

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2012-07-24-03 / NON-PRECEDENTIAL
ID: P-10-1708-H
DATE: JULY 24, 2012
DISPOSITION: DENIED
TAX TYPE: SALES
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPANY d/b/a RESTAURANT and PRESIDENT, as President and as an Individual (“Protestants”) appear through CPA, CPA. The Field Audit Section, Compliance Division (“Division”) of the Oklahoma Tax Commission, appears through OTC ATTORNEY, First Deputy General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On December 15, 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 December 17, 2010, a letter was mailed to CPA stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-10-1708-H. 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*.³ On December 21, 2010, OTC ATTORNEY 2, Assistant General Counsel, and OTC ATTORNEY 3, Assistant General Counsel, filed an Entry of Appearance as Co-Counsel for the Division.

On January 19, 2011, the Notice of Prehearing Conference was mailed to CPA’s last-known address, setting the prehearing conference for February 1, 2011, at 10:30 a.m.⁴ On January 27, 2011, the Division filed the Status Report In Lieu of Appearance at Pre-Hearing Conference, advising the Protestants had provided documentation for the Division’s review. A letter was mailed January 28, 2011 directing a status report be filed on or before March 3, 2011.

On February 18, 2011, a Notice of Substitution of Attorney and Entry of Appearance were filed by OTC ATTORNEY 1 as Co-Counsel for the Division.⁵

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. 2012). The notice was mailed to CPA at CPA, FIRM, CPA ADDRESS.

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

On March 3, 2011, the Status Report was filed advising the documentation provided by the Protestants was insufficient to warrant an adjustment to the proposed sales tax assessment. The Division requested additional time to either settle or request that a hearing be set. On March 4, 2011, the Division requested this matter be set for hearing. On March 9, 2011, a letter was mailed setting this matter for hearing on May 2, 2011, at 9:30 a.m., with memorandum briefs or position letters due on or before April 25, 2011.

On April 21, 2011, the Division's Motion to Strike and Set the Matter for Status Reporting was filed with the Court Clerk.⁶ The Division's witness had been placed on medical leave for an unknown period of time. On April 25, 2011, an Order Striking Hearing and Requesting Status Report was issued striking the hearing from the May 2, 2011, docket with a status report to be filed on or before May 25, 2011.

On May 25, 2011, the Division filed the Status Report advising that the Division's witness had not been released by his physician.

On June 7, 2011, a letter was mailed advising a status report was to be filed on or before June 24, 2011. On June 24, 2011, the Division filed the Status Report advising the auditor still had not been released by his physician. On June 24, 2011, a letter was mailed advising a status report was to be filed on or before July 25, 2011.

On July 26, 2011, the Division filed the Status Report advising the Division's witness had been released by his physician to return to work.

On August 10, 2011, a letter was mailed setting this matter for hearing on October 10, 2011, at 9:30 a.m., with memorandum briefs and/or position letters due on or before October 3, 2011.

On October 3, 2011, the Division advised its witness was back at work, but could not physically tolerate the long trip from CITY A to CITY B until he was done with "chemo" around October 20th. On October 3, 2011, the Division's Unopposed Motion to Reschedule Hearing was filed upon the aforementioned basis. On October 17, 2011, the notice was issued setting the hearing for November 9, 2011, at 9:30 a.m., with memorandum briefs and/or position letters due on or before November 2, 2011.

On November 2, 2011, a statement of the Protestants' Position was filed with attachments thereto. On November 2, 2011, the Division's Brief was filed with Exhibits A through S attached thereto.

On November 9, 2011, at 9:30 a.m. a closed hearing⁷ was held as scheduled. The Protestants appeared through PRESIDENT,⁸ as President and as an Individual.⁹ PRESIDENT

⁶ OKLA. ADMIN. CODE § 710:1-5-10(c)(2) (June 25, 1999).

⁷ The Protestants, through PRESIDENT, invoked their right to a confidential hearing as provided by the provisions of OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2012).

made a brief opening statement. The Division waived its opening statement. PRESIDENT testified on behalf of the Protestants about how business is conducted at both locations and the field audit. The “Original” photos were identified, offered, and admitted into evidence as Protestants’ Exhibit 1, with exceptions noted for the record. The Division called AUDITOR, Field Auditor (“Field Auditor”),¹⁰ Field Audit Section, Compliance Division of the Oklahoma Tax Commission, who testified about the conduct of the field audit and as custodian of the Division’s records. The Division’s Exhibits A through H were identified, offered, and admitted into evidence by stipulation. The Division’s Exhibits I through T were identified, offered, and admitted into evidence, with exceptions noted for the record. At the conclusion of the hearing, the record remained opened for thirty (30) days for the parties to provide the following:

- Protestants were directed to provide copies of bank statements, which would be identified and admitted into evidence as ALJ’s Exhibit 1 and a copy of the computer records, which would be identified and admitted into evidence as ALJ’s Exhibit 2.
- Division was directed to provide a copy of the sales tax assessment against the Secretary, which would be identified and admitted into evidence as ALJ’s Exhibit 3.¹¹

On November 14, 2011, the Court Clerk received COMPANY’s General Ledger (computer records) from September 1, 2007, through June 27, 2010, which was identified and admitted into evidence as ALJ’s Exhibit 2. On November 15, 2011, a letter from PRESIDENT, with copies of bank statements, was identified and admitted into evidence as ALJ’s Exhibit 1. On November 21, 2011, a letter was mailed memorializing the announcements made at the November 9th hearing and advising the Division to review the records submitted by the Protestants to determine if any revisions to the proposed sales tax assessments were warranted. On November 21, 2011, the Division filed a Status Report Regarding ALJ’s Exhibit 3, with a copy of the sales tax assessment against SECRETARY, as Secretary and as an Individual, which was identified and admitted into evidence as ALJ’s Exhibit 3.¹²

⁸ PRESIDENT advised that CPA was not present due to a previous engagement in Siloam Springs, AR. PRESIDENT had not previously advised the Court Clerk of CPA’s scheduling conflict and PRESIDENT did not request that the hearing be continued.

