

JURISDICTION: OKLAHOMA TAX COMMISSION DECISION
CITE: 2008-09-18-03 / NON-PRECEDENTIAL
ID: P-07-040-H
DATE: SEPTEMBER 18, 2008
DISPOSITION: SUSTAINED IN PART / DENIED IN PART
TAX TYPE: SALES
APPEAL: NO APPEAL TAKEN

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPANY and PRESIDENT, as President and as an individual (“Protestants”), appear by and through ACCOUNTANT, CPA. The Field Audit Section of the Compliance Division f/k/a the Audit Division (“Division”), Oklahoma Tax Commission, appears by and through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

AMENDED PROCEDURAL HISTORY

On March 14, 2007, the protest file was received by this office for further proceedings consistent with the Uniform Tax Procedure Code¹ and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.² On March 19, 2007, 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-07-040-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 March 28, 2007, the Notice of Prehearing Conference (“PHC”) was mailed to the last known address of the Protestants, setting the PHC for April 23, 2007, at 2:00 p.m.³ On April 2, 2007, the Division filed a Motion for Continuance. The Protestants’ representative requested to meet with the Division prior to the PHC. On April 3, 2007, an Order Granting Motion for Continuance was issued resetting the PHC for May 7, 2007, at 1:30 p.m.

On May 7, 2007, at 1:30 p.m. the PHC was held as scheduled. On May 10, 2007, the parties were advised by letter to submit a status report on or before June 6, 2007. On June 5, 2007, the Protestants filed the Status Report advising that it was still compiling information for the Division.⁴ On June 8, 2007, the parties were advised to file an additional status report on or

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.

⁴ In the letter, ACCOUNTANT advises:

Part of the assessment was from the Tax Commission taking the gross sales per income tax returns, comparing to sales tax reports filed and charging tax on the difference. We are attempting to reconcile the General Ledger sales account for the audit period to the invoices reported on the sales tax returns.

before July 9, 2007. On July 6, 2007, the Protestants filed the Status Report advising that information was being provided to the Division.⁵ On July 10, 2007, the parties were advised by letter to submit an additional status report on or before August 9, 2007.

On August 9, 2007, the Division filed the Status Report advising that work sheets had not been received from the Protestants. ACCOUNTANT was out of town, and the Division requested that ACCOUNTANT be given the opportunity to submit a status report. On August 10, 2007, the Protestants filed the Status Report.⁶ On August 20, 2007, the Protestants filed a letter with a spreadsheet attached thereto. The parties were directed by letter to submit an additional status report on or before October 19, 2007. On October 19, 2007, the Division filed the Status Report advising that the Protestants had not provided documentation to support any revision and requesting that this matter be set for hearing. On October 22, 2007, the parties were advised by letter that this matter had been set for hearing on December 19, 2007, at 9:30 a.m.

On December 7, 2007, the Brief of the Compliance Division was filed, with Exhibits A through K attached thereto. On December 12, 2007, the Protestants' Position Letter was filed of record.

On December 19, 2007, at approximately 9:35 a.m. a closed hearing⁷ was held as scheduled. The Protestants did not call any witnesses. The Protestants announced at hearing they would stand on their Position Letter and Protest Letter, with the attachments thereto.⁸

The Division called two (2) witnesses, AUDITOR, Field Auditor, Field Audit Section of the Compliance Division f/k/a the Audit Division, Oklahoma Tax Commission, who testified about the Division's audit procedures and as custodian of the Division's records. The Division called PRESIDENT as its second witness, who testified about the Protestants' business practices and procedures. At the request of the undersigned, SUPERVISOR, Auditor Supervisor, Field

⁵ In this letter, ACCOUNTANT further advises:

You may recall from our previous status report that we were reconciling gross sales per income tax returns to the monthly sales tax reports. This is taking considerable more time than we expected. However, we expect to have the comparison worksheets completed sometime next week. Then, we have to investigate all discrepancies (if any) between the listing per books and the listing per sales tax reports. Then, the worksheets can be sent to the Oklahoma Tax Commission auditors to review.

⁶ ACCOUNTANT advises:

You may recall from our previous status reports that we were reconciling gross sales per income tax returns to monthly sales tax reports. This has been completed. We are now investigating the discrepancies (if any) between the listing per books and the listing per sales tax reports. ...

⁷ The Protestants invoked their right to a confidential hearing as provided by OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2008).

⁸ Protestants' Protest Letter dated November 22, 2006, is Division's "Amended" Exhibit J.

Audit Section of the Compliance Division f/k/a the Audit Division, was called as a witness to testify about the Division's audit methodology in this matter. Division's Exhibits A through I, "Amended" J, K, and M, and Division's Exhibits One (1) through Twelve (12) were identified, offered, and admitted into evidence.

Upon conclusion of the hearing, the record was held open for the limited purpose of the Division filing additional documentation in support of the revised assessment dated November 26, 2007. On December 20, 2007, the parties were advised by letter that the record was being held open, as stated, for the Division to provide on or before December 31, 2007, the following:

- The Basis For Months To Project (Reported Sales For Audit Period).
1. Sales Tax Error Rate Calculation Spreadsheet.
 2. Projection for Audit Period.

The parties were provided a copy of Division's "Amended" Exhibit J, according to the Court's evidentiary ruling during the hearing.⁹ The parties were advised that upon receipt [and review] of the documentation from the Division, the parties would be notified in writing the date the record in this matter was closed and the case submitted for decision.¹⁰

On December 21, 2007, the Division filed a Memorandum, with information attached thereto. The parties were advised by letter that the record in this matter was closed and this case was submitted for decision on December 31, 2007.

On February 13, 2008, Findings, Conclusions and Recommendations were issued by the undersigned sustaining the protest in part and denying the protest in part.

On February 29, 2008, the Compliance Division's *Motion for Reconsideration* was filed. The Protestants filed a *Response* on March 11, 2008. On March 21, 2008, the Protestants' filed an additional *Response*, and the Division filed an *Objection to Protestants' March 21, 2008 Letter*. On March 27, 2008, the Division's *Motion for Reconsideration and Objection to Protestants' March 21, 2008 Letter* was granted and the Findings, Conclusions and Recommendations issued on February 17, 2008, were ordered withdrawn.

AMENDED FINDINGS OF FACT

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

⁹ Division's "Amended" Exhibit J, consists of a complete copy of the letter of protest dated November 22, 2006, with the attachments thereto. The Division's Original Exhibit J was incomplete.

¹⁰ OKLA. ADMIN. CODE § 710:1-5-39 (June 25, 1999).

1. On January 10, 1995, the Tax Commission received a Business Registration from COMPANY. The principal taxable product(s) or service(s) listed were “Gift Baskets/Decorations.” PRESIDENT was listed as President of COMPANY.¹¹

2. COMPANY is a full service event planning company, offering expertise in creating, organizing, and producing every component of each event.¹²

3. COMPANY is on the “cash basis method” of accounting and files its sales tax reports accordingly.

4. COMPANY bills its customer using an invoice only. COMPANY’S fee is never reflected on the customer invoice. The COMPANY’S work sheet for the event is not included with the customer invoice or provided to the customer.¹³

5. On June 8, 2006, the Division met with PRESIDENT on the proposed audit of Sales Tax, Use Tax, Franchise Tax, and Withholding Tax for the period July 1, 2003, through May 31, 2006 (“Audit Period”).¹⁴ PRESIDENT was given the Division’s Records Request,¹⁵ Taxpayer’s List of Principal Officers,¹⁶ Partners or Members (LLC), Statute of Limitation Waiver Agreement,¹⁷ and Audit Methodology Agreement.¹⁸

6. The Protestants provided records of sales and purchase invoices, correspondence with customers and suppliers, copies of some but not all customers’ exemption certificates, copies of customers’ checks, and handwritten monthly sheets with sales of events reported for the month.¹⁹

7. The Sample Periods selected to conduct the error rate projection audit were December 2003, May 2004, October 2004, March 2005, July 2005, and January 2006.²⁰

¹¹ Division’s Exhibit A-1 through A-4. The form was signed by PRESIDENT and AUDITOR.

