JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2007-06-05-03 (NON-PRECEDENTIAL)
ID: P-06-003-H
DATE: JUNE 5, 2007
DISPOSITION: DENIED
TAX TYPE: SALES
APPEAL: NONE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPANY, LLC ("LLC") and MEMBER, Inc., as the Sole Member ("Sole Member") appears by and through REPRESENTATIVES, FIRM. The Field Audit Section of the Audit Division ("Division"), Oklahoma Tax Commission, appears by and through OTC ATTORNEY, First Deputy General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On January 9, 2006, 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 January 18, 2006, 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-06-003-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 January 31, 2006, the Notice of Prehearing Conference was mailed to the last known address of the Protestants, setting the prehearing conference for February 27, 2006, at 1:30 p.m.[3]

The prehearing conference was held as scheduled on February 27, 2006, at 1:30 p.m. All parties were represented at the prehearing conference. Pursuant to the prehearing conference, the parties were directed to file a status report on or before March 29, 2006. The Procedural History from the prehearing conference to August 23, 2006, is being omitted herein.

On August 24, 2006, a Joint Motion and Proposed Briefing Schedule was filed by the parties. On August 25, 2006, an Order Granting Joint Motion was issued bifurcating the following issues:

1. Whether LLC is located within the city limits of the City of ANY TOWN; and

2. Whether an Oklahoma Vendor with a Sale for Resale Tax Permit is responsible for remitting sales tax to the State of Oklahoma on the inventory and equipment used when the

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

[2] OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47 (June 11, 2005).

[3] OKLA. STAT. ANN. tit. 68, § 208 (West 2001).

taxpayer withdraws inventory purchased tax exempt in order to provide an out of state service or "turnkey project"?

Issue One is held in abeyance and Issue Two is being submitted on stipulations and briefs.[4] On September 14, 2006, the Joint Stipulation of Facts and Issue to be Resolved were filed by the parties. On September 15, 2006, the Protestants' Brief in Chief was filed. The Position Letter of the Audit Division was filed on October 13, 2006. The Protestants Reply to the Audit Division Position Letter was filed on October 30, 2006. On October 30, 2006, the record in this matter was closed and submitted for decision.

On November 1, 2006, a letter was mailed to the parties advising that a teleconference had been set by the undersigned for November 8, 2006, at 10:30 a.m., pursuant to OKLA. ADMIN. CODE § 710:1-5-38 (June 25, 1999), to clarify the position of the parties on the stipulations, and in particular, the members(s)/manager(s) of the LLC, the parties assessed, and the timeliness of the Statute of Limitations Waiver Agreement.

On November 1, 2006, the teleconference was held as scheduled. On November 15, 2006, the parties filed a Response to Questions Raised.

STIPULATION OF FACTS

On September 14, 2006, the parties entered into to the following Joint Stipulation of Facts and Issue,[5] as follows, to-wit:

1. A field audit was conducted for COMPANY, LLC for franchise tax, gross production tax, income tax, sales tax and use tax. The audit was divided into Income Tax Withholding, Sales Tax, and Use Tax to be conducted by AUDITOR; and Gross Production and Franchise Tax to be performed by another auditor.

2. By fax dated August 13, 2004, COMPANY, LLC was notified of the documents that would be needed to perform the audit. Exhibit "A".

3. By fax stamped September 14, 2004, VICE-PRESIDENT, VP of Finance for COMPANY, LLC returned a Taxpayer's Power of Attorney Form identifying PERSON 1 and PERSON 2 as Attorneys in Fact. Exhibit "B".

4. By fax dated September 22, 2004, VICE-PRESIDENT, VP of Finance for COMPANY, LLC returned signed copies of the Statute of Limitations Waiver Agreement, and Audit Methodology Agreement identifying the Audit Period as September 1, 2001 through August 31, 2004 and audit methodology as an error rate projection methodology with the sample

[4] OKLA. ADMIN. CODE § 710:1-5-38 (June 25, 1999).

[5] The text of the stipulated facts is set out *in haec verba*. *"**in haec verba**"* (in heek **v<<schwa>>r**-b<<schwa>>). [Latin] In these same words; verbatim. BLACK'S LAW DICTIONARY (8th ed. 2004), available at http://westlaw.com (October 18, 2006).

periods selected to be September 2001, October 2001, May 2002, and February 2004. Exhibit "C" and Exhibit "D".

5. The audit was performed in October 2004 at the Oklahoma City office of COMPANY, LLC with preliminary audit workpapers dated October 25, 2004 signed by COMPANY, LLC CONTROLLER on October 26, 2004. Exhibit "E".

6. An assessment was issued February 4, 2005, based upon workpapers dated December 3, 2004 to COMPANY, LLC AFA MEMBER, INC. Member and as an Individual with the following figures:

Sales Tax Due	$237,970.10
Interest through 3/3/05	$ 57,497.65
Tax and Interest Due	$295,467.75
30 day delinquent Penalty	$ 23,797.34
	$319,265.09

Exhibit "F, Pg. 13" and Exhibit "F, Pgs. 17-190".

