

**JURISDICTION:** OKLAHOMA TAX COMMISSION - DECISION  
**CITE:** 2001-04-24-012 / NOT PRECEDENTIAL  
**ID:** P000005A  
**DATE:** 04-24-01  
**DISPOSITION:** DENIED  
**TAX TYPE:** SALES / WITHHOLDING  
**APPEAL:** NO APPEAL TAKEN

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Stipulated Facts

1. PROTESTANT is a former Executive Vice President and Chief Financial Officer of PROTESTANT CORPORATION AN OUT OF STATE corporation, now the subject of federal bankruptcy proceedings in the OTHER State.
2. PROTESTANT was never a shareholder of PROTESTANT CORPORATION, a corporation whose stock is publicly held.
3. PROTESTANT CORPORATION was assigned Federal Taxpayer Identification No. XX-XXXXXXX and Oklahoma Sales Tax Permit No. YYYYYY.
4. On March 15, 1996, PROTESTANT filed PROTESTANT CORPORATION' Initial Oklahoma Franchise Tax Return for the fiscal year ending February 1, 1997, and signed the return as Senior Vice President and Chief Financial Officer.
5. On April 4, 1996, PROTESTANT filed PROTESTANT CORPORATION' Oklahoma Business Registration and signed such Registration as Senior Vice President and Chief Financial Officer.
6. On August 27, 1997, PROTESTANT filed Oklahoma Franchise Tax Return for the reporting period January 28, 1996 through February 1, 1997, and PROTESTANT was listed as Senior Vice President and Chief Financial Officer.
7. On December 5, 1997, PROTESTANT and PROTESTANT CORPORATION entered into an Employment Agreement pursuant to which PROTESTANT was to serve as Executive Vice President and Chief Financial Officer of PROTESTANT CORPORATION, report to the President and Chief Executive Officer and Board of Directors of PROTESTANT CORPORATION, and to perform those duties customarily performed by an Executive Vice President and Chief Financial Officer of a corporation comparable to PROTESTANT CORPORATION.

8. On December 5, 1997, PROTESTANT CORPORATION and MR. X entered into an Employment Agreement pursuant to which Mr. X was to serve as President and Chief Executive Officer of PROTESTANT CORPORATION. PROTESTANT signed the Employment Agreement on behalf of PROTESTANT CORPORATION as its Executive Vice President and Chief Financial Officer.
9. On August 26, 1998, PROTESTANT CORPORATION filed Oklahoma Franchise Tax Return for reporting period February 2, 1997 through January 31, 1998, and PROTESTANT was listed as Executive Vice President and Treasurer.
10. On September 11, 1998, PROTESTANT CORPORATION filed a Business Registration to add a new store location and PROTESTANT signed as Executive Vice President and Chief Financial Officer.
11. On September 15, 1998, PROTESTANT signed a check on PROTESTANT CORPORATION' Bank account payable to the Oklahoma Tax Commission ("OTC") in the amount of One Hundred Sixty-Five Dollars and Twenty-Eight Cents (\$165.28).
12. On November 17, 1998, PROTESTANT signed a check on PROTESTANT CORPORATION' Bank account payable to the OTC in the amount of Four Thousand Three Hundred Fifty-Six Dollars and Twenty Cents (\$4,356.20).
13. On August 26, 1998, PROTESTANT filed Oklahoma Franchise Tax Return for reporting period February 2, 1997 through January 31, 1998, and PROTESTANT was listed as Executive Vice President and Treasurer.
14. On December 18, 1998, PROTESTANT filed Oklahoma Franchise Tax Return for reporting period July 1998 through June 1999, and PROTESTANT was listed as Vice President.
15. On January 21, 1999, PROTESTANT CORPORATION delivered a check signed by PROTESTANT payable to the OTC for Seven Thousand Eight Hundred Fifty Dollars and Eighty-six Cents (\$7,850.86).
16. On February 16, 1999, PROTESTANT CORPORATION delivered a check, bearing PROTESTANT's rubber stamp facsimile signature, payable to the OTC for Four Thousand Two Hundred Seventeen Dollars and Ninety-Seven Cents (\$4,217.97).
17. On February 16, 1999, PROTESTANT CORPORATION delivered a check, bearing PROTESTANT's rubber stamp facsimile signature, payable to the OTC for Three Hundred Eighty-Six Dollars and Twenty-Eight Cents (\$386.28).