¹² Testimony of PRESIDENT. See COMPANY website, <http://www.WEBSITE.com> (Last visited December 31, 2007). The Administrative Law Judge is taking judicial notice of the COMPANY’S website to complete the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999).

¹³ Testimony of PRESIDENT.

¹⁴ Testimony of AUDITOR. The field audit resulted in proposed assessments of sales tax only.

¹⁵ Division’s Exhibit B.

¹⁶ Division’s Exhibit C. On July 17, 2006, PRESIDENT signed the form, listing herself as the President of COMPANY during the Audit Period.

¹⁷ Division’s Exhibit M.

¹⁸ Division’s Exhibit D. The agreement was signed by PRESIDENT and AUDITOR.

¹⁹ Testimony of AUDITOR. See Division’s brief filed December 7, 2007, Statement of Facts #2.

²⁰ Division’s Exhibit D.

8. The Division's First ("1st") Work Papers reflect findings that can be classified into two (2) distinct categories:

- (A) Gross Sales reported on COMPANY'S Federal Income Tax Returns for the 2004 and 2005 tax years that are not reported on filed sales tax reports.²¹

Period	Gross Sales Federal Return	Reported Sales	Under-Reported Sales
2004	\$1,037,985.00	\$849,615.00	\$188,370.00
2005	\$1,196,507.00	\$921,714.00	\$274,793.00
			\$463,163.00

- (B) The projected results for the Audit Period after a review of invoices for the Sample Periods.

Sample Months	Year	Reported Sales
December	2003	\$339,077.00
May	2004	17,920.00
October	2004	119,630.00
March	2005	35,757.00
July	2005	28,356.00
January	2006	310,013.00
		\$850,753.00

Invoice Date	Month Reported	Audit Sample
07/21/03	December 2003	\$34,722.39
12/01/03	December 2003	4,017.91
12/15/03	December 2003	8,845.00
04/16/04	May 2004	33.07
10/05/04	October 2004	15,650.16
10/15/04	October 2004	2,577.43
10/15/04	October 2004	480.48
	March 2005	0.00
05/06/05	July 2005	868.06
12/06/05	January 2006	120.00
12/13/05	January 2006	334.93
12/13/05	January 2006	3,189.97
12/25/05	January 2006	464.24
	Sample Errors	\$71,303.64
	\$ 71,303.64	(Sample Errors)
Divided By	\$850,753.00	(Sample Months)
Equals	0.083812387	(Error Rate)

Audit Period Projection

²¹ Division's Exhibit F.

Using Error Rate \$168,776.10²²

Total Under-Reported Sales on 1st Work Papers:

2004/2005 Federal Returns	\$463,163.00
Sample Errors	71,303.64
Projection	168,776.10
<u>Total Under-Reported Sales</u>	<u>\$703,242.74</u>

9. The 1st Work Papers did not include the imposition of CITY sales tax on the \$463,163.00 of Under-Reported Sales (“U-R Sales”) from the Protestants’ Federal Returns for the 2004 and 2005 tax years.²³

10. On November 3, 2006, the Division issued proposed sales tax assessments²⁴ against the Protestants for the Audit Period, as follows, to-wit:

Tax Due:	\$35,513.87
Interest @ 15% Through 11/30/06:	8,271.57
Tax & Interest Due Within 30 Days:	\$43,785.44
30 Day Delinquent Penalty @ 10%:	3,551.40
Tax, Interest & Penalty Due After 30 Days:	\$47,336.84

11. On November 29, 2006, the Division received a timely letter of protest, with attachments thereto. The basis of the protest is stated in pertinent part, as follows, to-wit:

Most of the assessment amounts are for labor, especially the fees charged by COMPANY for coordinating the event. Your auditor appears to not have understood the nature of the business which is a requirement of all types of audits.

COMPANY is contracted by companies and organizations to set up and oversee events such as parties, celebrations, etc. The Company charges a fee for these services plus costs incurred. Sales taxes are charged to the clients on these costs incurred if they are items subject to sales taxes, i.e., rentals of tables, chairs, props, decorations, etc. The Company’s fees, and labor incurred, are not subject to sales taxes.

During the audit, it was discovered that the XYZ FOUNDATION was not tax exempt, so the Protestants voluntarily paid sales tax (\$7,610.44) on four (4) XYZ FOUNDATION events,

²² See Division’s Memorandum filed December 21, 2007. This figure does not include the amount for Sample Errors (\$71,303.64).

²³ Testimony of AUDITOR. See Exhibit G.

²⁴ Division’s Exhibit H and Exhibit I.

which the Protestants had treated as exempt for sales tax purposes. The Protestants also request a refund for overpayment of sales tax (\$693.45).²⁵

12. On November 26, 2007, the Division revised the proposed sales tax assessments and issued the Second (“2nd”) Work Papers²⁶ for the Audit Period, as follows, to-wit:

Tax:	\$30,886.96
Interest @ 15% through 12/31/07:	13,802.78
Penalty	<u>3,088.70</u>
	\$47,778.44

13. The 2nd Work Papers removed the U-R Sales from the Protestants’ Federal Returns for the 2004 and 2005 tax years (\$463,163.00).²⁷ The Division conducted a “Detail Audit” using COMPANY’S General Ledger for the entire Audit Period, resulting in line item U-R Sales (\$151,457.90), which are not on the 1st Work Papers²⁸ and \$583.00 for January 2005.²⁹ The 2nd Work Papers also charge CITY sales tax on the total amount of U-R Sales, which were calculated as follows, to-wit:

Sample Errors:	\$ 71,303.64
Projection Using Error Rate:	168,776.10
Detail Audit:	<u>151,457.90</u>
Total U-R Sales	\$391,537.64 ³⁰

14. The XYZ FOUNDATION event reflected on the 1st and 2nd Work Papers as Item ID 117 is an “annual” event.³¹ The event is described on the COMPANY’S invoice dated July 21, 2003, for the event held on July 18, 2003, and reported December 2003,³² as follows, to-wit:

²⁵ Division’s “Amended” Exhibit J.

²⁶ Division’s Exhibit K.

²⁷ See Note 26.

²⁸ Testimony of AUDITOR. See Division’s Exhibit G, Exhibit K, and Division’s Memorandum filed December 21, 2007. The 2nd Work Papers also include a number of line item sales which the Protestants claimed were to exempt entities, but no proof of exemption was provided at hearing.

²⁹ Division’s Exhibit K. AUDITOR noted that the January 2005 sales tax report should have reported gross sales of \$117,075.00, but reported only \$116,492.00.

³⁰ See Note 28.

³¹ Testimony of AUDITOR. See Division’s Exhibit 8.

³² See Division’s Exhibits E, G, K, and “Amended” Exhibit J. See also Division’s Exhibit 8. The Division also picked up what appears to be the XYZ Fundraiser held June 2004, Invoice #4062 for \$30,727.04, but the Division determined the Protestant had U-R Sales of \$20,000.00.

EVENT: XYZ FOUNDATION EVENT

Agreed Contract Amount: Includes Guest Count of 700	Total
Event Coordination, Rentals, Lighting, Balloons, Catering, Beverages, Etc. . . .	\$34,722.40

15. During the Field Audit, the Protestants discovered that XYZ RELATED ENTITY was exempt from sales tax, but the XYZ FOUNDATION was not exempt from sales tax. The following events for the XYZ FOUNDATION were not charged sales tax and the Protestants voluntarily paid the sales tax due on these four (4) events with the protest:

08/27/02		\$17,594.00
07/18/03	117	34,957.00 ³³
09/06/03		7,600.00
06/07/04		30,727.04
Total		\$90,878.04
Sales Tax Due		\$ 7,610.44 ³⁴

AMENDED CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.³⁵

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code (“Sales Tax Code”).³⁶ The Sales Tax Code levies “upon all sales,³⁷ not otherwise exempted . . . an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds³⁸ of each sale of . . . tangible personal property. . . .”³⁹ Oklahoma Statutes authorize

³³ The invoice for this event reflects that the contract amount is \$34,722.40, but the Protestants reflect \$34,957.00 or \$234.60 more than the invoice. See Division’s “Amended” Exhibit J.

