

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2006-08-22-09 (Non-Precedential)
ID: P-05-071-H
DATE: AUGUST 22, 2006
DISPOSITION: DENIED
TAX TYPE: FRANCHISE
APPEAL: NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

CORPORATION (“Protestant”) appears through VICE-PRESIDENT, Vice President of Tax, and MANAGER, Tax Manager, PARENT CORPORATION. The Business Compliance 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 June 24, 2005, the protest file was received by this office for further proceedings consistent with the Uniform Tax Procedure Code¹ and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.² On June 27, 2005, 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-05-071-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 July 29, 2005, the Notice of Prehearing Conference was mailed to the last known address of the Protestant, setting the prehearing conference for August 15, 2005, at 1:30 p.m.³

On August 4, 2005, the Protestant filed a request to reschedule the prehearing conference due to conflicting commitments. The Division had no objection to the request. On August 9, 2005, the Notice of Prehearing Conference was mailed to the parties, resetting the prehearing conference for September 20, 2005, at 9:30 a.m. The prehearing conference was conducted by telephone. On September 23, 2005, the parties were advised to file a status report on or before October 20, 2005. The Division filed the Status Report on October 20, 2005, advising that the Protestant had been provided with a letter explaining the Division’s position that the documents provided by the Protestant supported the Division’s position. The parties were unable to resolve the pending matter and on February 17, 2006, the parties were mailed a notice setting this matter for hearing on March 22, 2006, at 1:30 p.m.

On March 9, 2006, a *Motion to Strike, Reschedule and Recharacterize Proceedings* was filed by the parties requesting that the hearing be stricken because the Protestant was

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

² OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

³ OKLA. STAT. ANN. tit. 68, § 208 (West 2001). The notice was mailed to the Protestant at ADDRESS.

contemplating settlement and that if settlement was not possible, the parties believed that this matter could be submitted on stipulations and briefs, and the parties would need sufficient time to enter into stipulations.

On March 14, 2006, an *Order Granting Motion* was issued, with a schedule, as requested by the parties, to submit this matter on stipulations and briefs. On May 15, 2006, the Protestant filed its Brief. On May 25, 2006, the Brief of the Audit Division was filed. On May 26, 2006, the Stipulation of Fact and Statement of Issue was filed by the parties. On May 26, 2006, the Corrected Brief of the Audit Division was filed. On June 5, 2006, the Protestant's Reply Brief was filed. On June 6, 2006, the record in this matter was closed and the case was submitted for decision.

STIPULATION OF FACT AND STATEMENT OF ISSUE

STIPULATION OF FACTS

At the request of the parties this matter was submitted for decision on the briefs.⁴ The following facts were stipulated⁵ by the parties:

1. On or about December 21, 2001, Protestant filed its 2002 Oklahoma Franchise Tax Return for the period of July 1, 2001 through June 30, 2002. Exhibit A.

2. On or about December 21, 2001, Protestant filed its 2000 Oklahoma Income Tax Return for the period of April 1, 2000 through March 31, 2001. Exhibit B.

3. On its 2002 Franchise Tax Return, Protestant sought to claim Fifty-seven Million, Ten Thousand, Four Hundred Nineteen Dollars (\$57,010,419) of intercompany payables as current liabilities. Exhibits A (balance sheet, line 22 of 2002 franchise tax return) and B (statement 4, page 8, lines 19 & 22, of 2000 corporate return).

4. On or about December 3, 2004, Protestant filed its 2003 Oklahoma Franchise Tax Return for the period of July 1, 2002 through June 30, 2003. Exhibit C.

5. On or about December 3, 2004, Protestant filed its 2002 Oklahoma Income Tax Return for the period of April 1, 2002 through March 31, 2003. Exhibit D.

⁴ OKLA. ADMIN. CODE § 710:1-5-38:

When a taxpayer in an administrative proceeding does not request an oral hearing, or the parties agree that an oral hearing is not needed, the Administrative Law Judge will base the Findings, Conclusions and Recommendations on the position letters and briefs submitted by the parties. The Administrative Law Judge will mail notice of a date certain for each party to submit a position letter or brief setting out therein the statement of facts, issues to be determined, contentions and statutory and case law relied upon to support his contentions. The Administrative Law Judge may schedule a conference between the parties if it is deemed necessary to clarify the positions of the parties.