⁹ PRESIDENT has been in law enforcement for over twenty-five (25) years and has been the Assistant Chief of Police for the City of CITY A for eight (8) years. Testimony of PRESIDENT.

¹⁰ AUDITOR has been employed by the Tax Commission for approximately twenty-eight (28) years, conducting approximately 150-200 sales tax audits, which includes three (3) to five (5) restaurant audits.

¹¹ At the November 9th hearing PRESIDENT informed the undersigned that he was not aware of a proposed sales tax assessment having been issued against SECRETARY. However, according to the Division’s records, an assessment was issued but not protested.

¹² *Id.*

On January 12, 2012, a letter was mailed to the parties directing the Division to review ALJ's Exhibits 1 through 2 and advise on or before January 27, 2012, whether the documents were sufficient to warrant any revisions to the proposed sales tax assessments. On January 13, 2012, OTC ATTORNEY 3 contacted the Court Clerk by e-mail and advised the Division had not received a copy of ALJ's Exhibit 2. On January 13, 2012, the Court Clerk sent the Division a copy of ALJ's Exhibit 2 by interagency mail and email. On January 27, 2012, the Division filed the Status Report advising the Division had reviewed ALJ's Exhibits 1 and 2 and the documents were insufficient to warrant any revisions to the proposed sales tax assessments.¹³

On February 7, 2012, a letter was mailed to the parties advising this case was to be put on hold¹⁴ until the *Findings, Conclusions and Recommendations* in the "pivotal" convenience store case had been issued and the parties would be notified when this case was ready to be submitted for decision.

On March 9, 2011, OTC ATTORNEY 3 filed a Withdrawal of Counsel, as Co-Counsel for the Division.

On April 9, 2012, a letter was mailed to the parties stating this case was submitted for decision as of April 9, 2012.

FINDINGS OF FACT

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

1. The "original" RESTAURANT ("RESTAURANT") at WEST LOCATION ADDRESS ("West Location") has been in business since 1948. Basically, RESTAURANT has always been a "Hot Dog Stand," best known for its chili recipe. RESTAURANT seating consists of six (6) stools at the counter with a drive-through/walk-up window.¹⁵ RESTAURANT has never used a cash register, sequentially numbered tickets, daily sales log, etc. to keep track of its daily sales. RESTAURANT has always used a "muffin pan" beginning each day with \$112.50 to make change in its "muffin pan."¹⁶

2. PRESIDENT was looking for a business enterprise to supplement his current income and his retirement income in the future. In 2003 PRESIDENT purchased a RESTAURANT franchise located at EAST LOCATION ADDRESS ("East Location").

¹³ Attached to the status report is a copy of a memorandum dated January 27, 2012, from the Field Auditor to the Field Audit Supervisor.

¹⁴ It was at this time the record in this matter was closed.

¹⁵ Protestants' Exhibit 1.

¹⁶ Testimony of PRESIDENT.

3. On May 9, 2003, COMPANY, an S Corporation (“Corporation”), submitted a Business Registration Application (“Application”) for a sales tax permit to operate the East Location. The first date of sale was reflected as June 3, 2003. The Application was submitted by PRESIDENT, as President of Corporation (“President”) owning seventy percent (70%). SECRETARY, his wife, was listed as Secretary of Corporation (“Secretary”) owning the remaining thirty percent (30%).¹⁷

4. On February 5, 2004, Corporation submitted an Application for a sales tax permit to operate a second location (West Location).¹⁸ The first date of sale was reflected as February 2, 2004. The Application was submitted by President of Corporation.¹⁹

5. President consulted several business people, including CPA 2, CPA, who is the son of CPA, about how business should be conducted. President testified he was advised RESTAURANT had used a “muffin pan” since 1948, so why change it. President continues to conduct business on that basis, without a cash register, sequentially numbered tickets, daily sales journal or log, etc. to document daily gross sales. Each month, the President adds up the deposits, according to the General Ledger (computer records), and multiplies the total times the applicable sales tax rate (currently 9.15%). RESTAURANT menus prices *do not* include sales tax. RESTAURANT gives one-half (½) price discounts to police, firefighters, military, and EMS workers. RESTAURANT does not document the discounted sales or exempt sales to veterans. RESTAURANT does not maintain a beginning or ending inventory or any inventory controls. RESTAURANT sales are cash, although some checks are accepted. RESTAURANT does not accept debit cards or credit cards.²⁰

6. The President is basically an “absentee owner.” The Secretary “manages” RESTAURANT on a daily basis as time permits.²¹ RESTAURANT employs eight (8) to twelve (12) employees (mostly teenagers), whose weekly work hours range from twelve (12) to fifteen (15) hours and up to fifty (50) to sixty (60) hours. RESTAURANT employees eat and drink for free, along with the President’s family, but there are no records documenting these withdrawals from inventory.²² The President noted for the record there is also a problem with employees giving away food and drinks, along with theft of money, but RESTAURANT does not document these types of losses.²³

¹⁷ Division’s Exhibit A. The mailing address for the President and Secretary is MAILING ADDRESS.

