JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2010-12-16-05 / NON-PRECEDENTIAL**
ID: **P-10-509-H**
DATE: **DECEMBER 16, 2010**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPANY d/b/a BUSINESS ("Protestant") appears by and through CPA, CPA.[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 June 21, 2010, 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 June 30, 2010, OTC ATTORNEY filed an Entry of Appearance as Counsel of record for the Division.

On July 8, 2010, a letter was mailed to the Protestant's Representative stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-10-509-H. The letter also advised the Protestant's Representative 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 July 23, 2010, the Notice of Prehearing Conference was mailed to the last-known address of the Protestant's Representative, setting the prehearing conference for August 17, 2010, at 2:30 p.m.[5]

On August 17, 2010, at 2:30 p.m. the prehearing conference was held as scheduled. CPA did not appear in person or by telephone. OTC ATTORNEY appeared via telephone. On August 19, 2010, pursuant to the prehearing teleconference, a letter was mailed to the parties setting this matter for hearing on September 14, 2010, at 1:30 p.m., with position letters or memorandum briefs due on or before September 7, 2010.

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[1] *See* Note 22, *infra.*

[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 CPA at ADDRESS.

On September 7, 2010, the Division's Memorandum Brief was filed with Exhibits A through H attached thereto. CPA did not file a position letter or memorandum brief on behalf of the Protestant. On September 14, 2010, at 1:30 p.m., the hearing was held as scheduled. CPA did not appear on behalf of the Protestant. The Division called two (2) witnesses to testify. The Division's first witness, AUDITOR, Field Auditor,[6] 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 through H were identified, offered, and admitted into evidence. At the request of the undersigned, the Power of Attorney to CPA was identified, offered, and admitted as Division's Exhibit I. The Division's second witness, SUPERVISOR, Auditor Supervisor, Field Audit Section, Compliance Division, Oklahoma Tax Commission, testified about the audit methodology. At the conclusion of the hearing, the record in this matter was held open in order for the Division to provide a copy of the form signed by a taxpayer to authorize a shelf test, which would be identified, offered, and admitted as Division's Exhibit J. On September 16, 2010, the Division filed a Memorandum, Affidavit of SUPERVISOR, and attachments thereto, marked as Division's Exhibit J. The record in this matter was closed and this case was submitted for decision on September 16, 2010.

FINDINGS OF FACT

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

1. COMPANY d/b/a BUSINESS ("Protestant") is a convenience store located at ADDRESS, which sells fuel, beer, cigarettes, tobacco, miscellaneous food, and consumer goods. The Protestant operates under sales tax permit number XXXXXX. PRESIDENT is the President ("President") and SECRETARY is the Secretary/Treasurer ("Secretary/Treasurer") of the Protestant.[7]

2. On or about September 21, 2009, the Division commenced a sales tax field audit on the Protestant from March 1, 2007, through December 31, 2009, ("Audit Period") because the Protestant's 3.2 beer purchases were $32,686.95 and sales were $33,549.00, which is not enough to account for markup and the sale of other products.[8]

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

[7] Division's Exhibit A. On October 25, 2004, the Business Registration Application was filed with the Protestant located at PROTESTANT'S ADDRESS. On December 13, 2004, the Protestant filed an Application for Business Location Change to NEW ADDRESS. The Protestant purchased land and built the current facility located at BUSINESS ADDRESS. The Protestant began business at this address March 1, 2007. *See* Note 16, *infra.*

[8] Testimony of AUDITOR. Division's Exhibit B. The original Audit Period was January 1, 2007, through December 31, 2009, but was changed to March 1, 2007, through December 31, 2009. *See* Note 16, *infra.*

3. On January 5, 2010, at the opening field audit conference, AUDITOR met with the Protestant's CPA, and requested that the Protestant provide a list of records for the Audit Period listed on the Records Request Form.[9]

4. CPA provided certain documents, including Protestant's 2007 and 2008 Federal "S" Corporation income tax returns, Protestant's Suppliers Contact Approval Form, and the "Mark-up Percentages" form. CPA was unable to produce the Protestant's price list, purchase invoices, z-tapes, sales journals, or financial statements. CPA advised AUDITOR that the President refused to provide the records requested.[10]

5. The only information available to the Division was the Protestant's 3.2 beer purchases during the Audit Period from its wholesalers, COMPANY 1 ("COMPANY 1") and COMPANY 2 ("COMPANY 2").[11]

6. The Division used the Convenience Store Gross Sales Computation ("CSGS Computation")[12] to calculate Protestant's taxable sales during the Audit Period based upon the Protestant's 3.2 beer purchases,[13] as follows:

Wholesaler	2007	2008	2009
COMPANY 1	21,447.99	23,536.95	18,997.40
COMPANY 2	9,248.69	9,150.00	8,391.00
Totals	30,696.68	32,686.95	27,388.40

[9] *Id.* Division's Exhibit C.

[10] *Id.* Division's Exhibit D-1 through D-4.

