JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2011-11-15-03 / NON-PRECEDENTIAL**
ID: **P-11-237-H**
DATE: **NOVEMBER 15, 2011**
DISPOSITION: **SUSTAINED**
TAX TYPE: **WITHHOLDING**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

SECRETARY, as Secretary of COMPANY and as an Individual ("Protestant"), appears pro se.[1] The Withholding Tax Section, Compliance Division ("Division") of the Oklahoma Tax Commission, appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On March 25, 2011, the protest file was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*[2] and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.[3] On March 31, 2011, OTC ATTORNEY filed an Entry of Appearance as Counsel of record for the Division.

On April 13, 2011, a letter was mailed to the Protestant stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-11-237-H. The letter also advised the Protestant that a Notice of Prehearing Conference would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Office of Administrative Law Judges.*[4] On April 28, 2011, the Notice of Prehearing Conference was mailed to the last-known address of the Protestant, setting the prehearing conference for May 10, 2011, at 10:30 a.m.[5]

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[1] "[P]**ro 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*.

[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] *Id.*

[5] OKLA. STAT. ANN. tit. 68, § 208 (West Supp. 2011). The notice was mailed to the Protestant at ADDRESS.

On May 4, 2011, the Court Clerk[6] received a copy of a letter to OTC ATTORNEY from the Protestant requesting that the prehearing conference be held by telephone. On May 10, 2011, at 10:30 a.m. the prehearing conference was held via telephone as requested. On May 17, 2011, a letter was mailed to the parties pursuant to the prehearing conference directing that a status report be filed on or before June 9, 2011.

On June 10, 2011, the Division filed the Status Report (one (1) day extension granted) advising that the Division was unable to revise the proposed withholding tax assessment based upon the documents provided by the Protestant and requested that this matter be set for hearing. On June 15, 2011, a letter was mailed to the parties setting this matter for hearing on July 18, 2011, at 1:30 p.m., with position letters or memorandum briefs due on or before July 11, 2011.

On July 8, 2011, the Protestant's Position Letter was filed with the Court Clerk. On July 11, 2011, the Division's Memorandum Brief was filed, with Exhibits A through E attached thereto. On July 5, 2011, the Protestant filed by electronic transmission, a Request for Extension/Continuance due to a scheduling conflict. On July 19, 2011, there being no objection from the Division, a letter was mailed striking the hearing from the July 18th docket and resetting the hearing for August 24, 2011, at 1:30 p.m., with position letters or memorandum briefs due on or before August 17, 2011.

On August 17, 2011, by electronic transmission,[7] the Protestant requested a continuance to try and obtain copies of the bylaws for COMPANY, along with copies of its 2009 and 2010 tax filings. On August 23, 2011, there being no objection by the Division, the hearing was stricken from the August 24th docket and reset for hearing on September 15, 2011, at 1:30 p.m., with position letters or memorandum briefs due on or before September 8, 2011.

On September 8, 2011, the Division's Corrected Memorandum Brief was filed, with Exhibits A through D attached thereto. On September 8, 2011, by electronic transmission, the Protestant's Position Letter was filed with five (5) unexecuted affidavits attached thereto. On September 9, 2011, by facsimile, the Protestant's Position Letter was filed with Exhibits A through J, attached thereto.[8] On September 14, 2011, by facsimile, the Protestant's "Revised" Position Letter was filed, with Exhibits A through J attached thereto. On September 14, 2011, the Division's Second Corrected Memorandum Brief was filed, with Exhibits A through F attached thereto.

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[6] OKLA. ADMIN. CODE § 710:1-5-10(c)(2) (June 25, 1999).

[7] On August 19, 2011, the hard copy of the request was received for filing.

[8] On September 12, 2011, the hard copy was received. Protestant's Exhibits F through J were unexecuted copies of affidavits.

On September 15, 2011, at approximately 1:50 p.m. a closed hearing[9] was held as scheduled. The Protestant appeared on her own behalf and testified about the terms of her employment, her job duties, how business was conducted, and her termination from COMPANY. The Protestant's Exhibits A through L were identified, offered, and admitted into evidence.[10] The Division appeared through OTC ATTORNEY. The Division called SUPERVISOR, Audit Supervisor, Withholding Tax Section, Compliance Division of the Oklahoma Tax Commission, who testified about the audit of COMPANY'S withholding account, the proposed and "revised" withholding tax assessment, and as custodian of the Division's records. The Division's Exhibits A through F, were identified, offered, and admitted into evidence. At the conclusion of the hearing, the record in this matter was held open in order for the Division to provide the underlying audit work papers for the "revised" withholding tax assessment, including how the estimated amounts were determined.[11] On September 21, 2011, the Division filed its Notice of Transmission of Additional Documentary Evidence to the Tribunal ("Notice"), with attachments thereto. On September 29, 2011, a letter was mailed to the parties acknowledging receipt of the Division's Notice and advising the Division that a request had also been made for the underlying work papers to reflect how the estimated amount ($769.10) used for each month was determined, which was not attached to the Notice.