³⁴ See Division’s “Amended” Exhibit J. The sales tax due was calculated and voluntarily paid by the Protestants with the protest. The Protestants also request a waiver of penalty and interest on these four (4) transactions.

³⁵ OKLA. STAT. ANN. tit. 68, § 221(D) (West Supp. 2008).

³⁶ OKLA. STAT. ANN. tit. 68, § 1350 et seq. (West 2001).

³⁷ OKLA. STAT. tit. 68, § 1352(22)(a) (West Supp. 2003).

³⁸ OKLA. STAT. tit. 68, § 1352(11) (West Supp. 2003) in pertinent part, states as follows, to-wit:

- (a) “Gross receipts”, “gross proceeds or “sales price” means the total amount of consideration, including cash, credit, property and services, for which personal property or services are sold, leased or rented, valued in money, whether received in money or otherwise, without any deduction for the following:

incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.⁴⁰

3. Rules promulgated pursuant to the Administrative Procedures Act⁴¹ are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court.⁴² Rules are valid and binding on the persons they affect, have the force of law, and are prima facie evidence of the proper interpretation of the matter to which they refer.⁴³

4. The Tax Commission has promulgated rules as provided by law to facilitate the administration, enforcement, and collection of taxes under the Sales Tax Code.⁴⁴

5. For the purpose of proper administration of the provisions of the sales tax laws, it is presumed that all gross receipts are subject to tax until they are shown to be tax exempt.⁴⁵

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- (1) the seller's cost of the property sold,
 - (2) the cost of materials used, labor or service cost,
 - (3) interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller,
 - (4) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges,
 - (5) delivery charges and installation charges, unless separately stated on the invoice, billing or similar document given to the purchaser, and
 - (6) the value of exempt personal property given to the purchaser where taxable and exempt personal property have been bundled together and sold by the seller as a single product or piece of merchandise.
- (b) Such term shall not include:
- (1) discounts, including cash, term, or coupons that are not reimbursed by a third party that are allowed by a seller and taken by a purchaser on a sale,
 - (2) interest, financing, and carrying charges from credit extended on the sale of personal property or services, if the amount is separately stated on the invoice, bill of sale or similar document given to the purchaser, and
 - (3) any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale or similar document given to the purchaser,

³⁹ OKLA. STAT. tit. 68, § 1354(A)(1) (West Supp. 2003).

⁴⁰ OKLA. STAT. tit. 68, § 1370 (West Supp. 2003) and OKLA. STAT. tit. 68, § 2701 (West Supp. 2003).

⁴¹ OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2001).

⁴² OKLA. STAT. ANN. tit. 75, § 306(C) (West 2001).

⁴³ OKLA. STAT. ANN. tit. 75, § 308.2(C) (West 2001).

⁴⁴ OKLA. ADMIN. CODE § 710:65-1-1.

⁴⁵ OKLA. STAT. tit. 68, § 1365(F) (West Supp. 2006).

6. Vendors⁴⁶ shall keep records and books of all sales and all purchases of tangible personal property and must maintain complete books and records covering receipts from all sales and distinguishing taxable from nontaxable receipts.⁴⁷

7. At minimum, the following records constitute a minimum requirement for the purposes of the Sales Tax Code for vendors selling tangible personal property:

- (1) Sales journal or log of daily sales in addition to cash register tapes and other data which will provide a daily record of the gross amounts of sales.
- (2) A record of the amount of merchandise purchased. To fulfill this requirement, copies of all vendors' invoices and taxpayers' copies of purchase orders must be retained serially and in sequence as to date.
- (3) A true and complete inventory of the value of stock on hand taken at least once each year.⁴⁸

8. An auditor for the Tax Commission may suggest a sample sales/use tax audit rather than a detailed audit. The auditor shall select the periods to sample and apply the results to all the periods of the audit. The auditor shall prepare forms to be signed by the taxpayer stating they agree with the periods and method chosen for the sample.⁴⁹ The Audit Methodology Agreements are binding on the Tax Commission and the Protestants.⁵⁰

9. The term "caterer" means a person engaged in the business of preparing or serving meals, food, and drinks, without regard to whether the service is at the caterer's place of business, the customer's location, or some other location, usually for a specified price for a specific menu or offering, but not off a menu to the public. The term does not include wait persons hired directly by a caterer's customer, whether hired by the hour, by the day, or for the event.⁵¹

10. Sales tax must be collected, reported and remitted on all charges made by "caterers" for serving meals, food, and drinks, inclusive of charges for food, the use of dishes, silverware, glasses, chairs, tables, etc., used in connection with serving meals, and for the labor of serving the meals. Sales tax must be collected, reported and remitted on charges made by "caterers" for

⁴⁶ OKLA. STAT. tit. 68, § 1352(27) (West Supp. 2006).

⁴⁷ OKLA. STAT. tit. 68 1365(F) (West Supp. 2003).

⁴⁸ OKLA. ADMIN. CODE § 710:65-3-31(a) (June 26, 1994).

⁴⁹ OKLA. ADMIN. CODE § 710:65-5-2. *See* OKLA. STAT. ANN. tit. 68, § 206 (West 2001).

⁵⁰ *See* Note 49. *See also* Sampling for Sales and Use Tax Compliance, Federation of Tax Administrators, (December 2002), Appendix A-Summary of State Sampling Practices, *available at* <http://www.taxadmin.org/> (Last visited November 28, 2007) and Note 12.

⁵¹ OKLA. ADMIN. CODE § 710:65-19-40(a) (June 25, 1998). *See* 29 Okl. Op. Atty. Gen. 64, Okla. A.G. Opin. No. 99-13, 1999 WL 304378 (Okla.A.G.).

the rental of dishes, silverware, glasses, etc., even though no food is provided or served by the “caterers” in connection with such rental.⁵²

11. “Delivery charges” means charges by the seller of personal property or services for preparation and delivery to a location designated by the purchaser of personal property. In every case where a delivery charge represents the cost of transporting the item sold from the vendor to the consumer, and is separately-stated on the invoice or statement, such charges are not subject to sales tax.⁵³ Shipping, freight, or delivery charges paid by a seller in acquiring property for sales are considered costs of doing business to the seller and may not be deducted from the gross proceeds of the sale in computing tax liability, even though such costs may be passed on to his customers and regardless of whether they are separately-stated.⁵⁴

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

13. The principal officers of the corporation shall be liable for the payment of sales tax during the period of time for which the assessment is made. The liability of a principal officer for sales tax shall be determined in accordance with the standards for determining liability for payment of federal withholding tax.⁵⁵

14. PRESIDENT, as President of COMPANY, was a principal officer of COMPANY during the Audit Period. As a principal officer of COMPANY, PRESIDENT is a “responsible person” for the collection and remittance of sales tax during the Audit Period.⁵⁶

15. Oklahoma Statutes provide for the collection of interest and penalty on delinquent tax.⁵⁷ “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....”⁵⁸

16. 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.”⁵⁹

⁵² OKLA. ADMIN. CODE § 710:65-19-40(b) (June 25, 1998).

⁵³ OKLA. ADMIN. CODE § 710:65-19-70(a) and (b) (June 25, 2004). If delivery charges are included in the selling price of the tangible personal property sold, the charges are subject to sales tax. OKLA. ADMIN. CODE § 710:65-19-70(c) (June 25, 2004).

⁵⁴ OKLA. ADMIN. CODE § 710:65-19-70(d) (June 25, 2004). *See* Division’s Exhibit 10.

