JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2005-12-20-02 (NON-PRECEDENTIAL)
ID:	P-04-176-H
DATE:	DECEMBER 20, 2005
DISPOSITION:	SUSTAINED IN PART/DENIED IN PART
TAX TYPE:	SALES/MIXED BEVERAGE
APPEAL:	NONE
NOTE:	AMENDED BY 2006-01-10-02

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPANY d/b/a RESTAURANT 2 and PRESIDENT, as President and as an individual, and SECRETARY, as Secretary/Treasurer and as an individual, ("Protestants") appear pro se[1] through PRESIDENT. The Field Audit Section of the Audit Division ("Division"), Oklahoma Tax Commission, appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On December 16, 2004, the protest file was received from the Division for further proceedings consistent with the Uniform Tax Procedure Code[2] and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.[3] On December 22, 2004, a notice was mailed to the Protestants which stated that this matter had been assigned to ALJ, Administrative Law Judge, and the docket number of the case, enclosed a copy of the Rules of Practice and Procedure Before the Oklahoma Tax Commission, and advised the Protestants they would be receiving a notice setting a prehearing conference.[4]

On January 24, 2005, the notice setting a prehearing conference for February 10, 2005, at 10:30 a.m. was mailed to the parties. The prehearing conference was continued several times at the request of the parties in order to exchange information that would possibly resolve this matter without the necessity of a hearing. On June 6, 2005, the Division advised that it had sent the Protestants revised work papers, but that the Protestants had not responded how they wished to proceed, and the Division requested that a hearing date be set. On June 9, 2005, the parties were advised by letter that this matter had been set for hearing on July 11, 2005, at 1:30 p.m. On July 5, 2005, the Division filed a Motion for Continuation of the hearing due to Division's witness not being available for the July 11th hearing. The Division requested that the hearing be reset for July 21, 2005. On July 8, 2005, an Order Granting Motion for Continuance was entered resetting the hearing for July 21, 2005, at 1:30 p.m.

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[1] "Pro se" is defined as "For himself; in his own behalf; in person. Appearing for oneself, as in the case of one who does not retain a lawyer and appears for himself in court." BLACK'S LAW DICTIONARY 1099 (5th ed. 1979).

[2] OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

[3] OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

[4] OKLA. ADMIN. CODE § 710:1-5-21.

A closed hearing was held on July 21, 2005, at approximately 1:30 p.m.[5] The Protestants appeared at the hearing. The Protestants called one witness, PRESIDENT, who testified regarding the records of the Protestants. The Protestants' Exhibits 1 through 9 were identified, offered, and admitted into evidence. The Division called one witness, AUDITOR, Field Auditor, Field Audit Section, Audit Division, who testified regarding the records of the Division. The Division's Exhibits A through M were identified, offered, and admitted into evidence. Upon conclusion of the hearing, the record was held open in order for the Protestants to provide information to the Division on audit items conceded by AUDITOR during the course of the hearing.

On July 26, 2005, the parties were advised by letter that the Protestants had fourteen (14) days to provide the ending inventory for 3.2 beer and all invoices reflecting the return of 3.2 beer to Anheuser-Busch during the Audit Period. The parties were also advised that upon receipt of the requested information, another notice would be issued with instructions to the Division regarding the information and the concessions made by the Division during the hearing. On August 3, 2005, the documentation on the ending inventory for 3.2 beer and all invoices reflecting the return of 3.2 beer to Anheuser-Busch during the Audit Period were received from the Protestants. On August 19, 2005, the information was forwarded to the Division to review and revise the audit work papers. On October 27, 2005, the Division filed revised work papers in this matter for the proposed mixed beverage tax assessment and the proposed sales tax assessments. On October 28, 2005, the parties were advised by letter that the record in this matter was closed and the case was submitted for decision. The record was reopened on November 2, 2005, so that the Division could file the revised work papers in this matter for the proposed mixed beverage tax assessment and the proposed sales tax assessments. The work papers filed on October 27, 2005, omitted the Division's adjustments made for the drink "Paradise." The record was re-closed on November 2, 2005, and this matter was re-submitted for decision on November 2, 2005.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, the position letters, and the Division's revised work papers, the undersigned finds:

1. COMPANY is a corporation organized under the laws of the State of Oklahoma. COMPANY received its Certificate of Incorporation from the Oklahoma Secretary of State on January 14, 1998.[6] COMPANY owns and operates two (2) restaurants, RESTAURANT 1 and RESTAURANT 2.