On October 12, 2011, the Division's Addendum to Notice of Transmission of Additional Documentary Evidence to the Tribunal ("Addendum") was filed, with attachments thereto. The record in this matter was closed and this case was submitted for decision on October 12, 2011.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, the Protestant's "Revised" Position Letter, and the Division's Second Corrected Memorandum Brief, the undersigned finds:

1. On January 3, 2008, COMPANY was registered with the Oklahoma Secretary of State, with PRESIDENT listed as the registered agent.[12] COMPANY was formed by PRESIDENT ("President"), an Oklahoma attorney,[13] who owned all "shares or stock" in

[9] The Protestant was not present at the beginning of the hearing to either invoke or waive her rights to a confidential hearing. After the Protestant appeared at the hearing, she was not asked about confidentiality, so by default the hearing is closed as a precautionary measure under the provisions of OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2011).

[10] At hearing, the Protestant filed the original affidavits, which are Protestant's Exhibits F through J.

[11] On September 16, 2011, a letter confirming the announcement made at hearing was mailed to the parties. The requested documentation would be identified and admitted into evidence as ALJ's Exhibit 1.

[12] The Administrative Law Judge is taking judicial notice of the Oklahoma Secretary of State's website at http://www.sos.ok.gov to complete the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999).

[13] *Id.* The President is an attorney practicing in the State of Oklahoma. OKLAHOMA LEGAL DIRECTORY, OFFICIAL DIRECTORY OF THE OKLAHOMA BAR ASSOCIATION (2010).

COMPANY. COMPANY originally had four (4) employees, including the President, the Protestant, EMPLOYEE 1 , and EMPLOYEE 2. The Protestant was recruited and hired by the President of COMPANY as an "Escrow" Closer on or before January 2008.[14] At the President's request, the Protestant agreed to hold the position of Secretary of COMPANY because she had the most experience of the other three (3) original employees.[15]

2. The Protestant was a signatory on COMPANY'S operating account due to the President's frequent absences, but the Protestant did not have the authority to decide which of COMPANY'S creditors would be paid, including the Tax Commission. The Protestant signed checks on COMPANY'S operating account at the direction of the President or COMPANY'S in-house bookkeeper.[16]

3. The Protestant did not have an entrepreneurial stake in COMPANY, nor did the Protestant have the ability to hire and fire employees.[17]

4. On August 4, 2008, a Business Registration Application ("Application") was filed on behalf of COMPANY by its President. The Application lists the Protestant as Secretary of COMPANY.[18]

5. COMPANY'S franchise tax return for 01/01/2008-12/31/2008 lists the Protestant as Secretary.[19]

6. According to the records of the Oklahoma Employment Security Commission the Protestant is the Secretary of COMPANY.[20]

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[14] *Id.*

[15] Testimony of Protestant. *See* Note 29, *infra*.

[16] *Id.*

[17] Testimony of Protestant. *See* Protestant's Exhibit F.

[18] Testimony of SUPERVISOR. *See* Division's Exhibit E. The Application is signed by the President.

[19] *Id.* The franchise tax return is not signed or dated.

[20] *Id.* *See* Note 26, *infra*.

7. On November 22, 2010, the Division issued a proposed withholding tax assessment against the Protestant as an officer of COMPANY and as an individual, for January 1, 2009, through September 30, 2010 ("Audit Period"),[21] as follows, to-wit:

Tax Due:	$ 9,998.30
Interest @ 15% through 01/21/11:	1,305.34
Tax & Interest if paid within 60 Days:	$11,303.64
30 Day Delinquent Penalty @ 10%:	999.83
Tax, Interest & Penalty if Paid after 60 Days:	$12,303.47

