JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2001-04-10-008 / NOT PRECEDENTIAL**
ID: **P980068A / P980068B**
DATE: **04-10-01**
DISPOSITION: **DENIED**
TAX TYPE: **SALES / WITHHOLDING**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties stipulate to the following:

1. The Oklahoma Tax Commission issued letters of proposed assessment against the Protestants on January 23, 1998 representing a sales tax liability (and/or interest and penalty) for the periods April, 1996; August, 1996 and November, 1996 through August, 1997.

2. The Oklahoma Tax Commission issued [sic] letters of proposed assessment against the Protestants on January 23, 1998 representing a withholding tax liability (and/or interest and penalty) for the periods of January, 1997 through February, 1997; April, 1997; July, 1997 and August, 1997.

3. The proposed sales tax assessments total $414,947.95, inclusive of tax, interest and penalty through February 26, 1998.

4. The proposed withholding tax assessments total $12,939.06, inclusive of tax, interest and penalty through February 26, 1998.

5. Both Protestants filed protests of the sales and withholding tax assessments [sic] which were received by the Division on March 23, 1998.

6. Protestant A was an officer holding the position of Vice-President within the corporation during the periods of assessment.

7. Protestant B was an officer holding the position of President within the corporation during the periods of assessment.

8. Protestants A AND B do not contest the accuracy of the calculations indicating the amount due for sales and withholding tax, interest or penalty due for the periods at issue. Instead, they argue that they are not the appropriate parties from which to obtain the amount due.

9. On or about March 21, 1996, B, as President of PROTESTANT CORPORATION, entered into an agreement entitled "Contingent Blocked Account Amendment To A LockBox Agreement;" this agreement contained a provision allowing ANONYMOUS Credit Corporation ("ANONYMOUS") to take control of PROTESTANT CORPORATION's lock box (accounts receivable) at any time in its sole discretion upon notification to the bank.

10. On October 23, 1996, ANONYMOUS notified PROTESTANT'S Bank that it was taking control of PROTESTANT CORPORATION's lock box account.

11. The protest of A, as an officer of PROTESTANT CORPORATION and as an Individual, is properly before the Commission.

12. The protest of B, as an officer of PROTESTANT CORPORATION and as an Individual, is properly before the Commission.

ISSUES

The issue presented for decision is whether Protestants are "responsible parties" under Oklahoma law for the amounts assessed from and after October 23, 1996, until the corporation ceased doing business.

Protestants admit that they are responsible for any and all taxes prior to October 23, 1996. Protestants contend that they are not "responsible parties" from and after October 23, 1996 because they did not "willfully" fail to collect and remit the assessed taxes. Protestants also contend that the liability of a principal officer under Section 253 contains the willfulness component since the determination of liability is based on Internal Revenue Code standards. Protestants further contend that to impose liability on them without a finding of willfulness is tantamount to an application of strict liability on officers of a corporation.

Protestants further contend that the "reasonable cause" exception adopted by the Tenth Circuit Court of Appeals in ***Finley v. United States***, 123 F.3d 1342 (10th Cir. 1997) excuses any liability for the failure to remit the assessed taxes. In support of these contentions, Protestants assert that because of the lockbox arrangement they cannot be held personally liable for the assessed taxes. Protestants further contend that ANONYMOUS, in its fiduciary capacity, accepted the responsibility and liability for the tax obligations of the corporation and is thus liable for the assessed taxes. In support of this contention, Protestants argue that when ANONYMOUS intercepted the taxes pursuant to the lockbox arrangement, it placed itself in the position of a receiver for the corporation and created a constructive trust.

The Division contends that Protestants should be held personally liable for the sales and withholding taxes assessed. In support of this contention, the Division argues that Section 253 does not contain a willfulness component citing Oklahoma Tax Commission Precedential Order No. 96-12-17-037. The Division further argues that neither the statutes nor the Division's interpretation of the statutes imposes strict liability on officers of a corporation. The Division further argues that there is simply no authority whereby a responsible party may delegate away his responsibility for the collection and remittance of state sales and withholding taxes citing Oklahoma Tax Commission Precedential Order No. 98-07-30-008.

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. Sections 1361(A) and 2385.3(d) do not contain a "willfulness" component and therefore, the determination of liability under Section 253 is limited to the standards for determining who is a "responsible person". Oklahoma Tax Commission Precedential Order No. 96-12-17-037. *Compare,* 68 O.S.1991, § 1361(F).

5. The long continuing construction of a statute by an agency charged with its administration, carries great weight and should not be disturbed unless clearly erroneous, especially when the legislature has convened several times and has not expressed its disapproval of such construction. ***Schulte Oil Co., v. Oklahoma Tax Commission***, 882 P.2d 65 (Okl. 1994).

6. Sections 1361(A), 2385.3(d) and 253 do not impose strict liability on an officer of a corporation. Imposition of liability is based on a determination that the officer was a principal officer of the corporation during the period for which the assessment is made. 68 O.S.1991, § 253. Protestants failed to present any evidence to show they were not principal officers of the corporation. Such failure shall be held against them. Rule 710:1-5-47 of the *Oklahoma Administrative Code*. See, ***Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission***, 768 P.2d 359 (Okl. 1988).

7. The "reasonable cause" exception of ***Finley**, supra*., is applicable to the "willfulness" component of I.R.C. § 6672, which is not a consideration for the determination of who is a principal officer under Section 253. 123 F.3d at 1347. See, paragraph 4 above. Notwithstanding, the Court in ***Finley*** observed that a lenient reasonable cause exception should not be adopted, but instead narrowly construed the exception in order to further the basic purpose of protecting government revenue, discouraging corporations from self-executing government loans using trust fund money and avoiding the potential of making the government an unwilling partner in a floundering business. 123 F.3d at 1348. The Court concluded that the reasonable cause exception should be limited to two elements; i.e., where taxpayer has shown by sufficient evidence that reasonable efforts were made to protect the trust funds and those efforts were frustrated by circumstances outside the taxpayer's control. *Id.* Here, Protestants have not presented any evidence to show what efforts they made to protect the trust funds nor to show in what respect, if any, those effort were frustrated.

8. Evidence pertaining to a lockbox arrangement is irrelevant and does not negate a principal officer's or an employer's status as a responsible person. Oklahoma Tax Commission Precedential Order No. 98-07-30-008.

9. The state is statutorily restricted as to whom or from whom it can seek liability for the trust fund taxes. See, 68 O.S. 1991, §§ 1361(A) and 2385.3(d). The vendor and/or employer is the fiduciary and has the duty, as trustee, to the state in regard to the sales and/or withholding tax funds. 68 O.S.1991, §§ 1361(F) and 2385.3(d). A trustee cannot avoid his obligations by entering into an agreement by which funds entrusted to him are used to pay his other obligations. ***Kalb v. United States***, 505 F.2d 506, 510 (2nd Cir. 1974). Further, a license holder may be held liable for acts committed under authority of his license if those acts were committed with either the knowledge, consent or acquiescence, either express or implied, of the licensee. ***Matter of Revocation of County Beverage License***, 620 P.2d 395, 397 (Okl. 1980).

10. Protestants' protest to the proposed sales and withholding tax assessments should be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is DETERMINED that the protest of Protestants, A AND B, as officers of PROTESTANT CORPORATION and as individuals, be denied. It is further DETERMINED that the amounts in controversy, plus any additional accrued and accruing interest, be fixed as the deficiencies 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.