JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2000-09-28-011 / NOT PRECEDENTIAL**
ID: **P9600351**
DATE: **09-28-00**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Audit Division of the Oklahoma Tax Commission ("Division") issued a sales tax assessment dated February 20, 1996, to PROTESTANT, President of ANONYMOUS, Inc., d/b/a COMPANY ONE, to her ANONYMOUS address ANYTOWN, Oklahoma. Ms. PROTESTANT, now PROTESTANT ANONYMOUS NAME, ("Protestant") protested the sales tax assessment by letter dated February 26, 1996.

2. The sales tax assessment was based on a mixed beverage tax depletion audit conducted by the Division for the period February 1, 1993, to December 31, 1994. The Protestant was assessed for sales taxes as the responsible officer of ANONYMOUS, Inc. The Division adjusted its audit by removing sales taxes assessed after reviewing information which indicated that the Protestant was an officer of the corporation during the period of February 1, 1993, to December 18, 1993. The Division removed sales taxes assessed for the audit period subsequent to December 18, 1993, and assessed the following amounts by letter of May 7, 1996:

Sales Tax	$1,864.22
Interest	675.71
Penalty	186.42
TOTAL	$2,726.35

The Protestant timely filed a letter of protest as to this assessment on May 13, 1996, pursuant to 68 O.S. §221.

3. The Protestant and her husband had purchased ANONYMOUS, Inc. on June 1, 1989, and operated a bar doing business as COMPANY ONE. The Protestant became President of ANONYMOUS, Inc. on September 1, 1989, and resigned as President on December 18, 1993, after the corporation had been sold to another party. The Protestant was the only officer of ANONYMOUS, Inc. during that time and has unlimited authority to operate the corporation including authority to contract, authority to write checks, and authority to employ or dismiss personnel.

ISSUES

1. Whether the Protestant can be held liable for sales taxes assessed after she had resigned as an officer.

2. Whether the Division properly determined the correct sales taxes owed.

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 Protestant is liable for sales taxes assessed against ANONYMOUS, Inc., for the period in which she was the principal officer of the corporation. Title 68 O.S. §1361(A) 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.

OAC 710:65-7-3 identifies the "principal officer" of a corporation to be the President. Since the Protestant is the only officer of the corporation for the time period February 1, 1993, to December 18, 1993, she is indisputably personally liable for the sales taxes due during that period. It is irrelevant whether or not the Protestant was an officer during the entire audit period assessed against the corporation or that the Protestant resigned as President before the taxes were assessed. Section 1361(E) imposes a fiduciary duty as trustee upon the Protestant as to any sums collected or required to be collected. Subject to this fiduciary duty, the Protestant is strictly liable for alt sums assessed as sales taxes in the case at bar for the period in which she was the principal officer of the corporation, OAC 710:65-5-5.

3. The Division correctly determined the sales taxes due based on the depletion audit method using the only records available supplied by liquor wholesalers, who reported purchases made by ANONYMOUS, Inc., and information from the Alcoholic Beverage Laws Enforcement Commission. Under this method the sales tax was assessed on the number of drinks available for sale, calculated on the gross receipts that should have been generated from the sale of those drinks. The Protestant did not present sufficient accounting records at the hearing which could demonstrate that the assessment is incorrect. Most notably, the Protestant did not provide the Division with the minimum records required by OAC 710:65-3-31, which are a sales journal, a record of merchandise purchased and a true and complete inventory. Also, OAC 710:20-5-7 required all mixed beverage tax permit holders to maintain records of 1. all purchase invoices, 2. all cash register receipts, 3. all price lists, 4. dates of price changes or additions and deletions and

5. records of daily admissions. A taxpayer is responsible for record keeping and when a taxpayer fails to make reports or keep proper records, the depletion audit method is a reasonable method to calculate the tax due, *Kifer v. Oklahoma Tax Commission*, 1998 OK Civ. App. 34, 956 P.2d 162.

4. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect, *Enterprise Management Consultant's, Inc. v. Oklahoma Tax Commission*, 768 P.2d 359 (Okl. 1988). Failure to provide evidence which is sufficient to show an adjustment to the proposed assessment is warranted will result in denial of the protest, *Continental Oil Co. v. Oklahoma Tax Commission*, 570 P.2d 315 (Okl. 1977). The burden of proving a sale is not a taxable sale is on the person who made the sale, 68 O.S. §1365(C). The Protestant has not carried her burden of proof as to show in what respect the action of the Division is incorrect. The Commission must deny the protest upon the grounds that Protestant has failed to prove sufficient facts which would entitle her to the requested relief, OAC 710:1-5-47.

5. Protestant's protest to the proposed assessment should be denied.

DISPOSITION

It WAS DETERMINED based upon the specific facts and circumstances of this case, that the sales tax protest of PROTESTANT as an officer of ANONYMOUS, Inc. d/b/a COMPANY ONE be denied.

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.