JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2005-06-28-06
ID: P-02-186-K
DATE: JUNE 28, 2005
DISPOSITION: SUSTAINED IN PART/REVERSED IN PART
TAX TYPE: SALES/WITHHOLDING
APPEAL: NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

By letter dated March 8, 2002, the Division notified the Corporation that it had been selected for an audit of its records concerning several tax types, including sales and withholding taxes. The auditor assigned to conduct the audit was AUDITOR. By letter dated March 20, 2002, OWNER acknowledged at least one (1) conversation he had with AUDITOR regarding the audit.[1] OWNER indicated in the letter that he could not produce any records for the audit because a former business partner, PARTNER, had removed the records and his personal files and although ordered by the District Court in and for the County of Tulsa, State of Oklahoma, he [PARTNER] had failed to produce the files and records. OWNER also accused AUDITOR of receiving copies of the some of the records and files.

By letter dated April 6, 2002, the Division forwarded copies of the Corporation's records which were used for the withholding tax audit.[2] The letter indicated that the Division did not have any journal records, general ledgers, corporate minutes, or bank records of the Corporation. The letter further indicated that "[t]he transactions by payroll liability item for January, 2001 through March, 2002, which you have provided are the only payroll related records that we have available."

By letter dated April 29, 2002, OWNER indicated that AUDITOR attempted to contact him for the first time "in over four weeks" when "[he] called my cell phone at 6:30 p.m. on Saturday, April 27th, 2002 and left a message with my brother for me to `call him immediately' and then he placed a second call at 8:30 p.m. on Sunday, April 28th, 2002."[3]

By letter dated May 7, 2002, OWNER indicated he was forwarding to the Division, "[b]ank records including deposit slips and canceled checks (where available) for the period from January 1, 1999 through September 30, 2001 for all accounts used by [the Corporation]" which records did not include "copies of checks and deposits slips for eleven months of the year 2000". He also indicated he was forwarding corporate tax returns for 2000 and 2001 which were prepared "mainly from the bank information".[4] OWNER further indicated the bank records were obtained pursuant to the written IRS requests dated March 11, 2002 and March 25, 2002 and that certain of the records had already been provided to the IRS.

[1]Division's Exhibit C.

[2]Division's Exhibit D.

[3]Division's Exhibit E.

[4]Division's Exhibit F.

By letter dated June 12, 2002, OWNER indicated that PARTNER had delivered the records in his possession to the receiver for CARPET BUSINESS 1., that he would make arrangements in the next few days to examine the records, take possession of his personal records and those of his companies, review the records in conjunction with the returns he provide to the Division on May 8, 2002, prepare and deliver any amended returns that are necessary to ensure the returns are complete and accurate and prepare and deliver his personal tax returns.[5] OWNER also indicated he would prepare and deliver any payroll or sales tax returns that may be due or provide copies of the returns from his files, however he did not believe any taxes were due.

By letters dated July 18, 2002, the Division caused to be issued proposed sales and withholding tax assessments against the Corporation and MRS. OWNER, President and as an Individual.[6] Protestants protested the proposed assessments by letter dated August 13, 2002.[7] The Division by letter dated August 26, 2002, acknowledged receipt of the protest and advised the file was currently under review and the Division would notify them if the protest could be resolved by obtaining additional information.[8]

By Affidavit and Protest by MRS. OWNER, MRS. OWNER again protested the proposed assessments and requested an oral hearing to present argument and evidence.[9]

On August 18, 2002, the Division forwarded its file in this matter to the Office of the Administrative Law Judges for further proceedings consistent with the Uniform Tax Procedure Code[10] and the Rules of Practice and Procedure before the Oklahoma Tax Commission[11]. The case was assigned to ALJ, Administrative Law Judge.

A Notice of Pre-hearing Conference was forwarded to the parties on November 7, 2002, giving notice to the parties that a pre-hearing conference would be held in this cause on December 11, 2002. The conference was held and at the request of Protestants for a continuance to attempt to obtain the records of the business, the cause was continued to February 12, 2003, for the parties to file a status report.

By Status Report filed February 12, 2002, the Division advised the ALJ's Office that despite its request for documentation of attempts by Protestants to obtain records related to this matter, it had not received any documentation. The Division therefore requested that a scheduling order be

---

[5]Division's Exhibit G.

[6]Division's Exhibit H and I.

[7]Division's Exhibit J.

[8]Division's Exhibit K.

[9]Division's Exhibit L.

