

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2009-11-03-13 / NON-PRECEDENTIAL
ID: P-08-076-H
DATE: NOVEMBER 3, 2009
DISPOSITION: SUSTAINED IN PART / DENIED IN PART
TAX TYPE: SALES
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above styled and numbered cause comes on for consideration pursuant to assignment regularly made by the Oklahoma Tax Commission to ALJ, Administrative Law Judge. COMPANY d/b/a BUSINESS and PRESIDENT, as President, and VICE PRESIDENT, as Vice President, of COMPANY and as Individuals (“Protestants”) appear through attorney, ATTORNEY, FIRM. The Field Audit Section of the Compliance Division (“Division”), Oklahoma Tax Commission, appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On July 10, 2008, the protest file was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*¹ and the *Rules of Practice and Procedure Before the Oklahoma Tax Commission*.² On July 11, 2008, a letter was mailed to the Protestants’ representative³ stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-08-076-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*.⁴

On July 17, 2008, OTC ATTORNEY filed an Entry of Appearance as Counsel of record for the Division.

On July 22, 2008, a copy of a letter was filed with the clerk of the court (“Clerk”) from CPA, advising that he no longer represented the Protestants and that all future correspondence should be directed to PRESIDENT at ADDRESS.

On July 31, 2008, the Notice of Prehearing Conference was mailed to the last-known address of the Protestants, setting the prehearing conference for August 26, 2008, at 10:30 a.m.⁵

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 At the time the letter was mailed, the Protestants were represented by CPA.

⁴ See Note 2, *supra*.

⁵ OKLA. STAT. ANN. tit. 68, § 208 (West 2001). The notice was mailed to the Protestants c/o PRESIDENT at ADDRESS.

On August 26, 2008, at 10:30 a.m. the prehearing conference was held by teleconference as scheduled. At PRESIDENT'S request, the Protestants were given thirty (30) days to retain counsel. On August 26, 2008, the Division filed its first revision of the proposed sales tax assessments with the Clerk. On August 27, 2008, a letter was mailed to the parties advising a status report was to be submitted on or before September 25, 2008.

On September 25, 2008, the Status Report was filed by the Division advising that PRESIDENT had contacted an attorney, but that the Protestants needed an additional thirty (30) days for a CPA hired by the attorney to review the Division's work papers. On September 26, 2008, a letter was mailed directing the parties to submit a status report on or before October 27, 2008.

On October 27, 2008, the Division filed the Status Report advising that ATTORNEY would file an Entry of Appearance and requesting that the hearing be set for December 29, 2008.

On October 27, 2008, ATTORNEY filed an Entry of Appearance as Counsel of record for the Protestants. On October 30, 2008, a letter was mailed to the parties setting the hearing on January 7, 2009, at 1:30 p.m., with position letters or memorandum briefs due on or before December 31, 2008.

On December 16, 2008, Counsel filed a Joint Motion to Strike Brief and Hearing with the Clerk. The parties had agreed to conduct a "detailed" audit of the Protestants. On December 18, 2008, an Order Granting Joint Motion to Strike Brief and Hearing and Requesting Status Report was issued and mailed to the parties, with a status report due on or before February 16, 2009.

On February 17, 2009, the Division filed the Status Report advising the "detailed" audit had not been completed. On February 18, 2009, a letter was mailed directing the parties to file a status report on or before March 19, 2009.

On March 18, 2009, the Division filed the Status Report, along with the work papers for the "detailed" audit and requested that the hearing be set in about sixty (60) days. On March 24, 2009, a letter was mailed to the parties setting the hearing on May 20, 2009, at 1:30 p.m., with position letters or memorandum briefs due on or before May 13, 2009.

On May 13, 2009, the Brief of the Compliance Division was filed with Clerk, with Exhibits A through J attached thereto. A brief was not filed on behalf of the Protestants.

On May 19, 2009, ATTORNEY filed an Application to Continue Hearing due to a death in his immediate family. He was not prepared for hearing on May 20th and requested a two (2) week continuance. On May 19, 2009, a teleconference was held with Counsel. On May 20, 2009, the Division's Motion to Overrule Protestants' Request for Continuance was filed with the Clerk. On May 21, 2009, an Order Granting Application to Continue Hearing and Denying Division's Motion to Overrule was issued resetting the hearing for June 16, 2009, at 1:30 p.m., with the Protestants' brief due on or before June 9, 2009. On June 12, 2009, the Protestants' Brief was filed (out-of-time) with the Clerk.

