

JURISDICTION: OKLAHOMA TAX COMMISSION  
CITE: 2004-05-27-04  
ID: P-03-123C, P-03-125C, P-03-127C, P-03-129C, P-03-141  
DATE: MAY 27, 2004  
DISPOSITION: SUSTAINED  
TAX TYPE: MOTOR FUEL, OFFICER LIABILITY  
APPEAL: NONE TAKEN

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

An open hearing was held in this matter on February 23, 2004, at approximately 9:30 a.m., and upon conclusion of the hearing, the record in this matter was closed. This case was submitted for decision on February 23, 2004.<sup>1</sup>

#### FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence and the position letters, briefs and supplemental arguments of the parties, the undersigned finds:

1. FUEL COMPANY. was licensed as a motor fuel eligible purchaser.<sup>2</sup> The President of FUEL COMPANY is PRESIDENT. PRESIDENT owns approximately eight to ten entities, including PARENT COMPANY and FUEL COMPANY.
2. Protestant was employed by PARENT COMPANY, as its Chief Financial Officer (“CFO”) and Treasurer.<sup>3</sup>
3. On March 11, 2002, the Protestant signed, hand-delivered, and filed FUEL COMPANY’S 2002 Oklahoma Franchise Tax Return. As of December 31, 2001, the Protestant was the Treasurer of FUEL COMPANY.<sup>4</sup>
4. The Protestant’s duties for FUEL COMPANY were limited to determining the status of FUEL COMPANY’S financial affairs and submitting reports to PRESIDENT.<sup>5</sup> The Protestant did not own stock in FUEL COMPANY, nor was he named to FUEL COMPANY’S Board of Directors. The Protestant did not have the ability to hire and fire employees of FUEL COMPANY, manage the day-to-day operations of FUEL COMPANY, and did not have check writing authority on FUEL COMPANY’S checking account with ABC BANK.<sup>6</sup> The Protestant did not have the authority to disburse funds and payments to FUEL COMPANY’S motor fuel suppliers.
5. As an eligible purchaser, FUEL COMPANY elected to defer the payment of motor fuel taxes to its suppliers by making an Electronic Funds Transfer (“EFT”) on the 25<sup>th</sup> of each month.<sup>7</sup>
6. FUEL COMPANY defaulted on an EFT payment to SUPPLIER 1 for January 2003 motor fuel tax due January 25, 2003.

7. On April 11, 2003, the Division issued a proposed assessment for additional motor fuel tax against Protestant in the following amounts:

	<b>Gasoline</b>	<b>Diesel</b>
Tax	\$249,309.72	\$57,631.19
Interest	9,630.87	2,226.30
Penalty	<u>24,930.97</u>	<u>5,763.12</u>
Total \$	283,871.56	\$65,620.61 <sup>8</sup>

8. FUEL COMPANY defaulted on an EFT payment to SUPPLIER 2 for February 2003 motor fuel tax due February 25, 2003.

9. On April 11, 2003, the Division issued a proposed assessment for additional fuel tax against Protestant in the following amounts:

	<b>Gasoline</b>	<b>Diesel</b>
Tax	\$129,018.62	\$30,418.30
Interest	8,165.29	1,925.10
Penalty	<u>12,901.86</u>	<u>3,041.83</u>
Total	\$150,085.77	\$35,385.23 <sup>9</sup>

10. FUEL COMPANY defaulted on an EFT payment to SUPPLIER 2 for February 2003 motor fuel tax due February 25, 2003.

11. On May 15, 2003, the Division issued a proposed assessment for additional motor fuel tax against Protestant in the following amounts:

	<b>Gasoline</b>	<b>Diesel</b>
Tax	\$141,522.55	\$39,974.15
Interest	6,572.07	1,856.33
Penalty	<u>14,152.26</u>	<u>3,997.42</u>
Total	\$162,246.88	\$45,827.90 <sup>10</sup>

