JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2010-08-17-03 / NON-PRECEDENTIAL**
ID: **P-09-188-H**
DATE: **AUGUST 17, 2010**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPANY d/b/a STORE and PRESIDENT, as President of COMPANY d/b/a STORE ("Protestants") appear by and through attorneys, ATTORNEY 1 and ATTORNEY 2, LAW FIRM.[1] 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 4, 2009, the protest file was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*[2] and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.[3] On November 6, 2009, a letter was mailed to the Protestants stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-09-188-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 Office of Administrative Law Judges.*[4] On November 13, 2009, OTC ATTORNEY filed an Entry of Appearance as Counsel of record for the Division. On November 20, 2009, the Notice of Prehearing Conference was mailed to the last-known address of the Protestants, setting the prehearing conference for December 15, 2009, at 10:30 a.m.[5]

On December 15, 2009, at 10:30 a.m. the prehearing conference was held as scheduled. OTC ATTORNEY appeared via telephone. The Protestants failed to appear or call the Court Clerk.[6] On December 15, 2009, a notice was mailed to the parties setting this matter for hearing

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[1] On February 4, 2010, ATTORNEY 1 entered an appearance as Protestants' Counsel of record post-hearing. On July 15, 2010, ATTORNEY 2 entered his appearance as Protestants' co-counsel of record post-hearing. *See* Procedural History herein.

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

[3] OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

[4] *Id.*

[5] OKLA. STAT. ANN. tit. 68, § 208 (West Supp. 2010). The notice was mailed to the Protestants at BUSINESS ADDRESS.

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

on January 21, 2010, at 1:30 p.m., with position letters or memorandum briefs due on or before January 14, 2010.[7]

On January 12, 2010, the Division's Memorandum Brief ("*Brief*") was filed with Exhibits A through E attached thereto. The Protestants did not file a position letter or memorandum brief. On January 21, 2010, at 1:30 p.m. the hearing was held as scheduled. The Protestants did not appear at the hearing and did not contact the Division or the Court Clerk concerning the hearing. 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 about the conduct of the audit, the audit methodology, and as custodian of the Division's records. The Division's second witness, SUPERVISOR, Auditor Supervisor, Field Audit Section of the Compliance Division, Oklahoma Tax Commission, testified about the conduct of the audit and the audit methodology. The Division's Exhibits A through I-3 were identified, offered, and admitted into evidence. At the conclusion of the hearing, the record in this matter was held open in order for the Division to file the supporting work papers used to arrive at the percentages shown and utilized on Division's Exhibit H. On January 26, 2010, a letter was mailed to the parties memorializing the Administrative Law Judge's announcement at hearing and directing the Division to file the work papers on or before February 22, 2010.

On February 3, 2010, the Division's [Work Papers] In Support of Its Use of National Convenience Store Averages ("*Supporting Work Papers*") was filed with the Court Clerk. On February 4, 2010, by facsimile, ATTORNEY 1 filed an Entry of Appearance as Counsel of record for the Protestants.[8] On February 5, 2010, a teleconference was held with Counsel concerning the captioned matter. It was agreed that the record in this matter would remain open for thirty (30) days in order for the Protestants to provide information to the Division regarding the proposed assessments and any possible revisions by the Division. At the end of the thirty (30) days, if the parties jointly agreed, Counsel could request the record to remain open in order to complete any revision. If the parties did not make the joint request, the record would be closed at the end of the thirty (30) days and the case submitted for decision on March 8, 2010.[9]

On March 5, 2010, by facsimile, ATTORNEY 1 filed a letter requesting the record to remain open until March 22, 2010, reciting that OTC ATTORNEY agreed to the request.[10] On March 5, 2010, OTC ATTORNEY filed a Status Report confirming same. On March 8, 2010, a letter was mailed to Counsel stating the record would remain open until March 22, 2010, for the Protestants to provide information to the Division, as well as an additional fifteen (15) days thereafter for the Division to make any revisions to the proposed assessments. At that time the record in this matter would be closed and submitted for decision. On March 23, 2010,

[7] The notice was mailed to the Protestants at their last-known address. *See* Note 5, *supra.*

[8] On February 5, 2010, the original was received for filing by the Court Clerk.