18. On March 9, 1999, PROTESTANT CORPORATION delivered a check; bearing PROTESTANT's rubber stamp facsimile signature, payable to the OTC for Three Hundred Ninety-Two Dollars and Sixty-Seven Cents (\$392.67).
19. On March 30, 1999, PROTESTANT CORPORATION delivered a check, bearing PROTESTANT's rubber stamp facsimile signature, payable to the OTC for Forty-One Dollars and Twelve Cents (\$41.12).
20. On April 6, 1999, PROTESTANT CORPORATION delivered a check, bearing PROTESTANT's rubber stamp facsimile signature, payable to the OTC for Two Hundred Forty Dollars and Eighty-Four Cents (\$240.84).
21. On August 28, 1998, PROTESTANT CORPORATION delivered a check signed by MR. Z payable to the OTC for One Hundred Fifty-One Dollars and No Cents (\$151.00).
22. On December 18, 1998, PROTESTANT CORPORATION delivered a check signed by MR. Z payable to the OTC for Eleven Dollars and Fifty Cents (\$11.50).
23. On October 22, 1999, the OTC proposed an assessment against PROTESTANT for PROTESTANT CORPORATION' sales tax for October 1998 and December 1998 through August 1999, in the total amount of Forty-Two Thousand Three Hundred Thirty-Nine Dollars and Twelve Cents (\$42,339.12).
24. On October 10, 1999, the OTC proposed an assessment against PROTESTANT for PROTESTANT CORPORATION' withholding tax for January 1999, April 1999 and August 1999, in the total amount of Nine Hundred Four Dollars and Seven Cents (\$904.07).
25. On February 29, 2000, the OTC proposed an assessment against PROTESTANT for PROTESTANT CORPORATION' withholding tax for May 1999 through July 1999, in the total amount of One Thousand Seven Hundred Seventy-Two Dollars and Thirty-Seven Cents (\$1,772.37).
26. On December 22, 1999, PROTESTANT filed its Protest to the proposed assessments.
27. PROTESTANT shall be permitted to submit an Affidavit with PROTESTANT's Brief as to other relevant facts which have not been included in this Stipulation.

**B. Stipulated Facts Contained in Addendum**

1. At the meeting of the Board of Directors of PROTESTANT CORPORATION on March 24, 1998, the directors provided approval to proceed in finalizing a banking relationship with LENDER X;
2. On March 24, 1998, PROTESTANT was a member of the Board of Directors of Jay PROTESTANT CORPORATION;
3. The minutes of the Board of Directors meeting on March 24, 1998, attached to Addendum to Stipulation of Facts filed November 13, 2000, are true and correct; and
4. At the direction of the Board of Directors of PROTESTANT CORPORATION, PROTESTANT, as Executive Vice President and Chief Financial Officer of PROTESTANT CORPORATION, signed the Loan and Security Agreement with LENDER X.

**C. Facts Contained in Affidavit of PROTESTANT**

1. Affiant is a former Executive Vice President and Chief Financial Officer of PROTESTANT CORPORATION, AN OUT OF STATE corporation, now the subject of federal bankruptcy proceedings in the OTHER STATE.
2. Affiant was never a shareholder of PROTESTANT CORPORATION, a corporation whose stock is publicly held.
3. Pursuant to a loan agreement between PROTESTANT CORPORATION and its asset based lender, LENDER X, dated June 1998 (the "Loan Agreement"), LENDER X required that all receipts from PROTESTANT CORPORATION' stores, including sales tax, be electronically transferred on a daily basis into an account controlled by LENDER X. The funds were then applied against PROTESTANT CORPORATION' outstanding loan balance on a daily basis. LENDER X had total control over PROTESTANT CORPORATION' borrowing of funds to pay daily obligations, including sales tax. The Loan Agreement was authorized by PROTESTANT CORPORATION' Board of Directors.
4. From February 1999 through July 1999, PROTESTANT CORPORATION experienced a significant decline in its sales revenues (\$3,000,000 from its budget), resulting in a default under the Loan Agreement.
5. On July 29, 1999, LENDER X stopped funding advances under the Loan Agreement and forced PROTESTANT CORPORATION'S liquidation.

6. From July 29, 1999, and until PROTESTANT CORPORATION initiated Chapter XI proceedings on September 3, 1999, LENDER X captured all of PROTESTANT CORPORATION'S daily receipts, including sales taxes, and applied such receipts to payment of the outstanding loan balance reduced from \$14.8 million to approximately \$10.0 million.
7. PROTESTANT CORPORATION'S bankruptcy proceedings have not been completed as of this date and it is possible that all of the taxes, interest and penalty proposed to be assessed will be paid by PROTESTANT CORPORATION.
8. Affiant and other employees of PROTESTANT CORPORATION made repeated requests for LENDER X to pay current and past due taxes; however, LENDER X refused.
9. This Affidavit is being submitted as a part of the Brief of Taxpayer to support the protest of Affiant to proposed assessment of Oklahoma sales tax and withheld income taxes.
10. The foregoing factual statements would have been the sworn testimony of Affiant if a hearing on the Protest had been held.

