JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2012-07-17-04 / NON-PRECEDENTIAL**
ID: **P-10-954-H**
DATE: **JULY 17, 2012**
DISPOSITION: **REMANDED TO ALJ**
TAX TYPE: **SALES**
APPEAL: **UNDETERMINED**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above matter comes on for entry of a final order of disposition by the Oklahoma Tax Commission. Having reviewed the files and records herein, including the Findings of Fact, Conclusions of Law and Recommendations made and entered by the Administrative Law Judge on the 31st day of August, 2011, the Commission makes the following Findings of Fact and Conclusions of Law and enters the following order.

PROCEDURAL HISTORY

On August 30, 2010, the protest file was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*[1] and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.[2] On September 2, 2010, a letter was mailed to the Protestants' Representative stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-10-954-H. The letter also advised the Protestants' 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.*[3] On September 3, 2010, OTC ATTORNEY 1 and OTC ATTORNEY 2, Assistant General Counsel, filed an Entry of Appearance as Co-Counsel of record for the Division.

On December 10, 2010, the Notice of Prehearing Conference was mailed to the last-known address of the Protestants' Representative and the Protestants, setting the prehearing conference for January 13, 2011, at 3:30 p.m.[4]

On January 13, 2011, at 3:30 p.m. the prehearing conference was held by telephone. On January 19, 2011, the parties were advised by letter that pursuant to the prehearing conference, a status report was to be filed on or before February 14, 2011.

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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] *Id.*

[4] OKLA. STAT. ANN. tit. 68, § 208 (West Supp. 2011). The notice was mailed to ACCOUNTANT at ACCOUNTANT'S ADDRESS and the Protestants at PROTESTANT'S ADDRESS.

On February 11, 2011, the Division filed the Status Report advising that due to inclement weather, the Protestants had been unable to deliver records to ACCOUNTANT. On February 17, 2011, OTC ATTORNEY 3 filed a Notice of Substitution of Attorney and Entry of Appearance as Co-Counsel of record for the Division.[5] On February 22, 2011, a letter was mailed to the parties' Representatives advising a status report was due on or before April 6, 2011.

On April 6, 2011, the Division filed the Status Report advising that the Protestants' had provided a box of records for the Division's review. On April 12, 2011, a letter was mailed to the parties' Representatives advising that a status report was due on or before May 6, 2011.

On May 6, 2011, the Division filed the Status Report advising that the Protestants' documents consisted of incomplete invoices with no other documentation and requested that this matter be set for hearing. On May 17, 2011, a letter was mailed to the parties' Representatives setting this matter for hearing on June 16, 2011, at 9:30 a.m., with position letter or memorandum briefs due on or before June 9, 2011.

On June 6, 2011, the Division's Memorandum Brief was filed, with Exhibits A through U, attached thereto. ACCOUNTANT did not file a position letter or memorandum brief on behalf of the Protestants.

On June 16, 2011, at 9:30 a.m. the hearing was held as scheduled. Accountant did not appear on behalf of the Protestants. OTC ATTORNEY 3 and OTC ATTORNEY 1 appeared on behalf of the Division. Before the hearing, the Division announced that the Division's Brief contained an error on page three (3). The amount was incorrectly stated on #30. The Division called AUDITOR, Field Auditor, Field Audit Section of the Compliance Division,[6] Oklahoma Tax Commission, who testified about the conduct of the audit, the audit methodology, and as custodian of the Division's records. The Division's Exhibits A[7] through U and AA through MM were identified, offered, and admitted into evidence. At the conclusion of the hearing, the record was held open in order for the Division to review DISTRIBUTOR 1's records to remove any items, which were not 3.2 beer. On June 16, 2011, a letter was mailed to the parties' Representatives confirming that the record would remain open for thirty (30) days to allow the Division to review the figures for 3.2 beer purchased by the Protestants and make any warranted revisions, with a status report to be filed on or before July 18, 2011.

[5] This filing serves as a Withdrawal of Counsel for OTC ATTORNEY 2.

[6] AUDITOR has been employed as an auditor by the Tax Commission for approximately twenty (20) years, with approximately eighteen (18) years as a sales tax auditor, and has conducted approximately fifty-three (53) convenience store audits. Testimony of AUDITOR.

