

JURISDICTION: OKLAHOMA TAX COMMISSION DECISION
CITE: 2009-02-03-09 / NON-PRECEDENTIAL
ID: P-07-146-H
DATE: FEBRUARY 3, 2009
DISPOSITION: DENIED
TAX TYPE: SALES
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPANY and PRESIDENT,¹ as President and as an Individual, (“Protestants”) appear through their representative, REPRESENTATIVE.² The Field Audit Section of the Compliance Division (“Division”), Oklahoma Tax Commission, appears through OTC ATTORNEY 1, First Deputy General Counsel, and OTC ATTORNEY 2, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On October 11, 2007, the protest file was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*³ and the *Rules of Practice and Procedure Before the Oklahoma Tax Commission*.⁴ On October 15, 2007, a letter was mailed to the Protestants stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-07-146-H. The letter also advised the Protestants 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*.⁵ On November 7, 2007, the Notice of Prehearing Conference was mailed to the last-known address of the Protestants, setting the prehearing conference for December 6, 2007, at 2:00 p.m.⁶

On November 13, 2007, OTC ATTORNEY and OTC ATTORNEY 2 filed an Entry of Appearance as counsel and co-counsel, respectively, for the Division.

On November 30, 2007, the Division filed a Status Report In-Lieu of Prehearing Conference. The Protestants had executed a Power of Attorney dated November 28, 2007, to REPRESENTATIVE. On December 5, 2007, the parties were advised by letter either a status report or a proposed scheduling order was to be submitted on or before February 4, 2007. On

¹ PRESIDENT is also known as 2ND FORM OF NAME.

² REPRESENTATIVE is not an out-of-state attorney. See Memorandum filed herein on February 1, 2008.

³ OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

⁴ OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

⁵ See Note 4.

⁶ OKLA. STAT. ANN. tit. 68, § 208 (West 2001). The notice was mailed to the Protestants at BUSINESS ADDRESS.

December 7, 2007, a letter was mailed to the parties correcting the submission date to February 4, 2008. The Procedural History from December 8, 2007, to April 15, 2008, is omitted herein.

On April 16, 2008, a letter was mailed to the parties advising this matter had been set for hearing on May 8, 2008, at 9:30 a.m., with position letters or memorandum briefs due on or before May 1, 2008.

On May 1, 2008, the Protestants' Position Letter and the Division's Brief were filed with the clerk of the court, along with separate exhibit files. On May 6, 2008, a Correction to the Division's Brief was filed with the clerk of the court, with a copy of Division's Exhibit X attached thereto.

On May 8, 2008, at 9:30 a.m., the hearing was held as scheduled, with the parties and their representatives in attendance. The Protestants called one (1) witness, PRESIDENT, who testified about the Protestants' business practices and procedures. The Protestants' Exhibits A through C were identified, offered, and admitted into evidence. The Division called one (1) witness, AUDITOR, Field Auditor, Field Audit Section of the Compliance Division, Oklahoma Tax Commission, who testified about the field audit and as custodian of the Division's records. The Division's Exhibits A through V⁷ were identified, offered, and admitted into evidence. The Administrative Law Judge requested the Protestants' written withdrawal of the protests to the Division's proposed Franchise Tax and Use Tax Assessments be marked as ALJ's Exhibit 1 and a summary of the Protestants' position should be marked as ALJ's Exhibit 2. The parties were advised the Administrative Law Judge was taking judicial notice of the Field Audit Write-up, pursuant to Tax Commission Rule 710:1-5-36.⁸

At the conclusion of the hearing held on May 8, 2008, the Administrative Law Judge kept the record open until June 9, 2008, for the filing of proposed findings of fact and conclusions of law. At that time, the record would be closed and the case submitted for decision. On May 12, 2008, a letter confirming the Administrative Law Judge's ruling was mailed to the parties.

On June 6, 2008, REPRESENTATIVE filed a letter requesting an additional thirty (30) to sixty (60) days to provide additional information to the Division in an effort to work out a mutually agreeable conclusion, along with proposed findings of fact and conclusions of law.⁹

On June 6, 2008, the Division filed a Request for Continuance to submit proposed findings of fact and conclusions of law. The Protestants had delivered seven (7) boxes of additional documents for review. On June 9, 2008, the parties were mailed an Order Granting Request for Continuance, directing the Division to file a status report on or before July 9, 2008.

⁷ The parties stipulated to the admission into evidence of Division's Exhibits U-1 and U-2.