[9] On February 5, 2010, a letter was mailed to Counsel reflecting the agreement reached during the teleconference.

[10] On March 8, 2010, the Court Clerk received the original for filing.

ATTORNEY 1 filed a letter transmitting copies of a letter to OTC ATTORNEY dated March 22, 2010, with attachments thereto.

On April 2, 2010, the Division's Response to Protestants' Production of Records ("*Response*") was filed with Exhibits 1 through 3 attached thereto.[11] The record in this matter was closed and this case submitted for decision on April 6, 2010.

On June 30, 2010, an *Order Denying Protestants' Motion to Reconsider* was issued. On June 30, 2010, an *Order Granting Division's Motion to Reconsider* was issued as to the category of "lottery tickets," which were not part of the Convenience Store Gross Sales Computation Model. The *Findings, Conclusions and Recommendations* ("*Findings*") issued on May 18, 2010, are being amended to delete the last paragraph of Page Eighteen, which states as follows, to-wit:

> The one (1) category that was not reflected on the Protestant's Business Registration was the sale of lottery tickets. According to the Z-Tapes, the Protestant does sell lottery tickets, which are not subject to sales tax. The Oklahoma Education Lottery Act provides for stringent reporting requirements, so the Division should be able to obtain the sales reported to the Oklahoma Lottery Commission for the Audit Period. The amounts reported for the Audit Period should be deducted from Taxable Sales, just as cigarettes and other tobacco products were deducted as Non-Sales Taxable.

The remainder of the *Findings* is being amended accordingly. Therefore, the *Findings* issued on May 18, 2010, are hereby withdrawn.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, the Division's *Brief*, *Supporting Work Papers*, and *Response*, the undersigned finds:

1. On or about August 22, 2007, the Tax Commission processed a Business Registration Application submitted for COMPANY d/b/a STORE ("Protestant") by PRESIDENT, as President and sole officer ("President") of Protestant. Protestant is a convenience store located at BUSINESS ADDRESS ("Business Location"). The Protestant started business August 15, 2007, and sells fuel, 3.2 beer, cigarettes, other tobacco products, lottery tickets,[12] and miscellaneous food and consumer goods.[13]

[11] *Response* Exhibit 1 is a copy of the attachments to ATTORNEY 1'S letter filed March 23, 2010.

[12] *See Supporting Work Papers.* At the time of the "field" audit it does not appear that the Division was aware the Protestant sold lottery tickets.

[13] Division's Exhibit A.

2. On or about June 2009, the Division commenced a sales tax field audit on Protestant for August 15, 2007, through June 30, 2009 ("Audit Period").[14]

3. The Division attempted to contact Protestant, through its President, several times by telephone, but always got a facsimile signal.[15] On July 1, 2009, a second audit notification letter was mailed, along with a records request.[16] No reply was received by the Division.[17]

4. The only information available to the Division was the Protestant's 3.2 beer purchases during the Audit Period from its wholesalers, Premium Beers ("Premium") and Capital Distributing ("Capital").[18]

5. The Division used the Convenience Store Gross Sales Computation ("CSGS Computation")[19] to calculate Protestant's taxable sales during the Audit Period based upon the Protestant's 3.2 beer purchases,[20] as follows:

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[14] Testimony of AUDITOR. AUDITOR testified that the Protestant had not filed sales tax reports for January through June 2009, according to wholesaler reports, even though it was making regular purchases of 3.2 beer. On January 19, 2010, AUDITOR verified the information for the Audit Period had not changed. *See* Division's Exhibit F. The Protestant did file and remit reports for July 2009 ($1,288.56) and August 2009 ($1,417.97), and then did not file sales tax reports for September and October 2009.

[15] 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 (June 25, 1999). AUDITOR testified that she attempted to contact the President at the last-known telephone number according to the records of the Tax Commission. According to the Field Audit Write Up the "contact's" last-known phone number is XXX-XXXX.

