JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2011-03-08-03 / NON-PRECEDENTIAL**
ID: **P-09-197-H**
DATE: **MARCH 8, 2011**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPANY and PRESIDENT, as President and as an individual ("Protestants"), appears through attorney, ATTORNEY, FIRM. The Field Audit Section of the Compliance Division ("Division"), Oklahoma Tax Commission, appears through OTC ATTORNEY, First Deputy General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On July 21, 2009,[1] the protest was received by the Court Clerk.[2] On July 21, 2009, ATTORNEY filed an Entry of Appearance as Counsel of record for the Protestants. On November 25, 2009, the protest file was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*[3] and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.[4]

On December 2, 2009, a letter was mailed to the parties stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-09-197-H. The letter also advised Counsel 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.*[5] On December 3, 2009, OTC ATTORNEY filed an Entry of Appearance as Counsel of record for the Division. On December 8, 2009, the Notice of Prehearing Conference was mailed to Counsel, setting the prehearing conference for January 11, 2010, at 3:00 p.m.

On January 8, 2010, OTC ATTORNEY filed a Status Report In Lieu of Prehearing Conference advising that the Protestants were to provide additional information to the Division and the parties requested sixty (60) days to file a status report. On January 11, 2010, a letter was mailed to Counsel directing that a Status Report be filed on or before March 12, 2010.

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[1] The envelope is post-marked July 16, 2009.

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

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

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

[5] *Id.*

On February 12, 2010, the Division filed a Notice of Sales Tax Revision ("First Revision") with the Court Clerk. A copy of the Division's work papers were attached thereto. On February 18, 2010, a letter was mailed to Counsel advising that the Division's First Revision had been filed and advised the Protestants that a response to the First Revision was to be filed on or before March 12, 2010, including how the Protestants wished to proceed.

On March 12, 2010, via facsimile,[6] the Protestants filed a protest to the Division's First Revision advising that the file containing customer information had been destroyed due to water damage in one of the Protestants' offices and attempts were still being made to get copies of permits and licenses from its customers. On March 12, 2010, the Division filed a Status Report stating that the parties could not resolve this matter and requesting this case be set for hearing. On March 15, 2010, Counsel was advised by letter that this matter had been set for hearing on April 28, 2010, at 9:30 a.m., with position letters or memorandum briefs due on or before April 21, 2010. On March 18, 2010, the Division filed a second revision ("Second Revision") with the Court Clerk. A copy of the Division's work papers were attached thereto.

On April 20, 2010, a teleconference was held at Counsels' request for a continuance of the hearing to May 27, 2010, at 9:30 a.m. On April 21, 2010, ATTORNEY filed a Motion for Continuance of hearing in according with the teleconference. On April 21, 2010, an Order Granting Continuance was issued setting the hearing for May 27, 2010, at 9:30 a.m., with position letters or memorandum briefs due on or before May 20, 2010.

On May 20, 2010, the Position Statement of PRESIDENT, Individually and as President of COMPANY was filed with the Court Clerk. On May 20, 2010, the Position Letter of the Compliance Division was filed with the Court Clerk. On May 24, 2010, the Division filed a Notice of Third Sales Tax Revision, with attachments thereto. On May 27, 2010, the Protestants' filed a *Motion to Dismiss* ("*Motion*") on the basis that the three (3) year time period to assess sales tax had run.

On June 2, 2010, a letter was mailed confirming that by agreement of Counsel the hearing set for May 27, 2010, had been stricken from the docket with a status report due on or before June 28, 2010. On June 28, 2010, the Division filed a Status Report advising that the parties were unable to resolve this matter and requesting that the protest be set for hearing.

On July 22, 2010, a letter was mailed to Counsel setting the hearing on September 2, 2010, at 9:30 a.m., with position letters or memorandum briefs due on or before August 26, 2010. The letter also advised Counsel that any issues raised in the *Motion* filed May 27, 2010, would be addressed at the hearing pursuant to Rule 710:1-5-46(c).[7]

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[6] On March 15, 2010, the original was received by the Court Clerk.