⁸ OKLA. ADMIN. CODE § 710:1-5-39 (June 25, 1999).

⁹ The Protestants' proposed findings were drafted before the filing of the Division's Notice of Sales Tax Adjustment filed herein on August 20, 2008.

On July 7, 2008, the Division filed the Status Report advising that following the Protestants' delivery of the seven (7) boxes of additional information, the Protestants agreed to provide the documents in an electronic format, which were received July 3, 2008. On July 8, 2008, the parties were advised to file a status report on or before August 11, 2008. The Procedural History from July 9, 2008, to August 19, 2008, is omitted herein.

On August 20, 2008, the Division filed its Notice of Sales Tax Adjustment, with a copy of the work papers attached thereto. On August 21, 2008, the parties were advised by letter the Protestants could respond to the revised sales tax audit on or before September 22, 2008. On August 21, 2008, the Protestants filed a letter stating that as of August 20, 2008, the revised sales tax work papers had not been received from the Division. On September 22, 2008, the Protestants filed their response to the Division's Notice of Sales Tax Adjustment. On September 22, 2008, the Division was advised it could file a reply to the Protestant's response on or before October 7, 2008.

On September 26, 2008, the Division's Reply to Protestants' Response was filed with the clerk of the court. On September 30, 2008, the parties were advised by letter that proposed findings of fact and conclusions of law could be submitted on or before October 30, 2008. On October 24, 2008, the Division's Proposed Findings, Conclusions, and Recommendations were filed with the clerk of the court. No further filings were received from the Protestants. On November 3, 2008, the record in this matter was closed and the case was submitted for decision.

FINDINGS OF FACT

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

1. On January 27, 1998, a Business Registration was filed on behalf of COMPANY by PRESIDENT, as CEO of COMPANY. The COMPANY corporate office is located at BUSINESS ADDRESS.¹⁰

2. COMPANY markets wellness and nutritional products through approximately 10,000 Distributors, using a multi-level distribution system. COMPANY sells its products world-wide, with all products shipped from the State of Oklahoma.¹¹

3. Individuals who enroll in the COMPANY Program become Distributors, who may earn daily commissions,¹² as follows, to-wit:

- a. purchasing COMPANY products at wholesale prices and reselling them at retail prices (making 40% to 100% profit),

¹⁰ Division's Exhibit A.

¹¹ Testimony of PRESIDENT and AUDITOR.

¹² Division's Exhibits B through H.

- b. building their “down-line organization” by recruiting additional distributors whose “income flows up through their organization to yours,”
 - c. enrolling customers in “Auto-Ship” to receive automatic monthly shipments of COMPANY products, or
 - d. earning points and incentives for each product sold.
4. By completing a COMPANY “Independent Representative Application and Agreement Form” (“Agreement”),¹³ Distributors agree to certain terms and conditions, including, but not exclusive of the following, to-wit:
- Responsibility to comply with the COMPANY Seventy Percent (70%) Resale Rule to customers.
 - Must keep accurate records of retail sales. COMPANY may periodically ask to provide documentation of such sales to COMPANY.
 - Develop and service at least five (5) customers per month.
 - Agree to be bound by all sales tax collection agreements between COMPANY and all appropriate taxing jurisdictions, and all related rules and procedures.
 - Forfeiting all rights as an “Independent Representative,” including their “down-line organization,” for failing to renew annually their COMPANY Distributorship.
 - COMPANY Agreement is governed/construed in accordance with the laws of the State of Oklahoma.
5. On December 8, 2006, the Division held an opening conference with CO-FOUNDER (“Co-Founder”) concerning the proposed sales tax audit for the period of June 1, 2004, through May 31, 2007 (“Audit Period”).¹⁴ The Division was directed to work with COMPANY’s accounting firm (“Accounting Firm”) who had most of COMPANY’s business records.¹⁵
6. PRESIDENT was President (“President”) of COMPANY during the Audit Period.¹⁶
7. On December 11, 2006, the Division requested COMPANY’s business records for the Audit Period.¹⁷
8. COMPANY provided over 600 invoices pursuant to the records request. The Division reviewed the invoices and confirmed the correct sales tax was charged based on a product’s “ship-to” address. The Division also determined from the review sales tax was

¹³ Division’s Exhibit I.

¹⁴ In COMPANY’s literature, Co-Founder is also listed as Vice-President of COMPANY, but she is not an officer of COMPANY according to Tax Commission Records or Division’s Exhibit J.