⁵ The text of the stipulated facts and statement of issue are set out verbatim.

6. On its 2003 Franchise Tax Return, Protestant sought to claim Forty-five Million, Two Hundred Eighty-five Thousand, Eight Hundred Forty-two Dollars (\$45,285,842) of intercompany payables as current liabilities. Exhibits C (balance sheet, line 22) and D (balance sheet, page 4, line 17, beginning of taxable year, 2002 Oklahoma Income Tax Return).

7. On or about December 3, 2004, Protestant filed its 2004 Oklahoma Franchise Tax Return for the period of July 1, 2003 through June 20, 2004. Exhibit E.

8. On its 2004 Franchise Tax Return, Protestant sought to claim Fifty-five Million, Four Hundred Two Thousand, Three Hundred Eighty Dollars (\$55,402,380) of intercompany payables as current liabilities. Exhibits E (balance sheet, line 22) and D (balance sheet page 4, Line 17, end of taxable year, 2002 Oklahoma Income Tax Return).

9. On or about December 3, 2004, Protestant filed its 2005 Oklahoma Franchise Tax Return for the period of July 1, 2004 through June 30, 2005. Exhibit F.

10. On or about December 14, 2004, Protestant filed its 2003 Oklahoma Income Tax Return for the period of April 1, 2003 through March 31, 2004. Exhibit G.

11. On its 2005 Franchise Tax Return, Protestant sought to claim Sixty-nine Million, Nine Hundred Forty-four Thousand, Seven Hundred Thirty-one Dollars (\$69,944,731) of intercompany payables as current liabilities. Exhibit F (balance sheet, line 21), Exhibit G (Statement 4, page 8, 2003 Oklahoma Income Tax Return) and Exhibit H (audit worksheets, page 7, adjusted balance sheet for 03/31/04 to be used on 2005 adjusted franchise tax return).

12. Based upon an office audit of Protestant's franchise and Oklahoma corporate tax returns, on or about April 1, 2005 the Division issued its assessment of additional franchise tax due for the tax years 2003-2005 in the amount of Fifty-four Thousand, Ninety Dollars and Thirty-six Cents (\$54,090.36), consisting of additional tax in the amount of Forty-one Thousand, Two Hundred Forty-eight Dollars and Seventy-five Cents (\$41,248.75),⁶ penalty in the amount of Four Thousand, One Hundred Twenty-four Dollars and Eighty-eight Cents (\$4,124.88) and interest in the amount of Nine Thousand Six Hundred Thirty-two Dollars and Eleven Cents (\$9,632.11) through June 23, 2005. Exhibit I.

13. On or about May 19, 2005, Protestant timely filed its protest in this matter and provided copies of the following documents (Exhibit J) in support of its position:

⁶ This amount consists of \$60,000 of franchise due, less previous payments of \$18,751.25.

Intercompany Loan Schedules
for the periods of

Monthly Cash Flow Statements
for the periods of

01/01/02 through 03/31/02
02/01/03 through 03/31/03
04/01/03 through 03/31/04
04/01/04 through 03/31/05

01/01/02- 11/30/02
01/01/03- 02/28/03; 04/01/03- 10/31/03
12/01/03- 12/31/03; 01/01/04- 12/31/04
01/01/05- 03/31/05

STATEMENT OF ISSUE

Whether the Division properly adjusted Taxpayer's total current liabilities and capital employed in Oklahoma for Franchise Tax years 2003, 2004 and 2005.

ADDITIONAL FINDINGS OF FACT

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

1. The Protestant is a foreign⁷ for profit corporation. On May 15, 1987, the Protestant qualified to begin doing business⁸ in the State of Oklahoma.⁹ The Protestant is located at 123 FAKE STREET, SMALL TOWN, Oklahoma 12345, and is the manufacturer and distributor of ceramic magnet materials.¹⁰

2. PARENT CORPORATION is the parent corporation ("Parent") of the Protestant, a subsidiary. In 2001, the Protestant joined with its Parent and became a member of an affiliated¹¹ group of companies, which files a consolidated Federal Corporate Income Tax Return.¹²

⁷ OKLA. STAT. ANN. tit. 18, § 1130 (A) (West Supp. 2006):

As used in the Oklahoma General Corporation Act, the words 'foreign corporation' means a corporation organized pursuant to the law of any jurisdiction other than this state.

