JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2012-07-17-05 / NON-PRECEDENTIAL**
ID: **P-10-1150-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 20th day of July, 2011, the Commission makes the following Findings of Fact and Conclusions of Law and enters the following order.

PROCEDURAL HISTORY

On September 24, 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 October 8, 2010, OTC ATTORNEY 1 and OTC ATTORNEY 2, Assistant General Counsel, filed an Entry of Appearance as Co-Counsel of record for the Compliance Division of the Oklahoma Tax Commission. On October 14, 2010, a letter was mailed to CPA stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-10-1150-H. The letter also advised 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 December 10, 2010, the Notice of Prehearing Conference was mailed to the last-known address of the Protestants' Representative, setting the prehearing conference for January 13, 2011, at 1:30 p.m.[4]

On January 13, 2011, at 1:30 p.m. the prehearing conference was held as scheduled. The Division appeared via telephone. CPA did not appear on behalf of the Protestants. On January 18, 2011, the Prehearing Conference Order was mailed to the parties' Representatives directing the Division to file a verified response, including all work papers and underlying work

[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 CPA at CPA ADDRESS.

sheets, on or before February 17, 2011, with the Protestants' response due on or before March 4, 2011.

On February 15, 2011, an Order Setting Hearing was issued vacating the Prehearing Conference Order and setting this matter for hearing on May 5, 2011, at 9:30 a.m., with position letters or memorandum briefs due on or before April 28, 2011.

On April 22, 2011, a Joint Motion to Strike and Reschedule was filed on the basis that CPA was scheduled to be out of town on April 28, 2011, and would not return until May 16, 2011. On April 27, 2011, an Amended Scheduling Order was issued striking the hearing from the May 5th docket and resetting the hearing for June 8, 2011, at 1:30 p.m., with position letters or memorandum briefs due on or before June 1, 2011.

On June 1, 2011, the Division's Position Letter was filed, with Exhibits A through O attached thereto. CPA did not file a position letter or memorandum brief on behalf of the Protestants.

On June 8, 2011, at 1:30 p.m. an open hearing[5] was held as scheduled. CPA appeared on behalf of the Protestants. OTC ATTORNEY 3 and OTC ATTORNEY 1 appeared on behalf of the Division. CPA called one (1) witness, PRESIDENT ("PRESIDENT"), President of COMPANY d/b/a STORE, who testified about business practices and the audit. The Protestants identified Exhibits 1, 1A, 1B, 3A, 3B, and 4, but failed to offer any of the exhibits to be admitted into evidence.[6] The Division called AUDITOR, Field Auditor, Field Audit Section of the Compliance Division,[7] 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 through P were identified, offered, and admitted into evidence without objection.[8] At the conclusion of the hearing, the record in this matter was held open in order for the Division to file the records from the 3.2 beer distributors for 2009. On June 9, 2011, the Division filed the Schedule of Beer Purchased in 2009.[9] On June 15, 2011, a letter was mailed to the parties acknowledging the Division's filing and advising that the record in this matter was closed and this case submitted for decision on June 15, 2011.

[5] The Protestants, through CPA , waived their right to a confidential hearing as provided by the provisions of OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2011).

[6] It was brought to CPA's attention near the end of the hearing that he had not offered any of the Protestants' exhibits to be admitted into evidence. Protestants' Exhibits 1-A and 1-B are from the Division's Exhibit H. CPA withdrew Protestants' Exhibit 4.

[7] 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. Testimony of AUDITOR.

[8] The parties stipulated to the admission of Division's Exhibit N.

