JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2010-05-04-02 / NON-PRECEDENTIAL**
ID: **P-08-132-H**
DATE: **MAY 4, 2010**
DISPOSITION: **SUSTAINED IN PART, DENIED IN PART**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROTESTANT ("Protestant") appears 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 November 21, 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 November 26, 2008, a letter was mailed to Counsel stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-08-132-H. The letter also advised 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.*[3]

On December 4, 2008, OTC ATTORNEY filed an Entry of Appearance as Counsel of record for the Division.

On January 21, 2009, the Notice of Prehearing Conference was mailed to Counsel, setting the prehearing conference for February 5, 2009, at 9:30 a.m. Pursuant to agreement of the parties, the time was changed to 1:30 p.m.

On February 5, 2009, at 1:30 p.m., the prehearing conference was held at the agreed time with Counsel in attendance. On February 9, 2009, a letter was mailed to Counsel directing them to file a status report on or before February 19, 2009. On February 19, 2009, the Status Report was filed advising the Protestant was to take the deposition of AUDITOR, Field Auditor, Field Audit Section of the Compliance Division, Oklahoma Tax Commission, and requesting a status report be filed in forty-five (45) days to allow time for the deposition. On February 23, 2009, Counsel was advised by letter a status report was to be filed on or before April 6, 2009.

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[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] *Id.*

On April 6, 2009, the Status Report was filed advising the parties were still waiting for the deposition of AUDITOR to be taken. On April 7, 2009, Counsel was advised by letter a status report was to be filed on or before May 6, 2009.

On May 6, 2009, the Status Report was filed advising the deposition of AUDITOR had been taken and requesting this matter be set for hearing. On May 8, 2009, Counsel was advised by letter this matter had been set for hearing on July 8, 2009, at 9:30 a.m., with position letters or memorandum briefs due on or before July 1, 2009. By letter dated May 13, 2009, filed with the clerk of the court ("Clerk"), ATTORNEY requested the hearing be reset due to a scheduling conflict. On May 19, 2009, a copy of a letter from ATTORNEY to OTC ATTORNEY was filed with the Clerk confirming Counsel had agreed to a new hearing date of July 16, 2009. On May 18, 2009, a letter was mailed to Counsel advising the hearing set for July 8, 2009, at 9:30 a.m. had been stricken from the docket and reset for July 16, 2009, at 9:30 a.m., with position letters or memorandum briefs due on or before July 9, 2009.

On July 6, 2009, the Protestant's Position Statement was filed with the Clerk, with copies of documents attached thereto. On July 9, 2009, the Brief of the Compliance Division was filed with the Clerk, with Exhibits A through N attached thereto. The Procedural History from July 10, 2009, through October 18, 2009, has been omitted herein.

On October 19, 2009, a Joint Motion for Continuance was filed with the Clerk. The parties were attempting to resolve this matter without the necessity of a hearing. On October 21, 2009, an Order Granting Continuance was issued resetting the hearing for November 18, 2009, at 1:30 p.m.

On November 18, 2009, at 1:30 p.m., a closed hearing[4] was held as scheduled. The Protestant called one (1) witness, MEMBER, a Member of the Protestant's business, who testified on its behalf as to the Protestant's business practices, the Protestant's application for manufacturer sales tax exemption permits, and the field audit conducted by the Division. The Protestant's Exhibits 1 through 4 were identified, offered, and admitted into evidence. The Division called three (3) witnesses. The Division's first witness, AUDITOR, Field Auditor, Field Audit Section of the Compliance Division, Oklahoma Tax Commission, testified about the processing of the Protestant's application for manufacturer sales tax exemption permits. The Division's second witness, SUPERVISOR, Auditor Supervisor, Field Audit Section, Compliance Division, Oklahoma Tax Commission, testified as the custodian of the Division's records. The Division's third witness, AUDITOR 2, Field Auditor, Field Audit Section of the Compliance Division, Oklahoma Tax Commission, testified about the field audit, the manufacturer sales tax exemption permits, and as custodian of the Division's records. The Division's Exhibits A through E, H through O, and Q were identified, offered, and admitted into evidence. At the conclusion of the hearing, the record was held open thirty (30) days for the Division to file "Revised" Work Papers pursuant to Division's Exhibit O. On November 19, 2009, a letter was mailed to Counsel memorializing the announcement made at hearing and advising upon the Division's filing of the Revised Work Papers, the record in this matter would be closed and the case submitted for decision.

