

**JURISDICTION:** OKLAHOMA TAX COMMISSION - DECISION  
**CITE:** 2001-02-22-013 / NOT PRECEDENTIAL  
**ID:** P980020A / P980020C / P980020D  
**DATE:** 02-22-01  
**DISPOSITION:** DENIED AS TO OFFICERS A AND C /  
DISMISSED AS TO OFFICER D  
**TAX TYPE:** WITHHOLDING  
**APPEAL:** NO APPEAL TAKEN

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. That PROTESTANT A was President of PROTESTANT CORPORATION, an Oklahoma corporation, at all times relevant to this proceeding and owned 100% of the corporation's stock.

2. That PROTESTANT C held the office of Secretary of the corporation and was an employee of the corporation from June, 1996 until the corporation dissolved.

3. That PROTESTANT D was employed by PROTESTANT CORPORATION from May, 1991 through June 17, 1996 as a cost accountant, receptionist and secretary for PROTESTANT A, THE PRESIDENT. Additionally, PROTESTANT D held the position of Treasurer of the corporation.

4. That a letter proposing to assess withholding tax, interest and penalty in the total amount of \$34,437.84 consisting of a tax due in the amount of \$22,795.72, penalty in the amount of \$5,698.93 and accrued interest through December 31, 1997 in the amount of \$5,943.19 for the original audit period of October 1, 1994 through August 31, 1996 was sent to PROTESTANTS A, D, AND C, as principal officers of the corporation. At the hearing held on September 14, 1998, the Division amended the assessment period to October 1, 1995 through August 31, 1996. (Exhibit "A")

5. That protests were timely submitted to the Oklahoma Tax Commission by PROTESTANTS A AND C. (Exhibit "E")

6. That the protest submitted by PROTESTANT D was not received by the Oklahoma Tax Commission within thirty (30) calendar days from the date of the assessment letter. (Exhibits "B" and "C")

### ISSUE

The issue presented for decision is whether PROTESTANTS A, C AND D should be held personally liable for the withholding tax delinquency for the period of October 1, 1995 through August 31, 1996.

### CONTENTIONS

PROTESTANT A contends that he was inactive during the period involved and that he had delegated the responsibilities of the corporation to other employees, and specifically the responsibility to pay withholding taxes to PROTESTANT D.

PROTESTANT C contends she was an officer in name only and had no responsibilities for remitting the withholding tax during the period in question and therefore, she should not be held liable as a principal officer.

PROTESTANT D contends that she had the authority to pay bills only after PROTESTANT A's approval and had no authority to make any decision as to which creditor to pay.

The Division contends that each party had check signing authority and that as a principal officer, each had the responsibility for remitting withholding taxes to the Commission. Additionally, the Division contends that PROTESTANT D's protest is untimely.

### CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission (the "Commission") has jurisdiction of this protest. 68 O.S. 1991, § 207.

2. The principal officers of any corporation shall be liable for the payment of any tax 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 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.

3. These standards are not set out by statute and therefore, we must look to case law for guidance in determining whether an individual is a principal officer. Several factors were identified in *Lee v. U.S.*, 951 F. Supp. 79 (W.D. Pa. 1997) citing *Greenberg v. U.S.*, 46 F.3d 239, 243 (3rd Cir. 1994), which are appropriate to consider when determining whether an individual is a responsible person:

- (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.

Although this list is not binding and is not exhaustive, it provides a starting point to examine the status of these Protestants.

### PROTESTANT A

4. According to PROTESTANT A's testimony, he bought out his former partner and incorporated the company in 1974. Additionally, PROTESTANT A held 100% of the company's stock, entered into contracts for the company, obtained loans and financing on behalf of the corporation, hired and fired employees, took a monthly salary from the company and withdrew money from the company.

5. PROTESTANT A testified that he moved to ANOTHER STATE for health problems and that he had to have help to run the company during that time. The evidence is conflicting as to when PROTESTANT A moved to ANOTHER STATE and when he returned, however he testified that he was in the office quite a bit during 1995 and 1996.

