

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 2003-09-23-09 / NOT PRECEDENTIAL
ID: P0200064A / P0200064B / P0200066A / P0200066B
DATE: 09-23-03
DISPOSITION: DENIED
TAX TYPE: SALES / WITHHOLDING
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. ANONYMOUS CORP and ANONYMOUS CORP d/b/a COMPANY B were located in ANYTOWN, Oklahoma and operated under federal identification number 99-9999999 and sales tax permit numbers 888888 and 777777, respectively, during the periods at issue.

2. Protestants, OFFICER A and OFFICER B, were listed as President and Vice-President of the Corporation, respectively, on the business registration forms filed with the Tax Commission for these business and the franchise tax returns filed by the Corporation for the periods at issues.

3. The business registration forms, franchise tax returns and the remittances for the fees and/or taxes due which were paid by checks drawn on the account of the Corporation were executed by OFFICER A.

4. OFFICER A listed himself as the officer or employee responsible for remitting Oklahoma Income Tax withheld from employees on the business registration forms of the businesses.

5. The sales and withholding tax reports filed for the periods that are listed as "actual" on the Division's proposed assessments of sales and withholding taxes against the Protestants, and the checks in remittance or partial remittance of these taxes were executed by OFFICER A.

6. On December 8, 2000, the Division mailed its proposed assessments of sales and withholding taxes against Protestants.

7. Protestants timely protested the proposed assessments.

8. ANONYMOUS CORP filed Chapter 11 bankruptcy on February 2, 1996 which was converted to Chapter 7 bankruptcy on August 6, 1997.

9. Protestants, OFFICER A and OFFICER B also filed for bankruptcy protection in 1996 which case was subsequently consolidated with the bankruptcy filing of ANONYMOUS CORP.

10. THE TRUSTEE was appointed trustee of the consolidated case by the bankruptcy court on August 6, 1997, and was authorized by Orders of the court issued October 9, 1997 and January 20, 1998, to liquidate the assets of the debtors.

11. The Trustee's Closing Report and Application for Final Decree and Trustee's Discharge was filed in the consolidated case on May 2, 2000.

12. The Tax Commission received a total of \$1,200.97 from the bankruptcy estate, consisting of \$184.77 for employer withholding taxes for ANONYMOUS CORP for the period of April, 1998 and \$1,016.20 for the priority tax claim of the Tax Commission.

13. The Division by letters dated February 13, 2003, notified Protestants of an adjustment to the proposed assessments which adjustment excluded any taxes assessed for periods subsequent to July, 1997.

14. The amount in controversy is \$64,014.37, consisting of the following:

ANONYMOUS CORP

(Sales tax for the actual period of 1/96-3/96
and the estimated period of 4/96-7/97)

Tax:	\$15,397.71
Interest: (to 5/31/03)	15,123.27
Penalty:	<u>1,539.71</u>
Total:	\$32,060.69

ANONYMOUS CORP

(Withholding tax for the actual period of
8/93; 1/94; 7/94; 6/95; 8/95; 10/95-3/96
and the estimated period of 4/96-7/97)

Tax:	\$ 4,591.31
Interest: (to 5/31/03)	4,460.52
Penalty:	<u>1,122.07</u>
Total:	\$10,173.90

ANONYMOUS CORP dba COMPANY B

(Sales tax for the actual period of
8/95-3/96 and the estimated period of
3/94; 7/94; 1/95; 4/96-7/97)

Tax:	\$10,181.27
Interest: (to 5/31/03)	10,580.36
Penalty:	<u>1,018.15</u>
Total:	\$21,779.78

15. Protestants' bankruptcy filings were precipitated by an action brought against Protestants by their Bank to collect interest on their loan. Protestants counter sued requesting cancellation of the loan due to the excessive rate of interest and damages. The X COUNTY District Court canceled the note. Thereafter, the Bank sought reconsideration of the decision which was reversed and payment in full was ordered. Protestants filed bankruptcy at this point to stay the action of the District Court and to allow time to pursue damages in the Bankruptcy Court. The Bankruptcy Court denied Protestants' claim for damages to which Protestants perfected an appeal to the U.S. District Court for the Eastern District of Oklahoma. The U.S. District Court reversed the Bankruptcy Court and remanded the case back for a determination of the level of damages. Protestants allege the trustee failed or refused to pursue the damage claim to the detriment of Protestants' creditors and Protestants.

16. OFFICER B died November 1, 2000.

17. Protestant, OFFICER B, did not sign any withholding tax returns, nor does her signature appear on any company checks.

18. The Division admits that Protestant, OFFICER B, should not be held liable for the withholding taxes of ANONYMOUS CORP.

ISSUE

Two issues are presented for decision. The first issue is whether Protestants should be absolved from the pre-petition taxes (those accrued prior to February, 1996), penalty and/or interest, because the Bankruptcy Court determined and ordered to be paid what it considered to be the amount owed on the pre-petition taxes. The second issue is whether Protestants should be absolved from liability for the post-petition taxes, those accrued during the period of February, 1996 through June, 1997, because the taxes were an administrative expense of the bankruptcy estate entitled to first priority and the trustee failed to pay those taxes notwithstanding the bankruptcy estate would have had sufficient assets to pay those taxes (an assumption) if the trustee had pursued Protestants' damage claim.

