JURISDICTION: **OKLAHOMA TAX COMMISSION DECISION**
CITE: **2004-09-02-04 / NOT PRECEDENTIAL**
ID: **P-03-073-H**
DATE: **SEPTEMBER 2, 2004**
DISPOSITION: **SUSTAINED**
TAX TYPE: **SALES TAX / USE TAX / WITHHOLDING TAX**
APPEAL: **NO APPEAL TAKEN**

The above-styled and-numbered cause comes on for a final order of disposition. A hearing was held before one of the Commission's Administrative Law Judges, who entered his Findings of Fact and Conclusions of Law herein, and a Recommendation that the protests be sustained in part and denied in part. Taxpayers have requested oral argument before the Commission *en banc*.

We do not believe that oral argument would significantly assist us in our deliberations in this cause, and we therefore deny that request. Having reviewed the files and records herein and being fully advised, however, we find and order that, for the following reasons, the protests should be sustained.

FINDINGS OF FACT

1. PROTESTANT is a distributor of gasoline pumps and other equipment for service stations and convenience stores. PROTESTANT is also in the lighting and electrical contracting business.

2. At all times material herein, PRESIDENT was the president and sole stockholder of PROTESTANT; SECRETARY was the corporation's secretary and maintained PROTESTANT'S payroll records.

3. The Audit Division conducted a field audit of PROTESTANT'S books and records covering sales tax, use tax and withholding tax for the period February 1, 1999 through January 31, 2002 (the audit period).[1] As a result of this audit, assessments of sales, use and withholding taxes were proposed on October 16, 2002 against the company; assessments of the sales and withholding taxes were also proposed against the officers, individually. All of the assessments were protested on December 2, 2002.[2]

Sales Tax

4. At the beginning of the hearing herein before the Administrative Law Judge, Protestants withdrew their protest of the sales tax assessment *except* as it pertained to sales tax assessed on payments made by PROTESTANT to PRESIDENT and sole shareholder, for the use of certain vehicles and equipment owned by PRESIDENT individually. These payments consisted of payments of $4,100.00 per month throughout the audit period, plus additional payments of $500.00 and $270.00, all characterized as "equipment lease" payments.

5. The vehicles and equipment consisted of a 1994 GMC truck, a 1998 Dodge truck, a 1998 Bobcat loader, a computer and some software. Throughout the audit period this property was in the possession of and used exclusively by PROTESTANT, depreciated by it on its corporate returns, and listed by PROTESTANT as its personal property for ad valorem tax purposes, but title to the property remained at all times in PRESIDENT, individually.

6. The cost of the equipment including financing costs was somewhat over $75,000. Payments made to PRESIDENT, INDIVIDUALLY, by PROTESTANT for the exclusive use and possession of the equipment during the audit period totaled $144,270.

7. PRESIDENT, INDIVIDUALLY, apparently either did not believe these transactions between himself and his company to be subject to sales tax, or did not consider the matter. In any case, there is no evidence that the company improperly presented or PRESIDENT, INDIVIDUALLY, relied on any permit or other certification from the Tax Commission that the transactions between them were exempt from sales tax. PRESIDENT, INDIVIDUALLY, simply did not collect or report sales taxes on these transactions.

Withholding Tax

8. During most of the audit period, PROTESTANT failed to withhold or remit income tax on wages it paid to most or all of its employees. The auditor calculated the amount of taxes that should have been withheld, the interest and penalty owing for failure to withhold these sums and then eliminated the tax amount where it could be determined that the employee had subsequently filed and paid the income tax due by such employee. The resulting proposed assessment was revised by the Audit Division on January 21, 2004, to further reduce the withholding taxes claimed in light of additional income tax filings and payment by individual employees.

9. The revised schedule asserts delinquent withholding tax in regard to two employees only, plus penalty and interest with regard to the other employees, all of whom had since individually filed and paid their income tax returns for the tax years involved in the audit period.

10. The two employees regarding whom the Audit Division proposes to assess delinquent withholding tax are EMPLOYEE ONE and EMPLOYEE TWO. In addition to receiving $595.00 per week for a 40-hour work schedule, EMPLOYEE ONE also owned and operated his own electrical contracting business. In lieu of withholding income tax from EMPLOYEE ONE'S $595.00 weekly wages, PROTESTANT treated all payments to him as those to an independent contractor, and issued an IRS form 1099 showing total payments to him of $80,177.20 for the tax year 2001. The proposed assessment concerns only the $595.00 weekly wages paid.