¹⁸ Hereinafter both locations will collectively be referred to as “RESTAURANT.”

¹⁹ Division’s Exhibit B.

²⁰ *Id.*

²¹ Testimony of President.

²² *See* OKLA. ADMIN. CODE § 710:65-3-4 (June 11, 2011) and § 710:65-19-109 (June 25, 1998).

²³ *Id.* The President also noted the Police Reports had been filed. One such incident involved the daughter of a policeman, so it was not pursued.

7. On October 2, 2009, an “Audit Lead” generated by the Field Auditor was approved,²⁴ which states as follows, to-wit:

Operates 2 locations in CITY A, OK.

Does not use register or computer. Does not give receipts [sic]. Figures bill on calculator.

Cash only business. Makes no record of sales.

8. On April 2, 2010, the Division mailed an Audit Notification Letter to the Corporation, which was returned because the address was incorrect.²⁵

9. On April 5, 2010, the Division re-mailed an Audit Notification Letter to the Corporation.²⁶

10. On May 13, 2010, an Opening Conference was held with President and Field Auditor, at which time the President was presented with the Division’s standard records request. The President signed a Statute of Limitations Waiver Agreement.²⁷

11. From September 1, 2007, through June 30, 2010 (“Audit Period”), the Corporation filed and remitted consolidated sale tax reports for both locations.²⁸

12. The Field Auditor compared the Corporation’s gross sales reported to the Tax Commission to gross sales reported to the Internal Revenue Service (“IRS”) on its S-Corp income tax returns for the Audit Period. The Corporation underreported its gross sales during the Audit Period,²⁹ as follows, to-wit:

²⁴ Division’s Exhibit H. The Field Auditor who generated the Audit Lead is the same Field Auditor who conducted the Field Audit. Testimony of Field Auditor. This is the first time the Tax Commission has audited RESTAURANT since the Corporation became the owner of both locations. There is no indication in the record whether RESTAURANT has ever been the subject of a compliance visit.

²⁵ Division’s Exhibit I. The address on the letter is incorrect. The correct address is CORRECT ADDRESS, not INCORRECT ADDRESS. The address is incorrect in the records of the Tax Commission. The Field Auditor notes this in the Field Audit Work Papers. Testimony of Field Auditor. The letter is dated April 5, 2010, but the envelope returned reflects a post-mark of April 2, 2010.

²⁶ Division’s Exhibit J. This letter was mailed to the business address of the East Location.

²⁷ Division’s Exhibit K. Testimony of Field Auditor.

²⁸ Division’s Exhibit C.

²⁹ Division’s Exhibits D and L.

| <u>Tax Year</u> | <u>IRS</u> | <u>OTC</u> | <u>Underreported</u> |
|---------------------|-------------------|-------------------|----------------------|
| 2007 (Partial Year) | \$ 93,965.00 | \$ 86,100.00 | \$ 7,865.00 |
| 2008 | 273,305.00 | 269,594.00 | 3,711.00 |
| 2009 | 244,892.00 | 244,250.00 | 642.00 |
| 2010 (Partial Year) | <u>111,502.50</u> | <u>110,646.00</u> | <u>856.50</u> |
| Total | \$723,664.50 | \$710,590.00 | \$13,074.50 |

13. The Field Auditor testified the Protestants' records for the Audit Period were incomplete and the Protestants provided only a fraction of the records requested, which included only a few months of the Audit Period.³⁰

14. Due to the incompleteness of the Protestants' records, the Field Auditor utilized an IRS indirect audit methodology, which utilizes a thirty-two percent (32%)³¹ food cost formula for estimating expected sales from a "Limited Service Restaurant" whose customers have a median average check of five dollars (\$5.00).³²

15. The Field Auditor calculated underreported sales for each partial year and full year of the Audit Period,³³ as follows, to-wit:

| <u>Tax Year</u> | <u>Underreported Sales</u> |
|---------------------|--------------------------------|
| 2007 (Partial Year) | \$ 36,566.66 |
| 2008 | 67,634.12* |
| 2009 | 100,496.00 |
| 2010 (Partial Year) | <u>17,755.00</u> ³⁴ |
| Total | \$222,451.78 |

*Example:

(COGS 1120-S)

| | <u>2008 Tax Year</u> | |
|----------------------|----------------------|-----------------------|
| \$107,913.00 / 32% = | \$337,228.12 | in sales |
| | <u>-269,594.00</u> | sales reported to OTC |
| | \$ 67,634.12 | Underreported Sales |

³⁰ Testimony of Field Auditor.

³¹ Thirty-two percent (32%) is the Cost of Goods Sold ("COGS").

³² *Id.* Division's Exhibit S. This exhibit consists of a Bars and Restaurants Audit Technique Guide (ATG), published by the IRS using *Restaurant Industry Operations Report for 2000*, National Restaurant Association Deloitte & Touche, and three (3) articles from the National Restaurant Association's website at <https://www.restaurant.org>. The IRS publication reflects COGS of 29.7%. The Field Auditor used the COGS for a Limited Service Restaurant of 32.0 % from the article titled "Food-Cost Fitness."

³³ *Id.* Division's Exhibit M. The work papers (Division's Exhibit N) reflect underreported sales of \$222,696.78, which is \$245.00 more than the calculation on Division's Exhibit M.

³⁴ *Id.* The Field Audit used the COGS figure from the Profit and Loss Statement provided by CPA for January through June 2010.

