

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2013-08-20-06 / NON-PRECEDENTIAL
ID: P-11-558-K
DATE: AUGUST 20, 2013
DISPOSITION: DENIED
TAX TYPE: SALES
APPEAL: NO APPEAL TAKEN

ORDER

COMPANY (“Company”) and OFFICER (“Officer”), collectively referred to as Protestants, previously represented by CPA, CPA, FIRM, appear pro se. The Compliance Division of the Oklahoma Tax Commission (“Division”) is represented by OTC ATTORNEY 1, Assistant General Counsel, and OTC ATTORNEY 2, Deputy General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

Utilizing the Convenience Store Gross Sales Computation (“CSGS Computation”) developed by the Division and Protestants’ purchases of low-point beer as reported by the beer wholesalers, the Division estimated Protestants’ expected taxable sales for the period inclusive of the months of April, 2008 through January, 2011. It was determined by this methodology that Protestants had unreported taxable sales when compared to Protestants’ reported taxable sales. As a result, the Division by letters dated March 31, 2011 issued proposed sales tax assessments against Protestants. Protestants timely protested the proposed assessments by letter dated and marked received May 2, 2011.

On September 19, 2011, the Division referred the protest to the Office of the Administrative Law Judges for further proceedings consistent with the Uniform Tax Procedure Code¹ and the Rules of Practice and Procedure before the Office of Administrative Law Judges². The protest was docketed as Case No. P-11-558-K.³

A *Subpoena Duces Tecum* was issued to the Company on October 5, 2011, directing that the records set forth therein be delivered to the Division on or before November 1, 2011. The *Compliance Division’s Notice of Revision* (“Revision”) was filed July 12, 2012. The *Revision* used the Updated CSGS Computation to estimate Protestants’ expected taxable sales. Protestants were directed to file a response to the *Revision* on or before July 26, 2012, which deadline was extended to August 27, 2012.

¹ 68 O.S. 2011, § 201 et seq., as amended.

² Rules 710:1-5-20 through 710:1-5-47 of the *Oklahoma Administrative Code* (“OAC”).

³ OAC 710:1-5-22(b).

Protestants' response to the *Revision* was filed August 24, 2012. A pre-hearing conference was scheduled for September 6, 2012, by a *Prehearing Teleconference Notice* issued August 27, 2012. Pursuant to the conference, the parties were directed to file a joint motion for order to produce discovery. A *Joint Motion for Order to Produce Discovery* was filed September 7, 2012. On September 11, 2012, an *Order to Produce Discovery* was issued directing Protestants to produce the identified records for the Division's review on or before November 9, 2012, and the parties to file a status report on or before November 30, 2012.

On November 26, 2012, the *Compliance Division's Second Notice of Revision* ("Second Revision") and *Compliance Division's Status Report* were filed. Protestants were directed to respond to the *Second Revision* on or before January 2, 2013. Protestants did not file a response to the *Second Revision*. On January 9, 2013, the *Compliance Division's Motion to Set Date for Hearing* was filed.

On January 11, 2013, a *Scheduling Order and Notice of Hearing* was issued. The hearing was scheduled for June 18, 2013. The *Compliance Division's Motion to Amend Scheduling Order, Motion in Limine, and Brief in Support thereof* ("Motion") was filed January 15, 2013. By letter dated January 16, 2013, Protestants were directed to file a response to the *Motion* on or before January 31, 2013. Protestants did not file a response to the *Motion*. An *Order Granting Compliance Division's Motion to Amend Scheduling Order and Motion in Limine* was issued February 12, 2013, striking the previously issued scheduling order, the hearing scheduled for June 18, 2013, and limiting the evidence to be presented at trial to evidence relevant and material to the issues presented by the *Second Revision*. Further, a hearing was scheduled for March 26, 2013, by the *Notice of Hearing* issued February 12, 2013.

The *Compliance Division's Pre-hearing Brief* was filed March 19, 2013. By facsimile filed March 21, 2013, Protestants' representative withdrew as the representative of Protestants. Based on this filing, the hearing scheduled for March 26, 2013 was stricken and rescheduled for May 2, 2013, by *Notice of Hearing* issued March 26, 2013.