[4] The Protestant, through ATTORNEY, invoked its right to a confidential hearing as provided by OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2010).

On December 1, 2009, the Division filed its Revised Work Papers with the Clerk. A letter was mailed to Counsel advising the record in this matter was closed and the case was submitted for decision on December 2, 2009.

On December 3, 2009, a letter was mailed to Counsel directing the Division to file, on or before December 11, 2009, a list of the invoices specified on Division's Exhibit O which were removed from the Revised Work Papers. On December 9, 2009, the Division filed a list of the invoices which were removed from Division's Revised Work Papers. However, the record was not re-opened and the filing has been disregarded.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, the Protestant's Position Statement, the Brief of the Compliance Division, and the Division's Revised Work Papers, the undersigned finds:

1. The Protestant was registered with the Oklahoma Secretary of State effective February 16, 2005.[5] LLC was registered with the Oklahoma Secretary of State effective May 20, 2004.[6]

2. The Protestant did not have a sales tax permit or manufacturer sales tax exemption permits ("MSEPS") until after the Division's field audit was completed by AUDITOR 2.[7] The Protestant's sales were reported using the sales tax permit XXX of LLC, which ceased doing business as of December 31, 2007.[8]

3. MEMBER'S SPOUSE and MEMBER also have a farming operation with an Agricultural Exemption Permit (SMX No. ZZZ).[9]

4. The Protestant's purchases (which are the subject of the proposed sales tax assessment) were made by using the resale permit of LLC XXX and/or the MEMBERS' Agricultural Exemption Permit (SMX No. ZZZ).[10]

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[5] MEMBER testified the Protestant began business sometime in October 2002 or October 2003.

[6] The Administrative Law Judge is taking judicial notice of the Oklahoma Secretary of State's website to complete the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999).

[7] Testimony of MEMBER and AUDITOR 2.

[8] Testimony of MEMBER. MEMBER testified she did not know a separate permit was needed for the Protestant, so she used LLC'S permit.

[9] Testimony of MEMBER and AUDITOR 2. The MEMBERS' farming operation uses one and seven/eights inch (1⅞″) and four inch (4″) metal tubing to build fence and construct chicken houses and frames for the shading of livestock. A small amount of the one inch (1″) metal tubing is used on the fencing and gates for the farming operation, but MEMBER could not identify any line items on the Division's Work Papers which were specifically used for the farming operation.

5. Protestant is in the business of producing "cut stone and stone products" (which are extracted from a quarry) and manufacturing "metal crates,"[11] using one inch (1″) square metal tubing, which are then primarily sold to wholesalers for resale.[12] The Protestant has three (3) locations with a mailing address of MAILING ADDRESS and physical locations as follows, to-wit:

Location One (1)
LOCATION 1 ADDRESS

Location Two (2)
LOCATION 2 ADDRESS

Location Three (3)
LOCATION 3 ADDRESS

6. On February 23, 2007,[13] the Tax Commission received a Business Registration Application ("Application") from the Protestant's CPA. The Members of the Protestant are MANAGER MEMBER (Manager Member) and MEMBER. The Application reflects the Protestant is the manufacturer of "pallets for rock shipment" for the location at LOCATION 2 and the Application requested a manufacturer sales tax exemption permit ("MSEP").[14]

7. On March 7, 2007, the Tax Commission received an "Amended" Application from the Protestant's CPA to "Amend Original app. to add Rock Manufacture and Correct Name and other answers."[15]

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[10] *Id.* MEMBER testified that LLC would then invoice the Protestant for the purchases made on behalf of the Protestant without charging sales tax to "balance the books." *See* Protestant's Exhibit 4, 0113 et seq. AUDITOR 2 testified that he did not see the invoices from LLC to the Protestant when he conducted the field audit.

[11] The metal crates are manufactured using one inch (1″) metal tubing. The metal tubing is cut to size using saws and then welded. Most of the Protestant's customers are stone yards (wholesalers) which charge sales tax on the metal crates when they are re-sold to customers.

[12] Protestant's Exhibits 1-2. Testimony of MEMBER. The Protestant also makes some sales to "swimming pool companies," but sales tax is collected and remitted on these sales. The stone is quarried using heavy equipment to extract the stone and cut it to sizes which are stacked horizontally on wooden pallets using a forklift and wrapped with chicken wire. The larger slabs of stone are stacked vertically on wooden pallets using forklifts, enclosed by a metal crate (manufactured by Protestant), wrapped with a chain, and locked.