16. On August 23, 2010, the Closing Conference was held with the President at the CITY A Police Department. The Field Auditor provided the President with a copy of the Field Audit Work Papers.³⁵

17. On October 8, 2010, the Division issued proposed sales tax assessments against the Protestants for the Audit Period,³⁶ as follows, to-wit:

| | |
|--|-------------|
| Tax Due: | \$19,820.01 |
| Interest @ 15% through 12/31/2010: | 4,571.52 |
| Tax & Interest due within 30 Days: | 24,391.53 |
| 30 day delinquent Penalty @ 10%: | 1,982.00 |
| Tax, Interest & Penalty due after 30 Days: | \$26,373.53 |

18. On October 20, 2010, the Division received a timely filed protest to the proposed assessments against the Protestants.³⁷

19. On November 5, 2010, the Division received a Power of Attorney for CPA to represent the Protestants in this matter.³⁸

20. On January 26, 2011, the Division received additional information from CPA. The information consisted of sample invoices, profit and loss statements for each year of the Audit Period, credit card statements reflecting food purchases, and some bank statements reflecting deposits. The Division determined this information was insufficient to warrant a revision of the proposed sales tax assessments.³⁹

21. According to the Menus for both locations,⁴⁰ the following items are offered for sale:

East Location

| | | | |
|-----------------|-----------------|----------|---------|
| Hot Dog | 1.75 | | |
| Cheese Dog | 1.95 | | |
| Frito Chili Pie | 3.00 | W-Cheese | 3.50 |
| Chips | No price listed | | |
| Drinks | SM/1.50 | MED/1.60 | LG/1.90 |

³⁵ OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999). The Administrative Law Judge is taking judicial notice of the Field Audit Write-up, which is part of the court file, to complete the factual details of this matter.

³⁶ Division's Exhibits N and O. The Division also issued a proposed sales tax assessment against the Secretary, but the assessment was not protested. See ALJ's Exhibit 3. At hearing, the President was not aware that an assessment had been issued against the Secretary.

³⁷ Division's Exhibit P.

³⁸ Division's Exhibit Q.

³⁹ Testimony of Field Auditor.

⁴⁰ See Note 15, *supra*.

West Location⁴¹

| | | | |
|-------------|---------|----------|---------|
| Hot Dogs | 1.75 | | |
| Cheese Dogs | 1.95 | | |
| Frito Pie | 3.25 | W-Cheese | 3.50 |
| Drinks | SM/0.95 | MED/1.50 | LG/1.60 |

22. On November 2, 2011, CPA provided the Division with her computations of COGS and the Profit Margin for a Hot Dog, Hot Dog with Cheese, Soft Drinks, and Chips, along with supporting invoices, summarized as follows,⁴² to-wit:

| | | | | |
|---------------|-------------------|-------------------|--------------------------|--------------------|
| | <u>Hot Dog</u> | <u>Cheese Dog</u> | <u>Soft Drinks</u> | <u>Chips</u> |
| | 67% ⁴³ | 64% | 18% (East Location Avg.) | 51% |
| Profit Margin | ±50% | ±57% | ±460% (Avg.) | ±96% ⁴⁴ |

23. President acknowledged at hearing that CPA’s calculation for the COGS for the wieners is incorrect. CPA’s calculation⁴⁵ is as follows, to-wit:

\$16.70 per box of 160 (\$16.70/160) = \$1.04

Invoice #89754 dated March 16, 2009, from DISTRIBUTOR 1 reflects:

| <u>NO OF PKGS</u> | <u>DESCRIPTION</u> | <u>WEIGHT</u> | <u>PRICE</u> | <u>AMOUNT</u> |
|-------------------|----------------------|---------------|--------------|---------------|
| 3 | BOX X 16/1 [WIENERS] | 30 | 16.70 | 50.10 |

CPA misinterpreted the invoice to mean each box contained sixteen (16) wieners or \$1.04 each. The invoice actually indicates each box weighs ten (10) pounds or 160 wieners per box which equals \$0.10 each. Based upon the information provided by CPA, RESTAURANT COGS would be approximately 27.66% during the Audit Period, which would include everything on RESTAURANT menus, but the COGS for Frito Chili Pies.⁴⁶

⁴¹ Chips are not listed on the menu.

⁴² See Protestants’ Position Letter, with attachments thereto. The COGS for condiments is not calculated, nor is the COGS calculated for Frito Chili Pies.

⁴³ CPA indicates this figure assumes every bun is used, but ten percent (10%) are thrown away due to imperfection or over-steaming and approximately twenty (20) to fifty (50) wieners are thrown away each day because of breakage and/or left in the steamer at the end of the day. There is no documentation to back up either figure. President testified at hearing that at one RESTAURANT location the buns can be returned to the vendor for credit, but not at the other location because it is a different vendor. See Note 15, *supra*.

⁴⁴ CPA’s calculation includes the recovery of cost, not just the profit margin.

⁴⁵ *Id.*

⁴⁶ From a review of the Protestants’ records it appears the “Fritos” used in Frito Chili Pies are purchased in bulk.