[7] At the beginning of the hearing OTC ATTORNEY 1 requested that the Administrative Law Judge take judicial notice of Division's Exhibit A, which is a printout from the Oklahoma Secretary of State's website at https://www.sos.ok.gov. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999). The Division's request was granted.

On July 11, 2011, the Division filed the Notice of Sales Tax Revision, with Exhibits A-1 through A-19 attached thereto.[8] On July 19, 2011, a letter was mailed to the parties' Representatives acknowledging the Division's filing and advising that the record in this matter was closed and this case submitted for decision on July 19, 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 Memorandum Brief, and the Notice of Sales Tax Revision, the undersigned finds:

1. On October 7, 2004, a Business Registration Application ("Application") for COMPANY d/b/a STORE ("STORE") was received by facsimile, to operate a convenience store located at STORE ADDRESS. The Application reflects PRESIDENT, as President of STORE with the date of first sales as August 17, 2004.[9] According to the records of the Tax Commission PRESIDENT was the President of STORE during 2007 through 2010.[10]

2. On or about May 9, 2008, a second location at STORE 2 ADDRESS was added to STORE's sales tax permit as STORE 2 (collectively "STORE"). The STORE 2 location was open from approximately May 15, 2008, through September 2008, at which point the STORE 2 location was rented by STORE to another operator.[11]

3. The Division received the audit lead from the Mayor of TOWN, Oklahoma, who had concerns about the reported taxable sales because STORE has an advantageous location near ATTRACTION and does a brisk business, but the reported taxable sales were much lower than those reported by comparable stores.[12]

4. On March 25, 2010, the Division mailed a letter to STORE notifying that it had been selected for an audit.[13]

5. On March 26, 2010, the Auditor called STORE and left a message for its President.[14]

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[8] The Division's schedule has been identified as ALJ's Exhibit 1 and admitted into evidence.

[9] Division's Exhibit B. On September 16, 2004, STORE was registered with the Oklahoma Secretary of State. *See* Note 8, *supra.*

[10] Division's Exhibits T, AA through FF.

[11] Testimony of AUDITOR ("Auditor"). Division's Exhibit MM.

[12] Testimony of Auditor.

[13] Division's Exhibit C.

[14] Division's Exhibit D. Testimony of Auditor.

6. On March 30, 2010, the Auditor mailed the President a standard Records Request Form, an Officer List, Statute of Limitations Waiver Agreement, Permission to Contact Vendors Form, and a request for an Inventory Price List.[15]

7. On March 30, 2010, the President returned the Auditor's March 26th call. The President informed her that he had an accountant ("Accountant"), with a Power of Attorney and that she was to deal with him regarding the audit.[16]

8. On March 30, 2010, the Division received by facsimile the Power of Attorney to Accountant executed by the President.[17]

9. On April 1, 2010, the Auditor called and left a message for Accountant at his office.[18]

10. On April 28, 2010, the Accountant returned the Auditor's phone call of April 1st. The Accountant stated that he had not received any of the forms mailed to the President. The Auditor re-mailed the forms to Accountant.[19]

11. On May 17, 2010, and May 24, 2010, the Auditor left messages for Accountant and on May 25, 2010, left a message for the President. No response was received from Accountant or the President.[20]

12. On May 26, 2010, the Auditor contacted STORE's 3.2 beer distributors, DISTRIBUTOR 1 and DISTRIBUTOR 2 ("DISTRIBUTOR 2"), for a history of STORE's purchases,[21] which were as follows, to-wit:

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[15] *Id.* *See* Division's Exhibit E. The Records Request included, but not exclusive of the following, to-wit:

Federal/State Income Tax Returns – 2007, 2008, and 2009	Sales Tax Reports for the Entire Audit Period
Profit and Loss Statement for entire audit period	Daily Sales Reports
Balance Sheets for entire audit period	Monthly Sales Summaries
General Ledgers	Sales Invoices, Sales tickets or z-tapes
Chart of Accounts – Current	Exemption Files…
All Purchases Invoices	Exemption Files…
Bank Statements	Information on Food Stamp sales…

[16] *Id.*

[17] Division's Exhibit F.

[18] *See* Note 15, *supra*.

[19] *Id.*

[20] *Id.*

[21] Division's G through J. DISTRIBUTOR 1's records were reviewed by the Division post-hearing to remove purchases which were not 3.2 beer. *See* Note 9, *supra*.

