JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2006-10-03-05 (Non-Precedential)
ID: P-04-136-H
DATE: OCTOBER 3, 2006
DISPOSITION: DENIED
TAX TYPE: SALES
APPEAL: NONE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPANY, Inc. ("Company"), PRESIDENT, as President and as an individual ("President"), and SECRETARY, as Secretary/Treasurer and as an individual ("Secretary") (jointly, "Protestants"), appear through ATTORNEY, Attorney-at-Law and ACCOUNTANT. The Field Audit Section, Audit Division ("Division"), Oklahoma Tax Commission, appears through OTC ATTORNEY, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On September 21, 2004, the protest file was received by this office for further proceedings consistent with the Uniform Tax Procedure Code[1] and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.[2] On September 27, 2004, a letter was mailed to the Protestants stating that this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-04-136-H. The letter also advised the Protestants 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 September 29, 2004, the Notice of Prehearing Conference was mailed to the last known address of the Protestants, setting the prehearing conference for October 28, 2004.[3]

On October 22, 2004, the Protestants requested a continuance of the prehearing conference in order to compile additional information. The Division did not have any objection. On October 27, 2004, a Notice of Prehearing Conference resetting the conference for November 18, 2004, at 2:30 p.m. was mailed to the parties. On November 17, 2004, a Status Report was filed by the Protestants, which was accepted in lieu of the prehearing conference. The Procedural History from November 18, 2004, to July 11, 2005, has been omitted.

On July 12, 2005, the Position Letter of the Division was filed, along with the Position Letter of the Protestants. A closed hearing[4] was held on July 18, 2005, at approximately

[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 Protestants c/o ACCOUNTANT, ACCOUNTING FIRM, BUSINESS ADDRESS.

[4] The Protestants invoked their right to a confidential hearing as provided by OKLA. STAT. ANN. tit. 68, § 205 (West 2001).

1:30 p.m. The Division called one witness, SUPERVISOR, Auditor Supervisor, Field Audit Section, Audit Division, Oklahoma Tax Commission, who testified regarding the records of the Division. The Division's Exhibits A through F were identified, offered, and admitted into evidence. The Protestants called one witness, ACCOUNTANT, who testified regarding the bookkeeping practices of the Company and the field audit conducted by the Division.[5] The Protestants did not offer any exhibits to be admitted into evidence.

Upon conclusion of the hearing, the record was left open for an indefinite period of time to allow the Division to review files and documents submitted by the Protestants, post-hearing.

On July 22, 2005, a notice was sent to the parties advising of the following matters, to-wit:

> At the hearing held in this matter on July 18, 2005, the record was left open for an indefinite period of time to allow for review of the files and submission of documents. The Division is to search its files for the Protestant's hand-written invoices for January 2002 through October 2002 which it may have in its possession and advise whether or not they have been located. Following the Division's use of the invoices, they are to be returned to ACCOUNTANT.
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> The following additional documentation is to be submitted for the record:
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> •The claim for refund originally filed;
> •Division's denial of [the] [Company's] claim for refund;
> •A letter dated June 9, 2003, from ACCOUNTANT to AUDITOR;[6] and
> •The audit documents sent out by the field auditors.
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> Counsel for the Division is to file a status report on or before August 17, 2005, advising of the status of the review and an estimate of the time still needed.
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> Upon completion of these matters, a date will be set for filing of proposed findings of fact and conclusions of law. If either party desires to file post-hearing briefs, a request may be filed with this office. Once all filings have been made, the record will be closed and the case submitted for decision.

[5] ACCOUNTANT testified that she began working with the Protestants sometime in March or April of 2003.

[6] SUPERVISOR testified that AUDITOR had conducted the field audit, but at the time of hearing AUDITOR was unavailable to testify because she was on leave.

On August 2, 2005, the Division filed the documents previously requested.[7] The Division advised that it was not in possession of the hand-written invoices. The Division requested that the parties be allowed to file a status report in approximately thirty (30) days. On August 9, 2005, the parties were advised to file a status report on or before September 9, 2005. On September 1, 2005, the Division filed a Status Report stating that the auditor had started reviewing the invoices provided by the Protestants, but that it would be approximately thirty (30) days before the review could be completed. On September 16, 2005, a notice was sent to the parties to file a status report on or before October 14, 2005.

