JURISDICTION: **OKLAHOMA TAX COMMISSION- DECISION**
CITE: **2008-03-20-04 / NON-PRECEDENTIAL**
ID: **P-07-122-H**
DATE: **MARCH 20, 2008**
DISPOSITION: **DENIED**
TAX TYPE: **WITHHOLDING**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PRESIDENT, as President, and TREASURER, as Treasurer of COMPANY (a suspended corporation), and as individuals ("Protestants"), appear pro se.[1] The Field Audit Section of the Compliance Division f/k/a the Audit Division ("Division"), Oklahoma Tax Commission, appears by and through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On August 14, 2007, the protest file was received by this office for further proceedings consistent with the Uniform Tax Procedure Code[2] and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.[3] On August 15, 2007, a letter was mailed to the Protestants stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-07-122-H. The letter also advised the Protestants a Notice of Prehearing Conference ("PHC") would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Oklahoma Tax Commission.* On August 24, 2007, the Notice of PHC was mailed to the last known address of the Protestants, setting the PHC for September 17, 2007, at 9:30 A.m.[4]

On August 30, 2007, the Division filed a Report in Lieu of PHC. The Division advised the parties were exchanging discovery which could result in settlement. On August 31, 2007, the parties were advised by letter the PHC was stricken and to file a status report on or before October 17, 2007.

On October 17, 2007, the Division filed the Status Report advising discovery had been exchanged which did not result in settlement and requested this matter be set for hearing. On

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[1] "**pro se"** (proh **say** *or* **see**), *adv*. & *adj*. [Latin] For oneself; on one's own behalf; without a lawyer <the defendant proceeded pro se> <a pro se defendant>. -- Also termed *pro persona*; *in propria persona*; *propria persona*; *pro per*. See PROPRIA PERSONA. BLACK'S LAW DICTIONARY (8th ed. 2004), available at *http://westlaw.com*. (March 16, 2006).

[2] OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

[3] OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

[4] OKLA. STAT. ANN. tit. 68, § 208 (West 2001). The notice was mailed to the Protestants at LAST KNOWN ADDRESS.

October 18, 2007, the Scheduling Order was issued setting this matter for hearing on January 14, 2008, at 9:30 a.m. On January 7, 2008, the Position Letter of the Protestants was filed, with attachments thereto. The Brief of the Audit Division was also filed January 7, 2008, with Exhibits A through K attached thereto.

A closed hearing[5] was held as scheduled on January 14, 2008, at approximately 9:30 a.m. The Protestants called one (1) witness, PRESIDENT, who testified about COMPANY. Protestants' Exhibits 1 through 10 were identified, offered, and admitted into evidence. Upon cross-examination, PRESIDENT testified about the Division's records used in the audit and the proposed withholding tax ("ITW") assessments against the Protestants. The Division's Exhibits A through K were identified, offered, and admitted into evidence. Upon conclusion of the hearing, the record in this matter was closed and this case was submitted for decision on January 14, 2008.[6]

STIPULATION

At hearing, the Protestants, through PRESIDENT, stipulated to the dollar amounts of the Division's proposed ITW assessments, as follows, to-wit:

1. On June 5, 2007, the Division issued proposed ITW assessments[7] against the Protestants for December 1, 2003, through April 30, 2005 ("Initial Audit Period"), as follows, to-wit:

Tax Due:	$ 76,192.49
Interest @ 15% through 08/15/07:	33,241.71
Tax & Interest Due Within 60 Days:	$109,434.20
30 Day Delinquent Penalty:	19,048.16
Tax, Interest & Penalty Due After 60 Days:	$128,482.36

2. On March 1, 2004, the Protestants resigned as members of the Board of Directors and as officers of COMPANY and "…no longer assume responsibility of the decisions of the management of the Corporation."[8]

[5] The Protestants, through PRESIDENT, invoked their right to a confidential hearing. *See* OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2008).

[6] OKLA. ADMIN. CODE § 710:1-5-39 (June 25, 1999).

