

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 2001-08-21-012 / NOT PRECEDENTIAL
ID: P0100039
DATE: 08-21-01
DISPOSITION: DENIED
TAX TYPE: SALES / WITHHOLDING
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

NOW on this 16th day of July, 2001, the above styled and numbered cause comes on for consideration pursuant to assignment regularly made by the Oklahoma Tax Commission to AN Administrative Law Judge. A prehearing conference was scheduled in this matter and notice was sent to Protestant at her last known address. Protestant did not appear for the prehearing conference, scheduled for March 27, 2001. Thereafter, notice was served upon the parties that this cause would be closed and the matter submitted for decision upon the filing of a verified response to the protest by the Division. Protestant did not file a response to this notice. Accordingly, this matter was submitted for an examination into the merits of the protest pursuant to 68 O.S. § 221(D).

Upon review of the file and records in this matter, including the protest filed by Protestant and the verified response to the protest filed by the Account Maintenance Division, the undersigned Administrative Law Judge makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. A business registration form signed by PARTNER A and PARTNER B was filed October 28, 1997, with the Tax Commission for THE BUSINESS located at 99999 ANY STREET, ANONYMOUS, Oklahoma. The form indicates that the business is owned as a general partnership and the partners listed on the form are PARTNER A and PARTNER B. PARTNER B and PARTNER A are listed on the form as responsible for remitting Oklahoma income tax withheld from employees.
2. Protestant had check signing authority and filed sales tax reports on behalf of the business.
3. Actual sales tax reports signed by Protestant were filed for March, 1998, and April, 1998, without remittance.

4. By letters dated October 13, 2000, the Division caused to be issued proposed sales and withholding tax assessments against Protestant, PARTNER A, as a partner in THE PARTNERSHIP and as an individual.

5. The assessments indicate that sales tax was assessed in the total amount of \$5,558.32 for the periods of March and April, 1998, December, 1998, through April, 1999, and June, 1999, through August, 2000, and that withholding tax was assessed in the total amount of \$2,665.87 for the periods January, 1998, through September, 1998, and January 1999, through June, 2000.¹

6. The business was sold to a third party in June, 1999. The Division is no longer seeking to establish liability against Protestant for the estimated amount of sales tax for the period July, 1999, through August, 2000, and the estimated amount of withholding tax for the period July, 1999, through June, 2000.

7. For sales tax the total amount in controversy is \$2,152.54, inclusive of tax in the amount of \$1,487.61, interest accrued through March 15, 2001, in the amount of \$499.26 and penalty in the amount of \$165.67.

8. For withholding tax, the total amount in controversy is \$1,597.65, inclusive of tax in the amount of \$1,000.00, interest accrued through March 15, 2001, in the amount of \$347.65 and penalty in the amount of \$250.00.

9. Protestant timely protested the proposed assessments stating that "I was not the owner, it was not a partnership, I should not be responsible for this debt" and that the estimated amount assessed for May, 1999, through August, 2000, is not correct because "the BUSINESS had been out of business or sold."

10. Protestant provided a portion of a Statement of Account from the ANONYMOUS Bank of ANONYMOUS, OK for the BUSINESS, statement period November 28 through December 31, 1997. The statement designates PARTNER B as owner. Additionally, Protestant provided a copy of a 1997 Federal Form 1040 for PARTNER B, with a Schedule C and a Depreciation and Amortization Schedule. The Schedule C lists PARTNER B, as owner of the BUSINESS, business address XXX ANY ROAD, ANONYMOUS, Oklahoma.

¹ The periods of March and April, 1998, are based on actual sales tax reports; the remaining periods, both sales and withholding tax, are based on estimated amounts.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and the subject matter of this action. 68 O.S. 1991, § 207.

2. Sales tax is levied upon the gross receipts or gross proceeds of each sale of tangible personal property. 68 O.S. § 1354(1)(A).

3. Sales of tanning services are also subject to sales tax. 68 O.S. § 1354(1)(K) and *Oklahoma Administrative Code 710:65-19-313*.

4. Section 1361 of Title 68 sets forth the duties of a vendor to collect sales tax and the penalties for the vendor's failure to collect or remit sales tax. The relevant provisions of 68 O.S. Supp. 1998, § 1361 provide:

(A) Except as otherwise provided by subsection C of this section, the tax levied by Section 1350 et seq. of this title shall be paid by the consumer or user to the vendor as trustee for and on account of this state. Except as otherwise provided by subsection C of this section, each and every vendor in this state shall collect from the consumer or user the full amount of the tax levied by Section 1350 et seq. of this title, or an amount equal as nearly as possible or practicable to the average equivalent thereof. Every person required to collect any tax imposed by Section 1350 et seq. of this title, and in the case of a corporation, each principal officer thereof, shall be personally liable for the tax. .

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* * *

(F) Any sum or sums collected or accrued or required to be collected or accrued in Section 1350 et seq. of this title shall be deemed to be held in trust for the State of Oklahoma, and, as trustee, the collecting vendor or holder of a direct payment permit as provided for in Section 1364.1 of Title 68 of the Oklahoma Statutes shall have a fiduciary duty to the State of Oklahoma in regards to such sums and shall be subject to the trust laws of this state. . . .

5. Section 1352(21)(a) of Title 68 of the Oklahoma Statutes defines a "vendor" to mean "a person making sales of tangible personal property or services in this state, the gross receipts or gross proceeds from which are taxed by the Oklahoma Sales Tax Code." "Person" is defined to include a "partnership". 68 O.S. § 1352(12). A partner is not included in the definition of person.

6. A partnership, as a vendor, has a fiduciary duty to the State of Oklahoma in regard to any sales tax collected or required to be collected under the Oklahoma Sales Tax Code. 68 O.S. § 1361(F). These funds are held in trust for the State of Oklahoma. *Id.* As such, the sales tax collected or required to be collected under the Oklahoma Sales Tax Code is an obligation of the partnership and the partners of the partnership are jointly and severally liable for these funds. 54 O.S. Supp. 1998, § 1-306.

7. Section 2385.2 of Title 68 sets forth the requirement that employers who make payments of wages must withhold a set amount. Section 2385.3 of Title 68 requires that the amount withheld must be paid to the Tax Commission.

8. Personal and individual liability for withholding taxes is found at Section 2385.3(d) wherein it provides in pertinent part:

Every employer who fails to withhold or pay to the Tax Commission any sums herein required to be withheld or paid shall be personally and individually liable therefor to the State of Oklahoma. The term "employer" . . . includes an officer or employee of a corporation, manager or member of a limited liability company or a member or employee of a partnership, who as an officer or employee of a corporation, or manager or member of a limited liability company or member or employee of a partnership is under a duty to act for a corporation, limited liability company or partnership to withhold and remit withholding taxes

9. Pursuant to *Oklahoma Administrative Code 710:1-5-47*, the burden of proof in all proceedings, unless otherwise provided by law, is on the taxpayer to show in what respect the action or proposed action of the Tax Commission is incorrect.

10. Protestant has failed to provide evidence to substantiate for the periods at issue that she should not be held personally liable for sales and withholding tax debts of THE PARTNERSHIP'S BUSINESS.

11. The protest 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 PARTNER A, as an individual and partner in THE PARTNERSHIP'S BUSINESS 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.