With respect to the first issue, Protestants contend that some of the pre-petition taxes claimed by the Division are not unsecured priority claims under the Bankruptcy Code, therefore, as determined by the Bankruptcy Court, they are not liable for the remainder of the pre-petition taxes, or the post-petition penalty and interest on the pre-petition taxes.

With respect to the second issue, Protestants contend that the failure of the trustee of the bankruptcy estate to pay the post-petition taxes did not relieve the trustee or the court from the responsibility to pay the taxes, nor does such failure automatically transfer such responsibility back to Protestants. In support of this contention, Protestants argue that the post-petition taxes were an administrative expense of the bankruptcy estate, jurisdiction of which was assumed by the Bankruptcy Court and the obligation to pay was the responsibility of the trustee when the case was transferred from Chapter 11 to Chapter 7.

The Division contends that Protestants should not be absolved from their respective liability for the sales and withholding taxes of the Corporation to which they were the principal officers and to which Protestant, OFFICER A, was the employer during the periods at issue. In support of this contention, the Division argues that as debtors in possession under Chapter 11 of the Bankruptcy Code, Protestants were responsible for and were required to remain current with the filing and payment of all post-petition taxes.

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. 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.).

5. A "trust fund tax" is "a tax required to be collected or withheld and for which the debtor is liable in whatever capacity." 11 U.S.C. § 507(a)(7)(C). "Trust fund taxes" are nondischargeable in bankruptcy regardless of the age of the tax. See, § 506(a)(7)(C) and § 523(a)(1)(A). Oklahoma sales and withholding taxes are "trust fund taxes." See, 68 O.S. § 1361(A) and (F) and § 2385.3(D). See also, *In re Kelley*, 171 B.R. 113 (N.D. Okla. 1994).

6. Here, sales and withholding taxes were assessed against Protestants. Sales and withholding taxes are "trust fund taxes" which are nondischargeable in bankruptcy regardless of the age of the taxes. Accordingly, Protestants remain liable for the sales and withholding taxes assessed against them, respectively.

7. Expenses of the bankruptcy estate and claims against the debtor are prioritized under the Bankruptcy Code. 11 U.S.C. § 507. Administrative expenses of the estate which include taxes accrued during the pendency of the bankruptcy are given first priority. § 507(a)(1). Unsecured pre-petition state and local taxes are given eighth priority status. § 507(a)(8)(A)(i).

As an officer of the bankruptcy court, the debtor in possession is fully subject to taxes and interest incurred during his operation of the business in the Chapter 11 proceedings. **Nicholas v. U.S.**, 384 U.S. 678, 86 S.Ct. 1674, 16 L.Ed.2d 853 (1966). Where a Chapter 11 case is converted to a Chapter 7 case, the post-petition pre-conversion administrative claims of the Chapter 11 case are subordinated to the Chapter 7 administrative claims. 11 U.S.C. §§ 503(b), 507(a) and 726. See, **In re Ehrman**, 184 B.R. 362 (D. Ariz. 1995). Post-petition pre-conversion tax claims incurred during Chapter 11 proceedings are junior to claims for expenses incurred in the post-conversion bankruptcy proceedings. **Nicholas**, *supra* at 86 S.C. 1674, 1682. See, **In re LPM Corp.**, 300 F.3d 1134 (CATH. 2002).

A bankruptcy debtor has appellate standing to challenge a bankruptcy order if the debtor qualifies as a "person aggrieved" by the order. **In re Kehoe**, 221 B.R. 285 (1998). To qualify as a "person aggrieved", the debtor must demonstrate that he was "directly and adversely affected pecuniarily" by the court's order; that is, the order diminished debtor's property, increased his burden, or detrimentally affected his rights. *Id.* at 287. It is incumbent upon a Chapter 7 debtor seeking to appeal a bankruptcy court order to show that the order would directly and adversely affect the possibility of residual assets being available to the debtor. *Id.* at 288.

8. Notwithstanding whether the post-petition pre-conversion sales and withholding taxes were administrative expenses of the bankruptcy estate, the taxes are "trust fund taxes" and they are nondischargeable. See, 11 U.S.C. § 506(a)(7)(C) and § 523(a)(1)(A). Accordingly, Protestants remain liable for the sales and withholding taxes assessed against them, respectively.

9. The protest of Protestant, OFFICER A, to the sales and withholding taxes assessment issued against him as an officer of ANONYMOUS CORP and ANONYMOUS CORP d/b/a COMPANY B, and as an individual, should be denied. The protest of Protestant, OFFICER B, to the sales tax assessment issued against her as an officer of ANONYMOUS CORP and ANONYMOUS CORP d/b/a COMPANY B, and as an individual, should be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is DETERMINED that the protest of OFFICER A be denied and that the protest of OFFICER B, insofar as it relates to the sales tax assessment issued against her, be denied. It is further DETERMINED that the respective amounts in controversy, inclusive of any additional accrued and accruing interest, be fixed as the relative deficiency due and owing by each of the Protestants.

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.