

**JURISDICTION:** OKLAHOMA TAX COMMISSION - DECISION  
**CITE:** 2003-07-22-09 / NOT PRECEDENTIAL  
**ID:** P9800255  
**DATE:** 07-22-03  
**DISPOSITION:** SUSTAINED  
**TAX TYPE:** INCOME  
**APPEAL:** NO APPEAL TAKEN

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties filed Joint Stipulation of Facts, as follows:

#### **Procedural Facts**

1. XYZ timely filed its consolidated Oklahoma income tax return for the tax year 1990, on October 11, 1991. Such return was marked received by the Tax Commission on October 14, 1991. Joint Exhibit A.

2. XYZ timely filed an amended consolidated Oklahoma income tax return for the tax year 1990, on October 14, 1994. Such return was marked received by the Tax Commission on October 19, 1994. Joint Exhibit B.

3. XYZ timely filed its consolidated Oklahoma income tax return for the tax year 1991, on October 14, 1992. Such return was marked received by the Tax Commission on October 16, 1992. Joint Exhibit C.

4. XYZ timely filed an amended consolidated Oklahoma income tax return for the tax year 1991, on October 14, 1994. Such return was marked received by the Tax Commission on October 19, 1994. Joint Exhibit D.

5. XYZ timely filed its consolidated Oklahoma income tax return for the tax year 1992, on October 13, 1993. Such return was marked received by the Tax Commission on October 15, 1993. Joint Exhibit E.

6. XYZ timely filed an amended consolidated Oklahoma income tax return for the tax year 1992, on October 14, 1994. Such return was marked received by the Tax Commission on October 19, 1994. Joint Exhibit F.

7. XYZ timely filed its consolidated Oklahoma income tax return for the tax year 1993, on October 14, 1994. Such return was marked received by the Tax Commission on October 17, 1994. Joint Exhibit G.

8. XYZ timely filed its consolidated Oklahoma income tax return for the tax year 1994, on October 12, 1995. Such return was marked received by the Tax Commission on October 16, 1995. Joint Exhibit H.

9. XYZ timely filed its consolidated Oklahoma income tax return for the tax year 1995, on August 6, 1996. Such return was marked received by the Tax Commission on August 15, 1996. Joint Exhibit I.

10. XYZ timely filed an amended consolidated Oklahoma income tax return for the tax year 1995, on December 30, 1998. Such return was marked received by the Tax Commission on January 29, 1999. Joint Exhibit J.

11. XYZ timely filed its consolidated Oklahoma income tax return for the tax year 1996, on October 9, 1997. Such return was marked received by the Tax Commission on October 13, 1997. Joint Exhibit K.

12. By letter dated June 26, 1998, AN AUDITOR, through his supervisor IN THE Corporate Income Tax Audit Division of the Tax Commission, proposed to assess additional income tax and interest against XYZ for the tax years 1990 through 1996, under Tax Commission audit no. 9800845. Joint Exhibit L.

13. By letter dated July 17, 1998, XYZ requested an extension of time to file a Protest pursuant to 68 O.S. § 221(f). Joint Exhibit M. By letter dated July 24, 1998, the Commission extended the time for XYZ to file a Protest to August 25, 1998. Joint Exhibit N.

14. By letter dated August 11, 1998, XYZ timely filed a formal Protest objecting to the proposed assessment. Joint Exhibit O.

15. By letter dated September 4, 1998, the Audit Control Division notified XYZ that its Protest was being forwarded for further action. Joint Exhibit P.

16. A Prehearing Conference was held by telephone on November 23, 1998. The Administrative Law Judge issued a Prehearing Conference Order and Notice of Hearing on December 7, 1998. Joint Exhibit Q.

17. The Protest of XYZ is properly before the Tax Commission.

#### **Facts Relating to the Tax Years at Issue in the Audit**

18. XYZ did not object to the adjustments made for the tax years 1990 and 1991. Those years are closed except for such adjustments as may be based on Federal Revenue Agent's Reports ("RAR").

19. The parties agree that the tax reported in XYZ's return and amended return for the tax year 1992, as well as the tax proposed to be assessed for the tax year 1992 in the June 26, 1998, proposed assessment, was not computed by the method described in Commission Order No. 99-02-08-007 as it relates to consolidated returns. Both parties agree to waive any filing method or requirement related to Commission Order No. 99-02-08-007 for the tax year 1992.