⁵⁵ OKLA. STAT. ANN. tit. 68, § 253 (West 2001).

⁵⁶ *See* Note 55.

⁵⁷ OKLA. STAT. tit. 68, § 217 (West Supp. 2003).

⁵⁸ *See* Note 57.

⁵⁹ OKLA. STAT. tit. 68, § 1365(F) (West Supp. 2006).

17. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.⁶⁰

18. An order of the Tax Commission must be supported by substantial evidence.⁶¹ Likewise, the audit upon which a portion of the record is formed and order issued, must be supported by substantial evidence.⁶² An audit is supported by substantial evidence when an evidentiary foundation for the audit has been established. In a majority of cases, the evidentiary foundation will be established by the records reviewed by the auditor. In those cases where an evidentiary foundation for the audit has been established, the taxpayer has the burden of proving in what respect the action of the Tax Commission in assessing the tax is incorrect. Where, however, an evidentiary foundation has not been laid or the records upon which the audit is based do not establish a basis for assessing a tax, the audit and assessment, in the initial instance, cannot be sustained as being supported by substantial evidence.⁶³

AMENDED DISCUSSION **PROTESTANTS' FIRST CONTENTION**

The Protestants' first ("1st") contention is that sufficient evidence has been presented to meet the burden of proof that COMPANY is not a "caterer" as defined by Tax Commission Rule 710:65-19-40.⁶⁴

COMPANY is an event planning business. COMPANY plans the theme for an event, coordinates the venue, any entertainment, decorations, and catering if required. COMPANY does not have a kitchen and is not engaged in the business of preparing or serving meals, food, or drinks.⁶⁵ When a "caterer" is required for an event, the "caterer" is separately charged and sales tax collected and paid.⁶⁶ COMPANY has met its burden of proof that it is not a "caterer," as defined by Tax Commission Rule 710:65-19-40, for purposes of imposing sales tax during the Audit Period.

⁶⁰ See *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

⁶¹ *Dugger v. State ex rel. Oklahoma Tax Com'n*, 1992 OK 105, 834 P.2d 964.

⁶² OTC Order No. 2003-07-22-09 (July 22, 2003), 2003 WL 2347117 (Okl. Tax Com.), available at <http://westlaw.com>. (August 10, 2006).

⁶³ See Note 62.

⁶⁴ See Note 51.

⁶⁵ Testimony of PRESIDENT.

⁶⁶ Testimony of PRESIDENT. See Division's Exhibit 4, 6, and 12.

PROTESTANTS' SECOND CONTENTION

The Protestants' second ("2nd") contention is that their clients are charged on "items subject to sales taxes, i.e., rentals of tables, chairs, props, decorations, etc." and, further, that the Division is improperly attempting to charge sales tax on the fees charged by COMPANY for coordinating an event, together with labor, and a small amount of delivery charges. To support their position, the Protestants point to several examples from the twelve (12) invoices used by the Division to determine the Sample Errors.

All twelve (12) invoices were reviewed in detail, but for purposes of these "Amended" Findings, Conclusions and Recommendations, two (2) invoices dated December 2003 and reported December 2003 (Sample Month) illustrate how COMPANY invoiced its clients during the Audit Period, as follows, to-wit:

FIRST INVOICE**(CUSTOMER 1 EVENT)**

<u>Item ID</u>	<u>Invoice Date</u>	<u>Client</u>	<u>Description</u>	<u>Total</u>
109 ⁶⁷	12/01/03	CUSTOMER 1	Event: Holiday Party Based on 100 Guests: CATERER (Food & Beverage & Rental) Dance Floor DJ Floral Arrangements Table Drape Enhancements Delivery, Set Up & Strike	\$11,997.89

According to face of the First ("1st") Invoice, sales tax is "NA" and the total due is \$11,997.89.

The Division examined the Protestants' records and made the following determinations for the CUSTOMER 1 Event:

Sales Total:	\$11,977.89 times 0.08375 (State 0.045 & CITY 0.03875) equals
Tax Expected:	\$ 1,003.15
Tax Charged:	\$ 666.65
Tax Balance Due:	\$ 336.50 (\$1,003.15 minus \$666.65)
Additional Taxable Sales:	\$ 4,017.91 (\$336.50 divided by 0.08375)

The Protestants assert that the Division's finding of U-R Sales for the CUSTOMER 1 Event is based upon an attempt to impose sales tax on "Non-Taxable" items, as follows, to-wit:

⁶⁷ Division's Exhibit 7.

\$(1,080.00) Tips for wait staff
 (592.95) Sales tax included in total per work sheet
 (159.96) Sales tax included in total per work sheet
 (450.00) Labor for DJ
 (1,604.98) COMPANY'S fee
(250.00) Room rental
 \$(4,137.89) minus \$4,017.91 equals an overpayment of sales tax \$(119.98).

Attached to the protest is a copy of a hand-written work sheet for the CUSTOMER 1 Event and a copy of an invoice from CATERER (the "caterer" for the event), which reflects \$502.50 in sales tax due. The parties could not agree on whether the hand-written work sheet was contemporaneous with the invoice to CUSTOMER 1 or whether the work sheet was produced post-audit to explain the invoice.

CUSTOMER 1 was invoiced a "lump-sum" for the event. The 1st Invoice does not separately state the charges for COMPANY'S Fee, Labor, or Delivery Charges.⁶⁸ From the 1st Invoice, there is no way to distinguish taxable items from non-taxable items for sales tax purposes. However, the Division did determine that COMPANY charged, collected, and remitted \$666.65 in sales tax for this event, even though the tax is not reflected on the 1st Invoice.

SECOND INVOICE

(CUSTOMER 2 EVENT)

Item ID	Invoice Date	Client	Description	Total
107 ⁶⁹	12/15/03	CUSTOMER 2	Event: Annual Employee Holiday Event	
			HOTEL:	
			851 Holiday Menu	\$33,146.45
			20% Svc Charge for Food	6,629.29
			8.375% Tax (Food)	3,331.22
			Wine on Tables	1,320.00
			1250 Drink Tickets	6,250.00
		[13.5% plus 8.375%]	21.88% Beverage Tax	1,656.32
			20% Service Charge	1,845.26
			8.375% Tax on Service Charge	154.54
			BAND	1,800.00
			Decorations, Tablecloths, Draped Buffets, Centerpieces, Etc.	22,000.00
			Labor	2,000.00
			Tax:	<u>1,101.73</u>
			TOTAL	\$81,234.81

The Second ("2nd") invoice for the CUSTOMER 2 Event goes into much greater detail and separately states the charges for the caterer (including tax, wine (taxable), service charge (taxable), the band (non-taxable), and labor (non-taxable). However, \$22,000.00 of the 2nd

⁶⁸ See Note 67.

⁶⁹ Division's Exhibit 6.

Invoice is listed under a catch all category “Decorations, Tablecloths, Draped Buffets, Centerpieces, Etc.” and reflects sales tax due of \$1,101.73.