[7] OKLA. ADMIN. CODE § 710:1-5-46(c) (June 11, 2005):

> **Dismissal for lack of jurisdiction.** The Tax Commission is without jurisdiction to consider a protest that is not filed within the time provided by statute. The question of the Commission's jurisdiction to consider a protest may be raised at any time, by a party, the Administrative Law Judge, or the Commission itself. Questions as to the authority, propriety, or timeliness of the tax division's action or proposed action shall not be raised by a motion to dismiss, but

On September 2, 2010, at 9:30 a.m. an open hearing[8] was held as scheduled. Counsel announced that they were stipulating to the identification, offer, and admission into evidence of Division's Exhibits A through I, along with two (2) stipulations, which the undersigned requested Counsel reduce to writing. The Division called one (1) witness, SUPERVISOR, Auditor Supervisor, Field Audit Section, Compliance Division, Oklahoma Tax Commission, who testified as to the conduct of the audit and as custodian of the Division's records. The Division's Exhibit J was identified, offered, and admitted into evidence. Oral arguments were heard on the Protestants' *Motion.* At the conclusion of oral arguments, the record in this matter was held open for the Division to provide a copy of the underlying work papers related to Division Exhibit I (projection methodology) and copies of monthly cigarette reports reflecting a date stamp or a screen print showing the date the report was filed. On September 8, 2010, the Division filed Documentation Requested at Hearing, with attachments thereto. On September 14, 2010, a letter was mailed to Counsel requesting that all three (3) stipulations be reduced to writing. It was also noted in the letter that the Division had filed documentation. Counsel was given until October 4, 2010, to file the requested stipulations announced at hearing. On September 15, 2010, Counsel filed Joint Stipulation of Facts. The record in this matter was closed and this case was submitted for decision on September 16, 2010.

On November 10, 2010, the Findings, Conclusions and Recommendations ("*Findings*") were issued by the undersigned recommending that the protest of COMPANY and its President to the proposed sales tax assessments (Fourth Revision) should be granted. On November 24, 2010, the Division filed its Motion for Reconsideration on the basis that the *Findings* issued on November 10, 2010, were erroneous and not supported by the record or by any statutory authority. The Division's Certificate of Mailing reflects that the Division's Motion for Reconsideration was mailed to ATTORNEY'S last-known address at FIRM ADDRESS. ATTORNEY did not file a response to the Division's Motion for Reconsideration.

On January 11, 2011, an Order Granting the Division's Motion for Reconsideration was issued, withdrawing the *Findings* issued on November 10, 2010, and resubmitting this matter for decision on January 11, 2011.

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shall be raised as defenses to such action or proposed action, as a part of or addition to the protest.

[8] The Protestants, through ATTORNEY, waived their right to a confidential hearing as provided by the provisions of OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2010).

STIPULATION OF FACTS

On September 15, 2010, the parties filed Joint Stipulation of Facts,[9] as follows, to-wit:

1. During the audit period of *July 2003 through December 2005*, COMPANY did not hold an Oklahoma sales tax permit issued by the Oklahoma Tax Commission;

2. During the audit period of *July 2003 through December 2005*, COMPANY did not file an Oklahoma sales tax report with the Oklahoma Tax Commission; and

3. During the audit period of *July 2003 through December 2005*, PURCHASER did not hold an Oklahoma sales tax permit or an Oklahoma cigarette retailer license issued by the Oklahoma Tax Commission. (Emphasis added).

ADDITIONAL FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, the Protestants' Position Statement, the Division's Position Letter, and the Protestants' *Motion* the undersigned finds:

4. COMPANY ("COMPANY") was a wholesale distributor of cigarettes (Cigarette License ####) and other tobacco products to retail outlets and wholesalers in the State of Oklahoma, as well as other states.[10]

5. On or about July 2007, COMPANY closed its business located at ADDRESS ("Business Location").[11]

6. On March 27, 2008, the Division mailed a letter to COMPANY notifying that it had been selected for a sales tax audit covering *July 1, 2003 through June 30, 2008.* On August 18, 2008, an opening conference was held at COMPANY's Business Location. COMPANY, through PRESIDENT, its president ("President"), executed an Audit Methodology Agreement to conduct the sales tax audit using an error rate projection method through the use of randomly selected sample months. In support of its sales, the President provided the Division with sales invoices for the sample months of July 2003 and July 2004. At the conclusion of the audit, the Division provided the President with a copy of the proposed work papers.[12]

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[9] The text of the stipulated facts is set out *in haec verba*. "***in haec vega***" (in heek v<<schwa>>r-b<<schwa>>). [Latin] In these same words; verbatim. BLACK'S LAW DICTIONARY (8TH ed. 2004), available at http://westlaw.com. However, emphasis was added to the period covered by the audit. The correct audit period according to the Fourth Revision is from *July 1, 2003 through December 31, 2004*. *See* Note 26, *infra.*

[10] Protestants' Position Statement at 1. *See* Note 25, *infra.*

[11] *Id.*

[12] Division's Exhibit A. Testimony of SUPERVISOR.