07/01/07-12/31/07	DISTRIBUTOR 2	$ 0.00	
	DISTRIBUTOR 1	32,571.00	
	Subtotal		$ 32,571.00
2008	DISTRIBUTOR 1	$72,096.00	
	DISTRIBUTOR 2	4,916.00	
	DISTRIBUTOR 1/AREA	8,874.00	
	Subtotal		$ 85,886.00
2009	DISTRIBUTOR 1	$55,205.00	
	DISTRIBUTOR 2	4,413.90	
	Subtotal		$ 59,618.90
01/01/10-04/30/10	DISTRIBUTOR 1	$19,228.00	
	DISTRIBUTOR 2	3,494.00	
	Subtotal		$ 22,722.00
	Total		$200,797.90

13. The only information available to the Division was STORE's 3.2 beer purchases from DISTRIBUTOR 1 and DISTRIBUTOR 2 for July 1, 2007, through April 30, 2010 ("Audit Period").[22] The Division used the National Association of Convenience Store Gross Sales Computation ("NACS Computation")[23] to calculate STORE's taxable sales for the Audit Period based upon STORE's 3.2 beer purchases,[24] as follows, to-wit:

[22] *Id.* *See* Division's Exhibit GG through LL. Distributors report 3.2 beer purchases to the Tax Commission on an annual basis.

[23] The spreadsheet was compiled using the National Association of Convenience Stores 2008 Annual Report of National Averages. The Division did not have the markups for STORE because the President would not respond to the Division's requests to obtain records to conduct a "field" audit. *See* Notes 14 and 16, *supra.* The Division determined the Average Percent Markup for 3.2 beer. This percentage and the 3.2 beer purchased were entered into the program, which then determines the Dollars of Purchases by Department and the Average Percent Markup.

[24] The Division has been using the NACS Computation for approximately three (3) to four (4) years. Testimony of Auditor. 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. *See* OTC Order No. 2010-08-17-03 (August 17, 2010).

July 1, 2007 through December 31, 2007
Average-Sized Store

DOLLARS OF PURCHASES BY DEPARTMENT	PRODUCT MIX	DEPARTMENT	AVERAGE PERCENT OF MARKUP	GROSS DOLLARS OF SALES
	32.70%	CIGARETTES	23.38%	$133,249.96
	13.90%	FOODSERVICE	55.00%	56,641.42
	14.10%	PACKAGED BEVERAGES	37.66%	57,456.41
32,571.00[25]	**10.20%**	**BEER**	**21.64%**	**41,564.21**
	1.40%	GENERAL MERCHANDISE	52.55%	5,704.89
	3.20%	CANDY	47.98%	13,039.75
	3.50%	SALTY SNACKS	38.38%	14,262.23
	3.90%	OTHER TOBACCO	31.65%	15,892.20
	3.10%	FLUID MILK PRODUCTS	35.08%	12,632.26
	2.60%	PACKAGED SWEET SNACKS	26.85%	10,594.80
	11.40%	OTHER DEPARTMENTS	47.42%	46,454.12
	100.00%	TOTALS		$407,492.24

Remove Cigarettes and Other Tobacco	(149,142.16)
Sales Taxable Amount	$258,350.08
Reported Taxable Sales	(41,583.00)
Unreported Sales	$216,767.08

January 1, 2008 through December 31, 2008
Average-Sized Store

DOLLARS OF PURCHASES BY DEPARTMENT	PRODUCT MIX	DEPARTMENT	AVERAGE PERCENT OF MARKUP	GROSS DOLLARS OF SALES
	32.70%	CIGARETTES	23.38%	$ 351,364.90
	13.90%	FOODSERVICE	55.00%	149,356.95
	14.10%	PACKAGED BEVERAGES	37.66%	151,505.97
85,886.00[26]	**10.20%**	**BEER**	**21.64%**	**109,600.06**
	1.40%	GENERAL MERCHANDISE	52.55%	15,043.15
	3.20%	CANDY	47.98%	34,384.33
	3.50%	SALTY SNACKS	38.38%	37,607.86
	3.90%	OTHER TOBACCO	31.65%	41,905.91
	3.10%	FLUID MILK PRODUCTS	35.08%	33,309.82
	2.60%	PACKAGED SWEET SNACKS	26.85%	27,937.27
	11.40%	OTHER DEPARTMENTS	47.42%	122,494.19
	100.00%	TOTALS		$1,074,510.40

Remove Cigarettes and Other Tobacco	(393,270.81)
Sales Taxable Amount	$ 681,239.59
Reported Taxable Sales	(158,143.00)
Unreported Sales	$ 523,096.59

[25] Testimony of Auditor. *See* Division's Exhibits G and K. *See also* Notes 22-25, *supra*.

