**JURISDICTION:** **OKLAHOMA TAX COMMISSION - DECISION**
**CITE:** **2000-11-16-023 / NOT PRECEDENTIAL**
**ID:** **P9600371 / P9600379**
**DATE:** **11-16-00**
**DISPOSITION:** **DENIED**
**TAX TYPE:** **SALES**
**APPEAL:** **NO APPEAL TAKEN**

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Protestant, d/b/a THE CORPORATION ("PROTESTANT" or "THE CORPORATION") was an Oklahoma corporation with its principal place of business in ANYCITY, Oklahoma. THE PROTESTANT was a retailer of furniture in Oklahoma for over forty (40) years. (Exhibit A)

2. MR. "A" was President of THE CORPORATION as of June 30, 1994 as evidenced by the annual franchise tax return which was signed by MR. "A". (Exhibit B)

3. PROTESTANT obtained a sales tax permit, permit no. XXXXXX, which authorized it to engage and transact business in Oklahoma.

4. MR. "A" as Chairman of the Corporation entered into a Consulting and Service Agreement ("Agreement") on April 27, 1995 with COMPANY ONE, AN OUT OF STATE corporation ("COMPANY ONE"). The purpose of such agreement was to liquidate the corporation's inventory and to maximize proceeds of the sale. (Exhibit G)

5. On September 8, 1995, the OTC issued a tax warrant against PROTESTANT for the period of March, 1995 through July 31, 1995. Said tax warrant was filed in MY COUNTY on September 12, 1995. (Exhibit E)

6. On May 24, 1996, the Oklahoma Tax Commission ("OTC" or "the Commission") issued a letter to PROTESTANT proposing to assess sales tax in the amount of $81,755.02 for the period of March, 1995 through August, 1995. (Exhibit F-1)

7. On June 28, 1996, the Oklahoma Tax Commission issued a letter to MR. "A" proposing to assess sales taxes in addition to interest and penalties in the amount of $82,849.27 for the period of March, 1995 through August, 1995. (Exhibit F-4)

8. By letter dated June 21, 1996, the verified, consolidated and written protest of PROTESTANT, MR. "A", MR. "B", and MR. "C" was submitted to the Commission.

9. A hearing on this matter was scheduled on May 15, 1997 at which time Protestants and MR. "A" were represented by PROTESTANT'S ATTORNEY. The parties at that hearing presented opening arguments, but thereafter agreed to continue the hearing.

10. Protestants' Suggestion of Death upon the Record and Request for Conference with Court was filed on August 19, 1997 with an attached Certificate of Death which certified that Protestant, MR. "A" died on June 27, 1997.

11. Pursuant to Commission Order No. 96-02-13-017, notice of the continued hearing scheduled for January 14, 1998 was sent to MR. "A's" surviving spouse, MR. "A's" SPOUSE and such notice was returned marked "unable to deliver". There were no other appearances on behalf of Protestants, THE CORPORATION and MR. "A". At that hearing, Counsel for the Division introduced Exhibits A – I(7) which were admitted into evidence. At the conclusion of the hearing, this matter was submitted for decision.

## ISSUES

1. Whether Protestant, MR. "A" should be held personally liable for the proposed sales tax delinquency of THE CORPORATION for the tax periods covering March 1, 1995 through August 31, 1995.

2. Whether Protestant should be held liable for the proposed sales tax delinquency for August, 1995.

## CONTENTIONS

Protestants contend that due to an agreement with COMPANY ONE ("COMPANY ONE") to liquidate the inventory of THE CORPORATION the business was transformed and thereafter, COMPANY ONE was the vendor who had the duty to collect and remit sales tax and therefore, Protestants should not be held liable.

The Division contends that Protestants were responsible parties at all times and never relinquished control of THE CORPORATION as proven by the Agreement itself and subsequent acts of the Protestant, MR. "A".

## CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission has jurisdiction of this protest. 68 O.S. 1991, § 207.

2. Due to the death of MR. "A", testimony was not provided by Protestant and other witnesses. Accordingly, this Court in the hearing on January 14, 1998 held that OTC Order No. 96-02-13-017, dictated the procedures to be followed. The Order allows a verified protest to be considered as evidence and as such will be given such weight as deemed appropriate. The Court finds that the protest is verified and will accordingly consider all

arguments, legal authorities and supporting documentation.