24. Using CPA's computations of COGS for "Hot Dogs" only, the Field Auditor determined that the most a "Hot Dog" costs to prepare⁴⁷ is as follows, to-wit:

| | <u>Hot Dog</u> | <u>Cheese Dog</u> |
|------|--|--|
| | 0.23 | 0.27 |
| | <u>0.22</u> (with a few condiments without cheese) | <u>0.26</u> (with everything including sauerkraut) |
| | 0.45 | 0.53 |
| COGS | 25% | 27% |

25. On November 8, 2011, the Field Auditor went to one of the RESTAURANT locations and purchased three (3) Hot Dogs, and requested a receipt, which is hand-written,⁴⁸ as follows, to-wit:

| <u>RESTAURANT</u> | <u>11/8/11</u> | <u>Menu Price</u> |
|-------------------|--|----------------------------|
| 1 | e k (Hot Dog with everything, but sauerkraut) | \$ 1.75 |
| 1 | e (Cheese Dog with everything, including sauerkraut) | 1.95 |
| 1 | p (bun & wiener) | <u>1.65</u> (Not on Menus) |
| Total | | \$ 5.35 (No sales tax) |
| | [Cash] | 20.00 |
| | Change | \$14.65 |
| | SIGNATURE (appears to be the signature) | |

26. On January 27, 2012, the Field Auditor reviewed ALJ's Exhibits 1 and 2 and made the following conclusions,⁴⁹ to-wit:

- I reviewed the documents identified as ALJ Exhibits 1 and 2. I determined these were the same documents reviewed during the audit.
- Review of ALJ's Exhibits 1 and 2, along with the profit and loss statements and federal tax returns all show the same food costs for each year. The assumption is that their reported food costs are accurate. If one uses the percentage of cost of goods sold which acceptable to the IRS, the calculation reveals that the gross sales are much higher than what [President] reported. I used the IRS' percentage of 32% because [President's] records were incomplete. An explanation of how I calculated the costs is found in my audit report admitted into evidence.
- I testified at the hearing how I calculated the cost of goods sold using Division's percentage of food costs at 32%. I also calculated the costs of goods sold using the figures provided by [President's] CPA. Based on the CPA's figures, the percentage of cost of goods sold was approximately

⁴⁷ Division's Exhibit R. See Protestants' Position Letter and the attachments thereto. During the hearing, the Field Auditor conducted a very effective demonstration which used the condiment sizes CPA states are used on RESTAURANT Hot Dogs. The condiment sizes produced a Hot Dog/Cheese Dog that was basically uneatable using the papers RESTAURANT Hot Dogs are wrapped in.

⁴⁸ Division's Exhibit T. Receipts are only given to a customer when specifically requested and the receipt is hand-written, as it was in this matter. President acknowledged that \$0.48 in sales tax should have been charged on this transaction.

⁴⁹ See attachment to Status Report filed on January 27, 2012.

25%. The lower the cost, the higher the assessment. Based on my conversations with [Field Audit Supervisor], we both wanted to be as fair to [President] as possible. Therefore, [Field Audit Supervisor] and I decided to use the 32% for cost of goods sold to give [President] the benefit of the doubt.

- [President] has no inventory control system. He does not use a cash register or numbered order tickets. The sales are strictly cash sales. Therefore, it is impossible to verify that all the cash was deposited. Due to this impossibility, the bank statements are unreliable. (Emphasis added.)

27. The Protestants' General Ledger reflects that during the Audit Period, RESTAURANT also had "Spice" sales,⁵⁰ as follows, to-wit:

| <u>Date</u> | <u>Amount</u> |
|-------------|---------------|
| 11/15/2007 | \$ 40.00 |
| 11/21/2007 | 130.00 |
| 12/03/2007 | <u>60.00</u> |
| Subtotal | \$230.00 |
| 01/07/2008 | 36.00 |
| 01/29/2008 | 24.00 |
| 01/31/2008 | 24.00 |
| 03/15/2008 | 60.00 |
| 04/17/2008 | 24.00 |
| 05/01/2008 | 24.00 |
| 05/14/2008 | 24.00 |
| 06/29/2008 | 24.00 |
| 08/25/2008 | 24.00 |
| 09/11/2008 | <u>24.00</u> |
| Subtotal | \$288.00 |
| 2009 | 00.00 |
| 2010 | <u>00.00</u> |
| Total | \$518.00 |

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.⁵¹

⁵⁰ ALJ's Exhibit 2. The sale of "Spices" is nominal and does not warrant revising the proposed sales tax assessments. The General Ledger also reflects there is a RESTAURANT "CITY C," which was not mentioned by either party.

⁵¹ OKLA. STAT. ANN. tit. 68, § 221(D) (West Supp. 2011).

2. Rules promulgated pursuant to the Administrative Procedures Act⁵² are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court.⁵³ They are valid and binding on the persons they affect, have the force of law, and are prima facie evidence of the proper interpretation of the matter to which they refer.⁵⁴

3. The tax levied by the Oklahoma Sales Tax Code⁵⁵ shall be paid by the consumer or user to the vendor⁵⁶ 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.⁵⁷

4. 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 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 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. 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.⁵⁸

⁵² OKLA. STAT. ANN. tit. 75, § 250 *et seq.* (West 2002).

⁵³ OKLA. STAT. ANN. tit. 75, § 306(C) (West 2002).

⁵⁴ OKLA. STAT. ANN. tit. 75, § 308.2(C) (West 2002).

⁵⁵ OKLA. STAT. ANN. tit. 68, § 1350 *et seq.* (West 2008).

⁵⁶ “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).

⁵⁷ 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.

⁵⁸ OKLA. STAT. ANN. tit. 68, § 1365(F) (West 2008).