[26] *Id.* Division's Exhibits H and L.

January 1, 2009 through December 31, 2009
Average-Sized Store

DOLLARS OF PURCHASES BY DEPARTMENT	PRODUCT MIX	DEPARTMENT	AVERAGE PERCENT OF MARKUP	GROSS DOLLARS OF SALES
	32.70%	CIGARETTES	23.38%	$243,904.58
	13.90%	FOODSERVICE	55.00%	103,678.09
	14.10%	PACKAGED BEVERAGES	37.66%	105,169.87
59,618.90[27]	**10.20%**	**BEER**	**21.64%**	**76,080.33**
	1.40%	GENERAL MERCHANDISE	52.55%	10,442.40
	3.20%	CANDY	47.98%	23,868.34
	3.50%	SALTY SNACKS	38.38%	26,106.00
	3.90%	OTHER TOBACCO	31.65%	29,089.54
	3.10%	FLUID MILK PRODUCTS	35.08%	23,122.45
	2.60%	PACKAGED SWEET SNACKS	26.85%	19,393.02
	11.40%	OTHER DEPARTMENTS	47.42%	85,030.96
	100.00%	TOTALS		$745,885.57

Remove Cigarettes and Other Tobacco	(272,994.12)
Sales Taxable Amount	$472,891.45
Reported Taxable Sales	(107,030.00)
Unreported Sales	$365,861.45

January 1, 2010 through April 30, 2010
Average-Sized Store

DOLLARS OF PURCHASES BY DEPARTMENT	PRODUCT MIX	DEPARTMENT	AVERAGE PERCENT OF MARKUP	GROSS DOLLARS OF SALES
	32.70%	CIGARETTES	23.38%	$ 92,957.10
	13.90%	FOODSERVICE	55.00%	39,513.87
	14.10%	PACKAGED BEVERAGES	37.66%	40,082.42
22,722.00[28]	**10.20%**	**BEER**	**21.64%**	**28,995.79**
	1.40%	GENERAL MERCHANDISE	52.55%	3,979.81
	3.20%	CANDY	47.98%	9,096.72
	3.50%	SALTY SNACKS	38.38%	9,949.54
	3.90%	OTHER TOBACCO	31.65%	11,086.63
	3.10%	FLUID MILK PRODUCTS	35.08%	8,812.45
	2.60%	PACKAGED SWEET SNACKS	26.85%	7,391.08
	11.40%	OTHER DEPARTMENTS	47.42%	32,407.06
	100.00%	TOTALS		$284,272.47

Remove Cigarettes and Other Tobacco	(104,043.72)
Sales Taxable Amount	$180,228.75
Reported Taxable Sales	(22,513.00)
Unreported Sales	$157,715.75

[27] *Id.* Division's Exhibits I and M.

[28] *Id.* Division's Exhibits J and N.

14. The results of the "field" audit using the NACS Computation reflected that STORE had Unreported Taxable Sales during the Audit Period,[29] as follows, to-wit:

July 1, 2007 through December 31, 2007	$ 216,767.08
2008 Tax Year	523,096.59
2009 Tax Year	365,861.45
January 1, 2010 through April 30, 2010	157,715.75
Total	$1,263,440.87

15. On June 30, 2010, the Division issued proposed sales tax assessments for the Audit Period against the Protestants, [30] as follows, to-wit:

Tax Due:	$ 110,551.07
Interest @ 15% through 08/31/2010:	22,273.94
Tax & Interest due within 30 Days:	$ 132,825.01
30 day delinquent Penalty @ 10%:	11,055.10
Tax, Interest & Penalty due after 30 Days:	$ 143,880.11

16. On August 13, 2010, the Division received a timely filed protest[31] to the proposed sales tax assessments against the Protestants for the Audit Period. The grounds for the protest are stated in pertinent part, as follows, to-wit:

> I strongly disagree with the assessment, against [STORE] for the [Audit Period]. The assessment is the result of an Audit of my Sales Records. I strongly disagree with the findings of this audit it does not match the Sales Records, which were provided to the auditor via US Postal Service. At this time, I request a further review of my Sales Records as well as any other processes, which are available to me to correct the audit findings.
>
> The Tax type, which is included in the assessment, is as follows: Sales Tax. The Permit and Federal Identification and Social Security numbers, assessed, are outlined above. This protest is to include, but not limited to all tax types, permit numbers, and tax numbers listed herein.

