

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 99-05-25-010 / NOT PRECEDENTIAL
ID: P9600502
DATE: 05-25-99
DISPOSITION: DENIED
TAX TYPE: SALES
APPEAL: OKLA SUP CT 93,260 / OTC DECIS AFFIRMED

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:

FINDINGS OF FACT

1. The Division conducted an out-of-business mixed beverage gross receipts tax audit of the business of ANONYMOUS GRILL, INC. ("Corporation") for the period beginning with the date the Corporation received its licenses and permits through and including December 31, 1995.
2. The audit was conducted by using the wholesalers' sales invoice reports which indicated a last invoice date of December 29, 1995, the average prices for mixed drinks and wine for the area and the regulation pour rates for spirits and wine.
3. Assessments of mixed beverage gross receipts tax, sales tax and tourism tax were issued against the Corporation for the period of July 22, 1994 through December 31, 1995. Assessments of sales tax were also issued against ANONYMOUS SELLER "A" and ANONONYMOUS SELLER "B", as officers of the Corporation and as individuals.
4. ANONYMOUS SELLER "B" filed a letter of protest to the proposed sales tax assessment issued against him. In the letter of protest, ANONYMOUS SELLER "B" states that Protestant and THE BUYER, INC., ("BUYER") which Protestant admits to owning, purchased 100% of the stock and assumed all liabilities of the Corporation as of November 18, 1994, that the business was completely and formally transferred to Protestant on such date and that Protestant immediately took over the management of the business.
5. Attached to ANONYMOUS SELLER "B's" letter of protest was a copy of the Purchase Agreement on ANONYMOUS GRILL dated November 18, 1994, by and between Protestant and THE BUYER; and ANONYMOUS SELLER "A" and ANONYMOUS SELLER "B", as seller.

6. The Purchase Agreement provided for a purchase price of \$65,000.00 to be paid as follows: \$8,000.00 to THE BUYER for furniture and carpet, \$5,000.00 to ANONYMOUS SELLER "B" at closing, \$7,000.00 to ANONYMOUS SELLER "B" on December 15, 1994, an amount to be determined within the next 30 days to pay all the bills and obligations of the business and the balance to be paid in twelve equal installments beginning January 15, 1995. The agreement also provided that the purchase price included all lease hold improvements, furniture, fixtures and certain specifically listed equipment.

7. Based on the information provided in ANONYMOUS SELLER "B's" letter of protest and the Purchase Agreement, the Division added Protestant's name to the officer list of the Corporation and caused to be issued against Protestant, as an officer of the Corporation and as an individual, a proposed assessment of sales tax, interest and penalty for the period of November 18, 1994 through December 31, 1995.

8. The Division also withdrew the proposed sales tax assessments issued against ANONYMOUS SELLER "B" and ANONYMOUS SELLER "A" for the period of November 18, 1994 through December 31, 1995.

9. The aggregate amount in controversy is \$9,835.08, inclusive of sales tax in the amount of \$8,083.05, interest accrued through September 15, 1996 in the amount of \$943.71 and penalty in the amount of \$808.32.

10. Protestant timely protested the proposed sales tax assessment.

11. According to the auditor's notes, the sales tax assessment is based on the mixed beverage tax depletion audit, adjustments to the reports of sales tax for the period of July through September 1995 and an estimate of sales for the period of October through December 1995 which is based on an average of reported sales.

12. According to Protestant, ANONYMOUS SELLER "A" and THE MANAGER of the business hired by ANONYMOUS SELLER "B" and ANONYMOUS SELLER "A", offered to sell the business to him in late July or early August, 1994. He stated that instead of purchasing the business he agreed to purchase the furniture, fixtures and equipment of the business because of his concern over the loss of the income from his vending machines in the business and the fact that he had already put carpeting and some furniture in the business. Protestant also testified that he agreed to take over the lease of the building and assume the then current debts and obligations of the business, including the payment of delinquent sales tax for the months of August, September and October, 1994, as a means of protecting the assets from creditors.

13. Protestant testified that THE MANAGER purchased the business from ANONYMOUS SELLER "A" and ANONYMOUS SELLER "B" and that he, Protestant, entered into a sublease of the building with THE MANAGER. Protestant could not produce a copy of the sublease agreement.