[13] *See* Tax Commission Mailroom Date Stamp on page five (5) of Division's Exhibit B.

[14] Division's Exhibit B. The Application reflects the Protestant began manufacturing January 1, 2007. The mailing address of MAILING ADDRESS is used by the MEMBERS for their home and businesses, including the Protestant. Testimony of MEMBER.

[15] Division's Exhibit A.

8. On July 27, 2007, AUDITOR, a Field Auditor for the Division, was assigned to review the Protestant's "Original" and "Amended" Applications for MSEPS.[16] AUDITOR mailed an MSEP Determination Questionnaire ("Questionnaire") to the Protestant.[17]

9. On September 27, 2007, AUDITOR sent another Questionnaire to MANAGER MEMBER by facsimile requesting the Questionnaire be completed and returned to AUDITOR with copies of the Protestant's last two (2) months utility bills.[18]

10. On November 6, 2007, AUDITOR mailed a letter to the Protestant stating several attempts had been made to contact the Protestant regarding the Applications and no response had been forthcoming. The letter informed the Protestant the Applications would be denied if there was no response in thirty (30) days.[19]

11. On November 27, 2007, AUDITOR received the Questionnaire from MEMBER by facsimile. The Questionnaire reflects the Protestant manufactures "Metal Crates."[20]

12. On November 27, 2007, AUDITOR and MEMBER discussed the Questionnaire by telephone. AUDITOR noted on the bottom of the Questionnaire he had "Talked to TP on phone 11-27-07. TP said didn't need MSEP at this time. If needed will apply at that time."[21]

13. On December 4, 2007, the Business Tax Section of the Division mailed a letter to the Protestant at MAILING ADDRESS advising on November 27, 2007, AUDITOR had determined the Protestant did not qualify for an MSEP.[22] The letter also informed the Protestant if it did not agree with the Division's determination a hearing could be requested to show cause why the permit should be issued.[23]

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[16] AUDITOR testified the Application is usually processed by the Taxpayer Assistance Division, but due to a backlog of MSEP Applications, Field Auditors in the Division were assigned a list of pending applications to review.

[17] Testimony of AUDITOR.

[18] *Id.* Division's Exhibits C-D.

[19] *Id.* Division's Exhibit E.

[20] Division's Exhibit F.

[21] Protestant's Exhibit 3. There was conflicting testimony as to what was discussed during the course of the telephone conversation. MEMBER testified AUDITOR stated the Protestant only needed a resale permit, not an MSEP. AUDITOR'S recollection of the telephone conversation was not the same as MEMBER'S .

[22] AUDITOR testified his determination was based upon the Questionnaire and the Protestant's Applications were not considered in his decision to deny the Applications.

[23] Division's Exhibit Q. Testimony of SUPERVISOR. MEMBER testified she did not remember receiving the letter and the letter was not contained in the Protestant's records.

14. Subsequent to the Division's denial of the Protestant's Applications, AUDITOR 2 was assigned a Field Audit of the Protestant for July 1, 2005, through March 31, 2008 ("Audit Period").[24]

15. AUDITOR 2 conducted a "Detail Audit" of the Protestant for the Audit Period. AUDITOR 2 first scheduled all the purchase invoices which did not have sales tax. Second, AUDITOR 2 removed all items that were exempt from sales tax and removed all the items which were determined to be used for the MEMBERS' farming operation, resulting in the proposed work papers for the sales tax field audit, which includes "only purchases" made by the Protestant using the resale permit of LLC (XXX) and/or the MEMBERS' Agricultural Exemption Permit (SMX No. ZZZ).[25]

16. On July 23, 2008, the Division advised the Protestant by letters that it had been determined to be a manufacturer for its three (3) locations and that MSEPS had been issued with an effective date of "April 1, 2008." Locations One (1) and Three (3) were issued with a North American Industrial Classification System ("NAICS") Code of 327991 (Cut Stone and Stone Product Manufacturing) and Location Two (2) was issued a NAICS Code of 423830 (Industrial Machinery and Equipment Merchant Wholesalers).[26]

17. The Division issued MSEPS to the Protestant for its three (3) locations with an effective date of April 3, 2007.[27]

18. On August 15, 2008, the Division mailed a proposed sales tax assessment[28] against the Protestant for the Audit Period as follows, to-wit:

Tax Due:	$33,034.85
Interest @ 15% through 08/31/08:	8,081.64
Tax & Interest due within 30 Days:	$41,116.49
30 day delinquent Penalty @ 10%:	3,303.71
Tax, Interest & Penalty due after 30 Days:	$44,420.20

19. On October 14, 2008, the Division received by facsimile a timely filed protest to the proposed assessment.[29]

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[24] Testimony of AUDITOR 2.

