JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **99-07-27-005 / NOT PRECEDENTIAL**
ID: **P9700246**
DATE: **07-27-99**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Protestant owns and operates CORPORATION ONE and CORPORATION TWO. CORPORATION TWO builds walk-in coolers and freezers. CORPORATION ONE owns and operates juke boxes and pool tables. CORPORATION ONE also leases buildings suitable for beer bars and subleases or rents out the bar space to an operator.

2. In January, 1992, Protestant formed CORPORATION FOUR, an Oklahoma Corporation. The Corporation was formed to operate a beer bar which CORPORATION ONE had leased from MR. "A". A sales tax permit and county beer license were obtained in the name of CORPORATION FOUR. Protestant testified that he formed the Corporation in case he had to operate the bar himself.

3. Protestant never operated the bar under CORPORATION FOUR nor any other corporation.

4. Protestant initially testified that he sold CORPORATION FOUR to a lady who operated the bar for approximately two to three weeks and that MS. "B" purchased CORPORATION FOUR from this lady. Later on in his testimony and on cross-examination, Protestant testified that he sold CORPORATION FOUR to MS. "B" in February, 1992. In consideration for the sale, Protestant testified that he received a deposit down on the rent.

5. According to Protestant, MS. "B" was suppose to obtain the necessary licenses and permits and change the officers of CORPORATION FOUR. Protestant also testified, however, that he believed the Corporation was operating the bar and that he was aware MS. "B" was using the Corporate beer permit to operate the bar.

6. On February 26, 1992, MS. "C" made application for a sales tax permit for and on behalf of CORPORATION FOUR, located at ANONYMOUS LOCATION ONE.
The Business Registration indicates it was filed to show a change in business ownership. MS. "C", MS. "D", and MR. "E" are listed as the officers of the Corporation. MS. "D" is also listed as the owner of the Corporation and the officer responsible for remitting withholding taxes. MS. "D" is MS "B"'s daughter in law. The previous owner information indicates that the fixtures and equipment were leased from ANONYMOUS AMUSEMENT CO. and that ANONYMOUS AMUSEMENT CO. was "given notice to get out."

7. Sales tax permit number XXX was issued in the name of CORPORATION FOUR upon the application filed on February 26, 1992.

8. Protestant was listed as an officer of CORPORATION FOUR on the franchise tax returns filed for the periods of July 1, 1992 through June 30, 1993, July 1, 1993 through June 30, 1994 and July 1, 1994 through June 30, 1995. According to Protestant, he was unaware that he was listed as an officer of the Corporation on the franchise tax returns. Protestant also testified that he did not sign the franchise tax return for the period of July 1, 1994 through June 30, 1995.

9. The check accompanying the 94-95 franchise tax return is written on the account of MR. ACCOUNTANT, Protestant's accountant. Protestant testified that MR. ACCOUNTANT was hired to prepare and file the Articles of Incorporation for CORPORATION FOUR, but not to do the books. Protestant also testified that he never authorized anyone to sign his name on his behalf.

10. The address of Protestant's accountant is listed as the address of the Corporation on the referenced franchise tax returns.

11. According to Protestant, MS. "B" sold the Corporation to MR. "G" and MR. "G" after a period of time sold the Corporation to MR. "F".

12. Protestant never sold any beer nor purchased any beer to be sold. Protestant was never authorized to execute checks on the accounts of the operators of the bar, did not have any authority to make decisions as to the disbursement of funds or the payment of creditors and was not involved in the day to day management of the bar.

13. By letter dated January 26, 1996, the Special Projects Group of the Tax Commission requested a detailed explanation of the deductions claimed on the July, 1995 sales tax report. The request was forwarded to ANONYMOUS LOCATION TWO, which according to Protestant was MS. "B"'s address.

14. A handwritten note on the letter indicates that the auditor talked to an employee of the bar who "stated Protestant request no mail go to bar, but to home address" and lists an address of ANONYMOUS LOCATION THREE. According to Protestant, this is MR. "G"'s address.

15. The Division did not receive a response to the request and on March 31, 1997, caused to be issued an assessment of sales tax, interest and penalty against the Corporation and Protestant, as an officer of the Corporation. The assessment results from the disallowance of the deductions claimed on the sales tax reports filed for the period of March 1, 1994 through July 31, 1995. An aggregate amount of $4,953.09 was assessed, inclusive of tax in the amount of $3,424.26, interest accrued through May 19, 1997, in the amount of $1,186.39 and penalty in the amount of $342.44.

16. The assessment letter was mailed to ANONYMOUS LOCATION THREE address.

17. Protestant received notice of the letter and came to the offices of the Tax Commission. The assessment letter was thereafter remailed to Protestant's business address, which Protestant had given to the auditor.