14. Protestant testified that after ABLE raided the establishment and confiscated all the liquor and the license, he was forced to evict THE MANAGER from the premises because he was behind on the rental payments. He stated that at this point he attempted to sublease the premises to another person who was going to set up a corporation and operate the business, but did not because the person was unable to obtain a liquor license due to a lack of parking.

15. Protestant testified that he had no involvement in the business, that he never hired nor fired anyone, that he never wrote checks, that he never signed reports and that he never purchased liquor. He stated that the furniture, fixtures and equipment were not worth \$65,000.00, but he agreed to this because it would cost at least this much to start a restaurant/bar from scratch.

16. The Division admits that Protestant was not an officer of the Corporation during the audit period.

17. By letter dated June 12, 1995, notice of suspension and forfeiture of the corporate charter of the Corporation for failure to comply with the Oklahoma franchise laws was served on ANONYMOUS SELLER "A".

ISSUES AND CONTENTIONS

Two issues are presented for decision. The first issue is whether the evidence proves Protestant was the owner of the business during the audit period. The second issue is whether the owner of the business may be held responsible for the sales tax liability of the business.

Protestant contends that he was not the owner of the business and, therefore, cannot be held responsible for the tax liability. In support of this contention, Protestant argues that he did not purchase the business, but instead only purchased the assets of the business and leased those assets to the owner of the business. Protestant also argues that he did not manage the business, did not own any stock in the Corporation, never hired nor fired any employees, never had check signing authority, never signed any reports and never purchased any liquor.

The Division contends that Protestant should be held personally liable. In support of this contention, the Division argues that the evidence supports a finding that Protestant was the owner of the business. The Division further argues that persons other than officers may be held responsible for the tax liability of the business.

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. Each and every vendor is required to collect from the consumer or user and the consumer or user is required to pay to the vendor as trustee for and on account of the state the sales tax levied by the Oklahoma Sales Tax Code. 68 O.S. Supp. 1993, § 1361(A). "Every person required to collect sales tax, and in the case of a corporation, each principal officer thereof, shall be personally liable for the tax". *Id.*

3. A "Vendor" is "any person making sales of tangible personal property or services in this state, the gross receipts or gross proceeds from which are [subject to sales tax]", 68 O.S. Supp. 1994, § 1352(21)(a); and "any person maintaining a place of business . . . and making sales of tangible personal property or services, . . . to persons within this state, the gross receipts or gross proceeds from which are [subject to sales tax]", 68 O.S. Supp. 1994, § 1352(21)(b).

4. Whether a "principal officer" is personally liable for the taxes of a 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.

5. 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 (Okl. 1988).

6. Here, the evidence proves that Protestant was the owner of the business during the relevant time period. Protestant failed to explain why he was making payments to ANONYMOUS SELLER "B" when the purchase price included the furniture, fixtures and equipment. In addition, Protestant admitted that the furniture, fixtures and equipment were not worth \$65,000.00.

The evidence also shows that after the purchase of the business Protestant did not assume the responsibilities of an officer of the Corporation. See, ***Blair v. Bishop's Restaurants, Inc.***, 202 Okla. 648, 217 P.2d 161 (1950). The undersigned finds, however, that Protestant should not be excused from liability. Delegation of responsibility to another does not excuse a responsible person from liability. ***Mazo v. United States***, 591 F.2d 1151, 1156 (5th Cir. 1979). A responsible person is one who is so connected with the business as to be in the position to exercise full authority over the financial affairs, ***Koegel v. United States***, 437 F.Supp. 176 (D.C. N.Y 1977); to control the payment of corporate funds, ***Wilson v. United States***, 250 F.2d 312, 316 (9th Cir. 1958); and to avoid default, ***White v. United States***, 372 F.2d 513, 516 (1967).

Protestant was the owner of the business. As the owner, Protestant was in the position to control the financial affairs of the business, to control the payment of corporate funds and to avoid default. Protestant should not be allowed to escape liability by failing to assume the responsibilities of an owner. Further, subsequent to the suspension and forfeiture of the Corporation's charter Protestant's liability for the sales tax is one of a sole proprietor. See, *State Insurance Fund v. AAA Engineering & Drafting, Inc.*, 863 P.2d 1218 (Okla. 1993).

7. Protestant's protest 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.