11. The delinquent withholding taxes claimed with the regard to these two employees, however, do not in any way coincide with the Tax Commission's 2001 withholding tax tables. According to those published tables, the tax required to be withheld from EMPLOYEE ONE, who was married and claimed three exemptions, totals $1,189 for the year 2001. Both the original and the revised assessments set this amount at $2,070. EMPLOYEE TWO was married

and claimed eight exemptions. The Division's total withholding tax calculation regarding EMPLOYEE TWO for 2001 is $236.00. According to the tables, a married employee with eight exemptions earning the amount EMPLOYEE TWO was paid, has no withholding requirement at all.[3]

CONCLUSIONS OF LAW

Sales Tax

1. The Oklahoma Sales Tax Code imposes a tax on the gross proceeds of the rental of all tangible personal property, unless specifically exempted. 68 O.S. §1354(A)(17). "Rental" includes any agreement whereby the owner of the property gives exclusive use of the property to another for a consideration. OAC 710:65-1-11(b).

2. The transactions between PROTESTANT and PRESIDENT, INDIVIDUALLY, regarding the two trucks, the Bobcat loader and the computer and software were clearly a rental or lease of that property by PRESIDENT, INDIVIDUALLY, the vendor, to PROTESTANT, the user, upon which sales tax is due and should have been paid by PROTESTANT and reported and remitted by PRESIDENT, INDIVIDUALLY. 68 O.S. §1361.

3. Every person required to collect the tax, in this case PRESIDENT, individually, is personally liable therefore.[4] 68 O.S. §1361. However, in this case the Audit Division did not assess the vendor, but the consumer, PROTESTANT, and its officers. Under Oklahoma's statutes, the Tax Commission may assess and collect sales tax from the consumer only where the consumer improperly presented a sales tax permit or other certification or used the property purchased exempt from tax in a non-exempt manner. 68 O.S. §1361(A). There was no evidence of that here. Secondly, even if PROTESTANT could be assessed for the sales tax it did not pay on the lease of the vehicles and equipment in this case, there is no provision in the Sales Tax Code making a corporate *consumer's* officers liable for the tax.[5]

4. In this case the Division proposed to assess the wrong persons. Their protest to the sales tax proposed to be assessed against them with regard to the rental of the vehicles and equipment to PROTESTANT by PRESIDENT, INDIVIDUALLY should be sustained.

Withholding Tax

5. Every employer making payment of wages is required to deduct and withhold from the wages paid each employee a tax in an amount determined in accordance with tables prepared and published by the Oklahoma Tax Commission. 68 O.S. §2385.2. PROTESTANT clearly failed to do so in this case. In such case, the corporate employer and its responsible officers are personally liable for the tax, plus the interest and penalties otherwise applicable because of such failure. 68 O.S. §2385.3.

6. The tax amounts proposed to be assessed, however, even as revised, far exceed the amounts determined in accordance with the tax tables. And, even though the employer and its responsible officers remain liable for the penalty and interest accruing for their failure to

withhold the proper amount where the employee has filed his return and paid the tax due, 68 O.S. §2386.3(F), we cannot say with any confidence that the interest and penalty proposed by the Division are anywhere near accurate.

7. For these reasons, the protest to the proposed withholding tax assessment should be sustained.

ORDER

For the reasons stated, the protests of PROTESTANT and its officers, PRESIDENT and SECRETARY, to the withholding tax assessment and the sales tax assessment on the vehicle and equipment rentals herein described, are SUSTAINED.

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[1] The proposed assessments herein reflect an audit period of February 1, 1999 through January 31, 2001. This latter date is apparently a typographical error. All of the audit work papers reflect a period ending date of January 31, 2002, and the audit and resulting assessments cover transactions which occurred up to that date. Taxpayers' liability herein is determined with regard to the period ending in 2002.

[2] The protest was subsequently withdrawn as to use tax.

[3] Other withholding tax calculations in the original audit and proposed assessment were similarly defective.

[4] PRESIDENT, INDIVIDUALLY, as the vendor, is still liable to assessment for these uncollected taxes.

[5] Except for withdrawals from inventory held for sale, in which the taxpayer is, in effect, both the vendor and consumer at the same time.

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.