The Division examined the Protestants’ records and made the following determination for the CUSTOMER 2 Event:

Sales Total:	\$24,000.00 times 0.08375	(State 0.045 & CITY 0.03875) equals
Tax Expected:	\$ 2,010.00	
Tax Charged:	\$ 1,101.73	
Tax Balance Due:	\$ 908.27	(\$2,010.00 minus \$1,101.73)
Additional Taxable Sales:	\$10,845.00	(\$908.27 divided by 0.08375)
<u>Verified Labor Charges:</u>	<u>\$ (2,000.00)</u>	
Additional Taxable Sales:	\$ 8,845.00	

The Protestants assert that the Division’s finding of U-R Sales for the CUSTOMER 2 EVENT is an attempt to impose sales tax on “Non-Taxable” items, as follows, to-wit:

\$ (7,500.00)	COMPANY’S Fee
(1,070.00)	Labor Paid to Staff
<u>(275.25)</u>	Lunch for Labor
\$ (8,845.25) or zero sales tax due. ⁷⁰	

This 2nd Invoice mirrors the 1st invoice by lumping together what appears to be taxable and non-taxable items, if they were separately stated on the invoice to COMPANY’S client (\$2,000.00 charge for labor is separately stated and was removed by the Division).⁷¹

From a review of the record, the invoices to COMPANY’S clients never reflects COMPANY’S Fee, sometimes separately state charges for Labor and Delivery Fees from sales taxable items such as rentals of tables, chairs, props, decorations, etc., but generally COMPANY’S invoices reflect a “lump-sum,” which includes COMPANY’S Fee, Labor, and Delivery Fees, together with sales taxable items.⁷²

If COMPANY’S Fee, Labor, and “Non-Taxable” Delivery Fees are not separately stated on the invoice provided to the customer, the entire amount becomes taxable.⁷³

⁷⁰ See Division’s “Amended” Exhibit J.

⁷¹ See Division’s Exhibit E and Exhibit 6.

⁷² PRESIDENT testified that COMPANY’S fee is never reflected on the invoice to clients. The fee is on the work sheet, which is not given to clients.

⁷³ The Protestants also state that during hearing a citation was made to OTC Order No. 2006-10-03-05 (October 3, 2005), for the proposition: “...the Division gave credit for labor on invoices for which documentation could be provided.” The Protestants further state: “We have provided to the Division, contemporaneous records showing the detail of goods and services for each invoice in question. The worksheets are prepared in order to determine what amounts are to be billed to the clients. Otherwise the invoices would not be able to be prepared.” The Protestants citation to this order is misplaced. In that case, the Division did give credit for invoices that were for “labor only,” but generally the Company in that case billed its customers using invoices reflecting a “lump-sum.” The Company made the argument that 55.94% of its revenue was for exempt labor (“imputed labor”) and exempt from sales tax. That argument failed in that case, just as it does in this case. The Protestants are in essence

PROTESTANTS' THIRD CONTENTION

The Protestants' third ("3rd") contention is that even if all the Division's "assumptions" are correct, the Division's use of the error rate methodology is fundamentally flawed because the Error Rate is skewed by including a single large invoice for an XYZ FOUNDATION event. The Protestants state: "In order to use an 'error rate methodology', the Division is obliged to use a reasonably accurate methodology and, by including this invoice in its calculation, it inherently overstates the supposed 'error' that [the] [Division] is claiming."⁷⁴

According to AUDITOR'S review of the Protestants' records, the XYZ FOUNDATION event is an annual event, and the 2nd Work Papers reflect what appears to be the annual XYZ FUNDRAISER held in June 2004.⁷⁵ PRESIDENT did not dispute AUDITOR'S testimony and the invoice itself states that it is the "Annual XYZ FUNDRAISER."

The Protestants' real argument for the removal of this event is an equitable one. In the *Response to the Motion to Reconsider*, the Protestants' state:

The XYZ FOUNDATION event was an error due to misrepresentation by the Foundation and not an error on the part of COMPANY. There were no other errors of this type uncovered during the Division's examination. Sales taxes were paid for all events COMPANY has put on for the Foundation, even those outside of the sample period. Therefore this invoice should not be included in the error projection.

The Protestants' equitable argument fails and the invoice for the XYZ FOUNDATION Event should remain in the Division's Sample Errors, which are used in the calculation of the Error Rate.⁷⁶

AUDIT METHODOLOGY

Prior to the field audit, the parties signed an "Audit Methodology Agreement" consenting to the use of an error rate projection method for determining the amount of sales tax, if any, for

requesting an exemption for "imputed fees and labor," which is not supported by the Sales Tax Code or Tax Commission Rules. For COMPANY'S Fee, Labor, and "Non-Taxable" Delivery Fees to be exempt from sales tax they must be separately stated on the COMPANY'S Invoice to its customers.

⁷⁴ See Protestants' Position Letter filed December 12, 2007, Summary of COMPANY'S Contentions, No. 2.

⁷⁵ See Division's Exhibit 8. See also Division's "Amended" Exhibit J and Division's Exhibit K, Page K-9, Line One (1), Invoice #4062.

⁷⁶ Note that the invoice for the XYZ FOUNDATION event is a "lump-sum." The invoice does not separately state COMPANY'S Fee, Labor, and Delivery Charges. The Protestants determined the sales tax due, just as the Division determined U-R Sales on each of the twelve (12) invoices comprising the Sample Errors. See Division's "Amended" Exhibit J.

the Audit Period. The Sample Months selected were December 2003, May 2004, October 2004, March 2005, July 2005, and January 2006.⁷⁷

In the 2nd Work Papers, the Division included \$151,457.90 in additional U-R Sales, from the detail audit of the Protestants' General Ledger for the entire Audit Period. The detail audit resulted in U-R Sales, which were not on the Division's 1st Work Papers or used to calculate the Sample Errors. According to testimony, this amount also does not include any "non-recurring" high dollar transactions, which should appear separately as line items. Since COMPANY is on the "cash basis method" of accounting it cannot be determined whether any of the invoices from the detail audit are from Sample Months because only the date of invoice is reflected on the 2nd Work Papers.

The Division's 2nd Work Papers utilizes two (2) different audit methodologies, which violates the parties' agreement to use the "error rate projection method" for the entire Audit Period.⁷⁸

However, the record contains sufficient information for the Division to produce Third ("3rd") Work Papers, which should include invoices from Sample Months "only," to determine the correct Sample Errors and the calculation of the correct Error Rate, which can be used to project the U-R Sales for the entire Audit Period, as agreed by the parties.

The Division's recalculation of the Error Rate is not tantamount to a new proceeding, but an amended proceeding, so that the statutory period for assessment is tolled.⁷⁹

In the *Bancorporation* case, the Court of Civil Appeals of Oklahoma, Division No. 1, found as follows, to-wit:

Second proposed assessment for income tax issued by the Oklahoma Tax Commission (OTC) against taxpayer was a new proceeding, rather than an amended proceeding, such that the statutory period for assessment had run; second assessment did not involve the "same income" as the first assessment, and OTC changed its focus from out-of-state dividend income to proper amount of taxation on state income, which was a substantive change in assessment, not an amendment, and thus, OTC was time barred by the three year limitations period from attempting to propose the second assessment.⁸⁰

The Division's 2nd Work Papers contain the invoices that will be used for the recalculation. The Protestants have had since November 2007 to review the 2nd Work Papers and

⁷⁷ Division's Exhibit D.

⁷⁸ SUPERVISOR testified that the detail audit was necessary to account for U-R Sales from the Protestants' 2004 and 2005 Federal returns.

⁷⁹ *In re Income Tax Protest of F & M Bancorporation and Subsidiaries*, 2005 OK CIV APP 6, 105 P.3d 837.

⁸⁰ *Id.*

provide the Division with additional information for each of the invoices. The Protestants also had the opportunity to present evidence at the oral hearing held on December 19, 2007. The recalculation will use the same invoices on the 2nd Work Papers (but not necessarily all, if they are not from a Sample Month) and the focus remains the same, tolling the three (3) year statute of limitations contained in Section 223 of Section 68.⁸¹

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the protest to the proposed sales tax assessments against COMPANY and PRESIDENT, as President and as an individual, should be sustained in part and denied in part.

It is further ORDERED that the 2nd Work Papers should be adjusted in accordance with the findings of fact and conclusions of law herein⁸² and that the revised sales tax and penalty, inclusive of interest accrued and accruing, should be fixed as the amounts due and owing.⁸³

It is further the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case that the sales tax refund claim (\$693.45) of COMPANY and PRESIDENT, as President and as an individual, should be denied.

FIRST ADDENDUM TO AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Amended Findings, Conclusions and Recommendations issued on March 27, 2008, in the above styled and numbered cause, comes on for consideration of the recommendations as to the amount of the deficiency which should be confirmed by an order of the Tax Commission.