¹⁵ Testimony of AUDITOR.

¹⁶ Division’s Exhibit J.

¹⁷ Division’s Exhibit K. The records requested were for December 1, 2003, to November 30, 2006.

collected on the wholesale price of COMPANY's products. Sales tax was not collected on the retail price of many products, which were resold by COMPANY's Distributors.¹⁸

9. The Division used the invoices provided by COMPANY to create a listing of sales by month and a listing of sales by state.¹⁹

10. COMPANY separates products into four (4) coded categories,²⁰ as follows, to-wit:

- (a) "PC" (internet sales). These products are sold at retail prices to individuals, generally over the internet. The sales are for personal use or consumption. The retail customers are not COMPANY Distributors.²¹ Sales tax was collected on the retail price of each of these products.
- (b) "VS" (visual sales). These are sales of materials such as visual sales aides (catalogues, tapes, etc.) sold at retail prices to Distributors for use in marketing products purchased from COMPANY. Sales tax was collected on the retail price of each of these items.²²
- (c) "VA" (product code). These are sales of products sold via COMPANY's monthly auto-ship program. The monthly auto-ship program is limited to one order per month per Distributor. VA products are purchased by the Distributors at wholesale prices for personal use or consumption. Sales tax was charged on the wholesale price of the product.
- (d) "VL" (product code). These are sales of products to Distributors for resale, or personal use or consumption. Distributors purchase the products at wholesale prices. Sales tax was charged on the wholesale price of the products, regardless of whether the items were consumed, used, or resold by the Distributor.²³

11. Sales tax was collected on the retail prices of all PC and VS coded products. Sales tax was collected on the wholesale prices of VA and VL coded products.²⁴

12. COMPANY's top Fifteen (15) Distributors (by 1099 earnings) did not hold an Oklahoma Sales Tax Permit or remit sales tax during the Audit Period.²⁵

¹⁸ Testimony of AUDITOR.

¹⁹ Division's Exhibits L-1, L-2, and L-3.

²⁰ Testimony of AUDITOR.

²¹ Division's Exhibit M.

²² Division's Exhibit N.

²³ See Protestants' Exhibit A.

²⁴ Testimony of AUDITOR.

²⁵ Testimony of AUDITOR.

13. The Division requested records from COMPANY's Accounting Firm to establish the types and quantities of products sold during the Audit Period.²⁶

14. The Accounting Firm requested the Division to provide the authority requiring a "Multi-Level Distributor" to collect sales tax on the retail sales of its Distributors.²⁷

15. On January 24, 2007, the Division faxed the Accounting Firm copies of the authority as requested,²⁸ which consisted of the following, to-wit:

- a. 68 O.S. § 1354(19),²⁹
- b. Letter Ruling dated June 10, 2002,
- c. Letter Ruling dated October 2, 2002, and
- d. Letter Ruling dated June 1, 2005.

16. After receiving the copies of the authority relied upon by the Division, the Accounting Firm refused to provide additional information and documents. The Accounting Firm advised the Division to complete the audit based upon the information already provided.³⁰

17. The Division calculated under-reported sales on which sales tax was due during the Audit Period, upon the best information available.³¹

18. The Division calculated the under-reported sales subject to sales tax³² as follows, to-wit:

- a. COMPANY provided a breakdown of the total products sold in each coded category in the State of Oklahoma for 2004 and 2005. Based upon this information, the Division calculated each coded category's percent of total sales for 2004 and 2005.³³
- b. Using the invoices provided by COMPANY, the Division created a spreadsheet listing each product by item name, number, wholesale price,

²⁶ Testimony of AUDITOR.

²⁷ Testimony of AUDITOR.

²⁸ Division's Exhibit P. The Letter Rulings reference OKLA. ADMIN. CODE § 710:65-19-214 (June 26, 2003), Multi-level sales.

²⁹ OKLA. STAT. tit. 68, § 1354(19) (West Supp. 2003).

³⁰ Testimony of AUDITOR.

³¹ Testimony of AUDITOR.

³² Division's Exhibit S. Testimony of AUDITOR.