[10]68 O.S. 2001, § 201 et seq.

[11]*OAC*, 710:1-5-20 through 710:1-5-47.

issued. On February 13, 2003, a Scheduling Order and Notice of Hearing was issued in this cause setting forth dates for the parties to exchange preliminary witness lists, discovery requests, final witness lists and dates for the parties to complete discovery and file pre-trial briefs. The Scheduling Order scheduled the hearing for May 29, 2003 at the hour of 9:30 p.m.

By letter dated February 14, 2003, OWNER advised that PARTNER had allowed them restricted access to the facility in order to obtain all personal and business assets that were remaining on the premises, that they collected and inventoried all of the assets made available, that the personal and business records were not among the assets, and that they intended to depose PARTNER and petition the court to reinstate the contempt proceedings previously stayed by his bankruptcy filing. Based on these assertions, OWNER requested and the Division by status report filed February 19, 2003, indicated it would not object "in a final effort to accommodate the Protestant's search for documents" to a final sixty (60) continuance. By letter dated February 20, 2003, the parties were advised that the scheduling dates and hearing as set forth in the Scheduling Order and Notice of Hearing were stricken and the parties were granted to April 21, 2003, to file a status report.

By Status Report filed April 21, 2003, the Division advised that despite repeated requests, Protestants had failed to keep it apprised of the progress in its litigation to seek records. The Division therefore requested the issuance of a scheduling order. On April 22, 2003, a Scheduling Order and Notice of Hearing was issued in this cause setting forth dates for the parties to exchange preliminary witness lists, discovery requests, final witness lists and dates for the parties to complete discovery and file pre-trial briefs. The Scheduling Order scheduled the hearing for July 29, 2003 at the hour of 9:30 p.m.

By letter dated July 29, 2003, the hearing was stricken and further proceedings were stayed pending disposition of the bankruptcy case, upon Motion to Stay Proceedings filed by OWNER wherein he advised that a petition for personal bankruptcy had been filed by MRS. OWNER on June 13, 2003.

On December 11, 2003, the ALJ's Office was advised that the bankruptcy petition filed by MRS. OWNER had been dismissed as of September 18, 2003.

By letter dated December 15, 2003, the parties were direct to advise the Court on or before January 12, 2004, how they intended to proceed in this cause. In response, Protestant by letter dated January 11, 2004, advised that he still wished to proceed with the protest and still maintained that the audit did not reflect a correct accounting. Protestant further asserted that the audit calculated total dollar amounts deposited in the bank and assessed those as sales taxable and that this is incorrect as the company was a consulting company and sold labor which is non-taxable. By status report filed January 15, 2004, the Division requested that a scheduling order be issued due to the length of time the matter had been pending and the fact Protestant's bankruptcy had been dismissed.

On January 22, 2004, a Scheduling Order and Notice of Hearing was issued in this cause setting forth dates for the parties to exchange preliminary witness lists, discovery requests, final witness lists and dates for the parties to complete discovery and file pre-trial briefs. The Scheduling Order scheduled the hearing for May 19, 2004 at the hour of 1:30 a.m. The Scheduling Order and

Notice of Hearing was forwarded to Protestants in accordance with 68 O.S. 2001, § 208. Protestants did not comply with the scheduling order.

Protestants did not appear at the hearing scheduled for May 19, 2004, and it was noted for the record that Protestants had not contacted the ALJ's Office nor the Division's representative in regard to the hearing. The Division called one witness, AUDITOR, the auditor in this matter, who identified Division's Exhibit A and testified concerning how he determined sales and withholding taxes were due and how he calculated the amounts thereof. The Division's representative was thereafter allowed to identify the Division's Exhibits B through M which were offered and admitted into evidence. The Division's representative made a brief closing statement whereupon the hearing was concluded, the record was closed and the matter was submitted for decision.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings held in this cause and the exhibits admitted into evidence, the undersigned finds:

1. The Corporation was selected for a sales and withholding tax audit by the Division.[12]

2. According to AUDITOR, the auditor assigned to perform the audit, the audit research packet he received reflected the Corporation had not applied for a sales tax permit nor had it filed a business registration with the Tax Commission. The Corporation had obtained a federal identification number.[13]

3. According to the auditor, the Corporation was a successor company to PREVIOUS BUSINESS.

4. The Corporation had not filed or remitted sales or withholding taxes during the audit periods.[14]

5. AUDITOR testified that he determined the amount of sales tax for the period of January 1, 2000 through December 31, 2001, in the same manner he had determined the sales tax for PREVIOUS BUSINESS.; i.e., by dividing the gross sales reported on the Corporation's 2000 and 2001 federal income tax return, which were provided by Protestants, by twelve (12) for each year and then using the quotient for the year as the amount of the monthly gross sales upon which to assess sales tax for the year.