8. On December 29, 2010, the Division received a timely filed protest to the proposed withholding tax assessment for the Audit Period. The basis of the protest is stated as "…I was fired from [COMPANY] on/around October 19, 2009. I was an Employee of the Company from 1/1/09 to 10/16/09 but never had any control over nor did I benefit from any nonpayment of the Employer's Withholding Tax."[22]

9. On April 12, 2011, OTC ATTORNEY received a letter from the Protestant,[23] which states as follows, to-wit:

> My employment with [COMPANY] ended on October 16, 2009 as evidenced by the attached:
>
> 1) Monetary Determination for UE Benefits[24]
>
> I was an Escrow Closer for [COMPANY] and managed the escrow accounts only. It is my understanding that an Accountant in Grove issued the payroll checks and all other accounts were handled by the company's President.

[21] *Id.* Division's Exhibit A. COMPANY is delinquent in the filing of withholding reports for January, April, July, December 2009, and January through September 2010. The delinquent months of the Audit Period were estimated from the withholding reports filed by COMPANY. Testimony of SUPERVISOR. *See* ALJ's Exhibit 1.

[22] *Id.* Division's Exhibit B. The post-mark on the envelope is December 29, 2010.

[23] *Id.* Division's Exhibit C. On October 18, 2009, the Protestant applied for unemployment benefits.

[24] *Id.* There is a document attached which is titled "Monetary Determination for Unemployment Benefits," which confirms the Protestant's testimony.

10. On July 11, 2011, the Division issued a "revised" withholding tax assessment against the Protestant for January, April, and July 2009,[25] as follows, to-wit:

Estimated:	$ 769.10
Tax:	$2,307.30
Interest @ 15% through 07/18/11:	747.19
Penalty:	230.73
Total:	$3,285.22

11. The Protestant signed corporate checks, which were remitted for COMPANY'S withholding account for July 2008, August 2008, November 2008, February 2009, March 2009, and June 2009. The Protestant did not sign withholding tax reports for COMPANY. The President signed COMPANY'S withholding tax reports.[26]

12. The withholding tax reports and remittances for COMPANY for April 2008 through June 2009 were filed as follows,[27] to-wit:

P-11-236-H	P-11-237-H	CHECK#	MONTH	YEAR	SIGNATURE
EXHIBIT C-1		CHECK #9035	APRIL	2008	PRESIDENT
EXHIBIT D-1			APRIL	2008	PRESIDENT
EXHIBIT C-2		CHECK #9034	MAY	2008	PRESIDENT
EXHIBIT D-2			MAY	2008	PRESIDENT
EXHIBIT C-3		CHECK #9086	JUNE	2008	PRESIDENT
EXHIBIT D-3			JUNE	2008	PRESIDENT
	EXHIBIT D-1	**CHECK #9147**	**JULY**	**2008**	**PROTESTANT**
	EXHIBIT D-1		JULY	2008	NO SIGNATURE
EXHIBIT D-8			AUGUST	2008	PRESIDENT
	EXHIBIT D-2	**CHECK #9199**	**AUGUST**	**2008**	**PROTESTANT**
EXHIBIT C-4		CHECK #9337	SEPTEMBER	2008	PRESIDENT
EXHIBIT D-4			SEPTEMBER	2008	PRESIDENT
EXHIBIT C-5		CHECK #9407	OCTOBER	2008	PRESIDENT
EXHIBIT D-5			OCTOBER	2008	PRESIDENT
EXHIBIT D-9			NOVEMBER	2008	PRESIDENT
	EXHIBIT D-3	**CHECK #9483**	**NOVEMBER**	**2008**	**PROTESTANT**

[25] Division's Exhibit F. *See* Note 21, *supra.*

[26] Testimony of Protestant. Division's Exhibit D. SUPERVISOR testified that the Protestant did not sign any of the withholding reports which comprise Division's Exhibit D.

[27] *See* Note 12, *supra.* The Administrative Law Judge is taking judicial notice of the Division's exhibits in a companion case (P-11-236-H) to complete the factual details and background of this audit.