³³ Division's Exhibit Q-1 and Q-2.

and retail price. The percent mark-up was determined for each product. The highest percent mark-up for a single VL product was 108.34%. The highest percent mark-up for a single VA product was 300.01%.³⁴

- c. The Division created a spreadsheet reflecting the total additional sales on which sales tax would be assessed. The Division listed the monthly sales reported to the Division for June 2004 through October 2006 and December 2006 through January 2007. Sales tax reports were not filed by COMPANY for the months November 2006 and February 2007 through May 2007. The amount of sales was estimated based upon sales tax reports filed for prior months. The Division calculated the percent of reported sales attributable to VA and VL products, using the highest percent mark-up for the product in each category.³⁵

19. The Division determined COMPANY had under-reported taxable sales for the Audit Period of \$4,799,877.89 (“First Work Papers”).³⁶

20. On June 29, 2007, the Division issued proposed sales tax assessments for the Audit Period against COMPANY and President,³⁷ as follows, to-wit:

Tax Due:	\$401,989.74
Interest @ 15% Through 07/30/07:	101,276.11
Tax & Interest Due Within 30 Days:	\$503,265.85
30 Day Delinquent Penalty @ 10%:	40,198.96
Tax, Interest & Penalty Due After 30 Days:	\$543,464.81

21. On June 29, 2007, the Division issued a proposed Franchise Tax Assessment³⁸ against COMPANY for July 1, 2004, through June 30, 2006, as follows, to-wit:

Tax Due:	\$197.50
Interest @ 15% through 08/15/07:	87.50
Tax & Interest Due Within 60 [sic] Days:	\$285.00
30 Day Delinquent Penalty @ 10%:	19.75
Tax, Interest & Penalty Due After 60 Days:	\$304.75

³⁴ Division’s Exhibit R.

³⁵ See Note 34.

³⁶ Division’s Exhibit T.

³⁷ Division’s Exhibits U-1 and U-2, Stipulated to by the parties.

³⁸ The court file contains an audit packet, which was forwarded by the Division as part of the protest file on this matter. The Administrative Law Judge is taking judicial notice of the materials contained in the court file to complete the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (July 11, 1996).

22. On June 29, 2007, the Division issued a proposed Use Tax Assessment³⁹ against COMPANY for the Audit Period, as follows, to-wit:

Tax Due:	\$1,244.61
Interest @ 15% through 07/31/07:	287.72
Tax & Interest Due Within 30 Days:	\$1,532.33
30 Day Delinquent Penalty @ 10%:	124.49
Tax, Interest & Penalty Due After 30 [sic] Days:	\$1,656.82

23. On July 27, 2007, the Division received timely filed protests for COMPANY and President.⁴⁰

24. On November 28, 2007, the Protestants, through President, executed a Power of Attorney to REPRESENTATIVE.⁴¹

25. At the hearing held on May 8, 2008, COMPANY, through REPRESENTATIVE, withdrew its protests to the Division's proposed Franchise Tax and Use Tax Assessments.⁴²

26. On June 6, 2008, COMPANY delivered to the Division seven (7) boxes of additional information for review. On July 3, 2008, COMPANY forwarded the information to the Division in an electronic format.

27. On August 20, 2008, the Division filed its Notice of Sales Tax Adjustment. The Division determined after review of the information provided by COMPANY there were under-reported taxable sales during the Audit Period of \$172,612.46 ("Second Work Papers"). The Division revised the proposed sales tax assessments⁴³ against COMPANY and President, as follows, to-wit:

Tax Due:	\$37,921.00
Interest through 10/31/08:	8,622.02
Penalty:	<u>3,835.33</u>
Total	\$50,378.35

28. On September 22, 2008, the Protestants filed their response to the Division's Notice of Sales Tax Adjustment. The Protestants disagreed with the Second Work Papers on the basis

³⁹ See Note 38.

⁴⁰ Division's Exhibit V.

⁴¹ On November 30, 2007, the Power of Attorney was filed with the clerk of the court.

⁴² ALJ's Exhibit 1.

⁴³ See Exhibits A-1 through A-4 and Exhibit B attached to the Division's Notice of Sales Tax Adjustment filed August 20, 2008. After the Division issued the Second Work Papers, only the VL coded products remain at issue.

VL products should be adjusted down fifty percent (50%) based upon an industry-wide study, which found over fifty percent (50%) of VL products were consumed by the Distributors and not sold to customers.⁴⁴

29. On September 26, 2008, the Division's Reply to Protestants' Response was filed, which states the Protestants did not provide any documentation to support a fifty percent (50%) adjustment to VL products sold during the Audit Period.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.⁴⁵

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("STS Code").⁴⁶ The STS Code levies "upon all sales,⁴⁷ not otherwise exempted . . . an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds⁴⁸ of each sale of . . . tangible personal property. . . ."⁴⁹ Oklahoma Statutes authorize incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.⁵⁰

3. A Vendor,⁵¹ as trustee for the State of Oklahoma, shall collect from the consumer or user the full amount of the sales tax levied by the STS Code, or an amount equal as nearly as possible or practicable to the average equivalent.⁵²

⁴⁴ See letter filed here in.