12. FUEL COMPANY defaulted on an EFT payment to SUPPLIER 3 for February 2003 motor fuel tax due February 25, 2003.

13. On May 15, 2003, the Division issued a proposed assessment for additional motor fuel tax against Protestant in the following amounts:

	<b>Gasoline</b>	<b>Diesel</b>
Tax	\$37,514.01	\$8,463.67
Interest	1,742.09	393.04
Penalty	<u>3,751.40</u>	<u>846.37</u>
Total	\$43,007.50	\$9,703.08 <sup>11</sup>

14. FUEL COMPANY defaulted on an EFT payment to SUPPLIER 4, for the period from January 1, 2003, through February 28, 2003, due on January 25, 2003, February 25, 2003, and March 25, 2003, respectively.

15. On May 15, 2003, the Division issued a proposed assessment for additional motor fuel tax against Protestant in the following amounts:

	<b>Gasoline</b>
Tax	\$73,990.50
Interest	3,436.00
Penalty	<u>7,399.05</u>
Total	\$84,825.55 <sup>12</sup>

16. FUEL COMPANY defaulted on an EFT payment to SUPPLIER 5 for the period of March 2003, due March 25, 2003.

17. On July 15, 2003, the Division issued a proposed assessment for additional motor fuel tax against Protestant in the following amounts:

	<b>Gasoline</b>	<b>Diesel</b>
Tax	\$1,983.59	\$385.91
Interest	124.72	24.26
Penalty	<u>198.36</u>	<u>38.59</u>
Total	\$2,306.67	\$448.76 <sup>13</sup>

18. The Protestant timely protested each of the proposed assessments stating that he is not responsible for the motor fuel taxes.

19. All of the captioned protests filed were consolidated into one (1) proceeding for ease of administration.

20. The Protestant does not dispute that the tax is owed or the amount of the tax assessed.

#### ISSUES

One issue is presented for decision. Whether the Protestant sustained his burden of proving that he was not a principal officer of FUELCOMPANY during the audit period?

#### CONCLUSIONS OF LAW

1. The Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.<sup>14</sup>

2. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.<sup>15</sup> A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.<sup>16</sup>

3. A supplier of motor fuel shall pre-collect and remit motor fuel tax on behalf of and from the purchaser. The purchaser, after receiving written certification as an eligible purchaser from the Tax Commission, may elect to pay motor fuel tax by electronic funds transfer no later than the second preceding day (25<sup>th</sup> of the month) before the date remittance by the supplier is due to the Tax Commission (27<sup>th</sup> of the month).<sup>17</sup>

4. When the Tax Commission issues a proposed assessment for unpaid Motor Fuel Taxes, the Commission shall file assessments against the principal officers of the corporation as well. The principal officers of any corporation shall be liable for the payment of motor fuel tax if such officer held an officer position during the time period covered by the assessment. The liability of principal officers for motor fuel tax shall be determined in accordance with the standards used for determining officer liability for federal withholding tax.<sup>18</sup>

5. A two pronged test is used by courts to determine liability under the Internal Revenue Code (“IRC”).<sup>19</sup> 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.<sup>20</sup> The burden of proof on each issue is borne by the taxpayer.<sup>21</sup>

6. The determination of liability for Oklahoma tax is limited to the standards for determining who is a responsible person.<sup>22</sup>

7. The courts have developed standards to help determine whether an assessed individual is a “responsible person”. Factors to consider include the individual’s status as an officer or director, the individual’s duties as outlined in the corporation’s by-laws, 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.<sup>23</sup>

8. The mere holding of office, by itself does not render one responsible for the collection and payment of trust fund taxes.<sup>24</sup> More than one individual may be found to be a responsible person for a particular tax period, and liability may be imposed on both.<sup>25</sup> Responsibility is a matter of status, duty and authority, not knowledge.<sup>26</sup> The control necessary to support liability under federal law is the ability to direct and control the payment of corporate funds.<sup>27</sup>

The Protestant asserts that he was removed as Treasurer of FUEL COMPANY PRESIDENT as of November 2002, and that he submitted a written resignation to PRESIDENT on February 22, 2003, as to all entities owned by PRESIDENT.

