JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2000-12-12-019 / NOT PRECEDENTIAL**
ID: **P980321A / P980323A**
DATE: **12-12-00**
DISPOSITION: **SUSTAINED**
TAX TYPE: **SALES / WITHHOLDING**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. COMPANY ONE operated a mixed beverage establishment or bar doing business as COMPANY "A" in ANYCITY, Oklahoma. COMPANY TWO operated a bar doing business as COMPANY "B" in ANYCITY, Oklahoma. MR. ANONYMOUS is the sole owner and President of both corporations and managed the business of the corporations during the audit period.

2. MR. ACCOUNTANT is an accountant in a solo practice in ANYTOWN, Oklahoma. MR. ACCOUNTANT was the bookkeeper for the two corporations owned by MR. ANONYMOUS and his duties included filling out tax returns for the businesses operated by MR. ANONYMOUS. MR. ACCOUNTANT was listed on the Business Registration form filed by COMPANY ONE as the Secretary. MR. ANONYMOUS was listed on the Business Registration form as the President and is named as the officer responsible for remitting taxes. MR. ACCOUNTANT was not compensated for being the Secretary of the corporate taxpayers and was not an employee of either corporation. MR. ACCOUNTANT never went to the business premises because he performed his accounting services in his own office. MR. ACCOUNTANT did not have check signing authority for the bank accounts of the corporations nor did he have any authority within the corporations to hire and fire employees, manage the business or direct payment of funds. MR. ACCOUNTANT was only compensated for providing personal services to the corporate taxpayers in his capacity as an accountant in private practice.

3. The Audit Division of the Oklahoma Tax Commission, "Division" hereafter, conducted an audit of COMPANY ONE and COMPANY TWO, for the audit period December 12, 1995, through June 30, 1998, for sales tax, withholding tax, tourism tax and mixed beverage tax. MR. ACCOUNTANT was assessed individually as a corporate officer for sales tax pursuant to 68 O.S. § 1361(A), and for withholding tax pursuant to 68 O.S. § 2385.3(d). The Division issued proposed assessments to MR. ACCOUNTANT regarding both corporations in which he was an officer on October 16, 1998, for the following amounts:

COMPANY ONE d/b/a/ COMPANY "A":

	Sales Tax	Withholding Tax
Tax	$33,945.65	$1,318.25
Interest	7,818.29	370.99
Penalty	3,394.57	329.50
TOTAL	$45,158.51	$2,018.74

COMPANY TWO d/b/a/ COMPANY "B":

	Sales Tax	Withholding Tax
Tax	$41,913.65	$1,318.25
Interest	9,011.49	370.99
Penalty	4,191.35	329.50
TOTAL	$ 55,116.49	$ 2,018.74

4. By letters of November 16, 1998, MR. ACCOUNTANT timely protested the Division's proposed assessments set out above. A hearing in this matter was conducted on June 2, 1999, before the Administrative Law Judge of the Oklahoma Tax Commission and this case was thereafter submitted for decision.

ISSUE

Whether MR. ACCOUNTANT is liable for the assessed sales and withholding taxes of COMPANY ONE, and COMPANY TWO as a principle officer or responsible person of those corporations under Oklahoma law.

CONCLUSIONS OF LAW

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

2. COMPANY ONE and COMPANY TWO are liable for the withholding taxes assessed above. Pursuant to 68 O.S. § 253, the principal officers of the corporation liable for tax are also liable for sales and withholding tax. Section 253 provides that the liability of a principal officer for 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 corporation's Secretary is a principal officer pursuant to OAC 710:65-7-3. Personal liability for the tax, however, must rest with the "responsible person,"

OAC 710:90-53. 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 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 person(s) 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(s) with ultimate authority over expenditure of funds since such a persons) 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. In *Spang v. U.S.*, 533 F. Supp. 220 (W.D. Ok. 1982), the Federal Court explained the control necessary to invoke liability under federal law, at 533 F. Supp. 225:

> Liability may attach to each of those persons responsible for seeing that trust fund taxes deducted from employees' wages are paid over to the government, i.e., those persons who have significant control over the business affairs of the corporation or who participate in decisions regarding what bills should be or should not be paid and when, *Leushchner v. United States*; 336 F.2d 246 (9th Cir 1964); *Bloom v. United States*, 272 F.2d 215 (9th Cir. 1959) cert.denied, 363 U.S. 803, 80 S.Ct. 1236, 4 L.Ed.2d 1146 (1960). The control necessary to support liability under Section 6672 is simply the ability to direct or control the payment of corporate funds. *Bolding v. United States*, 215 Cl.Ct. 148, 565 F.2d 663, 671 (1977).

5. The Federal Court in *Bamett 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).

6. MR. ACCOUNTANT did not have sufficient status or authority within the corporations to exert significant control over the disbursement of funds. Although MR. ACCOUNTANT was named as the corporate Secretary for both corporate taxpayers, MR. ACCOUNTANT had no duties within the corporation. MR. ACCOUNTANT did not own any of the stock, did not manage the business, had no authority within the company to contract or .sign checks and made no decisions regarding disbursements of funds. The evidence and testimony presented in this case demonstrates by a preponderance of the evidence that MR. ACCOUNTANT is not a responsible person liable for the sales and withholding taxes assessed. The Division has failed to provide any basis in fact or under the law upon which the proposed assessments can stand. The standard burden of proof in administrative proceedings is "preponderance of the evidence," see Oklahoma Tax Commission Order No. 91-10-17-061. MR. ACCOUNTANT has carried his burden of proving that he is not a responsible officer liable for the taxes assessed by a preponderance of the evidence.

7. MR. ACCOUNTANT'S protest to the proposed assessments should be sustained.

DISPOSITION

It WAS the DETERMINATION of the undersigned, based upon the specific facts and circumstances of this case, that the sales and withholding tax protest of MR. ACCOUNTANT as an officer of COMPANY ONE and COMPANY TWO 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.