⁸ OKLA. STAT. ANN. tit. 68, § 1202 (West 2001):

When the term "doing business" is used in this article, it shall mean and include each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organizations, as are enumerated in the preceding section.

⁹ Exhibits B through G. The Protestant's Registered Agent is REGISTERED AGENT, AGENT'S ADDRESS, with an effective date of June 8, 1987, <https://www.sooneraccess.state.ok.us/corp>. (last visited July 3, 2006).

¹⁰ See Note 9.

¹¹ OKLA. ADMIN. CODE § 710:40-1-2:

3. The Protestant files a separate Oklahoma Corporate Income Tax Return.¹³
4. The “advances” made by the Parent to the Protestant (the intercompany payables claimed by the Protestant as “current liabilities” on the 2003, 2004, and 2005 Franchise Tax Returns) “. . . were not in the nature of a formal bond, note or debenture, and so there were not formal time limits stated in a written agreement.”¹⁴
5. The Protestant has been unable to repay the advances made by the Parent due to a downturn in business, including rapidly declining sales, growing operating losses, and a steady erosion of the balance sheet,¹⁵ as follows, to-wit:

The following words and terms, when used in this Chapter, shall have the following meaning, unless the context clearly indicates otherwise:

"Affiliated corporations" means those entities authorized or required to file a consolidated Federal Income Tax Return by the applicable provisions of the Internal Revenue Code, as amended, and regulations promulgated pursuant to such code.

...

¹² See Protestant’s Brief filed May 17, 2006.

¹³ Exhibits B, D, and G.

¹⁴ See Protestant’s Brief filed May 17, 2006. See also Protestant’s Reply Brief filed June 5, 2006:

. . . No note or other instrument was executed between [Protestant] and its [Parent] to evidence such terms. Neither are the advances formal capital contributions by [Parent] to its subsidiary [Protestant]. No stock was issued evidencing such advances, nor were they reflected as equity capital contributions in the audit financial statements of [Protestant].

The substance of the intercompany advances [Protestant’s] parent company has made to it are that they are an economic lifeline that the parent must extend to [Protestant], without which [Protestant] would be forced into bankruptcy. None of the advances made were intended to be loans outstanding for greater than three years, nor were they capital investments intended to be long-term commitments of funds to [Protestant’s] business. The essence of these advances is that they are short term, temporary liquidity provided by a parent company to a subsidiary to pay its operating expenses. They are intended to be repaid as soon as is possible and practicable, whether that is within six months, 12 months, two years, or longer. But the company is foundering in desperate economic conditions that have prevented it from repaying; a glance at the ending balance sheets attached to the federal returns for [Protestant] during any of the years at issue shows that ending cash on the balance sheet has not exceeded \$200,000. This kind of intercompany advance between a parent company and its subsidiary is neither a long term indebtedness, nor capital investment; the nature of such advances differ from formal instruments of finance, and represent a funding method unique to affiliated companies.

¹⁵ See Protestant’s Brief filed May 17, 2006.

<u>Fiscal Year</u>	<u>Sales</u>	<u>Losses</u>
2000	\$96.7 million	
2001	\$81.5 million	(\$19.0 million)
2002	\$45.2 million	(\$ 4.7 million)
2003	\$42.2 million	(\$13.4 million)
2004	\$31.0 million	(\$16.3 million)
2005	\$32.9 million	(\$13.9 million)

6. On April 1, 2005, the Division issued a Franchise Tax Assessment¹⁶ for the period of July 1, 2002, to June 30, 2005, as follows, to-wit:

¹⁶ Exhibits H & I. *See* Stipulation of Fact No. 12. The stipulation has interest updated through June 23, 2005, making the total \$55,005.74, not \$54,090.36, and omits that the Division's proposed assessment also includes \$300.00 for Registered Agent Fees.

See also OKLA. STAT. ANN. tit. 68, § 1205 (West 2001):

In determining the amount of tax to be levied, assessed and collected under the terms of this Article, the minimum amount shall, in no case, be less than Ten Dollars (\$10.00) nor shall the maximum amount exceed Twenty Thousand Dollars (\$20,000.00).