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

FINDINGS OF FACT

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

1. On March 11, 2009, PRESIDENT, as President ("President") and sole officer,[10] filed a Business Registration Application for COMPANY d/b/a STORE ("STORE") to operate a convenience store located at STORE ADDRESS.[11]

2. On September 29, 2009, an Audit Lead Sheet was approved by the Division on STORE. The Audit Lead Sheet states, "Taxpayer started business 1/1/2009 so no beer purchase information is available. Sales reported by this taxpayer are 72% lower than the taxable sales reported by the previous owner, which averages out to roughly $17,534.00 in taxable sales per month. Taxpayer had unstamped and gray market cigarettes confiscated by the OTC on 9/9/09."[12]

3. On April 15, 2010, the Division mailed a letter to STORE notifying that it had been selected for an audit.[13]

4. On April 21, 2010, AUDITOR ("Auditor") called STORE and left a message for the President. The President did not respond to the phone call.[14]

5. On April 22, 2010, the Auditor mailed to STORE a "Records Request,"[15] along with a Statute of Limitations Waiver Agreement, List of Officers, Power of Attorney, Permission to Contact Vendors, and Price List vs. Shelf Check.[16]

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[10] The President does not dispute that he is the sole officer and responsible for the taxes and records of the business. Testimony of President.

[11] Division's Exhibit A.

[12] Division's Exhibit B.

[13] Division's Exhibit C.

[14] Testimony of Auditor.

[15] The Records Request included:

Federal/State Income Tax Returns – …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 Purchase Invoices	Exemption Files…
Bank Statements	Information on Food Stamp sales…

[16] Division's Exhibit D.

6. On May 6, 2010, the Auditor received a phone call from CPA 2, CPA. CPA 2 stated that he represented the Protestants and that he would send by facsimile his Power of Attorney and the records requested.[17]

7. On May 7, 2010, by facsimile, the Division received the Power of Attorney for CPA 2 to represent the Protestants, which was executed by the President of STORE.[18]

8. On May 24, 2010, the Auditor spoke to CPA 2 by telephone. CPA 2 indicated that he would have the records requested for the meeting with the Auditor scheduled for May 29, 2010, at CPA 2'S offices.[19]

9. On May 29, 2010, the Auditor met with CPA 2, who provided the following documents, to-wit:

- March 2009 through December 2009 bank statements
- Samples of sales journals[20]
- Copy of a Request for Extension to file the corporate return for the 2009 Tax Year[21]

10. During the meeting, the Auditor agreed to give CPA 2 additional time to provide Z-Tapes, Z-Tape Summaries, and documentation to support Food Stamp Sales, complete sets of invoices from all vendors, a list of all vendors, and a verifiable price/inventory list to substantiate the Protestants' position that the correct amount of sales had been reported to the Tax Commission.[22]

11. After May 28, 2010, CPA 2 did not contact the Auditor, nor did he provide any additional forms or records from the Protestants.[23]

12. The only information available to the Division was the STORE's 3.2 beer purchases from its distributors, DISTRIBUTOR 1 ("DISTRIBUTOR 1") and DISTRIBUTOR 2 ("DISTRIBUTOR 2") for the 2009 Tax Year.[24] The Division used the Convenience Store Gross

[17] Testimony of Auditor.

[18] Division's Exhibit E. No other documents referenced in Division's Exhibit D were provided.

[19] Testimony of Auditor.

[20] Division's Exhibit F. The "samples" of sales journals (Daily Sales Reports) cover March 2009 through August 2009 and November 2009 through December 2009.

[21] Division's Exhibit G.

[22] Testimony of Auditor.

[23] *Id.*

[24] *Id.* *See* ALJ's Exhibit 1. Distributors report 3.2 beer purchases to the Tax Commission on an annual basis. The Division estimated STORE's purchases for the first four (4) months of 2010 using the 2009 purchases.