6. The auditor testified that he obtained the federal corporate income tax returns for 2000 and 2001 and bank statements inclusive of November, 2000 to August, 2001, from Protestants' attorney, ATTORNEY. He stated that he obtained the records in this manner because OWNER

[12]Division's Exhibit B.

[13]Testimony of AUDITOR.

[14]Testimony of AUDITOR.

believed AUDITOR was harassing him and wanted to avoid further contact, whereas AUDITOR testified that he made several attempts to contact OWNER to obtain the record because OWNER would not cooperate in turning over any records.

7. The auditor further testified that Protestants never provided him with anything other than the bank statements for the period indicated and the federal tax returns.

8. In regard to the withholding tax audit, AUDITOR testified that the audit period only included the months of November 1, 2000 through August 31, 2001, because this is the only period for which he received bank statements.

9. He stated that the amount of withholding tax assessed was determined in the same manner he had determined the withholding tax for PREVIOUS BUSINESS.; i.e., through a review of copies of checks contained in bank statements.

10. He stated that he picked up as taxable checks written to individuals on a weekly or biweekly basis which appeared to be salary and which checks did not have a notation at the bottom left of the check which stated otherwise.

11. AUDITOR further testified that it appeared the Corporation did not withhold taxes from the pay checks as evidenced by the checks; i.e., biweekly checks written to VICE PRESIDENT, V.P., for $1,000.00.

12. The Division, by letters dated August 18, 2002, caused to be issued proposed sales and withholding tax assessments against Protestants for the periods of January 1, 2000 through December 31, 2001 and November 1, 2000 through August 31, 2001 respectively, as follows:

	Sales	Withholding
Tax	$28,444.56	$ 4,148.00
Interest[15]	6,296.78	770.91
Sub-Total	$34,741.34	$ 4,918.91
Penalty	2,844.48	1,037.00
TOTAL	$37,585.82	$ 5,955.91[16]

14. Protestants timely protested the proposed assessments.[17]

15. In the Affidavit and Protest by MRS. OWNER[18], MRS. OWNER states:

[15]Accrued through August 15, 2002.

[16]Division's Exhibits H and I.

[17]Division's Exhibit J.

[18]Division's Exhibit L.

A. BACKGROUND

1. I am the shareholder of CORPORATION a management information services entity which first traded in the year 2000.

2. Until October 1, 2001 all of the business and personal records of my husband and I were kept at the company's office located at 123 FAKE STREET, TULSA, OK 12345. Over the weekend of September 29 and 30, 2001, my husband's business partner, PARTNER (SSN 999-99-9999) aided by another individual, ASSOCIATE. (SSN 111-11-1111), removed all of the records from the place in which they were normally located to an undisclosed location. At the same time they changed the locks on the building to deny access to my office and the personal property, even though my husband was a 50% owner of the building at that time. Since then, PARTNER has continued to deny access to the records and has falsely denied under oath in testimony before the district court that he has ever had possession of the records.

3 In or about October, 2001 the Oklahoma Tax Commission (OTC) through and by its auditor AUDITOR conducted an audit of two entities owned by PARTNER known as CARPET BUSINESS 1 and CARPET BUSINESS 2, at 999 ANYSTREET.

4. During the audit PARTNER took the opportunity to make a number of malicious allegations against my husband and I, and the companies that we are associated with, to AUDITOR and provided AUDITOR with copies of a selected few of the stolen records. PARTNER has also distributed selected stolen records to others such as the Internal Revenue Service (IRS).

5. My husband was subsequently notified by the OTC on March 20, 2002 that an audit would be conducted of one of our companies and then I received notification dated March 23, 2002 that CORPORATION would also be audited. The auditor, the same AUDITOR, was very aggressive making numerous accusations of misconduct against me even appearing at my house unannounced and calling and threatening us on my cellular phone on Saturday and Sunday evenings. We have fully disclosed the above circumstances to AUDITOR who initially denied receiving any of the stolen records. He refused to provide any written requests for information or provide a fax number so that we could provide him with written responses to his requests. We wrote to the Auditor Supervisor, SUPERVISOR, on several occasions expressing my concerns. (The OTC has since admitted that it received copies of certain of the stolen records from

PARTNER and has provided us with copies of those documents to assist us in responding to their requests).

