JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2000-06-20-017 / NOT PRECEDENTIAL**
ID: **P9800040**
DATE: **06-20-00**
DISPOSITION: **SUSTAINED**
TAX TYPE: **SALES / WITHHOLDING**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

FINDINGS OF FACT

A. The parties stipulate to the following:

1. Protestant was Treasurer of AN ANONYMOUS CORPORATION He was listed as the person who would be responsible for collecting and remitting withholding taxes to the State of Oklahoma.

2. Protestant was Treasurer of the above-referenced corporation on the 1995-96 franchise tax return. He co-signed the franchise tax payment for that year.

3. On June 3, 1997, Protestant provided Division with several bank cards showing that he was a signatory on the corporate bank accounts [sic].

4. Division mailed its proposed sales and withholding tax assessments to Protestant on January 9, 1998. The amounts at issue are as follows:

Sales Tax for the period January, 1996, thru March, 1996 (estimated)

Principal	$ 255.00
Interest(thru 02/19/98)	73.90
Penalty	25.50
Total	$ 354.40

Withholding Tax for the period November 1, 1995, thru March 31, 1996 (actual)

Tax	$18,121.73
Interest(thru 02/19/98)	5,633.69
Penalty	4,775.92
Total	$28,531.34

B. Additional findings:

1. Protestant was also the accountant for the Corporation during the relevant time period. Protestant's responsibilities for the Corporation included the preparation of the sales and withholding tax reports. Protestant was an authorized signatory on the bank signature cards for the payroll and general operating accounts of the Corporation and regularly along with MR. X, President and CEO of the Corporation, signed the corporate checks.

2. The bank signature cards for the payroll and general operating accounts of the Corporation required two signatures for the withdrawal of corporate funds. All of the corporate checks which were received into evidence reflect two signatures.

3. Protestant testified that the regular routine for the filing and remittance of sales and withholding taxes was; Protestant would prepare the reports and checks and execute the same, present the reports and checks to MR."X" who would co-sign the checks and MR. "X"'s secretary would forward the reports and checks to the Tax Commission. During the period at issue, particularly December, 1995 and January, 1996, Protestant prepared the reports and checks, executed the same and presented the reports and checks to MR. "X" who refused to co-sign the checks. According to Protestant, he thereafter prepared the reports, but stopped preparing the checks and executing the same.

4. Protestant did not own any stock and did not have any other financial stake in the Corporation. Protestant was merely an employee of the Corporation. Protestant was fired from his position with the Corporation by MR. "X" on April 3, 1996. Protestant testified that the failure to remit the taxes and his continued questioning of the same led to the firing.

5. Regarding the Business Registration filed on behalf of the Corporation by MR. "X", President/CEO, in May, 1994, Protestant testified that he did not prepare the registration form, was unaware of the form and did not consent to himself being listed as the person responsible for the remittance of withholding taxes.

6. A notarized statement by MS. ASSISTANT, Protestant's assistant in the accounting department of the Corporation, corroborates Protestant's testimony regarding

the procedures for the preparation and payment of the sales and withholding taxes, MR. "X"'s refusal to co-sign the checks and Protestant's attempts to get MR. "X" to pay the taxes.

7. Protestant testified that MR. "X" controlled the Corporation, made all of the decisions and prevented him from carrying out his responsibilities with the Corporation regarding the payment of taxes.

8. MR. ACCOUNTANT represented Protestant before the Internal Revenue Service in a SS 8 hearing on March 17, 1998, in regard to Protestant's responsibility for the failure of the Corporation to remit federal withholding taxes for approximately the same period at issue in this cause. According to MR. ACCOUNTANT, the IRS inquiry was resolved in Protestant's favor.

ISSUE

The parties stipulated that the issue presented for decision is "[w]hether Protestant as an officer of THE ANONYMOUS CORPORATION and as an individual is liable for Division's proposed sales and withholding tax assessments covering certain periods from November, 1995, through March, 1996."

The contentions of the parties to this matter were also stipulated by the parties as follows:

PROTESTANT'S CONTENTIONS

"Protestant maintains that he should not be held responsible for the sales and withholding tax liability at issue because he could not independently sign corporate checks." At the hearing, Protestant urged an additional or expanded contention that "he made every effort he could to see that the taxes were paid, but was thwarted in his efforts by the co-signer."

DIVISION'S CONTENTIONS

"1. That Protestant is liable for the delinquent sales and withholding taxes as an officer of the corporation.

2. That Protestant is responsible for the delinquent sales and withholding taxes, because he was involved in the day-to-day affairs of the business and because he had check-signing authority for the corporation.

3. That Protestant is not exonerated from liability simply because he may have signed checks on instruction."

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 . . ., 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 . . . 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.

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

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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....

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).

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." 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. The evidence shows that Protestant was not a "principal officer" nor an "employer" of the Corporation during the relevant time period.

The Division cites ***Brown v. United States***, 464 F.2d 590 (U.S.C.A. 5th Cir. 1972) for the proposition that a co-signing arrangement does not insulate an individual from liability as a responsible person. While the undersigned agrees with the basic premise of the case, the facts are sufficiently different to warrant a different conclusion in this cause. In Brown, the taxpayer argued that he only had token managerial responsibility as

president and that his cosignature on company checks was literally a rubber stamp. The Court however found that other evidence provided an ample basis for holding Brown liable including that he co-signed all corporate checks, that he actively participated in efforts to secure additional financing for the company, that he made the decision to terminate the company's operations and that he successfully secured payment of withholding taxes during a prior quarter of his tenure as president, when payment of the taxes was late. In addition, Brown was the sole shareholder of the company.

Here, Protestant was not a shareholder of the Corporation and did not have any other financial stake in the Corporation. Further, the evidence does not show that Protestant co-signed all corporate checks, that he actively participated in the day-to-day management of the company, or that he controlled the financial affairs of the Corporation. To the contrary, the evidence shows that MR. "X" controlled the management and financial aspects of the Corporation and through this control prevented Protestant from carrying out his responsibilities to the Corporation.

5. Protestant's protest to the proposed sales tax and withholding tax assessments should be sustained.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it WAS DETERMINED that the protest of Protestant be sustained.

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.