

JURISDICTION: OKLAHOMA TAX COMMISSION  
CITE: 2005-06-28-07  
ID: P-02-151--K  
DATE: JUNE 28, 2005  
DISPOSITION: SUSTAINED IN PART/DENIED IN PART  
TAX TYPE: SALES/WITHHOLDING  
APPEAL: NONE TAKEN

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

By letter dated March 20, 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.<sup>1</sup> The auditor assigned to conduct the audit was AUDITOR. By letter dated March 20, 2002, PRESIDENT acknowledged at least one (1) conversation he had with AUDITOR regarding the audit.<sup>2</sup> PRESIDENT 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. PRESIDENT also accused AUDITOR of receiving copies of the some of the records and files.

By letter dated March 23, 2002, PRESIDENT acknowledged an attempt by AUDITOR to contact him in person, wherein he writes: "I wish to protest the unannounced visit of your auditor to my residence on Thursday, March 21st, 2002 at approximately 9:00 a.m. AUDITOR had made no prior attempt to contact me by phone to arrange a meeting at my residence."<sup>3</sup> PRESIDENT also indicates in the letter that "[he had] received no further calls from AUDITOR since the last message [he] left for him and no list of documents that we are required to produce".

By letter dated April 29, 2002, PRESIDENT 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."<sup>4</sup> PRESIDENT also wrote in the letter, "I have no records that I can produce for an audit. The company has not been doing business in the past three years; to the best of my recollection COMPUTER BUSINESS operated from 1996 to 1999. It provided computer services locally but had no employees. It started as a hobby. I cannot provide any more information than that without the records [records removed by PARTNER]."

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<sup>1</sup>This letter is the second or third letter forwarded to the Protestants as Protestants identify letters from the Division dated March 8, 2002 and March 10, 2002 in their correspondences to the Division. Division's Exhibits B, C and D and Exhibits A and B to the Affidavit and Protest by PRESIDENT, admitted as part of ALJ's Exhibit 1.

<sup>2</sup>Exhibit A to the Affidavit and Protest by PRESIDENT, admitted as a part of ALJ Exhibit 1.

<sup>3</sup>Exhibit B to the Affidavit and Protest by PRESIDENT, admitted as a part of ALJ Exhibit 1.

<sup>4</sup>Division's Exhibit B and Exhibit C to the Affidavit and Protest by PRESIDENT, admitted as a part of ALJ Exhibit 1.

By letter dated May 7, 2002, PRESIDENT indicated he was forwarding to the Division, "[b]ank records including deposit slips and canceled checks for the period from January 1, 1996 through December 31, 1997 and from January 31, 1999 through February 28th, 2001 for all accounts used by [the Corporation]" which records did not include "copies of checks and deposits slips for the years 1996 and 1997". He also indicated he was forwarding corporate tax returns for 1999 and 2000 which were prepared "mainly from the bank information".<sup>5</sup> PRESIDENT further indicated the bank records were obtained pursuant to the written IRS requests dated March 11, 2002 and March 25, 2002.

By letter dated June 12, 2002, PRESIDENT 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.<sup>6</sup> PRESIDENT 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 June 17, 2002, the Division caused to be issued proposed sales and withholding tax assessments against the Corporation and PRESIDENT, President and as an Individual.<sup>7</sup> Protestants protested the proposed assessments by letter dated July 15, 2002.<sup>8</sup> The Division by letter dated July 31, 2002, acknowledged receipt of the protest and advised the file was currently under review and the protest could be resolved by submitting accounting records, previously requested, for substantiating actual taxable sales for each month covered in the audit period which sales records would include; sales journal, sales invoices, and in-state purchase invoices.<sup>9</sup>

By letter dated August 13, 2002, the Affidavit and Protest by PRESIDENT attached thereto and Exhibits A through D attached to the Affidavit, PRESIDENT again protested the proposed assessments and requested an oral hearing to present argument and evidence.<sup>10</sup> In the letter, PRESIDENT advised that he had reviewed the records turned over to the receiver, but did not find any of the "stolen personal and business records."

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

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<sup>5</sup>Division's Exhibit C.

<sup>6</sup>Division's Exhibit D.

<sup>7</sup>Division's Exhibit E and F.

<sup>8</sup>Division's Exhibit G.

<sup>9</sup>Division's Exhibit H.

<sup>10</sup>ALJ Exhibit 1.

Code<sup>11</sup> and the Rules of Practice and Procedure before the Oklahoma Tax Commission<sup>12</sup>. The case was initially assigned to ALJ 1, Administrative Law Judge.

