

Ohio Man Fights Personal Tax Liability For Employer's Buys

By **Vidya Kauri**

Law360, New York (February 13, 2017, 8:13 PM EST) -- A former employee of a patio construction company urged the Ohio Supreme Court on Monday to scrap a personal tax liability against him for use taxes supposedly owed by the company, saying that the taxes were already paid to vendors during purchases.

Lawrence Dulay told the high court that he had been unaware of an agreement that Patio Enclosures Inc. had entered into, before his employment at the company commenced, to pay the tax directly to Ohio's revenue agency instead of vendors.

Claiming that he was not given a fair warning that he could be personally responsible for Patio Enclosure's taxes, Dulay said that his constitutional rights to due process and equal protection are being violated.

"There is no substantial justification for imposing personal liability, because the majority of the underlying taxes were actually collected by the tax commissioner. In fact, the tax commissioner granted Patio a refund of such taxes, but refused to credit Dulay's personal assessment for this refund," Dulay said.

According to Dulay's appeal from the Ohio Board of Tax Appeals, Patio Enclosures had entered into a direct pay agreement with the Tax Commissioner of Ohio in 1976, but the company never actually filed its "direct pay" returns with the Ohio Department of Taxation during Dulay's 22-year employment with the company from 1987 to 2009. Instead, the company typically paid sales tax directly to its vendors, Dulay said.

Moreover, the agreement was specific to only one location and specific accounts that were not at issue during an audit that resulted in Patio Enclosures' being assessed more than \$370,000 of use tax, interest and penalty for the 2003 to 2006 tax years.

That location was converted from a manufacturing facility to a retail furniture store and warehouse as a result of "significant operational changes," Dulay said, adding that he did not know about the agreement until the tax department's auditor showed it to him.

"Dulay had no fair warning or reasonable expectation that he could have personal liability for Patio's taxes since he was unaware of the prior direct pay permit triggering the asserted personal liability," he said.

The majority of taxes ultimately assessed against Patio Enclosures resulted from the company's alleged failure to comply with the requirements of the Direct Pay agreement, and not a failure to pay tax on taxable purchases, Dulay said.

The former employee said that while the audit was pending, the tax department consistently referred to Patio Enclosures' delinquency as use tax on purchases, which does not carry personal liability, then "capriciously" changed its position after assessing the company to assert a sales tax liability that can be levied against an individual.

As a result, Dulay said that he is being held personally liable for use tax supposedly owed by Patio Enclosures for transactions upon which sales tax was paid to vendors.

Dulay also said that his request for a telephone hearing for medical reasons was ignored when the tax commissioner allegedly conducted an in-person hearing regarding his personal liability with the company's chief financial officer and accountants. An admission by the accountants as to Dulay's liability as a responsible party was the only fact contained in the tax commissioner's final determination against him, he said.

In addition, the tax commissioner found the company's president not to be liable for the taxes, even though the president had greater financial authority, Dulay said.

A representative for the Ohio Department of Taxation could not be reached late Monday.

Dulay is represented by Steven A. Dimengo, Richard B. Fry and Melinda Smith Yeargin of Buckingham Doolittle & Burroughs LLC.

Ohio's Tax Commissioner is represented by Michael Dewine and Daniel W. Fausey.

The case is Dulay v. Testa, case number 2015-2111, in the Supreme Court of the State of Ohio.

--Editing by Edrienne Su.

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