against corporations for unpaid sales taxes and withheld income taxes, the Commission shall file such proposed assessments against the principal officers of such corporations, if such officers are liable under the laws of Oklahoma.

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.* The determination of liability under Section 253 is limited to the standards for determining who is a "responsible person". Oklahoma Tax Commission Order No. 96-12-17-037 (Prec.).

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).

Sales tax attributable to the gross receipts on all sales occurring during the preceding calendar month is due and payable on the first day of each succeeding month. 68 O. S. 1991, § 1365(A). The tax is delinquent if not paid on or before the 15th day of such succeeding month. *Id.* Interest shall be imposed upon such tax if the tax is not paid before it becomes delinquent. 68 O.S. 1991, § 217(a). Penalty shall be imposed if the tax is not paid within fifteen (15) days after it becomes delinquent. 68 O.S. 1991, § 217(c).

A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect, and in what respect. Rule 710:1-5-47 of the *Oklahoma Administrative Code*. See, *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission*, 768 P.2d 359 (Okla. 1988). 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.*

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. A "principal officer" or an officer or employee who is an "employer" of a corporation may be personally liable for the sales and withholding taxes of the corporation. 68 O.S. 1991, §§ 1361(A) and 2385.3(d).

3. Whether a "principal officer" or an "employer" is personally liable for the taxes of the corporation 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.

4. Here, the evidence proves that Protestants were "principal officers" and "employers" of the Corporation during the relevant time period. Further, the evidence does not support any adjustments to the proposed assessments. Accordingly, Protestants' protest to the proposed sales and withholding tax assessments 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 OFFICERS be denied. It WAS further DETERMINED that the amounts in controversy, plus any additional accrued and accruing interest, be fixed jointly and severally as the deficiencies 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.