5. Tax Commission Rule 710:65-3-30⁵⁹ provides as follows, to-wit:
- (a) Vendors shall keep records and books of all sales and all purchases of tangible personal property. Vendors must maintain complete books and records covering receipts from all sales and distinguishing taxable from nontaxable receipts.
- (1) Such books and records must clearly document all the information (deductions as well as gross receipts) required for tax returns and shall, at all times during business hours of the day, be subject to inspection and audit by the Commission or its duly authorized agents and employees.
- (2) Such books and records must be kept in the English language.
- (3) Such books and records must be kept within Oklahoma except in instances where a business has several branches, with the head office being located outside Oklahoma, and where all books and records have been regularly kept outside the State at such head office. If books and records are kept outside Oklahoma, the vendor must, within a reasonable time after notification by the Commission, make all pertinent books, records, papers and documents available at some point within Oklahoma for the purpose of inspection and audit or arrange for Commission personnel to inspect and audit the books and records of the vendor at a location outside Oklahoma.
- (b) It shall be presumed that all sales of tangible personal property are subject to tax until the contrary is established, and the burden of proving that a transaction was not a taxable sale shall be upon the person who made the sale. [See: 68 O.S. §1365(F)]
6. Section 1352(12) of Title 68,⁶⁰ defines “Gross Receipts,” as follows, to-wit:
- a. “Gross receipts”, “gross proceeds” or “sales price” means the total amount of consideration, including cash, credit, property and services, for which personal property or services are sold, leased or rented, valued in money, whether received in money or otherwise, without any deduction for the following:
- (1) the seller’s cost of the property sold,
- (2) the cost of materials used, labor or service cost,
- (3) interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller,

⁵⁹ OKLA. ADMIN. CODE § 710:65-3-30 (July 1, 2008).

⁶⁰ OKLA. STAT. ANN. tit. 68, § 1352(12) (West 2008).

- (4) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges,
- (5) delivery charges and installation charges, unless separately stated on the invoice, billing or similar document given to the purchaser, and
- (6) credit for any trade-in.

b. Such term shall not include:

- (1) discounts, including cash, term, or coupons that are not reimbursed by a third party that are allowed by a seller and taken by a purchaser on a sale,
- (2) interest, financing, and carrying charges from credit extended on the sale of personal property or services, if the amount is separately stated on the invoice, bill of sale or similar document given to the purchaser, and
- (3) any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale or similar document given to the purchaser,

c. Such term shall include consideration received by the seller from third parties if:

- (1) the seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale,
- (2) the seller has an obligation to pass the price reduction or discount through to the purchaser,
- (3) the amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser, and
- (4) one of the following criteria is met:
 - (a) the purchaser presents a coupon, certificate or other documentation to the seller to claim a price reduction or discount where the coupon, certificate or documentation is authorized, distributed or granted by a third party with the understanding that the third party will reimburse any seller to whom the coupon, certificate or documentation is presented,
 - (b) the purchaser identifies himself or herself to the seller as a member of a group or organization entitled to a price reduction or discount; provided, a "preferred customer" card that is available to any patron does not constitute membership in such a group, or
 - (c) the price reduction or discount is identified as a third-party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate or other documentation presented by the purchaser;

7. Tax Commission Rules specifies “What records constitute minimum requirement,” in pertinent parts,⁶¹ as follows, to-wit:

(a) **Required records.** The following records constitute a minimum requirement for the purposes of the Sales Tax Code for vendors selling tangible personal property:

(1) Sales journal or log of daily sales *in addition to cash register tapes* and other data which will provide a daily record of the gross amount of sales. (Emphasis added.)

(2) A record of the amount of merchandise purchased. To fulfill this requirement, copies of all vendors’ invoices and taxpayers’ copies of purchase orders must be retained serially and in sequence as to date.

(3) A true and complete inventory of the value of stock on hand taken at least once each year.

...

(c) **Automated systems.** An Automated Data Process Systems (ADP) tax accounting system may be used to provide the records required for the verification of tax liability. Such ADP system must include a method of producing legible and readable records which will provide the necessary information for verifying such tax liability. The following requirements apply to any taxpayer who maintains any such records on an ADP system:

(1) **Recorded or reconstructible data.** ADP records shall provide an opportunity to trace any transaction back to the original source or forward to a final total. If detailed printouts are not made of transactions at the time they are processed, the systems must have the ability to reconstruct these transactions.

(2) **General and subsidiary books of account.** A general ledger with source references and subsidiary ledgers shall be written out to coincide with financial reports for tax reporting periods.

(3) **Supporting documents and audit trail.** The audit trail shall be designed so that the details underlying the summary accounting data such as sales invoices, purchase invoices, credit memoranda and like documents, are readily available to the Department upon request.

(4) **Program documentation.** A description of the ADP portion of the accounting system shall be made available. The statements and illustrations describing the system and scope of ADP operations being performed shall be sufficiently detailed to indicate the application being performed and the procedures employed in each application. Controls

⁶¹ OKLA. ADMIN. CODE § 710:65-3-31 (June 24, 1994). See OKLA. STAT. ANN. tit. 68, § 1365 (West 2008).

used to insure accurate and reliable processing should be noted along with the dates and nature of important changes.

(5) **Data storage media.** Adequate record retention facilities shall be available for storing tax and ADP records required for verification of tax liability. Records required would include data prepared for input in processing accounts payable, accounts receivable or any purchase or sales journal entries necessary for bookkeeping and tax reporting purposes. (Emphasis original.)

8. Oklahoma Statutes, prohibits any retailer to advertise or hold out or state to the public or to any customer, either directly or indirectly, that the sales tax imposed under Oklahoma Statutes, will be absorbed or assumed by such retailer, or that such tax will be paid by the vendor for the consumer or user.⁶²

9. Tax Commission Rule 710:65-1-6 addresses “Tax-included” prices,⁶³ as follows, to-wit:

(a) Certain vendors, in an effort to arrive at a sum for the tangible personal property being sold which may be conveniently handled as cash, have calculated the price of the property and collected a “**tax-included**” amount. In some cases the vendor has made signs, price lists, etc. on the premises advising that the prices include tax; in others no apparent mention of taxes has been made to the public.