#### **D. Additional Facts Contained in the Record**

1. PROTESTANT timely filed protests against all proposed assessments issued to him by the OTC.

#### **ISSUE**

Whether a non-owner employee of a publicly held corporation who was unable to control the payment of Oklahoma sales tax and withheld income taxes (the "Taxes") due to a loan agreement between such corporation and a third-party lender should be liable for such taxes.

#### **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. 91-10-17061. *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 USCA § 6672(a) on any person required to collect and pay over the tax (the "responsible person") who willfully fails to do so. A vice 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 statutes 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 No. 96-12-17-037.

PROTESTANT argues that a consistent application of federal and Oklahoma laws to responsible persons requires a finding of willfulness. The Commission, however, has consistently held in each case dealing with this issue that 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," Commission Order No. 98-07-30-008. PROTESTANT has not cited any applicable and controlling Oklahoma statute or opinion of an Oklahoma court which holds otherwise.

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 evidence submitted in this case demonstrates that PROTESTANT had sufficient status, duty and authority within the corporation to be properly identified as a "responsible person" liable for the taxes. PROTESTANT signed the initial franchise tax return filed with the OTC naming himself as the managing officer and Vice President. PROTESTANT also signed the Business Registration form filed with the OTC for PROTESTANT CORPORATION in which PROTESTANT is listed as the Treasurer and Chief Financial Officer as well as being named on line 9 of the Business Registration form as the person responsible for remitting the taxes. PROTESTANT signed an extensive employment agreement with PROTESTANT CORPORATION to hold the office of "Executive Vice President and Chief Financial Officer," and was a member of the Board of Directors. This agreement included a compensation based on a base salary plus a bonus provision and a signing incentive which included an unspecified amount of "Rollover Options" and additional "New Options" to purchase 788,016 shares of PROTESTANT CORPORATION'S common stock. The evident intent of the stock options was to provide an incentive to PROTESTANT to align his interests in PROTESTANT CORPORATION with that of the other stockholders. PROTESTANT also signed a similar employment agreement on behalf of PROTESTANT CORPORATION to employ MR. X as the President and Chief Executive Officer. The record also reflects evidence indicating that PROTESTANT regularly signed bank drafts for the remittance of the taxes on behalf of PROTESTANT CORPORATION. This evidence is sufficient to demonstrate that PROTESTANT maintained significant control over disbursement of PROTESTANT CORPORATION funds pursuant to the indicia outlined in *Barnett* and *Hochstein*.

8. PROTESTANT contends that he is not the responsible person because he owned no stock in the company and acted under the dominion and control of LENDER X, PROTESTANT CORPORATION'S Board of Directors and PROTESTANT CORPORATION'S President. The evidence in this case does not support this conclusion. PROTESTANT was granted a large stock option to purchase PROTESTANT CORPORATION'S stock in his employment contract. Evidently, the options were not exercised by PROTESTANT but the options do represent a significant financial stake in PROTESTANT CORPORATION.

PROTESTANT argues that IRS policy statement P5-60 indicates that non-owner employees are not held responsible for taxes if they acted solely under the control of others. However, PROTESTANT CORPORATION is a publicly held company as opposed to a privately held company. PROTESTANT has not pointed to a PROTESTANT CORPORATION stockholder that had the power to control his activities, as a stockholder of a privately held company could do. Rather, PROTESTANT was an Executive Officer and a Director of PROTESTANT CORPORATION whose responsibility was to remit the taxes. Further, the fact that the President of PROTESTANT CORPORATION, Mr. X, is likewise responsible for the taxes 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 Treasurer/CFO of the corporation.

9. PROTESTANT next asserts that pursuant to the Loan and Security Agreement between PROTESTANT CORPORATION and LENDER X, it was necessary for PROTESTANT CORPORATION to obtain approval from LENDER X before any payments could be made by PROTESTANT CORPORATION. Although requests were made to pay the taxes by the corporation, LENDER X 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 facts of this case are not distinguishable from the Commission's previous controlling authority. 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 LENDER X 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 LENDER X 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 protests 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 Vice 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.