[16] The first and second audit notification letters were not introduced into evidence. AUDITOR testified that the second audit notification letter advised the President that if he did not contact her the Division would have to use the only information available to it to calculate his taxable sales in order to determine if the Protestant had under-reported sales.

[17] Testimony of AUDITOR.

[18] *Id.*

[19] The spreadsheet was compiled using the National Association of Convenience Stores 2005 Annual Report of National Averages. The Division did not have the markups for the Protestant because the President would not respond to the Division's requests to obtain records to conduct a "field" audit. *See* Division's Exhibit H. The Division determined the Average Percent Markup for 3.2 beer. This percentage and the 3.2 beer purchased were entered into the program, which then determines the Dollars of Purchases by Department and the Average Percent Markup.

[20] The Division has been using the CSGS Computation for about a year and a half. This computation, or some variation thereof, is also used by the State of Texas, the State of California, and the Internal Revenue Service. The State of Texas conducted a state-wide survey of convenience stores, which are the percentages used by the State of Texas. The State of Oklahoma does not have a survey of convenience stores so the Division defaults to National Averages, much like the Division defaults to area-wide averages for mixed beverage depletion purposes when records are not available. Testimony of AUDITOR. Division's Exhibits I-1 through I-3.

August 15, 2007 through December 31, 2007

DOLLARS OF PURCHASES BY DEPARTMENT	DEPARTMENTS	AVERAGE PERCENT OF MARKUP	GROSS DOLLARS OF SALES
$202,190.95	CIGARETTES	20.10000%	$242,831.33
$ 60,495.26	FOODSERVICE	50.17000%	$ 90,845.74
$ 72,858.25	PACKAGED BEVERAGES	35.52000%	$ 98,737.50
$ 67,726.68[21]	**BEER**	**21.11000%**	**$ 82,023.78**
$ 12,327.74	GENERAL MERCHANDISE	39.95000%	$ 17,252.67
$ 19,052.25	CANDY	46.47000%	$ 27,905.84
$ 17,712.99	SALTY SNACKS	33.66000%	$ 23,675.19
$ 21,803.74	OTHER TOBACCO	28.79000%	$ 28,081.04
$ 12,543.64	FLUID MILK PRODUCTS	26.93000%	$ 15,921.64
$ 10,389.55	PACKAGED SWEET SNACKS	26.85000%	$ 13,179.15
$ 73,550.09	OTHER DEPARTMENTS	38.22000%	$101,660.93
$570,651.15	TOTALS		$742,114.80

Remove Cigarettes and Tobacco	($270,912.37)
Taxable Sales	$471,202.43
Reported Sales	($ 23,171.00)
Unreported Sales	$448,031.43

January 1, 2008 through December 31, 2008

DOLLARS OF PURCHASES BY DEPARTMENT	DEPARTMENTS	AVERAGE PERCENT OF MARKUP	GROSS DOLLARS OF SALES
$ 739,176.72	CIGARETTES	20.10000%	$ 887,751.24
$ 221,160.70	FOODSERVICE	50.17000%	$ 332,117.02
$ 266,357.74	PACKAGED BEVERAGES	35.52000%	$ 360,968.01
$ 247,597.56[22]	**BEER**	**21.11000%**	**$ 299,865.40**
$ 45,068.17	GENERAL MERCHANDISE	39.95000%	$ 63,072.90
$ 69,651.89	CANDY	46.47000%	$ 102,019.13
$ 64,755.78	SALTY SNACKS	33.66000%	$ 86,552.57
$ 79,710.89	OTHER TOBACCO	28.79000%	$ 102,659.65
$ 45,857.48	FLUID MILK PRODUCTS	26.93000%	$ 58,206.89
$ 37,982.49	PACKAGED SWEET SNACKS	26.85000%	$ 48,180.78
$ 266,886.99	OTHER DEPARTMENTS	38.22000%	$ 371,655.59
$2,086,206.39	TOTALS		$2,713,049.20

Remove Cigarettes and Tobacco	($ 990,410.89)
Taxable Sales	$1,722,638.31
Reported Sales	($ 72,645.00)
Unreported Sales	$1,649,993.31

[21] Testimony of AUDITOR. Division's Exhibit B. (2007 totals: Premium: $144,081.19 x 138/365 and Capital: $35,050.97 x 138/365).

