JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2003-12-16-06 / NOT PRECEDENTIAL**
ID: **P0300050**
DATE: **12-16-03**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. PROTESTANT CORPORATION is located in ANYTOWN, Oklahoma.

2. PROTESTANT A and PROTESTANT B, respectively hold the offices of President and Officer or Administrator for PROTESTANT CORPORATION

3. By Order No. 2000-11-27-007, the Tax Commission canceled and revoked Sales Tax Permit No. XXXXXX issued to PROTESTANT CORPORATION

4. The Commission Order resulted from the failure of Protestants to appear, after due notice, at a hearing scheduled to consider the cancellation of the Sales Tax Permit and show cause why the permit should not be canceled.

5. A part of the subject matter of the show cause hearing was the failure of Protestants to report and remit sales tax for the period of December, 1999 through August, 2000.

6. On January 8, 2001, A Field Representative, Collections Division of the Tax Commission, hand delivered the Permit Cancellation Order to Protestant A.

7. On January 8, 2001, Protestants issued check no. 2102 in the amount of $1,082.20 to the Tax Commission for partial payment of the tax delinquencies which were the subject of the show cause hearing.

8. Protestants filed sales tax reports for the period of September, 2000 through January, 2001, but did not remit the taxes shown on the reports.

9. The sales tax period at issue in this cause is February, 2001 through June, 2002.

10. During this period Protestants submitted sales tax reports and cash payment of the taxes shown by the reports to MS. Z.

11. According to Protestant A, MS. Z appeared at his business location on February 5, 2001, and represented to him that she was a field agent with the Tax Commission, Sales Tax Division and that she was there to collect his sales tax.

12. The testimony of PROTESTANT A concerning his first encounter with MS. Z was corroborated by two witnesses who were regular customers of Protestants.

13. MR. C, one of the two witnesses, testified that he is at Protestants' business location on a daily basis to drink coffee and discuss current events. He stated that he was present when the lady identified to him by PROTESTANT A as MS. z or MS. Z came into the business to collect taxes for the Tax Commission. He further stated that she carried a brief case or lap top computer and that he saw her at the business on ten to fifteen occasions. He described the woman as being professionally dressed, mid forties to early fifties in age, dishwater blonde hair, pleasantly plump and wearing glasses. He further testified that he saw PROTESTANT A giving her cash.

14. MR. D, the second of the two witnesses, testified that he is at Protestants' business location two to three times a week. He stated that he saw or overheard MS. z or MS. Z introduce herself and state that she was from the Tax Commission. He further stated that he saw MS. z or MS. Z at Protestants' business location twice during the period in question.

15. The parties to this proceeding stipulate that a person named MS. Z was employed by the Tax Commission.

16. The records of the Tax Commission indicate that a MS. Z was hired as an unclassified temporary clerk from May 20, 1985 to July 31, 1985. The records further indicate that the employee was born May 19, 1965 and she resided in Oklahoma City.

17. PROTESTANT A testified that on her initial visit to his business MS. Z gave him a card indicating she was employed by the Tax Commission, but that he does not currently have her card in his record, nor did he have her card at the time he filed the protest to the Division's assessment. He described her as a white woman, five feet two to four inches in height, hefty, sandy blonde hair and wearing wire rim glasses. He stated that he believed her to be an employee of the Tax Commission not only because of the card she gave him, but because of her knowledge of his case, the fact that she had a laptop computer and the fact that other employees of the Tax Commission had come to his place of business to collect taxes, including MS. L., MS. M, MS. N and MR. O.

18. THE Supervisor, Collection Division, Oklahoma City Field Services, testified that field representatives do not in general collect current monthly sales tax reports and payment, but rather conduct compliance surveys, visit new businesses, collect delinquent taxes after previous collection attempts and serve cancellation orders. He stated that the identification credentials of a field representative include a badge, State of Oklahoma, Oklahoma Tax Commission employee identification card and business cards. He further stated that generally and unless questioned, a field representative only presents a business card to a taxpayer for identification purposes.