2. The Division conducted field audits on both locations. The field audit on RESTAURANT 1 resulted in a zero audit. The field audit of RESTAURANT 2 resulted in the

[5] The Protestants requested a confidential hearing as provided by OKLA. STAT. ANN. tit. 68, § 205 (West 2001).

[6] Division's Exhibit A.

Division issuing a proposed mixed beverage tax assessment against RESTAURANT 2 and proposed sales tax assessments against RESTAURANT 2 and the officers as individuals.

3. The field audit conducted on RESTAURANT 2 was for the period of January 29, 2002, through February 29, 2004 ("Audit Period"). During the Audit Period, the President of RESTAURANT 2 was PRESIDENT and the Secretary/Treasurer was SECRETARY.

4. On August 11, 2004, the Division issued a proposed mixed beverage tax assessment[7] for the Audit Period against RESTAURANT 2 as follows:

Tax Due	$3,018.73
Interest through 09/30/04	246.87
Tax, Interest & Report Penalty due within 30 days	$3,265.60
30 day delinquent Penalty @ 10%	301.87
Tax, Interest & Penalty due after 30 Days	$3,567.47

5. On August 11, 2004, the Division issued proposed sales tax assessments[8] for the Audit Period against RESTAURANT 2, PRESIDENT , and SECRETARY as follows:

Tax Due	$2,391.02
Interest through 09/30/04	309.86
Tax, Interest & Report Penalty due within 30 days	$2,700.88
30 delinquent Penalty @ 10%	239.10
Tax, Interest & Penalty due after 30 days	$2,939.98

6. PRESIDENT sent the Division a protest letter through the U.S. Postal Service by certified mail on behalf of the Protestants for the proposed mixed beverage tax assessment and proposed sales tax assessments.[9] The Protestants timely paid the tax and interest under protest in the amounts of $3,265.80 and $2,700.88, respectively, to avoid the ten percent (10%) penalty and stop the accrual of interest.[10]

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[7] Division's Exhibit B.

[8] Division's Exhibit C.

[9] Division's Exhibit D. The postmark on the certified mail envelope is October 8, 2004.

[10] Division's Exhibit D.

The court file contains an audit packet, which was forwarded by the Division as part of the protest file on this matter. The Administrative Law Judge is taking judicial notice of the materials contained in the court file for the purpose of completing the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (2004). The cover sheet for the Mixed Beverage Tax Protest indicates that the Protestants paid $3,265.60, which comprises $3,018.73 in tax, and interest through September 13, 2004, in the amount of $225.79, leaving a credit of $21.08. The cover sheet for the Sales Tax Protest indicates that the Protestants paid $2,700.88, which comprises $2,391.02 in tax, and interest through September 13, 2004, in the amount of $293.16, leaving a credit of $16.70. Interest on the assessments was calculated through September 30, 2004.

7. On February 22, 2005, AUDITOR met with PRESIDENT in the Tulsa Office of the Oklahoma Tax Commission. During that meeting the parties discovered that RESTAURANT 1's mixed beverage tax reports for the month of February 2002 had been filed by mistake as the mixed beverage tax reports for RESTAURANT 2.[11] Amended sales tax reports for February 2002 were filed, which increased RESTAURANT 2's reported sales from $122,669.00 to $126,886.00, reducing the amount of non-reported sales.[12]

8. The ending inventory for strong beer provided by the Protestants indicated 756 bottles of strong beer. A data entry error reflected that the ending inventory for strong beer was 74 bottles. AUDITOR revised the ending inventory for strong beer to reflect 756 bottles.[13]

9. The Division rounded RESTAURANT 2's ending liquor inventory using the accepted industry method of gauging the amount of liquor in the container which indicates the remaining levels in one-tenth increments.[14]

10. AUDITOR conceded during the hearing that the Division should have given RESTAURANT 2 credit for the ending 3.2 beer inventory.[15]

11. The Division agreed to an adjustment for the number of Martinis (4.0 oz.) sold during the Audit Period from thirty percent (30%) to sixty-eight percent (68%), with the remaining thirty-two percent (32%) attributed to the sale of other gin and vodka drinks (1.5 oz.).[16] However, during cross-examination, AUDITOR conceded that a "Paradise" was a Martini.[17]

12. The Division adjusted products that are considered mix items and not drinks, but the revised work papers filed on November 2, 2005, still list "Sambuca di Amore" on Line 167 at

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[11] Protestants' Exhibit 9.

