JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 2001-02-22-012 / NOT PRECEDENTIAL
ID: P000005C
DATE: 02-22-01
DISPOSITION: DENIED
TAX TYPE: SALES / WITHHOLDING
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Stipulated Facts

1. The Commission has proposed the following assessments against the Protestant, all of which have been protested.

SALES TAX

Periods	Tax Due	Interest Thru 4/3/98	Penalty	HC	Total
4/1/96-4/30/96	$.00	$19.02	$178.05	$.00	$197.97
3/1/97-8/31/97	$368.23	$1,373.19	$1,933.55	$.00	$ 3,674.97
9/1/97-10/31/97	$7,000.00	$444.45	$ 700.00	$.00	$ 8,144.45
INTEREST THRU 11 /24/99					
10/98	$.02	$ 170.07	$ 435.62	$ .00	$605.71
12/98-8/99	$34,098.96	$2,542.94	$5,041.51	$50.00	$41,733.41

WITHHOLDING TAX

Periods	Tax Due	Interest	Penalty	HC	Total
INTEREST THRU 4/3/98					
3/97/97	$.00	$73.21	$ 242.05	$ .00	$315.26
9/97-11/97	$600.00	$34.34	$ 150.00	$ .00	$784.34
INTEREST THRU 11/24/99					
1/99	$.00	$2.70	$19.31	$.00	$22.01
4/99	$343.38	$27.23	$85.84	$.00	$456.45
8/99	$377.06	$10.85	$37.70	$.00	$425.61
INTEREST THRU 4/28/00					
5/99-7/99	$1,297.02	$151.11	$324.24	$.00	$1,772.37

2. The proposed deficiencies result from the failure of PROTESTANT CORPORATION, AN OUT-OF-STATE corporation, to pay the tax amounts due.

3. For the periods here in issue, PROTESTANT CORPORATION, owned and operated approximately 120 men's and women's clothing stores in 22 states.

4. PROTESTANT CORPORATION was authorized to do business in the State of Oklahoma and during this period operated 2 stores in Oklahoma.

5. The Business Registration form and Initial Franchise Tax Return filed for PROTESTANT CORPORATION, listed the Protestant as the President of PROTESTANT CORPORATION.

6. The Business Registration form and Initial Franchise Tax Return filed for PROTESTANT CORPORATION, listed OFFICER B as managing officer, Treasurer, and Chief Financial Officer.

7. The Business Registration form and Initial Franchise Tax Return was signed by OFFICER B.

8. No check, tax return or report, or disclosure form filed or provided to the State of Oklahoma by PROTESTANT CORPORATION was signed by Protestant.

9. The proposed assessments against the Protestant were made solely as a result of his name appearing on the Business Registration form and Initial Franchise Tax Return as President.

10. While in early 1999 PROTESTANT CORPORATION had 777 shareholders, voting control of the corporation was held by ANONYMOUS LIMITED PARTNERSHIP.

11. Protestant did not own any interest in PROTESTANT CORPORATION, either directly or indirectly.

12. Pursuant to the corporate By-Law for PROTESTANT CORPORATION, the Treasurer of the corporation was to have the custody of all moneys and securities of the corporation and was to keep regular books of account. He was to disburse the funds of the corporation in payment of the just demands against the corporation or may be ordered by the Board of Directors, taking proper vouchers of such disbursements, and should render to the Board of Directors from time to time as may be required of him an account of all of his transactions as Treasurer and of the financial condition of the corporation. The Treasurer was to perform such other duties incident to his office or that are properly required of him by the Board of Directors. The Assistant Treasurer, or Assistant Treasurers in the order designated by the Board of Directors, was to perform all of the duties of the Treasurer in the absence or disability of the Treasurer.

13. In March, 1998 PROTESTANT CORPORATION adopted a Senior Management Bonus Plan for the Fiscal Year Ended January, 1999 that encouraged the Treasurer of the corporation to replace or re-negotiate the credit line of the corporation then in place.

14. In May, 1998 PROTESTANT CORPORATION replaced its then existing credit line with a new credit line entered into with LARGE LENDER. The Loan and Security Agreement for this new financing was executed on behalf of PROTESTANT CORPORATION by OFFICER B, Treasurer and Chief Financial Officer and not by Protestant.

15. Pursuant to the LARGE LENDER Loan and Security Agreement, PROTESTANT CORPORATION granted to LARGE LENDER a first priority security interest in all of its then owned or thereafter acquired or arising inventory, equipment, receivables, life insurance policies and the proceeds thereof, trademarks, licenses and patents, investment property and general intangibles, including without limitation, all of its deposit accounts, money, any and all property now or at any time thereafter in LARGE LENDER's possession and all proceeds (including proceeds of any insurance policies, proceeds of proceeds and claims against third parties), all products and all books and records and computer data related to any of the foregoing.

16. February 1, 1999, PROTESTANT CORPORATION and LARGE LENDER entered into an amendment to the LARGE LENDER Loan and Security Agreement which amendment was executed by OFFICER B on behalf of PROTESTANT CORPORATION

17. As a result of the security interests granted LARGE LENDER, PROTESTANT CORPORATION was required to request funds from LARGE LENDER, for the payment of its debts, including taxes.

18. While requests were made by PROTESTANT CORPORATION, LARGE LENDER refused to authorize the payments by PROTESTANT CORPORATION of the taxes which are the basis of the current proposed assessment against Protestant.

B. Additional Facts Contained in the Record

19. The sales and withholding taxes were timely assessed by the Account Maintenance by letter of October 22, 1999, to PROTESTANT as President of PROTESTANT CORPORATION. PROTESTANT timely protested the proposed assessments by letter of November 18, 1999.

