**JURISDICTION:** **OKLAHOMA TAX COMMISSION - DECISION**
**CITE:** **99-05-20-007 / NOT PRECEDENTIAL**
**ID:** **P9700068**
**DATE:** **05-20-99**
**DISPOSITION:** **DENIED AS TO MOTOR FUEL / SUSTAINED AS TO UNDERGROUND STORAGE TANK ASSESSMENT**
**TAX TYPE:** **MOTOR FUEL / UNDERGROUND STORAGE TANK**
**APPEAL:** **NO APPEAL TAKEN**

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant to these proceedings, THE CORPORATION, a subsidiary of AN ANONYMOUS GROUP located OUT OF STATE, was a licensed distributor of motor fuel products in the State of Oklahoma. THE CORPORATION purportedly owned and operated approximately 38 convenience stores, some of which were located in Oklahoma. In addition to other consumer products, gasoline and diesel fuels were sold by THE CORPORATION at the convenience stores.

2. PROTESTANT admits he was Vice-President for and on behalf of THE CORPORATION and had check signing authority. PROTESTANT'S signature appears on two checks which were written in remittance of taxes during the audit period. PROTESTANT'S signature also appears on the no remit motor fuel/diesel fuel distributor reports for the periods of January and April, 1994.

3. In the verified written protest, PROTESTANT states:

> In addition, during the periods in question until he resigned on June 11, 1994, PROTESTANT was a vice president of THE CORPORATION. PROTESTANT'S duties as a vice president of THE CORPORATION consisted of being responsible for field operations. These duties included being responsible for pricing at the convenience stores, performing repairs (or arranging for third parties to perform repairs) at the convenience stores, and dealing with vendors supplying inventory to the convenience stores. During the periods in question, PROTESTANT had no responsibility for, nor any knowledge of, the financial aspects of THE CORPORATION. In fact, PROTESTANT was not even aware of the unpaid taxes until shortly before leaving THE CORPORATION in June, 1994. Although PROTESTANT'S name appeared on the signature card for THE CORPORATION bank accounts and his facsimile signature may appear on some of the checks issued by THE CORPORATION, any such checks were issued by THE CORPORATION'S computer check writing program which program had the ability to automatically print any signature stored in the program. Furthermore, PROTESTANT did not have access to the financial records or checkbook of THE CORPORATION during the periods in question and thus were powerless to effectuate <u>any</u> payment to <u>any</u> creditor.

THE PRESIDENT of THE CORPORATION, was solely responsible for and had complete control over all the financial aspects of THE CORPORATION. THE PRESIDENT'S duties as President of THE CORPORATION included having control over all creditors including determining what creditors would and would not be paid, being responsible for the filing of all state and federal returns, and being responsible for hiring and firing office personnel. THE PRESIDENT also retained physical possession of the financial records of THE CORPORATION and the company's checkbook.

4. On January 31, 1997, the Division caused to be issued against PROTESTANT an assessment of gasoline taxes, diesel taxes and underground storage taxes, inclusive of penalties and interest on each tax type for the periods of September and December, 1993, January, 1994 and April through June, 1994.

5. PROTESTANT timely protested the proposed assessment.

6. The Division subsequently adjusted the assessment by withdrawing the taxes assessed for the periods of September and December, 1993.

7. The total amount in controversy, inclusive of interest accrued through February 11, 1998, is $600,818.16. The following represents a breakout of the taxes assessed:

**Gasoline Tax**

| | |
|---|---|
| Tax: | $324,990.33 |
| Interest: | 181,048.27 |
| Penalty: | 32,541.29 |
| Total: | $538,579.89 |

**Diesel Tax**

| | |
|---|---|
| Tax: | $ 26,026.08 |
| Interest: | 14,227.88 |
| Penalty: | 6,008.44 |
| Total: | $ 46,262.40 |

**Underground Storage Tax**

| | |
|---|---|
| Tax: | $ 13,809.64 |
| Penalty: | 2,166.23 |
| Total: | $ 15,975.87 |

## ISSUES AND CONTENTIONS

Three issues are presented for decision. The first issue is whether PROTESTANT sustained his burden of proving that he was not a principal officer of THE CORPORATION during the period in question. The second issue is whether a principal officer's liability for the taxes of THE CORPORATION is dependent on a finding of willfulness. The third issue is whether a principal officer of a corporation may be held personally liable for underground storage taxes.

