JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2010-10-21-23 / NON-PRECEDENTIAL**
ID: **P-09-114-H**
DATE: **OCTOBER 21, 2010**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROTESTANT d/b/a STORE 1 and STORE 2 ("Protestant") appears by and through ACCOUNTANT, Accountant, MBA, 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 2, 2009, 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 Office of Administrative Law Judges*.[2] On July 2, 2009, a letter was mailed to the Protestant stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-09-114-H. The letter also advised the Protestant 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*.[3] On July 9, 2009, OTC ATTORNEY 2, Chief Deputy General Counsel filed an Entry of Appearance on behalf of OTC ATTORNEY 3, Assistant General Counsel, as Counsel of record for the Division. On July 31, 2009, the Notice of Prehearing Conference was mailed to the last-known address of the Protestant, setting the prehearing conference for August 17, 2009, at 2:30 p.m.[4]

On August 17, 2009, at 2:30 p.m. the prehearing conference was held as scheduled. The parties appeared via telephone. On August 19, 2009, pursuant to the prehearing teleconference, a letter was mailed to the parties directing that a status report be filed on or before September 16, 2009.

On September 16, 2009, OTC ATTORNEY 3 filed the Status Report advising that the Protestant had provided some information on ending inventory and that the Protestant may have some daily hand-written sales journals for the Division's review. On September 17, 2009, a

[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.*

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

letter was mailed to the parties directing that a status report be filed on or before October 16, 2009.

On October 16, 2009, OTC ATTORNEY 3 filed the Status Report advising that the Protestant had requested one (1) year of banking records for the Division's review. On October 19, 2009, a letter was mailed to the parties advising that a status report be filed on or before November 16, 2009.

On November 16, 2009, OTC ATTORNEY 3 filed the Status Report advising that the Protestant had not received copies of the banking records, and requested that this matter be set for hearing. On November 17, 2009, a letter was mailed to the parties advising that this matter had been set for hearing on February 23, 2010, at 1:30 p.m., with position letters or memorandum briefs due on or before February 16, 2010.

On January 27, 2010, the Court Clerk[5] received by facsimile for filing, a copy of a letter from ACCOUNTANT to OTC ATTORNEY 3 requesting a meeting with the Division to provide information concerning the proposed sales tax assessment, with attachments thereto.[6]

On February 10, 2010, the Court Clerk receiving by facsimile for filing, what is deemed an Entry of Appearance from ACCOUNTANT as the Protestant's Representative of record, along with a request to continue the hearing to allow ACCOUNTANT time to sort out all of the Protestant's business documents and bank statements. On February 10, 2010, there being no objection from the Division, the hearing was stricken from the February 23, 2010, docket and reset for hearing on April 27, 2010, at 9:30 a.m., with position letters or memorandum briefs due on or before April 20, 2010. On February 23, 2010, OTC ATTORNEY 3 filed a Withdrawal of Counsel of record for the Division. On February 24, 2010, OTC ATTORNEY filed an Entry of Appearance as Counsel of record for the Division.

On April 15, 2010, OTC ATTORNEY filed a Request to Continue Hearing and Brief Schedule due to scheduling conflicts associated with her recent entry into the case. On April 19, 2010, the hearing was stricken from the April 27, 2010, docket and reset for hearing on May 17, 2010, at 9:30 a.m., with position letters or memorandum briefs due on or before May 10, 2010.

On May 6, 2010, OTC ATTORNEY filed a Request to Continue Hearing because the Protestant had just provided several binders filed with bank records and other documents. By agreement of the parties, the hearing was stricken from the May 17, 2010, docket and reset for hearing on June 30, 2010, at 9:00 a.m., with position letters or memorandum briefs due on or before June 23, 2010.

On June 21, 2010, OTC ATTORNEY filed a Request to Continue Hearing and Brief Schedule because the Protestant was still providing information to the Division for review. By

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

[6] ACCOUNTANT indicates the attachments are a summary of the Protestant's banking statements for 2007 and 2008.

agreement of the parties, the hearing was stricken from the June 30, 2010, docket and reset for hearing on July 29, 2010, at 9:30 a.m., with position letters or memorandum briefs due on or before July 22, 2010. On June 25, 2010, the Division's Memorandum Brief was filed with Exhibits A-1 through I, attached thereto. On June 28, 2010, the Court Clerk received by facsimile, an e-mail ("Position Letter") from ACCOUNTANT on behalf of the Protestant, with Exhibit 1, attached thereto.