Tax Due	\$41,248.75
Interest @ 15% through 04/30/05	8,716.73
Tax & Interest due within 60 Days	\$49,965.48
30 delinquent Interest Penalty @ 10%	4,124.88
Tax, Interest & Penalty due after 60 Days	\$54,090.36
Registered Agent Fees ¹⁷	<u>300.00</u>
Total Assessed	\$54,390.36

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.¹⁸
2. The Tax Commission has promulgated rules as provided by law to facilitate the administration, enforcement, and collection of the Oklahoma Franchise Tax.¹⁹
3. The rules promulgated pursuant to the Administrative Procedures Act are presumed to be valid and binding on the persons they affect and have the force of law.²⁰
4. The terms of the Oklahoma Franchise Tax Code²¹ “shall apply to every corporation organized under the laws of this state, or qualified to do, or doing business in Oklahoma in a

¹⁷ OKLA. STAT. ANN. tit. 18, § 1130 (B) (West Supp. 2006):

No foreign corporation shall do any business in this state, through or by branch offices, agents or representatives located in this state, until it shall have paid to the Secretary of State of this state the fees prescribed in Section 1142 of this title. . . .”

OKLA. STAT. ANN. tit. 18, § 1142 (18) (West Supp. 2006):

A. The Secretary of State, for services performed in the Office of the Secretary of State and for expense of mailing, shall charge and collect the following fees:

...

18. For acting as the registered agent, a fee of One Hundred Dollars (\$100.00) payable on the first day of July each year, and if not paid before the next ensuing September 1st, the Oklahoma Tax Commission shall suspend and forfeit the charter of the delinquent corporation pursuant to the procedures prescribed in [Section 1212 of Title 68 of the Oklahoma Statutes](#). The Oklahoma Tax Commission shall collect and audit the registered agent fee authorized pursuant to this paragraph in conjunction with the collection and audit of franchise taxes as provided for in [Sections 1201](#) through [1214 of Title 68 of the Oklahoma Statutes](#). All monies received by the Oklahoma Tax Commission pursuant to the provisions of this paragraph shall be paid to the State Treasurer for deposit in the General Revenue Fund; and

...

¹⁸ OKLA. STAT. ANN. tit. 68, § 207 (West 2001).

¹⁹ OKLA. ADMIN. CODE § 710:40-1-1.

²⁰ OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2001).

corporate or organized capacity by virtue of creation or organization under the laws of this or any other state, territory or district, or a foreign country, including associations, joint-stock companies and business trusts as defined by Section 202 of this title, but not including limited liability companies as defined by Section 2001 of Title 18 of the Oklahoma Statutes.”²²

5. For purposes of the Franchise Tax Code, when the term “doing business” is used “it shall mean and include each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organizations, as are enumerated in the preceding section.”²³

6. The Uniform Tax Procedure Code²⁴ defines “corporation”²⁵ as follows:

The term “corporation” means an organization, other than a partnership, as hereinafter defined:

- (1) Created or organized under the laws of Oklahoma;
- (2) Qualified to do or doing business in Oklahoma, in a corporate or organized capacity, by virtue of creation or organization under the laws of the United States or of some state, territory or district, or of a foreign country;
- (3) Associations, joint-stock companies, insurance companies, including surety and bond companies;
- (4) Business trusts, which shall mean and include common law trusts, such as Massachusetts trusts and every other business organization consisting essentially of an arrangement whereby property is conveyed to one or more trustees for purposes other than the protection and conservation of assets or the protection of debtholders; and
- (5) National banking associations, state banks, and trust companies;

7. “Whenever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.”²⁶

²¹ OKLA. STAT. ANN. tit. 68, § 1201 et seq. (West 2001).

²² OKLA. STAT. ANN. tit. 68, § 1201 (West 2001). *See* OKLA. ADMIN. CODE § 710:40-1-1 et seq.

²³ OKLA. STAT. ANN. tit. 68, § 1202 (West 2001).

²⁴ OKLA. STAT. ANN. tit. 68, § 201 *et seq.* (West 2001). OKLA. STAT. ANN. tit. 68, § 201 (West 2001), states:

The purpose of this Article, which may be cited as the “Uniform Tax Procedure Code”, is to provide, so far as is possible, uniform procedures and remedies with respect to all state taxes. Unless otherwise expressly provided in any state tax law, heretofore or hereafter enacted, the provisions of this article shall control and shall be exclusive.