On April 10, 2008, the Division, as directed by the *Amended Findings, Conclusions and Recommendations*, filed a *Notice of Sales Tax Adjustment*, adjusting the proposed Sales Tax Assessments.

On April 11, 2008, the Protestants were notified a response to the Division's notice could be filed on or before April 25, 2008. On April 14, 2008, the Protestants requested additional time to review the Division's notice. On April 16, 2008, there being no objection by the Division, the Protestants' request was granted, with the response due on or before May 12, 2008.

⁸¹ OKLA. STAT. ANN. tit. 68, § 223 (West Supp. 2008).

⁸² The 3^d Work Papers should specifically detail the invoices used to determine the Sample Errors as reflected by Division's Exhibit E, but also including the "Month Reported," since COMPANY reports on a "cash basis."

⁸³ The protest includes a request for waiver of penalty and interest on the sales tax voluntarily paid on the XYZ FOUNDATION events. 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 designee, pursuant to OKLA. STAT. ANN. tit. 68, § 220 (West Supp. 2008).

On May 9, 2008, the Protestants filed their *Response* to the Division's notice, with Exhibits attached thereto. The Division was advised by letter that it could file a reply on or before May 28, 2008. On May 19, 2008, the Division's *Reply* was filed of record.

On May 20, 2008, the undersigned mailed a letter to the parties stating in pertinent part, "The matter was submitted for a ruling, taking into consideration what has already been filed. No further responses or replies are to be filed by either party."

Upon consideration of the *Amended Findings, Conclusions and Recommendations*, the *Notice of Sales Tax Adjustment*, Protestants' *Response*, and Division's *Reply*, the undersigned finds the following should be added to and incorporated in the *Amended Findings, Conclusions and Recommendations* issued on March 27, 2008:

1. On April 10, 2008, the Division filed a *Notice of Sales Tax Adjustment*, as follows, to-wit:

Sales Tax:	\$21,990.95
Interest to 05/31/08:	11,043.86
Penalty:	<u>2,199.12</u>
Total:	\$35,233.93

2. The Division's Third ("3rd") Work Papers adjusted the proposed Sales Tax Assessments, as follows, to-wit:

<u>Sample Months</u>	<u>Year</u>	<u>Reported Sales</u>
December	2003	\$339,077.00
May	2004	17,920.00
October	2004	119,630.00
March	2005	35,757.00
July	2005	28,356.00
January	2006	<u>310,013.00</u>
		\$850,753.00

<u>Invoice Date</u>	<u>Client</u>	<u>Month Reported</u>	<u>Audit Sample</u>
07/21/03 ⁸⁴	XYZ	December 2003	\$34,722.39
12/01/03	CUSTOMER 1	December 2003	4,017.91
12/15/03	CUSTOMER 2	December 2003	8,845.00
04/16/04	CUSTOMER 3 ⁸⁵	May 2004	33.07
10/05/04	CUSTOMER 4	October 2004	15,650.16
10/15/04	CUSTOMER 5 ⁸⁶	October 2004	2,577.43

⁸⁴ All references herein to Protestants' Exhibits are to the attachments to the Response. See Protestants' Exhibit 117. The correct date of the invoice is 07/21/03, not 12/31/03. The invoice reflects sales tax of \$2,405.50, but zero sales tax was remitted.

⁸⁵ Protestants' Exhibit 90 (CUSTOMER 3).

10/15/04	CUSTOMER 5 ⁸⁷	October	2004	480.48
No U-R Sales		March	2005	0.00
05/06/05	CUSTOMER 6 ⁸⁸	July	2005	868.06
07/07/05	CUSTOMER 7	July	2005	420.00
07/18/05	CUSTOMER 8 ⁸⁹	July	2005	1,365.00
07/18/05	CUSTOMER 8	July	2005	54.19
07/19/05	CUSTOMER 9	July	2005	307.39
07/29/05	CUSTOMER 8	July	2005	572.50
07/29/05	CUSTOMER 8	July	2005	1,899.00
07/29/05	VISITOR'S BUREAU ⁹⁰	July	2005	350.00
07/29/05	MINISTRY ORG.	July	2005	350.00
07/29/05	CHILDREN'S CENTER ⁹¹	July	2005	308.13
07/29/05	CUSTOMER 8	July	2005	250.00
07/29/05	COLLEGE 1	July	2005	37.93
07/29/05	COLLEGE 2	July	2005	146.31
07/29/05	ARCHITECT ⁹²	July	2005	600.00
07/29/05	COLLEGE 3 ⁹³	July	2005	21.68
12/06/05	CUSTOMER 10 ⁹⁴	January	2006	120.00
12/13/05	COMPUTER CO.	January	2006	334.93
12/13/05	CRAFT CO.	January	2006	3,189.97
12/25/05	CUSTOMER 11	January	2006	464.24
Sample Errors (26 Invoices)				\$77,985.77

	\$ 77,985.77	(Sample Errors)
Divided By	\$850,753.00	(Sample Months)
Equals	0.091666759	(Error Rate)
Audit Period Projection		
Using Error Rate	\$262,578.49 ⁹⁵	(U-R Sales)
Times (0.08375) Equals	\$ 21,990.95	(Sales Tax)

⁸⁶ Protestants' Exhibit 86 (CUSTOMER 5).

⁸⁷ Protestants' Exhibit 119.

⁸⁸ Protestants' Exhibit 44 (CUSTOMER 6).

⁸⁹ Protestants' Exhibit 4337 (CUSTOMER 8).

⁹⁰ Protestants' Exhibit 4347 (VISITOR'S BUREAU).

⁹¹ Protestants' Exhibit 4349 (CHILDREN'S CENTER).

⁹² Protestants' Exhibit 4354 (ARCHITECT).

⁹³ Protestants' Exhibit 4355 (COLLEGE 3).

⁹⁴ Protestants' Exhibit 34 (CUSTOMER 10).

⁹⁵ See Division's Exhibit 1.

3. On May 9, 2008, the Protestants filed a *Response* to the Division's 3rd Work Papers, with attachments thereto. The Protestants "...assert[] as errors a large number of events which were entirely exempt from tax and many other on which tax was in fact paid." The Protestants' arguments will be addressed by the corresponding Sample Month, as follows, to-wit:

December 2003 Sample Month
Three ("3") Invoices

The Protestants have not raised any new arguments to support the adjustment of the invoices for the "CUSTOMER 1 Event,"⁹⁶ the "CUSTOMER 2 Event,"⁹⁷ or the "XYZ FOUNDATION Event."⁹⁸ No adjustments should be made to the December 2003 Sample Month.

May 2004 Sample Month
One ("1") Invoice

The Protestants contend the correct amount of sales tax has already been remitted for the "CUSTOMER 3 Event" as reflected by the May 2004 Sales Tax Report. The invoice reflects a subtotal of \$1,070.50, sales tax of \$89.65 ($\$1,070.50 \times 0.08375 = \89.65).

However, the documentation does not support the Protestants' contention.⁹⁹ The worksheet for the May 2004 Sales Tax Report clearly reflects \$86.89 was remitted, not \$89.65, which is what the Division states on the 3rd Work Papers.¹⁰⁰ No adjustment should be made to the May 2004 Sample Month.

October 2004 Sample Month
Three ("3") Invoices

The Protestants provided documentation the following invoices were not reported and remitted with the October 2004 Sales Tax Report:

⁹⁶ Protestants' Exhibit 109. This invoice is for a "lump sum" of \$11,977.89. The invoice itself reflects sales tax as "NA". Protestants' contend sales tax of \$752.91 was included in the invoice, but only \$666.65 was reported and remitted.

⁹⁷ Protestants' Exhibit 107.

⁹⁸ Protestant's Exhibit 117. The invoice reflects \$2,400.50 for sales tax, but the Protestants did not remit any sales tax for this event.

⁹⁹ Protestants' Exhibit 90.

