JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2001-08-21-013 / NOT PRECEDENTIAL**
ID: **P000236A**
DATE: **08-21-01**
DISPOSITION: **SUSTAINED**
TAX TYPE: **SALES / WITHHOLDING**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. CORPORATION is in the carry out food service business. Its principal location of business is in ANYTOWN, Oklahoma.

2. The Corporation was formed by Protestant's brother in 1995. PROTESTANT'S BROTHER and is the owner and sole shareholder of the Corporation.

3. At the time of incorporating the business, PROTESTANT'S BROTHER asked Protestant and MR. Z to be officers of the Corporation and signatories on the corporate account because of a non-competition clause PROTESTANT'S BROTHER had with his former employer and because the lawyer who drew up the corporate papers advised him he needed at least two officers to form the Corporation.

4. Protestant testified that she agreed to be an officer of the Corporation as an accommodation to her brother. She stated that she never owned any stock of the Corporation, never attended any corporate meetings or made any corporate decisions and never had the corporate checkbook or access to it. She further stated that she never took an active role in the business and except for the corporate resolutions authorizing the opening of the corporate checking account and change of authorized signatories on the account, she never executed any documents on behalf of the Corporation. She further testified that she never received any profits or other compensation from the business.

5. Protestant verbally resigned as President of the Corporation in September, 1997. PROTESTANT'S BROTHER testified that he accepted Protestant's resignation and agreed to remove her name from the company, but admits that he failed to do so until June, 2000.

6. The commercial checking account of the Corporation was opened on July 12, 1995. The Deposit Agreement requires two (2) signatures for the execution of all checks on the account. Protestant and MR Z are listed as the signatories on the account. Protestant admits that she signed the Deposit Agreement and Corporate Resolution accompanying the agreement. MR Z executed the documents on behalf of the Corporation. PROTESTANT'S BROTHER testified that he had a facsimile stamp of Protestant's signature made for purposes of executing checks on the account.

7. A change to the Deposit Agreement was made on October 1, 1996. MR Z was deleted as an authorized signatory on the account and PROTESTANT'S BROTHER was added. The Deposit Agreement also shows that only one signature is required for the execution of checks. Protestant admits that she signed the Deposit Agreement and Corporate Resolution accompanying the Agreement. She also admits that she executed the Deposit Agreement on behalf of the Corporation. PROTESTANT'S BROTHER executed the Corporate Resolution on behalf of the Corporation. PROTESTANT'S BROTHER testified that he kept Protestant as a signatory on the account in case something happened to him. He stated that he continued to use Protestant's facsimile stamp signature for the execution of checks because he thought two (2) signatures were required for the execution of checks.

8. Protestant and MR. Z were reported to be the officers of the Corporation from 1995 to June 30, 2000, on the Corporation's annual franchise tax returns. The franchise tax returns were prepared by PROTESTANT'S BROTHER'S accountant. Except for the initial franchise tax return which was signed by MR. Z, PROTESTANT'S BROTHER signed the returns.

9. Throughout the relevant time period, Protestant resided in BIGCITY. She was employed full-time in a retail business in BIGCITY.

10. By letter dated October 13, 2000, the Division caused to be issued a proposed sales tax assessment of $35,024.07 against Protestant, as President of the Corporation and as an individual, for the periods of March, 1998 through January, 1999; July, 1999 through August, 1999; November, 1999; March, 2000 through April, 2000; and August, 2000. Said assessment consists of reported, but unremitted sales tax, interest accrued through January 11, 2001, penalty and charges for returned checks.

11. By letter dated October 13, 2000, the Division caused to be issued a proposed withholding tax assessment of $2,241.72 against Protestant, as President of the Corporation and as an individual, for the periods of April, 2000 and August, 2000. Said assessment consists of estimated withholding tax for the period of April, 2000, reported, but unremitted withholding tax for the period of August, 2000, interest accrued through January 11, 2001, penalty and charges for a returned check.