3. Further, the Order also dictates that notice to the legal authorized personal representative of the taxpayer or other person who may be expected to have a legal interest in the taxpayer's estate should be made or attempted so as to allow such person an opportunity to appear and participate in the protest proceeding as a substitute for the deceased taxpayer. Such notice is to be sent to the taxpayer's address as last given in connection with the protest proceeding. The Court finds that such notice was provided to MR. "A's" SPOUSE, 9999 MY STREET, ANYCITY, Oklahoma, 99999 and was returned marked by the United States Post Office as "not deliverable as addressed – unable to forward." The letter was also addressed to MR. ATTORNEY, Attorney at Law, 901 HIS AVENUE, Suite 322, ANYCITY, Oklahoma, 99999 and to AN ASSISTANT GENERAL COUNSEL, Attorney for the Oklahoma Tax Commission. The above facts are recited for the purpose of the allowance, admission and sufficiency of evidence submitted by Protestant.

4. Each and every vendor is required to collect from the consumer or user and the consumer or user is required to pay to the vendor as trustee for and on account of the state the sales tax levied by the Oklahoma Sales Tax Code. 68 O.S. Supp. 1991, §1361(A). "Every person required to collect sales tax, and in the case of a corporation, each principal officer thereof, shall be personally liable for the tax." Id.

5. A "vendor" is defined at 68 O.S. Supp 1999, §1352(21) as:

a. any person making sales of tangible personal property or services in this state, the gross receipts or gross proceeds from which are taxed by the Oklahoma Sales Tax Code,

b. any person maintaining a place of business in this state and making sales of tangible personal property or services, whether at the place of business or elsewhere, to persons within this state, the gross receipts or gross proceeds from which are taxed by the Oklahoma Sales Tax Code,

c. any person who solicits business by employees, independent contractors, agents or other representatives or by distribution of catalogs or other advertising matter, and thereby makes sales to persons within this state of tangible personal property or services, the gross receipts from which are taxed by the Oklahoma Sales Tax Code, or

d. any person, pursuant to an agreement with the person with an ownership interest in or title to personal property, who has been entrusted with the possession of any such property and has the power to designate who is to obtain title, to physically transfer possession of, or otherwise make sales of the property.

6. The personal liability of an officer of a corporation for the sales tax required to be collected in this state is dependent upon a finding that the officer was a "principal officer" of the corporation. 68 O.S. Supp 1999, §1361(A). 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. 68 O.S. Supp 1999, §253. Whether an officer of a corporation is a "principal officer" is determined in accordance with the Internal Revenue Code standards for determining liability for payment of federal withholding tax. Id.

7. *Oklahoma Administrative Code 710:65-7-3* suggests the following factors when making the determination as to whether an officer is a "principal" officer of a corporation:

(A) limited responsibilities within the corporation,
(B) limited duties within the corporation, and
(C) limited authority within the corporation.

Further, the rule states that the determination of a "principal" officer shall be made on an "individual case" basis.

8. Protestants cite 68 O.S. Supp 1999, §1352(21)(d) to define the relationship between THE CORPORATION and COMPANY ONE to demonstrate that COMPANY ONE became the vendor after the date of the Agreement. From the beginning, neither party has contested that COMPANY ONE did not obtain a permit to operate a business in the State of Oklahoma, and therefore it is by virtue of the Agreement that COMPANY ONE assumed operation of the business.

9. In a case where the Court found that an operator of an oil well acting as an agent for the principals under terms of an operating agreement, which imposed a duty on the agent to collect and remit sales taxes, the Court ultimately found the owners were the vendors statutorily charged with the duty to collect and remit any applicable sales tax. The Court held that the labels used in describing the parties legal relations are not controlling, and looked to the intent and effect of contractual language in conjunction with the parties actual conduct to determine their amenability to taxation. *Waterford Energy, Inc. v. Tax Com'n*, 845 P.2d 198 (Okl. App. 1992) citing *Enterprise Management Consultants, Inc. v. State ex rel. Tax Com'n*, 768 P.2d 359 (Okla. 1988). In the instant case, the Agreement is instructive as to the intent of each party and their respective rights upon entering into it.

10. In reviewing the Agreement, paragraph "B" outlines the obligations of THE CORPORATION (referenced as the "Company" throughout the Agreement) as follows:

B. Company's Obligations. The Company shall provide COMPANY ONE with full access to the Premises, shall be available to consult with and advise COMPANY ONE as requested for the purpose of making decisions on the conduct of the Sale, and generally shall assist COMPANY ONE as reasonably requested in the performance of COMPANY ONES obligations described hereinabove. The Company shall keep and maintain books and records related to the Sale which shall be available to COMPANY ONE for inspection during normal business hours. The company shall timely execute and file all tax returns and pay all wages, employee benefits, unemployment taxes, workers' compensation premiums, income taxes, personal property taxes, withholding taxes, sales taxes, use taxes, excise taxes, license fees and other fees and assessments related to the Company's business operations and employees, or related to the acquisition, use, sale, and other disposition of the Company's inventory, including the Direct Sale Goods. (Exhibit G)

11. Clearly, the Agreement contemplated that THE CORPORATION was considered the record-keeper and was to perform those company related tasks which are indicia of a responsible party. Protestants contend that COMPANY ONE took over the accounts, made themselves signatories and maintained the employee payroll. Affidavits submitted by former employees of the company support that COMPANY ONE indeed took over the payroll, however, it cannot be ascertained as to whether this was a subsequent agreement of the parties or done at Protestant's request. In fact, it appears contradictory provisions exist in the Agreement as to who was responsible for payment of the employees' wages. While paragraph "G" dictates that the Company pays the employees, paragraph "F" specifies the prioritized order in which wages and commission of the employees were going to be paid by COMPANY ONE.

