JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2011-11-15-05 / NON-PRECEDENTIAL**
ID: **P-10-085-H**
DATE: **NOVEMBER 15, 2011**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPANY and PRESIDENT, as President of COMPANY and as an individual ("Protestants") appear through ATTORNEY, Attorney. The Field Audit Section, Compliance Division ("Division") of the Oklahoma Tax Commission, appears through OTC ATTORNEY 1, First Deputy General Counsel, and OTC ATTORNEY 2, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On March 26, 2010, the protest letter 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 March 26, 2010, a Memorandum was sent to the Division to transmit the protest file, along with a copy of the protest letter. On March 30, 2010, a letter was mailed to the Protestants stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-10-085-H.[3] The letter also advised the Protestants that a Notice of Prehearing Conference would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Office of Administrative Law Judges.*[4] On March 31, 2010, OTC ATTORNEY 3, Assistant General Counsel, filed an Entry of Appearance as Counsel of record for the Division.

On April 8, 2010, the Court Clerk[5] filed a memorandum to the court file stating the introductory letter of March 30th had been returned to sender "Attempted – Not Known/Unable to Forward." On April 14, 2010, the Notice of Prehearing Conference was mailed to the last-known address of the Protestants, setting the prehearing conference for May 24, 2010, at 10:30 a.m.[6] On April 28, 2010, a Second Request for the protest file was sent to the Division.

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

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

[3] *See* Note 6, *infra.*

[4] *Id.*

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

[6] OKLA. STAT. ANN. tit. 68, § 208 (West Supp. 2011). The notice was mailed to the Protestants at ADDRESS 2.

On May 14, 2010, the protest file was received by the Office of Administrative Law Judges.[7] On May 21, 2010, the Court Clerk filed a memorandum to the file noting a call had been received from ATTORNEY, Attorney, advising that he had just been retained as Counsel and requested a change in the prehearing conference date due to a scheduling conflict.[8] On May 24, 2010, ATTORNEY filed an Entry of Appearance as Counsel for the Protestants.[9] On May 24, 2010, Notice of Prehearing Conference was mailed to Counsel stating the prehearing conference had been set for June 15, 2010, at 9:30 a.m.

On June 15, 2010, the prehearing conference was held as scheduled. ATTORNEY and PRESIDENT appeared on behalf of the Protestants. OTC ATTORNEY 3 appeared via telephone on behalf of the Division.[10] On June 24, 2010, a letter was mailed to Counsel advising that a status report was to be filed on or before July 15, 2010.

On July 14, 2010, the Division filed the Status Report advising that ATTORNEY had been in the hospital and requested additional time to provide the Protestants' records. On July 21, 2010, a letter was mailed to Counsel stating a status report was to be filed on or before August 30, 2010.

On August 30, 2010, the Division filed the Status Report advising the Protestants' records had not been provided and requesting a status conference. On August 31, 2010, a letter was mailed to Counsel setting a status teleconference for September 22, 2010, at 9:30 a.m.[11]

On September 22, 2010, the Status Conference was held as scheduled, with OTC ATTORNEY 3 appearing via telephone. ATTORNEY did not appear on behalf of the Protestants. OTC ATTORNEY 3 was advised again that the protest file did not contain officer assessments for sales tax and withholding tax. On September 23, 2010, the Division filed a Motion to Hold in Abeyance.[12]

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[7] *See* Notes 1-2, *supra.* The protest file did not include copies of the officer assessments for sales tax and withholding tax.

[8] OTC ATTORNEY 3 filed a copy of a letter advising that the Division did not have any objection to the request.

[9] ATTORNEY'S address is reflected as ATTORNEY'S ADDRESS, with phone numbers of (YYY) YYY-YYYY and (ZZZ) ZZZ-ZZZZ.

[10] It was brought to OTC ATTORNEY 3'S attention during the prehearing conference that the protest file did not contain copies of the officer assessments for sales tax and withholding against PRESIDENT, as President of COMPANY although ATTORNEY had filed his Entry of Appearance for both COMPANY and PRESIDENT.

[11] The letter was mailed to ATTORNEY'S last-known address. *See* Note 9, *supra*.