7. By letter dated April 1, 2005 Taxpayer protested the proposed assessment. Exhibit "F, Pgs. 1-11".

8. A revised assessment was issued September 30, 2005 based on revised workpapers dated August 31, 2005 with the following revised figures:

Sales Tax Due	$161,033.50
Interest through 3/3/05	$ 55,875.61
Penalty	$ 16,103.50
	$233,012.61

Exhibit "G, Pg. 12" and Exhibit "G, Pgs. 28-49".

9. By letter dated October 26, 2005 taxpayer filed a written protest to the revised assessment. Exhibit "G, Pgs. 28-49".

10. On June 7, 2006, the Division adjusted the figures to the assessment issued Sept. 30, 2005 to include a job that was inadvertently deleted from the September 30, 2005 assessment resulting in the following figures:

Sales Tax Due	$170,573.52
Interest through 3/3/05	$ 79,027.41
Tax and Interest Due	$249,600.93
30 day delinquent Penalty	$ 17,057.49
	$266,658.42

Exhibit "H".

11. Protestant is an Oklahoma vendor who holds a valid Sale for Resale Tax Permit issued by the State of Oklahoma.

12. Protestant purchases inventory tax exempt and holds this property for resale in the State of Oklahoma.

13. Protestant will, at the request of customers, enter into contracts to perform "turnkey projects" where the Protestant agrees to provide a service for a certain bid price.

14. When Protestant performs these "turnkey projects" Protestant is withdrawing, from its inventory, in Oklahoma, the materials and equipment to fulfill the contracted for service.

15. The Protestant is protesting the taxability of the "Turnkey Projects" by the State of Oklahoma, when the "turnkey project" was performed in Texas.

ADDITIONAL FINDINGS OF FACT

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

16. LLC submitted a Business Registration Application to change from a corporation to an LLC on or about April 26, 2000. MEMBER, INC. is the Sole Member of LLC.[6]

17. The pending protest of the proposed sales tax assessment in this matter was filed on behalf of the LLC and Sole Member.[7]

18. Joint Stipulation of Facts, paragraph four (4) is correct as recited. The records of the Tax Commission reflect that the September 2001 sales tax return was filed on or before October 15, 2001. On or about September 22, 2004, prior to the expiration of the time prescribed by statute,[8] the parties executed the Statute of Limitations Waiver Agreement.[9]

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[6] *See* Response to Questions Raised filed November 15, 2006.

[7] *See* Note 6. *See also* Exhibit 6.

[8] OKLA. STAT. ANN. tit. 68, § 223 (West 2001):

> A. No assessment of any tax levied under the provisions of any state tax law except as provided in this section, shall be made after the expiration of three (3) years from the date the return was required to be filed or the date the return was filed, whichever period expires the later, and no proceedings by tax warrant or in court without the previous assessment for the collection of such tax shall be begun after the expiration of such period. No assessment shall be required if a report or return, signed by the taxpayer, was filed and the liability evidenced by the report or return has not been paid. If the assessment has been made within the limitation period set forth in this subsection, the tax may be collected by tax warrant or court proceeding, but only if the tax warrant is issued or the proceeding begun within ten (10) years after the assessment of the tax has become final.

19. LLC's business is the sale of drilling materials and the providing of engineering services to customers at customer well sites. The services consist of an engineer's determination of the well type and drilling materials or mud[10] to be used at the customer's well.

20. LLC typically bills separately for services and for materials, collecting the applicable state and local tax based on the delivery point of the materials.[11]

21. LLC does not typically solicit "turnkey," i.e. "lump sum" billing of engineering services and drilling materials, but when a customer requests turnkey billing the LLC accommodates the customer.[12]

22. With turnkey billing the LLC bills the customer one price for the engineering services and the materials used.[13]

23. LLC's books and records reflect the separate charges for materials and services. The LLC's books and records were used by the Division for purposes of the field audit.[14]

24. The materials used in the turnkey projects in this matter were "withdrawn" from what is referred to by the parties as the "ANY TOWN Warehouse."[15]

> B. Where before the expiration of the time prescribed in subsection A of this section for the assessment of the tax, both the Tax Commission and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon, and the period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. In those instances where the time to file a claim for a refund has not expired at the date the extension agreement is entered into, the entering into such an agreement shall automatically extend the period in which a refund may be allowed or a claim for a refund may be filed to the final date of such agreement.
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> …

[9] *See* Note 5. See also Joint Stipulation, ¶ 4 and Exhibit C. The time to assess for the Audit Period was extended to February 4, 2005.

[10] The drilling muds are used to stimulate well production and after being pumped into the well are pumped out and must be disposed. The LLC states that it is not responsible for hauling off the drilling mud after its use. The LLC's customer is responsible and either hires a third party to haul off the mud or the customer leaves it in the reserve pit until it dries up and they cover it over. *See* Protestants' Brief in Chief.

[11] *See* Protestants' Brief in Chief.

[12] Exhibit G.

[13] Exhibit G.

[14] Exhibit G.

[15] The resolution of issue one will determine whether the warehouse is actually located within the city limits of ANY TOWN. The ANY TOWN Warehouse is the only business location of the LLC mentioned in the record.

25. The LLC and Sole Member concede that, "For turnkey projects performed in Oklahoma, there is a taxable sale, unless otherwise exempt, of mud to the Oklahoma customer."[16]

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[17]

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Sales Tax Code").[18] The Sales Tax Code levies "upon all sales,[19] not otherwise exempted . . . an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds[20] of each sale of . . . tangible personal property[21]. . . ."[22] Oklahoma Statutes authorize incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.[23]

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[16] *See* Protestants' Brief in Chief, Page 5.