On October 14, 2005, the Division filed a "Notice of Revision," with audit work papers attached. On October 19, 2005, a notice was mailed to the parties that proposed findings of fact and conclusions of law were to be filed on or before November 14, 2005, and if either party desired to file post-hearing briefs, a request could be filed with this office. Once all filings had been made, the record would be closed and the case submitted for decision.

On November 10, 2005, the Protestants filed a Response advising that the Division's "Notice of Revision" was being reviewed and it was anticipated that additional documentation would be submitted to the Division by the end of November 2005.

On November 14, 2005, the Division filed its "Proposed Findings of Fact and Conclusions of Law." On November 18, 2005, a notice was mailed to the parties setting a status teleconference for November 29, 2005, at 1:30 p.m. The status teleconference was held as scheduled. On November 30, 2005, a notice was mailed to the parties directing that a status report was to be filed on or before December 29, 2005. On December 8, 2005, the Protestants filed a Response to the Division's "Notice of Revision." On December 22, 2005, the Division filed a Status Report advising that the information provided by the Protestants on December 8, 2005, was being reviewed and would not be completed until December 29, 2005. The Procedural History from December 23, 2005, to March 23, 2006, is being omitted.

On March 24, 2006, the Division filed its "Notice of Second Revision," with audit work papers attached. On March 30, 2006, the Protestants requested thirty (30) days to review the Division's "Notice of Second Revision." The parties were mailed a notice that a status report was to be filed on or before April 26, 2006. On April 26, 2006, the Division filed a Status Report stating that no response had been received from the Protestants to the "Notice of Second Revision." On April 27, 2006, a notice was mailed to the parties that additional filings could be made on or before May 5, 2006, and on that date, the record would be closed and the case submitted for decision. On April 27, 2006, the Protestants requested additional time to review the Division's "Notice of Second Revision." On April 28, 2006, the Protestants' request was denied.

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[7] The audit documents provided by the Division consisted of the following:

Statute of Limitation Waiver Agreement.
Corporate Officer Service Agent Authorization for the President of Company.
Taxpayer's Power of Attorney.
Corporate Officer Service Agent Authorization for Secretary/Treasurer of Company.
Taxpayer's List of Principal Officers, Partners or Members (LLC).

On May 5, 2006, the Protestants submitted the Response to the Division's "Notice of Second Revision." On May 24, 2006, the Division filed its "Notice of Third Revision," with audit work papers attached. On June 9, 2006, the Protestants filed a Response to the Division's "Notice of Third Revision." On June 15, 2006, the Division filed its Reply, and requested that the record in this matter be closed. On June 19, 2006, the record in this matter was closed and submitted for decision.

On July 5, 2006, ATTORNEY filed a Reply, along with a request that the filing be accepted as timely because the Division had mailed its June 15, 2006, filing to the wrong address.[8] There was no objection by the Division. The case was withdrawn from submission and the record reopened for ruling on the request. On July 10, 2006, the Reply was accepted as timely filed and the record was closed and the case submitted for decision.

FINDINGS OF FACT

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

1. The Company was established in 1954 and incorporated on February 19, 1981. The Company repairs, replaces, alters, remodels (redesigns), or builds to the customers specifications, residential and commercial upholstered furniture. In the Company's forty-nine (49) year business history (as of June 29, 2003), the Company collected and paid sales tax based on one-half (1/2) of the order being tangible goods and one-half (1/2) of the order being labor.[9]

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[8] Attached to ATTORNEY'S request is a copy of the Division's envelope, which reflects that the Division's Reply was mailed to WRONG ADDRESS, and returned to the Division on June 27, 2006, by the U.S. Postal Service marked "Return No Such Number." ATTORNEY'S correct address is CORRECT ADDRESS.