7. On January 29, 2009, AUDITOR, Field Auditor, Compliance Division, Oklahoma Tax Commission, placed a memorandum in the Division's Field Audit File noting the Audit Package mailed back to SUPERVISOR had "suffered extreme damage by the USPS." Attached to the memorandum is an undated form notice from the USPS. Portions of the Audit Package were missing, including the Audit Methodology Agreement signed by the President.[13]

8. On February 20, 2009, the Division issued a proposed sales tax assessment[14] against COMPANY for *July 1, 2003 through June 30, 2008* ("*Original Audit Period*"), which in pertinent parts states as follows, to-wit:

> Sales Tax permit numbers were not obtained from customers at the time of purchase for sales claimed as "sales for resale exempt from Sales Tax."

Tax Due:	$252,545.60
Interest @15% through 06/30/09:	$196,077.63
Tax & Interest due within 30 Days:	$448,623.23
30 day delinquent Penalty @ 10%:	$ 25,254.53
Tax, Interest & Penalty due after 30 Days:	$473,877.76

9. On April 8, 2009, the Division received a request, by facsimile, from the President for an extension of time to respond to the proposed sales tax assessment.[15]

10. On April 17, 2009, the Division mailed a letter to the Protestant granting the ninety (90) day extension request to respond to the proposed sales tax assessments. The letter states the extension would expire on July 20, 2009, at 4:30 p.m.[16]

11. On July 16, 2009, a timely protest was mailed by ATTORNEY to the Division.[17]

12. On August 28, 2009, the Division issued corrected sales tax assessments ("Corrected Assessments")[18] against the Protestants for *July 1, 2003 through June 30, 2008*, which in pertinent parts state as follows, to-wit:

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[13] Division's Exhibit J. Testimony of SUPERVISOR. *See* Division's Exhibit J. The Protestants do not dispute that the President signed the Audit Methodology Agreement, but that the Division could not produce it as an exhibit at the hearing.

[14] Division's Exhibit B.

[15] Division's Exhibit D.

[16] Division's Exhibit D-1.

[17] Division's Exhibit E. The envelope containing the protest letter is post-marked July 16, 2009, and is dated-stamped as being received by the Division on July 21, 2009. The Administrative Law Judge is taking judicial notice of the audit packet, which is part of the court file. The Division's exhibit does not have a copy of the envelope attached, but a copy of the envelope is contained in the court file. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999).

> The original assessment indicated a liability of $473,877.76. An error with the Computer Program has caused us to change certain portions of the audit.
>
> | | |
> |---|---|
> | Tax Due: | $362,871.97 |
> | Interest @ 15% through 09/30/09: | $295,100.70 |
> | Tax & Interest due within 30 Days: | $657,972.67 |
> | 30 day delinquent Penalty @ 10%: | $ 36,287.41 |
> | Tax, Interest & Penalty due after 30 Days: | $694,260.08 |
>
> Original Protest received July 21, 2009, will be accepted on this revision.

13. On February 12, 2010, the Division filed a Notice of Sales Tax Revision ("First Revision"),[19] from *July 1, 2003 through December 31, 2004* ("*Revised Audit Period*"),[20] as follows, to-wit:

Tax Due:	$199,592.17
Interest @ 15% through 08/05/09:	$161,556.80
Penalty:	$ 19,959.52
Total:	$381,108.49

14. On March 12, 2010, the Division received a protest to the Division's First Revision.[21]

15. On March 18, 2010, Division filed its Notice of Second Sales Tax Revision ("Second Revision")[22] for the *Revised Audit Period*, which states as follows, to-wit:

Sales Tax:	$199,774.13
Interest to 08/05/09:	$181,655.90
Penalty:	$ 19,977.70
Total:	$401,407.73

16. On May 24, 2010, the Division filed the Notice of Third Sales Tax Revision ("Third Revision"), for the *Revised Audit Period*, to reflect deletion of entries for tribal smoke shops and

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[18] Division's Exhibit C. The copy of the Corrected Revision against COMPANY is not part of the Division's exhibits.

