JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2002-04-17-004 / NOT PRECEDENTIAL**
ID: **P0100050**
DATE: **04-17-02**
DISPOSITION: **SUSTAINED**
TAX TYPE: **SALES / WITHHOLDING / TOURISM**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. THE COMPANY was organized as a limited liability company under the laws of the State of Oklahoma on November 12, 1999. The members of the Company as reported in the Article of Organization were Protestant and X. Each member owned fifty percent (50%) of the outstanding units of the Company. Protestant was designated as the Company's registered agent and " 'Tax Matters Partner' (as defined in Section 6231 of the Code), and was authorized and required to represent the Company, at the Company's expense, in connection with all examinations of the Company's affairs by tax authorities, including resulting administrative and judicial proceedings."

2. At all times relevant, the Company operated a bar and restaurant at 9999 ANY STREET in ANONYMOUS, Oklahoma and had secured in its name sales and mixed beverage tax permits for purposes of its operations.

3. The Business Registration form filed on behalf of the Company on January 11, 2000, lists both Protestant and X as managing officers. X executed the Registration form and is listed as the officer responsible for remitting taxes on line 9.

4. Protestant is in the businesses of real estate appraisal and real estate rental. He owned the building that the restaurant/bar occupied. Protestant testified that X was in the food service business, both as a supplier and as a restauranteur.

5. Protestant testified that he and X sought assistance from Protestant's counsel in setting up the Company. According to Protestant, for purposes of establishing and operating the business, he was to provide the building and X was to run the business. He stated that he did not have any involvement in the day to day operations of the business. He further stated that he was not involved in purchasing supplies for the business, securing utilities, paying debts or hiring, firing or paying employees.

6. Admitted into evidence in this cause were the bank statements, deposit slips and checks drawn on the Company's account for the period of December, 1999 through November, 2000. Of the numerous checks drawn on the account, Protestant's signature appears on only two (2) checks written in March, 2000.

7. The Company's withholding tax report for the first quarter of 2000, and the sales and tourism tax reports for the periods of February and March, 2000, were prepared and signed by X. The Division did not offer into evidence any sales, withholding or tourism tax reports of the Company that were executed by Protestant. The reports which were offered and admitted into evidence showed an address change request for the Company to a P. O. Box in LITTLE TOWN, Oklahoma. According to Protestant, X's mother resided in LITTLE TOWN, Oklahoma and X lived with his mother.

8. Protestant testified that it has come to his attention since the failure of the business that X was hiding information concerning the financial situation of the Company. He stated that X did not disclose to him any financial concerns or matters during the time the business was operating.

9. The amounts in controversy, inclusive of interest accrued through January 15, 2001 for the sales tax audit amount and October 19, 2001 for the reported and estimated amounts are as follows:

SALES TAX
(Audited amount)
(January 10, 2000 through June 30, 2000)

Tax:	$ 13,819.15
Interest:	1,354.26
Penalty:	1,381.93
Total:	$ 16,555.34

SALES TAX
(Reported Amounts)
(February, 2000 and March, 2000)

Tax:	$ 6,220.36
Interest:	1,456.43
Penalty:	622.04
Total:	$ 8,298.83

WITHHOLDING TAX
(Reported and estimated amounts)
(January 1, 2000 through June 30, 2000)

Tax:	$ 1,052.99
Interest:	218.30
Penalty:	263.24
Total:	$ 1,534.53

TOURISM TAX
(Reported amount)
(February, 2000 and March, 2000)

Tax:	$ 75.85
Interest:	17.78
Penalty:	7.58
Total:	$ 101.21

ISSUES AND CONTENTIONS

The issue presented for decision is whether Protestant may be held personally and individually liable for the amounts in controversy.

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. Sales and withholding taxes are trust fund taxes. See, 68 O.S. 1991, §§ 1361(F) and 2385.3(D). Personal liability for the sales and withholding taxes of a corporation, limited liability company or a partnership may be imposed upon the responsible person or persons. 68 O.S. 1991, §§ 1361(A) and 2385.3(D). Tourism taxes are not trust fund taxes and personal liability for the tax can not be imposed on the officers of a corporation, or the managers or members of a limited liability company. See, 68 O.S. 1991, § 50010 et seq.

3. The Oklahoma Sales Tax Code, 68 O.S. 1991, § 1350 et seq., provides that in the case of a limited liability company, "all managers and members under a duty to collect and remit taxes for the limited liability company shall be liable for the tax." 68 O.S. 1991, § 1361(A). Section 1361(A) further provides that "[i]f no managers or members have been specified to be under the duty of withholding and remitting taxes, then all managers and members shall be liable for the tax." Id.

4. The Oklahoma Withholding Tax Code, 68 O.S. 1991, § 2385.1 et seq., provides that "[e]very 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. 68 O.S. 1991, § 2385.3(D). Section 2385.3(D) further provides in pertinent part that "the term 'employer'. . . includes [a] . . ., manager or member of a limited liability company . . ., who as [a] . . ., manager or member of a limited liability company . . . is under a duty to act for a . . ., limited liability company . . . to withhold and remit withholding taxes . . . ." Id.

5. The Uniform Tax Procedure Code, 68 O.S. 1991, § 201 et seq., provides that "[w]hen the Oklahoma Tax Commission files a proposed assessment against corporations or limited liability companies for unpaid sales taxes, withheld income taxes . . ., the Commission shall file such proposed assessments against the principal officers of the corporations or the managers or members personally liable for the tax." 68 O.S. 1991, § 253. Section 253 further provides that:

> Managers or members of any limited liability company shall be liable for the payment of any tax as prescribed by this section if the managers or members were specified as responsible for withholding or collection and remittance of taxes during the period of time for which the assessment was made. If no managers or members were specified to be responsible for the duty of withholding and remittance of taxes during the period of time for which the assessment was made, then all managers and members shall be liable.

6. "[I]n the case of a limited liability company, Section 253 looks only to the manager or member specified as responsible (or in the case no manager or member is specified all managers or members) and does not require a determination of the responsible person in accordance with the standards of determining liability for payment of federal withholding tax because that standard is limited to determining liability of a principal officer of a corporation." Oklahoma Tax Commission Order No. 2001-07-10-027.

7. Here, X was designated as the person responsible for taxes on the Business Registration form of the Company and therefore, is the member of the Company who is liable for the sales and withholding taxes of the Company. Since Protestant was not listed as a person responsible for the taxes of the Company, Protestant can not be held personally liable for the taxes.

8. Protestant's protest to the proposed sales, withholding and tourism 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 of Protestant 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.