[11] Division's Exhibit E-2.

[12] The Protestant in this case did not provide a full detailed list to the Division of its products and costs. Therefore, the Division could not have performed a shelf test to verify Protestant's listed percentages. Testimony of SUPERVISOR. *See* Note 23, *supra.* The spreadsheet was compiled using the National Association of Convenience Stores 2008 Annual Report of National Averages. These averages are based on National Association of Convenience Stores (NACS) State of the Industry Report as of December 2008 in conjunction with CSX and Nielson Studies. Based on studies of 156 retail firms with 20,553 stores across the USA. The 3.2 beer purchased was entered into the program, which then determines the Dollars of Purchases by Department and the Average Percent of Markup. Division's Exhibit E-1.

[13] 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. The Administrative Law Judge is taking judicial notice of the Division's testimony in other cases to complete the background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999). *See* OTC Order No. 2010-08-17-03 (August 17, 2010).

March 1, 2007 through December 31, 2007

DOLLARS OF PURCHASES BY DEPARTMENT[14]	DEPARTMENTS	AVERAGE PERCENT OF MARKUP	GROSS DOLLARS OF SALES[15]
	32.70% CIGARETTES	23.38%	$125,582.00
	13.90% FOODSERVICE	55.00%	$ 53,381.95
	14.10% PACKAGED BEVERAGES	37.66%	$ 54,150.04
$ 30,696.68[16]	**10.20% BEER**	**21.64%**	**$ 39,172.37**
	1.40% GENERAL MERCHANDISE	52.55%	$ 5,376.60
	3.20% CANDY	47.98%	$ 12,289.37
	3.50% SALTY SNACKS	38.38%	$ 13,441.50
	3.90% OTHER TOBACCO	31.65%	$ 14,977.67
	3.10% FLUID MILK PRODUCTS	35.08%	$ 11,905.33
	2.60% PACKAGED SWEET SNACKS	26.85%	$ 9,985.11
	11.40% OTHER DEPARTMENTS	47.42%	$ 43,780.88
TOTALS	100.00%		$384,042.82

Remove Cigarettes and Tobacco	($140,559.67)
Taxable Sales	$243,483.15
Reported Sales	($ 28,952.00)
Unreported Sales	$214,531.15

[14] Dollars of Purchases in other categories are calculated from the base of Beer Purchases using the product mix shown. *See* Note 11, *supra*

[15] Gross Dollars of sales are calculated using margin percentage. *See* Note 11, *supra.*

[16] Testimony of AUDITOR. Division's Exhibit E-2.

January 1, 2008 through December 31, 2008

DOLLARS OF PURCHASES BY DEPARTMENT	DEPARTMENTS	AVERAGE PERCENT OF MARKUP	GROSS DOLLARS OF SALES
	32.70% CIGARETTES	23.38%	$133,724.32
	13.90% FOODSERVICE	55.00%	$ 56,843.06
	14.10% PACKAGED BEVERAGES	37.66%	$ 57,660.95
$ 32,686.95[17]	**10.20% BEER**	**21.64%**	**$ 41,712.17**
	1.40% GENERAL MERCHANDISE	52.55%	$ 5,725.20
	3.20% CANDY	47.98%	$ 13,086.17
	3.50% SALTY SNACKS	38.38%	$ 14,313.00
	3.90% OTHER TOBACCO	31.65%	$ 15,948.77
	3.10% FLUID MILK PRODUCTS	35.08%	$ 12,677.23
	2.60% PACKAGED SWEET SNACKS	26.85%	$ 10,632.51
	11.40% OTHER DEPARTMENTS	47.42%	$ 46,619.49
TOTALS	100.00%		$408,942.88

Remove Cigarettes and Tobacco	($149,673.09)
Taxable Sales	$259,269.78
Reported Sales	($ 33,499.00)
Unreported Sales	$225,770.78

January 1, 2009 through December 31, 2009

DOLLARS OF PURCHASES BY DEPARTMENT	DEPARTMENTS	AVERAGE PERCENT OF MARKUP	GROSS DOLLARS OF SALES
	32.70% CIGARETTES	23.38%	$112,047.63
	13.90% FOODSERVICE	55.00%	$ 47,628.81
	14.10% PACKAGED BEVERAGES	37.66%	$ 48,314.11
$ 27,388.40[18]	**10.20% BEER**	**21.64%**	**$ 34,950.64**
	1.40% GENERAL MERCHANDISE	52.55%	$ 4,797.15
	3.20% CANDY	47.98%	$ 10,964.91
	3.50% SALTY SNACKS	38.38%	$ 11,992.87
	3.90% OTHER TOBACCO	31.65%	$ 13,363.48
	3.10% FLUID MILK PRODUCTS	35.08%	$ 10,622.25
	2.60% PACKAGED SWEET SNACKS	26.85%	$ 8,908.99
	11.40% OTHER DEPARTMENTS	47.42%	$ 39,062.48
TOTALS	100.00%		$342,653.29