Sales Computation ("CSGS Computation")[25] to calculate STORE's taxable sales from January 2, 2009, to April 30, 2010, ("Audit Period") based upon STORE's 3.2 beer purchases,[26] as follows, to-wit:

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

DOLLARS OF PURCHASES BY DEPARTMENT	PRODUCT MIX	DEPARTMENTS	AVERAGE PERCENT OF MARKUP	GROSS DOLLARS OF SALES
	32.70%	CIGARETTES	23.38%	$ 761,638.55
	13.90%	FOODSERVICE	55.00%	$ 323,754.61
	14.10%	PACKAGED BEVERAGES	37.66%	$ 328,412.95
$186,171.38[27]	**10.20%**	**BEER**	**21.64%**	**$ 237,575.33**
	1.40%	GENERAL MERCHANDISE	52.55%	$ 32,608.38
	3.20%	CANDY	47.98%	$ 74,533.44
	3.50%	SALTY SNACKS	38.38%	$ 81,520.95
	3.90%	OTHER TOBACCO	31.65%	$ 90,837.63
	3.10%	FLUID MILK PRODUCTS	35.08%	$ 72,204.27
	2.60%	PACKAGED SWEET SNACKS	26.85%	$ 60,558.42
	11.40%	OTHER DEPARTMENTS	47.42%	$ 265,525.37
	100.00%	TOTALS		$2,329,169.88[28]

Remove Cigarettes and Other Tobacco	(852,476.18)
Sales Taxable Amount	$1,476,693.70
Reported Taxable Sales	(87,418.00)
Food Stamp Sales[29]	(74,119.65)
Unreported Sales	$1,315,156.05

[25] 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* Division's Exhibit H. 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.

[26] The Division has been using the CSGS 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).

[27] Testimony of Auditor. *See* Division's Exhibit O. *See also* Notes 21 through 22, and 27, *supra*. (2009 totals: DISTRIBUTOR 1: $145,229.38 and DISTRIBUTOR 2: $40,942.00).

[28] There is a two cents (2¢) variation of the total and sums its affects ($2,329,169.90).

[29] This number came from the bank statements provided by CPA 2 for March through December 2009.

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

DOLLARS OF PURCHASES BY DEPARTMENT	PRODUCT MIX	DEPARTMENTS	AVERAGE PERCENT OF MARKUP	GROSS DOLLARS OF SALES
	32.70%	CIGARETTES	23.38%	$229,655.29
	13.90%	FOODSERVICE	55.00%	$ 97,621.06
	14.10%	PACKAGED BEVERAGES	37.66%	$ 99,025.68
$56,135.87[30]	**10.20%**	**BEER**	**21.64%**	**$ 71,635.60**
	1.40%	GENERAL MERCHANDISE	52.55%	$ 9,832.34
	3.20%	CANDY	47.98%	$ 22,473.91
	3.50%	SALTY SNACKS	38.38%	$ 24,580.84
	3.90%	OTHER TOBACCO	31.65%	$ 27,390.08
	3.10%	FLUID MILK PRODUCTS	35.08%	$ 21,771.60
	2.60%	PACKAGED SWEET SNACKS	26.85%	$ 18,260.05
	11.40%	OTHER DEPARTMENTS	47.42%	$ 80,063.31
	100.00%	TOTALS		$702,309.76

Remove Cigarettes and Other Tobacco	(257,045.37)
Sales Taxable Amount	$445,264.39
Reported Taxable Sales	(48,943.00)
Food Stamp Sales[31]	(0.00)
Unreported Sales	$396,321.39

13. The results of the "field" audit using the CSGS Computation reflected that STORE had Unreported Taxable Sales during the Audit Period,[32] as follows, to-wit:

2009 Tax Year	$1,315,156.05
January 1, 2010 through April 30, 2010	396,321.39
Total	$1,711,477.44

14. On July 2, 2010, the Division issued proposed sales tax assessments for the Audit Period against the Protestants,[33] as follows, to-wit:

Tax Due:	$143,336.23
Interest @ 15% Through 9/15/2010:	$ 12,382.60
Tax & Interest due within 30 Days:	$155,718.83
30 day delinquent Penalty @ 10%:	$ 14,333.62
Tax, Interest & Penalty due after 30 Days:	$170,052.45

[30] *See* Note 27, *supra.* (2010 "estimated" totals: DISTRIBUTOR 1: $42,625.01 and DISTRIBUTOR 2: $13,510.87)

[31] No bank statements were provided for January through April 2010.

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

[33] Division's Exhibits I and J.