19. A Case Worker, Collections Division, testified that in her fifteen years of employment with the Tax Commission, she has never made a site visit to a business and that she not only has never been to Protestants' location of business, but that she has never been to ANYTOWN, Oklahoma. She stated that she was Protestants' case worker on a show cause hearing in the year 2000 and that he probably obtained her business card from correspondence regarding such matter which might have included the card.

20. PROTESTANT A testified that when MS. Z came to his business on February 5, 2001, he left his business with her there, went to a store and purchased a receipt book, identified by Protestant as a special receipt book for tax payments. He stated that he paid the taxes to MS. Z in cash because all of his bank accounts, both personal and business, were frozen on an on again off again basis during not only the period in question, but periods before and after the MS. Z period.

21. Twelve receipts for the seventeen month period were received into evidence. PROTESTANT A testified that a burglary occurred at his business in the fall of 2002 and that the only things stolen were personal information out of his tax folders, including federal tax returns and one page of the tax receipts book. He further testified that a police report of the incidence was made.

22. The receipt dated February 5, 2001, shows "MS. Z" received $231.00 in cash for "Sales Tax (999999)" from "Jan 01 to Feb 15".

23. PROTESTANT A testified that MS. Z would generally come to his business location a few days prior to the fifthteenth day of the month. He stated that she came to his business location a couple of days prior to July 15, 2002 and he paid her $52.00 in cash for the sales tax due for the month of June, 2002. He further stated that he did not keep copies of the sales tax reports he gave to MS. Z. He further testified that he did keep copies of the worksheets he used to prepare the sales tax reports for the disputed period, that copies of these worksheets were given to the Tax Commission and that his accountant used the worksheets to reconstruct the sales tax reports for this period.

24. THE Auditor II, Account Maintenance Division, testified that although Protestants had been notified by the Tax Commission of delinquencies in the remittance of taxes prior to the MS. Z period, Protestants did not receive any notices from the Tax Commission of delinquencies during the MS. Z period. He stated that the reason Protestants did not receive any notices during this period is because their sales tax permit had been canceled.

25. PROTESTANT A testified that prior to the MS. Z period he would prepare the monthly sales tax reports, mail those reports to the Tax Commission and pay the taxes shown on those reports by check. He stated that when MS. L or MS. M came to his business and collected taxes up through the current month, he always paid the taxes by check, never cash.

26. Admitted into evidence was check no 2306, dated July 13, 2001. The check was drawn on the business account of the Corporation and made payable to the Oklahoma Tax Commission for taxes. The admittance advice received into evidence indicates that the check was written in payment of not only the sales tax due and owing for the period of September, 2000 through January, 2001, but other delinquent taxes. The check was returned with the notation "insufficient funds". According to PROTESTANT A, the check was given to MR. O when he visited the business on the date of the check.

27. PROTESTANT A testified that at some point in time, either in May, June or July, 2002, he found out that MS. Z was not employed by the Tax Commission. He stated that he hired his accountant when he found out about MS. Z, but also stated in recollection of the events leading up to finding out about MS. Z, that his accountant called MS. N and was told by MS. N that his account with the Tax Commission was ok, but two weeks later MR. O contacted (PROTESTANT A) and advised him that they had not received anything from him for a year and a half.

28. Regarding the sales tax reports for May and June, 2002, PROTESTANT A testified that he knows he did not give the reports to MS. Z, but does not recall by whom the reports were filed, nor how the taxes were paid since there are no cash receipts for the taxes or canceled checks.

29. Regarding the sales tax reports for the months of July, 2002 through November, 2002, PROTESTANT A testified that the reports were sent in by his accountant, however, they subsequently found out that none of the reports were received by the Tax Commission.

30. The Tax Commission records reflect that the sales tax reports for the period of July, 2002 through February, 2003, were filed in March, 2003, the sales tax reports for the period of January, 2002 through June, 2002, were filed in April, 2003, and the sales tax reports for the 2001 period were filed in October, 2002.

31. THE AUDITOR II testified that the Tax Commission records do not show that the money paid to MS. Z was remitted to the Tax Commission.