⁴⁵ OKLA. STAT. ANN. tit. 68, § 221(D) (West Supp. 2007).

⁴⁶ OKLA. STAT. tit. 68, § 1350 et seq. (West 2001).

⁴⁷ OKLA. STAT. tit. 68, § 1352(22)(a) (West Supp. 2006).

⁴⁸ OKLA. STAT. tit. 68, § 1352(11) (West Supp. 2006).

⁴⁹ OKLA. STAT. tit. 68, § 1354(A)(1) (West Supp. 2006).

⁵⁰ OKLA. STAT. tit. 68, § 1370 (West Supp. 2006) and OKLA. STAT. tit. 68, § 2701 (West Supp. 2006).

⁵¹ OKLA. STAT. tit. 68, § 1352(27) (West Supp. 2006):

"Vendor" means:

- a. any person making sales of tangible personal property or services in this state, the gross receipts or gross proceeds from which are taxed by the Oklahoma Sales Tax Code,
- b. any person maintaining a place of business in this state and making sales of tangible personal property or services, whether at the place of business or elsewhere, to persons within this state, the gross receipts or gross proceeds from which are taxed by the Oklahoma Sales Tax Code,
- c. any person who solicits business by employees, independent contractors, agents, or other representatives or by distribution of catalogs or other advertising matter, and thereby

4. Rules promulgated pursuant to the Administrative Procedures Act⁵³ are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court.⁵⁴ 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.⁵⁵

5. The Tax Commission has promulgated rules as provided by law to facilitate the administration, enforcement, and collection of taxes under the STS Code.⁵⁶

6. 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. The burden of proving that a sale of tangible personal property or enumerated service is an exempt sale is upon the vendor.⁵⁷

7. Vendors operating a multi-level distributorship must comply with the reporting and remittance of sales tax,⁵⁸ as follows, to-wit:

(a) Vendors operating a multi-level distribution system will collect tax on the gross receipts of the retail value of the products sold. This tax is to be passed through the multi-level distributors, who will not be required to hold an Oklahoma sales tax permit, to the consumers/users.

makes sales to persons within this state of tangible personal property or services, the gross receipts or gross proceeds from which are taxed by the Oklahoma Sales Tax Code, or

d. any person, pursuant to an agreement with the person with an ownership interest in or title to tangible personal property, who has been entrusted with the possession of any such property and has the power to designate who is to obtain title, to physically transfer possession of, or otherwise make sales of the property.

See OKLA. STAT. tit. 68, § 1352(26) (West Supp. 2006):

"Tax remitter" means any person required to collect, report, or remit the tax imposed by the Oklahoma Sales Tax Code. A tax remitter who fails, for any reason, to collect, report, or remit the tax shall be considered a taxpayer for purposes of assessment, collection, and enforcement of the tax imposed by the Oklahoma Sales Tax Code.

⁵² OKLA. STAT. tit. 68, § 1361(A) (West Supp. 2006).

⁵³ OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2001).

⁵⁴ OKLA. STAT. ANN. tit. 75, § 306(C) (West 2001).

⁵⁵ OKLA. STAT. ANN. tit. 75, § 308.2(C) (West 2001).

⁵⁶ OKLA. ADMIN. CODE § 710:65-1-1.

⁵⁷ OKLA. STAT. tit. 68, § 1365(F) (West Supp. 2006).

⁵⁸ OKLA. ADMIN. CODE § 710:65-19-214 (June 26, 2003).

(b) For example, the vendor who sells to distributors, who in turn sell to consumers/users at home parties, is required to collect, report, and remit sales tax on the total amount of gross receipts received by the vendor's distributors from the sales of tangible personal property or taxable services. The distributors will collect the tax from the consumer.

(c) Shipping and handling charges associated with the shipment of multi-level sales merchandise to the distributor or the distributor's customers are not subject to sales tax, if separately stated.