EXHIBIT C-6		CHECK #9581	DECEMBER	2008	PRESIDENT
EXHIBIT D-6			DECEMBER	2008	PRESIDENT
EXHIBIT D-10			FEBRUARY	2009	PRESIDENT
	EXHIBIT D-4	**CHECK #9838**	**FEBRUARY**	**2009**	**PROTESTANT**
EXHIBIT D-11			MARCH	2009	PRESIDENT
	EXHIBIT D-5	**CHECK #9839**	**MARCH**	**2009**	**PROTESTANT**
EXHIBIT C-7		CHECK #9948	MAY	2009	PRESIDENT
EXHIBIT D-7			MAY	2009	PRESIDENT
EXHIBIT D-12			JUNE	2009	PRESIDENT
	EXHIBIT D-6	**CHECK #10098**	**JUNE**	**2009**	**PROTESTANT**

13. The President of COMPANY executed a notarized affidavit,[28] which states in pertinent part, as follows, to-wit:

> I was the President of [COMPANY] (hereinafter referred to as COMPANY or the company or the corporation). I worked in close proximity with [Protestant] from on or about September 2007 to October 19, 2009.
>
> I declare that [Protestant] had no ownership of shares or stocks in COMPANY. She had no entrepreneurial stake in the company. She had no ability to hire and fire employees.

14. EMPLOYEE 1, a former employee of COMPANY, executed four (4) notarized affidavits,[29] which state in pertinent parts as follows, to-wit:

- I declare that [Protestant] was approached by PRESIDENT on or about September of 2007. He was starting a new title company in CITY, Oklahoma and was looking for an Escrow Closer. Originally there were 4 employees of [COMPANY]: PRESIDENT, EMPLOYEE 2, SECRETARY & EMPLOYEE 1. PRESIDENT was the President and Owner of the corporation. [Protestant] was made Secretary of COMPANY because she had the most real estate experience of the other 3 employees.

[28] Protestant's Exhibit F.

[29] Protestant's Exhibits G through J.

- I certify that the Escrow Accounts for the company required 2 signatures. There were 4 people authorized to sign on the escrow accounts: PRESIDENT, EMPLOYEE 2, SECRETARY & EMPLOYEE 1. Due to PRESIDENT'S frequent abscences, {sic} [Protestant] was given corporate check signing authority on the company's other checking accounts. [Protestant's] responsibilities, duties and authority within the corporation were limited and given only after final approval from PRESIDENT.

- Further, I certify that COMPANY was a small company only employing on the average 6 to 7 employees. [Protestant] was the only Escrow Closer for the company and her primary day-to-day function was to perform real estate and loan closings.

- I was hired as a Closing Processor and worked in close proximity with [Protestant] from April 19, 2004 to January 21, 2008.[30]

- Further, I declare that [Protestant] had no control over the financial or business affairs of the corporation. She had no ability to direct or control the payment of corporate funds. She had no power to compel or prohibit the allocation of corporate funds. She did not have any exclusive control over corporate affairs and had no ultimate authority over expenditures of funds. She had no significant control of the day-to-day business operations.

- I certify [Protestant] did not participate in decisions regarding what bills should be or should not be paid and when. She did not have the final and significant word as to which bills or creditors were paid. She did not have the power and responsibility for seeing that the Employer's Withholding Tax was remitted to the Oklahoma Tax Commission.

- I declare that to my knowledge and experience, while employed by COMPANY, [Protestant] performed the following duties on a day-to-day basis:

    - Closed real estate transactions including but not limited to title analysis, drafting of HUD-1 Statements and lien elimination. Prepared closing documents, followed loan instructions and functioned transaction accordingly. Communicated with all parties involved in the transaction(s). Also responsible for disbursing and managing funds of multiple escrow accounts.
    - Held funds and/or legal papers, paid off mortgages and/or paid sums to designated parties. Filed and delivered deeds and other

[30] The Protestant testified that she was also a former employee of FORMER EMPLOYER before she was hired by the President of COMPANY.

legal papers. Handled in-person closings and ensured file is complete, verified and accurate prior to and after closing.

- Processed new closing orders, assisted in clearing title issues and corresponded with clients, brokers, lenders and real estate agents. Processed mortgage loans and prepared copies for pre and post closing transmittals, directed termite inspections and other required inspections.

15. On September 13, 2011, the President executed a document titled "Termination of Secretary," which states in pertinent part, "The removal of [Protestant] as Secretary of [COMPANY] shall become effective October 16, 2009 @ 7:00 p.m."[31]

16. On September 13, 2011, the Protestant executed a document titled "Resignation of Secretary," which states in pertinent part, "The resignation of the undersigned Secretary shall become effective October 16, 2009 at 7:00 p.m."[32]

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[33]

2. Rules promulgated pursuant to the Administrative Procedures Act[34] are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court.[35] They are valid and binding on the persons they affect, have the force of law, and are prima facie evidence of the proper interpretation of the matter to which they refer.[36]

3. Every employer is required to deduct and withhold tax and pay over the amount so withheld as taxes to the Oklahoma Tax Commission.[37]

4. 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.[38]

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[31] Protestant's Exhibit K.