On June 16, 2009, at 1:30 p.m. a closed hearing⁶ was held as scheduled with Counsel and the parties in attendance. The Protestants called PRESIDENT to testify as President of COMPANY d/b/a BUSINESS and as to its business practices during the audit period. The Division stipulated that PRESIDENT would present Protestants' Exhibits A through E in support of his testimony. *The Division did not stipulate to the veracity or accuracy of Protestants' Exhibits A through E, but simply acknowledged that the exhibits were in support of PRESIDENT'S testimony as set out in Protestants' Exhibits A through E.* Based upon the stipulation, Protestants' Exhibits A through E were identified, offered, and admitted into evidence. The Division called two (2) witnesses to testify. The Division's first witness, AUDITOR, Field Auditor, Field Audit Section of the Compliance Division, Oklahoma Tax Commission, testified concerning the audits of the Protestants and as custodian of the Division's records.⁷ The Division's second witness, SUPERVISOR, Auditor Supervisor, Field Audit Section, Compliance Division, Oklahoma Tax Commission, testified about her review of the audit work papers, the documents provided by the Protestants, and her experience as a field auditor.⁸ The Division's Exhibits A through H were identified and offered for admission into evidence. ATTORNEY stipulated to the admission into evidence of Division's Exhibits A through H. The Division's Exhibits I through O were identified, offered, and admitted into evidence. At the conclusion of the hearing, the record in this matter was closed and the case was submitted for decision on June 16, 2009.

On June 30, 2009, a letter was mailed to Counsel reopening the record for the limited purpose of the Division providing copies of the work papers for the 3.2 beer depletion audit in support of Division's Exhibit J.

On June 30, 2009, the Division filed the requested information with the Clerk. On July 1, 2009, the record was closed and this matter re-submitted for decision.

FINDINGS OF FACT

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

1. On July 1, 2002, COMPANY was incorporated as a product distributing company. COMPANY'S wholesale division ("Wholesale Division") purchased stamped cigarettes and

⁶ The Protestants, through ATTORNEY, invoked their right to a confidential hearing. OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2009).

⁷ AUDITOR is a licensed CPA (since 2003) and is employed by the Division as a field-auditor since August 2006. AUDITOR has performed approximately twenty-five (25) to thirty (30) field audits.

⁸ SUPERVISOR has been employed by the Division for approximately twenty (20) years. For approximately the last four (4) years, SUPERVISOR has been a supervisor. For approximately sixteen (16) years, SUPERVISOR was a field auditor.

miscellaneous items to sell to retail businesses. The Wholesale Division is no longer in business.⁹

2. On May 20, 2005, COMPANY applied for a sales tax permit, retail cigarette license, and an off-premise retail dealer low point beer license for a convenience store. The convenience store is COMPANY d/b/a BUSINESS, which is the retail division (“Retail Division”) of COMPANY.¹⁰

3. On or about August 21, 2005, BUSINESS opened for business at BUSINESS ADDRESS. BUSINESS also prepares and sells hamburgers and other types of fast food.¹¹

4. On March 9, 2007, the parties had an opening conference in preparation for the pending field audit. AUDITOR (“Field Auditor”) provided PRESIDENT a Records Request Form,¹² Statute of Limitation Waiver Agreement, Officer List, Audit Methodology Agreement, and Power of Attorney.¹³

5. On March 9, 2007, PRESIDENT provided Field Auditor with the following executed documents:

- Statute of Limitation Waiver Agreement¹⁴
- List of Principal Officers¹⁵
- Audit Methodology Agreements. Consent obtained from President to conducts the audits on Wholesale Division and Retail Division using an “Error Rate Projection Method.”¹⁶
- Power of Attorney appointing CPA as COMPANY’s Attorney-In-Fact.¹⁷

⁹ Testimony of PRESIDENT.

¹⁰ 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) and Testimony of PRESIDENT.

¹¹ *Id.*

¹² Division’s Exhibit A. The Division’s records request included but were not exclusive of monthly (March 2004 through February 2007) sales journals, z-tapes, detailed records of all special events and admission charges, purchase invoices, bank statements, balance sheets, profit and loss statements, general ledger, ending inventory, customer list with permit numbers, sales invoices, and Federal & Oklahoma income tax returns, including all schedules for tax year 2004 through 2007.