17. On July 11, 2011, the Division's filed its Notice of Sales Tax Revision ("Revision"), which removed any product listed by DISTRIBUTOR 1 on the reports which were not 3.2 beer purchases,[32] as follows, to-wit:

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[29] *See* Notes 26 through 29, *supra*. *See also* Division's Exhibits G through K.

[30] Division's Exhibits R and S.

[31] Division's Exhibit U.

[32] *See* Note 9, *supra*. Attached thereto is a list of all the products removed from DISTRIBUTOR 1's records.

Unreported Taxable Sales:	$1,086,821.14
Sales Tax:	$ 95,097.65
Interest to 08/31/11:	19,333.71
Penalty:	9,509.76
Total:	$ 123,941.12

18. Based upon the Division's Revision, the Protestant's 3.2 beer purchases during the Audit Period were as follows, to-wit:

07/01/07-12/31/07	DISTRIBUTOR 1	$29,056.00	
	DISTRIBUTOR 2	0.00	
	Subtotal		$ 29,056.00
2008	DISTRIBUTOR 1	$64,465.00	
	DISTRIBUTOR 2	4,916.00	
	DISTRIBUTOR 1 AREA	7,878.00	
	Subtotal		$ 77,259.00
2009	DISTRIBUTOR 1	$49,198.00	
	DISTRIBUTOR 2	4,413.90	
	Subtotal		$ 53,611.90
01/01/10-04/30/10	DISTRIBUTOR 1	$15,110.00	
	DISTRIBUTOR 2	3,494.00	
	Subtotal		$ 18,604.00
	Total		$178,530.90

19. Based upon the Division's Revision for the Audit Period the Division used the NACS Computation[33] to recalculate STORE's taxable sales for the Audit Period based upon STORE's corrected 3.2 beer purchases,[34] as follows, to-wit:

[33] *Id.*

[34] *Id.*

July 1, 2007 through December 31, 2007
Average-Sized Store

DOLLARS OF PURCHASES BY DEPARTMENT	PRODUCT MIX	DEPARTMENT	AVERAGE PERCENT OF MARKUP	GROSS DOLLARS OF SALES
	32.70%	CIGARETTES	23.38%	$118,869.88
	13.90%	FOODSERVICE	55.00%	50,528.79
	14.10%	PACKAGED BEVERAGES	37.66%	51,255.82
29,056.00[35]	**10.20%**	**BEER**	**21.64%**	**37,078.68**
	1.40%	GENERAL MERCHANDISE	52.55%	5,089.23
	3.20%	CANDY	47.98%	11,632.53
	3.50%	SALTY SNACKS	38.38%	12,723.08
	3.90%	OTHER TOBACCO	31.65%	14,177.14
	3.10%	FLUID MILK PRODUCTS	35.08%	11,269.01
	2.60%	PACKAGED SWEET SNACKS	26.85%	9,451.43
	11.40%	OTHER DEPARTMENTS	47.42%	41,440.88
	100.00%	TOTALS		$363,516.45

Remove Cigarettes and Other Tobacco	(133,047.02)
Sales Taxable Amount	$230,469.43
Reported Taxable Sales	(41,583.00)
Unreported Sales	$188,886.43

January 1, 2008 through December 31, 2008
Average-Sized Store

DOLLARS OF PURCHASES BY DEPARTMENT	PRODUCT MIX	DEPARTMENT	AVERAGE PERCENT OF MARKUP	GROSS DOLLARS OF SALES
	32.70%	CIGARETTES	23.38%	$316,071.31
	13.90%	FOODSERVICE	55.00%	134,354.47
	14.10%	PACKAGED BEVERAGES	37.66%	136,287.63
77,259.00[36]	**10.20%**	**BEER**	**21.64%**	**98,591.05**
	1.40%	GENERAL MERCHANDISE	52.55%	13,532.11
	3.20%	CANDY	47.98%	30,930.53
	3.50%	SALTY SNACKS	38.38%	33,830.26
	3.90%	OTHER TOBACCO	31.65%	37,696.58
	3.10%	FLUID MILK PRODUCTS	35.08%	29,963.95
	2.60%	PACKAGED SWEET SNACKS	26.85%	25,131.05
	11.40%	OTHER DEPARTMENTS	47.42%	110,190.00
	100.00%	TOTALS		$966,578.94