¹⁰⁰ Protestants' Exhibit 90.

Invoice Date	Month Reported	Audit Sample
10/05/04	November 2004	\$15,650.16 ¹⁰¹
10/15/04	November 2004	\$ 2,577.43 ¹⁰²
10/15/04	December 2004	\$ 480.48 ¹⁰³

These three (3) invoices should be removed from the Sample Errors.

July 2005 Sample Month
Fifteen (“15”) Invoices

• The invoice provided by the Protestants for the “CUSTOMER 6 Event” reflects the following:

Item ID	Invoice Date	Description	Total
44 ¹⁰⁴	05/06/05	Event: Employee Appreciation Days	
		Décor Rentals	\$7,743.00
		Sub Total	\$7,743.00
		Tax	\$ 575.78
		Total	\$8,318.78

The Division examined the Protestants’ records and made the following determinations for the “CUSTOMER 6 Event”:

Sales Total:	\$7,743.00 times 0.08375 (State 0.045 & CITY 0.03875) equals
Tax Expected:	\$ 648.48
Tax Charged:	\$ 575.78
Tax Balance Due:	\$ 72.70 (\$648.48 minus \$575.78)
Additional Taxable Sales:	\$ 868.01 (\$72.70 divided by 0.08375) ¹⁰⁵

The Protestants have not raised any new arguments to support the adjustment of this “lump sum” invoice for the “CUSTOMER 6 Event.”

• The Protestants provided a copy of a check from CUSTOMER 7’s PAYOR to COMPANY for \$420.00. The check reflects this is a refund of a security deposit paid by COMPANY and not for a sale.¹⁰⁶ This invoice should be removed from the Sample Errors.

¹⁰¹ Protestants’ Exhibit 64.

¹⁰² Protestants’ Exhibit 86.

¹⁰³ Protestants’ Exhibit 119.

¹⁰⁴ Protestants’ Exhibit 44.

¹⁰⁵ There appears to be a five cent (5¢) difference due to computer rounding. See Division’s 3rd Work Papers.

¹⁰⁶ Protestants’ Exhibit 4329.

- The Protestants provided a copy of the invoice for the “CUSTOMER 9 Event” reflecting it was reported on the September 2005 Sales Tax Report, which is not a Sample Month.¹⁰⁷ This invoice should be removed from the Sample Errors.

- The Protestants’ remaining contentions revolve around the 25th General Conference of CUSTOMER 8. The Protestants provided a copy of the CUSTOMER 8’s Exempt Organizations (“EXO”) Permit No. XXX, effective August 9, 1999, with no expiration date. The CUSTOMER 8’s physical address is CUSTOMER 8’s ADDRESS, with a mailing address of CUSTOMER 8’s MAILING ADDRESS.¹⁰⁸

The Protestants also provided a copy of a letter dated March 15, 2002, from the Tax Commission to COLLEGE 1 for the verification of its exempt status for sales and use tax purposes.¹⁰⁹

The CUSTOMER 8 Conference included a Fine Arts Festival and Tradeshow, with Exhibitors from many parts of the country, which includes invoices to the VISITOR’S BUREAU, CITY A, STATE 1; MINISTRY ORGANIZATION, CITY B, STATE 2; CHILDREN’S CENTER, CITY C, STATE 3; and ARCHITECT, CITY D, STATE 3. Each of these invoices reflects charges for “Inbound Freight” and “Outbound Freight” only.

The Protestants’ position is these invoices are not subject to sales tax because “Freight Charges” or “Delivery Charges” was separately stated on the invoice.

“Delivery Charges” are addressed by Tax Commission Rule 710:65-19-70,¹¹⁰ which states:

(a) **Definition. "Delivery charges"** means charges [by the seller of personal property or services] for preparation and delivery to a location designated [by the purchaser of personal property or services] including, but not limited to, transportation, shipping, postage, handling, crating, and packing. **"Delivery charges"** does not include charges for the delivery of **"direct mail"** if the charges are separately-stated on an invoice or similar billing document given to the purchaser.

(b) **Separately-stated delivery charges.** In every case where a delivery charge represents the cost of transporting the items sold from the vendor to the consumer, and is separately-stated on the invoice or statement, such charges are not subject to sales tax.

¹⁰⁷ Protestants’ Exhibit A/R.

¹⁰⁸ Protestants’ Exhibit 4337.

¹⁰⁹ Protestants’ Exhibit 4352.

¹¹⁰ OKLA. ADMIN. CODE § 710:65-19-70 (June 25, 2004).

(c) **Delivery charges included in price.** If delivery charges are included in the selling price of the tangible personal property sold, the charges are subject to sales tax.

(d) **Transportation costs of the seller.** Shipping, freight, or delivery charges paid by a seller in acquiring property for sale are considered costs of doing business to the seller and may not be deducted from the gross proceeds of the sale in computing tax liability, even though such costs may be passed on to his customers and regardless of whether they are separately-stated.

(e) **Demurrage.** Demurrage is a charge for detaining a ship, freight car, or truck beyond the time allowed for loading or unloading. This is considered a penalty and is not subject to sales tax. (Emphasis added)

These invoices do not reflect any sales were made to the entities in connection with the CUSTOMER 8 Conference, which fall within the statutory definition of “gross receipts” for sales tax purposes or represent sales taxable “Delivery Charges” defined by Tax Commission Rule.¹¹¹

The invoices from the CUSTOMER 8 Conference are summarized as follows, to-wit:

Date of Invoice	Customer	Audit Sample	Adjustment
07/15/05	CUSTOMER 8	\$1,365.00	Yes. EXO. ¹¹²
07/18/05	CUSTOMER 8	\$ 54.19	Yes. EXO. ¹¹³
07/25/05	COLLEGE 1	\$ 37.93	Yes. Exempt. ¹¹⁴
07/26/05	CUSTOMER 8	\$1,899.00	Yes. EXO. ¹¹⁵
07/29/05	VISITOR’S BUREAU	\$ 350.00	Yes. ¹¹⁶
07/29/05	MINISTRY ORG.	\$ 350.00	Yes. ¹¹⁷
07/29/05	CHILDREN’S CENTER	\$ 307.50	Yes. ¹¹⁸

¹¹¹ See OKLA. STAT. tit. 68, § 1352(11) (West Supp. 2003). See also Note 27.

¹¹² See Division’s 3rd Work Papers, Invoice #4337.

¹¹³ See Division’s 3rd Work Papers, Invoice #4338.

¹¹⁴ Protestants’ Exhibit 4352. The correct amount for one (1) eight foot (8’) “draped table” is \$35.00, not \$37.93. The 3rd Work Papers incorrectly includes the sales tax reflected on the invoice in the total.

¹¹⁵ Protestants’ Exhibit 4345.

¹¹⁶ Protestants’ Exhibit 4347.

¹¹⁷ Protestants’ Exhibit 4348.

¹¹⁸ Protestants’ Exhibit 4349. The invoice is for \$307.50. \$300.00 charges for “Inbound Freight” and “Outbound Freight” are not taxable. The one (1) folding chair for \$7.50 is taxable. The 3rd Work Papers incorrectly includes the sales tax reflected on the invoice in the total.

07/29/05	MINISTRY 2 (CUSTOMER 8)	\$ 250.00	Yes. EXO. ¹¹⁹
07/29/05	COLLEGE 2, CITY E, STATE 4	\$ 135.00	Correction. ¹²⁰
07/29/05	ARCHITECT, CITY D, STATE 3	\$ 600.00	Yes. ¹²¹
07/29/05	COLLEGE 3, CITY F, STATE 3	\$ 20.00	Correction. ¹²²

January 2006 Sample Month
Four (“4”) Invoices

• The Protestants provided documentation the following invoices were not remitted with the January 2006 Sales Tax Report:

<u>Invoice Date</u>	<u>Month Reported</u>	<u>Audit Sample</u>
12/06/05	February 2006	\$120.00 ¹²³
12/25/05	March 2006	\$464.24 ¹²⁴

These two (2) invoices should be removed from the Sample Errors.

