JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2001-01-11-021 / NOT PRECEDENTIAL**
ID: **P9900238 / P0000086**
DATE: **01-11-01**
DISPOSITION: **DENIED**
TAX TYPE: **SALES / WITHHOLDING**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. PROTESTANT CORPORATION, a corporation, was formed in 1989 or 1990 by Protestant's father. PROTESTANT CORPORATION was in the business of remanufacturing and installing automobile engines and components. PROTESTANT CORPORATION had locations in CAPITOL CITY, Oklahoma (the corporation's headquarters) BIGCITY, Oklahoma and BIGD, Texas.

2. In 1991, subsequent to graduating from Oklahoma City University with a degree in finance, Protestant was hired as controller of PROTESTANT CORPORATION. In his capacity as controller, Protestant was in charge of all accounting functions of PROTESTANT CORPORATION, including accounts receivable and payable.

3. Protestant was an authorized signatory on the commercial checking account of PROTESTANT CORPORATION as of December, 1991. At all times relevant, PROTESTANT CORPORATION only had one operating account. All funds, including sales and withheld income taxes, were deposited in this account. Only one signature was required to withdraw funds on deposit in the account. Protestant's father was also an authorized signatory on the commercial checking account of PROTESTANT CORPORATION during all relevant periods.

4. As early as December, 1993, Protestant was listed as Secretary/Treasurer of PROTESTANT CORPORATION. Protestant's signature appears on the corporate resolution authorizing a modification to the signature card for the commercial checking account of PROTESTANT CORPORATION. As of December, 1993, only Protestant and his father were authorized signatories on the commercial checking account of PROTESTANT CORPORATION. On February 12, 1997, the signature card for the commercial checking account of PROTESTANT CORPORATION was again modified to include OFFICER C as an authorized signatory on the account.

5. The business registration for PROTESTANT CORPORATION, filed with the Commission on March, 29, 1993, reports Protestant as chief financial officer. Protestant signed the registration and listed himself as the "officer or employee responsible for remitting Oklahoma income tax withheld from employees." Protestant's father, reported to be the President/Chief Executive Officer of PROTESTANT CORPORATION, is the only officer listed on the business registration.

6. In 1996, Protestant became President of PROTESTANT CORPORATION. According to Protestant, MAJORITY SHAREHOLDER, a physician in Oklahoma City, offered him the position of President of PROTESTANT CORPORATION. The record is devoid of any facts showing when MAJORITY SHAREHOLDER became involved with PROTESTANT CORPORATION, however, it is undisputed that MAJORITY SHAREHOLDER was the owner of seventy percent (70%) of the outstanding stock of PROTESTANT CORPORATION and a major contributor of capital to PROTESTANT CORPORATION. Protestant's father owned the other thirty percent (30%) of the outstanding stock of PROTESTANT CORPORATION. Protestant did not own any shares of stock of PROTESTANT CORPORATION and did not have any stock options to purchase shares of PROTESTANT CORPORATION, either equitably or otherwise.

7. According to Protestant, MAJORITY SHAREHOLDER was Chairman of the Board of PROTESTANT CORPORATION and his boss. As President of PROTESTANT CORPORATION, Protestant oversaw the day to day operations of PROTESTANT CORPORATION, including management of employees, the staffing of managers at all locations and the quality control of the manufacturing environment. According to Protestant, he could not hire any personnel without the approval of MAJORITY SHAREHOLDER. According to OFFICER C, controller of PROTESTANT CORPORATION subsequent to Protestant becoming President of PROTESTANT CORPORATION (from September, 1996 through August, 1998), Protestant hired and fired employees as part of his day to day duties and responsibilities with PROTESTANT CORPORATION.

8. According to Protestant, he and MAJORITY SHAREHOLDER would meet on a weekly basis to discuss the business of PROTESTANT CORPORATION. Protestant stated that OFFICER C was privy to some of these meetings. According to OFFICER C, he attended weekly meetings with MAJORITY SHAREHOLDER, PROTESTANT'S FATHER and Protestant until sometime in 1998 when the meetings started to tail off. He stated that MAJORITY SHAREHOLDER would still come through the office once a week and meet with Protestant and that MAJORITY SHAREHOLDER, PROTESTANT'S FATHER and Protestant would still meet approximately once a week. He further stated that he was not privy to these meetings.

9. Protestant would prepare a business related agenda for the weekly meetings. At the meetings, old business, new business and accounts receivable and payable, including sales and withholding taxes would be discussed. According to Protestant, he presented MAJORITY SHAREHOLDER with a listing of debts by age, MAJORITY SHAREHOLDER would decide and give him specific instructions on which bills to pay and which bills not to pay. According to OFFICER C, he would present the financials to MAJORITY SHAREHOLDER and Protestant and the two of them would go over them.

10. Protestant testified that he did not have independent authority to pay the taxes, however, Protestant also testified that the mortgages, taxes and utilities, the normal business items to keep the doors open were prepared, checks in payment were prepared and were sent under MAJORITY SHAREHOLDER' instructions without talking to him, unless MS instructed Protestant otherwise.

11. It is undisputed that MAJORITY SHAREHOLDER was not a passive investor in the business, but had a keen interest in the business and funded the business from time to time.

12. According to Protestant, his father, stopped contributing funds to the company when Protestant became President of PROTESTANT CORPORATION. OFFICER C, however, remembered one meeting in which PROTESTANT'S FATHER and MAJORITY SHAREHOLDER went over the payables to decide how much each would have to contribute. He also stated that he never received a check from either PROTESTANT'S FATHER or MAJORITY SHAREHOLDER with any specific instructions on how the check should be used.