Remove Cigarettes and Tobacco	($125,411.11)
Taxable Sales	$217,242.19
Reported Sales	($ 39,330.00)
Unreported Sales	$177,912.19

[17] *Id.*

[18] *Id.*

7. 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 (03-12, 2007)	$214,531.15
Unreported Taxable Sales (2008)	$225,770.78
Unreported Taxable Sales (2009)	$177,912.19
Total	$618,214.12[19]

8. On March 19, 2010, the Division issued a proposed sales tax assessment[20] for the Audit Period against the Protestant, as follows, to-wit:

Tax Due:	$ 51,775.44
Interest @ 15% through 04/30/2010:	$ 10,361.49
Tax & Interest due within 30 Days:	$ 62,136.93
30 day delinquent Penalty @ 10%:	$ 5,177.54
Tax, Interest & Penalty due after 30 Days:	$ 67,314.47

9. On April 27, 2010, the Division received a timely protest[21] to the proposed sales tax assessment against the Protestant for the Audit Period.

10. On December 29, 2009, the President executed a Power of Attorney to CPA, CPA.[22]

11. The Division no longer uses the form requiring a taxpayer to sign authorizing the Division to perform a shelf test for convenience store audits in those cases where a taxpayer fails to provide all of the requested records, including the taxpayer's cost/price list. If the taxpayer requests the Division to perform a shelf test and has provided all of the requested documents, the Division requires the taxpayer to sign the agreement to confirm the number of items to sample or test.[23] SUPERVISOR also states as follows, to-wit:

> The Protestant in this case did not provide a full detailed list to the Division of its products and costs. Therefore, the Division could not have performed a shelf test to verify Protestant's listed percentages. If a convenience store taxpayer does provide the Division's auditor with a full detailed list of its

[19] *See* Note 12, *supra*.

[20] Division's Exhibit F-G. AUDITOR testified that officer assessments were issued against President and Secretary/Treasurer, but that the officer assessments were not protested.

[21] Division's Exhibit H. The protest details various thefts from the Protestant during 2007 through 2009, none of which are documented. The protest letter is from the President, but all notices were sent to CPA pursuant to the Power of Attorney. *See* Note 22, *infra*. CPA did not contact the Division or the Court Clerk at any time during this matter to indicate that he was not representing the Protestant.

[22] Division's Exhibit I.

[23] Division's Exhibit J. SUPERVISOR notes that the Division's decision was based on OTC Order No. 2008-12-02-02 (December 2, 2008) and OTC Order No. 2006-12-07-04 (December 7, 2006).

> products and costs, the Division's auditor will confirm that the taxpayer's prices are correct by going to the store and checking the list against the posted prices. If both the prices and the costs are confirmed to be accurate, the Division will use them on the audit instead of the national margins. If a convenience store taxpayer only provides the Division with a partial list of his merchandise, the Division will incorporate his "confirmable margins" into the national averages, and thus create a hybrid of the national convenience store average calculations.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[24]

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Sales Tax Code").[25] The Sales Tax Code levies "upon all sales,[26] not otherwise exempted…an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds[27] of each sale of…tangible personal property…."[28] Oklahoma Statutes authorize incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.[29]

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[30] 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

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

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

[26] 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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> …

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

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

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

[30] *See* Note 25, *supra*.

hereunder and such other records of goods, wares and merchandise, and other subjects of taxation under the Oklahoma Sales Tax Code[31] 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.[32] 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.[33]

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.[34]

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.[35]

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.[36]

7. The rules promulgated pursuant to the Administrative Procedures Act[37] are presumed to be valid and binding on the persons they affect and have the force of law.[38]

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[31] *Id.*

[32] *Id.*

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

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

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

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

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

8. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[39]

9. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[40]

DISCUSSION

The protest does not challenge the Division's choice of methodology, but states that the President "could not reconcile how [the Division] [came] up with $51,775.44 tax due on your statement. I believe we are currant [sic] on our sales tax payments."[41] In the protest letter the President states, "I would like to bring your attention to the following matters of [Protestant]…that might shed some light on the discrepancy in our numbers versus yours…"[42] The protest goes on to detail various thefts which the President asserts occurred during 2007 through 2009, but none of the thefts are documented.

The Division's choice of audit methodology was necessitated by the failure of the Protestant to maintain the statutorily mandated records necessary to conduct a sales tax field audit and to provide those records to the Division when requested. The Division's choice of methodology in this matter is an acceptable "indirect" approach since the Protestant's records are incomplete.

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.

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

[39] 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.

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

[41] *See* Note 21, *supra*.

[42] *Id.*

The Protestant did not document any of the alleged losses due to theft and neither the Oklahoma Sales Tax Code[43] nor Tax Commission Rules[44] 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 its burden of proof that the Division's proposed sales tax assessment for the Audit Period is 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.

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."

[43] *See* Note 25, *supra*.

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