(b) Although certainly desirable from an accounting and auditing standpoint, neither the statutes nor Commission rules require a vendor to state the sale price separately from the applicable tax. 68 O.S. 1361(B) provides that sales tax shall be added to the sales price, “*and when added such tax shall constitute a part of such price.*” Under present law, taxes collected as part of a tax-included price, if so charged and collected, may be “backed out” of the total receipts to arrive at the amount of gross receipts or gross proceeds subject to tax.

(c) Whether the vendor added and collected the tax or whether the vendor truly failed to collect any tax at all, is always a fact to be determined. Such factual determination must be made in light of all circumstances, documents, records and information available. No single factor will be relied on to the exclusion of other evidence. As always in tax matters, the burden of proving that the tax was added and collected is on the vendor. The vendor must keep sufficient documentary evidence, i.e. books, records, price lists, signs, to sustain this burden. (Emphasis original.)

⁶² OKLA. ADMIN. CODE § 710:65-1-5 (July 1, 2008). See OKLA. STAT. ANN. tit. 68, 1361(D) (West 2008).

⁶³ OKLA. ADMIN. CODE § 710:65-1-6 (June 25, 2004). See OKLA. STAT. ANN. tit. 68, § 1361(B) (West 2008).

10. Every person required to collect any tax imposed by the Oklahoma Sales Tax Code, and in the case of a corporation, each principal officer thereof, shall be personally liable for the tax.⁶⁴

11. 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.⁶⁵

12. In this matter, there is no dispute that the President is one of the principal officers of the Corporation and a “responsible person” liable for the collection and remittance of sales tax.⁶⁶

13. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.⁶⁷

⁶⁴ See Note 65, *infra*. The Tax Commission identifies the “President, Vice-President, Secretary, Treasurer, or Secretary/Treasurer as principal officers.” OKLA. ADMIN. CODE § 710:65-7-3-(1).

⁶⁵ 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 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.

⁶⁶ Testimony of President.

⁶⁷ 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.

14. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.⁶⁸

DISCUSSION OF SALES TAX AUDIT METHODOLOGY

An order of the Tax Commission must be supported by substantial evidence.⁶⁹ Likewise, the audit upon which a portion of the record is formed and order issued must be supported by substantial evidence.⁷⁰

The President did provide copies of bank statements and copies of the Corporation's General Ledger for the Audit Period, which was maintained on a computer. The General Ledger contains detailed information on just about every aspect of business operations, except daily gross sales.⁷¹

The Division's choice of audit methodology was not arbitrary; it was necessitated by the manner in which the President chose to conduct business on a daily basis, without maintaining any statutorily mandated records to document daily gross sales.

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.⁷²

DISCUSSION

In the Position Letter, the Protestants' contentions are stated,⁷³ as follows, to-wit:

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.

⁶⁸ See *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

⁶⁹ *Dugger v. State ex rel. Oklahoma Tax Com'n*, 1992 OK 105, 834 P.2d 964.

⁷⁰ Tax Commission Order No. 2003-07-22-09 (July 22, 2003), 2003 WL 2347117 (Okla. Tax Com.), available at <http://westlaw.com>. (August 10, 2006).

⁷¹ See Note 34, *supra*.

⁷² See OTC Order No. 2011-11-15-05 (November 15, 2011).

⁷³ Protestants' Position Letter at 1.

1. Our opinion of the issues to be decided: We hope to prove to the judge at the hearing that the cost of goods sold percentage used by the field auditor in order to calculate possible additional unreported sales and sales tax does not apply to this establishment since it has a very limited menu with easily discernable food costs.

2. Our contention is that the field auditor failed to communicate with the taxpayer or his representative and upon assessment failed to communicate with the taxpayer or his representative after further information regarding cost of goods sold were provided. Statutory and case law used to rely on our position: none

The Division responds, “In order for Protestants to carry their burden of proof that Division’s assessments are erroneous, Protestants needs to prove their assertion by using their own records. Protestants cannot meet this burden because they did not keep or maintain proper records as required by Oklahoma law.”⁷⁴ “Protestants aver that Division’s assessments are based on a thirty-two percent food cost formula which is not representative of their actual food costs.”⁷⁵

On cross-examination, the President admitted the amount of monthly gross sales was no more than an estimate, based upon daily bank deposits, coupled with the fact RESTAURANT does not keep records of discounts, withdrawals from inventory, etc. The President also testified at hearing RESTAURANT prices do not include sales tax, although the President acknowledged that RESTAURANT was suppose to be charging and collecting sales tax. From the record, it does not appear that RESTAURANT is charging sales tax, as evidenced by the receipt⁷⁶ and from the method the President uses to determine RESTAURANT monthly gross sales for reporting purposes.

According to the President’s testimony, he determines RESTAURANT monthly sales by adding up the daily deposits in the General Ledger and multiples the total by the current sales tax rate (9.15%). Unfortunately, it appears to confirm that sales tax is not being charged and collected, but that RESTAURANT is absorbing the sales tax. However, there is no indication in the record that RESTAURANT advertises or holds out or states to the public or to any customer, either directly or indirectly, that the sales tax imposed under Oklahoma Statutes will be absorbed or assumed by RESTAURANT or that the sales tax will be paid by RESTAURANT for its customers.⁷⁷ The President’s testimony was also clear that RESTAURANT prices are not “Tax-

⁷⁴ Division Brief at 5.