[22] *Id.* (2008 totals: Premium: $209,161.56 and Capital: $38,436.00).

January 1, 2009 through June 30, 2009

DOLLARS OF PURCHASES BY DEPARTMENT	DEPARTMENTS	AVERAGE PERCENT OF MARKUP	GROSS DOLLARS OF SALES
$ 440,236.71	CIGARETTES	20.10000%	$ 528,724.28
$ 131,718.24	FOODSERVICE	50.17000%	$ 197,801.28
$ 158,636.56	PACKAGED BEVERAGES	35.52000%	$ 214,984.27
$ 147,463,43[23]	**BEER**	**21.11000%**[24]	**$ 178,592.96**
$ 26,841.57	GENERAL MERCHANDISE	39.95000%	$ 37,564.77
$ 41,483.07	CANDY	46.47000%	$ 60,760.25
$ 38,567.06	SALTY SNACKS	33.66000%	$ 51,548.73
$ 47,473.98	OTHER TOBACCO	28.79000%	$ 61,141.73
$ 27,311.66	FLUID MILK PRODUCTS	26.93000%	$ 34,666.69
$ 22,621.50	PACKAGED SWEET SNACKS	26.85000%	$ 28,695.37
$ 160,142.93	OTHER DEPARTMENTS	38.22000%	$ 221,349.55
$1,242,496.70	TOTALS		$1,615,829.90

Remove Cigarettes and Tobacco	($ 589,866.02)
Taxable Sales	$1,025,963.88
Reported Sales	($ 0.00)
Unreported Sales	$1,025,963.88

6. The results of the "field" audit using the CSGS Computation reflected that Protestant had Unreported Taxable Sales during the Audit Period as follows, to-wit:

Unreported Taxable Sales (2007)		$ 448,031.43
Unreported Taxable Sales (2008)		$1,649,993.31
Unreported Taxable Sales (2009)		$1,025,963.88
	Total	$3,123,988.62.[25]

[23] Testimony of AUDITOR. Division's Exhibit B. (2009 totals: Premium: $112,167.43 and Capital: $35,296.00).

[24] *See Supporting Work Papers* filed February 3, 2010. The percentage markup for beer was calculated as follows, to-wit:

Top Ten Product Categories	$882,553.46	(Average Sales Per Store)
Times Over All Store Gross Margin	30.80%	
Equals Average Cost Per Store	$271,826.47	
Average Sales Per Store for Beer	$ 96,590.00	($96,590.00÷$882,553.46=10.9%) Percent of the Top 10 Categories Gross Margin In-Store Sales
Average Cost of Beer Per Store	$ 20,386.98	$271,826.47x7.5% (Gross Margin Contribution))
Divided by (Average Sales of Beer Per Store)	$ 96,590.00	
Equals the Average Markup for Beer	21.11%	

[25] Division's Exhibit C. Testimony of AUDITOR.

7. On August 17, 2009, the Division issued proposed sales tax assessments[26] for the Audit Period against the Protestants as follows, to-wit:

Tax Due:	$261,634.04
Interest @ 15% Through 9/30/2009:	$ 26,455.21
Tax & Interest due within 30 Days:	$288,089.25
30 day delinquent Penalty @ 10%:	$ 26,163.40
Tax, Interest & Penalty due after 30 Days:	$314,252.65

8. On September 8, 2009, the Division received a timely filed protest[27] to the proposed sales tax assessments against the Protestants for the Audit Period. The grounds for the protest are stated in pertinent part, as follows, to-wit:

> - You have assessed on the basis of your estimated (industry average) cost of taxable products with your estimated percentage of mark up (industry average again). We disagree with both of your arbitary [sic] assessment of cost of taxable products and percentage of mark up.
>
> - In addition, we [sic] have ignored our loss of products due to shop lifting, breakage/spoileage [sic] and out of date products which totals up to a considerable amount.
>
> We are in the process of assessing total cost of taxable products and actual percentage of mark up. We will send the assessment as soon as it is ready. Should you have further inquiries please contact me at the address mentioned below.
>
> Sincerely,
>
> (PRESIDENT)
> President
> COMPANY.
> BUSINESS ADDRESS

9. All post-protest correspondence and notices were mailed to the Business Location at BUSINESS ADDRESS, as instructed by the President in the protest letter.

10. On January 19, 2010, AUDITOR went to Protestant's Business Location and purchased a soft drink to verify that the Protestant was still open, operating, and collecting sales tax.[28]

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[26] Division's Exhibits D-1 and D-2.

[27] Division's Exhibit E.

[28] Division's Exhibit G. The receipt reflects the Protestant's Business Location at BUSINESS ADDRESS and phone number (XXX-XXX-XXXX). The purchase of $1.38 was rung up on Cash Register #1 under "Grocery" at $1.38 with sales tax charged and collected of $.12 for a total purchase of $1.50.

11. With the exception of the initial protest letter, neither the Division nor the Court Clerk received any calls or correspondence from the President prior to the post-hearing filing of the Entry of Appearance by ATTORNEY 1 on February 4, 2010.

12. On February 3, 2010, the Division's *Supporting Work Papers* were filed with the Court Clerk with the following attachments, to-wit:

- 2004 State of the Industry ("SOI") Highlights~The Convenience Store Industry's 2003 Performance;
- Convenience Stores Averages From 2003, taken from the National Association of Convenience Stores ("NACS") 2003 State of the Industry Report;
- 2005 Computations;
- Convenience Store Gross Sales Computation (utilizing the NACS 2005 Annual Report of National Averages);
- Convenience Store Gross Sales Computation (utilizing the NACS 2008 Annual Report of National Averages).

13. On March 23, 2010, ATTORNEY 1 filed a copy of a letter to OTC ATTORNEY dated March 22, 2010, with the following attachments, to-wit:

- Daily [sic] Sales Journal (Summary for 2008)
- Sales Journal Summaries for January 2008 through December 2008.
- Daily [sic] Sales Journal (Summary for 2009)
- Sales Journal Summaries for January 2009 through December 2009.
- Cash Register Tapes:
  Current Yearly Report for Cash Registers #1, #2, and #6
  Open Yearly 01/09/08 17:27
  Close Yearly Pending
  Summary Report for Cash Register #1
  Summary Report for Cash Register #2
  Summary Report for "ALL REGISTERS"[29]
  "PLU" Report[30]
  "PLU" Exception Report
  "PLU" Promo Report
  Deal Report
  Department Report
  Category Report
  Tax Report
  "Hourly" Report for Register #1
  "Hourly" Report for Register #2

[29] The Summary Reports include Registers #1 and #2, but not #6.

[30] "PLU" is an acronym for "Price-Look Up" codes.

"Hourly" Report for "All Registers"[31]

14. On April 2, 2010, the Division's *Response* was filed with Exhibits 1 through 3 attached thereto. The Division declined to adjust or revise the proposed sales tax assessments as more fully set forth therein.

15. Approximately one (1) month prior to the hearing, the Division received updated percentages from the National Association of Convenience Stores through 2008, but the Division did not use the updated percentages because the revision would have increased the proposed sales tax assessments approximately $30,000.00.[32]

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[33]

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Sales Tax Code").[34] The Sales Tax Code levies "upon all sales,[35] not otherwise exempted…an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds[36] of each sale of…tangible personal property…," and specifically, the sale of "[n]atural or artificial gas,…."[37] Oklahoma Statutes authorize incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.[38]

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[31] *See* Procedural History herein.

[32] Testimony of SUPERVISOR.