[32] Protestant's Exhibit L.

[33] OKLA. STAT. ANN. tit. 68, § 221(D) (West Supp. 2011).

[34] OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2002).

[35] OKLA. STAT. ANN. tit. 75, § 306(C) (West 2002).

[36] OKLA. STAT. ANN. tit. 75, § 308.2(C) (West 2002).

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

[38] OKLA. STAT. ANN. tit. 68, § 2385.3(E) (West Supp. 2011).

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 of Title 68 is limited to the standards for determining who is a "responsible person."[40]

7. The state is statutorily restricted as to whom or from whom it can seek liability for withholding (trust fund taxes). The vendor and/or employer are the fiduciary and have the duty, as trustee, to the state concerning withholding funds.[41]

8. 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.[42]

9. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[43]

ISSUE

Whether the Protestant as a principal officer of COMPANY is also a "responsible person" liable for the remittance of withholding taxes during the "Revised" Audit Period?[44]

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

[40] OKLA. STAT. ANN. tit. 68, § 2385.3 (West Supp. 2011). *See* OTC (Precedential) Order No. 96-12-17-037 (December 17, 1996), 1997 WL 201593 (Okl.Tax.Com.).

[41] *See* Note 39, *supra*. *See also* OTC Order No. 2001-04-10-008 (April 10, 2001), 2001 WL 664973) (Okl.Tax.Com.).

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

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

[44] The Protestant does not dispute that she was Secretary of COMPANY up to October 16, 2009.

DISCUSSION

The Protestant's position[45] is stated as follows, to-wit:

> The issue in this protest is whether I am a responsible party for the withholding tax period 1/1/09 through 9/30/10. I was Secretary of the corporation in name only and had no responsibilities for remitting the withholding tax during the period in question and therefore, should not be held liable.
>
> To my knowledge, I never signed any quarterly tax returns, any corporate tax returns or any other tax returns of the corporation. (see Exhibits **A, B, C, D and E**). I had no knowledge that the withholding taxes had not been remitted to the Oklahoma Tax Commission.
>
> I had check signing authority only after the President's approval and had no authority to make any decision as to which creditor to pay. I had no control over the financial affairs of the company. I never obtained loans or financing on behalf of the corporation.
>
> I owned no shares and had no entrepreneurial stake in the company. My role in the day to day operations was as an Escrow Closer. (Emphasis original.)

The Division responds, "The Division requested that Protestant provide documentation to verify Protestant's claims that she did not have authority to control or influence the payment of withholding taxes that were owed to the Oklahoma Tax Commission ('Commission') but Protestant has produced evidence that Protestant did not inject herself into that role or otherwise attempt to influence payment and has failed to produce any documents that demonstrate that her attempts to influence lawful payment were either rejected or ignored."[46]

Section 2385.3[47] and Section 253[48] do not impose strict liability on a principal officer of a corporation. Imposition of liability is based on a determination that a principal officer is a "responsible person" for the collection and remittance of withholding tax.[49]

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[45] Protestant's "Revised" Position Letter at 1.

[46] Division's Second Corrected Memorandum Brief at 6.

[47] *See* Note 40, *supra*.

[48] *See* Note 39, *supra*.

[49] *Id.*

In determining whether person is a "responsible person," within meaning of statute authorizing recovery of corporation's employment taxes, court looks generally to person's degree of control over corporate finances, and persons with significant degree of control are considered responsible; this definition of responsible person is meant to encompass all those connected closely enough with the business to prevent the tax default from occurring. While no single factor is dispositive in determining whether an individual had "significant control," for purposes of holding that person liable for corporation's unpaid employment taxes, relevant considerations include status as an officer or director, ownership of shares or possession of an entrepreneurial stake in the company, role in the day-to-day management of the company, ability to hire and fire employees, ability to make decisions regarding which, when and in what order outstanding debts or taxes will be paid, control over daily bank accounts and disbursements records, and authority to sign corporate checks.[50]