¹³ Testimony of Field Auditor.

¹⁴ Division’s Exhibit B.

¹⁵ Division’s Exhibit C.

¹⁶ Division’s Exhibits D-E.

¹⁷ Division’s Exhibit F.

6. The principal officers of COMPANY are PRESIDENT, President (“President”), and VICE PRESIDENT, Vice President (“Vice President”).¹⁸

7. The pending field audit was structured as two (2) separate sections. The first section for the Wholesale Division of COMPANY covered March 1, 2004, through February 28, 2007 (“Wholesale Audit Period”). The second section for the Retail Division of COMPANY covered August 1, 2005, through February 28, 2007 (“Retail Audit Period”).¹⁹

8. The Field Auditor computed a mark-up percentage for the off-premise 3.2 beer sales by using the retail prices of thirteen (13) products sold by the Retail Division and the most recent costs supplied by the wholesale distributors. The mark-up percentage for the thirteen (13) products was an average of nineteen percent (19%). For kegs, costs were deducted from the total cost of beer and net cost was grossed up to nineteen percent (19%) to ascertain the 3.2 off-premise retail sales for each month of the sample periods. The Division assumed that the retail prices of kegs were fully reported, which was deducted from the 3.2 beer sales taken from the daily case register summary reports. Then the net retail amount was deducted from the computed retail sales to determine the amount of the Under-Reported 3.2 beer sales. There was not a beginning inventory because the Retail Division was a new business at the beginning of the Retail Audit Period. The ending inventory was calculated by taking the January 2007 cost and dividing it by the number of cases provided by distributors.²⁰

9. On March 4, 2008, the Division issued proposed Sales Tax Assessments²¹ against the Protestants for the Combined Audit Periods, reflecting Under-Reported Taxable Sales of \$201,023.17, as follows, to-wit:

Tax Due:	\$17,356.61
Interest @ 15% through 03/31/2008:	5,855.13
Tax & Interest Due Within 30 Days:	\$23,211.74
30 Day Delinquent Penalty @ 10%:	1,735.97
Tax, Interest & Penalty Due After 30 Days:	\$24,947.71

10. On April 23, 2008, the Division received a timely filed protest to the proposed Sales Tax Assessments against the Protestants.²² The basis of the protest was stated in pertinent part as follows, to-wit:

¹⁸ Division’s Exhibit C and Testimony of President.

¹⁹ See Note 14, *supra*.

²⁰ Division’s Brief at 2.

²¹ Division’s Exhibits G-1 through G-3.

²² Division’s Exhibit H.

- A large portion of our exempt sales which have been taxed were to one business for which we had the permit # but could not locate at the time of the audit.
- The auditor sampled a few months, concluded we were not ringing up all the beer and calculated an amount of tax she thought should be due. Multiplied it times the period we've been open and came up with an unrealistic amount. When we first set up our cash register we had some codes in the wrong category, some beer would ring up as groceries. We paid tax on the groceries/beer, but the auditor didn't count those sales. She only used the beer purchases to compare to beer sales. She didn't take the entire purchases including groceries, etc. to see if we were over or under reported in other areas.²³

11. On August 20, 2008, the Division issued revised work papers²⁴ ("First Revision") to the proposed Sales Tax Assessments for the Combined Audit Periods based upon information supplied by President, reflecting Under-Reported Taxable Sales of \$103,015.61, as follows, to-wit:

Tax:	\$ 9,464.73
Interest:	3,616.71
Penalty:	<u>946.64</u>
Total:	\$14,028.08

12. Subsequent to the filing of the protest, President requested that the Division conduct a detailed audit ("Detailed Audit") of COMPANY's Retail Division. On February 6, 2009, President provided the Field Auditor with computerized monthly sales summary reports for each month of the Retail Audit Period, bank statements for January and February of 2007, and a few purchase invoices. No purchase invoices were provided for grocery or other non-beer items for the Retail Audit Period.²⁵ On March 12, 2009, the Field Auditor conducted a Detailed Audit as requested by President. The Detailed Audit was conducted as follows, to-wit:

- (A) The allowable non taxable sales (\$1,640,357.64) were taken from the taxpayer's computerized monthly sales summary reports. These sales were deducted from the total sales listed on these reports (\$2,614,688.86) to obtain the audited taxable sales (\$974,331.22). The reported taxable sales (\$961,889.00) were then compared to audited taxable sales

²³ *Id.*

²⁴ Division's Exhibit I. President provided the Division with additional records, which consisted of a valid exemption permit allowing sales of \$93,654.09 to be removed and computerized sales summary reports which revealed that \$1,857.78 of beer sales in September 2005, \$850.73 of beer sales in March 2006, and \$925.69 of beer sales in October 2006, were reported on the sales tax reports originally filed.

²⁵ Testimony of Field Auditor.

(\$974,331.22) and the difference (\$12,442.22) was entered into the Division's computer program.²⁶

(B) Using the retail prices from the computerized sales summary reports and the cost from the 3.2 beer purchase invoices provided, a mark-up was computed for each 3.2 beer item sold during each month of the Audit Period. For the packaged beer, a weighted average was then computed by dividing the number of each item sold by the total of items sold as itemized on the summary reports. This weighted average was then multiplied to the item mark-up to be applied to the cost provided by the 3.2 beer suppliers. The records did not separate the keg sales by vendors; therefore, a simple average was computed and applied to the item mark-up. This resulted in Under-Reported 3.2 beer sales (\$24,635.55) minus Ending Inventory (\$4,909.14 equals \$19,726.41). This amount along with the \$8,633.57 draft beer sales sold at home football games were entered into the Division's computer program.²⁷

(C) The Auditor computed a percentage of Under-Reported beer sales to reported taxable sales at 5.56%.²⁸ This percentage was applied to the sum of the reported sales (\$961,889.00) plus the Under-Reported Sales (\$12,442.22) minus the reported 3.2 beer sales (\$354,517.42) equals \$619,813.80 times 5.56% equals Audited Under-Reported Non-Beer Sales (\$34,461.65).²⁹ This amount was entered into the Division's computer program.³⁰

13. On March 12, 2009, the Division issued the results of the "Detail Audit"³¹ ("Second Revision") for the proposed Sales Tax Assessments reflecting Under-Reported Taxable Sales (Groceries, Non-Beer Items, and 3.2 Beer, Packaged and Kegs) as follows, to-wit:

²⁶ Division's Exhibit L.

²⁷ See 3.2 Beer Depletion Audit Work Papers filed June 30, 2009. President did not keep track of the beer sold during home football games. Kegs were tapped and beer was sold for \$1.00 a cup in the parking lot of BUSINESS. Testimony of President.

²⁸ See Note 26, *supra*. The percentage was calculated as follows, to-wit:

Total Audited Beer Sales minus Reported Beer Sales equals Under-Reported Beer Sales.
Under-Reported Beer Sales divided by Reported Beer Sales equals Percentage Under-Reported Beer Sales (\$374,243.83-\$354,517.42=\$19,726.41 divided by \$354,517.42=5.56%).

²⁹ *Id.*

³⁰ *Id.*

³¹ Division's Exhibit J.

Wholesale Division:	\$21,237.99
Retail Division:	\$12,442.22
	\$19,726.41
	\$ 8,633.57
	<u>\$34,461.65</u>
Subtotal:	\$75,263.85
Total Under-Reported Taxable Sales:	\$96,501.84
Wholesale Division:	\$ 1,948.93
Retail Division:	<u>6,880.54</u>
Total Sales Tax:	\$ 8,829.47
Interest @ 15% through 05/31/09:	4,317.32
Penalty:	<u>883.12</u>
Total Due:	\$14,029.91

14. At hearing, the Second Revision of the Wholesale Division was not at issue.³²

15. According to the Division's records from wholesale distributors, the Retail Division purchased 3.2 beer (Packaged/\$294,372.87 and Kegs/\$22,673.00) in the amount of \$317,045.87 during the Retail Audit Period.³³

16. According to the Sales Summary Reports³⁴ provided by the President, the 3.2 beer purchases for BUSINESS during the Retail Audit Period were \$313,424.16 as follows, to-wit:

³² Testimony of President.

³³ See Note 26, *supra*.

³⁴ Protestants' Exhibits A-C.