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

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

[35] 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,
>
> …

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

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

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

3. It shall be the duty of every tax remitter required to make a sales tax report and pay any tax under the Oklahoma Sales Tax Code[39] 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 the Oklahoma Sales Tax Code[40] 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 the Oklahoma Sales Tax Code.[41] 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]

4. If any taxpayer shall fail to make any report or return as required by any state tax law, the Oklahoma Tax Commission, from any information in its possession or obtainable by it, may determine the correct amount of tax for the taxable period. If a report or return has been filed, the Tax Commission shall examine such report or return and make such audit or investigation as it may deem necessary. If, in cases where no report or return has been filed, the Tax Commission determines that there is a tax due for the taxable period, or if, in cases where a report or return has been filed, the Tax Commission shall determine that the tax disclosed by such report or return is less than the tax disclosed by its examination, it shall in writing propose the assessment of taxes or additional taxes, as the case may be, and shall mail a copy of the proposed assessment to the taxpayer at the taxpayer's last-known address. Proposed assessments made in the name of the "Oklahoma Tax Commission" by its authorized agents shall be considered as the action of the Tax Commission.[43]

5. 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 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

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

[40] *Id.*

[41] *Id.*

[42] OKLA. STAT. ANN. tit. 68, § 1365(F) (West 2008).

[43] OKLA. STAT. tit. 68, § 221(A) (West 2002).

to such section.[44] From the record, there is no dispute that PRESIDENT was (and is) the principal officer of the Protestant and responsible for the filing and remittance of sales tax during the Audit Period.

6. 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.[45]

7. 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.[46]

8. The rules promulgated pursuant to the Administrative Procedures Act[47] are presumed to be valid and binding on the persons they affect and have the force of law.[48]

9. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[49]

10. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[50]

11. 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."[51]

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

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

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

[47] OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2002).

[48] *See Toxic Waste Impact Group, Inc. v. Leavitt*, 1988 OK 20, 755 P.2d 626.

[49] 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.

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

DISCUSSION

It is the Protestants' position that the proposed sales tax assessments are incorrect[52] as follows, to-wit:

- You have assessed on the basis of your estimated (industry average) cost of taxable products with your estimated percentage of mark up (industry average again). We disagree with both of your arbitary [sic] assessment of cost of taxable products and percentage of mark up.

- In addition, we [sic] have ignored our loss of products due to shop lifting, breakage/spoileage [sic] and out of date products which totals up to a considerable amount.

The Division responds that prior to the "field" audit, the Division attempted to contact the President by telephone several times, but always got a facsimile signal and that AUDITOR mailed two (2) audit notification letters to the President, but never got a response, even though the second letter advised the President that if he did not contact the Division it would have to use the only information available to calculate the Protestant's taxable sales in order to determine if the Protestant had under-reported its sales during the Audit Period.

The President did not respond to the Division's requests and the only contact from the President was the protest letter the Division received September 8, 2009. In the protest letter, the President stated in pertinent part, "We are in the process of assessing total cost of taxable products and actual percentage of mark up.…"[53] The hearing in this matter was held on January 21, 2010, at 10:30 a.m., but as of the date of hearing the President still had not provided any information to the Division. Without the President's cooperation and the failure to provide records, the Division defaulted to the national industry averages obtained from the National Association of Convenience Stores for 2005, using the Protestant's 3.2 beer sales obtained from its wholesalers for the Audit Period.

An order of the Tax Commission must be supported by substantial evidence.[54] Likewise, the audit upon which a portion of the record is formed and order issued, must be supported by substantial evidence.[55]

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[51] *See* Note 44, *supra*.

[52] *See* Note 29, *supra*.

[53] *Id.*

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

[55] Tax Commission Order No. 2003-07-22-09 (July 22, 2003), 2003 WL 2347117 (Okl. Tax Com.), available at *http://westlaw.com*. (August 10, 2006).