[7] Division's Exhibits G-1 and G-2. Proposed ITW assessments were also issued against COMPANY and VICE-PRESIDENT. Protestants' Exhibit 6. No protest was received on behalf of COMPANY or VICE-PRESIDENT for the Initial Audit Period. According to the audit write-up, COMPANY ceased doing business April 30, 2005. On May 1, 2005, VICE-PRESIDENT formed LIMITED LIABILITY COMPANY.

[8] Division's Exhibit J.

3. On July 19, 2007, the Division issued "revised" proposed ITW assessments[9] against the Protestants for the period of December 1, 2003, through March 1, 2004 ("Revised Audit Period"), as follows, to-wit:

Tax Due:	$13,111.26
Interest @ 15% through 10/15/07:	7,210.25
Tax & Interest Due Within 60 Days:	$20,321.51
30 Day Delinquent Penalty:	3,277.82
Tax, Interest & Penalty Due After 60 Days:	$23,599.33

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, and the briefs, the undersigned finds:

4. On January 20, 2000, the Tax Commission received a Business Registration for COMPANY,[10] a corporation located at OKLAHOMA BUSINESS ADDRESS, with a mailing address of GEORGIA MAILING ADDRESS.[11] The Protestants are listed as President and Secretary/Treasurer, respectively.[12] TREASURER is listed on the Business Registration as the officer responsible for remitting ITW withheld from employees.[13] COMPANY sold, installed, and serviced industrial fire sprinkler systems and fire alarm systems.[14]

5. The Division conducted an ITW audit on COMPANY for the Initial Audit Period.[15]

6. On or about April 30, 2007, the Division's opening conference was held with VICE-PRESIDENT, Vice-President of COMPANY. As part of the audit packet, VICE-PRESIDENT signed a "Taxpayer's List of Principal Officers, listing the Protestants as President and Treasurer, respectively, and himself as Vice-President during the Initial Audit Period.[16]

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[9] Division's Exhibits G-1 and G-3.

[10] The Administrative Law Judge is taking judicial notice of the Oklahoma Secretary of State website to complete the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999). COMPANY reflects an effective date of October 21, 1999, with VICE-PRESIDENT, as Registered Agent, OKLAHOMA BUSINESS ADDRESS. *See* https://www.sooneraccess.state.ok.us (Last visited January 16, 2008).

[11] Division's Exhibit A-1.

[12] Division's Exhibit A-1. The Protestants' address is listed as LAST KNOWN ADDRESS.

[13] Division's Exhibit A-1. The Business Registration was signed by VICE-PRESIDENT, Vice-President of COMPANY. The registration reflects withholding began November 29, 1999.

[14] Division's Exhibit A-1. Testimony of PRESIDENT.

[15] Division's Exhibit F.

[16] Division's Exhibit A-2. Attached to Division's Exhibit A-2 is a copy of COMPANY'S Oklahoma Annual Franchise Tax Return ("FRX Return") for the period of July 1, 2003, through June 30, 2004. The FRX Return lists

7. The audit revealed that COMPANY issued W-2's and W-3's for the 2003, 2004, and 2005 tax years. COMPANY is delinquent in filing and remitting ITW for the Initial Audit Period,[17] as follows, to-wit:

Period	W-2's	ITW Remitted	ITW Balance
2003	$60,380.00	$56,156.00	$ 4,224.00
2004	$53,323.49	$ 0.00	$53,323.49[18]
Jan/April 2005	$18,645.00	$ 0.00	$18,645.00[19]

8. On August 4, 2006, COMPANY was suspended by the Tax Commission for failing to pay franchise tax for the period of July 1, 2004, through June 30, 2005.[20]

9. On July 23, 2007, the Division received a timely filed protest to the proposed ITW assessments.[21]

10. The Protestants were the majority stockholders, members of the Board of Directors, and officers of the following businesses (collectively the "Businesses"),[22] including COMPANY, during the Revised Audit Period:

GEORGIA COMPANY
TEXAS CITY COMPANY 1
TEXAS CITY COMPANY 2
SPRINKLER COMPANY
TEXAS COMPANY

11. On or about August 26, 1999, the Protestants and the Businesses entered into a certain ABC Loan and Security Agreement No. XXX (along with other agreements not mentioned herein) with BANK, as thereafter supplemented, renewed, extended and/or amended ("Loan Agreement").[23]

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the Protestants as President and Secretary, respectively. The FRX Return is signed by PRESIDENT and a check from COMPANY dated August 23, 2003, is signed by TREASURER. Testimony of PRESIDENT.