[17] OKLA. STAT. ANN. tit. 68, § 227 (West 2001).

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

[19] OKLA. STAT. ANN. tit. 68, § 1352(15)(b) (West 2001) and (as amended) OKLA. STAT. ANN tit. 68, § 1352(21)(b) (West Supp. 2006):

> "Sale" means the transfer of either title or possession of tangible personal property for a valuable consideration regardless of the manner, method, instrumentality, or device by which the transfer is accomplished in this state, or other transactions as provided by this paragraph, including but not limited to:
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> …
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> b. the disposition for consumption or use in any business or by any person of all goods, wares, merchandise, or property which has been purchased for resale, manufacturing, or further processing,
>
> …

[20] OKLA. STAT. tit. 68, § 1352(7) (West 2001) and (as amended) OKLA. STAT. ANN. tit 68, § 1352(11) (West Supp. 2006).

[21] OKLA. STAT. tit. 68, § 1352(17) (West 2001) and (as amended) OKLA. STAT. ANN. tit. 68, § 1352(23) (West Supp. 2006):

> "Tangible personal property" means personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses. . . .

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

[23] OKLA. STAT. ANN. tit. 68, § 1370 et seq. (West Supp. 2006) and OKLA. STAT. ANN. tit. 68, § 2701 (West Supp. 2006).

3. 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.[24]

4. 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.[25]

5. For the purpose of proper administration of the provisions of the sales and use tax laws, it is presumed that all gross receipts are subject to tax until they are shown to be tax exempt. The burden of proving that a sale of tangible personal property or enumerated service is an exempt sale is upon the vendor.[26]

6. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[27] The Division's action is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.[28]

7. In sales tax matters, "[t]he burden of proving that a sale was not a taxable sale shall be upon the person who made the sale."[29]

8. Legislative intent controls statutory interpretation.[30] Intent is ascertained from the whole act in light of its general purpose and objective[31] considering relevant provisions together

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[24] OKLA. STAT. ANN. tit. 68, § 203 (West Supp. 2006) and OKLA. ADMIN. CODE § 710:65-1-1.

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

[26] OKLA. ADMIN. CODE § 710:65-1-4(a) (June 26, 1994).

[27] OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999):

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

OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999), 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.

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

[29] OKLA. STAT. tit. 68, § 1365(E) (West 2001).

See OKLA. ADMIN. CODE § 710:65-1-4(a) (June 26, 1994).

[30] *World Publishing v. Miller*, 2001 OK 49, ¶7, 32 P.3d 829.

[31] *Id.* at ¶7.

to give full force and effect to each.[32] The Court presumes that the Legislature expressed its intent and that it intended what it expressed.[33]

9. Statutes are interpreted to attain that purpose and end[34] championing the broad public policy purposes underlying them.[35] Only where the legislative intent cannot be ascertained from the statutory language, i.e. in cases of ambiguity or conflict, are rules of statutory construction employed.[36] However, where the statutory language is ambiguous or uncertain, a construction is applied to avoid absurdities.[37]

The Protestants assert that it "…has a tax free inventory of property as the majority of its business is the reselling of the drilling muds to customers. The origin of the muds is from Oklahoma vendors, transfers from Protestant's out[-of-]state warehouse location, and purchases from out[-of-]state vendors. Additionally, combining of muds occurs at the Oklahoma warehouse to achieve specific mud blends."[38]

In support of its position, the Protestants' cite Section 1402 of Title 68, (West 2001), which states:

> There is hereby levied and there shall be paid by every person storing, using, or otherwise consuming within this state, tangible personal property purchased or brought into this state, an excise tax on the storage, use, or other consumption in this state of such property at the rate of four and one-half percent (4.5%) of the purchase price of such property. Said tax shall not be levied on tangible personal property intended solely for use in other states, but which is stored in Oklahoma pending shipment to such other states or which is temporarily retained in Oklahoma for the purpose of fabrication, repair, testing, alteration, maintenance, or other service. The tax in such instances shall be paid at the time of importation or storage of the property within the state and a subsequent credit shall be taken by the taxpayer for the amount so paid upon removal of the property from the state. Such tax is hereby levied and shall be paid in an amount equal to four and one-half percent (4.5%) of the purchase price of such tangible personal property.

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[32] *Id.* at ¶7.

[33] *Id.* at ¶7.

[34] *Id.* at ¶7.

[35] *Id.* at ¶7.

[36] *Id.* at ¶7.

[37] *Id.* at ¶7.

[38] *See* Protestants' Brief in Chief, Page 6.

The Protestants' reliance on this provision is misplaced. Section 1402 applies to "tangible personal property intended solely for use in other states, but which is stored in Oklahoma pending shipment to such other states or which is temporarily retained in Oklahoma for the purpose of fabrication, repair, testing, alteration, maintenance, or other service." According to the record, the LLC is an Oklahoma vendor who holds a valid Sale for Resale Tax Permit issued by the State of Oklahoma and the LLC purchases inventory tax exempt and holds this property for resale in the State of Oklahoma at its "ANY TOWN Warehouse."[39]

The LLC is regularly engaged in the business of reselling materials purchased. A sale for resale exemption is provided by statute which relieves the LLC of paying tax on such purchase of materials.[40] The LLC typically bills separately for services and materials,[41] collecting the applicable state and local tax based on the delivery point of the materials.[42]

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[39] *See* Stipulations ¶, 11 and ¶, 12.