13. According to OFFICER C, MAJORITY SHAREHOLDER never directed him to do this or that. He stated that he received his instructions from Protestant, that Protestant determined which bills would be paid on a monthly basis and that, in his opinion, Protestant's determination was based on cash flow. According to Protestant, OFFICER C reported to him in the normal chain of command and that he instructed OFFICER C to pay bills in accordance with his instructions from MAJORITY SHAREHOLDER.

14. Protestant is listed as President and the only officer of PROTESTANT CORPORATION on the 1996-97, 1997-98 and 1998-99 franchise tax returns of PROTESTANT CORPORATION.

15. Protestant admits that he knew the taxes were either not paid or were paid late.

16. Protestant resigned as President of PROTESTANT CORPORATION on June 26, 1998. Protestant met with MAJORITY SHAREHOLDER to discuss his resignation and the delinquent taxes. According to Protestant, MAJORITY SHAREHOLDER agreed to get the delinquent taxes paid. Pursuant to this meeting, Protestant instructed OFFICER C to get all back taxes prepared. According to OFFICER C, Protestant instructed him to make sure the withholding and sales taxes were current through the end of June, 1998. OFFICER C testified that the sales tax returns were prepared during the first five days of each month, that the returns would be placed in a folder waiting to be filed, that Protestant determined when the returns would be filed and that checks would be prepared when it was time to file the returns. OFFICER C further testified that in his opinion, the checks in payment of the taxes were not release[d] (sic) at the time of Protestant's resignation because there was not enough cash in the account to cover them.

17. OFFICER C testified that the April and May, 1998 sales tax returns and the May, 1998 withholding tax return were not filed after Protestant's resignation because MAJORITY SHAREHOLDER told him not to file the returns. According to OFFICER C, MAJORITY SHAREHOLDER told him that the taxes were Protestant's responsibility and Protestant would have to pay them.

18. Protestant testified that there was sufficient cash in the commercial checking account of PROTESTANT CORPORATION at the time of his resignation to pay the delinquent taxes. The bank statement for the commercial checking account reports a negative account balance as of June 24, 1998 and June 30, 1998.

19. The amount in controversy for sales tax, inclusive of penalty and interest accrued through April 11, 2000, is $51,352.46.

20. The amount in controversy for withholding tax, inclusive of interest accrued through March 31, 2000, is $8,563.33.

ISSUE

The issue presented for decision is whether Protestant, as the officer of PROTESTANT CORPORATION, sustained his burden of proving that he is not a responsible person for the delinquent sales and withholding taxes of PROTESTANT CORPORATION, a defunct corporation.

Protestant contends that he should not be held liable for the delinquent sales and withholding taxes of PROTESTANT CORPORATION. In support of this contention, Protestant cites the standards developed by the federal courts for determining who is a responsible person for federal withholding tax purposes and argues that he did not have or share the authority to determine which bills or creditors should or should not be paid and when. In the alternative, Protestant argues that reasonable cause should excuse his failure to remit the taxes since he made reasonable efforts to protect the trust funds and such efforts were thwarted by circumstances beyond his control. Further, Protestant argues that his liability for the taxes should be excused because the failure to remit the taxes was not willful.

The Division contends that Protestant should be held liable for the sales and withholding taxes. In support of this contention, the Division argues that the evidence shows Protestant was the responsible person for seeing that the sales and withholding taxes were paid.

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.).

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[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).

A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect, and in what respect. Rule 710:1-5-47 of the *Oklahoma Administrative Code*. See, ***Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission***, 768 P.2d 359 (Okl. 1988). The standard burden of proof in administrative proceedings is "preponderance of evidence." Black's Law Dictionary, 1064 (5th ed. 1979). See, *Oklahoma Tax Commission Order No.* 91-10-17-061.

> "Preponderance of evidence" means "[E]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Id. It is also defined to mean "evidence which is more credible and convincing to the mind ... [T]hat which best accords with reason and probability." Id.

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. 1991, § 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. 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.).

5. Here, Protestant did not sustain his burden of proving by a preponderance of the evidence that he was not a responsible person for the sales and withholding tax delinquencies of PROTESTANT CORPORATION. The evidence regarding Protestant's authority over the financial affairs of PROTESTANT CORPORATION is conflicting at best. Protestant swears that he did not have final authority over which bills were to be paid or not paid. However, Protestant admits that he had a standing order to pay the normal business items to keep the doors open, including taxes. Further, OFFICER C testified that Protestant would determine which bills were to be paid on a monthly basis notwithstanding that he was privy to the meetings with MAJORITY SHAREHOLDER.

In addition, reasonable cause should not excuse Protestant's failure to remit the taxes. Sales and withholding taxes are trust fund taxes. See, 68 O.S. 1991, §§ 1361(F) and 2385.3(D). If there were sufficient funds in PROTESTANT CORPORATION's account to pay the taxes at the time of Protestant's resignation, as testified to by Protestant, then he should have caused the taxes to be paid under his authorization to do so. If there were not sufficient funds in the account at such time, then Protestant misused the funds by authorizing the payment of other creditor to the exclusion of the Tax Commission.

6. Protestant's protest to the assessments of sales and withholding taxes against him as an officer of PROTESTANT CORPORATION and as an individual should be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is DETERMINED that the protest be denied. It is further DETERMINED that the amounts 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.