PROTESTANT contends that he was not a principal officer of THE CORPORATION during the relevant time period. In support of this contention, PROTESTANT argues that he did not have the final word as to what creditors should and should not be paid. In the alternative, PROTESTANT contends that he cannot be found liable for the taxes since his conduct was not willful. In support of this contention, PROTESTANT argues that he had no knowledge of the delinquent taxes and that assuming he was aware of the tax delinquency, he was powerless to effectuate any type of payment to any creditor.

The Division contends that PROTESTANT was a principal officer of THE CORPORATION and should be held personally liable for the taxes at issue. In support of this contention, the Division argues that PROTESTANT has not offered any proof to show he had no control or knowledge of the financial affairs of THE CORPORATION. The Division further argues that the applicable statutes do not contain a willfulness component.

## APPLICABLE LAW

Personal and individual liability of an officer of a corporation for the motor fuel taxes of the corporation is found at Section 253 of the Uniform Tax Procedure Code[1], wherein it provides in pertinent part:

> When the Oklahoma Tax Commission files a proposed assessment against corporations for unpaid . . . 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 the 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 . . . 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.

[1] 68 O.S. 1991, § 201 et seq.

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). 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). In ***Silberberg v. United States***, 524 F.Supp. 744 (E.D. N.Y. 1981), the Court found, "to be a responsible person or officer under the statute, it is not necessary to be the only such person, or to have exclusive control over all corporate affairs."

In ***White v. U.S.***, 372 F.2d 513, 178 Ct. Cl. 765 (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 when. It does not follow from this holding that the person must have the final word; ***Brown v. United States***, 464 F.2d 590, 591 (5th Cir. 1972), it is enough that the person have the ability to direct or control the payment of corporate funds or participate in decisions regarding what bills should be or should not be paid and when; ***Spang v. United States***, 533 F.Supp. 220, 225 (W.D. OK 1982).

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 mere holding of office, by itself, does not render one responsible for the collection and payment of trust fund 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). The control necessary to support liability under federal law is the ability to direct or control the payment of corporate funds. ***Wilson v. United States***, 250 F.2d 312, 316 (9th Cir. 1958).

PROTESTANT cites ***Brown v. United States***, 988 F.2d 58 (8th Cir. 1993) for the proposition that an officer of a corporation cannot be held personally liable for the trust fund taxes of the corporation where the signature appearing on the checks in payment of the taxes of the corporation is a facsimile. In ***Brown***, the Court held that the vice-president of a corporation was not a responsible person under the statute although a rubber stamp facsimile of his signature appeared on the payroll checks. In ***Brown***, however, unlike in this cause, the president of the corporation testified that he had exclusive control of all corporate funds, sole responsibility for paying taxes, and authorized every check. Here, PROTESTANT has not offered any exonerating evidence.

## 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 of a corporation may be personally liable for the motor fuel taxes of the corporation. 68 O.S. 1991, § 253.

3. Whether a principal officer 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. 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.). A finding of "willfulness" is not required under the statutory provisions at issue. Id.

5. Neither the provisions of the Oklahoma Petroleum Storage Tank Release Indemnity Program, 17 O.S. 1991, § 350 et seq. nor the provisions of Section 253 of the Uniform Tax Procedure Code provide for personal liability of an officer of a corporation for the corporations failure to report and remit underground storage taxes.

6. Here, PROTESTANT states that he had no responsibility for, nor knowledge of, the financial aspects of THE CORPORATION and did not have access to the financial records or checkbook of THE CORPORATION and thus was powerless to effectuate any payment to any creditor. The evidence presented by the Division, however, shows that PROTESTANT'S signature appears on two of the reports at issue. PROTESTANT did not offer any evidence to show these were facsimile signatures. PROTESTANT'S signatures on the reports indicate that he at least participated in the financial aspects of THE CORPORATION. In addition, PROTESTANT admits that he had check signing authority. Based on the evidence presented, the undersigned finds that PROTESTANT did not sustain his burden of proving by a preponderance of evidence that he was not a principal officer of THE CORPORATION during the period in question.

7. PROTESTANT'S protest to the assessment of the motor fuel taxes, interest and penalty should be denied. PROTESTANT'S protest to the assessment of the underground storage taxes and penalty should be sustained.

## DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is DETERMINED that the protest to the assessment of the motor fuel taxes, interest and penalty be denied. It is further DETERMINED that the protest to the assessment of the underground storage taxes and penalty be sustained. It is further DETERMINED that the amount of $584,842.29, inclusive of any additional accrued and accruing interest, be fixed as the deficiencies due and owing by PROTESTANT.

**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.