²⁵ OKLA. STAT. ANN. tit. 68, § 202(g) (West 2001).

²⁶ OKLA. STAT. ANN. tit. 25, § 2 (West 2001).

8. A franchise tax at the rate of One Dollar and twenty five cents (\$1.25) for each One Thousand Dollars (\$1,000.00) or fraction thereof of the amount of capital used, invested or employed within the state is assessed against every corporation, association, joint-stock company and business trust, organized and existing by virtue of the laws of some other state, territory or country, now or hereafter doing business in this state.²⁷

9. The Oklahoma Franchise Tax Code²⁸ provides in pertinent part:

(a) For the purpose of computing the amount of annual franchise tax levied upon and payable by the corporations, associations and organizations enumerated in Sections 1203 and 1204 of this title, the word "capital" shall be construed to include the following:

Outstanding capital stock, surplus and undivided profits, which shall include any amounts designated for the payment of dividends until such amounts are definitely and irrevocably placed to the credit of stockholders subject to withdrawal on demand, *plus the amount of bonds, notes, debentures or other evidences of indebtedness maturing and payable more than three (3) years after issuance.* The term "capital" stock where herein used shall include all written evidence of interest or ownership in the control or management of a corporation or other organization. The term "evidence of indebtedness" where herein used shall not include any deposit made in any bank.

(b) *Advances* made by a parent to a subsidiary or by a subsidiary to a parent corporation, organization or association shall be eliminated by both the parent and subsidiary from the calculations necessary to determine the amount of taxable capital employed in the business of either or both the parent and subsidiary. *Provided, however, advances made for purely operating expenses may, upon proper showing, satisfactory to the Tax Commission, be included in such calculations.* (Emphasis added.)

...

10. "Current liability" means any bond, note, debenture, or other evidences of indebtedness, or any portion thereof, payable within three (3) years or less after issuance. Current liability shall not include that portion of a debt which matures more than three (3) years after issuance.²⁹

²⁷ OKLA. STAT. ANN. tit. 68, § 1204 (West 2001).

²⁸ See Note 21. See also OKLA. STAT. ANN. tit. 68, § 1209 (West 2001).

²⁹ OKLA. ADMIN. CODE § 710:40-1-2. See OKLA. ADMIN. CODE § 710:40-1-2.1, for examples of current liabilities for Franchise Tax purposes:

Examples of amounts which may be treated as current liabilities in the case of a non-renewable, ten-year note, payable in annual installments, are as follows:

11. The intercompany payables claimed by the Protestant as “current liabilities” on its 2003, 2004, and 2005 Franchise Tax Returns are not in the nature of bonds, notes, debentures, or other evidences of indebtedness maturing within three (3) years or less. There is no written agreement between the Protestant and the Parent setting out the terms of the advances, including, but not exclusive of whether the advances are payable within three (3) years or less after the advance is made by the Parent. As stated in the Division’s Reply Brief, “There is simply a large and ongoing cash infusion which is for the most part largely [not] []repaid. The ongoing loan amount is then deducted in its entirety on a yearly basis as a deduction from capital or current liability for advances purely for operating expenses.”

12. The intercompany payables reported by the Protestant on its 2003, 2004, and 2005 Franchise Tax Returns are not “current liabilities,” as contemplated by Section 1209(a) of Title 68, and are includible as capital employed in the State of Oklahoma.

13. “Advances” made by a parent to a subsidiary or by a subsidiary to a parent corporation, organization, or association shall be eliminated by both the parent and subsidiary from the calculations necessary to determine the amount of taxable capital employed in the business of either or both the parent and subsidiary. Provided, however, advances made for purely operating expenses may, upon proper showing, satisfactory to the Tax Commission, be included in such calculations.³⁰

14. “The literal meaning of ‘operating expenses’ varies depending upon the type of industry analyzed.”³¹

15. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.³² A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.³³

(1) In the year of issuance, an amount equal to the sum of three years of payments from the date of issuance may be considered a current liability.

(2) In the second year after issuance, the sum of two years of payments from the date of issuance may be considered a current liability.