6. The theft of the records and other matters were and are in litigation in the District County of Tulsa County, State of Oklahoma case Number XX 2001-9999. PARTNER failed and refused to comply with direct orders of the Court and subpoenas to produce records and a jury trial for contempt of court was set for April 1, 2002. On March 26, 2002 PARTNER filed petitions in bankruptcy in the United States Bankruptcy Court for the Northern District of Oklahoma, Case Numbers 02-11111-X, 02-2222-X, and 02-3333-X, and his attorney petitioned the court to strike the jury trial, which petition was granted. On April 17 using the same attorney as PARTNER, PARTNER'S accomplice, ASSOCIATE, filed petitions in bankruptcy in the United States Bankruptcy Court for the Northern District of Oklahoma, Case Numbers 02-4444-X and 02-5555-X. We believe that multiple objections to PARTNER'S bankruptcy have been filed and the case is still pending.

7. At the appropriate time, we intend to attempt to lift the automatic stays in the above bankruptcy cases so that the civil trial may proceed in the state case in order to recover our records and obtain the relief we believe we are entitled to under the law.

8. In lieu of the records, we obtained duplicate bank records and provided copies of these to AUDITOR at his request.

9. We have requested on a number of occasions in writing that if the OTC requires any further information than that which was available to us, the OTC allow us sufficient time to recover the records from PARTNER through the courts. The OTC would not be harmed by this delay since we are confident that no taxes are due.

10. We have filed the required returns for our employees, paid the withholding taxes due, issued proper documentation to our subcontractors and paid the taxes due. The OTC proposed assessment of additional withholding taxes is improper and has been made, we believe, in a vindictive attempt to punish us.

11. We have also advised AUDITOR that the company provided services and did no manufacturing or assembly. The few items provided by the company to its customers, less than $5,000.00 in total, were sold to customers on a pass-through basis for which the company paid sales tax and passed through sales tax to its customers without markup of any kind. The OTC has advised us on multiple occasions that businesses that provide services and are not required to collect

sales are not required to file sales tax returns. We do not believe that the OTC has any evidence to refute our claims.

12. On July 18, 2002, notwithstanding the facts, the OTC made a proposed assessment for withholding tax and sales tax based, it appears, solely upon the auditor's interpretation of the copies of the bank records provided and the baseless allegations of PARTNER. On August 15, 2002 I filed a notice of intent to protest the assessments.

B. WITHHOLDING TAX ASSESSMENT

13. The OTC proposes to make an assessment of $5,955.91 for delinquent withholding taxes. This is entirely incorrect: no taxes are due.

14. CORPORATION has one employee who has been with the company for less than a year. Proper payroll tax deductions have been made, proper withholding tax returns have been filed and the withholding taxes due have been paid to the OTC. The assessment proposed by the OTC includes an amount for even these taxes which have already been paid. We have provided the OTC auditor with additional copies of the withholding tax returns and proof of payment yet, although we have made OTC aware of their errors the OTC has failed and refused to rescind these assessments. To fail and refuse to rescind an assessment when the OTC has actual knowledge that the withholding taxes have already been paid is an abuse of privilege.

15. The proposed assessment classifies independent contractors as employees; even those who were paid as little as $125, $225, $487 and $95 in a full calendar year. This is less than the federally mandated trigger for the issue of 1099's and is absurd. It is improper to classify an independent contractor operating his own business providing similar services to a number of entities as an employee simply because he was paid $95 in a calendar year by one of those entities.

16. The OTC has been provided with affidavits from some of these affirming that they were not at any time employees of CORPORATION. It is absurd to suggest that these independent contractors were employees. Making such a proposed assessment and failing and refusing to rescind it when OTC has actual knowledge of the above is grossly unreasonable and was only done to cause this taxpayer as much hardship as possible.