[9] *See* letter dated June 9, 2003, from ACCOUNTANT to the Division:

> Included in the manufacturing and/or re-manufacturing process are materials and supplies and labor. In the furniture manufacturing and upholstery industry, there may be many variables encountered on any one order. These variables, such as broken springs, missing supports, deterioration of padding materials, broken internal stitching and many other situations, cannot be diagnosed at the time the order is placed. All orders processed by [the] [Company] are manufactured (built from raw goods) or re-manufactured (rebuilt with raw goods) to establish the highest possible market value of the item, for the customer, The one consistent tangible good incorporated in the order, is the fabrics used as covering. This is consistent, because the fabric (or leather, vinyl etc) can be measured and a specific yardage ordered. There are "other tangible goods" incorporated into the order; these are springs, tacks, staples, clips, padding etc. To estimate or to count each tack or staple is not possible, since each re-manufactured item is different in nature. If the customer's charge of the taxable sale were based only on the fabric, it would be approximately one fourth of the total charge. [The] [Company] considers one-half of the total customer charge to be materials, so the "other tangible goods" are included plus the fabric, and are subject to sales tax.

The Company describes itself as a manufacturer and/or re-manufacturer, but the Company does not hold a Manufacturer's Exemption Certificate ("MEC"). *See* OKLA. STAT. ANN. tit. 68, 1359.2 (West 2001).

2. The Company derives the total invoice price[10] as follows:

A. The actual cost of the fabric purchased for the order is doubled, to produce profit and to allow for the cost of any consumables used in the Job. This is the reported taxable amount, Materials and Consumables, of the total invoice.
B. The nontaxable Labor amount is equal to the Materials and Consumables amount.
C. The Total Invoice Amount is 50% taxable Materials and Consumables, and 50% nontaxable Labor.

3. The Company has held an Oklahoma Sales Tax Permit (currently Sales Tax Permit #XXX) since at least 1986. The Company's books and records indicate that the Company purchases all of its shop equipment, building repair items, fabric, and all consumables exempt from sales tax for resale using the Company's sales tax permit.

4. On April 21, 2003, the Division mailed a letter to the Company stating that it had been selected for an audit.[11]

5. The Division conducted a field audit of the books and records of the Company for the period of May 1, 2000, through April 30, 2003 ("Audit Period"). Invoices reviewed during the

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> The invoices printed from the QuickBooks program are correctly calculated, (reference the attached sales contract). However, the accounting program was not correctly preferenced to report the taxable portion on materials and supplies and to show the labor portion separately. It was reasoned, that they would show the sales tax percentage as one-half, 3.96%, calculate it on the entire charge to the customer, which would be the same as charging 7.917% on one-half, for the material and supplies portion. This did maintain their overall reporting in their accounting software to report the liability correctly although reliance cannot be placed on their financial reporting, due to this inconsistency with generally accepted accounting practices. The preference has been corrected in their accounting software, as of May 01, 2003.

See also the Company's Response to the Division's "Notice of Third Revision" filed June 9, 2006:

> [The] [Company] has collected and paid in Sales Tax, without incidence or inquiry, using the established industry method as advised by the Oklahoma Tax Commission, from the conception of their business in 1954. [The] [Company] has existed in the current commercial business location for forty-nine (49) years. The location has separate delivery and staging areas independent of several designated workstations, each utilized for a different stage of the process, to achieve completion of the product. A single job may require all or part(s) of any of the processes performed at these workstations.

[10] *See* Note 9.

[11] Division's Exhibit B. ACCOUNTANT testified that when she requested to meet with the Division's field auditor at ACCOUNTANT'S office, she was informed that the field auditor could only travel a set radius from her home base and ACCOUNTANT'S office was outside that radius, so they would have to meet at the Company's office.

audit reflect that the Company charged customers a lump sum for work that included materials and labor and collected sales tax on the lump sum at the rate of 3.96%. The combined state, county, and city sales tax rate during the Audit Period was 7.917%.[12]

6. PRESIDENT is the President of the Company. The Protestant has held the position of President of the Company from May 1, 2000, to the present.[13]

7. SECRETARY is the Secretary/Treasurer of the Company. The Protestant has held the position of Secretary/Treasurer from May 1, 2000, to the present.[14]

8. The Division prepared audit work papers scheduling all gross receipts received by the Company less amounts of sales tax remitted by the Company. The audit work papers were mailed to the Company on October 2, 2003.[15]

9. On October 10, 2003, the Division mailed proposed sales tax assessments to the Company and to the President and the Secretary/Treasurer of the Company, as officers and as individuals,[16] for the Audit Period, as follows, to-wit:

Sales Tax Due:	$28,047.30
Interest @ 15% through 10/30/03:	8,773.08
Tax & Interest due within 30 Days:	$36,820.38
30 day delinquent Penalty @ 10%:	2,804.72
Tax, Interest & Penalty due after 30 Days:	$39,625.10

10. On December 9, 2003, the Division received a timely filed protest to the proposed assessments of sales tax against the Protestants.[17] The Company protested the manner in which it was selected for audit.[18] The Company asserted that due to an employee error, the Company

[12] According to the sales tax reports the actual sales tax rate was 7.917%. The Company divided the actual sales tax rate in half and rounded up (3.96%).