The Division asserts that the Protestant was Treasurer of FUEL COMPANY, as of December 31, 2001, (which the Protestant admits), and that he continued to be Treasurer of FUEL COMPANY through the audit period.

No evidence was presented by the Protestant that PRESIDENT removed him as Treasurer of FUEL COMPANY or any of the other entities owned by PRESIDENT. There were no corporate meetings or minutes for any of the entities owned by PRESIDENT, including FUEL COMPANY. The Protestant could not verbally explain how any of his duties or responsibilities for FUEL COMPANY or PARENT COMPANY changed substantially from November 2002, until February 22, 2003, the time the Protestant says he resigned from all entities PRESIDENT owned. The Protestant's salary paid by PARENT COMPANY did not change and the Protestant kept reporting to PRESIDENT on the financial affairs of the companies, just as he had always done. Based on the above factors, the Protestant has failed to sustain his burden of proof that he was not the Treasurer of FUEL COMPANY during the assessment period.

The Division asserts that the Protestant was a principal officer and responsible person liable for FUEL COMPANY'S default on EFT payments of motor fuel taxes to its suppliers. The Protestant was the Treasurer of FUEL COMPANY through the audit period, but he was not a director, nor did he own any stock or an entrepreneurial stake in FUEL COMPANY. The Protestant's duties were limited to determining the status of FUEL COMPANY'S financial affairs and submitting reports to PRESIDENT. The Protestant did not have the ability to hire and fire employees of FUEL COMPANY, or manage the day-to-day operations of FUEL COMPANY. Most importantly, the Protestant did not have check writing authority on FUEL COMPANY'S checking account with the ABC BANK, so as to disburse funds and payments to FUEL COMPANY'S motor fuel suppliers. It is apparent that PRESIDENT retained complete control over all financial aspects of FUEL COMPANY.

Holding the Office of Treasurer by itself, does not make the Protestant responsible for the payment of motor fuel taxes. Responsibility is a matter of status, duty and authority, not knowledge

#### DISPOSITION

It is the ORDER OF THE OKLAHOMA TAX COMMISSION, based on the specific facts and circumstances of this case, 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.

---

<sup>1</sup>The Protestant waived his right to a confidential hearing under 68 O.S. § 205.

<sup>2</sup>68 O.S. § 500.23. After the suppliers in the captioned cases reported that FUEL COMPANY had defaulted on the EFT payments and that a bad debt credit was being taking for the defaulted EFT, a Notice to Show Cause Hearing (“NTSC”) was held. FUEL COMPANY could not pay the motor fuel taxes due and its status as an eligible purchaser was terminated pursuant to the NTSC hearing.

<sup>3</sup>Protestant is also a CPA.

<sup>4</sup>Division Exhibit 1. Also attached to the return is a check from the PARENT COMPANY. (A company owned by PRESIDENT) account at XYZ BANK in the amount of \$3,500.00. The check is signed by PRESIDENT with a facsimile stamp. *See also* Division Exhibit 9.

<sup>5</sup>The Protestant apparently occupied the position of Treasurer for the other entities owned by PRESIDENT.

<sup>6</sup>The Protestant was an authorized signatory on FUEL COMPANY’S checking account with FORMER BANK, but PRESIDENT closed the account and opened a new account for FUEL COMPANY with the ABC BANK on November 8, 2002.

<sup>7</sup>68 O.S. § 500.22.

<sup>8</sup>Division Exhibit 3. Case No. P-03-123C.

<sup>9</sup>Division Exhibit 4. Case No. P-03-125C.

<sup>10</sup>Division Exhibit 5. Case No. P-03-125C.