**ADDITIONAL FINDINGS OF FACT**

20. Division's proposed assessment dated June 26, 1998, is for the following amounts:

	1990	1991	1992	1993
Tax Due	<\$15,917.00>	<\$17,802.00>	\$35,018.00	<\$358,429.00>
Penalty	0.00	0.00	0.00	0.00
Interest to 05/31/98	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>
Total Due/<Overpayment>	<\$15,917.00>	<\$17,802.00>	\$35,018.00	<\$358,429.00>

  

	1994	1995	1996	Total Due
Tax Due	\$99,157.00	\$147,341.00	\$182,159.00	
Penalty	0.00	0.00	0.00	
Interest to 05/31/98	<u>0.00</u>	<u>0.00</u>	<u>14,786.00</u>	
Total Due/<Overpayment>	\$99,157.00	\$147,341.00	\$196,945.00	\$86,313.00

21. AN OFFICIAL OF PROTESTANT'S Tax Department testified at hearing regarding the organization of XYZ, its various subsidiaries and corporations and their functions, as follows:

- \* XYZ of America, Inc. (XYZ-America) headquartered in ANOTHER STATE, is the parent corporation of the XYZ corporate group.
- \* XYZ incorporated in New York (XYZ-NY) and XYZ-Ohio incorporated in Ohio (XYZ-Ohio) together operate throughout the United States<sup>1</sup> and provide the XYZ standard ground service and pickup and delivery of air packages.
- \* XYZ-123 (XYZ-123) is an air forwarder which arranges for the transportation of packages from one point to another. For 1990 and 1991 XYZ-123 was an air forwarder only for international packages. Sometime in 1992, XYZ Air Forwarding, Inc. (XYZ-AF), a forwarder of only domestic packages for the period of 1990 through the middle of 1992, merged into XYZ-123.
- \* XYZ International (XYZ-INT) is a partner in a partnership which provides package transportation to and from the United States and Japan.
- \* XYZ AIRLINE (XYZ-AIR) is the XYZ airline that operates the aircraft.
- \* ANON Air provides the "next-flight-out" service throughout the United States.

<sup>1</sup> XYZ-NY operates in 13 northwestern states plus the District of Columbia. XYZ-Ohio operates in the remaining 37 states.

- \* XYZ BUS (XYZ-BUS) is the business advisory service for the entire XYZ organization in the United States.
- \* XYZ INT BUS provides business advisory services to corporations in the XYZ family that operate overseas.
- \* ANON FUEL whose name changed to XYZ FUEL is a company which initially provided for the buying and selling of aircraft fuel and later added ground equipment at the airports and other types of services.
- \* AAA develops routing and scheduling software utilized by XYZ and by other companies e.g., beer distributors and bread distributors.
- \* BBB manufactures ground positioning equipment for boats and aircraft.
- \* CCC provides for the refrigerated transportation of produce from the West Coast to the East Coast and rents the refrigerated trailers to XYZ-NY and XYZ-Ohio, who turn off the refrigeration units, load packages and transport them from the East Coast to the West Coast.
- \* XYZ LEASING leases trucks mostly to third parties.
- \* MMM repairs and reconditions trailers for the XYZ organization.
- \* XYZ TEL provides telecommunication service to XYZ's large customers, allowing those customers to track packages on a high-volume basis dealing directly with the XYZ database in New Jersey.
- \* XYZCO, a cash management company, provides for the efficient investment of excess cash in the organization.
- \* XYZ CUS clears packages through customs both to and from the United States.
- \* XYZ-LOG provides transportation and distribution services, i.e., transportation of raw products, inventory control and distribution of finished products, and it also supplies XYZ shipping materials to XYZ customers.
- \* ZZZ, a messenger service which at one time the XYZ management thought could be expanded throughout the United States, qualified to do business in every state; however, the operation never expanded beyond the California area and the operation was eventually closed down.

- \* REALCO is a real estate company, which owns real estate and rents the real estate to the operation in Oklahoma.
- \* There are approximately 60 real estate companies like REALCO throughout the United States, many foreign corporations providing transportation services and other ancillary corporations which comprise the rest of the XYZ group of companies.