[19] Division's Exhibit F.

[20] *Id.* The Division's work papers state, "Based on information furnished by T/P the 07/01/03 through 12/31/04 Assessment for Sales Tax."

[21] *See* copy in court file.

[22] Division's Exhibit G. The Division prepared the Second Revision to reflect changes made to correct errors on the county tax calculation. In the Corrected Revision county tax was not calculated on some cities when, in fact, county tax should have been calculated.

purchasers for which the Division was able to locate sales tax permits in effect during the *Revised Audit Period,*[23] as follows, to-wit:

Sales Tax:	$ 62,605.06
Interest to 07/31/10:	$ 58,603.68
Penalty:	$ 6,260.41
Total:	$127,469.15

17. On May 20, 2010, Counsel for the Protestants provided an address for PURCHASER, one (1) of the two (2) purchasers remaining on the Third Revision. The Division located a cigarette license and sales tax permit for PURCHASER at the address provided, but neither the cigarette license nor the sales tax permit were valid during the Sample Months. Both had been terminated in 2002. One (1) of the purchasers, PURCHASER 2 , was removed from the audit.[24]

18. Using the Sample Months and the Audit Sample Line Items for PURCHASER, the Division calculated the projection for the *Revised Audit Period*[25] as follows, to-wit:

Sample Months		Audit Sample Line Items	
July 2003	29,164.97	07/08/2003	22,437.00
July 2004	29,164.97	07/22/2003	15,840.00
Total	58,329.94	07/06/2004	11,020.50
		07/12/2004	10,665.00
		07/20/2004	13,864.50
		07/27/2004	7,820.95
		Total	81,647.95

Sample Errors	$81,647.95
Divided by	
Sample Months	$58,329.64
Equals Error Rate	1.399760569

For each month of the Audit Period the Sales ($29,164.97), times the Error Rate (1.399760569), equals $40,823.98; times sixteen (16) months, equals $653,183.68; plus the Audit Sample Line Items ($81,647.95), equals $734,831.63 in Taxable Sales for the Audit Period.

[23] Division's Exhibit H.

[24] Division Position Letter at 3.

[25] *See* Division's Documentation filed September 8, 2010, Exhibit A.

19. On May 26, 2010, the Division issued work papers for its fourth revision ("Fourth Revision"),[26] for the *Revised Audit Period*, as follows, to-wit:

Sales Tax:	$ 61,542.15
Interest to 07/31/10:	$ 57,599.31
Penalty:	$ 6,154.19
Total:	$125,295.65

20. During the *Revised Audit Period*, COMPANY filed Out of State Monthly Reports of Wholesalers and Jobbers of Cigarettes (OTC Form 16-9), with Interstate Sales of Cigarettes (OTC Form 16-1-B-R-85),[27] as follows, to-wit:

Month	Year	Dated	OTC Date Stamp
July	2003	08/13/03	None
August	2003	09/03/03	09/17/03
September	2003	10/09/03	None
October	2003	11/10/03	None
November	2003	12/01/03	None
December	2003	01/05/04	None
January	2004	02/09/04	None
February	2004	03/02/04	03/18/04
March	2004	04/13/04	None
April	2004	05/10/04	None
May	2004	06/04/04	None
June	2004	07/08/04	07/23/04
July	2004	08/06/04	None
August	2004	09/07/04	None
September	2004	10/10/04	None
October	2004	11/15/04	None
November	2004	12/08/04	None
December	2004	01/15/05	01/24/05

21. The Division states in the Documentation Requested at Hearing ("Documentation") as follows, to-wit:

> According to Division personnel, the date on which Cigarette Wholesaler Reports are filed is not captured electronically by the Oklahoma Tax Commission. Neither is the report routinely date-stamped in the Oklahoma Tax Commission mail room or when received by Division. After Cigarette Wholesaler Reports are audited by Division, the audit reports are scanned and the scanned copies maintained by the Division.