[40] OKLA. STAT. tit. 68, § 1352(16) (West 2001) and renumbered as OKLA. STAT. tit. 68, § 1352(22) (West 2004):

> "Sale for resell" means:
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> a. a sale of tangible personal property to any purchaser who is purchasing tangible personal property for the purpose of reselling it within the geographical limits of the United States of America or its territories or possessions, in the normal course of business either in the form or condition in which it is purchased or as an attachment to or integral part of other tangible personal property,
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> …

See OKLA. STAT. tit. 68, § 1357(3) (West 2001):

> There are hereby specifically exempted from the tax levied by Section 1350 et seq. of this title:
>
> …
>
> 3. Sales for resale to persons engaged in the business of reselling the articles purchased, whether within or without the state, ...

[41] Exhibit G. *See* OKLA. ADMIN. CODE § 710:65-19-158:

> Installation, alteration and special service charges
>
> (a) Where the vendor engages in the business of selling tangible personal property and such tangible personal property is installed or altered for the purchaser by the vendor (or some other special service is performed for the purchaser by the seller with respect to such property), the gross receipts of the vendor on account of his charges for such installation, alteration or other special service must be included in the receipts by which his sales liability is measured, if such installation, alteration or other special service charges are included in the selling price of the tangible personal property which is sold. This is true where the charge for the property which is sold and the charge for installation, alteration or other special services is billed by the vendor to his customers are included in a single billed price.
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> (b) On the other hand, where the seller and the buyer agree upon the installation, alteration or other special service charges separately from the selling price of the tangible personal

The Division's position is that the LLC withdraws and uses an item from its inventory rather than resell it. Such a transaction constitutes a withdrawal from inventory,[43] and the LLC is deemed the consumer. Once an item is withdrawn from inventory, the protection of the resale exemption is lost.

> property which is sold, then the receipts from the installation, alteration or other special service charge are not a part of the **"selling price"** of the tangible personal property which is sold, but instead such charge is a service charge, separately contracted and billed and need not be included in the figure upon which the seller computes his sales tax liability.

[42] OKLA. STAT. ANN. tit. 68, § 1352(13)(d) (West 2001):

> "Point of sale" means, for purposes of administration of any municipal or county sales tax levied in this state, the physical location at which a sale of tangible personal property or services taxable under the Oklahoma Sales Tax Code is made in the course of the vendor's business, to be determined by one of the following:
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> …
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> d. if the sale is made through solicitation at a place other than the place of business of the vendor, either by an employee, representative, or any other agent of the vendor, and the consumer has a right to accept or reject delivery, the point of sale shall be the place of delivery, ...

See Matter of Sales Tax Protest of LTV Energy Products Co., 1994 OK CIV APP 140, ¶2, 883 P.2d 1287: "The evidence clearly leads to the conclusion that point of sale in this case must be the 'place of delivery,' i.e., the location where the parts were delivered to the customer."

The "point of sale" provision was deleted by 2004 Okla. Sess. Laws c. 5, § 64, emerg. eff. March 1, 2004. *See* OKLA. STAT. ANN. tit. 68, § 1354.27 (West Supp. 2006) for the "Sourcing of retail sale or lease or rental" of tangible personal property, which became effective March 1, 2004.

[43] *See* OKLA. STAT. tit. 68, § 1362(C) (West 2001):

> Except as otherwise provided by subsection C of Section 1361 of this title, each person required pursuant to the provisions of the Oklahoma Sales Tax Code to make a sales tax report shall include in the gross proceeds derived from sales to consumers or users, the sales value of all tangible personal property which has been purchased for resale, manufacturing, or further processing, and withdrawn from stock in trade for use or consumption during the taxable period covered by such report, and shall pay the tax on the sales value of this tangible personal property withdrawn from stock in trade for consumption or use; . . . .

See also OKLA. ADMIN. CODE § 710:65-1-7(2) (June 25, 2001):

> 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 report for the month the property was withdrawn.

The Protestants' response is that the LLC did not withdraw inventory for its own use or consumption and that the Division is attempting to treat the LLC as if it was a "contractor,"[44] citing OTC Order No. 92-06-18-048, 1992 WL 547641 (June 18, 1992).

There is no support in the record that the Division is attempting to treat the LLC as if it is a "contractor." The Division is relying on the LLC's own characterization of the "turnkey projects." The LLC and Sole Member stipulated that the LLC "is withdrawing, from its inventory, in Oklahoma, the materials and equipment to fulfill the contracted for service."[45]

When the LLC withdraws the materials from its inventory to fulfill the "contracted for services," the materials lose the protection of the resale exemption and are reportable by the LLC as "gross receipts." The "point of sale" for purposes of "withdrawals from inventory" in this matter is the LLC's "ANY TOWN Warehouse."

10. The LLC and Sole Member have failed to meet their burden of proof that the proposed assessments of sales tax are incorrect and in what respects.