[12] The gist of the motion is that on February 12, 2010, the sales tax and withholding tax assessments against PRESIDENT, as President of COMPANY and as an Individual, were mailed to PRESIDENT'S last-known residential address according to his 2006 Oklahoma Income Tax Return, but the Division was not sure that the mailings were returned or that the proposed assessments were mailed to the "best" last-known address.

On September 23, 2010, the Division mailed the assessments to PRESIDENT at ADDRESS 1 and ADDRESS 2.

On October 1, 2010, the Division filed a copy of the green card signed by PRESIDENT on September 24, 2010, for the address at ADDRESS 2. On October 4, 2010, the Division filed the returned envelope reflecting the mailing to ADDRESS 1, was returned to sender as "Not Deliverable as Addressed/Unable to Forward." On October 14, 2010, the Order Granting Motion to Hold Protest in Abeyance was granted to allow PRESIDENT to file a protest to the proposed assessments.

On November 23, 2010, the Division filed a Request to Lift Abeyance.

On January 10, 2011, an Order Lifting Abeyance and Setting Hearing for April 26, 2011, at 9:30 a.m. with pre-trial briefs or position letters due on or before April 19, 2011.

On February 16, 2011, OTC ATTORNEY 1 and OTC ATTORNEY 2 filed a Notice of Substitution of Attorney and Entry of Appearance as Co-Counsel of record for the Division.[13]

On April 20, 2011, the Division filed a Request for Extension of Time. On April 21, 2011, an Order Granting Extension of Time and Resetting Hearing was issued striking the hearing from the April 26th docket and resetting the hearing for May 24, 2011, at 9:30 a.m., with pre-trial briefs or position letters due on or before May 17, 2011.[14]

On May 13, 2011, the Division filed a Motion to Strike Briefing and Hearing and Set For Status Reporting. The Division had discovered that the Protestants had entered into a pay plan for the same periods as those in this matter and had tried to contact ATTORNEY several times with no success. On May 13, 2011, OTC ATTORNEY 2 received an e-mail response from ATTORNEY which states as follows, to-wit:

> Please forgive my silence. I do still represent the COMPANY and its owner. We have been out of touch for some reason but I do intend to represent him.
>
> Since my bread and butter cases are generally criminal I am restrained by cautious judges from using or answering my phone while in court. Calling me in the afternoon is probably better. My number is 405-XXX-XXXX[15] – and I got your message, just had to get confirmation from my client.

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[13] This filing serves as a Withdrawal of Counsel by OTC ATTORNEY 3.

[14] The order was mailed to ATTORNEY'S last-known address. OTC ATTORNEY 2 was also able to obtain an e-mail address from the Oklahoma Bar Association website at http://www.okbar.org. An e-mail was also sent to ATTORNEY at EMAIL ADDRESS. The Court Clerk filed a copy of the confirmation showing the e-mail had been delivered to ATTORNEY.

[15] *See* Note 9, *supra.* Please note, this is not either of the phone numbers on ATTORNEY'S entry of appearance filed in this matter.

On May 16, 2011, the Division filed a Motion Requesting Status Conference. The Court Clerk advised Counsel by phone that a status conference had been set for May 18, 2011, at 3:30 p.m. The Status Conference was held late because ATTORNEY could not be reached at 3:30 p.m. Counsel appeared via telephone. The mailing addresses for ATTORNEY and PRESIDENT were confirmed as ATTORNEY'S ADDRESS , and ADDRESS 2, respectively. Any records of the Protestants were to be delivered by ATTORNEY to OTC ATTORNEY 2 by May 20, 2011. On May 23, 2011, an Order Granting Motion to Strike Hearing was issued. On May 23, 2011, a letter was mailed advising that a status report was to be submitted on or before June 20, 2011. On May 31, 2011, the letter of May 23, 2011, mailed to PRESIDENT at ADDRESS 2 was returned to sender as "Attempted Not Know/Unable to Forward."

On June 20, 2011, the Division filed the Status Report advising that ATTORNEY had timely provided one (1) box of documents, which the Division had reviewed and found insufficient to revise the proposed assessments. On June 24, 2011, a letter was mailed setting the hearing for August 29, 2011, at 9:30 a.m., with position letters or memorandum briefs due on or before August 22, 2011.

