JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2000-11-16-017 / NOT PRECEDENTIAL**
ID: **P9800138**
DATE: **11-16-00**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. That Protestant OFFICER was President of COMPANY ONE d/b/a COMPANY TWO, an Oklahoma corporation located in ANYTOWN, at all times relevant to this proceeding and owned 100% of the corporation's stock. (Division Exhibits "A" and "B-1" - "B-4")

2. That a letter dated February 9, 1993 proposing to assess sales tax in the total amount of $64,110.75 consisting of a tax due of $49,637.16, penalty in the amount of $5,383.06 and accrued interest through March 19, 1993 in the amount of $9,090.53 for the period of December 1, 1989 through November 30, 1992 was sent to COMPANY ONE d/b/a COMPANY TWO and PROTESTANT OFFICER as a principal officer of the corporation. (Division Exhibit "C")

3. That Protestants filed a protest letter dated February 15, 1993 and such protest was timely submitted to the Oklahoma Tax Commission. (Division Exhibit "E")

4. That on April 7, 1993, Protestant, COMPANY ONE d/b/a COMPANY TWO filed a petition for relief in the United States Bankruptcy Court for the ANONYMOUS Division of Oklahoma, Case No. XX-XXXXX-XX.

5. That subsequent to the above bankruptcy proceedings, Protestants requested a hearing before this Court by letter dated June 1, 1998 on the proposed assessment of sales tax for the period of December 1, 1989 through November 30, 1992.

6. That the Division filed a Motion to Dismiss on November 3, 1998 requesting that the protest be dismissed on the grounds that Protestants failed to raise any issue as a basis for their protest that was not precluded by Commission Order No. 98-07-30-008.

7. That a hearing was held on this matter pursuant to Protestants' request on January 21, 1999. At that hearing, Division withdrew its Motion to Dismiss and thereafter, Protestants requested a continuance of the hearing which was granted.

8. That by letter dated February 15, 1999, the Court was notified that Protestants withdrew their request for an oral hearing and wished to have the matter decided on briefs previously submitted by the parties pursuant to Oklahoma Administrative Code 710:1-5-38.

ISSUE

The issue presented for decision is whether Protestants COMPANY ONE d/b/a COMPANY TWO, and PROTESTANT OFFICER, individually and as an officer of COMPANY ONE are liable for sales taxes for the period of December 1, 1989 through November 30, 1992 during which time Protestants had entered into a "lockbox" arrangement with a creditor.

CONTENTIONS

Protestants contend that all of the corporation's accounts, sales proceeds and inventory was taken over by COMPANY THREE, a creditor of Protestants', by means of a "lockbox" pursuant to a security agreement entered into by the parties. Since Protestants had no authority, control or even access to the funds, they argue that they should therefore not be liable for the sales tax due.

The Division contends that the Protestant, PROTESTANT OFFICER, was a principal officer who was involved in the day-to-day affairs of the corporation, had check-signing authority and owned 100% of the corporation's stock and is therefore liable for the delinquent sales tax.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission (the "Commission") has jurisdiction of this protest. 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 an on account of the state, the sales tax levied by the Oklahoma Sales Tax Code. 68 O.S. Supp. 1999, §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. The principal officers of any corporation shall be liable for the payment of sales tax if such officers were officers were officers of the corporation during the period of time for which the assessment was made. The liability of a principal officer shall be determined in accordance with the standards for determining liability for payment of federal withholding tax pursuant to the Internal Revenue Code. 68 O.S. Supp. 1999, §253.

4. The burden of proof is on the Protestants to show that the proposed assessment of sales tax is incorrect. Oklahoma Administrative Code 710:1-5-47.

5. PROTESTANT OFFICER argues that he was not a principal officer based on the "lockbox" arrangement with his creditor, COMPANY THREE. According to Protestant, COMPANY THREE contacted Protestant's customers and instructed them to send payments directly to the lockbox. After such funds were deposited into the lockbox, Protestant had no access to the funds, nor could he direct or control the distribution of the funds to any creditors including the State of Oklahoma. Despite Protestant's repeated demands to COMPANY THREE to pay sales taxes, COMPANY THREE did not remit such taxes to the Commission.