22. According to THE OFFICIAL's testimony, the activities of the outlined corporations have an effect on XYZ operations in Oklahoma. For example, a package shipped from Oklahoma to Pennsylvania would be transported by XYZ-NY; equipment made by AAA and BBB is utilized in XYZ vehicles operating in Oklahoma; trailers operating in Oklahoma are repaired and reconditioned by MMM; and XYZ customers in Oklahoma receive their shipping materials from XYZ-LOG.

23. XYZ-123, as an air freight forwarder or indirect air carrier, arranges for the pickup and delivery of packages from one point to another, which causes them to have agreements with both ground-based companies for picking up, delivering and sorting packages and with airlines for transporting the packages.

24. A graphic representation of the delivery cycle XYZ-123 utilizes to get a package from point A to point B was submitted. The graphic illustrated, and THE OFFICIAL explained, that the cycle begins with the package being picked-up at the shipper by one of XYZ's ground companies; an initial sort is done and the package is brought to the origin airport; the package is loaded on a XYZ airline or aircraft or on a third party aircraft and flown to a XYZ sorting center to be sorted according to destination; the package is placed on an aircraft; and a XYZ ground company takes the package to the company.

25. XYZ-123 has contractual relationships with various companies to provide service to customers from pickup point to delivery point.

26. In response to an inquiry as to how it came about that XYZ-123 had no property or payroll for years 1990 and 1991, THE OFFICIAL responded that XYZ-123 was formed in 1988. At that time all of the functions that it would perform were in actuality being performed by other companies and the facilities were owned by other companies.

27. A hub in ANONYMOUS, California, one of three in the country, was opened in August 1992 and ownership was transferred to XYZ-123 thereafter in 1992. The book value of the property is over \$80 million. The hub handles over 196,000 pounds of air cargo and between 200,000 and 600,000 packages on a daily basis, and can handle between 20 and 50 large flights and 15 to 49 small aircraft flights daily.

28. Packages which are shipped between Oklahoma and the West Coast travel through and are sorted at the ANONYMOUS, California, facility.

29. In 1996, 46 direct flights originated in Tulsa, Oklahoma, and terminated in ANONYMOUS, California.

30. DIVISION'S AUDITOR testified that information was received from Protestant regarding a compressed natural gas credit. While reviewing this information he noticed that the two forwarding companies, XYZ-AF and XYZ-123, reported to Oklahoma under different factors. The auditor stated he pulled the returns and prepared a consolidated corporation summary and analysis of XYZ-Ohio, marked as Division's Exhibit 1.

31. Part I of Exhibit 1 sets forth the corporations included in the XYZ-Ohio's Oklahoma consolidated returns for the 1985 through 1996 tax years and the amounts of taxable income or loss reported thereon. Part II of Exhibit 1 outlined the audit adjustments for tax years 1992 through 1996. Part III of Exhibit 1 shows the federal taxable income or loss and percentage of federal taxable income for XYZ-Ohio, XYZ-AIR and XYZ-123 for tax years 1992 through 1996; XYZ-AF for tax year 1992; XYZ-NY for tax years 1992, 1993 and 1995; and XYZ-America for tax years 1992, 1993 and 1995.

32. At the hearing the Division submitted several charts, based on the information contained in Division's Exhibit 1, which demonstrated the following:

During the years 1992 through 1995, XYZ-Ohio's federal taxable income fluctuated between approximately \$666 million and \$765 million. In 1996, it fell to \$236 million. The federal taxable income of XYZ-AF and XYZ-123 in 1992 and XYZ-123 thereafter, through 1996, increased from \$565 million to \$1.4 billion. Division's Exhibit 2.

The federal taxable income of XYZ-America and its subsidiaries rose from approximately \$1.2 billion to \$1.8 billion over the period of 1992 through 1995. Division's Exhibit 3.

In 1992, the combined federal taxable income of XYZ's two ground companies, XYZ-NY and XYZ-Ohio, was approximately \$894 million. In 1992, the federal taxable income of the two primary airfreight forwarders, XYZ-AF and XYZ-123, was approximately \$565 million. Division's Exhibit 4.

In 1995, the combined federal taxable income of the two ground companies was approximately \$804 million and the federal taxable income of the airfreight forwarder, XYZ-123, was approximately \$1 billion. Division's Exhibit 5.