⁷⁵ *Id.*

⁷⁶ See Note 48, *supra*.

⁷⁷ See Notes 62-63, *supra*.

Included,”⁷⁸ which further illustrates why daily deposits alone are inadequate proof of daily gross sales.

As an example, the April 2010 Sales Tax Report as filed, is summarized, as follows to-wit:

| | |
|--------------------------------------|-----------------|
| Gross Sales | \$21,085.00 |
| Times Sales Tax Rate of 9.15% Equals | <u>1,929.28</u> |
| Total | \$23,014.28 |

If RESTAURANT monthly gross sales were \$21,085.00, the monthly deposit should have been \$23,014.28, not \$21,085.00. If RESTAURANT prices had been “Tax-Included,” the sales would have been backed out and the April 2010 Sales Tax Report would have reflected the following, to-wit:

| | |
|--------------------------------------|-----------------|
| Gross Sales | \$19,317.00 |
| Times Sales Tax Rate of 9.15% Equals | <u>1,768.00</u> |
| Total | \$21,085.00 |

During the hearing, the President voiced his concerns that the Division’s focus was solely on the fact that RESTAURANT did not have cash register tapes (Z-Tapes), despite having the bank statements and the General Ledger during the Audit Period. The President believed the daily record of deposits should be sufficient to prove RESTAURANT daily gross sales and the Division was not only questioning his integrity as a business owner, but as a law enforcement officer.⁷⁹

The Division is not questioning the President’s integrity; this is business, not personal. As President of the Corporation, RESTAURANT is statutorily mandated to keep and preserve suitable records of its daily gross 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.⁸⁰ RESTAURANT should have kept records and books of all sales and all purchases of tangible personal property,⁸¹ distinguishing taxable from nontaxable receipts.⁸²

⁷⁸ *Id.*

⁷⁹ *See* Note 9, *supra*.

⁸⁰ *See* Note 58, *supra*.

⁸¹ RESTAURANT General Ledger does appear to contain complete information on purchases made during the Audit Period, along with complete withholding records, but the General Ledger appears to be geared towards the preparation and filing of the Corporation’s Sub-S Federal Returns, which are deficient for income tax purposes just as they are for state sales tax purposes. There are no records to verify RESTAURANT gross sales figures.

⁸² *See* Note 58, *supra*.

At minimum, the President should have maintained a sales journal or log of daily sales in addition to cash register tapes and other data which would provide a daily record of the gross amount of sales.⁸³ Instead, the President chose to use a “muffin pan,” in place of a cash register, which would have accurately and efficiently provided the Division a record of RESTAURANT daily gross sales and confirmed whether sales tax was being charged and collected, along with any exempt sales and/or discounts. The President did provide copies of bank statements and the General Ledger for the Audit Period. The bank statements would have been useful to cross-check Z-Tapes or a daily sales log or journal, but standing alone the bank statements are insufficient for field audit purposes. The Field Auditor stated, “[President] has no inventory control system or cash control system. He does not use a cash register or numbered order tickets. The sales are strictly cash sales. Therefore, it is impossible to verify that all the cash was deposited. Due to this impossibility, the bank statements are unreliable,”⁸⁴ and for purposes of the field audit and the records which should have been maintained, the Field Auditor is correct.

The Corporation’s federal income tax returns⁸⁵ for the Audit Period reflect RESTAURANT COGS were as follows, to-wit:

| | |
|---------|---------------|
| 2007 | 41.77% |
| 2008 | 39.48% |
| 2009 | 45.10% |
| 2010 | <u>40.20%</u> |
| Average | 41.64% |

However, using the Protestants’ records, CPA’s corrected figures, and the Field Auditor’s calculations, the COGS for RESTAURANT during the Audit Period range from approximately twenty-five percent (25%) to twenty-seven percent (27%),⁸⁶ which is substantially less than the thirty-two percent (32%) utilized by the Division. The lower the COGS for RESTAURANT results in higher proposed sales tax assessments during the Audit Period.

The President acknowledged several times during the hearing ignorance of the law was no excuse. The President’s statement is correct. The rule, long-standing and well-known, “We know of no case where mere ignorance of the law, standing alone, constitutes any excuse or defense against its enforcement. It would be impossible to administer the law if ignorance of its provisions were a defense thereto.”⁸⁷

⁸³ See Notes 58-61, *supra*. It should be noted that the Oklahoma Sales Tax Code does not specifically state the Protestants must maintain a cash register, but the language of Tax Commission Rule 710:65-3-31 implies a cash register is required to provide a daily record of the gross amount of sales.

⁸⁴ See Status Report filed January 27, 2012.

⁸⁵ See Note 29, *supra*.

⁸⁶ See Notes 42-47, *supra*.

⁸⁷ *Campbell v. Newman*, 1915 OK 538, ¶3, 151 P. 602, 603, citing *Utermehle v. Norment*, 197 U.S. 40, 25 S.Ct. 291, 49 L.Ed. 655 (1905).

The Protestants have failed to meet their burden of proof, by preponderance of the evidence, that the Division's proposed sales tax assessments are incorrect and in what respect.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the protests should be denied.⁸⁸

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.”

⁸⁸ During the hearing, the President made a request for waiver of the penalty and interest, if the protests were denied. It was explained to the President the Office of Administrative Law Judges does not have the authority to waive penalty and interest, nor does it make a recommendation. The authority to waive penalty and interest rests exclusively with the Commissioners or their designee, pursuant to OKLA. STAT. ANN. tit. 68, § 220 (West Supp. 2012).