32. By letters dated July 5, 2002, the Division caused to be issued against each of the Protestants a proposed assessment of sales tax, interest and penalty for the period of February, 2001 through June, 2002 in the aggregate amount of $5,277.17, inclusive of estimated tax for the period in the amount of $4,250.00, interest accrued through October 25, 2002, in the amount of $602.17 and penalty in the amount of $425.00. According to THE AUDITOR II, the estimated amount of the tax is based on a six month average of Protestants previous filings. Further, THE AUDITOR II testified that Protestants subsequently filed reports for the period in dispute which reported amounts supplant the amount of the assessment. He further testified that the only amount in dispute in this cause is the amount reported by Protestants for the period which was paid under protest.

33. Protestants timely protested the proposed assessments.

34. On January 6, 2003, the Tax Commission filed a Petition for Injunctive Relief against Protestants in the District Court of ANONYMOUS County, State of Oklahoma. During the pendency of this case, Protestant admitted that he owed sales tax for the period of June, 2002 through February, 2003. According to THE AUDITOR II, the ANONYMOUS County case concerned the tax delinquencies of Protestant prior to the assessment period. The Tax Commission dismissed the action without prejudice on March 18, 2003, due to payment in full of the liabilities. The payment was made in cash in open court.

35. According to the records of the Tax Commission, Protestants do not currently owe any tax, penalty or interest to the Tax Commission for the period of December, 1999 through February, 2003.

36. Protestants did not file a police report regarding the MS. Z incident.

37. The amount in controversy is $1,699.00, the amount paid under protest for the period of February, 2001 through June, 2002.

ISSUES AND CONTENTIONS

The sole issue tendered for decision is whether Protestants are liable to the Tax Commission for the sales tax reported by Protestants for the period of February, 2001 through June, 2002, and paid under protest.

Protestants contend that they paid the taxes in dispute to someone they believed to be properly authorized to collect those taxes for the Tax Commission and should not owe the amount paid under protest. In support of this contention, Protestants argue that they have received confusing information regarding what they owed and what they had paid during the entire time they have had an account with the Tax Commission and that the Tax Commission did not notify them that they were delinquent with their tax payments during the MS. Z period.

The Division argues that Protestants are liable for the sales taxes paid under protest for the period of February, 2001 through June, 2002. In support of this contention, the Division argues that notwithstanding whether any money was paid to the woman identified as MS. Z, if in fact it was, the money was not paid to the Tax Commission. The Division further argues that the woman identified as MS. Z was not an employee of the Tax Commission.

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this action is vested in the Tax Commission. 68 O.S. 2001, ϶ 221(D).

2. The standard burden of proof in administrative proceedings is "preponderance of evidence." Black's Law Dictionary, 1064 (5th ed. 1979). See, *Oklahoma Tax Commission Order No.* 91-10-17-061. "Preponderance of evidence" means "[E]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Id. It is also defined to mean "evidence which is more credible and convincing to the mind ... [T]hat which best accords with reason and probability." Id.

3. Here, the evidence does not support a finding that the woman who presented herself to Protestant A as an employee of the Tax Commission was in fact an employee.

4. Notwithstanding whether the woman identified as MS. Z was an employee of the Tax Commission, the State cannot be estopped and is not liable for the acts or omissions of its employees, especially where the employee is acting outside the scope of employment, which includes corruption or fraud. ***Burdick v. Independent School Dist. No. 52 of Oklahoma County***, 702 P.2d 48 (Okla. 1985). Liability for remitting sales tax to the State of Oklahoma lies with the vendor, not an agent of the vendor or any co-conspirators. 68 O.S. 2001, ϶ 1361(F). See, ***In re Mitchell***, 101 B.R. 278 (Bkrtcy. W.D. Okla. 1988). Although, Protestants may have paid the appropriate amount of sales tax to MS. Z, until payment is actually made to and received by the State, the liability for the payment of the taxes lies with the Protestants. See, ***U.S. v. Garami***, 184 B.R. 834 (M.D. Fla. 1995).

5. Protestants' request for the return of the sales taxes paid under protest for the period of February, 2001 through June, 2002 should be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is DETERMINED that the protest of Protestants 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.