[13] *See* Note 7.

[14] *See* Note 7.

[15] Division's Exhibit C. On May 8, 2003, the Company, through ACCOUNTANT , executed a "Statute of Limitation Waiver Agreement" extending the period that an assessment and refund could be issued for the Audit Period to October 31, 2003. *See* Note 7. *See also* OKLA. STAT. ANN. tit. 68, § 223 (West 2001).

[16] Division's Exhibit D.

[17] Division's Exhibit E.

[18] On January 6, 2003, the President of the Company filed a "Claim for Refund" in the amount of $6,325.72, for the period of January 2002 through October 2002. The President stated that a new employee had overpaid sales tax, explained how it was overpaid, enclosed copies of the original sales tax reports and "Amended Sales Tax Reports," and requested help on figuring out the correct penalty. On April 3, 2003, the Account Maintenance Division of the Oklahoma Tax Commission denied the refund for the period of February 2002 through October 2002 in the amount of $6,374.63. The Company did not protest the denial of the refund.

had overpaid sales tax, which it sought to recover through a "Claim for Refund," which was denied by the Tax Commission, and that a field audit had been requested to address the denial of the claim for refund.[19] The protest also states that the audit work papers do not specify which transactions resulted in additional sales tax and did not address the denial of the claim for refund.[20]

11. Sometime after the commencement of the audit,[21] some of the Company's handwritten invoices (a copy of the invoice that is given to the customer) were annotated by ACCOUNTANT. The annotations added to the invoices reflected sales tax on the purchase of fabric or foam at the rate of 7.917%, and fabric and labor at the rate of 3.96%.[22] Attached to each handwritten invoice is a copy of the Company's "QuickBook" invoice used for bookkeeping purposes only. The customer never sees the "QuickBook" invoice.

12. After the hearing on July 18, 2005, at 1:30 p.m., the Protestants' representatives delivered to the Division a box of invoices and asserted that the Division's proposed assessments included sales tax on sales to customers whose purchases were exempt from sales tax and that the sales tax on the invoices was for labor only.

13. After removing the invoices of exempt sales and the invoices that were for labor only, the Division prepared revised audit work papers for the Audit Period, which were filed in this matter on October 14, 2005, as the Division's "Notice of Revision," as follows, to-wit:

Sales Tax Due:	$15,523.12
Interest @ 15% through 10/31/05:	9,869.54
Penalty @ 10%:	1,552.39
Tax, Interest & Penalty	$26,945.05

14. On December 8, 2005, the Protestants filed a Response to the Division's "Notice of Revision," which set out in detail documentation that had been delivered to the Division on December 6, 2005.

15. On March 24, 2006, the Division filed its "Notice of Second Revision"[23] as follows,

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[19] *See* Note 17.

[20] *See* Note 17.

[21] ACCOUNTANT testified that the invoices (Division's Exhibit F) were originally attached to the letter dated June 9, 2003, to the Division.

[22] Division's Exhibit F. ACCOUNTANT testified that she had added the annotations to the invoices in an effort to explain to the Division how the Company calculated sales tax. *See* Note 12.

[23] Attached to the Division's "Notice of Second Revision" are the following:

Exhibit A. Summary Report.
Exhibit B. Final Revision, Second Revision, First Revision, and Original Liability.
Exhibit C. Sales Orders-Exempt Sales. List of Invoices (By Number) Accepted and List of Invoices Denied (With Reason for Denial of Each Denial). Sales Orders-Labor Only. List of

to-wit:

Sales Tax Due:	$ 6,695.38
Interest @ 15% through 05/31/06:	5,122.62
Penalty @ 10%:	669.54
Tax, Interest & Penalty	$12,487.54

16. On May 5, 2006, the Company filed its Response to the Division's "Notice of Second Revision," which set out in detail more documentation that had been provided to the Division.