C. SALES TAX ASSESSMENT

> 17. The OTC proposes to make an assessment of $37,585.82 for delinquent sales tax when CORPORATION'S business is almost exclusively the provision of services which are non-taxable. It does not manufacture or assemble nor sell items to retail purchasers.
>
> 18. The OTC has actual knowledge that CORPORATION'S business records have been stolen because the OTC's auditor was provided copies of certain records by the actual thief of the records.
>
> 19. Occasionally, CORPORATION purchases items for customers on a pass-through basis for which CORPORATION pays sales tax. These costs are passed through to our customers at cost without mark up.
>
> 20. CORPORATION has paid sales tax on all items that it purchased and does not collect sales tax from its customers.
>
> 21. There are no sales tax returns to be filed because there are no sales taxes collected or due.
>
> 22. The proposed assessment by the OTC suggests that CORPORATION [sold] taxable goods at the rate of exactly $13,005.83 for each and every month in the year 2000 and $16,934.58 in each and every month in the year 2001. This exceeds the companies sales and takes no account of the provision of services, which are non taxable. These sums are clearly delineated in CORPORATION'S tax returns which have been filed with the OTC and the IRS, copies of which have been provided to the OTC's auditor.
>
> **D. RELIEF REQUESTED**
>
> 21. I request an oral hearing to enable me to present my case and evidence.
>
> 22. I request that the proposed assessments by the OTC be rescinded.

16. In a letter dated January 1, 2000, VICE PRESIDENT, V.P. of Operations, CORPORATION.,[19] writes:

> Please note you will be receiving your billing from a different company from now on. Instead of receiving your bills from PREVIOUS BUSINESS., they will now come from CORPORATION. CORPORATION will offer you a number of different benefits and possibilities that PREVIOUS BUSINESS did not offer.

[19]Division's Exhibit A.

For example:

1. All techs are now network certified. We are certified either in Microsoft or Novell to provide you with a higher level of knowledge and experience.

2. Surveillance equipment. We are now offering IP based surveillance equipment. With this technology you are able to look through surveillance cameras at you PC.

3. IP based phone systems. With the proper training you will be able to manage configure your phone system with an easy interface.

With CORPORATION you will receive the same personal service you have received in the past from PREVIOUS BUSINESS with more services available from a network vendor.

Please make sure and note the new billing address and phone number.

If you have any questions please feel free to call me. Thank you for the opportunity to serve you and your company.

17. The amount in controversy is $43,541.73, plus accrued interest from August 15, 2002.

ISSUE

Whether Protestants sustained their burden of proving that either the proposed sales tax assessment or proposed withholding tax assessment is incorrect.

CONCLUSIONS OF LAW

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

2. In all proceedings before the Tax Commission, the taxpayer in general has the burden of proof to show that the action of the Commission is incorrect, and in what respect. *OAC*, 710:1-5-47. See, ***Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission***, 1988 OK 91, 768 P.2d 359 (1988). The standard of review in an administrative proceeding is "preponderance of the evidence." *Oklahoma Tax Commission Order No*. 1999-04-08-003 (citing *Oklahoma Tax Commission Order No.* 91-10-17-061). "Preponderance of the evidence" means "the evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which as a whole shows that the fact sought to be proved is more probable than not" or "that best accords with reason and probability." *Id*. See, *OAC*, 710:1-5-77(b).

3. With respect to the levy of sales tax, the sale of tangible personal property is subject to sales tax, unless otherwise specifically exempted by the provisions of the Oklahoma Sales Tax

Code. 68 O.S. 2001, § 1354(1)(A). The burden of proving that a sale is not a taxable sale is on the person making the sale. 68 O.S. 2001, § 1365(E).

Sales tax is levied on the "gross receipts or gross proceeds" of each sale. 68 O.S. 2001 § 1354(A). "Gross receipts or gross proceeds" is defined as "the total amount of consideration for the sale of any tangible personal property or service taxable under this article, whether the consideration is in money or otherwise." 68 O.S. 2001, § 1352(7). Section 1352(7) further provides that "[T]here shall not be any deduction from the gross receipts or gross proceeds on account of cost of the property sold, labor service performed, interest paid, or losses, or of any expenses whatsoever, whether or not the tangible personal property sold was produced, constructed, fabricated, processed, or otherwise assembled for or at the request of the consumer as part of the sale."

4. Taxes shall be deducted and withheld from the wages paid each employee by every employer making payment of wages. 68 O.S. 2001, § 2385.2(A). Every employer required to deduct and withhold taxes is required to pay over the amount withheld to the Tax Commission and file a return with each payment. 68 O.S. 2001, § 2385.3(A). The term "employer" for purposes of the Withholding Tax Act is defined to mean "any person * * * transacting business in or deriving any income from sources within the State of Oklahoma for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term 'employer' shall mean the person having control of the payment of such wages." 68 O.S. 2001, § 2385.1(b). See, *OAC*, 710:90-1-2. The term "employee" is defined to mean "any `resident individual,' * * * performing services for an employer, either within or without, or both within and without, the State of Oklahoma, and every other individual performing services within the State of Oklahoma, the performance of which services constitutes, establishes, and determines the relationship between the parties as that of employer and employee." 68 O.S. 2001, § 2385.1(c). See, *OAC*, 710:90-1-2. The term "employee" includes an officer of a corporation. *Id.*