[17] Division's Exhibits B-1 and B-2. The W-3 for the 2003 tax year was signed by VICE-PRESIDENT on February 24, 2004. The W-3's for the 2004 and 2005 tax years are unsigned.

[18] Division's Exhibit C.

[19] Division's Exhibit C.

[20] Division's Exhibit D.

[21] Division's Exhibit H.

[22] Division's Exhibit E. Testimony of PRESIDENT.

[23] Division's Exhibit E.

12. From the inception of the Loan Agreement, the Protestants deposited all funds ("Accounts Receivables") from the Businesses, including COMPANY, with BANK. Depending on the type of transaction, the Protestants would write checks either from a BANK account or from a checking account for each of the businesses.[24]

13. BANK did not want to process the payroll for the Businesses, including COMPANY. BANK would transfer the funds necessary to meet the weekly payroll to COMPANY'S checking account. The COMPANY payroll was processed by the Protestants, through TEXAS CITY COMPANY 1, which acted as a "holding company" for the businesses.[25] PRESIDENT would sign the reports and TREASURER would sign the checks.[26]

14. On December 8, 2003, BANK issued a "Notice of Default and Demand For Payment" as a result of the Protestants notifying BANK that the union employees of GEORGIA COMPANY had walked off the job and that GEORGIA COMPANY was ceasing operation and contemplating the filing of bankruptcy.[27]

15. BANK terminated the ABC Line of Credit and accelerated the terms of the Loan Agreement.[28] The Protestants were given until December 24, 2003, to comply with the notice. The Protestants failed to comply with the "Notice of Default and Demand for Payment."[29]

16. On February 14, 2004, BANK mailed Protestants a Forbearance/Settlement Agreement ("Forbearance Agreement"), two (2) Stock Pledge Agreements, and Irrevocable Stock Powers. The Protestants were to execute and return the documents with a $20,000.00 payment on or before February 24, 2004.[30]

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[24] Testimony of PRESIDENT.

[25] Testimony of PRESIDENT. PRESIDENT testified that TEXAS CITY COMPANY 1 was not set up to act as a "holding company," but that is how it operated, paying the bills for the Businesses.

[26] Testimony of PRESIDENT.

[27] Protestants' Exhibits 3, 4, 6, and 9. *See* Division's Exhibit E. Testimony of PRESIDENT. *See also* Protestants' Exhibit 2, an un-filed copy of a bankruptcy petition dated September 2, 2004, for the United States Bankruptcy Court, DISTRICT, DIVISION. On the petition, the Protestants' address is listed as NEW ADDRESS.

[28] Division's Exhibit E. PRESIDENT testified that on December 12, 2003, the Protestants met with a BANK Representative, along with the minority stockholders of the Businesses (which were also officers of the Businesses) in CITY, Texas. It is the Protestants' contention that they were excluded from the operation of the Businesses, including COMPANY and no longer had an interest in COMPANY after December 12, 2003. *See* Protestants' Exhibits 1, 3, 6, and 8.

[29] Division's Exhibit F.

[30] Division's Exhibit F. The copy of the Forbearance/Settlement Agreement was not executed. There is also an unsigned copy of TREASURER'S Stock Pledge Agreement, but not PRESIDENT'S Stock Pledge Agreement.

17. On or about March 4, 2004, the Protestants sent BANK a letter[31] enclosing the following:

> Checks from accounts receivable of TEXAS CITY COMPANY 1 totaling $20,738.39
> Receivable Aging Reports
> Executed Forbearance Agreement
> Stock Pledge Agreements
> Original Stock Certificates and Transfer Ledgers for SPRINKLER COMPANY (three entities); TEXAS COMPANY (three entities); and COMPANY

18. On March 1, 2004, the Protestants resigned as members of COMPANY'S Board of Directors and as officers of COMPANY and "no longer assume responsibility of the decisions of the management of the corporation."[32]