17. On May 24, 2006, the Division filed its "Notice of Third Revision"[24] as follows, to-wit:

Sales Tax Due:	$ 5,633.47
Interest @ 15% through 07/31/06:	4,497.84
Penalty @ 10%:	563.33
Tax, Interest & Penalty	$10,694.64

18. On June 7, 2006, the Company filed its Response to the Division's "Notice of Third Revision," requesting dismissal of the case, reversal of the proposed assessments, and approval of the "Claim for Refund" of sales tax for the period of January 2002 through October 2002, in the amount of $6,325.72, which had been denied by the Tax Commission on April 3, 2003, plus accrued and accruing interest, or alternatively requested all of the adjustments and the refund of sales tax for the Audit Period, as calculated by the Protestants, in the amount of $8,314.56, plus accrued and accruing interest, as follows, to-wit:

	Taxable Sales	Tax Liability
Division's Third Revision	$ 71,156.82	$5,633.47
Less: Exhibit A, Page 1, Issue 1	(2,959.20)	(234.28)
Less: Exhibit A, Page 2, Issue 3	(3,718.00)	(294.35)
Less: Exhibit A, Page 3, Issue 6	(2,864.00)	(226.74)
Less: Exhibit A, Page 4, Issue 9	(971.00)	(76.87)
Less: Exhibit A, Page 4, Issue 10		
Additional Exempt Labor (Imputed Labor @55.94%)[25]	(165,666.16)	(13,115.79)
Total:	($105,021.54)	($8,314.56)

Invoices (By Number) Accepted and List of Invoices Denied (With Reason for Denial of Each Invoice).

[24] Attached to the Division's "Notice of Third Revision" are the following exhibits:

Exhibit A. Summary Report.
Exhibit B. May 2006 Revision.
Exhibit C. Third Addendum to Field Audit Write Up.

[25] *See* the Response to the Division's "Notice of Third Revision." "The Monthly Sales Orders (Invoices), previously denied by the COMMISSION because labor was not separately stated, totals 285,038.47. The labor percentage of 55.94% applied to the Sales (Invoice) Total of 285,038.47, calculates an Imputed Labor of 165,666.16."

19. On June 15, 2006, the Division filed its Reply addressing each issue raised in the Protestants' Response to the Division's "Notice of Third Revision."

20. On July 5, 2005, the Protestants filed their final Response to the Division's "Notice of Third Revision."

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this action.[26]

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Sales Tax Code").[27] The Sales Tax Code levies "upon all sales, not otherwise exempted . . . an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds[28] of each sale of . . . tangible personal property. . . ."[29] Oklahoma Statutes authorize incorporated cities and towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.[30] There is no dispute among the parties that the City of BIG CITY and COUNTY levy a sales tax on tangible personal property sold within the city limits of the

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[26] OKLA. STAT. ANN. tit. 68, § 207 (West 2001).

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

[28] OKLA. STAT. ANN. tit. 68, § 1352(7) (West 2001):

> "Gross receipts" or "gross proceeds" means the total amount of consideration for the sale of any tangible personal property or service taxable under the Oklahoma Sales Tax Code, whether the consideration is in money or otherwise. "Gross receipts" or "gross proceeds" shall include, but not limited to:
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> a. cash paid,
> b. any amount for which payment is charged, deferred, or otherwise to be made in the future, regardless of the time or manner or payment,
> c. any amount for which credit or a discount is allowed by the vendor,
> d. any amount of deposit paid for transfer of possession, and
> e. any value of a trade-in or other property accepted by the vendor as consideration, except for used or trade-in parts excluding tires or batteries for a motor vehicle, bus, motor-cycle, truck-tractor, trailer, semitrailer or implement of husbandry, as defined in Sections 1-105, 1-125, 1-134, 1-135, 1-162, 1-180 and 1-183 of Title 47 of the Oklahoma Statutes, if the used or trade-in parts are taken in trade as exchange on the sale of new or rebuilt parts.
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> There shall not be any deduction from the gross receipts or gross proceeds on account of cost of the property sold, labor service performed, interest paid, or losses, or of any expenses whatsoever, whether or not the tangible personal property sold was produced, constructed, fabricated, processed, or otherwise assembled for or at the request of the consumer as part of the sale.