ISSUE

Whether the Protestant is a responsible principal officer of PROTESTANT CORPORATION, personally liable for sales and withholding taxes the corporation failed to remit.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission has jurisdiction of this protest, 68 O.S. §§ 207, 221.

2. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect, and in what respect, Enterprise Management Consultants 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 the denial of the protest, Continental Oil Company v. Oklahoma Tax Commission, 570 P.2d 315 (Okl. 1977).

3. The standard burden of proof in administrative proceedings is "preponderance of evidence," see Oklahoma Tax Commission Order No. 91-10-17-061. Black's Law Dictionary, 1064 (5th ed. 1979), defines "preponderance of evidence" as "evidence 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." It is also defined to mean "evidence which is more credible and convincing to the mind . . . that which best accords with reason and probability."

4. PROTESTANT CORPORATION is liable for the sales and withholding taxes assessed above. Pursuant to 68 O.S. § 253, the principal officers of the corporation liable for tax are also liable for sales tax, 68 O.S. § 1361(A), and withholding tax, 68 O.S. § 2385.3(d). Section 253 provides that the liability of a principal officer for sales tax and 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 U.S.C.A. § 6672(a) on any person required to collect and pay over the tax (the "responsible person") who willfully fails to do so. A President is a principal officer pursuant to OAC 710:65-7-3 and OAC 710:90-3-3.

Personal liability for the tax, however, must rest with the "responsible person," OAC 710:65-7-3(3) and OAC 710:90-5-3. However, under Oklahoma law, the statues 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 sales or withholding taxes of a corporation is not dependent on a finding of willfulness, Commission Order 96-12-17-037.

5. 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 persons 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 with ultimate authority over expenditure of funds since such a person 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.

6. The Federal Court in Barnett 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-today 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).

7. The stipulation of facts contain little information concerning PROTESTANT's activities as President, however, it is difficult-to imagine that the President and Chief Executive Officer of a corporation is not a responsible person liable for the trust fund taxes at issue because the President is invested with sufficient status, duty and authority within the corporation to exert significant control over corporate funds which identifies him as one of the responsible persons in the corporation. The Restated Bylaws of PROTESTANT CORPORATION, attached to the Stipulation of Facts as Exhibit "P-2", in Article V paragraph 3 provides that, "The President of the corporation shall be the chief operating officer of the corporation and shall have general control of the administration of the corporation." Further, Article IX of the Bylaws provides for indemnification for any loss suffered by the officers of the corporation by virtue of their duties as a corporate officer from the corporation itself. These provisions demonstrate that PROTESTANT possessed the control necessary to support liability in that he held the power to direct or control the payment of funds, Wilson v. United States, 250 F.2d 312 (9th Cir. 1958). PROTESTANT has failed to carry his burden of proving that he is not a responsible officer by a preponderance of the evidence presented in this case.

8. PROTESTANT argues that the Bylaws provide that the Treasurer and Chief Financial Officer of the Corporation, OFFICER B, is the person responsible for the trust tax liability in this case. However, the fact that OFFICER B is likewise responsible for the sales and withholding taxes of PROTESTANT CORPORATION, does not absolve PROTESTANT from his separate liability as a responsible officer. The liability of the principal officers for trust taxes pursuant to Section 253 reaches those who have the final words as to what bills should or should not be paid, and when, see Turner v. United States, 423 F.2d 448 (9th Cir. 1970). The court in Turner found that:

> In this context "final" means significant, rather than exclusive control. Section 6672 "was designed to cut through the shield of organizational form and impose liability upon those actually responsible for an employer's failure to withhold and pay over the tax. It would frustrate this purpose needlessly to imply a condition limiting the application of the section to those nominally charged with controlling disbursements of a corporate employer, thus immunizing those who, through agreement with or default of those nominally responsible, have exercised this corporate function in fact."

Liability may thus be imposed on more than one person. This liability is properly imposed on PROTESTANT in this case as the President of the corporation.

9. PROTESTANT next asserts that pursuant to the Loan and Security Agreement between PROTESTANT CORPORATION and LARGE LENDER, it was necessary for PROTESTANT CORPORATION to obtain approval from LARGE LENDER before any payments could be made by PROTESTANT CORPORATION. Although requests were made to pay the taxes by the corporation, LARGE LENDER refused to authorize the payments. Therefore, PROTESTANT asserts that he did not have control of corporate funds with which to pay the taxes at issue and is not a responsible officer for that reason. The Commission has previously ruled in Precedential Order No. 98-07-30-008 that evidence pertaining to a lockbox arrangement was irrelevant and did not negate a principal officer's liability. The sales and withholding taxes are held by the corporation in trust pursuant to 68 O.S. §§ 1361 and 2385.3. To permit corporate officers to escape liability for these trust taxes by entering into agreements which prefer other creditors to the government would defeat the entire purpose of the statute, Kalb v. United States, 505 F.2d 506 (2nd cir. 1974). The government cannot be made an unwilling partner in an enterprise of questionable finances at the whim of the taxpayer. The State is not a party to the LARGE LENDER agreement and PROTESTANT cannot circumvent his responsibility to the State for the trust taxes at issue based on a contract with a third party. These taxes were collected by PROTESTANT CORPORATION from the taxpayers of Oklahoma and may not be used to pay the LARGE LENDER contract but must be remitted to the Tax Commission. The taxes collected by PROTESTANT CORPORATION are not a part of its revenue available for any corporate use but are held in a fiduciary capacity in trust for the state. Therefore, PROTESTANT has a duty as a responsible officer of the corporation to insure that those trust taxes are remitted.

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

DISPOSITION

It is the DETERMINATION of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the sales tax and withholding tax protest of PROTESTANT, as President of PROTESTANT CORPORATION and as an individual, d/b/a PROTESTANT CORPORATION 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.