12. Protestant timely protested the proposed assessments. Protestant testified that she first learned of the problem and the fact that she had not been removed as an officer of the Corporation when she received the assessments.

13. Subsequent to the hearing, the Division revised the assessments to reflect the removal of the assessments of sales and withholding taxes for the period of August, 2000. The amount at issue under the sales tax assessment is $12,064.95, inclusive of interest accrued through April 30, 2001, penalty and service charges for returned checks.

ISSUES AND CONTENTIONS

Two issues are presented for decision. The first issue is whether Protestant's verbal resignation is legally sufficient to absolve her from liability for the Corporation's debts. The second is whether Protestant sustained her burden of proving that she was not a "principal officer" of the Corporation.

Protestant contends that she is not liable for the sales and withholding tax liabilities of the Corporation. In support of this contention, Protestant argues that she resigned from the Corporation prior to the periods for which the Corporation incurred the sales and withholding tax liabilities. In the alternative, Protestant argues that she did not take any active role in the business of the Corporation and therefore, is not a principal officer of the Corporation.

The Division contends that Protestant failed to sustain her burden of proving that she is not a responsible person for the sales and withholding tax liabilities of the Corporation. In support of this contention, the Division argues that there is no documentation witnessing her resignation from the Corporation, whereas there is documentation showing she was an officer of the Corporation throughout the relevant period. The Division further argues that the evidence proves Protestant played an active role in the business of the Corporation.

APPLICABLE LAW

The relevant provisions of the Oklahoma Statutes are Section 1361(A)[1] and Section 2385.3(d)[2] of Title 68. In furtherance of these provisions, Section 253 of the Uniform Tax Procedure Code, 68 O.S. 1991, § 201 et seq., provides:

> When the Oklahoma Tax Commission files a proposed assessment against corporations for unpaid sales taxes, withheld income taxes . . ., the Commission shall file such proposed assessments against the principal officers of such corporations personally liable for the tax. The principal officers of any corporation shall be liable for the payment of any tax as prescribed by this section if such officers were officers of the corporation during the period of time for which the assessment was made.

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[1] This subsection provides in pertinent part:

> Every person required to collect any tax imposed by this article, and in the case of a corporation, each principal officer thereof, shall be personally liable for said tax.

[2] This section 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, or a member or employee of a partnership, who as such officer or employee ... is under a duty to act for a corporation or partnership to withhold and remit withholding taxes....

> The liability of a principal officer for sales tax, withheld income 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, as amended, or regulations promulgated pursuant to such section.

The courts have developed a two prong test for imposition of the penalty under the Internal Revenue Code. ***In Re Bernard***, 130 B.R. 740, 745 (Bkrtcy.W.D.La. 1991). See, ***Cooke v. United States***, 796 F. Supp. 1298 (N.D. Cal. 1992) and ***Feist v. United States***, 607 F.2d 954 (Ct. Cl. 1979). The first prong requires a finding that the person assessed is a "responsible person". The second prong requires the finding of a willful failure to collect, or truthfully account for, or pay over the tax. The burden of proof on each issue is borne by the taxpayer. ***Id***.

The determination of liability under Section 253 is limited to the standards for determining who is a "responsible person". Oklahoma Tax Commission Order No. 96-12-17-037 (Prec.).

The courts have also developed standards to be utilized in determining whether each prong of the test has been satisfied. The factors considered by the courts under the first prong include the individual's status as an officer or director, the individual's duties as outlined in the corporate bylaws, the individual's ownership of shares or possession of an entrepreneurial stake in the company, the individual's role in the day-to-day management of the company, the individual's ability to hire and fire employees, the individual's authority to sign checks of the corporation and the individual's control over the financial affairs of the corporation. See, ***Rizzuto v. United States***, 889 F.Supp. 698 (S.D.N.Y. 1995); ***United States v. Carrigan***, 31 F.2d 130 (C.A. 3rd 1994); ***Hochstein v. United States***, 900 F.2d 543 (C.A. 2nd 1990).