[12] Division's Exhibit E.

[13] Protestant's Exhibit 9.

[14] OKLA. ADMIN. CODE § 710:20-5-8(b)(4)(B).

[15] The Division had taken the position that because RESTAURANT 2 had received a beer license on December 15, 2001, the restaurant had been selling 3.2 beer before the start date of the audit, January 29, 2002, when RESTAURANT 2 received a liquor license. The 3.2 beer audit was conducted on purchases only. During the course of PRESIDENT'S cross-examination, AUDITOR conceded that RESTAURANT 2 was a new business at the beginning of the Audit Period and that 3.2 beer was not sold before the beginning date of the Audit Period, therefore the Division's original premise was incorrect. As a result, the Division had not requested an ending inventory for RESTAURANT 2's 3.2 beer, although the audit work papers reflected that RESTAURANT 2 was not open for business during January and February of 2002.

[16] Protestants' Exhibit 9.

[17] Protestants' Exhibit 9. *See* Protestants' Exhibit 5, the Martini Menu for RESTAURANT 2 during the Audit Period. A "Paradise" sold for $6.50 and is described as "Bombay Gin and Peach Schnapps mixed with orange juice and served chilled." Four ounces (4.0 oz.) of gin is the pour size.

$68.61 and on Line 168 at $182.97.[18] According to the Division's list "Sambuca" is exempt as a mixer, and is not a drink.[19]

13. The invoices that were not found in the Division's data base ("Added Inventory") were accurate, after the removal of one (1) item found to be exempt.[20]

14. The 3.2 beer audit was conducted on purchases only. Neither a beginning nor ending inventory was used. Subsequent to the audit the Protestants provided information that from June 2002 draft beer was purchased in 1/6 barrels and not 1/2 barrels. The Division adjusted the 3.2 beer depletion audit based upon the information. However, during cross-examination AUDITOR conceded that the 3.2 beer audit should have been conducted using the beginning and ending inventory.[21] AUDITOR also conceded that the purchase information supplied by Anheuser-Busch was incorrect based upon a copy of Invoice No. XXXX, dated June 4, 2002, which reflected that the Protestants had returned 3.2 beer for which it received credit from Anheuser-Busch and was not reflected on the list obtained by the Division from Anheuser-Busch.[22]

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[18] Protestants' Exhibit 9. See Division's Exhibit K, which is the Division's Standard Exemption Information for products used only as mixes in drinks:

> Anisette, Bitters, Coco Ribe Liqueur (Coconut), Crème De Almond, Crème De Banana, Crème De Cacao (both Brown and White), Crème De Cassis, Crème De Menthe (White and Gold only automatic) Green-verify price list, Crème De Noyaux, Curacao (Blue and Orange), Everclear (or any Plain Grain Alcohol), Galliano, Kummel, Maraschino, all 151 Proof Rum, Peter Heering, Sambuca, Triple Sec, Vermouth, Cooking Sherry, and Marsala Wine. The list notes that flavored brandies will no longer be automatically exempted. Verify their uses and see if they are listed as a drink price on the price list. Most current indications are only the cherry brandy is being used as a mix in Rattlesnakes.

The list reflects a revision date of July 1991.

See Protestants' Exhibit 8. *See also* the Division's revised work papers filed on November 2, 2005. PRESIDENT had advocated that RESTAURANT 2 should receive at least fifty percent (50%) credit for the following list of liquors as "mixers" in drinks:

Line 81	Chambord Raspberry	$ 507.51
Line 85	Cointreau Liqueur	773.34
Line 102	DEK Peachtree Schnapps	815.71
Line 105	DEK Sour Apple Pucker Schnapps	407.85
Line 118	Grand Marnier	2,316.65
Line 158	Midori Melon Liqueur	580.01
Line 187	Walker Amaretto	734.14
	Total	$6,135.21

[19] *See* Note 18.

[20] Protestants' Exhibit 9.

[21] Protestants' Exhibit 9. *See* Note 14

[22] Protestants' Exhibit 9. *See* Protestants' Exhibit 7.