6. Citing *Barrett v. U.S.*, 580 F.2d 449 (1978), PROTESTANT OFFICER contends that a principal forced to act at the direction of one who is domineering and assertive is a factor to be considered in determining whether one is a responsible person. The facts in the case of Barrett, however, are vastly different from the facts in the instant case. Barrett involved a husband who forced his wife to sign checks for his floundering corporation by "berating her publicly, threatening her, and at times beating her." Id. at 451. The Barrett Court found that she was not involved in the corporation in any way: she did not prepare or sign tax returns, she was not responsible for payroll, she was not authorized to hire or fire employees and she did not negotiate with creditors or customers on behalf of the corporation. In fact, Mrs. Barrett had a full-time job and the only act she performed was to sign certain checks when directed by her husband. The Court reasonably concluded where one member was domineering and assertive in a family relationship, this would be a factor in examining the status of a responsible person.

7. The facts in the instant case are quite opposite because Protestant and COMPANY THREE were in a business relationship. COMPANY THREE'S ability to dominate and assert control over Protestant was done by agreement which Protestant consciously entered into and allowed COMPANY THREE by virtue of the agreement to encumber trust funds and place restrictions over the access to funds. Therefore, the factor cited by the Barrett Court, that a principal forced to act at the direction of one family member who is domineering' and assertive is not applicable in the instant case.

8. The State of Oklahoma was not a party to the agreement and Protestants cannot relieve themselves of liability by entering into such an agreement. "Responsible persons cannot delegate away their statutory responsibility of truthfully reporting and remitting taxes by agreeing to lockbox arrangements. *Lee v. U.S.*, 951 F. Supp, 79 (W.D. Pa. 1997) citing *Kalb v. U.S.*, 505 F.2d 506 (2"d Cir. 1974).

9. The Lee case also provides standards for determining liability for payment of federal withholding tax which are not set out by statute. Factors that are appropriate to consider when determining whether an individual is a responsible person include:

(1) The ability to sign checks on the corporation's bank accounts;

(2) The identity of the individual or individuals who signed the corporation's quarterly Form 941 tax returns during the tax quarters in question, as well as other tax returns of the corporation;

(3) The identity of the corporation's officers, directors and stockholders;

(4) The identity of the individual or individuals who hired and fired employees;

(5) The individual or individuals who had control of the financial affairs of the corporation on a day-to-day basis, and/or who made decisions as to disbursement of funds and payments to creditors;

(6) The contents of the by-laws;

(7) The identity of the individual or individuals in charge of the firm's financial affairs generally. Lee at 82, citing *Greenberg v. U.S.*, 46 F.3d 239, 243 (3rd Cir. 1994). Although this list is not binding and is not exhaustive, it provides a starting point to examine the status of these Protestants.

10. PROTESTANT OFFICER owned 100% of the corporation's stock, had check signing authority, had authority to hire and fire employees and managed the day-to-day operations of the business. Protestant made the business decision as to the disbursement of funds and payment of creditors when he entered into an agreement with COMPANY THREE. PROTESTANT OFFICER has not presented any evidence which demonstrates that he was not a principal officer.

11. The Commission has previously ruled on this precise issue in Order No. 98-07-30-008 holding that evidence pertaining to a lockbox arrangement is irrelevant and does not negate a principal officer's or an employer's status as a responsible person. PROTESTANT OFFICER has presented no evidence which would disavow his status as a principal officer of the corporation nor has he presented any legal authority which would persuade the Commission to reverse its previous ruling on this issue.

12. The Court finds that Protestant has not met his burden to show that the proposed assessment of sales tax upon him as a principal officer of the corporation is incorrect. Therefore, PROTESTANT OFFICER'S protest to the proposed assessment should be denied.

13. Additionally, Protestant COMPANY ONE d/b/a COMPANY TWO has not met its burden to show that the proposed assessment of sales tax upon the corporation is incorrect. Therefore, Protestant COMPANY ONES protest to the proposed assessment should also be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it WAS DETERMINED that the protest of Protestants, COMPANY ONE and PROTESTANT OFFICER, 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.