19. The Forbearance Agreement allowed the Protestants to seek alternative financing or sell SPRINKLER COMPANY, TEXAS COMPANY, and COMPANY. BANK agreed to forbear from exercising its rights and remedies under the Loan Documents until June 30, 2004, all subject to the Protestants' compliance with the terms of the Forbearance Agreement.[33]

20. The Protestants submitted all proceeds from the collection of Accounts Receivable and proceeds from the liquidation of furniture, fixtures, equipment, and inventory of GEORGIA COMPANY and TEXAS CITY COMPANY 1 and provided BANK weekly collection and progress reports.[34]

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[31] Division's Exhibit G. Testimony of PRESIDENT. The Forbearance Agreement contains a March 3, 2004, deadline.

[32] Division's Exhibit J. Testimony of PRESIDENT. PRESIDENT also testified that on December 24, 2003, the Protestants attempted to have their names removed from the COMPANY corporate accounts at BANK 2. The letter does not state that the Protestants are no longer officers of COMPANY, but simply requests that they be removed from the COMPANY account. *See* Protestants' Exhibit 8, a copy of a letter to REPRESENTATIVE, BANK 2. According to a letter obtained by the Division dated August 29, 2007, REPRESENTATIVE remembered the Protestants' request (although the bank did not have a copy). A signature card and corporate resolution to facilitate this request were drawn up and mailed to the remaining COMPANY officer for approval, but the records of the bank did not indicate that the signature card and corporate resolution were ever received back from COMPANY. *See* Protestants' Exhibit 7. PRESIDENT testified that the bank had changed hands a couple of times and that is why the bank did not have the records and REPRESENTATIVE had no reason to help the Protestants.

[33] Division's Exhibit F, Recitals #5. The loan balance at the time of the Forbearance Agreement was a total of $2,377,605.82, including principal, interest, and late charges, etc. BANK took over an existing loan the Protestants had with the Small Business Administration. The Loan Agreement covered a $1,000,000.00 personal loan to the Protestants and approximately a $1,700,000.00 revolving line of credit. Testimony of PRESIDENT.

[34] Division's Exhibit F, Agreement, Obligations of Obligors, 7 through 7.5. Testimony of PRESIDENT. *See* Protestants' Exhibit 9, a notarized letter from MANAGER, the Fabrication Manager for GEORGIA COMPANY.

ISSUE

Whether the Protestants were principal officers of COMPANY during the Revised Audit Period and "responsible persons" liable for the remittance of withholding taxes?

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[35]

2. Every employer is required to deduct and withhold tax and pay over the amount so withheld as taxes to the Oklahoma Tax Commission.[36]

3. Every employer, including an officer or employee of a corporation, who is required to withhold and remit taxes to the Tax Commission, shall be held personally liable for failure to do so.[37]

4. Any officer or individual listed on the Business Registration filed by an employer who is designated as responsible for Oklahoma Income Tax Withholding and its remittance, may be held personally liable until such name is removed or information received or becomes available to the contrary.[38]

5. 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.[39]

6. Section 2385.3 of Title 68 does not contain a "willfulness" component and therefore, the determination of liability under Section 253 is limited to the standards for determining who is a "responsible person."[40]

7. The "reasonable cause" exception is applicable to the "willfulness" component of IRC § 6672, which is not a consideration for the determination of who is a principal officer under Section 253.[41] Notwithstanding, the Court in *Finley* observed that a lenient reasonable cause

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[35] OKLA. STAT. ANN. tit. 68, § 221(D) (West Supp. 2008).

[36] OKLA. STAT. ANN. tit. 68, § 2385.2(A) (West 2001).

[37] OKLA. STAT. tit. 68, § 2385.3(E) (West Supp. 2004).

[38] *See* Note 37. *See also* OKLA. ADMIN. CODE § 710:90-3-19 (June 25, 1999) and OKLA. ADMIN. CODE § 710:90-5-3.

[39] OKLA. STAT. ANN. tit. 68, § 253 (West 2001).

[40] OTC Precedential Order No. 96-12-17-037 (December 17, 1996), 1997 WL 201593 (Okl.Tax.Com.).