[25] *Id.* Division's Exhibit H.

[26] Division's Exhibit K-M. The effective date on the letters is incorrect. The Administrative Law Judge is taking judicial notice of the NAICS website at http://www.naics.com to complete the factual details of this matter. *See* Note 6, *supra.*

[27] Division's Exhibit N.

[28] Division's Exhibit I. AUDITOR testified the Members of the Protestant were not assessed. No explanation was offered as to why the Members of the Protestant were not assessed.

[29] Division's Exhibit J.

20. At hearing, the Protestant, through MEMBER, agreed that the two (2) following line items on the Division's Work Papers[30] were sales taxable:

Name	Date	Invoice#	Items	Taxable
CARPET CO.	06/11/07	874	carpet	$2,191.37
AUTO REPAIR CO.				
Repair	01/30/08	None	& parts	$1,274.42
			Total	$3,465.79

21. None of the Protestant's operations are conducted within the boundaries of any municipality, but some of the line items on the Division's Work Papers were purchased at vendors located within a municipality's boundaries.[31]

22. Subsequent to the Field Audit and the issuance of the Protestant's MSEPS, the Division prepared a work sheet of line items which the Division agreed should be removed from the assessment. The Division removed line items for Location Two, which manufactures the "Metal Crates," using the MSEP effective date of April 3, 2007.[32] The Division removed line items for Locations One and Three, which produces "Cut Stone and Stone Products," using July 1, 2007, which is the effective date of Section 1359(15) of Title 68.[33]

23. On December 1, 2009, the Division filed its Revised Work Papers based upon Division's Exhibit O,[34] as follows, to-wit:

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[30] Division's Exhibit H, pages 20 and 25. *See* Protestant's Exhibit 4, pages (0134 and 0393).

[31] Testimony of MEMBER and AUDITOR 2. *See* Division's Exhibit H.

[32] Division's Exhibit O.

[33] *See* Note 49, *infra.*

[34] Division's Exhibit O indicates the following were to be removed from the Original Work Papers:

Agricultural Exempt	$ 58,338.45
Pallets Starting 04/03/07	35,624.72
Stone Quarry Starting 07/01/07	7,590.00
Subtotal	$101,553.17
Questionable	4,964.68
Total	$106,517.85

Original Taxable Sales	$551,377.37[35]
Revised Taxable Sales	$468,435.66
Reduction in Taxable Sales	$ 82,941.71
Sales Tax:	$ 28,680.45
Interest through 01/31/10	13,540.69
Penalty:	2,868.30
Total:	$ 45,089.44

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[36]

2. Every person desiring to engage in a business within this state who will regularly and continuously make sales subject to taxation from an established place of business, will make taxable seasonal sales, or make taxable sales through peddlers, solicitors or other salesmen who have no established place of business in Oklahoma must secure from the Commission every three (3) years a written sales tax permit for a fee of Twenty Dollars ($20.00) prior to engaging in such business in this state. Each such person shall file with the Commission an application for a permit to engage in or transact business in this state, setting forth such information as the Commission may require. The application shall be signed by an owner or authorized representative of the business, and, in the case of a corporation, by an officer thereof.[37]

3. It should also be noted that it is fundamental law that all persons are charged with knowledge of the laws that affect them.[38]

4. The gross proceeds derived from sales of goods, wares, merchandise, and telecommunications services by vendors, for resale, to persons having a valid sales tax permit who are regularly engaged in reselling the articles or services purchased are exempt from sales tax. If the purchaser is an Oklahoma resident, he must provide the vendor with his Oklahoma sales tax permit number if the sale is made in Oklahoma. In addition to furnishing his sales tax permit number to the vendor, the purchaser must certify in writing to the vendor that said purchaser is engaged in the business of reselling the articles purchased. Failure to so certify, or to falsely certify, with the knowledge that the items purchased are not for resale, shall be

[35] *See* Division's Exhibit H. The Division's Revised Work Papers indicates Taxable Sales were reduced $82,941.71 and does not account for the discrepancy with the amounts listed on Division's Exhibit O.

[36] OKLA. STAT. tit. 68, § 221(D) (West 2002).