A Notice of Pre-hearing Conference was forwarded to the parties on September 16, 2002, giving notice to the parties that a pre-hearing conference would be held in this cause on October 1, 2002. On September 30, 2002, PRESIDENT telephoned the ALJ's Office to request that the pre-hearing conference be held by telephone which request was granted. The conference was held on October 1, 2002, and at the request of Protestants for a continuance to attempt to obtain the records of the business, the cause was continued sixty (60) days for the parties to file a status report.

By letter dated December 2, 2002, PRESIDENT advised the ALJ's Office that he had received notification that PARTNER had been discharged from his personal bankruptcy (a copy of the Discharge of Debtor was attached to the letter) and that he [PRESIDENT] intended to re-institute legal action against PARTNER to obtain the stolen records. By memorandum dated December 6, 2002, the Division advised the Court that it did not object to an additional sixty (60) day continuance to allow Protestants time to obtain the records, however, it requested that any correspondence to any non-parties be provided to it so that it could remain apprised of Protestants' progress. By letter dated December 10, 2003, the parties were granted to January 31, 2003 to file a status report.

By status report filed February 3, 2003, the Division advised that despite speaking with PRESIDENT on at least one occasion, the Division had not received any documentation or pleadings from PRESIDENT showing an attempt by Protestants to obtain the records. The Division therefore requested that a scheduling order be issued. By letter dated February 11, 2003, PRESIDENT 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, PRESIDENT 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 21, 2003, the parties were granted to April 21, 2003, to file a status report.

By status report filed April 21, 2003, the Division advised that Protestant had failed to keep the Division apprised of the progress in its litigation to seek records despite repeated requests and 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 1:30 p.m.

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<sup>11</sup>68 O.S. 2001, § 201 et seq.

<sup>12</sup>OAC, 710:1-5-20 through 710:1-5-47.

By Order Granting Motion to Stay Proceedings dated July 29, 2003, the hearing scheduled for July 29, 2003, was stricken pending disposition of the bankruptcy case, upon Motion to Stay Proceedings filed by PRESIDENT wherein he advised that a petition for personal bankruptcy had been filed by him on June 13, 2003.

On December 11, 2003, the ALJ's Office was advised that the bankruptcy petition filed by PRESIDENT had been dismissed as of September 18, 2003. Also, on December 11, 2003, this cause was reassigned to ALJ 2, Administrative Law Judge pursuant to *OAC*, 710:1-5-31.

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 9:30 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 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 A through I which were offered and admitted into evidence. The Court also identified for the record ALJ's Exhibit 1 which was admitted into evidence. After conferring with counsel whether there was anything further to present, 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.<sup>13</sup>
2. According to AUDITOR, the auditor assigned to perform the audit, the audit research packet he received showed the Corporation was delinquent on sales tax from October, 1997 to

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<sup>13</sup>Division's Exhibit A.

February, 2000, when the Corporation ceased doing business as reported on the Corporation's 2000 federal income tax return.

3. AUDITOR also testified that to the best of his memory the audit research packet reflected that the Corporation had never filed a withholding tax report during its existence.

4. The Corporation had filed for and received a sales tax permit for its business operations.<sup>14</sup>

5. The audit research packet also reflected that the Corporation had remitted sales taxes for the period of March, 1995 through September, 1997 of approximately \$7,000.00, which according to AUDITOR could have been the result of a prior field or in-house audit.

6. AUDITOR testified that he determined the amount of sales tax for the period of October, 1997 through December, 1999, by dividing the gross sales reported on the Corporation's 1999 federal income tax return, which return he received from SUPERVISOR, a supervisor in the Division at the time, by twelve (12) and then using the quotient as the amount of the monthly gross sales upon which to assess sales tax.

7. For the two month period in 2000, AUDITOR divided the gross sales reported on the Corporation's 2000 federal income tax return, which he also obtained from SUPERVISOR, by two and assessed sales tax on these amounts.<sup>15</sup>

8. AUDITOR testified that he tried numerous times to contact Protestants regarding the audit, however, Protestants absolutely would not cooperate. He stated that he called PRESIDENT'S answering service several times and left several messages, however, PRESIDENT would not return his calls. He further stated that PRESIDENT finally did return his phone calls and he was able to obtain PRESIDENT'S cell phone number through caller ID. AUDITOR further testified that the Protestants never provided him with any documentation to substantiate the amount of sales tax owed for the audit period.

