

JURISDICTION: OKLAHOMA TAX COMMISSION  
CITE: 2007-06-19-06 (NON-PRECEDENTIAL)  
ID: P-06-210-H  
DATE: JUNE 19, 2007  
DISPOSITION: SUSTAINED  
TAX TYPE: SALES/WITHHOLDING  
APPEAL: NONE

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

SECRETARY, as Secretary and Treasurer of COMPANY, and as an Individual, (“Protestant”) appears by and through attorney, ATTORNEY, LAW FIRM. The In-House Audit Section of the Audit Division (“Division”), Oklahoma Tax Commission, appears by and through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

### PROCEDURAL HISTORY

On November 17, 2006, the protest file was received by this office for further proceedings consistent with the Uniform Tax Procedure Code<sup>1</sup> and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.<sup>2</sup> On November 27, 2006, a letter was mailed to the Protestant stating that this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-06-210-H. The letter also advised the Protestant that a Notice of Prehearing Conference would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Oklahoma Tax Commission*. On December 19, 2006, the Notice of Prehearing Conference was mailed to the last known address of the Protestant, setting the prehearing conference for January 11, 2007, at 9:30 a.m.<sup>3</sup> On January 9, 2007, a written request for continuance was received from the Protestant. On January 10, 2007, the continuance was granted and the prehearing conference was rescheduled for February 12, 2007, at 9:30 a.m.

The prehearing conference was held as scheduled on February 12, 2007, at 9:30 a.m., with the parties in attendance. At the request of the parties, the “protest” of COMPANY was placed on hold, pending the determination in this matter.

On February 16, 2007, a Scheduling Order was issued, as suggested by the parties, setting this matter for hearing on April 4, 2007, at 9:30 a.m., with position letters or briefs due on or before March 28, 2007.

On March 6, 2007, the parties filed Joint Stipulation of Facts and Exhibits. On March 28, 2007, the Division’s Memorandum Brief was filed and on March 29, 2007, the Position

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<sup>1</sup> OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

<sup>2</sup> OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

<sup>3</sup> OKLA. STAT. ANN. tit. 68, § 208 (West 2001). The notice was mailed to the Protestant at PROTESTANT’S ADDRESS.

Statement of Protestant SECRETARY was filed of record. On March 30, 2007, the Protestant filed an Application to Correct the Position Statement of Protestant SECRETARY. On April 3, 2007, an Order Granting Application was issued by the undersigned.

A closed hearing<sup>4</sup> was held as scheduled on April 4, 2007, at approximately 9:30 a.m. The Protestant called one (1) witness, SECRETARY, who testified on his own behalf. The Protestant's Exhibits A and B were identified, offered, and admitted into evidence. The Division called one (1) witness, AUDITOR, Auditor, In-House Audit Section of the Audit Division, Oklahoma Tax Commission, who testified regarding the records of the Division. The Division's Exhibits 1 through 3 were identified, offered, and admitted into evidence. The Joint Exhibits of the parties, Exhibits A through F, were identified, offered, and admitted into evidence.

Upon conclusion of the hearing, the record was closed and the case was submitted for decision on April 4, 2007.

### STIPULATION OF FACTS

On March 6, 2007, the parties filed Joint Stipulation of Facts and Exhibits,<sup>5</sup> as follows, to-wit:

1. That SECRETARY was elected as Secretary and Treasurer of COMPANY on September 25, 2003. (Exhibit "A".)

2. That SECRETARY is listed as the Secretary/Treasurer of COMPANY on the Business Registration of COMPANY. (Exhibit "B".)

3. That on July 24, 2006, the Division issued its assessment for the tax period of April 1, 2004 through November 30, 2005 in the amount of Thirty-One Thousand Three Hundred Seventy-One Dollars and Sixty-Three Cents (\$31,371.63), consisting of Twenty-Four Thousand Six Hundred Eight-Eight Dollars and Thirty-Five Cents (\$24,688.35) in tax, plus Four Thousand Two Hundred Fourteen Dollars and Forty-Nine Cents (\$4,214.49) in interest through August 23, 2006, and penalty in the amount of Two Thousand Four Hundred Sixty-Eight Dollars and Seventy-Nine Cents (\$2,468.79) for sales tax and Six Hundred Ninety-One Dollars and Fifty-Eight Cents (\$691.58), consisting of Three Hundred Nineteen Dollars and Fifty-Three Cents (\$319.53) in tax, plus One Hundred Twenty Dollars and Five Cents (\$120.05) in interest through September 22, 2006, and penalty in the amount of Two Hundred Fifty-Two Dollars and Zero Cents (\$252.00) for Withholding Tax against SECRETARY, as Secretary and Treasurer of COMPANY and as an Individual. (Exhibit "C".)

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<sup>4</sup> The Protestant invoked his right to a confidential hearing as provided by OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2007).