On July 1, 2010, the Court Clerk received for filing a copy of a letter dated June 29, 2010, from OTC ATTORNEY to ACCOUNTANT advising that the Division had reviewed the information provided by the Protestant, but that the Division declined to make any adjustments to the proposed sales tax assessment. On July 1, 2010, a letter was mailed to the parties' Representatives, at their request, confirming that the hearing time had been changed from 9:30 a.m. to July 29, 2010, at 1:30 p.m.

On July 29, 2010, at 1:30 p.m., an open hearing[7] was held as scheduled. The Division called one (1) witness to testify. The Division's witness, AUDITOR, Field Auditor,[8] Field Audit Section of the Compliance Division, Oklahoma Tax Commission, testified about performing the audit, the audit methodology, and as custodian of the Division's records. The Division's Exhibits A-1 through J were identified, offered, and admitted into evidence. The Protestant testified on his own behalf about the management of the businesses at the two (2) locations. The Protestant's Exhibit 1 was identified and offered, but based upon the objection of the Division, Protestant's Exhibit 1 was not admitted into evidence, with exceptions being noted in the record. At the conclusion of the hearing, the record in this matter was held open in order for the Division to file the 3.2 Beer Wholesaler Reports to support the portion of the proposed sales tax assessment attributed to 3.2 beer purchases. On July 30, 2010, the Division filed its Submission of 3.2 Beer Wholesaler Reports, which was identified as Division's Exhibits K-1 through K-2 and admitted into evidence.[9] The record in this matter was closed and this case submitted for decision on August 3, 2010.[10]

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 Letter, and the Division's Brief, the undersigned finds:

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[7] The Protestant, through ACCOUNTANT, waived his right to a confidential hearing as provided by the provisions of OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2010).

[8] AUDITOR testified she has been employed by the Tax Commission for approximately twenty-one (21) years and has performed several hundred field audits.

[9] On August 11, 2010, OTC ATTORNEY filed the 2008 3.2 Beer Wholesaler Report from Capital for 2008, which had inadvertently been omitted from the filing on July 30, 2010 (K2).

[10] The record was reopened on August 11, 2010, and closed that same day to allow OTC ATTORNEY to file Division's Exhibit K2. *See* Note 9, *supra.*

1. The Protestant was the sole proprietor of two (2) convenience stores which sold a variety of items including beer, cigarettes, tobacco, soft drinks, chips, candy, and sundries. The Protestant operated both stores under sales tax permit number ###. STORE 1 ("Location One") at STORE 1 ADDRESS, opened in August 2002.[11] STORE 2 ("Location Two") at STORE 2 ADDRESS, opened in September 2005.[12]

2. On or about May 2008, the Division commenced a sales tax field audit on Protestant for July 1, 2006, through December 31, 2008,[13] ("Audit Period") because the Protestant's 3.2 beer purchases exceeded the Protestant's reported taxable 3.2 beer sales for both locations.[14]

3. At the opening field audit conference, AUDITOR requested that the Protestant provide a list of records for the Audit Period, including the daily sales journals ledgers and z-tapes for both locations.[15]

4. The Protestant did not keep daily records during the Audit Period, but looked at the store shelves to calculate the sales.[16]

5. The Protestant executed several field audit forms, including a Statute of Limitations Waiver Agreement, an Audit Methodology Agreement,[17] and a Statute of Limitations Waiver Agreement (Extension).[18]

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[11] Division's Exhibits A-1 through A-2. On September 8, 2005, the Tax Commission processed a Business Registration Application submitted by the Protestant d/b/a STORE 2. The Tax Commission's records indicate that the only business registration filed by the Protestant was for STORE 2. The Protestant testified that due to an armed robbery at Location #2, that "he gave away that store." The Division did give the Protestant credit for the ending inventory of Location #2.

[12] 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). According to the Field Audit Write Up, the Protestant was working at Location #2 on March 11, 2009, and was held up at gunpoint by two (2) men. The register was emptied and his wallet was stolen. AUDITOR was able to verify the incident because the robbery was covered by a reporter for KOCO Channel 5 News. Testimony of AUDITOR and PROTESTANT.