(3) In the third year after issuance, one years payment may be considered a current liability.

(4) In the fourth year and thereafter, no amount of the obligation is considered to be a current liability for Franchise Tax purposes.

³⁰ OKLA. STAT. ANN. tit. 68, § 1209 (b) (West 2001). See OKLA. ADMIN. CODE § 710:40-1-10.

³¹ Oklahoma Tax Commission Order No. 1988-10-13-88 (October 13, 1988). In this case the Commission found that “Operating expenses of lending operation such as protestant’s cannot include both administrative expenses and all debt and equity capital, just as capital employed should not include purely operating expenses, under the rationale of *Personal Loan & Finance Co. of Capital Hill v. Oklahoma Tax Commission*, 1968 OK 11, 437 P.2d 1015. Under that case, purely operating expense, like short term debt, should be excluded from the calculation of capital employed, and, ‘advances’ are not ‘purely operating expenses’. . . [A]dvances are separable from purely operating expenses. . . The taxpayer further failed to demonstrate that, in its business, operating expense is synonymous with working capital.”

³² OKLA. ADMIN. CODE § 710:1-5-47:

16. In this matter the Protestant has failed to meet its burden of proof to show that the proposed assessment of the Division is incorrect, and in what respect.

The Protestant contends that the statutes and rules relied on by the Division are definitional in character and that the Division's definitional interpretations do not contemplate the unique nature of intercompany advances made by a parent company to a subsidiary, which is being overwhelmed by exceedingly difficult economic conditions.

However, "[t]he Legislature, in enacting § 1209(b), obviously determined it would establish a classification of parent-subsidiary corporations for the purpose of levying and collecting franchise taxes on capital employed in Oklahoma. Subsection (b) applies to all parent-subsidiary situations. In lender and borrower transactions between Oklahoma parent-subsidiary corporations the tax is levied and paid the State. In the absence of subsection (b) any non-resident foreign parent corporation could loan money to its Oklahoma subsidiary corporation and neither would be taxed on such capital in Oklahoma."³⁴

Under the rationale of *Personal Loan & Finance Co.*³⁵ the advances made by the Parent to the Protestant are capital being used, invested, or employed within this state and subject to the levy of franchise tax. Otherwise, the Protestant would continue to deduct the advances from its capital assets, the result the Legislature intended to prevent by the enactment of Section 1209(b) of Title 68.

The Protestant also contends that the advances at issue are "made for purely operating expenses," and exempted from elimination by Section 1209(b) of Title 68. "Operating expenses" are usually expenses which are general and administrative and may include collection costs. Such expenses typically include ordinary expenses and overhead to keep the business running, such as rent, electricity, and heat. Inventory, cash, and purchase of assets are normally

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 grounds of failure to prove sufficient facts which would entitle the protestant to the requested relief.

OKLA. ADMIN. CODE § 710:1-5-77(b), 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.

³³ See *Enterprise Management Consultants, Inc. v. State ex rel Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

³⁴ *Personal Loan & Finance Co. of Capitol Hill v. Oklahoma Tax Commission*, 1968 OK 11, ¶4, 437 P.2d 1015.

³⁵ See Note 34.

not included and the Division has wide discretion in determining whether or not the amounts borrowed are, in fact, used purely for “operating expenses.”³⁶

In this matter the Protestant has not met its burden of proof, and has failed to demonstrate how the funds borrowed from its Parent for the 2003 through 2005 franchise tax years were made for “purely operating expenses.” The Protestant has also not demonstrated that in its business, operating expense is synonymous with working capital.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the protest should be denied.

It is further ORDERED that the total amount of franchise tax and penalty assessed for the Audit Period should be fixed as the Protestant’s deficiency and those amounts should be determined as due and owing, including interest accrued and accruing.

It is further ORDERED that the total amount of registered agents fees assessed for the Audit Period should be fixed as the Protestant’s deficiency and those amounts should be determined as due and owing.

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.

³⁶ The Division also makes an alternative argument that even if some portion of the advances made by the Parent to the Protestant were for purely operating expenses, the amounts the Division would consider as operating expenses, based upon the documents submitted by the Protestant, would not require an adjustment of the assessment due to the minimum/maximum franchise tax caps. See Division’s Corrected Brief filed May 26, 2006.