A document marked as Exhibit 8 compared the information in Part I and Part II of Division's Exhibit 1 in graph form.

33. The Division also submitted documents which showed that in 1996, XYZ-123 owned approximately .7 percent of the total assets of XYZ-Ohio, XYZ-AIR and XYZ-123. Division's Exhibit 7. This percentage was calculated from the net depreciable assets reported by the three companies on XYZ's consolidated Oklahoma income tax return for tax year 1996.

34. When asked individually on cross-examination if each of the Division's Exhibits 2, 3, 4, 5 and 8 supported the proposition that the Oklahoma apportioned income reported by XYZ-123 for 1992 through 1996 was out of all appropriate proportion to the business done or property owned by the corporation in Oklahoma, THE AUDITOR responded negatively in each instance.

35. On redirect examination, the auditor responded affirmatively to the question of whether the exhibits to which he had previously testified, taken together, support the proposition that the income reported by XYZ-123 is out of all appropriate proportion to the property owned or business transacted in this state.

36. The auditor further testified that an inquiry was made to Protestant regarding the 1990 loss year of XYZ-123. Protestant was asked why XYZ-123, for the 1990 loss year, reported property in Oklahoma of zero and property everywhere of a million dollars and had sales in Oklahoma and sales everywhere, and only a single sales factor was used. The auditor stated that the return was accepted as filed. However, the auditor added that for the 1992 tax year, XYZ-123, utilized two factors [sales and property], with sales in Oklahoma and sales everywhere and with zero property in Oklahoma and with all other property everywhere. He agreed that, for the 1990 tax year, had XYZ-123 applied two factors, as was done in 1992, the loss reported would have been reduced.

### **ISSUES**

Whether Protestant has shown that the Division improperly applied Section 2358(A)(5) of Title 68 of the Oklahoma Statutes when it modified the standard apportionment formula, resulting in additional tax attributable to Protestant.

Whether the Tax Commission should be required to pay costs and reasonable attorneys fees incurred by Protestant in this matter.

### **CONTENTIONS**

Protestant contends that in the absence of a statutory provision requiring or authorizing a departure from standard apportionment methods, it was required to compute its Oklahoma apportionment using a property factor in those years. Therefore, Protestant contends, it was not proper for the Division to require XYZ-123, a subsidiary doing business in Oklahoma, to depart from the standard apportionment formula and use an alternate formula. Further, Protestant contends that the Division's actions in eliminating the property factor were arbitrary and, therefore, it should be awarded costs and reasonable attorneys fees.

The Division contends that it relied on Section 2358(A)(5) of Title 68 of the Oklahoma Statutes to eliminate the property factor from the standard three-factor formula because its inclusion attributed an insufficient portion of net income to Oklahoma. It is the Division's contention that the property owned by XYZ-123, all located outside of Oklahoma, is de minimis in quantity and the property did not contribute appreciably to the consolidated group's activities in Oklahoma. Further, the Division contends that it acted reasonably in eliminating the property factor and was not arbitrary.

### CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission has jurisdiction of this protest. 68 O.S. 1991, § 207.
2. This protest arises under the Income Tax Act, 68 O.S. § 2351, et seq., and is specifically governed by Section 2358.
3. An income tax is "imposed upon the Oklahoma taxable income of every corporation doing business within this state or deriving income from sources within this state . . . ." 68 O.S. 1991, § 2355(C).
4. In Oklahoma, the law provides that the state will apportion the total unitary business income between the taxing states and the rest of the world, taking into account the corporation's activities within or without the state. See 68 O.S. Supp. 1997, § 2358(A)(5).
5. The United States Supreme Court has defined a "unitary business" as a corporate taxpayer and any other subsidiaries or affiliates that, when grouped together, possess the following traits: functional integration, centralization of management and economies of scale. *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 435 (1980). The unitary business concept serves to prevent a corporation from inaccurately reflecting its in-state value or net income and, as a matter of due process, is a limit on the state's authority to tax income or value that cannot in fairness be attributed to the taxpayer's activities within the state. *Allied-Signal, Inc. v. Director, Division of Taxation*, 112 S. Ct. 2251, 2255 (1992).
6. The Oklahoma Supreme Court defines a unitary business as a business which operates in more than one state and whose operations conducted in one state benefit and are benefitted by the operations in one or more other states where the various activities are so interdependent and of such mutual benefit that they, in effect, comprise one integral business. *Flint Resources Company v. Oklahoma Tax Commission*, 780 P.2d 665, 670 (Okla. 1989).