[13] The original audit period was January 1, 2005, through December 31, 2007, but the Statute of Limitations Waiver Agreement expired. Testimony of AUDITOR. *See* Note 17, *infra.*

[14] Testimony of AUDITOR.

[15] *Id.* Division's Exhibit B.

[16] *Id.* Testimony of PROTESTANT. PROTESTANT also testified that since the field audit he is trying to maintain records as requested by the Division.

[17] Division's Exhibit C. The Statute of Limitations Waiver Agreement was for January 1, 2005, through December 31, 2007, with an expiration date of September 30, 2008. The Statute of Limitations Waiver Agreement (Extension) had an expiration date of December 31, 2008.

[18] *Id.*

6. The Protestant did not produce records as requested by the Division, but the Protestant provided copies of his personal income tax returns for the 2005 and 2007 Tax Years and purchase invoices for July 2008.[19]

7. The Protestant's purchase invoices for July 2008[20] are summarized as follows, to-wit:

VENDOR	GROCERY	BEER	TOTAL
COCA-COLA	1,446.15		1,446.15
7UP/RC	430.56		430.56
BUY FOR LESS	198.35		198.35
SAM'S	432.18		432.18
PREMIUM		9,229.72	9,229.72
G & L DIST.	84.27		84.27
LANDSHIRE, INC.	94.08		94.08
FRITO-LAY	647.05		647.05
CAPITAL		2,794.56	2,794.56
LDF (RED BULL)	149.00		149.00
BIMBO BAKERIES	258.24		258.24
HILAND DAIRY	292.50		292.50
TOTAL	**4,032.38**	**12,024.28**	**16,056.66**

8. On May 5, 2008, the Protestant signed a "Questionnaire for use in Convenience Store Audits," which estimated his mark-up for beer, candy, snacks, and groceries at ten percent (10%). The Division performed a shelf check to confirm the Protestant's estimate, which was accepted by the Division.[21]

9. The Division used the "Cost-Markup Method" to calculate Protestant's sales during the Audit Period because the Protestant failed to provide any additional records.[22]

10. The Division scheduled the Protestant's July 2008 purchase invoices and determined that the Protestant's total purchases for July 2008 ($16,056.66), including the Protestant's 3.2

[19] Division's Exhibit D. On April 24, 2009, the Division returned the Protestant's original invoices to him. *See* Division's Brief at Note 2.

[20] *Id.*

[21] Division's Exhibit E. AUDITOR testified that the Division no longer submits the "Questionnaire for use in Convenience Store Audits" to determine the taxpayer's mark-up when the taxpayer does not have sufficient records to conduct the field audit. The Division defaults to the National Association of Convenience Store Gross Sales Computation ("NACSGS") Method. In this case the Division accepted the Protestant's across-the-board mark-up of ten percent (10%). The NACSGS Method's average percent mark-ups range from 21.64% for 3.2 beer to 55.00% for foodservice. The NACSGS Method's median percent mark-up is 37.96%. AUDITOR testified that if the Division had used the NACSGS Method based upon the Protestant's 3.2 beer purchases for both locations, the Total Gross Sales would have been $13,521,439.30. After removing Cigarettes and Other Tobacco Sales ($4,948,846.78) and Reported Taxable Sales ($139,941.00) there would have been Unreported Sales of $8,432,651.51 for the Audit Period with a tax rate of 8.375% resulting in sales tax due of $706,234.56. Division's Exhibit J.

[22] Testimony of AUDITOR.

beer purchases as reported by Premium and Capital, were more than $16,056.66 (excluding cigarettes and tobacco) and the Protestant had only reported $7,490.00 in sales for July 2008.[23]

11. Based on the ratio between Protestant's 3.2 beer purchases totaling $12,024.28 and the Protestant's grocery purchases totaling $4,032.38 for July 2008, the Division estimated that thirty-four percent (34%) of the Protestant's purchases were for groceries and sixty-six percent (66%) of the Protestant's purchases were for 3.2 beer. The thirty-four percent (34%) ratio was then used by the Division to estimate the Protestant's total grocery purchases to the total 3.2 beer purchases for the Audit Period.[24]

12. The Protestant's 3.2 beer purchases from Capital and Premium ($1,080,773.47) and "estimated" grocery purchases ($367,462.98) were added together to arrive at the Protestant's "estimated" purchases ($1,448,236.44) during the Audit Period. The Division applied the ten percent (10%) mark-up accepted by the Division ($1,593,060.09) which was compared to the Protestant's reported sales ($139,941.00) for the Audit Period resulting in under-reported sales ($1,453,119.09).[25]