<sup>11</sup>Division Exhibit 6. Case No. P-03-127C.

<sup>12</sup>Division Exhibit 7. Case No. P-03-129C.

<sup>13</sup>Division Exhibit 8. Case No. P-03-141.

<sup>14</sup>68 O.S. § 207.

<sup>15</sup>The standard of review in an administrative proceeding is preponderance of the evidence. *Oklahoma Tax Commission Order No. 1999-04-08-003* (citing *Oklahoma Tax Commission Order No. 1991-10-17-061*). *Oklahoma Administrative Code (“OAC”) 710:1-5-77(b)* provides in pertinent part that “preponderance of the evidence” means the evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which as a whole shows that the fact sought to be proved is more probable than not.

<sup>16</sup>*OAC 710:1-5-47. Enterprise Management Consultants, Inc. v. Oklahoma Tax Comm’n*, 1988 OK 91, 768 P. 2d 359.

<sup>17</sup>68 O.S. § 500.22 provides:

Each supplier and bonded importer who sells motor fuel shall precollect and remit on behalf of and from the purchaser the motor fuel tax imposed under Section 4 of this act. At the election of an eligible purchaser, which notice shall be evidenced by a written statement from the Commission as to the purchaser eligibility status as determined under Section 23 of this act, the seller shall not require a payment of motor fuel tax on transport truck loads from the purchaser sooner than two (2) business days prior to the date on which the tax is required to be remitted by the supplier or bonded importer under Section 20 of this act. This election shall be subject to a condition that the remittances by the eligible purchaser of all amounts of tax due the seller shall be paid on the basis of ninety-eight and four-tenths percent (98.4%) for gasoline and ninety-eight and one-tenth percent (98.1%) for diesel fuel and which shall be paid by electronic funds transfer on or before the second preceding day prior to the date of the remittance by the supplier to the Commission, and the election by the eligible purchaser under this section may be terminated by the seller if the eligible purchaser does not make timely payments to the seller as required by this section.

<sup>18</sup> 68 O.S. § 253 provides:

When the Oklahoma Tax Commission files a proposed assessment against corporations or limited liability companies for unpaid sales taxes, withheld income taxes or *motor fuel taxes* collected pursuant to Article 5, 6 or 7 of this title, the Commission shall file such proposed assessments against the *principal officers* of the corporations or the managers or members 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. 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.

The liability of a *principal officer* for sales tax, withheld income tax or promulgated *motor fuel 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 pursuant to such section.

<sup>19</sup> *In re Bernard*, 68 AFTR 2d 91-5514, 91-5518 (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).

<sup>20</sup> *In re Bernard* at 91-5518.

<sup>21</sup> *Id.*

<sup>22</sup> *Oklahoma Tax Commission Order No. 96-12-17-037 (Prec.)*. In contrast to the IRC, 68 O.S. § 2385.3(E) does not contain the words “willful” or “willfully”. Consequently, the same standards for determining federal withholding tax liability are utilized up to the point required under Oklahoma statutes.

<sup>23</sup> See *Rizzuto v. United States*, 889 F. Supp. 698 (S.D.N.Y. 1995); *United States v. Carrigan*, 31 F. 3d 130 (3<sup>rd</sup> Cir. 1994); *Hochstein v. United States*, 900 F. 2d 543 (2d Cir. 1990).

<sup>24</sup> *Bauer v. United States*, 464 F. 2d 142,149 (Ct. Cl. 1976).

<sup>25</sup> *Turner v. United States*, 423 F. 2d 448, 449 (9<sup>th</sup> Cir. 1970).

<sup>26</sup> *Mazo v. United States*, 591 F. 2d 1151, 1156 (5<sup>th</sup> Cir. 1979).

<sup>27</sup> *Wilson v. United States*, 250 F. 2d 312, 316 (9<sup>th</sup> Cir. 1958).