[29] OKLA. STAT. ANN. tit. 68, § 1354(A)(1) (West 2001).

[30] OKLA. STAT. ANN. tit. 68, § 1370 et seq. (West 2001) and OKLA. STAT. ANN. tit. 68, § 2701 (West 2001).

City of BIG CITY and COUNTY, respectively. There is also no dispute among the parties that the combined State (4.5%), City of BIG CITY (3%), and COUNTY (0.417%) sales tax equals 7.917%, or as rounded up by the Protestants, (3.96% plus 3.96%) 7.92%.[31]

3. The phrase "tangible personal property" is defined by the Sales Tax Code to mean "personal property which may be seen, weighed, measured, felt, or touched or which is in any other manner perceptible to the senses."[32] The phrase "tangible personal property" is all inclusive and is not limited except by specific exemption.[33]

4. The terms "*consumer*" or "user" is defined by the Sales Tax Code, in pertinent part, to mean "a person to whom a taxable sale of tangible personal property is made or to whom a taxable service is furnished. . . ."[34] (Emphasis added.)

5. "If any business purchases tangible personal property for resale, manufacturing or further processing and that business withdraws tangible personal property, either from its inventory or after such inventory has been manufactured or processed for its own use or consumption, that business has made a taxable sale and the value of the property withdrawn is taxable at its "sales value", as defined in OAC 710:65-1-2. The business withdrawing tangible personal property from inventory should include the "sales value" of such property in gross receipts or gross proceeds on its sales tax report for the month the property was withdrawn."[35]

6. The Tax Commission has promulgated rules as provided by law to facilitate the administration, enforcement, and collection of excise taxes pursuant to the Sales Tax Code.[36] 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.[37]

7. "A furniture repairer or upholsterer primarily renders services and is considered the *consumer* of items like fabric, glue, tacks, nails, paints, varnishes, etc. Sales to him of such items are taxable. Sales of machinery, tools, etc., to furniture repairers and upholsterers for use in their business are taxable."[38] (Emphasis added.) The Company is the *consumer* of items like fabric, glue, tacks, nails, paints, varnishes, etc. and the purchases are taxable. The sales of machinery, tools, etc., to the Company are also taxable. The audit revealed that the Company has been

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[31] *See* Note 12.

[32] OKLA. STAT. ANN. tit. 68, § 1352(17) (West 2001). *See* OKLA. ADMIN. CODE 710:65-1-2.

[33] *Magnolia Petroleum Company v. Oklahoma Tax Commission*, 1958 OK 124, 326 P.2d 821.

[34] OKLA. STAT. ANN. tit. 68, § 1352(3) (West 2001).

[35] OKLA. STAT. ANN. tit. 68, § 1362(C) (West 2001) and OKLA. ADMIN. CODE § 710:65-1-7(2).

[36] OKLA. STAT. ANN. tit. 68, § 420 (West 2001).

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

[38] OKLA. ADMIN. CODE § 710:65-19-340.

making these purchases as "sales for resale,"[39] without paying the required sales tax imposed by the Tax Code and the Rules of the Tax Commission.

8. The term "corporation" means an organization, other than a partnership, created or organized under the laws of Oklahoma.[40]

9. When the Tax Commission files a proposed assessment against a corporation for unpaid sales taxes, the Tax Commission shall file such proposed assessments against the principal officers of the corporation personally liable for the tax. The principal officers of any corporation shall be liable for the payment of sales tax if such officers were officers of the corporation during the period of time for which the assessment was 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 pursuant to the Internal Revenue Code of 1986, as amended, or regulations promulgated pursuant to such section.[41]

10. In this matter it is not disputed that the President and the Secretary were principal officers of the Company during the Audit Period and responsible for the payment of sales tax during the Audit Period.[42]

11. Oklahoma Statutes provide for the collection of interest and penalty on delinquent tax.[43] "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. . . ."[44]

12. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[45]

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[39] OKLA. STAT. ANN. tit. 68, § 1352(16) (West 2001).

[40] OKLA. STAT. ANN. tit. 68, 202(g)(1) (West 2001). *See also* OKLA. STAT. ANN. tit. 18, § 1001 et seq. (West 2001) for the provisions of the "Oklahoma General Corporation Act."

[41] OKLA. STAT. ANN. tit. 68, § 253 (West 2001).