August	2005	\$ 5,244.18	January	2007	\$ 17,929.72
September	2005	16,371.15	February	2007	<u>19,342.61</u>
October	2005	14,369.95	Total 2007 Purchases		\$ 37,272.33
November	2005	14,561.25			
December	2005	<u>15,871.30</u>			
Total 2005 Purchases		\$ 66,417.83			
January	2006	\$ 14,484.70	2005 Purchases		\$ 66,417.83
February	2006	10,668.60	2006 Purchases		209,734.00
March	2006	15,981.20	2007 Purchases		<u>37,272.33</u>
April	2006	15,555.39	Total Purchases		\$313,424.16
May	2006	18,803.44			
June	2006	13,121.92			
July	2006	14,370.07			
August	2006	23,157.26			
September	2006	23,407.63			
October	2006	26,005.31			
November	2006	16,864.87			
December	2006	<u>17,313.61</u>			
Total 2006 Purchases		\$209,734.00			

For the Retail Division, there is a difference of \$3,621.73 between the Division's records and the Sales Summary Reports of the 3.2 beer purchased during the Retail Audit Period.³⁵

17. The Protestants could not provide any records to document 3.2 beer sales, which were rung up on the cash register(s) as miscellaneous sales.³⁶ The Protestants could not provide records to substantiate the estimated percentage of 3.2 beer sales reflected on the Sales Summary Reports³⁷ for the Retail Audit Period.³⁸

³⁵ It is stated in the Protestants' Brief at 1-2, "The Auditor requested all sales/purchase invoices from the Protestant for the Audit/sample period in which most were provided but all were not found by the Protestant and some of the original Beer Suppliers have since went out of business making it literally impossible to recreate the missing purchase invoices."

³⁶ Testimony of President.

³⁷ See Note 34, *supra*.

³⁸ *Id.*

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.³⁹

2. All sales of drinks sold or dispensed by hotels, restaurants, or other dispensers, and sold for immediate consumption upon the premises, are subject to sales tax.⁴⁰

3. 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.”⁴¹

4. The Division used the “Cost-Mark-Up Depletion Method” to audit the on premises sale of 3.2 beer (Packaged and Kegs). It is a reasonable method for determining the total gross receipts subject to sales.⁴²

5. Rules promulgated pursuant to the Administrative Procedures Act⁴³ are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court.⁴⁴ They 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.⁴⁵

³⁹ OKLA. STAT. ANN. tit. 68, § 221(D) (West Supp. 2007).

⁴⁰ OKLA. STAT. tit. 68, § 1354(A)(9) (West Supp. 2005).

⁴¹ OKLA. STAT. ANN. tit. 68, § 1365(F) (West 2008):

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

⁴² The Division uses the same depletion method for beverages subject to gross receipts tax. See OKLA. STAT. ANN. tit. 37, § 579 (West 2009) and OKLA. ADMIN. CODE § 710:20-5-8 (May 25, 2002).

⁴³ OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2002).

⁴⁴ OKLA. STAT. ANN. tit. 75, § 306(C) (West 2002).

⁴⁵ OKLA. STAT. tit. 75, § 308.2(C) (West 2002).

6. The tax levied by the Oklahoma Sales Tax Code⁴⁶ shall be paid by the consumer or user to the vendor⁴⁷ as trustee for and on account of this state and each and every vendor shall collect from the consumer or user the full amount of the tax or an amount equal as nearly as possible or practicable to the average equivalent thereof.⁴⁸

7. “Every person required to collect any tax imposed by [the Oklahoma Sales Tax Code], and in the case of a corporation, each principal officer thereof, shall be personally liable for the tax.”⁴⁹

8. 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.⁵⁰

⁴⁶ OKLA. STAT. ANN. tit. 68, § 1350 et seq. (West 2008).

⁴⁷ “Vendor” is defined as “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.” OKLA. STAT. tit. 68, § 1352(27)(a) (West Supp. 2005).

“Person” is defined to include “any individual” or “[any] corporation.” OKLA. STAT. tit. 68, § 1352(17) (West Supp. 2005).

⁴⁸ OKLA. STAT. tit. 68, § 1361(A) (West Supp. 2005). *See also Wal-Mart Stores, Inc. v. Oklahoma Tax Commission*, 1991 OK CIV APP 73, 817 P.2d 1281.

