

**JURISDICTION:** OKLAHOMA TAX COMMISSION - DECISION  
**CITE:** 2000-09-28-005 / NOT PRECEDENTIAL  
**ID:** P9800244  
**DATE:** 09-28-00  
**DISPOSITION:** SUSTAINED  
**TAX TYPE:** SALES / WITHHOLDING  
**APPEAL:** NO APPEAL TAKEN

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. THE CORPORATION owns the franchise for two ANONYMOUS restaurants. One restaurant is in CITYONE, Oklahoma, and one restaurant is in CITYTWO, OUT OF STATE. The stock of this corporation is owned by OFFICER ONE AND HIS SPOUSE. OFFICER ONE is the President of the corporation and PROTESTANT was the Vice-President during the audit period subject to this matter. PROTESTANT was not a shareholder or director of the corporation and did not share in the profits of the corporation or receive additional compensation for being an officer. PROTESTANT was the manager of the two restaurants operated by the corporation and had authority to hire and fire hourly employees. OFFICER ONE had the authority to hire and fire the store managers. PROTESTANT did not graduate from high school. PROTESTANT began working for THE CORPORATION, as a cook in 1984 when he was 18. In 1986 he was promoted to assistant manager and in 1987 he was promoted to manager of the corporation.

2. PROTESTANT signed the Oklahoma Tax Commission Business Registration form as the Vice-President of THE CORPORATION. PROTESTANT was authorized to sign checks on the corporate checking account along with OFFICER ONE. PROTESTANT signed all sales tax and withholding tax returns filed with the Tax Commission as well as all of the checks in payment of those taxes. PROTESTANT also signed all checks in payment of creditors. However, OFFICER ONE required PROTESTANT to present all bills and tax returns to him for OFFICER ONE's personal authorization before the payment was made.

3. On Monday and Thursday of each week PROTESTANT left the CITYONE store in order to supervise the store in CITYTWO, OUT OF STATE. PROTESTANT would take all checks in payment of bills to vendors, taxes and payroll to OFFICER ONE's home in CITYTWO, OUT OF STATE. OFFICER ONE would then review each check and item for payment and instruct PROTESTANT as to which payments would be made and when to make the payment. No payments were made by the corporation until OFFICER ONE had given prior approval. PROTESTANT would then mail the payments that OFFICER ONE authorized and hold the unauthorized payments. PROTESTANT would hold payroll checks past pay days when instructed to do so by OFFICER ONE. OFFICER ONE would also direct PROTESTANT to transfer money to OFFICER ONE's personal account on several occasions. PROTESTANT did not maintain the bookkeeping records or prepare the tax returns because those tasks were performed by a bookkeeping firm. Each month during the assessment period, PROTESTANT presented checks for tax payments to OFFICER ONE who decided not to send the tax payments.

4. The Oklahoma Tax Commission revoked the sales tax permit issued to THE CORPORATION for nonpayment of taxes on October 14, 1997. On July 10, 1998, the Account Maintenance Division issued proposed assessments of sales taxes and withholding taxes to PROTESTANT as an officer of THE CORPORATION for the period of October 1995 to March 1996 in the following amounts:

Sales Tax	\$21,600.00	Withholding Tax	\$1,000.00
Interest	8,151.03	Interest	383.62
Penalty	<u>2,160.00</u>	Penalty	<u>250.00</u>
Total	\$31,911.03	Total	\$1,633.62

PROTESTANT filed a written protest received by the Oklahoma Tax Commission on August 19, 1998, and mailed on July 28, 1998, as postmarked on the envelope addressed to the Oklahoma Tax Commission. In accordance with 68 O.S. §221, the protest was timely filed within 30 days of the assessment upon the date of mailing as evidenced by the postmark pursuant to OAC 710:1-5-44(2), in order to invoke the jurisdiction of the Tax Commission.

### ISSUE

Whether Protestant, Vice-President and manager of the ANONYMOUS RESTAURANT, CITYONE, Oklahoma, was a principal officer who may be held individually liable for delinquent sales and withholding taxes of THE CORPORATION.

### CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission, 68 O.S. §§207,221.

2. THE CORPORATION is liable for the sales and withholding taxes assessed above. Pursuant to 68 O.S. §253, the principal officers of the corporation liable for tax are also liable for sales tax, 68 O.S. §136(A), and withholding tax, 68 O.S. §23 85.3(d). Section 253 provides that the liability of a principal officer for sales tax and withholding 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. Such liability is imposed by federal law at Title 26 USCA §6672(a) on any person required to collect and pay over the tax (the "responsible person") who willfully fails to do so. A Vice-President is a principal officer pursuant to OAC 710:65-7-3 and OAC 710:90-3-3. Personal liability for the tax, however, must rest with the "responsible person," OAC 710:65-7-3(3) and OAC 710:90-5-3. However, under Oklahoma law, the statutes cited above do not contain a "willfulness" component and, therefore, the determination of who shall be liable as an "employer" or "principal officer" is limited under the provisions of Section 253 to the standards under federal law for determining who is a "responsible person." The liability of a responsible person for sales or withholding taxes of a corporation is not dependent on a finding of willfulness, Commission Order 96-12-17-037.

3. The Federal Courts look to three factors to identify the "responsible person" who is actually responsible for an employer's failure to withhold and pay over the tax which include the person's status, duty, and authority within the corporation, *Heimark v. U.S.*, 18 cl.ct. 15, 89-2 USTC 9499 (1989). Thus, any person with sufficient status, duty and authority to avoid the default is a responsible person. This determination of responsibility is a matter of substance, not merely form, *Godfrey v. United States*, 748 F.2d 1568 (1984). This inquiry requires the fact finder to look through the mechanical functions of the various corporate officers to determine the persons having the power to control the decision-making process by which the corporation allocates funds to other creditors in preference to its withholding tax obligations. The statute seeks the person with ultimate authority over expenditure of funds since such a person can fairly be said to be responsible for the corporation's failure to pay over its taxes. The mechanical duties of signing checks and preparing tax returns are thus not determinative of liability, *Godfrey* at 748 F.2d 1575. Therefore, the Internal Revenue Service, as a matter of policy, will not pursue assessments against non-owner employees of a business who acted solely under the dominion and control of others and who are not in a position to make important decisions on behalf of the business entity, see IRS Policy Statement P-5-60, Feb. 2, 1993, Internal Revenue Manual-Administration.

4. The Federal Court in *Barnett v. IRS*, 988 F.2d 1449 (5th Cir 1993) considered the following indicia of authority to determine responsibility: 1. whether the person is an officer or member of the board of directors; 2. owns substantial amount of stock in the company; 3. manages the day-to-day operations; 4. has authority to hire and fire employees; 5. makes decisions as to disbursement of funds and payment of creditors; 6. possesses the authority to sign checks. The crucial inquiry, however, is whether the person has significant control over the disbursement of funds, *Hochstein v. U.S.*, 900 F.2d 543 (2nd cir. 1990).

5. PROTESTANT did not have sufficient status or authority within the corporation to exert significant control over the disbursement of funds. As to the indicia listed above, PROTESTANT was an officer but was not on the board. PROTESTANT owns no stock in the company as it was all held by OFFICER ONE and HIS SPOUSE. PROTESTANT did manage the stores and hire and fire hourly wage employees, but not the managers of the restaurants. Other than the mechanical duties of gathering the bills and signing checks, PROTESTANT had no role in the financial affairs or oversight of the business records and did not make the decisions as to disbursement of funds. The testimony at the hearing of this protest indicated that the President, OFFICER ONE, retained all authority on disbursement of funds. PROTESTANT does not have a high school diploma and was initially hired by the corporation as a cook. When he was promoted to manager and designated as the "Vice-President," PROTESTANT never gained the status within the corporation to exercise substantial control of the corporation, nor did he acquire any authority within the corporation to do anything other than what he was told to do. PROTESTANT performed his duties under the dominion and control of the President, OFFICER ONE. The case law discloses that the authority to sign checks, without more, is a weak pillar on which to rest liability, see *Heimark*, supra. The inquiry must focus on actual authority to control, not on titles and trivial duties. In the case at bar, PROTESTANT had no voting stock and no authority to control disbursements.

6. The Protestant has carried his burden of proving that he is not a responsible person for sales and withholding taxes assessed against THE CORPORATION and the protest filed herein 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, VICE-PRESIDENT OF CORPORATION, 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.