[42] *See* Division's Memorandum filed August 2, 2005, with attachments, including, but not exclusive of the Taxpayer's Power of Attorney signed by the President of the Company on June 3, 2003, Corporate Officer Service Agent Authorization signed by the Secretary on June 3, 2003, Taxpayer's List of Principal Officer during the Audit Period signed by the President of the Company on June 3, 2003, and Division's Exhibit D. *See also* Division's Exhibit E.

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

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

[45] OKLA. ADMIN. CODE § 710:1-5-47, which states:

> 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.

13. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.[46]

14. In this matter the Protestants have failed to meet their burden of proof that the Division's proposed sales tax assessments against the Protestants, as reflected in the Division's "Notice of Third Revision," are incorrect and in what respects.

CONCLUSIONS BY ISSUE

Exhibit A, Page 1, Issue 1

Prior to issuing the "Notice of Second Revision," the Division reviewed the invoices submitted by the Protestants. The Protestants were provided a list of the invoices included in the revision and a listing of invoices that were not allowed.[47] The Protestants presented no additional documentation on which the Division could allow additional credit so no adjustment was made.[48] The Protestants have not met their burden of proof. There is no evidence in the record that an adjustment of $2,959.30 to the proposed sales tax assessments should be made on this issue.

Exhibit A, Page 2, Issue 3

The Protestants are seeking credit for invoices #5483, #5522, and #5493, which are dated outside the Audit Period. The Protestants state that the invoice date is not the date used for sales tax purposes. The invoice date is simply the date the item was received by the Company for the work desired by the customer and the date used for sales tax purposes is the date the sales transaction was actually closed with the customer. The Protestants have not met their burden of proof that these three (3) invoices are not outside the Audit Period. There is no evidence in the record that an adjustment of $3,718.00 to the proposed sales tax assessments should be made on this issue.

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.

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

[47] The Protestants state in their Reply filed July 5, 2006, that the Division did not provide a list of invoices, but a list of invoices is attached to the Division's "Second Notice of Revision" filed with this office on March 24, 2006. A list of invoices is also attached to the Protestants' Response to "Notice of Second Revision" filed with this office on May 5, 2006.

[48] *See* Note 17. *See also* the Protestants' Response to "Notice of Second Revision" and the Division's "Notice of Third Revision."

Exhibit A, Page 3, Issue 6

The Protestants assert that invoice number #6707 is a continuation of invoice #6613, which was exempt as a sale for resale to "The EXEMPT COMPANY." There are copies of the handwritten invoice #6707 and the "QuickBooks" invoice #6707 attached to the Protestants' "Response to Third Revision." Both copies clearly reflect that the customer is "NON-EXEMPT CO.," not "The EXEMPT COMPANY." There is an annotation on the "QuickBooks" copy "ref. to Inv. #6613," which is the invoice to "The EXEMPT COMPANY," but there is no evidence as to when the annotation was added, nor is there an annotation on the handwritten copy that indicates "The EXEMPT COMPANY " is the customer and not "NON-EXEMPT CO.." The Protestants have failed to meet their burden of proof that invoice #6707 is a continuation of invoice #6613, and exempt as a sale for resale. There is no evidence in the record that an adjustment of $2,864.00 should be made to the proposed sales tax assessments on this issue.

Exhibit A, Page 4 [3], Issue 9

The Protestants are seeking a "labor only" credit for invoices #5394, #5551, and #5407, which are also outside the Audit Period. The Protestants have not met their burden of proof that these invoices are not outside the Audit Period. There is no evidence in the record that an adjustment of $971.00 should be made to the proposed sales tax assessments on this issue.

Exhibit A, Page 4, Issue 10

The Protestants assert that more than fifty percent (50%) of the Protestants revenue comes from labor charges. The Protestants admit that the remaining invoices do not separate materials and labor, and argue that "Imputed Labor" should be applied to the invoices in the amount of $165,666.16, because the Protestants had "no intent or desire to not collect sales taxes" and "[t]hey are simply guilty of sloppy invoicing."[49]

The Protestants also assert that the proposed sales tax assessments are contrary to Tax Commission Rule because the labor portions of the sales are included. The Protestants cite the following Tax Commission Rule,[50] which states:

> **Upholsterers and furniture repairers**.
>
> (a) A furniture repairer or upholsterer primarily renders services and is considered the consumer of items like fabric, glue, tacks, nails, paints, varnishes, etc. Sales to him of such items are taxable.
>
> (b) Sales of machinery, tools, etc., to furniture repairers and upholsterers for use in their business are taxable.