⁴⁹ OKLA. STAT. tit. 68, § 1361(A) (West Supp. 2005). *See* 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).

⁵⁰ OKLA. STAT. ANN. tit. 68, § 253 (West 2001) in pertinent part states as follows:

When the Oklahoma Tax Commission files a proposed assessment against corporations...for unpaid sales taxes, withheld income taxes or motor fuel taxes collected pursuant to Article 5, 6 or 7 of this title, the Commission shall file such proposed assessments against the principal officers of the corporations... The principal officers of any corporation shall be liable for the payment of any tax as prescribed by this section if such officers were officers of the corporation during the period of time for which the assessment was made....

The liability of a principal officer for sales tax, withheld income tax or motor fuel tax shall be determined in accordance with the standards for determining liability for payment of federal withholding tax pursuant to the Internal Revenue Code of 1986, as amended, or regulations promulgated pursuant to such section.

Section 253 sets out the 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.

9. In this matter, President and Vice President are the principal officers of COMPANY responsible for the collection and remittance of sales tax.⁵¹

10. Oklahoma Statutes provide for the collection of interest and penalty on delinquent tax.⁵² “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”⁵³

11. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.⁵⁴

DISCUSSION

The Protestants are in full agreement that “It shall be presumed that all sales of tangible personal property are subject to tax until the contrary is established and the burden of proving that a transaction was not a taxable sale shall be upon the person who made the sale.”⁵⁵ The Protestants contend a better method would be a comparison of costs/purchases minus inventory remaining/Sales method. If the Division initially started with purchases made by Protestants (Costs), then subtracted out current inventory and compared that to the sales summary, a more accurate amount could be determined for sales tax reporting. Even under the cost mark-up method the correct cost must be established. It is the Protestants’ position that the correct cost, inventory, or sales have not been established by the Division.

The Division responds that the use of the purchases from the wholesaler(s) and invoices provided by the Protestants and applying the “cost-mark-up” method was proper because the Protestants failed to keep proper records pursuant to Section 1365(F) of Title 68.⁵⁶ The Protestants requested a detail audit; however, the Protestants failed to keep complete records. The Protestants failed to keep invoices for August 2005 through December 2005 and 3.2 beer invoices for March 2006, October 2006, and December 2006. The Protestants did not produce any purchase invoices for the non-beer items that were purchased and sold, and bank records were not complete. The Protestants only produced bank records for January and February 2007.

The Protestants admit that the Retail Division “...could not produce all purchase receipts, however protestant can produce all bank statements and cancelled checks (See Exhibit “E”) of all beer purchases made before, during and after the audit period to validate it’s position that Beer

⁵¹ Division’s Exhibit C. *See* OKLA. STAT. ANN. tit. 68, 253 (West 2001).

⁵² OKLA. STAT. tit. 68, § 217 (West Supp. 2004).

⁵³ OKLA. STAT. tit. 68, § 217(G) (West Supp. 2004).

⁵⁴ *See Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com’n*, 1988 OK 91, 768 P.2d 359.

⁵⁵ Protestants’ Brief at 2, citing OKLA. ADMIN. CODE §§ 710:65-3-30 and 33.

⁵⁶ *See* Note 41, *supra*.

Sales cannot exceed Beer purchases and that all retail sales made by Protestant were accounted for on the Stores Sales Summary Report (See Exhibit “D”) including all Beer sales.”⁵⁷

The problem with the Protestants’ position is that proper records were not maintained during the Retail Audit Period. The President testified that some 3.2 beer sales were rung up on the cash register under the “miscellaneous” category (a problem which has now been fixed), but the Protestants cannot provide any documentation to substantiate their claim. The Protestants did submit Sales Summary Reports, which estimate the percentage of 3.2 beer for each month of the Retail Audit Period rung up as miscellaneous. The veracity of the President’s testimony that some 3.2 beer was rung up as miscellaneous is not at issue, but President’s testimony standing alone is not enough to meet the Protestants’ burden of proof that the Division’s calculation of Under-Reported Taxable Sales of 3.2 beer (\$28,359.98) for the Retail Audit Period is incorrect and in what respects.