In event of failure of corporation to pay withholding taxes, liability may attach to each of those persons responsible for seeing that trust fund taxes deducted from employees' wages are paid over to government, i.e., those persons who have significant control over business affairs of corporation or who participate in decisions regarding what bills should or should not be paid and when. A "responsible person" who may be liable for failure of corporation to pay withholding taxes, is generally defined as anyone with power and responsibility within corporate structure for seeing that withheld taxes are remitted to United States and includes every person who has significant responsibility with respect to collecting, truthfully accounting for or paying such taxes.[51]

In *Spang*[52] the court held, "Even though plaintiff signed six checks on behalf of corporation, he had no actual managerial responsibilities, functions, or authority in corporation, he was not a regular signatory for checks, did not draw or authorize drawing of checks, did not sign payroll checks, neither his signature nor his name appeared on bank signature card for either payroll checking account or general checking account for corporation, and there was no evidence that plaintiff made any determination as to which creditors would be paid first, and therefore, plaintiff was not a responsible person with respect to collection, accounting for, and paying over of withholding taxes of corporation and could not be held liable for unpaid withholding taxes."

In *Godfrey*[53] the court held, "Mechanical duties of signing checks and preparing tax returns are not determinative of liability of an individual under statute imposing 100% penalty for failing to pay over withholding taxes."

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[50] *Rizzuto v. U.S.*, 889 F.Supp. 698 (1995). *See* OTC (Precedential) Order No. 96-12-17-037 (December 17, 1996), 1997 WL 201593 (Okl.Tax.Com.).

[51] *Spang v. U.S.*, 533 F.Supp. 220 (1982)

[52] *Id.*

[53] *Godfrey v. U.S.*, 748 F.2d 1568 (1984).

The Protestant does not dispute that she was the Secretary of COMPANY during the "Revised" Audit Period, but the Protestant does dispute that she was a "responsible person." In support of the Protestant's position she testified and provided evidence in the form of notarized affidavits from the President of COMPANY and a former employee of COMPANY that she did not have an entrepreneurial stake in COMPANY, nor did she have the ability to hire and fire employees.[54] The Protestant also does not dispute that she had check signing authority on COMPANY'S operating account, but testified that she was placed as a signatory on the operating account because she had the most experience of the three (3) other original employees and because of the President's frequent absences.[55] When the President was absent the Protestant was directed to sign checks from COMPANY'S operating account by the in-house bookkeeper. The Protestant did not have the authority to direct or control which of COMPANY'S creditors would or would not be paid, including the Tax Commission.[56] The Protestant's testimony was corroborated by the affidavits of EMPLOYEE 1.[57]

The Division does not dispute that the Protestant did not own any shares or stock in COMPANY, or that the Protestant did not have an entrepreneurial stake in COMPANY. The Division also does not dispute that COMPANY'S withholding reports were all signed by the President or that the Protestant did not have the ability to hire and fire employees. The Division's position is based upon three (3) facts: (1) Protestant was a principal officer of COMPANY, (2) Protestant had check signing authority on COMPANY'S operating account, and (3) Protestant signed six (6) checks from April 2008 to June 2009 on COMPANY'S withholding account, the majority of which were signed by the Protestant in the months prior to her termination in October 2009. The Division states in its Brief "…Protestant has produced evidence that Protestant did not inject herself into that role or otherwise attempt to influence payment and has failed to produce any documents that demonstrate that her attempts to influence lawful payment were either rejected or ignored."[58] What the Division fails to recognize is that its position goes to the determination of "willfulness," not whether the Protestant is a "responsible person."[59]

The Protestant has met her burden of proof by preponderance of the evidence that the Division's proposed withholding assessment for the "Revised" Audit Period is incorrect and in what respect.

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[54] *See* Notes 28-30, *supra.*

[55] Testimony of Protestant.

[56] *Id. See* Note 29-30, *supra.*

[57] *Id.* The Division was not aware of EMPLOYEE 1 prior to hearing and EMPLOYEE 1 was not present at the hearing for the Division to question concerning her affidavit.

[58] Division's Second Corrected Memorandum Brief at 6.

[59] *See* Note 53, *supra.*

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case that the protest should be sustained.

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

NOTE: The distinction between a Commission Order designated as "Precedential" or "Non-Precedential" has been blurred because all OTC Orders resulting from cases heard by the Office of Administrative Law Judges are now published, not just "Precedential" Orders. *See* OKLA. STAT. ANN. tit.68, § 221(G) (West Supp. 2009) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002). *See also* OTC Orders 2009-06-23-02 and 2009-06-23-03 (June 23, 2009), which also conclude the language of the Statute is "clear and unambiguous."