18. Protestant timely protested the proposed sales tax assessment.

19. None of the sales tax reports filed for the audit period or checks in remittance of the taxes were signed by Protestant. The reports and checks bear either the signature of MS. "D" or MS. "B". MS. "B"'s address appears on the preprinted reports. The checks were initially written on an account bearing the names of MS. "B" and MS. "D". In December, 1994 and thereafter, the checks were written on an account bearing the name of CORPORATION THREE.

20. On January 5, 1995, MS. "D" responded to a withholding tax delinquent notice on behalf of "CORPORATION THREE." She indicated on the notice that she was the "owner".

ISSUES AND CONTENTIONS

The issue presented for decision is whether Protestant is personally liable for the delinquent sales taxes.

Protestant contends that the mere holding of an office is not sufficient grounds for personal liability. Protestant further contends that the evidence shows he was not involved in the day to day management of the business, did not have the authority to decide which creditors would or would not be paid and did not have check signing authority. Protestant additionally contends that the evidence proves he sold the Corporation to MS. "B" and that she and others believed they were the officers of the Corporation and were responsible for the operations of the bar and remittance of taxes.

The Division contends that Protestant should be held personally liable. In support of this contention, the Division argues that Protestant was the sole officer listed on the franchise tax returns during the audit period. The Division further argues that there are a number of questions concerning Protestant's involvement with the business which have not been answered.

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. The liability of an officer of a corporation for the sales tax required to be collected by the corporation is dependent upon a finding that the officer was a "principal officer" of the corporation. 68 O.S. Supp. 1993, § 1361(A). 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.

5. 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 v. United States***, 372 F.2d 513, 516 (1967); ***Koegel v. United States***, 437 F.Supp. 176 (D.C. N.Y. 1977); ***Wilson v. United States***, 250 F.2d 312, 316 (9th Cir. 1958). Responsibility is a matter of status, duty and authority, not knowledge. ***Mazo v. United States***, 591 F.2d 1151, 1156 (5th Cir. 1979). The mere holding of office, by itself, does not render one responsible. ***Bauer v. United States***, 543 F.2d 142, 149 (Ct. Cl. 1976).

6. A permit issued under the Oklahoma Sale Tax Code is not assignable and is valid only for the person in whose name it is issued and for the transaction of business at the place designated in the permit. 68 O.S. 1991, § 1364(D). The term "person" includes a corporation. 68 O.S. Supp. 1994, § 1352(12).

7. The liability of the holder of a sales tax permit extends to any person authorized to transact business for the holder under the permit. ***Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission***, 768 P.2d 359 (Okl. 1988). See, Oklahoma Tax Commission Order No. 90-02-06-062.

8. A license holder is liable for acts committed under authority of the license if such acts are committed with either the knowledge, consent or acquiescence, either express or implied, of the licensee. ***Matter of Revocation of County Beverage License***, 620 P.2d 395, 397 (Okl. 1980). This principle applies to tax liability as long as the permit holder has at least the basic minimum of awareness of the commission of the acts in question. Oklahoma Tax Commission Order No. 92-10-13-004.

9. 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). The standard burden of proof in administrative proceedings is preponderance of evidence. See, Oklahoma Tax Commission Order No. 91-10-17-061.

10. The question in this cause is whether Protestant transferred CORPORATION FOUR to MS. "B". The evidence supporting a transfer includes Protestant's testimony, the Business Registration Application and the response to the withholding tax delinquency notice. The evidence suggesting that a transfer of CORPORATION FOUR did not occur includes Protestant's testimony, the corporate franchise tax return filings by Protestant's accountant, the auditor's notes detailing a conversation with an employee of the bar and the accounts on which the checks were drawn. In addition, the testimony that the Corporation was transferred to each successive operator of the bar and Protestant's own admission that he formed the Corporation in case he had to operate the bar suggest that an actual transfer of CORPORATION FOUR did not occur.

Based on the above evidence, the undersigned finds that Protestant did not sustain his burden of proving by a preponderance of the evidence that CORPORATION FOUR was transferred to MS. "B". Having so found, the undersigned further finds that Protestant should be held personally liable for the sales tax delinquency of the Corporation. Protestant had knowledge of, consented to and acquiesced in the use of the Corporate licenses and permits by MS. "B". Protestant was at the least one of the Corporate officers and, more than likely, the only legally recognizable officer of the Corporation.

Reasonable cause may excuse responsible persons, but mere delegation of responsibility to another does not constitute reasonable cause. ***Mazo v. United States***, 591 F.2d 1151, 1156 (5th Cir. 1979).

11. 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.