The Company did not conduct its business in conformity with the cited rule for upholsterers and furniture repairers. The Company purchased all fabric, consumables, and shop equipment exempt from sales tax utilizing its sales tax permit.

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[49] *See* Protestants' Reply filed July 5, 2006.

[50] OKLA. ADMIN. CODE § 710:65-19-340. *See* OKLA. ADMIN. CODE § 710:65-19-115 and § 710:65-19-310.

In applying for and utilizing Sales Tax Permit #XXX, the Company held itself as a "vendor"[51] making sales of tangible personal property or services in this state, the gross receipts or gross proceeds[52] from which are taxed by the Sales Tax Code. "There shall not be any deduction from the gross receipts or gross proceeds on account of . . . labor service performed . . . whether or not the tangible personal property sold was produced, constructed, fabricated, processed, or otherwise assembled for or at the request of the consumer as part of the sale."[53]

The Company invoiced its customers a lump sum amount, which included tangible personal property (fabric, foam, and other consumables) and labor, but the Company did not charge its customers the applicable sales tax rate of 7.917% on the gross receipts or gross proceeds of such sales, including labor. Exemptions are strictly construed against granting exemptions.[54] In order to be entitled to an exemption, the entity claiming the exemption has the burden of proof to show an exemption from the tax laws.[55] There are no implied exemptions from taxation, and a relinquishment of such right by the state will not be presumed, unless a deliberate purpose to relinquish it appears.[56]

The Protestants assert that 55.94% of its revenue is for exempt labor ("imputed labor") and exempt from sales tax. The Division has given the Protestants credit for labor on all invoices for which documentation could be provided. The Protestants are seeking a credit for "imputed

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[51] OKLA. STAT. ANN. tit. 68, § 1352(21) (West 2001):

"Vendor" means:

a. 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,
b. any person maintaining a place of business in this state and making sales of tangible personal property or services, whether at the place of business or elsewhere, to persons within this state, the gross receipts or gross proceeds from which are taxed by the Oklahoma Sales Tax Code,
c. any person who solicits business by employees, independent contractors, agents, or other representatives or by distribution of catalogs or other advertising matter, and thereby makes sales to persons within this state of tangible personal property or services, the gross receipts or gross proceeds from which are taxed by the Oklahoma Sales Tax Code, or
d. any person, pursuant to an agreement with the person with an ownership interest in or title to tangible personal property, who has been entrusted with the possession of any such property and has the power to designate who is to obtain title, to physically transfer possession of, or otherwise make sales of the property.

[52] *See* Note 27.

[53] *See* Note 27.

[54] *Magnolia Petroleum Company v. Oklahoma Tax Commission*, 1958 OK 124, 326 P.2d 821.

[55] *Oklahoma Tax Commission v. City Vending of Muskogee, Inc.*, 1992 OK 110,835 P.2d 97.

[56] *State ex rel. Nesbitt v. Ford*, 1967 OK 186, 434 P.2d 934.

labor." The Protestants have not met their burden of proof that "imputed labor" is exempt under the Sales Tax Code or Tax Commission Rules. There is no evidence in the record that an adjustment of $165,666.16 should be made to the proposed sales tax assessments on this issue.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case that the protests of the Company, the President, as an officer and as an individual, and the Secretary, as an officer and as an individual, should be denied.

It is further ORDERED that the total amounts assessed for unpaid sales taxes, as reflected by the Division's "Notice of Third Revision," be fixed as the Protestants' deficiency and that those amounts should be determined to be due and owing, including penalties and interest, accrued and accruing.[57]

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.

[57] The Response to the Division's "Notice of Third Revision" filed by the Protestants on June 7, 2006, contains a "Request for Waiver of Penalty and Interest," if the Protestants were determined to be subject to the proposed assessments of sales tax. This office does not have the authority to waive penalty and interest. The authority to waive penalty and interest rests exclusively with the Commissioners or their designees. *See* OKLA. STAT. ANN. tit. 68, § 220 (West Supp. 2006).