8. Vendors⁵⁹ 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.⁶⁰

9. At minimum, the following records constitute a minimum requirement for the purposes of the STS 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.⁶¹

10. In the case of sales for resale⁶² the following items are required to establish properly completed documentation:

- (1) A copy of the purchaser's sales tax permit, or if unavailable, the purchaser's name, address, sales tax permit number, and its date of expiration. If a copy of the sales tax permit is unavailable, and if the information provided has not been previously verified, it must be verified by either calling the Taxpayer Assistance Division or by reference to the sales tax permit list obtained pursuant to OAC 710:65-9-6;
- (2) A statement that the articles purchased are purchased for resale;
- (3) The signature of the purchaser or a person authorized to legally bind the purchaser;

⁵⁹ See Note 51.

⁶⁰ OKLA. STAT. tit. 68 1365(F) (West Supp. 2006).

⁶¹ OKLA. ADMIN. CODE § 710:65-3-31(a) (June 26, 1994).

⁶² See Note 47.

- (4) Certification on the face of the invoice, bill or sales slip or by a separate document, that says the purchaser is engaged in reselling the articles purchased; and,
- (5) In cases where purchases are made on regular basis, and the certification indicates that all purchases are for resale, then subsequent purchases may be made without further certification until the expiration date of the permit.⁶³

11. Every person required to collect any tax imposed by the Sales Tax Code, and in the case of a corporation, each principal officer thereof, shall be personally liable for the tax.⁶⁴

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. 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.⁶⁵

13. From the record, there does not appear to be a dispute PRESIDENT was the President and sole officer of COMPANY during the Audit Period. As a principal officer of Corporation, PRESIDENT is a “responsible person” for the collection and remittance of sales tax during the Audit Period.⁶⁶

14. Oklahoma Statutes provide for the collection of interest and penalty on delinquent tax.⁶⁷ “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....”⁶⁸

15. In sales tax matters, “[t]he burden of proving a sale was not a taxable sale shall be upon the person who made the sale.”⁶⁹

⁶³ OKLA. ADMIN. CODE § 710:65-7-8 (June 25, 2001).

⁶⁴ OKLA. STAT. ANN. tit. 68, § 253 (West 2001). The Tax Commission identifies the “President, Vice-President, Secretary, Treasurer, or Secretary/Treasurer as principal officers.” OKLA. ADMIN. CODE § 710:65-7-3(1).

⁶⁵ See Note 64. Section 253 sets out trust taxes (which cannot be discharged in bankruptcy) for which a principal officer of a corporation that is also a “responsible person” is held personally liable, regardless of whether a corporation is in good standing or suspended.

⁶⁶ See Note 16.

⁶⁷ OKLA. STAT. tit. 68, § 217 (West Supp. 2006).

⁶⁸ See Note 67.

⁶⁹ OKLA. STAT. tit. 68, § 1365(F) (West Supp. 2006).

16. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.⁷⁰ Corporation and President have failed to meet their burden of proof the Division's proposed STS Assessments (Second Work Papers) are incorrect and in what respects.

DISCUSSION

After the Division filed its Notice of Sales Tax Adjustment the Protestants state, "While we agree with the majority of the revised audit findings, we do **disagree** with the adjustment of the sales and personal use of our VL sales."⁷¹ (Emphasis original.)

The Protestants' contention is, "This type of product purchase is designed for personal use and may be sold by representatives to their customers... To underscore this point, we would like to point out that an industry-wide study found that over 50% of product is consumed by the independent sellers and never resold... We have previously provided executed statements from Oklahoma Independent Representatives relative to their use of VL products.... Therefore, in closing, we would like to respectfully request a 50% reduction in the assessment against COMPANY...."⁷²

In response, the Division asserts the Protestants have failed to provide any further documentation to establish an adjustment to the VL coded products sold during the Audit Period.

Based upon the record in this matter the Protestants have failed to meet their burden of proof the Division's calculation of additional sales tax on VL coded products (Second Work Papers) is incorrect and in what respects.⁷³

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, the protests to the proposed STS Assessments (Second Work Papers) against the Protestants should be denied.

It is further ORDERED the proposed sales tax and penalty, including interest, accrued and accruing, should be fixed as the amounts due and owing.

OKLAHOMA TAX COMMISSION

⁷⁰ See *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

⁷¹ See letter filed herein on September 22, 2008.

⁷² See Note 71.

⁷³ The statements from Oklahoma Distributors (Protestants' Exhibit A) consist of what amounts to an informal survey. There is no documentation to support a fifty percent (50%) adjustment to VL coded products.

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.