[26] Division's Exhibit I.

[27] *See* Division's Documentation filed September 8, 2010, Exhibit B. *See also* Protestants' *Motion* Exhibit B.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[28]

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Sales Tax Code").[29] The Sales Tax Code levies "upon all sales,[30] not otherwise exempted . . . an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds[31] of each sale of . . . tangible personal property. . . ."[32] Oklahoma Statutes authorize incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.[33]

3. Rules promulgated pursuant to the Administrative Procedures Act[34] are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court.[35] They are valid and binding on the persons they affect, have the force of law, and are prima facie evidence of the proper interpretation of the matter to which they refer.[36]

4. The Tax Commission has promulgated rules as provided by law to facilitate the administration, enforcement, and collection of taxes under the Sales Tax Code.[37]

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[28] OKLA. STAT. tit. 68, § 221(D) (West Supp. 2010).

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

[30] OKLA. STAT. tit. 68, § 1352(21) (West Supp. 2004):

> "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,
>
> …

[31] OKLA. STAT. tit. 68, § 1352(11) (West Supp. 2004).

[32] OKLA. STAT. tit. 68, § 1354(A)(1) (West Supp. 2004).

[33] OKLA. STAT. ANN. tit. 68, § 1370 et seq. (West 2008) and OKLA. STAT. tit. 68, § 2701 (West Supp. 2003).

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

[35] OKLA. STAT. ANN. tit. 75, § 306(C) (West 2002).

[36] OKLA. STAT. ANN. tit. 75, § 308.2(C) (West 2002).

[37] OKLA. ADMIN. CODE § 710:65-1-1.

5. For the purpose of proper administration of the provisions of sales tax law, it is presumed that all gross receipts are subject to tax until they are shown to be tax exempt.[38]

6. 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.[39]

7. Vendors[40] shall keep records and books of all sales and all purchases of tangible personal property and must maintain complete books and records covering receipts from all sales and distinguishing taxable from nontaxable receipts.[41]

8. Where the nature of a business is such that charge and time sales are made, or where the nature of the business is such that a portion of its sales are for resale, or are within the protection of the Commerce Clause of the Constitution of the United States, or consist of nontaxable services, or are exempt under any provision of the Oklahoma Sales Tax Code, then such records as will clearly indicate the information required in filing returns must be kept. To support deductions made on the tax return, the vendor's records for each transaction for which exemption is claimed shall be in detail sufficient to show:

(1) The name and address of the customer,
(2) The character of the transaction,
(3) The date,
(4) The amount of gross receipts or gross proceeds; and
(5) Such other information as may be necessary to establish the nontaxable character of such transaction under the Sales Tax Code.[42]

9. Effective January 1, 2005, the sales of cigarettes are exempt from sales tax levied by the Sales Tax Code.[43] The Division did not assess any sales tax on COMPANY's cigarette sales occurring on or after January 1, 2005.[44]

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[38] OKLA. STAT. tit. 68, § 1365(F) (West Supp. 2004).

[39] OKLA. ADMIN. CODE § 710:65-9-1(a).

[40] OKLA. STAT. tit. 68, § 1352(27) (West Supp. 2004).

[41] *See* Note 38, *supra*.

[42] OKLA. ADMIN. CODE § 710:65-3-33. *See* OKLA. STAT. tit. 68, § 1365(C) (West Supp. 2004).

[43] OKLA. STAT. tit. 68, § 1354(A)(1) (West Supp. 2004). *See* OKLA. ADMIN. CODE § 710:65-13-30(h)(3).

[44] *See* Note 26, *supra*.

10. 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[45] 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[46] 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.[47] 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.[48] Anyone claiming a sale for resale exemption shall also keep a record of the purchaser's resale number issued by the Commission. The failure to obtain and keep a record of the purchaser's resale number shall create a presumption that the sale was not a sale for resale. The vendor may, however, present other documentary evidence from its books and records to overcome this presumption.[49]

11. All sales are presumed to be subject to sales tax unless specifically exempted by the Sales Tax Code.[50] Vendors are liable for the sales tax collected as well as for tax that should have been collected.[51]

12. 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

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

[46] *Id.*

[47] *Id.*

[48] *See* Note 38, *supra*.