13. On May 8, 2009, the Division issued a proposed sales tax assessment[26] for the Audit Period against the Protestant for both locations as follows, to-wit:

Tax Due:	$121,698.72
Interest @ 15% Through 06/30/2009:	$ 22,603.90
Tax & Interest due within 30 Days:	$144,302.62
30 day delinquent Penalty @ 10%:	$ 12,169.87
Tax, Interest & Penalty due after 30 Days:	$156,472.49

14. On May 15, 2009, the Protestant mailed (certified mail) a timely protest[27] to the proposed sales tax assessment for the Audit Period. The Protestant did not agree with the amount of 3.2 beer purchases reflected on the Division's work papers.

15. On June 17, 2010, the Division revised the proposed sales tax assessment ("First Revision"). The Protestant provided documentation as to Food Stamp Sales and Ending Inventory for Location #2,[28] which reduced the proposed sales tax assessment $5,151.09, as follows, to-wit:

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[23] Testimony of AUDITOR.

[24] Testimony of AUDITOR. *See* Note 19, *supra*. *See also* Note 21, *supra*.

[25] Division's Exhibits F and G.

[26] Division's Exhibit H.

[27] *Id.*

[28] Division's Exhibit I. According to the Division's work sheet the allowance for Food Stamps was $34,639.80. The allowance for ending inventory at Location #2 was $26,873.27, which resulted in underreported taxable sales of $1,391,606.01.

Tax Due:	$116,547.00
Interest @ 15% Through 06/30/2010:	$ 39,396.25
Penalty:	$ 11,654.71
Total:	$167,597.96

16. On July 30, 2010, the Division filed its Submission of 3.2 Beer Wholesaler Reports,[29] which reflect purchases during the Audit Period, as follows, to-wit:

Premium	2006 (July-Dec)	2007	2008	
Location One	$ 56,247.08	$141,929.29	$158,945.87	
Location Two	$105,321.39	$214,561.57	$220,339.99	
Subtotal	$161,568.47	$356,490.86	$379,285.86	$ 897,345.19

Capital	2006 (July-Dec)	2007	2008	
Location One	$ 27,600.81	$ 45,962.14	$ 41,210.00	
Location Two	$ 15,404.33	$ 26,522.00	$ 26,729.00	
Subtotal	$ 43,005.14	$ 72,484.14	$ 67,939.00	$ 183,428.28
Total				$1,080,773.47

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[30]

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Sales Tax Code").[31] The Sales Tax Code levies "upon all sales,[32] not otherwise

[29] Division's Exhibits K1-K2.

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

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

[32] 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,
>
> …

exempted…an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds[33] of each sale of…tangible personal property….”[34] Oklahoma Statutes authorize incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.[35]

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[36] 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[37] 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.[38] 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.[39]

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.[40]

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

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

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

[36] *See* Note 31, *supra*.

[37] *Id.*

[38] *Id.*

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

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

5. 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.[41]

6. 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.[42]

7. The rules promulgated pursuant to the Administrative Procedures Act[43] are presumed to be valid and binding on the persons they affect and have the force of law.[44]

8. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[45]

9. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[46]

10. 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."[47]

DISCUSSION

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

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

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

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

[45] 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.

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

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

ACCOUNTANT presented the Protestant's position in three (3) points. First, the Division had used the NACSGS Method to estimate 3.2 beer sales instead of using actual purchase records; second, the Division's ratio of grocery sales to 3.2 beer sales was incorrect; and third, the Division had failed to give the Protestant ten percent (10%) allowances each for "Out of Date" products, "Breakage," and "Lost or Stolen" products during the Audit Period.