[37] OKLA. ADMIN. CODE § 710:65-9-1(a) (June 25, 2009).

[38] OTC Precedential Order No. 2006-03-23-07 (March 23, 2006). *See Ponder v. Ebey*, 1944 OK 271, 152 P.2d 268.

sufficient grounds upon which the Commission may cause the purchaser's sales tax permit to be canceled.[39]

5. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Sales Tax Code").[40] The Sales Tax Code levies "upon all sales,[41] not otherwise exempted…an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds[42] of each sale of…tangible personal property…," and specifically, the sale of "[n]atural or artificial gas,…."[43] Oklahoma Statutes authorize incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.[44]

6. "Manufacturing" means and includes the activity of converting or conditioning tangible personal property by changing the form, composition, or quality of character of some existing material or materials, including natural resources, by procedures commonly regarded by the average person as manufacturing, compounding, processing or assembling, into a material or materials with a different form or use. *"Manufacturing" does not include extractive* industrial *activities such as* mining, *quarrying*, logging, and drilling for oil, gas and water, nor oil and gas field processes, such as natural pressure reduction, mechanical separation, heating, cooling, dehydration and compression.[45] (Emphasis added.)

7. "Manufacturing operation" means the designing, manufacturing, compounding, processing, assembling, warehousing, or preparing of articles for sale as tangible personal property. A manufacturing operation begins at the point where the materials enter the

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[39] OKLA. ADMIN. CODE § 710:65-13-200 (June 25, 2001). *See* OKLA. STAT. ANN. tit. 68, § 1365(D) (West 2008).

[40] OKLA. STAT. ANN. tit. 68, § 1350 et seq. (West 2008).

[41] OKLA. STAT. ANN. tit. 68, § 1352(22)(a) and (b) (West 2008):

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

[42] OKLA. STAT. ANN. tit. 68, § 1352(12) (West 2008).

[43] OKLA. STAT. ANN. tit. 68, § 1354(A)(1) and (2) (West 2008). *See* OKLA. ADMIN. CODE § 710:65-13-120.

[44] OKLA. STAT. ANN. tit. 68, § 1370 et seq. (West 2008). *See* OKLA. STAT. tit. 68, § 2701 (West Supp. 2006).

[45] OKLA. STAT. tit. 68, § 1352(13) (West Supp. 2004).

manufacturing site and ends at the point where a finished product leaves the manufacturing site. "Manufacturing operation" does not include administration, sales, distribution, transportation, site construction, or site maintenance. *Extractive activities* and field processes *shall not be deemed to be a part of a manufacturing operation even when performed by a person otherwise engaged in manufacturing.*[46] (Emphasis added.)

8. "Manufacturing site" means a location where a manufacturing operation is conducted, including a location consisting of one or more buildings or structures in an area owned, leased, or controlled by a manufacturer.[47]

9. Specifically exempted from the Oklahoma Sales Tax Code[48] are "Sales of tangible personal property and services used or consumed in all phases of the *extraction* and manufacturing of crushed stone and sand, including but not limited to site preparation, dredging, overburden removal, explosive placement and detonation, onsite material hauling and/or transfer, material washing, screening and/or crushing, product weighing and site reclamation."[49] (Emphasis added.)

10. Exempted from the levy of sales tax are "[s]ales of goods, wares, merchandise, tangible personal property, machinery and equipment to a manufacturer for use in a manufacturing operation."[50]

11. "Tangible personal property" means personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses. "Tangible personal property" includes electricity, water, gas, steam and prewritten computer software.[51]

12. Tax exemptions, deductions, and credits depend entirely on legislative grace and are strictly construed against the exemption, deduction, or credit.[52]

13. The Supreme Court of Oklahoma has recognized that Section 1359.2 is a "mandatory procedural statute," which must be followed to obtain the statutory tax exemption.[53]

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[46] OKLA. STAT. tit. 68, § 1352(14) (West Supp. 2004).

[47] OKLA. STAT. tit. 68, § 1352(15) (West Supp. 2004).

[48] OKLA. STAT. ANN. tit. 68, §§ 1350 et seq. (West 2008).

[49] OKLA. STAT. ANN. tit. 68, § 1359(15) (West 2008).

[50] OKLA. STAT. ANN. tit. 68, § 1359(1) (West 2008).

[51] OKLA. STAT. ANN. tit. 68, § 1352(24) (West 2008).