9 In regard to the withholding tax audit, AUDITOR testified that the audit period was inclusive of the months of March, 1995 through April, 2000, because his research indicated the Corporation had never filed withholding tax reports or remitted withholding taxes during its existence.

10. He stated that the amount of withholding tax assessed was determined through a review of copies of checks contained in bank statements which PRESIDENT had provided to his attorney, ATTORNEY.

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<sup>14</sup>Testimony of AUDITOR.

<sup>15</sup>Testimony of AUDITOR.

11 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.

12. AUDITOR further testified that he was never provided with any documentation to show that the individuals to whom the checks were written were not employees of the Corporation.

13. The Division, by letters dated June 17, 2002, caused to be issued proposed sales and withholding tax assessments against Protestants for the periods of October, 1997 through February, 2000 and March, 1995 through April, 2000, respectively, as follows:

	Sales	Withholding
Tax	\$47,827.95	\$14,368.23
Interest <sup>16</sup>	<u>25,179.10</u>	<u>8,804.70</u>
Sub-Total	\$73,007.05	\$23,172.93
Penalty	<u>4,782.51</u>	<u>3,592.33</u>
TOTAL	<u>\$77,789.56</u>	<u>\$26,765.26</u> <sup>17</sup>

14. Protestants timely protested the proposed assessments.<sup>18</sup>

15. In the Affidavit and Protest by PRESIDENT<sup>19</sup>, PRESIDENT states:

#### **A. BACKGROUND**

1. I was the founder and operator of COMPUTER BUSINESS a computer services entity that traded in Tulsa, Oklahoma, from 1996 until March 2000.

2. Until October 1, 2001 all of the business and personal records of COMPUTER BUSINESS were kept at my office located at 123 FAKE STREET, ANYTOWN, Oklahoma 11111. Over the weekend of September 29 and 30, 2001, my business partner, PARTNER (SSN 111-11-1111), aided by another individual, ASSOCIATE. (SSN 222-22-2222), 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 me access to my office and my personal

<sup>16</sup>Accrued through June 30, 2002.

<sup>17</sup>Division's Exhibits E and F.

<sup>18</sup>Division's Exhibit G.

<sup>19</sup>ALJ's Exhibit 1.

property even though I was a 50% owner of the building. Since that time PARTNER has continued to deny me access to the records and has 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 the entities known as CARPET BUSINESS 1 and CARPET BUSINESS 2 both of which were operated by PARTNER at the same above location on FAKE STREET. I had previously been a partner with PARTNER in CARPET BUSINESS 1 but had no association with CARPET BUSINESS 2.

4. During the audit PARTNER made a number of allegations against COMPUTER BUSINESS and me 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. I was subsequently notified by the OTC on March 20, 2002 that an audit would be conducted of COMPUTER BUSINESS and then I received notification dated March 23, 2002 that the entity I now work for would also be audited. The auditor AUDITOR was very aggressive and made numerous accusations of misconduct against me even appearing at my house unannounced and calling and threatening me on my cellular phone on Saturday and Sunday evenings. I fully disclosed the above circumstances to AUDITOR. He initially denied receiving any of the stolen records. He refused to provide me with any written requests for information or provide me with a fax number so that I could provide him with written responses to his requests. I wrote to the Auditor Supervisor, AUDIT 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 2001-1111. PARTNER has 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 in the Northern District of Oklahoma, Case Numbers 11-1111-A, 22-22222-B, and 33-33333-C, 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 44-44444-D and 55-55555-E. We believe that multiple objections to PARTNER'S bankruptcy have been filed and the case is still pending.

7. 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. 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 required 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 advised AUDITOR and his supervisor that COMPUTER BUSINESS did not at any time have employees, did not file, nor was it required to file, withholding tax returns. It did employ various independent contractors from time to time to whom 1099's were issued. Four of these were regular corporations and we paid another four less than \$100 each over the entire period from October 1997 through February 1999. The OTC has been provided with affidavits from some of these affirming that they [were] not at any time employees for COMPUTER BUSINESS. It is absurd to suggest that these independent contractors were employees.

11. We have also advised AUDITOR that the company provided services and did no manufacturing or assembly. Any items that were sold to customers were done so on a pass-through basis for which the company paid sales tax and passed through sales tax to its customers. 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. On June 17, 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 July 15, 2002 I filed a notice of intent to protest the assessments.