11. Sales taxes are trust fund taxes.[46] Personal liability for the sales taxes imposed by the Code ensues to "[e]very person required to collect [the] tax" and all the "members [of a limited liability company] under a duty to collect and remit taxes for the limited liability company" or "[i]f no managers or members have been specified to be under the duty of withholding and remitting taxes, … all managers and members."[47] In this matter LLC is a single member limited liability company. Sole Member is responsible for the collection and remittance of sales taxes.

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[44] OKLA. STAT. tit. 68, 1352(4) (West 2001):

> "Contractor" means any person who performs any improvement upon real property and who, as a necessary and incidental part of performing such improvement, incorporates tangible personal property belonging to or purchased by the person into the real property being improved;

[45] Stipulation 14.

[46] OKLA. STAT. tit. 68, § 1361(F) (West 2001).

[47] OKLA. STAT. tit. 68, § 1361(A) (West 2001). *See* OKLA. STAT. ANN. tit. 68, § 253 (West 2001):

> 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 the 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.

12. Oklahoma Statutes provide for the collection of interest and penalty on delinquent tax.[48] "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. . . ."[49]

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 LLC and Sole Member should be denied on Issue Two.

It is further ORDERED that the Division's proposed assessment of sales tax and penalty should be fixed as the Protestants' deficiency, including interest,[50] accrued and accruing, subject to the ultimate determination of Issue One (Whether the warehouse is located within the city limits of the City of ANY TOWN).

ADDENDUM TO FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

The *Findings, Conclusions and Recommendations* issued on December 22, 2006, in the above styled and numbered cause, comes on for consideration of the bifurcated issue "Whether LLC is located within the city limits of the City of ANY TOWN?"

Upon consideration of the *Findings, Conclusions and Recommendations* and the *Request for Determination on City of ANY TOWN Issue* filed by the Division on January 19, 2007, and the *Protestants' Response* filed on February 5, 2007, the undersigned finds that the following findings, conclusions, and recommendations should be added to and incorporated in the *Findings, Conclusions and Recommendations*:

FINDINGS OF FACT

1. On January 19, 2007, the Division filed a *Request for Determination on City of ANY TOWN Issue*, with copies of a letter opinion dated November 16, 2006, and Ordinance No. 1064, annexing the subject property, attached thereto.

> 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.

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

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

[50] The protest includes a Request for Abatement of Penalty and Interest, if the protests of the LLC and Sole Member were denied. This office does not have the authority to grant the Protestants' request. The authority to waive penalty and interest rests exclusively with the Commissioners or their designee, pursuant to OKLA. STAT. ANN. tit. 68, § 220 (West Supp. 2007). *See* Exhibit G.

2. On November 21, 2006, CITY ATTORNEY, attorney for the City of ANY TOWN, issued a letter opinion addressed to OTC ATTORNEY that the property owned by the LLC, commonly referred to as the "ANY TOWN Warehouse," is located within the city limits of ANY TOWN, Oklahoma, pursuant to Ordinance No. 1064, passed and adopted February 7, 1983.[1] The letter opinion also states in pertinent part:

> However, there is a defect in the legal description in the ordinance annexing the subject property. The metes and bounds description does not describe an enclosed parcel because…
>
> It is my opinion, based upon case law and Oklahoma statutes, that a defect in an ordinance annexing territory is not fatal to the ordinance and the effect of the ordinance is not changed. Therefore, I believe that the property owed [sic] by COMPANY, LLC at issue herein, is with [sic] the corporate city limits of the City of ANY TOWN. I expect to request the City Commission to consider curing the defect in the attached ordinance to clarify this issue.

3. The Protestants were provided notice of the Division's request.

4. The Protestants filed a response to the request, which challenges CITY ATTORNEY'S conclusion and cites case law[2] and portions of the "Oklahoma Municipal Code"[3] to support the Protestants' position that the ordinance is defective and that the "ANY TOWN Warehouse" is not within the physical boundaries described in ANY TOWN City Ordinance No. 1064.

5. On February 20, 2007, the undersigned Administrative Law Judge mailed a letter to the parties, which states as follows, to-wit:

> In reviewing the record on Issue One ("Whether LLC is located within the city limits of the City of ANY TOWN?"), a matter has come to my attention that the parties must address in more detail.
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> On Exhibit H ("Addendum to Field Audit Write-up"),[4] AUDITOR, the Division's Auditor, states:

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[1] The copy of Ordinance No. 1064 reflects the ordinance was published in the ANY TOWN Daily Press on February 10, 1983, Page 46 of Minute Book No. 20. The ordinance also reflects that it was signed by MAYOR, Mayor, and Attested by CLERK, City Clerk.

[2] *City of Maud v. Tulsa Rig, Reel & Mfg. Co.*, 1933 OK 508, 25 P.2d 792. *See Metzger v. Town of Luther*, 1995 OK CIV APP 132, 914 P.2d 674.

[3] OKLA. STAT. ANN. tit. 11, § 1-101 et seq. (West 2001).

[4] A copy of Exhibit H was enclosed therein.

> ANY TOWN warehouse is within the city limits of ANY TOWN according to our web site locator.