6. Protestant contends that during this period of time when he lived out of state that he delegated authority to take care of the business to his employees and specifically that he delegated authority to pay any and all bills to PROTESTANT D. When he was there, he would authorize payment of the bills.

7. During the time he lived in ANOTHER STATE, PROTESTANT A testified that he talked to his employees every week and that PROTESTANT D kept him apprised of debts and financial difficulties, however, PROTESTANT A denied that he was aware of any tax owed until the day PROTESTANT D quit in June, 1996.

8. Protestant has cited *Mazo v. U.S.*, 591 F.2d 1151 (5th Cir. 1979) for the proposition that if a person lacks knowledge that withheld taxes were not being paid, then that person does not willfully fail to account for and pay the amount due and should not be penalized.

The Oklahoma statute, 68 O.S. Supp. 1999, § 253, under which Protestant is cited, however, does not contain a willfulness component as opposed to the Internal Revenue Service statute, 26 U.S.C. § 6672(a) which levies penalties equal to the total amount of tax on one who "willfully fails to collect such tax, or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat such tax or the payment thereof". Therefore, this proposition is without merit. See Commission Order No. 96-12-17-037.

9. A separate principle set forth in *Mazo* is, however, instructive in the instant case. The *Mazo* Court, in determining the willfulness component of the Internal Revenue Service statute, held that although the Fifth Circuit in *Newsome v. U.S.*, 431 F.2d 742, 746 (5th Cir. 1970) recognized that reasonable cause may excuse the failure to collect, account for, or pay over withholding taxes, the mere delegation of responsibility to another does not constitute reasonable cause. Although PROTESTANT A may have delegated the duty to pay withholding taxes to PROTESTANT D, this does not absolve him of the duties and obligations of a principal officer.

10. In a similar case in which the president of a corporation argued that he was away from the office and that subordinates were in charge of the administrative and managerial duties of the corporation, the Court held that it was his responsibility to determine how corporate funds should be expended and therefore he was a responsible officer. *Bloom v. U.S.*, 272 F.2d 215 (9th Cir. 1959).

11. PROTESTANT A's arguments that PROTESTANT D had the authority to pay any and all bills and that such delegation relieves him of the liability is largely corroborated by his own testimony and is contradicted by PROTESTANT D.

12. Based upon the foregoing facts and legal authorities, this Court finds that PROTESTANT A did not delegate such authority to relieve himself of the responsibility as is held by a principal officer of the corporation.

13. PROTESTANT A's protest to the proposed assessment should be denied.

### **PROTESTANT C**

14. PROTESTANT C was listed as secretary of the corporation and was made an officer in 1993.

15. PROTESTANT C testified that with the exception of an initial board meeting, she performed no duties for the corporation prior to June, 1996. At that time, she returned to Oklahoma and became an employee of the company.

16. PROTESTANT C knew she had check signing authority for the corporation, but did not sign any checks prior to June, 1996.

17. No evidence has been presented which demonstrates that PROTESTANT C had any control in the decision-making or had access to the records or the checkbook of the corporation prior to June, 1996.

18. Additionally, there is no evidence which indicates that she signed quarterly tax returns or had the authority to hire and fire employees. It appears that PROTESTANT C had no control over the financial affairs of the corporation until June, 1996 at which time she became responsible for the corporation's financial affairs.

19. Therefore, under the evidence presented and legal authorities previously cited, PROTESTANT C was not a principal officer of the corporation prior to June, 1996 and should not be held responsible for the withholding tax liability prior to that time.

20. PROTESTANT C's protest to the proposed assessment should be sustained in part as to the period prior to June, 1996 and denied in part with respect to the period of June, 1996 - August, 1996.

#### **PROTESTANT D**

21. By letter dated November 18, 1997, the Commission proposed to assess withholding taxes against PROTESTANT D, as treasurer of PROTESTANT CORPORATION and as an Individual. (Exhibit "A")

22. The return receipt establishes that the date of delivery was November 19, 1997 and was signed by PROTESTANT C. (Exhibit "B")

23. Protestant's written protest was postmarked December 29, 1997. (Exhibit "C")

24. Protestant has not questioned or contested the validity of the above evidence and has not presented any evidence of a request for an extension of time in which to file her protest as required by 68 O.S. 1991, § 226.