<sup>5</sup> The text of the stipulated facts is set out *in haec verba*. "*in haec verba*" (in heek v<<schwa>>-b<<schwa>>). [Latin] In these same words; verbatim. BLACK'S LAW DICTIONARY (8<sup>TH</sup> ed. 2004), available at <http://westlaw.com> (Last visited October 18, 2006).

4. That August 16, 2006, SECRETARY requested an extension of time to protest the assessment. (Exhibit “D”.)

5. That on August 16, 2006, the Division granted SECRETARY a ninety (90) day extension in which to protest the assessment. (Exhibit “E”.)

6. That on or about September 27, 2006, the Protestant timely filed his written protest to the assessment. (Exhibit “F”.)

7. That SECRETARY was not an authorized signatory on any known bank account held by COMPANY.

8. That the Commission has no records of SECRETARY’S signature on any reports or returns filed on behalf of COMPANY.

### ADDITIONAL FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, and the position letter and brief, the undersigned finds:

9. Upon the formation of COMPANY on September 25, 2003, PRESIDENT owned 900 shares and the Protestant owned 100 shares.<sup>6</sup> As of April 16, 2004, PRESIDENT owned 840 shares, the Protestant owned 60 shares, and STOCK HOLDER owned 100 shares.<sup>7</sup>

10. The Business Registration for COMPANY was filed by PRESIDENT, as President of COMPANY, with a business start date of April 15, 2004.<sup>8</sup>

11. On Line 9 of the Business Registration, PRESIDENT designated himself as the officer responsible for remitting Oklahoma Income Tax withheld from employees.<sup>9</sup>

12. The Protestant never resigned in writing as the Secretary and Treasurer of COMPANY.<sup>10</sup> PRESIDENT listed the Protestant as the Secretary and Treasurer of COMPANY

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<sup>6</sup> Protestant’s Exhibit B.

<sup>7</sup> Protestant’s Exhibit B. The Protestant testified that it was sometime around the stock transfer that he called PRESIDENT by phone and resigned as an officer of COMPANY and that the stock transfer on April 16, 2004, was the result of that resignation. The Protestant also testified that he retained a four percent (4%) interest in COMPANY, as an investor only.

<sup>8</sup> Joint Exhibit B.

<sup>9</sup> Joint Exhibit B. The Business Registration signed by PRESIDENT on November 15, 2003, contains the following text in pertinent part, as follows, to-wit:

I further acknowledge and agree that sales, withholding, and motor fuel taxes are trust funds for the State of Oklahoma and that any use of these trust funds other than timely remittance to the State of Oklahoma is embezzlement and can result in criminal prosecution.

on Franchise Tax Returns filed for the periods of 07/01/04 through 06/30/05 and 07/01/05 through 06/30/06.<sup>11</sup>

13. PRESIDENT went out-of-business on or about November 2005, followed by a bankruptcy filed by PRESIDENT.<sup>12</sup>

14. The Protestant did not have the authority to hire or a fire employee, manage the day-to-day operations of COMPANY, and was not an authorized signatory on any known bank account held by COMPANY.<sup>13</sup> The Protestant did not have control over the financial affairs of COMPANY.

### CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.<sup>14</sup>

2. Rules promulgated pursuant to the Administrative Procedures Act<sup>15</sup> are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court.<sup>16</sup> They are valid and binding on the persons they affect, have the force of law, and are prima facie evidence of the proper interpretation of the matter to which they refer.<sup>17</sup>

3. The tax levied by the Oklahoma Sales Tax Code<sup>18</sup> shall be paid by the consumer or user to the vendor<sup>19</sup> as trustee for and on account of this state and each and every vendor shall

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<sup>10</sup> Testimony of Protestant.

<sup>11</sup> Division's Exhibits 1 and 2. Both returns were signed by PRESIDENT.

<sup>12</sup> Division's Exhibit 3. The Protestant filed a protest on behalf of COMPANY on December 21, 2006, but states in the letter that he resigned as an officer, and was filing the protest on behalf of COMPANY because PRESIDENT had accepted a contractor job in Iraq and the Protestant did not know what to do. Testimony of Protestant.

<sup>13</sup> See Stipulation 7. See also Protestant's Exhibit A and Testimony of the Protestant.

<sup>14</sup> OKLA. STAT. ANN. tit. 68, § 221(D) (West Supp. 2007).

<sup>15</sup> OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2001).

<sup>16</sup> OKLA. STAT. ANN. tit. 75, § 306(C) (West 2001).

<sup>17</sup> OKLA. STAT. ANN. tit. 75, § 308.2(C) (West 2001).

<sup>18</sup> OKLA. STAT. ANN. tit. 68, § 1350 et seq. (West 2001).

<sup>19</sup> "Vendor" is defined as "any person making sales of tangible personal property or services in this state, the gross receipts or gross proceeds from which are taxed by the Oklahoma Sales Tax Code." OKLA. STAT. ANN. tit. 68, § 1352(27)(a) (West Supp. 2007).