### **B. WITHHOLDING TAX ASSESSMENT**

12. At no time did COMPUTER BUSINESS have any employees. Any and all labor was casual and provided by independent contractors who generally provided similar services to other entities.

13. I did not personally receive a paycheck from COMPUTER BUSINESS.

14. The assessment of withholding taxes does not include any breakdown and so I am unable to respond in detail but repeat that at no time did COMPUTER BUSINESS have any employees. I have requested a breakdown of the audit from the auditor supervisor.

15. There were no withholding tax returns to be filed because the company did not at any time have employees.

### **C. SALES TAX ASSESSMENT**

16. COMPUTER BUSINESS'S prime business was the provision of services. It did not manufacture or assemble nor did it sell items to retail purchasers.

17. Any items purchased for customers were purchased on a pass-through basis for which COMPUTER BUSINESS paid sales tax.

18. To the best of my knowledge COMPUTER BUSINESS, like my present business, paid sales tax on all items that it purchased and did not collect sales tax from its customers.

19. There were no sales tax returns to be filed because there were no sales taxes.

20 The proposed assessment by the OTC suggests that COMPUTER BUSINESS sold taxable goods for exactly \$21,761.00 each and every month from October 1997 through December 1999. The total sales of the company was less than this for that period an averaged \$21,020 per month. Over 95% of this business was the result of services provided not items sold. The company's income tax returns provided to AUDITOR shows this.

### **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, XYZ CORPORATION.,<sup>20</sup> writes:

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

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 XYZ CORPORATION you will receive the same personal service you have received in the past from COMPUTER 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.<sup>21</sup>

17. The amount in controversy is \$104,554.82, plus accrued interest from June 30, 2002.

#### ISSUE

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

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<sup>20</sup>Successor corporation to COMPUTER BUSINESS.

<sup>21</sup>Admitted by Official Notice in this proceeding because of its direct relevance and materiality to a question of fact.

## 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: "[i]t provided computer services locally but had no employees", "[i]t started as a hobby"; "a computer services entity"; "COMPUTER BUSINESS did not at any time have employees, did not file, nor was it required to file, withholding tax returns"; "[i]t did employ various independent contractors from time to time to whom 1099's were issued"; "the company provided services and did no manufacturing or assembly"; "[a]ny items that were sold to customers were done so on a pass-through basis for which the company paid sales tax and passed through sales tax to its customers"; "[a]t no time did COMPUTER BUSINESS have any employees"; "[a]ny and all labor was casual and provided by independent contractors who generally provided similar services to other entities"; "I did not personally receive a paycheck from COMPUTER BUSINESS"; "COMPUTER BUSINESS'S prime business was the provision of services"; "[i]t did not manufacture or assemble nor did it sell items to retail purchasers"; "[a]ny items purchased for customers were purchased on a pass-through basis for which COMPUTER BUSINESS paid sales tax"; "[t]o the best of my knowledge COMPUTER BUSINESS, like my present business, paid sales tax on all items that it purchased and did not collect sales tax from its customers"; and "[o]ver 95% of this business [\$21,020.00 per month average] was the result of services provided not items sold".

The Division states that "[t]axpayer was in the computer hardware sales and service business." Paragraph 1 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 1999 and 2000 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. Further, the evidence as a whole, that which best accords with reason and probability, shows the sales tax assessment is incorrect, to-wit: the Corporation paid approximately \$7,000.00 in sales tax for the 31 month period inclusive of March, 1995 through September, 1997, however, the auditor assessed approximately \$48,000.00 in delinquent sales tax for the 29 month period inclusive of October, 1997 through February, 2000.

The facts in this case are similar to the facts in *Oklahoma Tax Commission Order No. 97-05-08-010*.<sup>22</sup> 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

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<sup>22</sup>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.

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:

We have advised AUDITOR and his supervisor that COMPUTER BUSINESS did not at any time have employees, did not file, nor was it required to file, withholding tax returns. It did employ various independent contractors from time to time to whom 1099's were issued. Four of these were regular corporations and we paid another four less than \$100 each over the entire period from October 1997 through February 1999. The OTC has been provided with affidavits from some of these affirming that they [were] not at any time employees for COMPUTER BUSINESS. It is absurd to suggest that these independent contractors were employees.

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 in the computer service business. Protestants admit they averaged approximately \$21,000.00 in sales per month during the audit period. The letter of January 1, 2000, indicates that the Corporation employed computer technicians. 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.

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 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, COMPUTER BUSINESS, and PRESIDENT, as an officer of COMPUTER BUSINESS, 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.