25. Title 68 Section 221(e) governs the filing of protests with the Commission and in pertinent part reads as follows:

(e) If the taxpayer fails to file a written protest within the thirty-day period herein provided for or within the period as extended by the Tax Commission, or if the taxpayer fails to file the notice required by Section 226 of this title within thirty (30) days from the date of mailing of an assessment, then the proposed assessment, without further action of the Tax Commission, shall become final and absolute at the expiration of thirty (30) days from the date same is mailed to the taxpayer, or in cases in which an extension has been granted for filing a protest pursuant to this section, at the expiration of the period as extended by the Tax Commission.

26. The Court in *Matter of Request of Hamm. Prod. Co. for Ext.*, 671 P.2d 50 (Okla. 1983) held that the time limitation provisions of the act are jurisdictional. Failure of the taxpayer to file either its protest or an application for an extension to file its protest within the thirty (30) day period allowed by 68 O.S. Supp. 1999, § 221(E) resulted in the proposed assessment becoming final and the Commission was without jurisdiction thereafter to grant an extension of time in which to file a protest under § 221(F). This Court likewise has no authority to grant such an extension or to ignore the preclusive effect of an appellate review.

27. Therefore, this Court has no jurisdiction to review the merits of the proposed assessment and dismisses the protest of PROTESTANT D.

### **DISPOSITION**

Based on the above and foregoing findings of fact and conclusions of law, it is DETERMINED that the protest of PROTESTANT A be denied and that the protest of PROTESTANT D be dismissed. As to these Protestants, it is DETERMINED that the amount in controversy, inclusive of any additional accrued and accruing interest be fixed as the deficiency due and owing. Further, it is recommended that PROTESTANT D's protest received on December 29, 1997 be considered a timely filed request for abatement pursuant to 68 O.S. 1991, § 221(c). It is also recommended that the proposed withholding tax assessment with respect to PROTESTANT C be adjusted in accordance herewith and that the resultant amount inclusive of any additional accrued and accruing interest be fixed as the deficiency due and owing.

### **ADDENDUM TO FINDINGS, CONCLUSIONS AND RECOMMENDATIONS**

NOW on this 5<sup>th</sup> day of February, 2001, the Findings, Conclusions and Recommendations ("Findings") pertaining to PROTESTANT C in Case No. P-98-020C, issued on October 12, 2000, come on for consideration of additional findings of fact and a recommendation as to the amount of the deficiency which should be confirmed by an Order of the Tax Commission.

The Division, as directed by the Findings, adjusted the withholding tax assessment and provided notice to Protestant. Protestant has not challenged the adjustment proposed by the Division.

Upon consideration of the Findings and the adjustment to the assessment, the undersigned finds that the following Findings of Fact should be added to and incorporated in the Findings:

1. That notice of the adjustment to the assessment was filed of record in this cause on December 5, 2000.

2. That the Division adjusted the withholding tax assessment to an amount of \$6,020.22, consisting of tax in the amount of \$3,179.45, interest accrued through November 30, 2000, in the amount of \$2,045.91, and penalty in the amount of \$794.86.
3. That the aggregate amount in controversy is \$6,020.22.
4. That the adjustment complies with the recommendations set forth in the Findings.
5. That Protestant was provided notice of the adjustment.
6. That Protestant did not file a response to the adjustment.

The undersigned further finds that the following Recommendation should be added to and incorporated in the Findings:

It is further recommended that the amount in controversy, inclusive of any additional accrued and accruing interest, be respectively fixed as the deficiency due and owing.

THEREFORE, the Findings, Conclusions and Recommendations pertaining to PROTESTANT C in Case No. P-98-020C, issued on October 12, 2000, are amended to include and incorporate the above and foregoing findings of fact and recommendation.

**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.