Remove Cigarettes and Other Tobacco	(353,767.89)
Sales Taxable Amount	$612,811.05
Reported Taxable Sales	(158,143.00)
Unreported Sales	$454,668.05

[35] *Id.*

[36] *Id.*

January 1, 2009 through December 31, 2009
Average-Sized Store

DOLLARS OF PURCHASES BY DEPARTMENT	PRODUCT MIX	DEPARTMENT	AVERAGE PERCENT OF MARKUP	GROSS DOLLARS OF SALES
	32.70%	CIGARETTES	23.38%	$219,329.58
	13.90%	FOODSERVICE	55.00%	93,231.84
	14.10%	PACKAGED BEVERAGES	37.66%	94,573.30
53,611.90[37]	**10.20%**	**BEER**	**21.64%**	**68,414.73**
	1.40%	GENERAL MERCHANDISE	52.55%	9,390.26
	3.20%	CANDY	47.98%	21,463.44
	3.50%	SALTY SNACKS	38.38%	23,475.64
	3.90%	OTHER TOBACCO	31.65%	26,158.57
	3.10%	FLUID MILK PRODUCTS	35.08%	20,792.71
	2.60%	PACKAGED SWEET SNACKS	26.85%	17,439.05
	11.40%	OTHER DEPARTMENTS	47.42%	76,463.52
	100.00%	TOTALS		$670,732.65

Remove Cigarettes and Other Tobacco	(245,488.15)
Sales Taxable Amount	$425,244.50
Reported Taxable Sales	(107,030.00)
Unreported Sales	$318,214.50

January 1, 2010 through April 30, 2010
Average-Sized Store

DOLLARS OF PURCHASES BY DEPARTMENT	PRODUCT MIX	DEPARTMENT	AVERAGE PERCENT OF MARKUP	GROSS DOLLARS OF SALES
	32.70%	CIGARETTES	23.38%	$76,110.11
	13.90%	FOODSERVICE	55.00%	32,352.61
	14.10%	PACKAGED BEVERAGES	37.66%	32,818.12
18,604.00[38]	**10.20%**	**BEER**	**21.64%**	**23,740.77**
	1.40%	GENERAL MERCHANDISE	52.55%	3,258.54
	3.20%	CANDY	47.98%	7,448.08
	3.50%	SALTY SNACKS	38.38%	8,146.34
	3.90%	OTHER TOBACCO	31.65%	9,077.35
	3.10%	FLUID MILK PRODUCTS	35.08%	7,215.33
	2.60%	PACKAGED SWEET SNACKS	26.85%	6,051.57
	11.40%	OTHER DEPARTMENTS	47.42%	26,533.80
	100.00%	TOTALS		$232,752.62

Remove Cigarettes and Other Tobacco	(85,187.46)
Sales Taxable Amount	$147,565.16
Reported Taxable Sales	(22,513.00)
Unreported Sales	$125,052.16

[37] *Id.*

[38] *Id.*

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[39]

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Sales Tax Code").[40] The Sales Tax Code levies "upon all sales,[41] not otherwise exempted…an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds[42] of each sale of…tangible personal property…," and specifically, the sale of "[n]atural or artificial gas,…."[43] Oklahoma Statutes authorize incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.[44]

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[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

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

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

[41] 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,
>
> …

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

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

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

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

[46] *Id.*

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]

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.[49]

5. When the Tax Commission issues a proposed assessment against a corporation for unpaid sales tax, the Commission shall file assessments against the principal officers of the corporation personally liable for the tax. The principal officers of any corporation shall be liable for the payment of any tax as prescribed by this section if such officers were officers of the corporation during the period of time for which the assessment was made. The liability of a principal officer for sales tax, withheld income tax or motor fuel tax shall be determined in accordance with the standards for determining liability for payment of federal withholding tax pursuant to the Internal Revenue Code of 1986, as amended, or regulations promulgated pursuant to such section.[50] From the record, there is no dispute that PRESIDENT was (and is) the President of COMPANY and a "responsible person" for the filing and remittance of sales tax during the Audit Period.[51]

6. The Tax Commission shall also collect interest at the rate of one and one-quarter percent (1¼%) per month from the date prescribed by state law.[52]

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[47] *Id.*

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

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

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

[51] *See* Note 11, *supra*.