The Division's choice of audit methodology was not arbitrary; it was necessitated by the complete lack of cooperation by the President in providing the records necessary to conduct a field audit on the Protestant. The Division's choice of methodology is an acceptable "indirect" approach when the taxpayer's records are incomplete, unavailable, or non-existent. The NACS Computation is sophisticated and complex, similar to the "indirect" approaches utilized by the State of Texas, the State of California, and the Internal Revenue Service. The methodology is also similar to other "indirect" approaches using bank deposits, federal tax returns, etc. as a basis to determine if a taxpayer has under-reported sales.

A detailed examination of the Division's methodology supports the conclusion that an evidentiary foundation has been laid for the basis of the audit and the proposed sales tax assessments are supported by substantial evidence.

As to the second part of the Protestants' position that the Division ignored the Protestants' "…loss of products due to shop lifting, breakage/spoileage [sic] and out of date products which totals up to a considerable amount," the Protestants did not document any such losses. Additionally, neither the Oklahoma Sales Tax Code nor Tax Commission Rules allow such a deduction for "convenience stores."

Post-hearing, the Protestants provided *Summaries* (Daily, Monthly, and Yearly) for 2008 and 2009, along with Z-Tapes, to the Division for examination. The Protestants were unable to provide any information for August 15, 2007, through December 31, 2007, but the Protestants believe sales in 2007 would be similar to sales in 2008.

The Division reviewed the records submitted by the Protestant and determined the records did not provide a basis for an adjustment or revision to the proposed sales tax assessments for the following reasons, to-wit:

- Dates of sales captured by comprehensive register tape ("z-tape") is [sic] uncertain.
- Possible missing sales from a third cash register.
- Extraordinary number of errors/corrections (representing nearly one million dollars in sales).
- Department report lacks sufficient detail for product mix calculations.
- Cigarette department lists one sale in the purported 18-month period.
- Multiple differences between the Summary Report and the Department Report sections of the tape.
- Multiple differences between Sales Journal and Register Report.
- Taxpayer's records indicate $100,366.66 in sales tax collections; taxpayer only remitted $6,320.06 (6.3%).
- Markup or margin on beer from taxpayer's records is higher than used in the audit.
- Sales Journal reflects only 32% of register tape's grocery sales amount.
- Register tape lists beer sales at 9.72% of total and grocery sales at 12.10% of total yet sales journal beer sales are $489,744.64 and grocery sales are $214,254.53.

- Protestant's "z-tape" shows Grand Total of $6,170,931.54 and Sales Total of $5,589,344.34, resulting in a questionable difference of $581,587.20.

The Sales Journals are just *Summaries*, without supporting documentation. Some of the "highlights" from the Z-Tapes reflect "OPEN YEARLY: 01/09/09 17:27" and "CLOSE YEARLY: PENDING," when the Audit Period is August 15, 2007, through June 30, 2009. The Z-Tapes also reflect there is "REGISTER #1," "REGISTER #2," and "REGISTER #6," but there are no Z-Tapes for Register #6. The Protestant reported sales tax collected for August 15, 2007, through December 31, 2007, in the amount of $23,171.00; January 1, 2008, through December 31, 2008, in the amount of $71,645.00; and zero sales for January 1, 2009, through June 30, 2009, when the Sales Journals (which are unavailable for 2007) reflect 2008 sales tax collected of $40,718.59 and January-June 2009 sales tax collected of $18,239.67. However, the Z-Tapes reflect the Protestant collected sales tax of $100,366.66, while the Protestant only remitted sales tax of $6,320.63 for the entire Audit Period. The Sales Journals for 2008 and 2009 report cigarette sales of $972,384.34 and $890,387.50, but the Z-Tapes reflect the sale of one (1) cartoon of cigarettes at $27.00.

The Division's objections to making any changes or revisions to the proposed sales tax assessments based upon the information provided by the Protestants post-hearing is supported by the record. The information provided post-hearing is not only incomplete, but riddled with inconsistencies.

The Protestants have failed to meet their burden of proof that the Division's proposed sales tax assessments for the Audit Period are incorrect and in what respects.

DISPOSITION

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

It is further ORDERED that the proposed sales tax assessments against the Protestants, inclusive of accrued interest and penalty, should be fixed as the amounts due and owing.

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.