7. States have wide latitude in the selection of a formula used to apportion the income of an interstate business. *Moorman Mfg. Co. v. Blair*, 437 U.S. 267, 274 (1978). The Court in *Moorman* reiterated the basic principal that "a formula-produced assessment will only be disturbed when the taxpayer has proved by 'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportion to the business transacted . . . in that State,' [*Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*], 283 U.S., at 135, 51 S.Ct., at 389, or has 'led to a grossly distorted result,' [*Norfolk & W. Ry. v. Missouri State Tax Comm'n*], 390 U.S., at 326, 88 S.Ct., at 1002." *Moorman Mfg. Co.* at 274.

8. Oklahoma law apportions the income between the states, providing a three-factor formula using property, payroll and sales or gross revenues. 68 O.S. Supp. 1997, § 2358(A)(5).

9. Each of these three factors is a fraction, with the numerator being the property, payroll or sales in Oklahoma and the denominator being the property, payroll or sales everywhere. *Id.*

10. Many states, including Oklahoma, have enacted alternative apportionment relief provisions. One common approach is set forth in the California Provision, which is a virtual restatement of The Uniform Division of Income for Tax Purpose Act (UDITPA) § 18, and states:

If the allocation and apportionment provisions of this act do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the Franchise Tax Board may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

- (a) Separate accounting
- (b) The exclusion of any one or more of the factors;
- (c) The inclusion of one or more additional factors which fairly represent the taxpayer's business activity in this state; or
- (d) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Cal. Rev. & Tax Code § 25137.

In states which have not adopted the same or similar language to that of UDITPA § 18, use of an alternative apportionment method may be required by the taxing authority or permitted to the taxpayer under the circumstances where the standard formula:

- \* Results in 'an unfair or inequitable proportion of the taxpayer's entire net income being assigned to' Delaware.

- \* Does 'not fairly reflect all or any part of taxable net income allocable to' Minnesota.
- \* Does not 'reasonably ... approximate the net income derived from business carried on within' Massachusetts.<sup>2</sup> [Footnotes omitted].

11. In Oklahoma, the Tax Commission is empowered by statute to modify the standard apportionment factors. Section 2358(A)(5) is the provision permitting such modification, and it reads as follows:

In any case where the apportionment of the three factors prescribed in this paragraph attributes to Oklahoma a portion of net income of the enterprise out of all appropriate proportion to the property owned and/or business transacted within this state, because of the fact that one or more of the factors so prescribed are not employed to any appreciable extent in furtherance of the enterprise; or because one or more factors not so prescribed are employed to a considerable extent in furtherance of the enterprise; or because of other reasons, the Tax Commission is empowered to permit, after a showing by taxpayer that an excessive portion of net income has been attributed to Oklahoma, or require, when in its judgment an insufficient portion of net income has been attributed to Oklahoma, the elimination, substitution, or use of additional factors, or reduction or increase in the weight of such prescribed factors.

Provided, however, that any such variance from such prescribed factors which has the effect of increasing the portion of net income attributable to Oklahoma must not be inherently arbitrary, and application of the recomputed final apportionment to the net income of the enterprise must attribute to Oklahoma only a reasonable portion thereof.

68 O.S. Supp. 1997, § 2358 (A)(5).

12. The Division contends that pursuant to Section 2358 (A)(5), its audit of XYZ revealed that XYZ had applied a property factor to a subsidiary, which distorted the Oklahoma income of the XYZ Oklahoma consolidated group. The Division further contends that it eliminated the property factor [California facility] claimed by XYZ-123 for tax years 1992 through 1996 based on its judgment that an insufficient portion of net income was being attributed to Oklahoma. This determination was based on the fact that the California facility, transferred to XYZ-123 in 1992, did not contribute appreciably to the consolidated group's activities in Oklahoma and that the facility only comprised .7 percent of the entire property of the group and was therefore de minimis. It was also noted by the auditor that XYZ-123 for tax year 1990 only applied a sales factor even though XYZ-123 possessed property everywhere of a million dollars.