15. At the time of hearing the Division had made the following adjustments, via work papers,[23] for the proposed mixed beverage tax assessment as follows, to-wit:

Tax Due	$1,174.40
Interest @ 15% through 06/30/05	227.80
30 Day Delinquent Penalty @ 10%	117.44
Total	$1,519.64

16. At the time of hearing the Division had made the following adjustments, via work papers,[24] for the proposed sales tax assessments as follows, to-wit:

Tax Due	$ 873.50
Interest @ 15% through 06/30/05	191.07
30 Day Delinquent Penalty @ 10%	87.36
Total	$1,151.93

ADDITIONAL FINDINGS OF FACT

Based upon audit points conceded during the hearing, the Protestants were instructed to provide the 3.2 beer ending inventory for RESTAURANT 2 and all invoices reflecting credits for the return of 3.2 beer to Anheuser-Busch during the Audit Period. The Division was instructed to recalculate the 3.2 beer audit using the beginning and ending inventory, instead of using purchases only. The Division was also instructed to revise its audit calculations reclassifying the "Paradise" as a Martini, and to review the invoices from Jarboe Sales Company[25] to confirm the number of disputed purchases made during the Audit Period for the following:

(1) Beringer White Zinfandel, California
(26) Kendall Jackson Chardonnay VR, California
(9) Black Opal Cabernet/Merlot, Australia
(1) Estrella Cabernet Sauvignon 1.5L
(1) 1800 Reposado Tequila

[23] Division's Exhibit M. The Division's revised work papers do not take into account that the Protestants timely paid the proposed mixed beverage tax assessment within thirty (30) days under protest, which stopped the accrual of interest and eliminated the ten percent (10%) penalty.

[24] Division's Exhibit L. The Division's revised work papers do not take into account that the Protestants timely paid the proposed sales tax assessments within thirty (30) days under protest, which stopped the accrual of interest and eliminated the ten percent (10%) penalty. *See* Note 10.

[25] Protestants' Exhibit 4.

17. On October 27, 2005, the Division filed revised work papers[26] for the proposed mixed beverage tax assessment as follows, to-wit:

Tax Due	$1,046.65
Interest @ 15% through 12/31/05	282.17
30 Day Delinquent Penalty @ 10%	104.67
Total	$1,433.49

18. On October 27, 2005, the Division filed revised work papers for the proposed sales tax assessments as follows, to-wit:

Tax Due	$660.32
Interest @ 15% through 12/31/05	176.66
30 Day Delinquent Penalty @ 10%	66.03
Total	$903.01

19. On November 2, 2005, the Division filed revised work papers[27] for the proposed mixed beverage tax assessment reflecting the adjustments made for the reclassification of the "Paradise" as a Martini:

Tax Due	$ 997.66
Interest @ 15% through 12/31/05	268.96
30 Day Delinquent Penalty @ 10%	99.77
Total	$1,366.39

20. On November 2, 2005, the Division filed revised work papers[28] for the proposed sales tax assessments reflecting the adjustments made for the reclassification of the "Paradise" as a Martini:

Tax Due	$629.41
Interest @ 15% through 12/31/05	168.39
30 Day Delinquent Penalty @ 10%	62.95
Total	$860.75

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[26] Attached to the revised work papers is an "Addendum to Field Audit," which explains the adjustments made by AUDITOR. The 3.2 beer audit was recalculated using a beginning and ending inventory, and crediting the Protestants for the 3.2 beer returned to Anheuser-Busch during the Audit Period. The recalculation resulted in a zero audit.

The Protestants were also credited with the return of thirty-seven (37) bottles of wine to Jarboe Sales Company. The addendum indicates that the Jarboe Sales Company invoices reflect that the Protestants had received one (1) bottle of 1800 Reposado Tequila, so no adjustment was made.

[27] Attached to the revised mixed beverage tax work papers is an "Addendum to Field Audit," which explains the adjustments made by AUDITOR. The list of Martinis was revised to include a "Paradise" using a four ounce (4.0 oz.) pour size. This changed the percentage of Martinis from 68% to 70.32%. The work papers reflect a "Spillage Allowance" for Bottle Beer (0.05), Keg (0.14), Liquor (0.16), and Wine (0.1).