15. On July 15, 2010, a Power of Attorney was faxed to the Division appointing CPA as the Protestants' Representative. The Power of Attorney was signed by the President of STORE.[34]

16. On August 17, 2010, the Division received a timely filed protest[35] 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:

> There was a misunderstanding as to the audit and what was required of us, due to a language barrier.[36] *We do have the records necessary to complete an audit, including z-tapes.* We will be happy to provide any information needed to complete the audit through our accountant, CPA, CPA. A power of attorney form giving CPA authority to deal with the audit has been sent to you. (Emphasis added.)
>
> We do not accept the use of industry averages in the calculation of our sales. The use of the National Association of Convenience Stores averages is inherently flawed. We are prepared to demonstrate those flaws in court but we trust than an audit will make that unnecessary. Please contact CPA to arrange for an audit.

17. On September 8, 2010, the Division sent a letter to the Protestants c/o CPA acknowledging receipt of the protest.[37]

18. On October 7, 2010, OTC ATTORNEY 1 sent a letter to CPA requesting documentation to support the Protestants' position.[38]

19. On January 13, 2011, the prehearing conference was held as scheduled. The Division appeared via telephone. CPA did not appear for the Protestants.[39]

20. The President did not work at STORE during the Audit Period. The "store manager" and/or employees ran STORE, determined the mark-ups on the products, supplied the

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[34] Division's Exhibit K.

[35] Division's Exhibit L. The President testified that CPA 2 typed the protest letter and he signed it.

[36] The Auditor was dealing with CPA 2 during the audit, not the President. The Auditor testified that she has been dealing with CPA 2 for a number of years. The President testified that CPA 2 was from the same State in COUNTRY that he was from, so there should not have been any language barrier between CPA 2 and the President.

[37] Division's Exhibit M.

[38] Division's Exhibit N.

[39] *See* Procedural History herein.

information to the CPA 2 to prepare STORE's sales tax reports, prepared sales journals,[40] and retained purchase records. The President did not verify if any of the information was correct, including the numbers supplied to CPA 2 to prepare STORE's sales tax reports during the Audit Period. The President did make some purchases of products including soda and cigarettes from "DISTRIBUTOR 3," but the purchase invoices were given to the "store manager" and/or employees.[41]

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[42]

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Sales Tax Code").[43] The Sales Tax Code levies "upon all sales,[44] not otherwise exempted…an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds[45] of each sale of…tangible personal property…," and specifically, the sale of "[n]atural or artificial gas,…."[46] Oklahoma Statutes authorize incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.[47]

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[40] *See* Note 20, *supra*. The President testified that the sales journals (Daily Sales Reports) are not always prepared daily. The "samples" provided by CPA 2 appear to have prepared at the same time, by the same person, with the same pen.

[41] Testimony of President.

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

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

[44] 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:
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> 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,
>
> …

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

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

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

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[48] 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[49] 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.[50] 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.[51]

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.[52]

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

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

[49] *Id.*

[50] *Id.*

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

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

to such section.[53] From the record, there is no dispute that "PRESIDENT" was (and is) the principal and sole officer (President) of STORE and responsible for the filing and remittance of sales tax during the Audit Period.[54]

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.[55]

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.[56]

8. The rules promulgated pursuant to the Administrative Procedures Act[57] are presumed to be valid and binding on the persons they affect and have the force of law.[58]

9. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[59]

10. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[60]

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

[54] *See* Note 10, *supra*.

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

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

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

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

[59] 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.

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

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."[61]

12. Although the Tax Commission is not required to comply with provisions of the Administrative Procedures Act ("APA"),[62] 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.[63]

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.[64]

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.[65]

15. Failure to provide notice of the specific issues in administrative hearings violates procedural due process.[66]

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.[67]

The evidence in this matter establishes that the protestants did not keep all of the records required by statute[68] or by Tax Commission Rule[69]. 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

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

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

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

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

[65] *Id.*

[66] *Id.*

[67] *See* Conclusions of Law 12-15

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

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

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 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 the 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 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.”