12. The affidavits of the former employees allege that COMPANY ONE assumed complete and total control of all store operations to the extent that all accounts were in COMPANY ONES name and COMPANY ONE made all decisions regarding the day to day operations of the business. However, this is consistent with the terms of the Agreement which specifically allows all of the proceeds of the liquidation sale to be payable to COMPANY ONE (Exhibit G, paragraph "E") and that the deposits were to be collected and segregated into accounts. In fact, the Agreement goes so far as to allow COMPANY ONE to be PROTESTANT'S attorney in fact. (Exhibit G, paragraph "E")

13. Additionally, there are other provisions of the Agreement which define the parties relationship. As stated in paragraph "C" entitled "Relationship between the Parties", "COMPANY ONE shall be an independent contractor, not an employee of the Company... COMPANY ONE shall not be liable for any claims, damages, indebtedness, liabilities or

obligations of the Company or asserted against the Company".

14. An independent contractor is defined as one who in exercise of an independent employment, contracts to do a piece of work according to his own methods as is subject to his employer's control only as to end product or final result of his work. *Black's Law Dictionary*, 6th Ed., West Publishing Company. Admittedly, COMPANY ONE took such power as was delegated to them under the Agreement as an individual contractor.

15. Further, it appears that Protestant MR. "A" did maintain adequate control or have access to the books as evidenced by the filing of sales tax reports for the months of June and July, 1995. (Exhibits C-3 and C-4).

16. PROTESTANT was also required by the Agreement to bear the risk of loss and to maintain comprehensive liability and casualty insurance on the collateral. This provision is also consistent with an independent contractor relationship.

17. PROTESTANT contend that the Agreement was in fact a resignation of the officers of THE CORPORATION and that the subsequent conduct of the parties reinforced the resignation. However, the evidence before the Court of the signing of the sales tax forms and the Pay Plan Application and Worksheet and remitting a down payment by MR. "A" are not consistent with the conduct of one who considered himself no longer an officer of the company and a responsible party.

18. The affidavits of former employees suggest that COMPANY ONE assumed complete and total control of all store operations. However, it appears that COMPANY ONE took what control was given to them in the Agreement. Paragraph M of the Agreement provided for the PROTESTANT'S rights in the event of COMPANY ONES default of the Agreement and yet, Protestants have not alleged any default of the Agreement.

19. Protestants have alleged additional merchandise was added to the beginning inventory of THE CORPORATION in violation of Oklahoma's Closing Out Sale Law, 15 O.S. Supp 1999, §767 et. seq., and therefore, COMPANY ONES ownership and sale of the majority of the inventory sold constituted a substantive transfer and transformation of the business from one owned by THE CORPORATION to one owned by COMPANY ONE. Unfortunately, there is no evidence before the Court to substantiate this claim. It cannot be factually asserted that such goods were added to the inventory, the amount of goods added to the inventory and whether sales taxes were paid on such goods.

20. However, it seems obvious from a review of the Agreement that PROTESTANT knew of COMPANY ONES intentions to increase the sale inventory. This is specifically stated in paragraph "D" of the Agreement entitled "Direct Sale Goods". These goods are referenced throughout the Agreement and additionally, PROTESTANT was responsible for insuring these goods. PROTESTANT had knowledge of and participated in COMPANY ONES intentions to "enhance the inventory" and should not be allowed to assert that such actions relieve them of liability.

21. Considering the foregoing actions, provisions and intent of the Agreement, it is concluded Protestant, MR. "A" maintained adequate control over the Company and was responsible as a principal officer of THE CORPORATION and is therefore personally liable for the sales tax delinquency for the period of March, 1995 through August, 1995.

22. Additionally, PROTESTANT is liable for the period of August, 1995.

23. Based on the foregoing facts and the applicable law, the protests of MR. "A" and PROTESTANT d/b/a THE CORPORATION should be denied.

## DISPOSITION

It WAS DETERMINED, based upon the specific facts and circumstances of this case, that the sales tax protests of MR. "A" and PROTESTANT d/b/a THE CORPORATION be denied.

**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.