5. Protestants never described in detail the nature of the business of the Corporation. Protestants made the following general and vague statements about the business, to-wit: "a management information services entity"; "the company provided services and did no manufacturing or assembly"; "[t]he few items provided by the company to its customers, less than $5,000.00 in total, were sold to customers on a pass-through basis for which the company paid sales tax and passed through sales tax to its customers without markup of any kind"; "CORPORATION has one employee who has been with the company for less than a year"; "CORPORATION'S business is almost exclusively the provision of services which are non-taxable"; "[i]t does not manufacture or assemble nor sell items to retail purchasers"; and "[o]ccasionally, CORPORATION purchases items for customers on a pass-through basis for which CORPORATION pays sales tax".

The Division states that "[t]axpayer was in the computer hardware sales and service business." Paragraph 2 of the Relevant [sic] Facts of the Brief of the Audit Division.

6. The undersigned finds that Protestants sustained their burden of proving that the proposed sales tax assessment is incorrect. Protestants state and the Division admits that Protestants performed computer related services during the audit period. The auditor, however, subjected to

sales tax the gross sales reported on the Corporation's 2000 and 2001 federal income tax returns, which necessarily includes income from the performance of services, without factoring in the labor as either reported on those returns or at the very least as subjected to withholding tax in this matter.

The facts in this case are similar to the facts in *Oklahoma Tax Commission Order No.* 97-05-08-010.[20] In that case, the auditor utilized the amounts reported as gross receipts on the taxpayer's federal income tax returns as the amount of taxpayer's sales subject to sales tax during the audit period due to a lack of records. The auditor in that case, however, credited against the gross receipts an amount for labor.

Therefore, the undersigned finds that the sales tax audit and assessment should be revised or adjusted to credit against the Corporation's gross receipts, the labor amounts reported on the Corporation's federal income tax returns or at the very least the wage or salary amounts the auditor subjected to withholding tax.

7. The undersigned further finds that Protestants failed to sustain their burden of proving the withholding tax assessment is incorrect. The Protestants state they had only one employee who had been with the company for less than a year and that they filed proper withholding tax reports and remitted the proper amount of withholding taxes to the Tax Commission. The Protestants further state that the proposed assessment classifies independent contractors as employees, even those who were paid as little as $125, $225, $487, and $95 in a full calendar year.

The evidence as a whole, however, and that which best accords with reason and probability suggests otherwise, which Protestants have not refuted. Protestants swear the Corporation was a management information services entity. The federal income tax returns of the Corporation indicate Protestants averaged approximately $13,000.00 in sales during 2000 and $17,000.00 during 2001. The letter of January 1, 2000, indicates that the Corporation employed computer technicians. The letter of the Division dated April 6, 2002, indicates the payroll related records Protestants provided were considered and such records reflected a liability for January, 2001 through March, 2002. Further, the auditor testified that he only "picked up" as taxable checks written to individuals on a weekly or biweekly basis which appeared to be salary and which checks did not have a notation at the bottom left hand corner of the check indicating otherwise. The auditor further testified that it did not appear from the payroll checks that the Corporation was withholding taxes from the checks and gave as an example the biweekly checks written to VICE-PRESIDENT in the amount of $1,000.00.

Therefore, the undersigned finds that the proposed withholding tax assessment should be sustained.

8. Protestants protest to the proposed assessments is sustained in part and denied in part. Protestants protest to the proposed sales tax assessment is sustained and the assessment should be

[20]The only material differences to this case is that in Order No. 97-05-08-010 it was admitted the taxpayer designed, constructed and installed tangible personal property and taxpayer charged and collected a fee for the total project done, including the design and consulting work, anything purchased and the work performed by subcontractors.

revised as hereinbefore decided. Protestants protest to the proposed withholding tax assessment is denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestants, CORPORATION. and MRS. OWNER, as an officer of CORPORATION. and as an individual, be sustained in part and denied in part. It is further ORDERED that the sales tax assessment be revised in accordance herewith and that the resultant amount be fixed as the deficiency due and owing by Protestants. It is further ORDERED that the amount of the withholding tax assessment, including any additional accrued and accruing interest, be fixed as the deficiency due and owing by Protestants.

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.