[52] OKLA. STAT. ANN. tit. 68, § 217(A) (West Supp. 2011).

7. If any tax due under any state tax law is not paid within thirty (30) days after such tax becomes delinquent, a penalty of ten percent (10%) on the total amount of tax due and delinquent shall be added thereto, collected and paid.[53]

8. The rules promulgated pursuant to the Administrative Procedures Act[54] are presumed to be valid and binding on the persons they affect and have the force of law.[55]

9. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[56]

10. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[57]

11. In sales tax matters, "[t]he burden of proving a sale was not a taxable sale shall be upon the person who made the sale."[58]

12. Although the Tax Commission is not required to comply with provisions of the Administrative Procedures Act ("APA"),[59] including those which address judicial review of final agency orders, the due process standards embodied therein apply to all state agencies, including the Tax Commission.[60]

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[53] OKLA. STAT. ANN. tit. 68, § 217(C) (West Supp. 2011).

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

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

[56] 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.

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

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

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

[60] *Grasso v. Oklahoma Tax Com'n*, 2011 OK CIV APP 37, 249 P.3d 1258. (Citations omitted.)

13. Taking of one's property by legal process, including assessment of taxes against an individual in his personal capacity, is a protected interest to which due process is applicable.[61]

14. Procedural due process of law contemplates a fair and open hearing before a legally constituted court or other authority with notice and opportunity to present evidence and argument, representation by counsel, if desired, and information concerning the claims of the opposing party with reasonable opportunity to controvert them.[62]

15. Failure to provide notice of the specific issues in administrative hearings violates procedural due process.[63]

DISCUSSION AND ORDER

The taking of one's property by legal process, including assessment of taxes, is a protected interest to which due process is applicable. Procedural due process of law contemplates a fair and open hearing with notice and opportunity to present evidence and argument and information concerning the claims of the opposing party with reasonable opportunity to controvert them.[64]

The evidence in this matter establishes that the protestants did not keep all of the records required by statute[65] or by Tax Commission Rule[66]. When taxpayer records are not complete or not reliable the Commission recognizes that the Division may need to use an alternative methodology to determine the amount of tax owed. The objective of the Division in computing a proposed assessment must always be to arrive at the most accurate amount of tax owed. There must be a substantial basis underlying the estimates in any methodology used by the Division. Adjustments to the estimates, or to the methodology, may be warranted based on the distinct and identifiable characteristics of an individual business as compared to the characteristics of the businesses underlying the estimates used in the alternative methodology. Adjustments to the estimates, or to the methodology, should be made when an individual taxpayer can provide sufficient evidence that would justify adjusting the estimates used in the audit. The taxpayer must always be afforded Due Process in the conduct of the audit.

Comparison between the results obtained by using an alternative methodology and the results obtained by using taxpayer records may indicate that an adjustment to the alternative methodology is warranted. Adjustments to the amount of taxable sales estimated by an

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[61] *Id.* *See* U.S. CONST. amend. XIV. (Citations omitted.)

[62] *Id.*

[63] *Id.*

[64] *See* Conclusions of Law 12-15.

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

[66] OKLA. ADMIN. CODE § 710: 65-3-31.

alternative methodology may be warranted where there is no reasonable relationship between such estimates and estimates obtained by using such records as may be provided by a taxpayer. The amount of adjustment warranted should be based on the reliability and amount of taxpayer records furnished and the degree by which the alternative methodology estimate deviates from estimates derived from taxpayer records. Adjustments may also be warranted based on the distinct and identifiable characteristics of an individual business as compared to the characteristics of the businesses underlying estimates used in the alternative methodology. The unique situation of individual retailers related to their product mix and the size of their stores should be considered when attempting to determine the amount of tax owed.

This order is not intended to set out all of the possible reasons why the alternative audit methodology should be adjusted. Evidence furnished by a taxpayer which would reasonably indicate that the audit methodology may be inaccurate should be considered.

Based on the specific facts and circumstances of this case, this matter is remanded to the Office of the Administrative Law Judge with directions that the Compliance Division be ordered to revise the assessment of sales taxes against the protestants in a manner not inconsistent with this order. Protestants should be afforded the opportunity to respond to such revised assessment.

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.”