"Person" is defined to include "any individual" or "[any] corporation." OKLA. STAT. ANN. tit. 68, § 1352(17) (West Supp. 2007).

collect from the consumer or user the full amount of the tax or an amount equal as nearly as possible or practicable the average equivalent thereof.<sup>20</sup>

4. Every employer who is required to withhold and remit taxes to the Tax Commission, shall be held personally responsible for failure to do so.<sup>21</sup>

5. "Every person required to collect any tax imposed by [the Oklahoma Sales Tax Code and Oklahoma Income Tax Code], and in the case of a corporation, each principal officer thereof, shall be personally liable for the tax."<sup>22</sup>

6. When the Tax Commission issues a proposed assessment against a corporation for unpaid sales and withholding taxes, the Commission shall file assessments against the principal officers of the corporation personally liable for the taxes. The principal officers of the corporation shall be liable for the payment of sales tax and withholding tax during the period of time for which the assessment is made. The liability of a principal officer for sales tax and withholding tax shall be determined in accordance with the standards for determining liability for payment of federal withholding tax.<sup>23</sup>

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<sup>20</sup> OKLA. STAT. ANN. tit. 68, § 1361(A) (West Supp. 2007). *See also Wal-Mart Stores, Inc. v. Oklahoma Tax Commission*, 1991 OK CIV APP 73, 817 P.2d 1281.

<sup>21</sup> OKLA. STAT. ANN. tit. 68, § 2385.3(E) (West Supp. 2007).

<sup>22</sup> OKLA. STAT. ANN. tit. 68, § 1361(A) (West Supp. 2007). *See* OKLA. STAT. ANN. tit. 68, § 253 (West 2001). The Tax Commission identifies the "President, Vice-President, Secretary, Treasurer, or Secretary/Treasurer as principal officers." OKLA. ADMIN. CODE § 710:65-7-3-(1).

<sup>23</sup> The full text of OKLA. STAT. ANN. tit. 68, § 253 (West 2001) is as follows, to-wit:

When the Oklahoma Tax Commission files a proposed assessment against corporations or limited liability companies for unpaid sales taxes, withheld income taxes or motor fuel taxes collected pursuant to Article 5, 6 or 7 of this title, the Commission shall file such proposed assessments against the principal officers of the corporations or the managers or members personally liable for the tax. The principal officers of any corporation shall be liable for the payment of any tax as prescribed by this section if such officers were officers of the corporation during the period of time for which the assessment was made. Managers or members of any limited liability company shall be liable for the payment of any tax as prescribed by this section if the managers or members were specified as responsible for withholding or collection and remittance of taxes during the period of time for which the assessment was made. If no managers or members were specified to be responsible for the duty of withholding and remittance of taxes during the period of time for which the assessment was made, then all managers and member shall be liable.

The liability of a principal officer for sales tax, withheld income tax or motor fuel tax shall be determined in accordance with the standards for determining liability for payment of federal withholding tax pursuant to the Internal Revenue Code of 1986, as amended, or regulations promulgated pursuant to such section.

Section 253 sets out the trust taxes (which cannot be discharged in bankruptcy) for which a principal officer of a corporation that is also a "responsible person" is held personally liable, regardless of whether a corporation is in good standing or suspended. The current Business Registration Form on the signature line in part states, "I further acknowledge and agree that sales, withholding and motor fuel taxes are trust taxes for the State of Oklahoma and

7. In this matter, PRESIDENT designated himself on Line 9 of COMPANY'S Business Registration as the principal officer of COMPANY responsible for the collection and remittance of withholding tax.<sup>24</sup>

8. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.<sup>25</sup>

9. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.<sup>26</sup>

10. In this matter, the Protestant has met his burden of proof that he is not a "responsible person" for the collection and remittance of sales tax and withholding tax as proposed by the Division.

### DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the protest of SECRETARY, as Secretary and Treasurer of COMPANY and as an Individual, to the proposed sales tax assessment should be sustained.

It is further ORDERED that the protest of SECRETARY, as Secretary and Treasurer of COMPANY and as an Individual, to the proposed withholding tax assessment should be sustained.

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that any use of these trust funds other than timely remittance to the State of Oklahoma is embezzlement and can result in criminal prosecution." The current form is available on-line at <http://www.oktax.state.ok.us/btforms.html> (Last visited March 29, 2007).

<sup>24</sup> Joint Exhibit A. See OKLA. STAT. ANN. tit. 68, 253 (West 2001).

<sup>25</sup> OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999):

In all administrative proceedings, unless otherwise provided by law, the burden of proof shall be upon the protestant to show in what respect the action or proposed action of the Tax Commission is incorrect. If, upon hearing, the protestant fails to prove a prima facie case, the Administrative Law Judge may recommend that the Commission deny the protest solely upon the grounds of failure to prove sufficient facts which would entitle the protestant to the requested relief.

OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999), provides in pertinent part:

... "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.

<sup>26</sup> See *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

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.