[52] *TPQ Inv. Corp. v. State ex rel. Oklahoma Tax Com'n*, 1998 OK 13, ¶8, 954 P.2d 139.

[53] *Apache Corp. v. Oklahoma Tax Commission*, 2004 OK 48, 98 P.3d 1061. *See* OKLA. STAT. ANN. tit. 68, § 1359.2 (West 2008).

14. Estoppel generally does not apply against the state acting in its sovereign capacity because of the unauthorized acts of its officers,[54] or because of mistakes or errors of its employees.[55] Application of estoppel is not allowed against state, political subdivisions, or agencies, unless the interposition of estoppel would further some principal of public policy or interest.[56] Where there is no power to act, a public official cannot bind a government entity even if he or she mistakenly or falsely asserts such authority.[57]

15. When the Tax Commission issues a proposed assessment against a limited liability company for unpaid sales tax, the Commission shall file assessments against the members or managers of the limited liability company personally liable for the tax. The members or managers of the limited liability company shall be liable for the payment of sales tax during the period of time for which the assessment is made.[58]

16. The Tax Commission shall also collect interest at the rate of one and one-quarter percent (1¼%) per month from the date prescribed by state law.[59]

17. If any tax due under any state tax law is not paid within thirty (30) days after such tax becomes delinquent, a penalty of ten percent (10%) on the total amount of tax due and delinquent shall be added thereto, collected and paid.[60]

18. The rules promulgated pursuant to the Administrative Procedures Act are presumed to be valid and binding on the persons they affect and have the force of law.[61]

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[54] *State ex rel. Cartwright v. Dunbar*, 1980 Ok 15, 618 P.2d 900.

[55] *Id. See State, ex rel. Oklahoma Tax Com'n v. Emery*, 1982 OK CIV APP 13, 645 P.2d 1048.

[56] OTC Order No. 2003-12-16-06 (December 16, 2006). *See Burdick v. Independent School Dist. No. 52 of Oklahoma County*, 1985 OK 49, ¶5, 702 P.2d 48:

> Generally, Oklahoma jurisprudence does not allow the application of estoppel against the state, the political subdivisions or agencies, unless its interposition would further some principle of public policy or interest. The rationale for recognizing a government shield from estoppel is to enable the state to protect public policies and interests from being jeopardized by judicial orders preventing full performance of legally-imposed duties.

[57] *Hiland Dairy Foods Co., LLC v. Oklahoma Tax Com'n*, 2006 OK CIV App 68, ¶ 11, 136 P.3d 1072, *citing Indiana Nat'l Bank v. State Dept. of Human Services*, 1993 OK 101, 857 P.2d 53.

[58] *See* OKLA. STAT. ANN. tit. 68, § 253 (West 2001) and OKLA. ADMIN. CODE § 710:65-5-5(d) (May 15, 2006). *See* Note 28, *supra.*

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

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

[61] OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2002). *See Toxic Waste Impact Group, Inc. v. Leavitt*, 1988 OK 20, 755 P.2d 626.

19. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[62] A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[63]

PROTESTANT'S FIRST CONTENTION

The Protestant's first contention is it relied to its detriment upon the statement made by AUDITOR that the Protestant did not need an MSEP, and as a result purchases made by the Protestant were included in the proposed assessment.

The Protestant's argument on this issue is not supported by case law. Estoppel generally does not apply against the state acting in its sovereign capacity because of the unauthorized acts of its officers,[64] or because of mistakes or errors of its employees.[65] The Protestant's detrimental reliance argument is also not supported by the record. MEMBER testified the Protestant began business sometime in October 2002 or October 2003. The Protestant was registered with the Oklahoma Secretary of State as an LLC effective May 20, 2004. The Protestant made purchases of tangible personal property exempt from sales taxes, which were not for resale, using LLC'S resale permit and/or the MEMBERS' Agricultural Exemption Permit. MEMBER did not discuss the Protestant's need for any permit until her conversation with AUDITOR in November 2007, and the Division's post-audit issuance of the MSEPS to the Protestant based upon the Original and Amended Applications renders the Protestant's argument as a moot point.

A secondary issue arose during the course of the hearing concerning the effective date of the MSEPS. The Division was not sure how the effective date of the MSEPS was determined, but SUPERVISOR'S testimony was the Tax Commission's standard practice was to issue an MSEP based upon the date the application was received, if known and if not known, the date of the application.