[49] *See* Note 42, *supra*.

[50] *See* Note 45, *supra*.

[51] OKLA. ADMIN. CODE § 710:65-7-6 (a) (June 13, 2002).

made in the name of the "Oklahoma Tax Commission" by its authorized agents shall be considered as the action of the Tax Commission.[52]

13. "Every person required to collect any tax imposed by [the Sales Tax Code],[53] and in the case of a corporation, each principal officer thereof, shall be personally liable for the tax."[54]

14. When the Tax Commission issues a proposed assessment against a corporation for unpaid sales tax, the Commission shall file assessments against the principal officers of the corporation personally liable for the tax. The principal officers of the corporation shall be liable for the payment of sales tax during the period of time for which the assessment is made. The liability of a principal officer for sales tax shall be determined in accordance with the standards for determining liability for payment of federal withholding tax.[55]

15. In this matter the President is a principal officer of COMPANY during the Revised Audit Period. As a principal officer of COMPANY, the President is a "responsible person" for the collection and remittance of sales tax.

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

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

[54] *See* OKLA. STAT. ANN. tit. 68, § 253 (West 2001). The Tax Commission identifies the "President, Vice-President, Secretary, Treasurer, or Secretary/Treasurer" as principal officers. OKLA. ADMIN. CODE § 710:65-7-3(1).

[55] The full text of OKLA. STAT. ANN. tit. 68, § 253 (West 2001) is as follows:

> When the Oklahoma Tax Commission files a proposed assessment against corporations or limited liability companies for unpaid sales taxes, withheld income taxes or motor fuel taxes collected pursuant to Article 5, 6 or 7 of this title, the Commission shall file such proposed assessments against the principal officers of the corporations or the managers or members 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. Managers or members of any limited liability company shall be liable for the payment of any tax as prescribed by this section if the managers or members were specified as responsible for withholding or collection and remittance of taxes during the period of time for which the assessment was made. If no managers or members were specified to be responsible for the duty of withholding and remittance of taxes during the period of time for which the assessment was made, then all managers and member shall be liable.
>
> The liability of a principal officer for sales tax, withheld income tax or motor fuel tax shall be determined in accordance with the standards for determining liability for payment of federal withholding tax pursuant to the Internal Revenue Code of 1986, as amended, or regulations promulgated pursuant to such section.

Section 253 sets out the trust taxes (which cannot be discharged in bankruptcy) for which a principal officer of a corporation that is also a "responsible person" is held personally liable, regardless of whether a corporation is in good standing or suspended.

16. Oklahoma Statutes provide for the collection of interest and penalty on delinquent tax.[56] "All penalties or interest imposed by [Title 68], or any state tax law, shall be recoverable by the Tax Commission as a part of the tax with respect to which they are imposed…."[57]

17. 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.[58]

18. Each distributor shall maintain copies of invoices or equivalent documentation for each of its facilities for every transaction in which the distributor is the seller, purchaser, consignor, consignee, or recipient of cigarettes. The invoices or documentation shall show the name and address of the consignor, seller, purchaser, or consignee, and the quantity by brand style of the cigarettes involved in the transaction.[59]

19. The invoices or equivalent documentation must be retained for a period of three (3) years from the date of the transaction.[60]

20. No later than the tenth day of each calendar month, each person who has made a delivery sale, or mailed, shipped, or otherwise delivered cigarettes in connection with any such sale during the previous month, must (shall) make a memorandum report to the Oklahoma Tax Commission of the following information:

(1) The name of the purchaser;

(2) The brands of cigarettes sold; and,

(3) The quantity of cigarettes sold.[61]

21. Section 223 of Title 68[62] states as follows, to-wit:

> A. No assessment of any tax levied under the provisions of any state tax law except as provided in this section, shall be made after the expiration of three (3) years from the date the return was required to be filed or the date the return was filed, whichever period expires the later, and no proceedings by tax warrant or in court without the previous assessment for the collection of such tax shall be begun after the expiration of such period. No assessment shall be

[56] OKLA. STAT. tit. 68, § 217 (West Supp. 2004).

[57] OKLA. STAT. tit. 68, § 217(G) (West Supp. 2004).

[58] *See* Note 34, *supra*. *See also Toxic Waste Impact Group, Inc. v. Leavitt*, 1988 OK 20, 755 P.2d 626.