On August 22, 2011, the Division's Brief was filed, with Exhibits A through X attached thereto. ATTORNEY did not file a position letter or memorandum brief on behalf of the Protestants. On August 29, 2011, at 9:30 a.m. the hearing was held as scheduled. ATTORNEY or PRESIDENT failed to appear on behalf of the Protestants, nor did either contact the Court Clerk or the Division regarding the hearing. OTC ATTORNEY 1 and OTC ATTORNEY 2 appeared on behalf of the Division. The Division called one (1) witness, SUPERVISOR, Field Audit Section, Compliance Division of the Oklahoma Tax Commission, who testified about the conduct of the audit, the audit methodologies, and as custodian of the records. The Division's Exhibits A through Y were identified, offered, and admitted into evidence. At the conclusion of the hearing, the record was held open in order for the Division to confirm the file dates for the sales, withholding, and tourism reports, which were the subject of the audit. On August 30, 2011, a letter was mailed to Counsel and PRESIDENT confirming the announcement made at hearing that the record was being held open until the Division filed confirmation of the file dates of the reports at which time the record in this matter would be closed and this case submitted for decision.

On September 27, 2011, the Division's Response to Administrative Law Judge's Request for Additional Information Regarding Protestants' Report Status ("Response") was filed, with attachments thereto. The Response has been identified as ALJ's Exhibit 1 and admitted into evidence. The record in this matter was closed and this case was submitted for decision on September 28, 2011.

FINDINGS OF FACT

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

1. On November 9, 2006, COMPANY by and through its sole officer, PRESIDENT ("President"), submitted a Business Registration Application ("Application") for a sales tax

permit and withholding account. COMPANY is located at ADDRESS 2. The first date of sale is reflected as November 13, 2006, and the first date of withholding as January 1, 2007.[16]

2. Until the Tax Commission offered the "Clean Slate '08 Program," [17] COMPANY had not filed a sale tax report, withholding tax report, or tourism tax report for November 2006 through July 2008.

3. On September 8, 2009, an Audit Lead was approved as follows, to-wit:

> Taxpayer was issued a probationary sales tax permit which was not given permanent status because Taxpayer failed to file reports. Reports** were filed in November 2008 and a payout plan was entered into under Clean Slate 08; however, Taxpayer defaulted on POP.
>
> **Reports filed listed $3000 taxable sales for each period – sales would calculate to less than $150/day… There are eight delinquent periods on the ITW account.
>
> Request for an audit came from Collections – Taxpayer has a hearing scheduled for November 18, 2009.[18]

4. COMPANY filed zero withholding reports for July 1, 2008, through September 30, 2009 ("Withholding Tax Audit Period").[19]

5. On November 5, 2009, the Division mailed an audit notification letter to COMPANY.[20]

6. On November 10, 2009, COMPANY entered into a Pre-Show Cause Hearing Taxpayer Agreement.[21]

7. COMPANY, through its President, executed a Statute of Limitation Waiver Agreement for November 1, 2006, through October 31, 2009 ("Sales Tax Audit Period"),

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[16] Division's Exhibits A through B. On November 7, 2006, COMPANY was registered with the Oklahoma Secretary of State. *See* Division's Exhibit Y. From July 1, 2007, through June 30, 2010, PRESIDENT listed himself as President and sole officer on COMPANY'S franchise tax returns.

[17] Division's Exhibit X. *See* ALJ's Exhibit 1.

[18] Division's Exhibit C. COMPANY had entered into a pay plan under the "Clean Slate '08 Program," but had defaulted. COMPANY had also failed to file reports.

[19] Testimony of SUPERVISOR. *See* Note 17, *supra.*

[20] *Id.* Division's Exhibit D. At the time of the hearing, the original auditor, AUDITOR, had retired from the Tax Commission.