Whether an officer of a corporation is a "principal officer" or an "employer" for purposes of imposing personal liability under Sections 1361(A) and 2385.3(d), respectively, is determined on a case by case analysis of the facts and circumstances of each particular case.

In ***White v. U.S.***, 372 F.2d 513, 178 Ct. Cl. 765 (1967), the court held that the responsible person is frequently defined as the person who has the final word as to what bills or creditors should or should not be paid and when. In ***Koegel v. U.S.***, 437 F.Supp. 176 (D.C. N.Y. 1977), the court held that the responsible person is the one who is so connected with the business as to be in the position to exercise full authority over the financial affairs, and therefore to be ultimately responsible for the decision as to the payment of the tax. In ***Cellura v. U.S.***, 245 F.Supp. 379 (D.C. Ohio 1965), the court held that a person who has or shares the final word as to what bills should or should not be paid is the responsible person.

The mere holding of office, by itself, does not render one responsible for the collection and payment of withholding taxes. ***Bauer v. United States***, 543 F.2d 142, 149 (Ct.Cl. 1976). More than one individual may be found to be a "responsible person" for a particular tax period and liability may be imposed on both. ***Turner v. United States***, 423 F.2d 448, 449 (9th Cir. 1970). Responsibility is a matter of status, duty and authority, not knowledge. ***Mazo v. United States***, 591 F.2d 1151, 1156 (5th Cir. 1979). The control necessary to support liability under federal law is the ability to direct or control the payment of corporate funds. ***Wilson v. United States***, 250 F.2d 312, 316 (9th Cir. 1958).

A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect, and in what respect. Rule 710:1-5-47 of the *Oklahoma Administrative Code*. See, ***Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission***, 768 P.2d 359 (Okl. 1988). The standard burden of proof in administrative proceedings is "preponderance of evidence." Black's Law Dictionary, 1064 (5th ed. 1979). See, *Oklahoma Tax Commission Order No.* 91-10-17-061. "Preponderance of evidence" means "[E]vidence 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." Id. It is also defined to mean "evidence which is more credible and convincing to the mind ... [T]hat which best accords with reason and probability." Id.

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. An officer of a corporation shall hold his or her office for such term as are prescribed by the bylaws or determined by the board of directors or other governing body and until his or her successor is elected and qualified or until his or her earlier resignation or removal. 18 O.S. 1991, § 1028(B). Any officer may resign at any time upon written notice to the corporation. Id.

3. Here, Protestant admits that she did not give notice in writing of her resignation to the Corporation. Further, the record does not show she was removed as an officer of the Corporation or that a successor to her position was elected and qualified. Accordingly, Protestant's verbal resignation is not legally sufficient to absolve her of the sales and withholding tax liabilities of the Corporation.

4. 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 assessed against the corporation. See, 68 O.S. 1991, § 1361(A) and § 2385.3(d).

5. Personal liability of an officer or employee of a corporation is conditional upon the officer or employee's authority over the financial affairs of the corporation and ability to direct or control the payment of corporate funds. ***Koegel***, supra, ***Wilson***, supra.

6. Each and every officer or employee of a corporation is not a "principal officer" or "employer" of the corporation for purposes of personal liability for the sales and withholding taxes assessed against the corporation. See, 68 O.S. 1991, § 253.

7. In this matter, Protestant proved by a preponderance of evidence that she was not a "principal officer" or an "employer" of the Corporation during the assessment period. The record establishes that Protestant merely permitted her brother to utilized her name to incorporate the business as an accommodation to him. She did not assume any role in the business or the day-to-day operations. She did not own any stock or receive any profits or other remuneration. Except for the two Deposit Agreements and the Corporate Resolutions accompanying those Agreements, she did not execute any documents, checks or reports on behalf of the Corporation. Any conclusion to be drawn from Protestant's apparent check signing authority is negated by the evidence regarding Protestant's status, duty and authority concerning the Corporation, or essentially, the lack thereof.

8. Protestant's protest to the proposed sales and withholding tax assessments should be sustained.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is DETERMINED that the protest be sustained.

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.