It would appear that the Division utilized the address database available to vendors through the Tax Commission's website[5] to determine the correct ZIP +4 Code area (and corresponding tax rates) for individual addresses."[6]

The record in this matter is to be supplemented with the following information, to-wit:

1. REPRESENTATIVE is to provide the physical address of the "ANY TOWN Warehouse," including ZIP+4 Code, to OTC ATTORNEY with a copy of the letter to be filed in this office on or before March 2, 2007.

2. The Division is to file a memorandum, including copies of the screen print-outs from the address database, as more fully described above, which confirms that the "ANY TOWN Warehouse" is within the city limits of ANY TOWN, as stated on Exhibit H, on or before March 12, 2007.

Issue One will be resubmitted for decision upon receipt of the requested information from the parties.

6. On March 2, 2007, the *Protestants' Response to Request for Information* was filed, which states in pertinent part:

> The physical address for the ANY TOWN Warehouse is PHYSICAL ADDRESS. According to the City of ANY TOWN Post Office, there is no "+4" designation for the warehouse address. Moreover, the United States Post Office's website database does not include a physical address for properties located in the 100 and 200 blocks of FAKE Street.[7]

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[5] *See* http://www.oktax.state.ok.us/.

[6] *See* http://www.oktax.onenet.net/retven.htm (Last visited February 16, 2007).

[7] The Administrative Law Judge is taking judicial notice of the Tax Commission website and USPS website to complete the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999).

The Protestants are correct. The USPS website database does not include physical addresses for properties located in the 100 and 200 blocks of FAKE Street. However, the USPS website database does include physical addresses for properties located in the 300 and 400 blocks of FAKE Street. Both 302 and 402 are contained in the USPS database as "Non-Deliverable," but reflect ZIP+4 Codes of 99999-1111 and 99999-2222 respectively. Examples of Non-Deliverable addresses include buildings that no longer exist, addresses that do not accept mail, etc. First Class Mail sent to a Non-Deliverable address will be returned to the sender. *See* http://www.usps.com/ (Last visited March 26, 2007).

7. On March 12, 2007, the *Response of the Audit Division* was filed, which states that the Division is submitting the following as directed by letter dated February 20, 2007:

> 1. Exhibit "A"—Excerpt from Field Audit Write Up states at page 4, "SMALL TOWN and ANY TOWN warehouses are in the city limits of their respective cities."
>
> 2. Exhibit "B"—Addendum to Field Audit Write Up prepared June 5, 2006 prepared after prehearing conference where the issue of whether the ANY TOWN warehouse is within the city limits of ANY TOWN.
>
> 3. Exhibit "C"—Map of ANY TOWN City limits printed from http://geo.ou.edu/oeb/municipal/ANYTOWN.pdf.
>
> 4. Exhibit "D"—Memorandum of auditor dated March 5, 2007 explaining activities of the auditor to determine whether ANY TOWN warehouse was in the city limits of ANY TOWN.[8]
>
> Division agrees that the United States Postal Service has not assigned a +4 to the ANY TOWN warehouse for the reason that COMPANY receives it mail at a post office box and not at the street address.[9]

8. The Streamline Municipal Map contains the recorded boundaries for the City of ANY TOWN, which reflects that the ANY TOWN Warehouse is within the ANY TOWN City limits and subject to municipal sales tax.[10]

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[8] Exhibit D lists AUDITOR'S efforts to determine if the ANY TOWN Warehouse is within the city limits of ANY TOWN, OK:

> 1. Went to OTC website and pulled up a map of ANY TOWN. The address they are using was clearly within the city limits of ANY TOWN.
>
> 2. I took map and address to my Administrator, ADMINISTRATOR, who was raised in NEARBY TOWN, OK (15 miles NW of ANY TOWN) and has a brother who lives in ANY TOWN and she confirmed that the address was definitely in the City Limits.
>
> 3. I called the post office in ANY TOWN and they confirmed that the address was within the city limits.
>
> 4. I called the police department and they confirmed that the address was within the city limits.
>
> 5. Went to OTC Ad Valorem division and had them check the address. They also confirmed that the address was within the city limits of ANY TOWN.

[9] The overview on the Tax Commission website states, "The Oklahoma Tax Commission has developed this tax rate data system to help you determine the correct sales or use tax to charge on delivery sales. *This data system assigns city and county tax rates to all of the ZIP+4 Code areas in the state.* It will allow you find the correct ZIP+4 Code area (and corresponding tax rates) for individual addresses." (Emphasis added.) Available at http://www.oktax.onenet/pod/retven.htm (Last visited March 26, 2007).

9. The proposed sales tax assessments, as adjusted September 30, 2005, already include municipal sales tax for the City of ANY TOWN. No additional revisions to the proposed sales tax assessments are necessary.

CONCLUSIONS OF LAW

1. Footnote Seventeen (17) of the *Findings, Conclusions and Recommendations* should be corrected to read OKLA. STAT. ANN. tit. 68, § 221 (West 2001).