[21] Division's Exhibit E.

extending the Statute of Limitations to April 30, 2010, along with a Suppliers Contact Approval.[22]

8. The Protestants did not provide any records from which the Division could perform an audit for sales tax, withholding tax, and tourism tax.[23]

9. On January 6, 2010, the Division mailed letters to the three (3) suppliers requesting the purchase history of COMPANY for the Audit Period, but the Division did not receive records from any supplier.[24]

10. On February 12, 2010, the Division mailed proposed sales tax, withholding tax, and tourism tax assessments issued against COMPANY and a copy of the proposed sales tax assessment against COMPANY President to ADDRESS 4. On February 12, 2010, the Division also mailed proposed sales tax and withholding tax assessments against the President to ADDRESS 1. All assessments mailed to COMPANY were returned by the U.S. Postal Service as undeliverable. The Division is unable to determine whether the assessments to the President were returned as undeliverable.[25]

11. On March 15, 2010, the Division re-mailed the proposed sales tax, withholding tax, and tourism tax assessments against COMPANY to ADDRESS 2.[26] The assessments were not returned by the U.S. Postal Service.

12. On March 26, 2010, the Office of Administrative Law Judges received a timely filed protest from "COMPANY d/b/a PRESIDENT signed by the President. The protest letter states "I am protesting the amunt [sic] of this assessment."[27]

13. On April 1, 2010, the Protestants entered into a payment plan for "actual" sales tax reports and withholding tax reports as a result of Oklahoma Tax Commission Order No. 2010-02-08-02 (February 8, 2010), which revoked COMPANY'S sales tax permit. The payment plan includes periods between January 2007 and January 2010 with a total tax due of Four Thousand Three Hundred Forty-Three Dollars and Fifty-Nine Cents ($4,343.59).[28]

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[22] Division's Exhibit F. Three (3) suppliers were listed: WAREHOUSE STORE (two (2) in Oklahoma City), WHOLESALER, and BAKERY.

[23] Testimony of SUPERVISOR. *See* Note 33, *infra.*

[24] *Id.* Division's Exhibit G.

[25] *Id.* Division's Exhibits H, I, J, K, and L.

[26] *Id.* Division's Exhibits M, N, and O.

[27] Division's Exhibit P. Copies of the assessments issued against COMPANY are attached to the protest letter.

[28] Division's Exhibit Q. At the time of the hearing, the Protestants were still making payments on the pay plan, but COMPANY has not filed an informational income tax return since the 2007 Tax Year. COMPANY is an

14. On September 23, 2010, the Division re-mailed the proposed sales tax and withholding tax assessments against the President to ADDRESS 1, which were returned by the U.S. Postal Service as undeliverable.[29]

15. On September 23, 2010, the Division re-mailed the proposed sales tax and withholding tax assessments against the President to ADDRESS 2, by certified mail return receipt requested (######), which was signed for by the President on September 24, 2010.[30]

16. The Division did not receive a protest from the President based on the return receipt signed by the President on September 24, 2010. However, the original protest, which was timely filed, was from "COMPANY d/b/a PRESIDENT and signed by the President.[31]

SALES TAX SPECIFIC FACTS (AUDIT METHODOLOGY)

17. The Division conducted research regarding the expected sales and the Cost of Goods Sold ("COGS") at an "average" small restaurant using information from the National Restaurant Association "Quickservice Restaurant Trends 2007," which indicates that COGS are Thirty-Two Percent (32%) for an "average" small restaurant.[32]

18. Due to the lack of records, the Division used an indirect method to calculate the estimated sales for COMPANY during the Sales Tax Audit Period. The estimates were based upon Gross Sales and COGS as reported on COMPANY'S Oklahoma Corporate Income Tax Return (Form 512S) for the 2007 Tax Year.[33]

19. On COMPANY'S Form 512S for the 2007 Tax Year, COGS were reported as $59,445.00. By dividing $59,445.00 by .32, the Division estimated COMPANY'S sales for a twelve (12) month period to be $185,765.62 or $15,480.16 per month as the average gross sales. COMPANY was credited with the sales reported during the Sales Tax Audit Period.[34]

S-Corp. and the President is the sole shareholder. *See* Note 33, *infra.* No information was available as to whether COMPANY has timely filed its sales and withholding tax reports, including the amounts reported and remitted.

[29] Division's Exhibit R.

[30] Division's Exhibit S.

