JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2001-03-15-010 / NOT PRECEDENTIAL**
ID: **P9600251**
DATE: **03-15-01**
DISPOSITION: **DENIED**
TAX TYPE: **SALES / WITHHOLDING**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. A business registration form filed September 23, 1991, for PROTESTANT CORPORATION listed Protestant as President and the only officer of the corporation. The form was signed by Protestant. Pursuant to the business registration, PROTESTANT CORPORATION was applying for a sales tax permit to operate a restaurant at 99999 S. ANONYMOUS Road, ANYCITY, Oklahoma.

2. Protestant purchased the business from his son-in-law in September, 1991.

3. Protestant testified that SON-IN-LAW had been in financial trouble with the restaurant for some time. Protestant estimated that prior to purchasing the business, he had already given SON-IN-LAW approximately $90,000.00 over several years. Protestant believed that if he purchased the business and let his son-in-law continue to run it, that SON-IN-LAW would operate the restaurant in a more responsible manner. Protestant had no interest or experience in the restaurant business and intended to return the business to SON-IN-LAW once it became financially stable.

4. Protestant was not involved in the day-to-day operations of the restaurant. He testified that he ate at PROTESTANT CORPORATION as a paying customer on a regular basis and occasionally signed checks and forms when SON-IN-LAW told him it was necessary.

5. Protestant first became aware of the restaurant's tax problems in about October of 1992, when he received a letter at the restaurant from the Internal Revenue Service ("IRS") requesting payment of past due taxes. Protestant confronted SON-IN-LAW with the letter. SON-IN-LAW told Protestant that he had the money and would take care of the problem.

6. In December, 1992, Protestant was advised by his bank that the IRS had levied PROTESTANT CORPORATION's checking account for past due taxes. SON-IN-LAW again assured Protestant that the problem would be resolved.

7. Upon further investigation, Protestant discovered that SON-IN-LAW had fallen behind on the remittance of state and federal taxes.

8. On or about January 3, 1993, Protestant confronted SON-IN-LAW about the CORPORATION's tax debts and began to take over managerial duties. In the following days, Protestant spoke with SON-IN-LAW and insisted that he and Protestant go to Oklahoma City to meet with the Tax Commission and the IRS to work out payment of back taxes. According to Protestant, SON-IN-LAW stated that he would not go to meet with the tax authorities.

9. SON-IN-LAW, who had been undergoing psychological treatment, committed suicide on January 16, 1993.

10. Following SON-IN-LAW's death, Protestant met with CORPORATION employees and decided to keep the restaurant open while he looked for a buyer.

11. On November 3, 1993, Protestant and BUYER entered into an intent to purchase agreement for the restaurant. BUYER agreed to pay $75,000.00 for the restaurant only if it was operating at the time of sale and was cleared of all tax liens.

12. The sale never took place and instead, BUYER purchased the restaurant on March 21, 1994, at a foreclosure auction for $31,000.

13. Protestant admitted that at the time the corporation was formed he was aware that his son-in-law had financial difficulties and for that reason "kept his nose" in the business.

14. The Division by letter dated June 21, 1994, proposed assessment of sales tax, interest and penalty for the periods of December 1, 1991, through December 31, 1991, and February 1, 1992, through December 31, 1992, as follows:

Tax	$39,678.34
Interest through 7/20/94	9,917.81
Penalty	3,967.83
Adjustments	7,082.56
Total	$46,481.42

15. The Division, by letter dated June 21, 1994, proposed assessment of sales tax, interest and penalty for the period of September 1, 1993, through February 28, 1994, as follows:

Tax	$16,707.95
Interest through 7/20/94	1,438.37
Penalty	1,670.78
Total	$19,817.10

16. The Division, by letter dated June 21, 1994, proposed assessment of interest and penalty for late payment of withholding tax for the periods of September 1, 1993, through December 31, 1993, in the following amounts:

Tax	$	0.00
Interest through 7/20/94		57.47
Penalty		114.44
Total	$	171.91

17. The Division arrived at the proposed sales tax assessment based on actual reports filed and signed by Protestant.

18. Protestant admits that he was responsible for the reporting and remitting of sales and withholding taxes on behalf of the corporation after January 16, 1993.