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

> In all administrative proceedings, unless otherwise provided by law, the burden of proof shall be upon the protestant to show in what respect the action or proposed action of the Tax Commission is incorrect. If, upon hearing, the protestant fails to prove a prima facie case, the Administrative Law Judge may recommend that the Commission deny the protest solely upon the grounds of failure to prove sufficient facts which would entitle the protestant to the requested relief.

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

> . . . "preponderance of the evidence" means the evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which as a whole shows that the fact sought to be proved is more probable than not.

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

[64] *State ex rel. Cartwright v. Dunbar*, 1980 Ok 15, 618 P.2d 900.

[65] *Id. See State, ex rel. Oklahoma Tax Com'n v. Emery*, 1982 OK CIV APP 13, 645 P.2d 1048.

The Protestant's Original and Amended Applications were processed on April 2, 2007, and the MSEPS were issued with an effective date of April 3, 2007. However, the Original Application is dated February 21, 2007, and has a Tax Commission Mailroom Date Stamp reflecting the Original Application was received on February 23, 2007.[66]

The Division's position is that the two (2) MSEPS for "Cut Stone and Stone Products" are not effective until July 1, 2007, the effective date of Section 1359(15) of Title 68. Based upon a review of the record, this point is not in dispute and will not be discussed herein.[67]

The Supreme Court of Oklahoma has recognized that Section 1359.2 is a "mandatory procedural statute," which must be followed to obtain the statutory tax exemption.[68] None of the Protestant's purchases for Location Two (2) made prior to the "correct" effective date of the MSEP (February 23, 2007) are exempt from sales tax. None of the Protestant's purchases for Locations One (1) and Three (3) made prior to July 1, 2007, are exempt from sales tax.

PROTESTANT'S SECOND CONTENTION

The Protestant's second contention is the Division has included items related to the MEMBERS' farming operation which are exempt from taxation. In addition to MEMBER'S testimony, the Protestant's Exhibit 4 was identified, offered, and admitted into evidence. Protestant's Exhibit 4 is a compilation of invoices, billing statements, and sales tax reports (0001 through 0486).

The line items on the Revised Work Papers at issue include, but are not exclusive of, purchases from vendors such as VENDOR 1, VENDOR 2, and VENDOR 3. The Protestant did not provide individual invoices from these vendors for AUDITOR 2 to review to determine what, if any, of the purchases were for the MEMBERS' farming operation, but instead provided Statements, which summarized monthly purchases during the Audit Period. As to other vendors, such as VENDOR 4 and VENDOR 5, the Protestant did not introduce any additional evidence that the Division has included purchases attributable to the MEMBERS' farming operation. The Protestant has failed to meet its burden of proof that the Division has included line items on the Revised Work Papers which relate to the MEMBERS' farming operation (except as hereinafter noted).

Based upon a review of the record, and in particular the Division's Revised Work Papers and Protestant's Exhibit 4, a number of line items should be adjusted or removed as set forth hereinafter. Due to the large volume of line items, invoices are in date order corresponding to the Division's Revised Work Papers and cross-referenced to Protestant's Exhibit 4.

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[66] *See* Note 13, *supra*.

[67] *See* Note 49, *supra*.

[68] *Apache Corp. v. Oklahoma Tax Commission*, 2004 OK 48, 98 P.3d 1061.

DATE	INVOICE#	TOTAL	DELIVERY	DUPLICATE			
FARM	ADJUSTED	PG#					
			CHARGE				
EXEMPT	AMOUNT						
			SEPARATELY				
			STATED[69]				

[69] OKLA. STAT. tit. 68, § 1352(12) (West Supp. 2003):

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:
   (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) credit for any trade-in.

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,

c. Such term shall include consideration received by the seller from third parties if:
   (1) the seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale,
   (2) the seller has an obligation to pass the price reduction or discount through to the purchaser,
   (3) the amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser, and
   (4) one of the following criteria is met:
      (a) the purchaser presents a coupon, certificate or other documentation to the seller to claim a price reduction or discount where the coupon, certificate or documentation is authorized, distributed or granted by a third party with the understanding that the third party will reimburse any seller to whom the coupon, certificate or documentation is presented,
      (b) the purchaser identifies himself or herself to the seller as a member of a group or organization entitled to a price reduction or discount; provided, a "preferred customer" card that is available to any patron does not constitute membership in such a group, or
      (c) the price reduction or discount is identified as a third-party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate or other documentation presented by the purchaser;