• The Protestants have not raised any new arguments to support the adjustment of the invoice for the “CRAFT CO. Event.”¹²⁵

• The invoice provided by the Protestants for the “COMPUTER CO. Event” reflects the following:

¹¹⁹ Protestants’ Exhibit 4351.

¹²⁰ Protestants’ Exhibit 4353. The invoice is for Rental: “Plant Décor” for \$135.00, not \$146.31. The 3rd Work Papers incorrectly includes the sales tax reflected on the invoice in the total.

¹²¹ Protestants’ Exhibit 4354.

¹²² Protestants’ Exhibit 4355. The invoice is for one (1) eight foot (8’) plain table, which is \$20.00, not \$21.68. The 3rd Work Papers incorrectly includes the sales tax reflected on the invoice in the total.

¹²³ Protestants’ Exhibit 34.

¹²⁴ Protestants’ Exhibit 35.

¹²⁵ Protestants’ Exhibit 32.

<u>Item ID</u>	<u>Invoice Date</u>	<u>Description</u>	<u>Total</u>
186 ¹²⁶	12/13/05	Event: COMPUTER CO. Tradeshow As Agreed Per Proposal Vendor Stations Extension Cords, Rental Red Linen for Registration Raffle Bowl Colorful Balloons throughout Room CD Player & Game Show Music Onsite Coordination, Delivery, Set up & Strike	\$1,775.00
		Non Taxable: Inbound Freight Handling	\$ 300.00
		Sub Total	\$2,075.00
		Tax	\$ 145.73
		Service Charge	\$ 111.04
		Total	\$2,331.77

The Division examined the Protestants' records and made the following determinations for the "COMPUTER CO. Event":

Sales Total:	\$2,075.00 times 0.08375 (State 0.045 & CITY 0.03875) equals
Tax Expected:	\$ 173.78
Tax Charged:	\$ 145.73
Tax Balance Due:	\$ 28.05 (\$173.78 minus \$145.73)
Additional Taxable Sales:	\$ 334.94 (\$28.05 divided by 0.08375) ¹²⁷

This invoice does reflect sales were made to COMPUTER CO., which falls within the statutory definition of "gross receipts" for sales tax purposes and represents sales taxable "Delivery Charges" defined by Tax Commission Rule.¹²⁸ No adjustment should be made for the "COMPUTER CO. Event."

4. The undersigned concludes that the following recommendations should be added to and incorporated in the *Amended Findings, Conclusions and Recommendations*:

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the protests of COMPANY and PRESIDENT, as President and as an Individual, should be denied.

It is further ORDERED the 3rd Work Papers should be adjusted in accordance with the findings of fact and conclusions of law herein and that the

¹²⁶ Protestants' Exhibit 186.

¹²⁷ There appears to be a one cent (1¢) difference due to computer rounding. See Division's 3rd Work Papers.

¹²⁸ See Notes 27 and 28.

adjusted sales tax and penalty, inclusive of interest accrued and accruing, should be fixed as the amounts due and owing.¹²⁹

THEREFORE, the *Amended Findings, Conclusions and Recommendations* issued on March 27, 2008, are amended to include and incorporate the above and foregoing *First Addendum to Amended Findings, Conclusions and Recommendations*.

**SECOND ADDENDUM TO AMENDED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The *First Addendum to Amended Findings, Conclusions and Recommendations* issued on June 9, 2008, in the above styled and numbered cause, comes on for consideration of the recommendations as to the amount of the deficiency which should be confirmed by an order of the Tax Commission.

On June 10, 2008, the Protestants were notified a response to the Division's notice could be filed within fifteen (15) days of the mailing of the revisions.

On June 25, 2008, the Division, as directed by the *First Addendum to Amended Findings, Conclusions and Recommendations*, filed a *Notice of Sales Tax Adjustment*, adjusting the proposed Sales Tax Assessments.

On July 11, 2008, the Division filed a Memorandum, with "Revised" Work papers reflecting a credit for the Protestants' payment of \$7,610.44 and the removal of CUSTOMER 8 invoice dated July 19, 2005, which was exempt.

Upon consideration of the *First Addendum to Amended Findings, Conclusions and Recommendations*, the *Notice of Sales Tax Adjustment* and *Memorandum* filed July 11, 2008, the undersigned finds the following should be added to and incorporated in the *First Addendum to Amended Findings, Conclusions and Recommendations* issued on June 9, 2008:

1. On June 25, 2008, the Division filed a *Notice of Sales Tax Adjustment*, as follows, to-wit:

Sales Tax:	\$14,871.64
Interest to 08/15/08:	8,117.33
Penalty:	<u>1,487.19</u>
Total:	\$24,476.16

2. The Division's Fourth ("4th") Work Papers adjusted the proposed Sales Tax Assessments, as follows, to-wit:

¹²⁹ The protest includes a request for waiver of penalty and interest on the sales tax voluntarily paid on the XYZ FOUNDATION events. 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 designee, pursuant to OKLA. STAT. ANN. tit. 68, § 220 (West Supp. 2008).

<u>Sample Months</u>	<u>Year</u>	<u>Reported Sales</u>
December	2003	\$339,077.00
May	2004	17,920.00
October	2004	119,630.00
March	2005	35,757.00
July	2005	28,356.00
January	2006	<u>310,013.00</u>
		\$850,753.00

<u>Invoice Date</u>	<u>Client</u>	<u>Month Reported</u>	<u>Audit Sample</u>
07/21/03	XYZ	December 2003	\$34,722.39
12/01/03	CUSTOMER 1	December 2003	4,017.91
12/15/03	CUSTOMER 2	December 2003	8,845.00
04/16/04	CUSTOMER 3	May 2004	33.07
No U-R Sales		March 2005	0.00
05/06/05	CUSTOMER 6	July 2005	868.06
07/29/05	CUSTOMER 8	July 2005	572.50
07/29/05	COLLEGE 2	July 2005	135.00
07/29/05	COLLEGE 3	July 2005	20.00
12/13/05	COMPUTER CO.	January 2006	334.93
12/13/05	CRAFT CO.	January 2006	3,189.97
		Sample Errors (10 Invoices)	\$52,738.83

\$ 52,738.83		(Sample Errors)
Divided By	\$850,753.00	(Sample Months)
Equals	0.061990766	(Error Rate)

Audit Period Projection		
Using Error Rate	\$177,571.97	(U-R Sales)
Times (0.08375) Equals	\$ 14,871.64	(Sales Tax)

3. The Division's Fifth ("5th") Work Papers adjusts the proposed Sales Tax Assessments by removing the CUSTOMER 8 invoice dated July 29, 2005 (\$572.50) from the Sample Errors and credits the Protestants' payment, made with the protest, as follows, to-wit:

		<u>Less Pmt.</u>	<u>Net Total</u>
Sales Tax:	\$14,710.27	(\$7,610.44)	\$ 7,099.83
Interest to 08/15/08:	8,039.34	(1,889.06)	6,150.28
Penalty:	<u>1,471.06</u>	(.00)	<u>1,471.06</u>
Total:	\$24,220.67	(\$9,499.50)	\$14,721.17

4. The Protestants did not file a response to the Division's 4th or 5th Work Papers.

5. The undersigned concludes that the following recommendations should be added to and incorporated in the *First Addendum to Amended Findings, Conclusions and Recommendations*:

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the protests of COMPANY and PRESIDENT, as President and as an Individual, should be denied.

It is further ORDERED the adjusted sales tax and penalty (5th Work Papers) inclusive of interest accrued and accruing, should be fixed as the amounts due and owing.

THEREFORE, the *First Addendum to Amended Findings, Conclusions and Recommendations* issued on June 9, 2008, is amended to include and incorporate the above and foregoing *Second Addendum to Amended Findings, Conclusions 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.