[31] *Id. See* Note 27, *supra.*

[32] Division's Exhibit T.

[33] Division's Exhibit U.

[34] *Id.* Testimony of SUPERVISOR. The auditor noted that COGS on COMPANY'S 512S for the 2007 is Eighty-Eighty Percent (88%), which is unreasonable for an "average" small restaurant. (COGS - $59,445.00/Gross Sales $67,231.00)

20. On February 12, 2010, the Division issued proposed sales tax assessments against the Protestants for the Sales Tax Audit Period,[35] as follows, to-wit:

Sales Tax:	$38,760.42
Interest @ 15% through 04/15/2010:	10,747.16
Tax & Interest due within 30 Days:	$49,507.58
30 day delinquent Penalty @ 10%:	3,876.03
Tax, Interest & Penalty due after 30 Days:	$53,383.61

21. On or before May 20, 2010, ATTORNEY provided a box of records to the Division, which consisted of incomplete invoices for operating expenses (rather than purchases) during a nine (9) month period, which could not be used to determine COMPANY'S Gross Sales during the Sales Tax Audit Period.[36]

WITHHOLDING TAX SPECIFIC FACTS
(AUDIT METHODOLOGY)

22. COMPANY was required to file its Withholding Tax Reports on a quarterly basis.[37]

23. COMPANY filed zero Withholding Tax Reports for the Withholding Tax Audit Period, but during the Opening Conference held on December 7, 2009, at the business location, the auditor noticed two (2) employees other than the President. The President indicated that he usually had two (2) other employees besides himself, but failed to withhold any income taxes.[38]

24. The Protestants also failed to report wages to the Oklahoma Employment Security Commission ("OESC"). OESC estimated using wages reported for earlier periods. The Division used OESC's estimates to calculate its Withholding Tax Assessments against the Protestants for the Withholding Tax Audit Period. For the third quarter of 2008 OESC scheduled $8,000.00, fourth quarter of 2008 estimate was $9,000.00, first quarter of 2009 estimate was $10,000.00, second quarter of 2009 estimate was $11,000.00, and the third quarter of 2009 estimate was $12,000.00.[39]

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[35] *See* Notes 25, 26, 29, and 30, *supra.*

[36] Testimony of SUPERVISOR. SUPERVISOR confirmed that the records did not contain any bank statements, state or federal income tax returns, etc.

[37] *Id.*

[38] *Id.* Division's Exhibit V-2.

[39] *Id.* Division's Exhibit W. SUPERVISOR testified that for every quarter the employer fails to file its report, OESC increases the estimate $1,000.00 per month.

25. On February 12, 2010, the Division issued proposed Withholding Tax assessments for the Withholding Tax Audit Period against the Protestants,[40] as follows, to-wit:

Withholding Tax Due:	$2,500.00
Interest @ 15% through 04/15/2010:	350.73
Tax & Interest due within 30 Days:	$2,850.73
30 day delinquent Penalty:	250.00
Tax, Interest & Penalty due after 60 Days:	$3,100.73

TOURISM TAX SPECIFIC FACTS

26. Tourism tax is imposed on all sales in the amount of one-tenth of one percent (1/10 of 1%) of the gross receipts on "Any food, confection, or drink sold or dispensed by hotels, restaurants or bars, and sold for immediate consumption upon the premises or delivered or carried away from the premises for consumption elsewhere."[41]

27. COMPANY was required to file and remit Tourism Tax on its sales from November 1, 2006, through June 30, 2007 ("Tourism Tax Audit Period"),[42] but it failed to do so.

28. On February 12, 2010, the Division issued the proposed Tourism Tax assessment against COMPANY for the Tourism Tax Audit Period against COMPANY,[43] as follows, to-wit:

Tourism Tax Due:	$102.34
Interest @ 15% through 04/15/2010:	44.06
Tax & Interest due within 30 Days:	$146.40
30 day delinquent Penalty:	10.23
Tax, Interest & Penalty due after 60 Days:	$156.63

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[44]

2. Rules promulgated pursuant to the Administrative Procedures Act[45] are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court.[46] They

[40] *See* Note 35, *supra*.

[41] OKLA. STAT. tit. 68, § 50012(A)(2) (West 2001).