				(5.03) STS PAID (19.16) STS PAID			

				DUPLICATES OF 0063 AND 0064			

				(0.34) STS PAID			

				INVOICE IS FOR 175.33. NO NOTE OF MULTIPLE INVOICES. (128.19)			
				DUPLI			

				CATE OF 0254			
				FREIGHT NOT CHARGED. INVOICE ERROR. SHOULD HAVE			

				BEEN FOR 100 PIECES NOT 1,000 PIECES. CREDIT FOR (11,772.00). 0386-03			

				87.			
				DUPLICATE (PAYMENT) OF 0309 THRU 0312			
				DUPLI			

				CATE OF 0008			
				DUPLICATE (PAYMENT) OF 0313 THRU 0317			
				INVOI			

				CE IS FOR 5,635.20.			
				INVOICE IS FOR 4,194.74.			
				EARLY PAYMENT			

				DISCOUNT ALLOWED ON ALL OTHER INVOICES (5.20)			

				DUPLICATE OF 0004			

				AMOUNT OF INVOICE IS 540.00. DUPLICATE OF 0335			
				INVOICE IS F			

				OR 200.41. NO NOTE OF MULTIPLE INVOICES. (137.09)			
				(7.43) STS PAID			
				DUPL			

				ICATE OF 0007, 0003. 0009 & 0004. (6, 781.33)			
				DUPLICATE OF 0337 (720.00			

				)			
				LINE ITEM INCORRECT. INVOICE IS FOR 573.00. (200.00)			

				LABOR SEPARATELY STATED (400.00)			

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the protest should be sustained in part and denied in part.

It is further ORDERED that the Revised Work Papers should 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.[70]

ADDENDUM TO FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

The *Findings, Conclusions and Recommendations* issued on January 25, 2010, 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 February 4, 2010, the Division, as directed by the *Findings, Conclusions and Recommendations,* filed a Notice of Sales Tax Adjustment ("1st Adjustment"), revising the proposed Sales Tax Assessment and provided notice of the revision to Counsel. On February 10,

[70] *See* Pages 18-22.

2010, a letter was mailed to Counsel advising the 1st Adjustment still included VENDOR 5 Invoice No. 114004, dated March 29, 2006, in the amount of $2,199.36, and should be removed. On February 11, 2010, the Division filed a Notice of Sales Tax Adjustment ("2nd Adjustment") as directed.

Upon consideration of the *Findings, Conclusions, and Recommendations* and the 2nd Adjustment to the proposed assessment, the undersigned finds that the following findings should be added to and incorporated in the *Findings, Conclusions and Recommendations*:

1. On February 11, 2010, the Division filed a 2nd Adjustment submitting work papers for the proposed Sales Tax Assessment, as directed in the *Findings, Conclusions and Recommendations*, as follows, to-wit:

Sales Tax:	$26,169.60
Interest to 03/31/10:	12,963.21
Penalty:	2,617.15
Total:	$41,749.96

2. The Division's revisions as set forth in the 2nd Adjustment comply with the recommendations set forth in the *Findings, Conclusions and Recommendations* issued on January 25, 2010.

3. On February 22, 2010, OTC ATTORNEY filed a Withdrawal of Counsel with the Court Clerk.[71]

4. On February 23, 2010, OTC ATTORNEY 2, Assistant General Counsel, filed an Entry of Appearance as Counsel of record for the Division.

5. On February 24, 2010, a letter was mailed to Counsel advising the Protestant had until March 15, 2010, to respond to the Division's 2nd Adjustment.

6. Counsel for the Protestant did not file a response to the Division's 2nd Adjustment.

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

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 Assessment (2nd Adjustment) should be denied.

It is further recommended that the revised amounts of sales tax and penalty should be fixed as the amounts due and owing, inclusive of interest, accrued and accruing.

[71] OKLA. ADMIN. CODE § 710:1-5-10(c)(2) (June 25, 1999).

THEREFORE, the *Findings, Conclusions and Recommendations* issued on January 25, 2010, are amended to include and incorporate the above and foregoing *Addendum to Findings, Conclusion 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.

NOTE: The distinction between a Commission Order designated as "Precedential" or "Non-Precedential" has been blurred because all OTC Orders resulting from cases heard by the Office of Administrative Law Judges are now published, not just "Precedential" Orders. *See* OKLA. STAT. ANN. tit.68, § 221(G) (West Supp. 2009) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002). *See also* OTC Orders 2009-06-23-02 and 2009-06-23-03 (June 23, 2009), which also conclude the language of the Statute is "clear and unambiguous."