[59] OKLA. STAT. tit. 68, § 312.1(E) (West Supp. 2004).

[60] OKLA. STAT. tit. 68, § 312.1(I) (West Supp. 2004).

[61] OKLA. STAT. tit. 68, § 317.5(B) (West Supp. 2004).

[62] OKLA. STAT. ANN. tit. 68, § 223 (West Supp. 2010).

> required if a report or return, signed by the taxpayer, was filed and the liability evidenced by the report or return has not been paid. If the assessment has been made within the limitation period set forth in this subsection, the tax may be collected by tax warrant or court proceeding, but only if the tax warrant is issued or the proceeding begun within ten (10) years after the assessment of the tax has become final.
>
> B. Where before the expiration of the time prescribed in subsection A of this section for the assessment of the tax, both the Tax Commission and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon, and the period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. In those instances where the time to file a claim for a refund has not expired at the date the extension agreement is entered into, the entering into such an agreement shall automatically extend the period in which a refund may be allowed or a claim for a refund may be filed to the final date of such agreement.
>
> C. In the case of a false or fraudulent report or return, with intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time. The term "false or fraudulent" as used in this subsection shall have the same meaning as when used in Section 6501 of the Internal Revenue Code.
>
> D. In the case of a willful attempt in any manner to defeat or evade tax imposed by this title, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.
>
> E. In the case of a failure to file a report or return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

22. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[63] A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[64]

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[63] 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:

DISCUSSION

The Protestants' position is that they have met their burden of proof by a preponderance of evidence[65] as follows, to-wit:

> 1. COMPANY timely filed with the State of Oklahoma all monthly reports of cigarettes sold.[66]
>
> 2. COMPANY provided the State of Oklahoma sales tax permits and wholesaler licenses for the majority of the businesses to which COMPANY sold.
>
> 3. The State of Oklahoma was able to determine, through its own means, that sales tax permits and cigarette wholesale licenses existed for other businesses on the list except for one (1) business: PURCHASER.[67]

The Division's position can be summarized as follows, to-wit:

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A. Sales of tangible personal property are presumed taxable.

B. Protestants had a duty to document its sales for resale.

C. President is liable for COMPANY's sales tax assessment as an officer of the corporation and as an individual.

> … "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.

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

[65] Protestants' Position Letter at 5.

[66] *See* Note 27, *supra*.

[67] *See* Note 26, *supra*.

PROTESTANTS' MOTION TO DISMISS

On May 27, 2010, the Protestants' *Motion* was filed on the basis that under Section 223(A) of Title 68,[68] "…the three (3) years from the date the return was required to be filed or the date the return was filed, whichever period expires later" had run. In support of their *Motion*, the Protestants' position can be summarized as follows, to-wit:

> 1. On March 27, 2008, the Division mailed a letter to COMPANY notifying it that it had been selected for an audit.
>
> 2. On February 20, 2009, the Division issued a proposed sales tax assessment against COMPANY for the tax periods covering July 1, 2003, through June 30, 2008. On August 28, 2009, the Division issued Corrected Assessments against the Protestants for the tax periods covering July 1, 2003, through June 30, 2008.[69]
>
> 3. COMPANY timely filed the Monthly Reports of Wholesalers and Jobbers of Cigarettes ("Wholesaler Reports").[70]
>
> 4. At no time since the filing of the Wholesaler Reports did COMPANY enter into an agreement extending the time in which additional sales tax could be assessed.
>
> 5. The Division has not alleged that COMPANY's Wholesaler Reports are false or fraudulent.
>
> 6. The proposed sales tax assessments are based upon the fact that COMPANY could not produce sales tax permits relating to its customers for the Revised Audit Period that occurred beyond the three (3) year time period contained in Section 223 of Title 68, which "…is exactly what the statute of limitations is designed to prevent; a requirement that a taxpayer prove its return past the three (3) year statute of limitations period. COMPANY should not be required to keep records indefinitely. The statute of limitations has run."[71]

The Division did not file a written response to the Protestants' *Motion*, but stated its position during oral argument. First, the Division asserts that the *Motion* is inappropriate under the rule; second, COMPANY stipulated that it did not hold an Oklahoma sales tax permit during the Revised Audit Period; third, COMPANY stipulated that it did not file an Oklahoma sales tax

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[68] *See* Note 62, *supra*.

