

JURISDICTION: OKLAHOMA TAX COMMISSION DECISION
CITE: 87-09-22-14 / PRECEDENTIAL
ID: P-86-479
DATE: SEPTEMBER 22, 1987
DISPOSITION: SUSTAINED
TAX TYPE: SALES
APPEAL: NO APPEAL TAKEN

ORDER

This matter comes on before the Oklahoma Tax Commission pursuant to regular assignment on the agenda. The protest was submitted to the Administrative Law Judge upon the Protestant’s protest letter and position letters of both parties. The Commission, having reviewed the facts and authorities presented therein, and being fully advised in the premises, enters the following findings.

CORPORATION was a restaurant business which operated in the City of CITY. It was incorporated in December, 1984 and the officers elected at its organizational meeting were PRESIDENT, President, VICE-PRESIDENT, Vice-President-Treasurer, PROTESTANT, Secretary, and ASSISTANT SECRETARY, Assistant Secretary. Each officer, except PROTESTANT, was authorized to do business with the BANK in CITY in the name of CORPORATION. PROTESTANT, protestant in the instant case was the attorney who provided the legal services in forming the corporation.

The Business Tax Division issued a proposed assessment on September 26, 1986 to CORPORATION, and/or PROTESTANT as an individual for the period of October 1, 1985 to January 1, 1986. The proposed assessment was for unpaid sales tax in the amount of Sixteen Thousand Eight Hundred Fifty-two Dollars and Eighty-two Cents (\$16,852.82), interest in the amount of One Thousand Thirteen Dollars and Sixty Cents (\$1,013.60), and penalty in the amount of One Thousand Six Hundred Eighty-five Dollars and Twenty-seven Cents (\$1,685.27) for a total of Nineteen Thousand Five Hundred Fifty-one Dollars and Sixty-nine Cents (\$19,551.69). PROTESTANT was secretary of the corporation during a part of the assessment period until he resigned on November 25th, 1985. PROTESTANT filed a timely protest to the proposed assessment in the Administrative Law Judges office on October 27, 1986.

Protestant herein, as an individual and Secretary of CORPORATION, asserts that he was not a “principal officer” of said corporation within the sales tax statute since his duties within the corporate structure did not include responsibility for the collection and remittance of sales tax. Protestant further contends that, since he resigned his position as an officer of the corporation on November 25, 1985, he is not personally liable for the tax due after that date should the Oklahoma Tax Commission conclude that he was a principal officer within the sales tax laws.

The Business Tax Division contends that any secretary of any corporation is a principal officer under the sales tax statute, and that, as secretary, protestant is personally liable for sales tax, interest and penalty assessed against the corporation charged with the responsibility of collecting and remitting sales tax.

The sole issue for consideration herein is whether the secretary of a corporation whose sole duties are to prepare the minutes of the Director's meetings and to be custodian of the corporate seal is a principal officer under 68 O.S. 1981, § 1361.

The Oklahoma Tax Commission has jurisdiction to hear this protest under the Uniform Tax Procedure Code, as amended, 68 O.S. 1981, § 201 et seq. This action arises under the Oklahoma Sales Tax Code, 68 O.S. 1981, § 1350 et seq. Section 1361(A) of Title 68 of the Oklahoma Statutes, in effect at the time of the assessment, provides:

§ 1361. Consumer to pay tax - vendor to collect tax - Penalties for failure to collect

The tax levied by this article shall be paid by the consumer or user to the vendor as trustee for and on account of this state. Each and every vendor in this state shall collect from the consumer or user the full amount of the tax levied by this article, or an amount equal as nearly as possible or practicable to the average equivalent thereof. Every person required to collect any tax imposed by this article, and in the case of a corporation, each principal officer thereof, shall be personally liable for said tax.

This section imposes a duty upon the vendor, as trustee for the State of Oklahoma, to collect sales tax due from the consumer for purchases made which come within the purview of the Sales Tax Code. The disposition of this case is dependent upon whether this duty extends to all officers of a corporation as principal officers so as to impose personal liability upon them for collection and remittance of the tax due.

The Business Tax Division argues that any officer can be held liable under the statute citing as its authority the case of Preston-Thomas Construction, Inc. v. Central Leasing Corporation, 518 P.2d 1125 (Okl. App., 1974). In Preston-Thomas, the suit was for recovery of funds from a corporation, its officers and directors. The plaintiffs had transferred funds to the corporation which were to be used for the purchase of another corporation. The purchase was not made with the funds, and plaintiffs could not recover their money. The court held that an officer or director of a corporation is personally liable for the wrongful use of funds entrusted to it if, (1) he receives any of the money, (2) he participates in the wrongful asset distribution, or (3) being ignorant of the wrong-doing, he is negligent in failing to learn of and prevent it.

The facts and authority in Preston-Thomas, supra, are readily distinguishable from the instant case. Here, the Protestant, as Secretary of the subject corporation, had considerably limited responsibilities, duties and authority. He did not have authority to write checks on the corporate bank account; he lived in SMALLER CITY, Oklahoma and the business location and operations and other officers were in CITY; and the uncontroverted facts show that Protestant was only an officer to meet the requirements of 18 O.S. 1981, § 1.43(A). The Protestant's only functions were to record the minutes of the Directors meetings and to be keeper of the corporate seal.

The Legislature did not define the term principal officer under Section 1361(A) of Title 68. The Oklahoma Corporation Act, 18 O.S. 1981, § 1.43(A) mandates that, “Every Corporation shall have a President, a Secretary, a Treasurer...”, however, Title 18 does not define the principal officers as President, Secretary and Treasurer. Application of the sales tax statutes by the Division in routinely assessing the President, Vice-President, and Secretary-Treasurer of the Corporation as principal officers is appropriate. However, in this case, the Protestant has shown through uncontroverted facts, why he is not a principal officer. PROTESTANT, based upon the facts submitted, was not a principal officer, and therefore, is not personally liable for the sales tax due under the proposed assessment for the period of October 1, 1985 to January 1, 1986.

WHEREFORE, IT IS HEREBY ORDERED by the Oklahoma Tax Commission that the protest of PROTESTANT, individual, as an officer of CORPORATION be sustained based upon the specific facts and circumstances of this case.

OKLAHOMA TAX COMMISSION

Deemed precedential by Tax Commission Order No. 87-10-01-03.