2. When any territory is annexed to or detached from a municipality, whether by ordinance or court order, the mayor shall file and record a duly certified copy of the ordinance or court order, together with an accurate map or plat of the territory, in the office of the county clerk of the county in which the territory, or the greater portion of it, is located and with the Ad Valorem Division of the Oklahoma Tax Commission. The record in the office of the county clerk shall be conclusive evidence of such annexation or detachment.[11]

3. The intended effect of the requirement that annexation ordinances be recorded is to immunize annexation ordinances from attacks based upon procedural defects by making the recording in the county clerk's office conclusive evidence of the regularity of the proceedings.[12]

4. Where ordinances passed by a municipality acting within its authority have been in existence for many years, during which time their validity has not been questioned, they will be presumed to have been properly enacted until the contrary is proven.[13]

5. Section 1354.32 of Title 68,[14] adopted in conjunction with the Streamlined Sales and Use Tax Administration Act ("Streamline"),[15] in pertinent part, provides that the Tax Commission shall[16]:

> 1. Provide and maintain a database that describes boundary changes for all taxing jurisdictions within this state for sales and use tax purposes. This

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[10] *See* Division's Exhibit C, attached to the Response filed March 12, 2007.

[11] OKLA. STAT. ANN. tit. 11, § 21-112 (West 2001). *See* the Protestants' Response filed February 5, 2007.

[12] *Public Service Company of Oklahoma v. Northeastern Oklahoma Electric Cooperative, Inc.*, 2002 OK 29, 49 P.3d 80.

[13] *Peerless Realty & Operating Co. v. City of Tulsa*, 1939 OK 78, 87 P.2d 118.

[14] OKLA. STAT. ANN. tit. 68, § 1354.32 (West Supp. 2007). This statute has an effective date of November 1, 2003. Paragraph six (6) was added to the statute, with an effective date of November 1, 2004.

[15] OKLA. STAT. ANN. tit. 68, §§ 1354.14 through 1354.23 (West 2001).

[16] Generally, when the legislature uses the term "shall", it signifies a mandatory directive or command. *See Keating v. Edmondson*, 2001 OK 110, 37 P.3d 882.

> database shall include a description of the change and the effective date of the change for sales and use tax purposes;
> 2. Provide and maintain a database of all sales and use tax rates for all of the jurisdictions levying taxes within the state. For the identification of the state, counties, and cities, codes corresponding to the rates must be provided according to Federal Information Processing Standards (FIPS) as developed by the National Institute of Standards and Technology;
> 3. Provide and maintain a database that assigns each five-digit and nine-digit zip code within the state to the proper tax rates and jurisdictions. The lowest combined tax rate imposed in the zip code area shall apply if the area includes more than one tax rate in any level of taxing jurisdictions. The collections from an area that includes more than one jurisdiction in a level shall be allocated between the jurisdictions according to the pro rata population of each jurisdiction in the area. If a nine-digit zip code designation is not available for a street address or if a seller is unable to determine the nine-digit zip code designation of a purchaser after exercising due diligence to determine the designation, the seller may apply the rate for the five-digit zip code area. For the purposes of this section, there is a rebuttable presumption that a seller has exercised due diligence if the seller has attempted to determine the nine-digit zip code designation by utilizing software approved by the Tax Commission that makes this designation from the street address and the five-digit zip code of the purchaser;
>
> …

6. In sales tax matters, "[t]he burden of proving that a sale was not a taxable sale shall be upon the person who made the sale."[17]

7. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[18] A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.[19]

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[17] OKLA. STAT. ANN. tit. 68, § 1365(F) (West Supp. 2006):

> It shall be the duty of every tax remitter required to make a sales tax report and pay any tax under Section 1350 et seq. of this title to keep and preserve suitable records of the gross daily sales together with invoices of purchases and sales, bills of lading, bills of sale and other pertinent records and documents which may be necessary to determine the amount of tax due hereunder and such other records of goods, wares and merchandise, and other subjects of taxation under Section 1350 et seq. of this title as will substantiate and prove the accuracy of such returns. It shall also be the duty of every person who makes sales for resale to keep records of such sales which shall be subject to examination by the Tax Commission or any authorized employee thereof while engaged in checking or auditing the records of any person required to make a report under the terms of Section 1350 et seq. of this title. All such records shall remain in Oklahoma and be preserved for a period of three (3) years, unless the Tax Commission, in writing, has authorized their destruction or disposal at an earlier date, and shall be open to examination at any time by the Tax Commission or by any of its duly authorized agents. The burden of proving that a sale was not a taxable sale shall be upon the person who made the sale.

[18] OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999), which states:

The Protestants' position is that Ordinance No. 1064 is defective pursuant to Sections 21-103(B)(1) and 21-112 of Title 11[20] because Ordinance No. 1064 does not include the ANY TOWN Warehouse in its legal description, according the letter from CITY ATTORNEY. The letter from CITY ATTORNEY acknowledges that there is an error in the legal description contained in Ordinance No. 1064. Specifically, CITY ATTORNEY states that "[t]he metes and bounds description does not describe an enclosed parcel.", but still concludes, "It is my opinion, based on case law and Oklahoma statutes, that a defect in an ordinance annexing territory is not fatal to the ordinance and the effect of the ordinance is not changed. Therefore, I believe that the property owed [sic] by COMPANY at issue herein, is with [sic] the corporate city limits of the City of ANY TOWN. I expect to request the City Commission to consider curing the defect in the attached ordinance to clarify this issue."