[69] *See* Notes 14 and 18, *supra.*

[70] *See* Note 27, *supra*. The reports are referred to incorrectly in the *Motion* as "sales" tax reports.

[71] *Motion* at 2.

report; and fourth, during the Revised Audit Period, PURCHASER did not hold an Oklahoma sales tax permit or an Oklahoma cigarette retailer license so the three (3) year time period prescribed by Section 223 is tolled for sales tax purposes.

Tax Commission Rule 710:1-5-46(c) (June 11, 2005) ("Rule") states in pertinent part, "Questions as to the authority, propriety, or timeliness of the tax division's action or proposed action shall not be raised by a motion to dismiss, but shall be raised as defenses to such action or proposed action, as a part of or addition to the protest." In accordance with the Rule, the Protestants' *Motion* shall be treated as a defense raised to the Division's issuance of the proposed sales tax assessments for the Revised Audit Period.

As a wholesale distributor of cigarettes to retail outlets and wholesalers in the State of Oklahoma, COMPANY was making sales of tangible personal property, subject to the imposition of sales tax, unless the sales were otherwise exempted pursuant to the provisions of the Sales Tax Code. COMPANY was required to obtain a sales tax permit and was responsible for collecting/remitting the payment of Oklahoma sales tax (unless exempted) and was required to file a Sales Tax Report for every month of the *Revised Audit Period* even though there was no amount subject to tax or any tax due (Schedule N Sales Tax Exemption Schedule of Oklahoma Sales Tax Report Form 13-23).[72]

COMPANY stipulated that it did not hold an Oklahoma sales tax permit issued by the Tax Commission during the Revised Audit Period; nor did it file an Oklahoma sales tax report with the Tax Commission during the *Revised Audit Period*.[73] COMPANY also stipulated that during the *Revised Audit Period*, PURCHASER did not hold an Oklahoma sales tax permit or an Oklahoma cigarette retailer license issued by the Tax Commission.[74]

What complicated and confused this matter was that COMPANY was required by the Oklahoma Cigarette Stamp Tax Act[75] to file Wholesaler Reports on or before the tenth (10th) day of each calendar month following the sale of cigarettes during the previous month.[76] From the record, it appears that the Wholesaler Reports were either filed timely or within two (2) weeks of the due date. Although the filing of these reports is mandatory, "…the date on which Cigarette Wholesaler Reports are filed is not captured electronically by the Oklahoma Tax Commission. Neither is the report routinely date-stamped in the Oklahoma Tax Commission mail room or when received by Division. After Cigarette Wholesaler Reports are audited by Division, the audit reports are scanned and the scanned copies maintained by Division."[77]

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[72] The Administrative Law Judge is taking judicial notice of the Tax Commission website at http://www.oktax.state.ok.us to complete the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999).

[73] *See* Stipulations 1 through 2.

[74] *See* Stipulation 3.

[75] OKLA. STAT. tit. 68, § 301 et seq. (West Supp 2004). *See* Note 61, *supra.*

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

[77] *See* Note 27, *supra*.

At first glance, it appears that the Protestants' *Motion* is supported by the provisions of Section 223 of Title 68,[78] but the Wholesaler Reports were required to be filed by the Oklahoma Cigarette Stamp Tax Act,[79] not the Sales Tax Code.[80] More importantly, because COMPANY did not hold an Oklahoma sales tax permit and did not file any Oklahoma sales tax reports, the three (3) year time period was tolled. If COMPANY had timely filed Oklahoma sales tax reports and Wholesaler Reports during the *Revised Audit Period* then the three (3) year time period would have begin to run.

The Protestants have failed to meet their burden of proof that the proposed sales tax assessments for the *Revised Audit Period* (Fourth Revision) 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 of COMPANY and its President to the proposed sales tax assessments for the *Revised Audit Period* (Fourth Revision) should be denied.

It is further ORDERED that the amount of sales tax and penalty assessed for the *Revised Audit Period* (Fourth Revision) be fixed as the deficiency due and owing, including interest, accrued and accruing.

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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."

[78] *See* Note 62, *supra*.

[79] *See* Note 75, *supra*.

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