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<sup>2</sup> Houghton, Dennen and Borucki, "Apportionment Opportunities and Problems Involving the Sales Factor", Journal of Multistate Taxation and Incentives, May 2002.

13. The Division argues that Section 2358(A)(5) of Title 68 gives the Tax Commission the authority to require the elimination, substitution or use of additional factors, or reduction or increase in the weight of the prescribed factors, when in the Commission's judgment an insufficient portion of net income has been attributed to Oklahoma by the use or nonuse of an apportionment factor that is or is not employed to an appreciable extent in the furtherance of the enterprise. The Division states the only limitations are that the adjustments must (1) not be inherently arbitrary, and (2) attribute to Oklahoma only a reasonable portion of income.

14. However, the modification of the three-factor formula must be premised upon a finding that utilization of that formula attributes to Oklahoma a portion of net income of the enterprise "out of all appropriate proportion to the property owned and/or business transacted within this state."

15. Taxpayers who protest bear the burden of proving in what respect the action or proposed action of the Tax Commission is incorrect. Oklahoma Administrative Code 710:1-5-47. The denial of a protest is appropriate where the party opposing the proposed action fails to provide evidence which is sufficient to entitle the party to the relief requested. *Continental Oil Company v. Oklahoma State Board of Equalization*, 570 P.2d 315 (Okl. 1977).

16. An order of the Tax Commission must be supported by substantial evidence, *Dugger v. State, ex rel. Oklahoma Tax Commission*, 834 P.2d 964, 968 (Okl. 1992). Likewise the audit, upon which a portion of the record is formed and order is issued, must be supported by substantial evidence.

17. An audit is supported by substantial evidence when an evidentiary foundation for the audit has been established. In a majority of cases, the evidentiary foundation will be established by the records reviewed by the auditor.

18. In those cases where an evidentiary foundation for the audit has been established, the taxpayer has the burden of proving in what respect the action of the Tax Commission in assessing the tax is incorrect. Where, however, an evidentiary foundation has not been laid or the records upon which the audit is based do not establish a basis for assessing a tax, the audit and assessment, in the initial instance, cannot be sustained as being supported by substantial evidence.

19. An evidentiary foundation has not been laid for the audit and assessment in that the Division has not shown that the use of the standard apportionment formula resulted in net income of the enterprise being attributed to Oklahoma "out of all appropriate proportion to the property owned and/or business transacted within this state".

On cross-examination, the auditor testified that Division's Exhibits 2, 3, 4, 5 and 8, individually, did not support the proposition that the Oklahoma-apportioned income reported by XYZ-123 for 1992 through 1996 was "out of all appropriate proportion to the business done and/or property owned in Oklahoma". On redirect examination, the auditor agreed that the Division's exhibits, taken as a whole, demonstrated that the net income of XYZ-123 was out of all appropriate proportion to the property owned or business done in this state. However, the auditor did not provide any explanation for that conclusion. Further, on the one hand, the auditor testified that it was XYZ-123's income that had to be out of all appropriate proportion. In contrast, the Division's position is that the "enterprise" language in Section 2385(A)(5) refers to the Oklahoma consolidated group. The auditor's testimony is inconsistent with the position taken by the Division.

20. The protest of XYZ-Ohio to the proposed income tax assessment should be sustained.

21. The protesting party's request for costs and reasonable attorneys fees should be denied for the following reasons. Arguably, 12 O.S. § 941(B) does not apply to the proceedings brought before the Tax Commission. See, *Allen v. State of Oklahoma ex rel. Board of Trustees of the Oklahoma Uniform Retirement System for Justices and Judges*, 769 P.2d 1302, 1309 (Okl. 1988). Specifically, this action was brought by the filing of a timely protest to the proposed assessment, rather than the issuance of the assessment. See, generally, 68 O.S. 1991, § 221. More importantly, there are no reported Oklahoma Court decisions confronting the issue presented herein and the issue turns on the facts and circumstances of this proceeding. For these reasons, the undersigned cannot agree that the Division's position is without a reasonable basis or is frivolous.

### **DISPOSITION**

It is the DETERMINATION of the undersigned, based upon the specific facts and circumstances of this case, that the income tax protest be sustained and that the request for costs and reasonable attorneys fees be denied.

**OKLAHOMA TAX COMMISSION**

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are not 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.