JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2000-11-16-020 / NOT PRECEDENTIAL**
ID: **P9700087**
DATE: **11-16-00**
DISPOSITION: **SUSTAINED**
TAX TYPE: **SALES / WITHHOLDING**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. ANONYMOUS COMPANY ("Company") is owned by its President, MR. PRESIDENT.

2. Protestant was Vice President of the Company from January, 1993, to March, 1996.

3. Prior to September, 1995, Protestant, as Vice President of ANONYMOUS COMPANY, was in charge of the day to day operations of the business. Protestant was responsible for all business and financial decisions including determining which and when creditors would be paid, hiring and firing of employees and acquiring loans and credit for the Company. Protestant did not own stock in the corporation.

4. In September, 1995, while Protestant was away on vacation, MR. PRESIDENT, as President of the company, assumed control of the day to day operations of the business as the result of a dispute with Protestant over the management of the business. Protestant testified that after September, 1995, he did not participate in the day to day operations of the Company; that his duties were limited to customer service and consulting and that he had no decision making authority as to the payment of creditors.

5. Although Protestant no longer had control over the company, he retained the title of Vice President and continued to sign checks when requested to do so by MR. PRESIDENT. Protestant resigned as Vice President of the Company effective March 1, 1996. For a period of time thereafter, Protestant occupied a small office on the premises of the Company which he used while looking for another job.

6. MR. PRESIDENT also testified that Protestant did not retain any decision making power after September, 1995. MR. PRESIDENT testified that he alone decided what creditors would be paid and that it was not within Protestant's power to make any payments. When Protestant signed checks, it was only because he had been instructed to do so by MR. PRESIDENT.

7. MR. PRESIDENT further testified that the sales tax and withholding tax assessments are solely his responsibility and that he has begun making payments toward the debt owed to the Tax Commission.

8. Protestant was listed as Vice President on the Company's franchise tax returns for the period from July, 1995, through June, 1997.

9. Protestant signed franchise tax returns in August, 1995, and September, 1996, for the period from July, 1995, through June, 1997.

10. Protestant signed checks on January 29, 1996, February 29, 1996, March 30, 1996, April 30, 1996, and October 16, 1996, for payment of sales tax for the period from December, 1995, through April, 1996.

11. By letters dated December 13, 1996, the Division caused to be issued proposed sales tax and withholding tax assessments against Protestant, as Vice President of the Corporation and as an individual.

12. For sales tax the total amount in controversy is $364,291.00, inclusive of tax in the amount of $266,249.14, interest accrued through March 10, 1998, in the amount of $64,837.40, penalty in the amount of $33,179.46 and a service charge in the amount of $25.00.

13. For withholding tax, the total amount in controversy is $14,990.00, inclusive of tax in the amount of $10,136.87, interest accrued through March 10, 1998, in the amount of $2,179.81 and penalty in the amount of $2,673.32.

14. Protestant timely protested the proposed assessments.

ISSUE AND CONTENTIONS

The issue presented for decision is whether protestant sustained his burden of proving that he is neither a "principal officer" nor "employer" of the Corporation during the relevant time period.

Protestant contends that as of September, 1995, he no longer controlled the day-to-day operations of the company and did not make or participate in any decisions concerning the payment of creditors for the reason that MR. PRESIDENT, as President and shareholder of the corporation, assumed complete control of the management and financial affairs of the corporation. Therefore, Protestant asserts that he is not personally liable for the sales and withholding taxes assessed herein.

Division contends that Protestant is liable for the sales and withholding taxes at issue because Protestant was an officer during the relevant periods; that he had check signing authority and that he continued to sign checks for the corporation after MR. PRESIDENT purportedly assumed control of the business.

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.).

---

[1]This 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.

[2]This 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. . . .

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 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).

The mere holding of office within the corporation does not in itself render an individual responsible for remitting withholding tax. *Bauer v. United States*, 541 F.2d 142, 149 (Ct. Cl. 1976). The control necessary to establish responsibility for paying over federal withholding taxes is the ability to direct and control payment of corporate funds. *Bolding v. United States*, 565 F.2d 663 (Ct. Cl. 1977). The "responsible person" is frequently defined as the person who has final and significant word as to which bills or creditors are paid. *White v. United States*, 372 F.2d 513, 516 (1967). The responsible person is the person who is so connected with the business as to be in the position to exercise full authority over financial affairs and therefore is ultimately responsible for the decision as to the payment of the tax. *Koegel v. United States*, 437 F.Supp. 176 (D.C.N.Y. 1977).

The analysis must focus on whether the protestant had actual authority and not on titles and trivial duties. *In re Demarco*, 83 AFTR2d 99-527 (1999). See, *Heimark v. US*, 18 Ct. Cl. 15, 23 (1989). In *Demarco*, the debtor had check signing authority and was a shareholder and officer of the corporation. However, the court concluded he was not a responsible person because he signed checks only when instructed to do so and had no say as to which creditors were paid. The court further concluded that the debtors title was merely a courtesy with no actual authority attached to it. *In re Demarco* at 99-531. (See also, *Williams v. United States*, 25 Cl. Ct. 682 Plaintiff, Vice President, Treasurer and office manager of company not responsible person where his father, who controlled the company, gave instructions on which checks were to be signed.)

The burden of proof in all proceedings before the Tax Commission, unless otherwise provided by law, is on the Protestant to show in what respect the action or proposed action of the Tax Commission is incorrect. *Oklahoma Administrative Code 710:1-5-47*.

CONCLUSIONS OF LAW

1. The Tax Commission has jurisdiction over the parties and subject matter of this hearing. 68 O.S. § 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. Protestant has proven by a preponderance of the evidence that he was not a principal officer or employer of the corporation during the period in question. Protestant was little more than a clerical employee under the direction of MR. PRESIDENT. MR. PRESIDENT admits responsibility for the tax and confirms that protestant did not have the ability to direct and control the payment of corporate funds. Accordingly, Protestant's protest to the proposed sales and withholdings tax assessment should be sustained.

DISPOSITION

Based on the findings of fact and conclusions of law, it WAS the DETERMINED that the protest of PROTESTANT, as Vice President of ANONYMOUS COMPANY of ANYCITY and as an individual, d/b/a ANONYMOUS COMPANY, should 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.