[41] *Finley v. United States*, 123 F.3d 1342 (10th Cir. 1997).

exception should not be adopted, but instead narrowly construed the exception in order to further the basic purpose of protecting government revenue, discouraging corporations from self-executing government loans using trust fund money and avoiding the potential of making the government an unwilling partner in a floundering business. The Court concluded that the reasonable cause exception should be limited to two (2) elements; i.e., where taxpayer has shown by sufficient evidence that reasonable efforts were made to protect the trust funds and those efforts were frustrated by circumstances outside the taxpayer's control.[42]

8. The state is statutorily restricted as to whom or from whom it can seek liability for ITW (trust fund taxes). The vendor and/or employer are the fiduciary and have the duty, as trustee, to the state concerning ITW funds.[43]

9. A trustee cannot avoid his obligations by entering into an agreement by which funds entrusted to him are used to pay his other obligations.[44]

10. The long continuing construction of a statute by an agency charged with its administration carries great weight and should not be disturbed unless clearly erroneous, especially when the legislature has convened several times and has not expressed its disapproval of such construction.[45]

11. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[46] A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[47]

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[42] *Id.*

[43] OKLA. STAT. tit. 68, §2385.3(E) (West Supp. 2004). *See* Commission Order No. 2001-04-10-008 (April 10, 2001), 2001 WL 664973 (Okl.Tax.Com.).

[44] *Kalb v. United States*, 505 F.2d 506 (2nd Cir. 1974).

[45] *Schulte Oil Co. v. Oklahoma Tax Com'n*, 1994 OK 103, 882 P.2d 65.

[46] OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999):

> In all administrative proceedings, unless otherwise provided by law, the burden of proof shall be upon the protestant to show in what respect the action or proposed action of the Tax Commission is incorrect. If, upon hearing, the protestant fails to prove a prima facie case, the Administrative Law Judge may recommend that the Commission deny the protest solely upon the grounds of failure to prove sufficient facts which would entitle the protestant to the requested relief.

OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999), provides in pertinent part:

> . . . "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.

[47] *See Enterprise Management Consultants, Inc. v. State ex re.l Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

12. Section 2385.3 and Section 253 do impose strict liability on an officer of a corporation. Imposition of liability is based on a determination that the officer was a principal officer of the corporation during the period for which the assessment is made.[48]

DISCUSSION

The Protestants do not dispute that they were principal officers of COMPANY and "responsible persons" liable for the remittance of ITW prior to December 2003. The Protestants assert that after December 2003, they no longer had any interest in COMPANY. That BANK had effectively "foreclosed" on the loan, relieving them from liability for ITW during the Revised Audit Period.

However, from the inception of the loan (August 1999), the Protestants entered into essentially a "lockbox agreement,"[49] whereby COMPANY'S Accounts Receivables were deposited into a BANK account. BANK would then transfer funds into COMPANY'S account to meet its weekly payroll. This procedure continued through November 2003. In December 2003, BANK called the note and demanded payment.

The Protestants did not resign from the Board of Directors or as principal officers of COMPANY until March 2004, and from the record, the Protestants did not attempt to protect the ITW trust funds. The Protestants have failed to sustain their burden of proof that they were not principal officers of COMPANY during the Revised Audit Period.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the protests to the proposed assessments of withholding tax during the Revised Audit Period against PRESIDENT, as President, and TREASURER, as Treasurer of COMPANY (a suspended corporation) and as individuals should be denied.

It is further ORDERED that the proposed withholding taxes and penalties be fixed as the deficiency due and owing, including interest, accrued and accruing.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are generally applicable or are limited in time and/or effect. Non-

[48] *See* Note 39.

[49] "**lockbox" 1.** A secure box, such as a post-office box, strongbox, or safe-deposit box. **2.** A facility offered by a financial institution for quickly collecting and consolidating checks and other funds from a party's customers. BLACK'S LAW DICTIONARY (8th ed. 2004), available at http://westlaw.com (Last visited February 13, 2008). *See* OTC Precedential Order No. 98-07-30-008 (July 30, 1998), 1998 WL 749392 (Okl.Tax.Com.) *See also* OTC Order No. 2001-04-10-008 (April 10, 2001), 2001 WL 664973 (Okl.Tax.Com.)

precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.