When the Protestant took the stand and was put under oath, ACCOUNTANT'S first question was, "Do you agree with the numbers the Tax Commission provided for beer sale? Why you don't agree with it?" PROTESTANT'S answer was in pertinent part as follows, "First of all I swear, I did cheated on something, but not that much. I did not have 1.8 million dollar beer purchase.…"[48] The Protestant did not have any information about the purchase of 3.2 beer from July 1, 2006, through December 31, 2006.[49] The Protestant stated, "All the transactions between my business and 'Premium Beers of Oklahoma, LLC,' 'Capital Distributing,' … are recorded in my bank statement which we have provided already to the OTC auditor. We don't handle any cash transactions with our vendors."[50]

The Division did not use the NACSGS Method to estimate 3.2 beer sales during the Audit Period. The Division based the 3.2 beer sales upon the Protestant's purchase records from Premium and Capital during the Audit Period for both locations[51] using the ten percent (10%) mark-up supplied by the Protestant and accepted by the Division. The Protestant alleges that his 3.2 beer purchases for January 2007 through December 2008 were $498,650.92 based upon his bank statements,[52] but the Protestant could not produce copies of any invoices to the Division which disputed the records of purchases supplied by Capital and Premium for the Audit Period.[53]

The Protestant's second point of contention is with the Division's determination of the ratio of grocery purchases to 3.2 beer purchases. The Protestant states, "'Coca-cola', 'Pepsi', 'Red Bull' and 'Frito-Lay' falls under Grocery category and our calculation's indicates that grocery to low-point beer ratio is approximately 5% instead of the auditor's estimated grocery to beer at 34%."[54]

The Protestant is not challenging the method the Division used to determine the ratio of grocery purchases to 3.2 beer purchases, but rather the accuracy of the method, because the Division used the July 2008 invoices supplied by the Protestant instead of using the Protestant's bank records for 2007 and 2008.

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[48] Testimony of PROTESTANT.

[49] Position Letter at 1.

[50] *Id.*

[51] Testimony of AUDITOR. *See* Note 25, *supra.*

[52] *See* attachments to letter filed January 27, 2010.

[53] *See* Division's Exhibits K1-K2.

[54] Position Letter at 2.

The Protestant's calculation of the five percent (5%) ratio of grocery to 3.2 beer purchases presents several obstacles, all of them attributable to the same problems: the Protestant did not maintain any records of purchases (invoices) or sales (daily/monthly sales ledgers or z-tapes) to substantiate and prove his assertions (which the Protestant admits), and the reliability of the Protestant's testimony. The Protestant testified that all purchases were made by check and that there were no purchases made by paying vendors cash, but the copies of the July 2008 invoices reflect that the Protestant made purchases from vendors such as Buy for Less, Sam's, G & L Dist., Landshire, Inc., Bimbo Bakeries, and Hiland Dairy, in addition to purchases from Capital, Premium, Coca-Cola, 7Up/RC, Frito-Lay, and LDF (Red Bull). However, the summaries of the bank statements for 2007 and 2008 do not reflect any purchases from Buy for Less, Sam's, G & L Dist., Landshire, Inc., Bimbo Bakeries, or Hiland Dairy and not all purchases from Capital, Premium, Coca-Cola, Frito-Lay, and LDF (Red Bull) are reflected by the summaries.

The Division was faced with the overwhelming task of conducting a sales tax field audit on two (2) locations with virtually no records available, except the 3.2 beer purchase records supplied by Capital and Premium, along with the July 2008 purchase invoices supplied by the Protestant.

The Division's choice of audit methodology was not arbitrary; it was necessitated by the failure of the Protestant to maintain the statutorily mandated records necessary to conduct a sales tax field audit on the Protestant's locations. The Division's choice of methodology in this matter is an acceptable "indirect" approach since the Protestant's records are incomplete and unreliable.

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 assessment is supported by substantial evidence.

The third point of the Protestant's position is that the Division ignored the Protestant's losses due to products which were out of date (10%), breakage (10%), and lost or stolen (10%), which the Protestant asserts total $167,627.43.[55] However, the Protestant did not document any of the alleged losses. Additionally, neither the Oklahoma Sales Tax Code[56] nor Tax Commission Rules[57] allow such a deduction for "convenience stores."

It is the Protestant who has the burden of proof in this matter to show that the Division's proposed sales tax assessment is incorrect and in what respects. The Protestant has failed to meet his burden of proof that the Division's proposed sales tax assessment (First Revision) for the Audit Period is incorrect and in what respects.

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[55] Position Letter at 3.

[56] *See* Note 31, *supra*.

[57] OKLA. ADMIN. CODE § 710:65-1-1 *et seq.*

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 assessment (First Revision) against the Protestant, inclusive of accrued interest and penalty, should be fixed as the amount 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.

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."