

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 99-07-19-015 / NOT PRECEDENTIAL
ID: P9700350
DATE: 07-19-99
DISPOSITION: DISMISSED
TAX TYPE: SALES
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. THE CORPORATION (hereinafter "Corporation") operated a business known as COMPANY ONE in ANYTOWN, Oklahoma from approximately March 1, 1996 through the first week of October, 1996, when the business ceased operations due to the death of Protestant's husband. Protestant's husband died September 8, 1996.

2. That Protestant's deceased husband purchased the business from the former owners and operated the business through the Corporation.

3. That the former owners retained an interest in the name of the business and the fixtures and equipment.

4. That Protestant's deceased husband had worked at the business for the former owners prior to purchasing the business.

5. That Protestant was not involved in the negotiations for the purchase of the business.

6. That during the period of approximately March 1, 1996 to approximately July 15, 1996, Protestant's deceased husband spent approximately twelve to sixteen hours in the restaurant each day. He made all decision concerning the restaurant, including the days and hours it would be open, the employees to be hired and fired, the employees' work schedules and hours and the food to be ordered. He also dealt with the vendors of the business, inventoried the food, did the nightly paper work and deposits and signed all checks.

7. That during this period, Protestant spent approximately forty-five hours per week in the restaurant. She along with others designated by her deceased husband would accept merchandise from vendors, sign invoices, inventory food and deal with vendors when her deceased husband was not at the restaurant.

8. That after July 15, 1996 and up to approximately three weeks prior to his death, Protestant's husband spent approximately two hours each day in the restaurant. During this period, Protestant's husband would talk with employees, oversee how things were going and review paper work.

9. That after July 15, 1996, Protestant spent approximately twelve or more hours in the restaurant each day. In addition to the duties she previously performed, Protestant along with two other employees would do the nightly paper work and she would make the nightly deposits. She would also write and execute all corporate checks since no one else was authorized to sign checks on the corporate bank account.

10. That three employees were paid a salary by the Corporation - Protestant, her husband and THE BARTENDER. Protestant was paid approximately \$250.00 to \$300.00 per week up to July 15, 1996. After this date, Protestant's salary was increased by her deceased husband to compensate her for the additional work she performed for the business.

11. That up to his date of death, Protestant's husband maintained the business. Protestant would receive daily directions concerning all aspects of the business from her deceased husband. After his death, all operations of the restaurant remained the same.

12. That Protestant never hired nor fired any employees of the business nor made any decisions concerning how the business was run.

13. That after July 15, 1996, Protestant was responsible for taking the paper work of the business to the Corporation's accountant. The accountant would prepare the necessary tax reports and payroll checks from the paper work.

14. That all of the records and paper work of the business, including the corporate check book was left at the restaurant when it closed.

15. That on or about February 27, 1996, the bank signature card for the corporate checking account was changed to add Protestant as an authorized signatory on the account. Protestant admits to executing said business account agreement.

16. That Protestant also admits to executing the corporate authorization resolution which was filed in support of the change to the bank signature card. A corporate title is not assigned to Protestant on the resolution, however, she did execute the resolution in the space designated "Attest by One Other Officer."

17. That the bank statements and cancelled checks for the corporate checking account went to a Post Office Box to which Protestant did not have access. Protestant was unaware of the corporate finances and did not know at any given time how much money was in the corporate account.

18. That the sole officer of the Corporation was Protestant's deceased husband.

19. That although she does not know whether any meetings of the Corporation were ever conducted, Protestant never attended any corporate meetings, did not own any shares of stock in the Corporation and was never appointed as an officer of the Corporation.

20. That Protestant executed the sales and withholding tax reports for the month of July, 1996 and the checks in remittance of the taxes at the request of her deceased husband since he was unable to.

21. That the franchise tax return for the period of July, 1996 to June, 1997 was prepared and signed by someone other than Protestant. Protestant executed the check in remittance of the franchise tax.

22. That the Division on October 3, 1997, caused to be issued against Protestant as a manager of the Corporation and as an individual a proposed sales tax assessment for the period of August, 1996 through October 26, 1996, in the total aggregate amount of \$13,253.01, consisting of tax in the estimated amount of \$10,500.00, interest accrued through November 14, 1997, in the amount of \$1,703.01, and penalty in the amount of \$1,050.00.

23. That at all times relevant, the sales tax permittee of the business was the Corporation.

CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter of law that jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission, 68 O.S. 1991, § 207; that for purposes of these proceedings personal liability for sales tax is limited to vendors, and in the case of a corporation, each principal officer thereof, 68 O.S. 1991, § 1361(A); that a vendor is any person (defined to include a corporation) making sales of tangible personal property the proceeds of which are taxable under the Sales Tax Code, 68 O.S. 1991, §§ 1352(R) and 1352(I); that a person is a "de facto" officer where he/she "is in possession of the office and exercises the duties thereof under color or appearance of right, but fails of being an officer de jure by reason of ineligibility, irregularity in his/her election, or failure to qualify as required", 19 C.J.S. *Corporations* § 459 (1981); that the evidence fails to show Protestant was a "de facto"

officer of the Corporation as defined since she was not "in possession of the office under color or appearance of right" (neither the corporate resolution nor the franchise tax return lists an office for Protestant) and she did not "exercise the duties thereof under color or appearance of right" (Protestant performed her duties at the direction or instruction of her deceased husband up to the date of his death and thereafter the Corporation was without direction as evidenced by its demise shortly after his death); and that furthermore, as previously decided by the undersigned, the evidence does not support piercing the corporate veil to impute liability for the acts of the Corporation to Protestant since there has been no showing the Corporation was a sham or the mere instrumentality of Protestant. See, *Puckett v. Cornelson*, 897 P.2d 1154, 1156 (Okla. App. 1995) and *FDIC v. Hinch*, 879 F.Supp. 1099 (N.D. Okla. 1995).

DISPOSITION

THEREFORE, IT WAS DETERMINED that the proposed sales tax assessment issued against Protestant be dismissed.

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.