[42] Tourism Tax was repealed. *See* Laws 2006, 2nd Ex.Sess., c. 44, § 19, eff. July 1, 2007.

[43] *See* Note 35, *supra*.

[44] OKLA. STAT. ANN. tit. 68, § 221(D) (West Supp. 2011).

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

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.[47]

3. The tax levied by the Oklahoma Sales Tax Code[48] shall be paid by the consumer or user to the vendor[49] as trustee for and on account of this state and each and every vendor shall collect from the consumer or user the full amount of the tax or an amount equal as nearly as possible or practicable the average equivalent thereof.[50]

4. Every employer who is required to withhold and remit taxes to the Tax Commission, shall be held personally responsible for failure to do so.[51]

5. "Every person required to collect any tax imposed by [the Oklahoma Sales Tax Code and Oklahoma Income Tax Code], and in the case of a corporation, each principal officer thereof, shall be personally liable for the tax."[52]

6. When the Tax Commission issues a proposed assessment against a corporation for unpaid sales and withholding taxes, the Commission shall file assessments against the principal officers of the corporation personally liable for the taxes. The principal officers of the corporation shall be liable for the payment of sales tax and withholding tax during the period of time for which the assessment is made. The liability of a principal officer for sales tax and withholding tax shall be determined in accordance with the standards for determining liability for payment of federal withholding tax.[53]

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

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

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

[49] "Vendor" is defined as "any person making sales of tangible personal property or services in this state, the gross receipts or gross proceeds from which are taxed by the Oklahoma Sales Tax Code." OKLA. STAT. ANN. tit. 68, § 1352(28)(a) (West 2008).

"Person" is defined to include "any individual" or "[any] corporation." OKLA. STAT. ANN. tit. 68, § 1352(18) (West 2008).

[50] OKLA. STAT. ANN. tit. 68, § 1361(A)(1) (West 2008). *See also Wal-Mart Stores, Inc. v. Oklahoma Tax Commission*, 1991 OK CIV APP 73, 817 P.2d 1281.

[51] OKLA. STAT. ANN. tit. 68, § 2385.3(E) (West Supp. 2011).

[52] *See* Note 50, *supra*. The Tax Commission identifies the "President, Vice-President, Secretary, Treasurer, or Secretary/Treasurer as principal officers." OKLA. ADMIN. CODE § 710:65-7-3-(1).

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

> 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

7. In this matter, the President of COMPANY is the principal officer of COMPANY and the "responsible person" liable for the collection and remittance of sales and withholding tax.[54]

8. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[55]

9. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.[56]

> 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. The current Business Registration Form on the signature line in part states, "I further acknowledge and agree that sales, withholding and motor fuel taxes are trust taxes for the State of Oklahoma and that any use of these trust funds other than timely remittance to the State of Oklahoma is embezzlement and can result in criminal prosecution."

[54] *See* Notes 52 through 53, *supra*.

[55] 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.

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

10. In this matter, the Protestants have not met their burden of proof that the proposed assessments for sales tax, withholding tax, and tourism tax are incorrect and in what respect.

DISCUSSION OF SALES TAX AUDIT METHODOLOGY

An order of the Tax Commission must be supported by substantial evidence.[57] Likewise, the audit upon which a portion of the record is formed and order issued must be supported by substantial evidence.[58] The Division's choice of audit methodology was not arbitrary; it was necessitated by the complete lack of cooperation by the President in providing the records necessary to conduct a field audit on COMPANY using any other audit methodology, such as "sampling," "projection," etc.

The Division was faced with the task of conducting a sales tax field audit on COMPANY with no reliable records available. All that was available was the gross sales and COGS reported by COMPANY on its 2007 Oklahoma Corporate Income Tax Return (Form 512S).[59]

The Division's choice of methodology is an acceptable "indirect" approach when the taxpayer's records are incomplete, unavailable, or non-existent. A detailed examination of the Division's methodology supports the conclusion that an evidentiary foundation has been laid for the basis of the sales tax audit and the proposed sales tax assessments are supported by substantial evidence.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the protests of COMPANY and its President 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

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

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

[59] *See* Note 33, *supra*.

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."