ISSUE

Whether Protestant, as President of PROTESTANT CORPORATION is personally liable for the proposed assessments for sales tax.

CONCLUSIONS OF LAW

1. The Tax Commission has jurisdiction over the parties and subject matter in this proceeding pursuant to 68 O. S. 1991, § 207.

2. Each principal officer of a corporation is personally liable for the sales tax required to be collected by such corporation under the Oklahoma Sales Tax Code. 68 O.S. § 1361(A).

3. The specific corporate officers considered by the Tax Commission to be principal officers are the president, vice president, secretary, treasurer or secretary/treasurer. *Oklahoma Administrative Code* 710:65-7-3.

4. Mere holding of one of these offices does not make the individual liable for taxes as a principal officer. Certain indicia are considered, such as:

(A) Limited responsibilities within the corporation (only responsibility is as keeper of the corporate seal),

(B) Limited duties within the corporation (only duty is taking minutes at Board of Directors meeting), and

(C) Limited authority within the corporation (could not write checks on the corporate account). *Id*.

5. The Tax Commission is directed by Section 253 of Title 68 to make such a determination of liability in accordance with the standards for determining liability for payment of federal withholding tax.

6. For federal withholding tax purposes, the responsible person is frequently defined as the person who has a final and significant, although not exclusive, word as to which bills or creditors should be paid. *Commonwealth National Bank of Dallas v. United States*, 665 F.2d 743, 757 (5th Cir. 1982). The definition encompasses all officers or employees who are so connected with the business as to have responsibility and authority to avoid default. *White v. United States*, 372. F.2d 513, 516 (Ct.Cl. 1967).

7. The determination of who is a responsible person is made on a case-by-case basis considering factors such as: (1) holding an office or owning stock in a corporation; (2) managing the day-to-day operations of the business; (3) making decisions as to the disbursement of funds and the payment of creditors; and (4) check signing authority. *Turnbull v. United States*, 929 F.2d 173, 178 (5th Cir. 1991).

8. 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). Responsibility is a matter of status, duty and authority, not knowledge. *Mazo v. United States*, 591 F.2d 1151, 1156 (5th Cir. 1979). Reasonable cause may excuse liability, but mere delegation of responsibility to another does not constitute reasonable cause. *Id*.

9. The burden of proof in all proceedings before the Tax Commission unless otherwise provided by law is on the party opposing the action to show in what respect the action or proposed action of the Tax Commission is incorrect. *Oklahoma Administrative Code* 710:1-5-47. The denial of a protest is appropriate where the party opposing the proposed action fails to provide evidence which is sufficient to entitle the party to the relief requested. See, *Continental Oil Company v. Oklahoma State Board of Equalization*, 570 P.2d 315 (Okl. 1977).

10. Protestant was the lone officer and had check signing authority during the periods for which the assessments were made. Protestant bought the business after loaning SON-IN-LAW at least $90,000.00 to keep the business going. By purchasing the business from SON-IN-LAW, Protestant hoped that his son-in-law would operate the restaurant more responsibly if he had to answer to Protestant. Protestant periodically inquired about the business and when he learned that things were not going well, he began to exercise his authority to take over.

Protestant, as the lone officer and owner of PROTESTANT CORPORATION, was in the position to control the financial affairs of the business, to control the payment of corporate funds and to avoid default. Protestant possessed ultimate responsibility and control of the business and should not be allowed to escape liability because he delegated operation and responsibility to SON-IN-LAW.

11. Protestant has not met his burden of proof to show that the assessment was incorrect; therefore, the Protest of PROTESTANT 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, 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.