The Protestants failed to provide any records whatsoever as to non-beer (“Non-Beer”) items sold by the Retail Division during the Retail Audit Period. The Division calculated the Non-Beer items as follows, to-wit:

Sales Per Protestants Summary	\$2,614,688.86
Audited Non-Taxable Sales	<u>1,640,357.64</u>
Audited Taxable Sales	\$ 974,331.22
Sales Per Reports	<u>961,889.00</u>
Under-Reported Sales (Represents All Sales)	\$ 12,442.22

The Auditor then computed a percentage of Under-Reported 3.2 beer sales to Reported Taxable Sales at 5.56%⁵⁸ to determine Audited Under-Reported Sales for Non-Beer items. The Auditor calculated Audited Under-Reported Sales for Non-Beer items as follows, to-wit:

Sales Per Reports	\$ 961,889.00
Under-Reported Sales	12,442.22
Beer Sales Reported	<u>(354,517.42)</u>
Subtotal	\$ 619,813.80
Times Percentage of Under-Reported 3.2 Beer Sales	<u>5.56%</u>
Audited Under-Reported Non-Beer Sales	\$ 34,461.65

⁵⁷ Protestants’ Brief at 2.

⁵⁸ See Note 28, *supra*.

The Auditor calculated the total Under-Reported Taxable Sales as follows, to-wit:

Under-Reported 3.2 Beer Sales	\$ 19,726.41
Beer Sold at Football Games	<u>8,633.57</u>
Total Under-Reported 3.2 Beer Sales	\$ 28,359.98
<i>Under-Reported Sales</i>	<i>12,442.22</i>
Audited Under-Reported Non-Beer Sales	<u>34,461.65</u>
Retail Division Under-Reported Taxable Sales	\$ 75,263.85

It appears from the Division's calculation that the figure for Under-Reported Sales (\$12,442.22) should not have been added in to calculate the total for Under-Reported Taxable Sales since this figure was added to the Sales Per Reports to determine the amount of Audited Under-Reported Non-Beer Sales (\$34,461.65).

The Under-Reported Taxable Sales should be revised as follows, to-wit:

Under-Reported 3.2 Beer Sales	\$ 19,726.41
Beer Sold at Football Games	<u>8,633.57</u>
Total Under-Reported 3.2 Beer Sales	\$ 28,359.98
Audited Under-Reported Non-Beer Sales	<u>34,461.65</u>
Retail Division Under-Reported Taxable Sales	\$ 62,821.63
Wholesale Division Under-Reported Taxable Sales	\$ <u>21,237.99</u>
Revised Under-Reported Taxable Sales	\$ 84,059.62

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 (Second Revision) against the Protestants should be sustained in part and denied in part.

It is further ORDERED that the proposed Sales Tax Assessments (Second Revision) be adjusted in accordance with the findings of fact and conclusions of law herein and that the revised amounts, inclusive of accrued interest and penalty, should be fixed as the amounts due and owing.

ADDENDUM TO FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

The *Findings, Conclusions and Recommendations* issued on July 16, 2009, in the above styled and numbered cause, comes on for consideration of a recommendation as to the amount of the deficiency which should be confirmed by an order of the Tax Commission.

The Division, as directed by the *Findings, Conclusions and Recommendations*, revised the proposed sales tax assessments and provided notice of the revisions to the Protestants. The Protestants have not challenged the revisions proposed by the Division.

Upon consideration of the *Findings, Conclusions and Recommendations* and the revisions to the proposed assessments, the undersigned finds that the following findings should be added to and incorporated in the *Findings, Conclusions and Recommendations*:

1. On August 11, 2009, the Division filed a Notice of Sales Tax Adjustment submitting work papers for the revised sales tax assessments.

2. The proposed sales tax assessments were revised as follows:

Tax:	\$ 7,704.70
Interest through 09/30/09:	4,147.87
Penalty:	<u>770.67</u>
Total:	\$12,623.24

3. The revisions comply with the recommendations set forth in the *Findings, Conclusions and Recommendations* issued on July 16, 2009.

4. The Protestants were provided notice of the revisions.

5. The Protestants did not file a response to the revisions.

The undersigned further finds that the following ORDER should be added to and incorporated in the *Findings, Conclusions and Recommendations*:

It is further ORDERED that the revised sales tax, inclusive of accrued interest should be fixed as the amount due and owing.

THEREFORE, the *Findings, Conclusions and Recommendations* issued on July 16, 2009, are amended to include and incorporate the above and foregoing findings of fact and ORDER.

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.