[28] *See* Note 26.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[29]

2. All sales of drinks sold or dispensed by hotels, restaurants, or other dispensers, and sold for immediate consumption upon the premises, are subject to sales tax.[30]

3. Rules promulgated pursuant to the Administrative Procedures Act[31] are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court.[32] 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.[33]

4. The tax levied by the Oklahoma Sales Tax Code[34] shall be paid by the consumer or user to the vendor[35] as trustee for and on account of this state and each and every vendor shall collect from the consumer or user the full amount of the tax or an amount equal as nearly as possible or practicable to the average equivalent thereof.[36]

5. "Every person required to collect any tax imposed by the [the Oklahoma Sales Tax Code], and in the case of a corporation, each principal officer thereof, shall be personally liable for the tax."[37]

6. When the Tax Commission issues a proposed assessment against a corporation for unpaid sales tax, the Commission shall file assessments against the principal officers of the

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[29] OKLA. STAT. ANN. tit. 68, § 221(D) (West 2001).

[30] OKLA. STAT. ANN. tit. 68, § 1354(A)(9) (West 2001).

[31] OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2001).

[32] OKLA. STAT. ANN. tit. 75, § 306(C) (West 2001).

[33] OKLA. STAT. ANN. tit. 75, § 308.2(C) (West 2001).

[34] OKLA. STAT. ANN. tit. 68, § 1350 et seq. (West 2001).

[35] "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 2001).

"Person" is defined to include "any individual" or "[any] corporation." OKLA. STAT. ANN. tit. 68, § 1352(17) (West 2001).

[36] OKLA. STAT. ANN. tit. 68, § 1361(A) (West 2001). *See also Wal-Mart Stores, Inc. v. Oklahoma Tax Commission*, 1991 OK CIV APP 73, 817 P.2d 1281.

[37] OKLA. STAT. ANN. tit. 68, § 1361(A) (West 2001). *See also* 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).

corporation personally liable for the tax. The principal officers of the corporation shall be liable for the payment of sales tax during the period of time for which the assessment is made. The liability of a principal officer for sales tax shall be determined in accordance with the standards for determining liability for payment of federal withholding tax.[38]

7. In this case PRESIDENT and SECRETARY were the principal officers of RESTAURANT 2 and "responsible persons" for the collection and remittance of sales tax.[39]

8. Oklahoma Statutes provide for the collection of interest and penalty on delinquent tax.[40] "All penalties or interest imposed by [Title 68], or any state tax law, shall be recoverable by the Tax Commission as a part of the tax with respect to which they are imposed . . . ."[41]

9. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.[42] The revisions made by the Division post-hearing have corrected any audit items either conceded by the Division during the hearing or corrected by the Division after a review of additional documentation provided by the Protestants,

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[38] The full text of OKLA. STAT. ANN. tit. 68, § 253 (West 2001) is as follows:

> 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 duty of withholding and remittance of taxes during the period of time for which the assessment was made, then all managers and members 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 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*.

[39] *See* Note 38.

[40] OKLA. STAT. ANN. tit. 68, § 217 (West 2001).

[41] OKLA. STAT. ANN. tit. 68, § 217(G) (West 2001).

[42] *See Enterprise Management Consultants, Inc. v. State ex rel Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

with the exception of Lines 167 and Lines 168 of the revised work papers filed on November 2, 2005, which still includes "Sambuca di Amore." "Sambuca" is listed as exempt according to the Division's standard list as a mixer and not a drink.

10. In this matter the protests should be denied in accordance with the findings of fact and conclusions of law as set out herein, with the exception previously noted for "Sambuca."

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case that the protest of COMPANY d/b/a RESTAURANT 2, to the revised mixed beverage tax assessment, as reflected by the work papers filed on November 2, 2005, should be sustained in part and denied in part.

It is further ORDERED that the protests of COMPANY d/b/a RESTAURANT 2, PRESIDENT, as President and as an individual, and SECRETARY, as Secretary/Treasurer and as an individual, to the revised sales tax assessments, as reflected by the work papers filed November 2, 2005, should be sustained in part and denied in part.

It is further ORDERED that the revised mixed beverage tax and sales tax, inclusive of accrued interest to the date the Protestants paid the proposed assessments under protest, should be fixed as the amounts due and owing, and the monies overpaid should be refunded to the Protestants without interest.[43]

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.

[43] OKLA. ADMIN. CODE § 710:1-3-47, which states:

> In any case where a taxpayer files a written protest to a proposed assessment as provided by 68 O.S. § 221, the taxpayer may pay the tax amounts proposed to be assessed and designate such payment as being made under protest. Such payment will stop the accrual of interest on the amounts so paid. If the Commission sustains the protest, in whole or in part, the amount determined by the Commission not to be due shall be refunded to the taxpayer, without interest, except as otherwise provided by law.