The Protestants' cite *City of Maud v. Tulsa Rig, Reel & Mfg. Co.*, 1933 OK 508, 25 P.2d 792, and *Metzger v. Town of Luther*, 1995 OK CIV APP 132, for the proposition that "Annexation of territory to city pursuant to ordinance showing want of jurisdiction on its face may be collaterally attacked in any proceeding whereby town attempts to impose tax burden on owners of property in annexed territory." However, the case law cited by the Protestants' concern cases where the statutory authority used to annex the properties were incorrect, not where there was an error in the legal description of the property to be annexed.

> 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) (June 25, 1999), 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.

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

[20] OKLA. STAT. ANN. tit. 11, § 21-103(B)(1) (West 2001):

> The governing body shall provide the notice and public hearing required in subsection A of this section in the following manner:
>
> The governing body of the municipality shall direct that notice of the proposed annexation of the territory be published in a legally qualified newspaper of general circulation in the territory and shall describe the boundaries of the territory proposed to be annexed by reference to a map, geographical locations, legal or physical description or other reasonable designation. The notice shall state the date, time, and place the governing body shall conduct a public hearing on the question of annexing the territory. The notice shall be published in a legal newspaper of general circulation in the territory sought to be annexed within fourteen (14) days following the date the governing body directed the notice to be published;

The issue before the Supreme Court of Oklahoma in *Public Service Company of Oklahoma*[21] was whether Section 21-112 of Title 11, providing for the recording of an annexation ordinance, cured the Town of Chelsea's failure to publish the ordinance pursuant to Section 14-106 of Title 11. The Supreme Court of Oklahoma concluded that Courts will not deem the Legislature to have done a vain or useless act and the Legislature's enactment of Section 21-112 cured the Town of Chelsea's failure to publish under Section 14-106. The Court also concluded, "[g]enerally, the corporate limits of a municipality cannot be collaterally attacked except by the state acting through its attorney general," but "[a] challenging party has standing to challenge an annexation ordinance if it has a personal stake in the outcome and a personal or economic injury."

In this matter, the Protestants' do not challenge the City of ANY TOWN'S authority to pass the ordinance annexing the property or allege any procedural defect required by statute. In the response filed February 5, 2007, the Protestants' state, "The ordinance was passed by city government, noticed to landowners, and filed with the clerk." Ordinance No. 1064 was passed and adopted February 7, 1983. The City of ANY TOWN acting within its authority passed Ordinance No. 1064, which has been in existence for approximately twenty-four (24) years and during which time, according to record, its validity has not been questioned.

In the Protestants' Response filed March 2, 2007, the Protestants' state that the "physical address of the ANY TOWN Warehouse is PHYSICAL ADDRESS" and there is no Zip+4 on the ANY TOWN Warehouse. This is easily confirmed by searching the United States Postal Service's ("USPS") website at http://www.usps.com/ using the physical address of the ANY TOWN Warehouse. The Protestants' are also correct when they state that the USPS database does not include physical addresses for properties located in the 100 and 200 blocks of FAKE Street. The Protestants' state, "Even in light of this information, Protestants contend that the information contained in the Tax Commission's database is not determinative. CITY ATTORNEY, attorney for the City of ANY TOWN, admits that the legal description attached to the annexation ordinance does not include Protestants' land." The text of CITY ATTORNEY'S letter does not support the Protestants' reading of the letter, and the lack of a ZIP+4 Code for the address is not determinative of whether the ANY TOWN Warehouse is within the city limits of ANY TOWN, OK.

The Division takes a more pragmatic approach to its analysis of the issue. The Division agrees that, the USPS has not assigned a Zip+4 Code to the ANY TOWN Warehouse because the LLC receives its mail at a post office box, not at the physical address of the ANY TOWN Warehouse.

Under Streamline, the Zip+4 Codes are not the only methods available to determine the correct sales tax rate for the ANY TOWN Warehouse. Municipal maps are also available to review the recorded boundaries for municipalities in the State of Oklahoma. It is the municipal map the Division used to determine that the ANY TOWN Warehouse is within the City of ANY

[21] *Id.*

TOWN.[22] From the recorded boundaries represented by the municipal map, the ANY TOWN Warehouse is clearly within the City of ANY TOWN and subject to municipal sales tax.

The Protestants have not presented any evidence to show that Ordinance No. 1064 has been invalidated by a court of competent jurisdiction.[23] Therefore, *unless and until* the Protestants show by decision of a court of competent jurisdiction, that Ordinance No. 1064 is invalid, the proposed assessments of municipal sales tax on the sales at the "ANY TOWN Warehouse" are deemed correct.

DISPOSITION

It is the ORDER of the undersigned OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the protests of the LLC and the Sole Member should be denied on Issue One.

It is further ORDERED that the Division's proposed assessment of State, City, and County sales tax and penalty should be fixed as the Protestants' deficiency, including interest, accrued and accruing.

THEREFORE, the *Findings, Conclusions and Recommendations* issued on December 22, 2006, are amended to include and incorporate the above and foregoing findings of fact, conclusions of law, and recommendations.

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.

[22] *See* Division's Exhibit D to its Response filed March 12, 2007. AUDITOR lists in detail his efforts to verify that the ANY TOWN Warehouse was within the City of ANY TOWN.

[23] In this matter, the appropriate venue should be the District Court of ANY COUNTY County.