A closed hearing was held as rescheduled.⁴ Protestants did not appear at the hearing or respond to the notice. As a preliminary matter, Division's counsel announced the Division's concession of the fraud penalty assessed against Protestants. The Division called one witness: DIVISION WITNESS, CPA who testified in regard to the records reviewed, the conduct of the audit resulting in the *Second Revision* and the reasons for the proposed amount due. Exhibits A through D, F through K, M, and P through S were identified and admitted into evidence. Upon conclusion of the Division's presentation, the record was closed and the protest was submitted for decision.⁵

⁴ Confidentiality of the proceedings under 68 O.S. 2011, §205 was invoked by the Court.

⁵ OAC 710:1-5-39(a).

FINDINGS OF FACT

Upon review of the file and records, including the recording of the hearing, the Exhibits received into evidence and the Division's brief, the undersigned finds:

1. At all times relevant⁶, the Company owned and operated a convenience store located at BUSINESS ADDRESS in Oklahoma City. Exhibits A, C and K.
2. The Officer was the President of the Company during the audit period. See, *Taxpayer's List of Principal Officers, Partners or Members (LLC)*.⁷
3. "Vendor invoices were provided for beer purchases, tobacco, candy, energy drinks, soda, and hot food items * * * [b]eer purchase invoices appeared to be substantially complete, however no invoices were provided for groceries, bait and tackle, or other miscellaneous items." Exhibit H. The second *Addendum to Field Audit Write Up* ("*Second Addendum*") provides in part:
"[v]endor [i]nvoices were provided for motor fuel, beer, tobacco, gas, energy drinks, soda and candy, etc. * * * [t]he invoices were not complete and did not include wholesale purchases for groceries, medicine, toiletries, dairy products, and other goods sold by the store." Exhibit J.
4. An audit lead was written on the Company when "[i]t was discovered that the [Protestants'] purchases of 3.2 beer for 2008 exceeded * * * reported taxable sales." *Field Audit Write Up*, pp. 2.⁸ In addition, the *Field Audit Write Up* at pp. 3 provides: "[b]eer purchases per wholesaler information exceeded reported taxable sales for the audit period, and beer purchase amounts were supported by purchase amounts per [Protestants'] bank statements."
5. An audit notification letter was forwarded to the Company on December 20, 2010, together with a Records Request, a markup percentages methodology agreement and Statute of Limitations Waiver Agreement. Exhibit A.
6. The Records Request provides as follows:

⁶ The audit period includes the months of April, 2008 through January, 2011.

⁷ Included as part of the original audit file referred to this Office. The document was executed by the Officer on January 18, 2011. Evidence by official notice. OAC 710:1-5-36.

⁸ See, note 7.

Provide the following records and information for the periods of **January 1, 2008** through **December 31, 2010**. (Periods audited may be adjusted from dates listed, if needed, by the OTC)

1. **Complete the Retail Price/Product Cost Form and all other forms included, sign the forms, and return them with the documents requested.**
2. A list of **ALL** vendors and suppliers.
3. Copies of **ALL** purchases for 3 years for **ALL products**.
4. Daily sales sheets for 3 years.
5. **Daily cash register tapes for 3 years.**
6. Monthly P&L statements (profit/loss statements)
7. **Provide the Product Mix (p-mix) of items sold.**
8. Bank statements, deposits, and check stubs for all bank accounts.
9. Federal and State Income Tax Returns.
10. Payroll records, including daily/monthly payroll, 941's, OESC, OTC reports, W2's, W4's.
11. General Ledgers
12. Provide information on free or complimentary items given to customers.
13. Provide copies of OTC reports filed for this business.
14. Police reports or insurance claims filed during the period listed above.
15. PROVIDE COPIES OF ANY LETTER RULINGS, OPINIONS, OR ORDERS FROM THE OTC RECEIVED DURING THE AUDIT PERIOD.

Additional records may be requested as needed.

Exhibit A, (emphasis original).

7. The Statute of Limitation Waiver Agreement also listed the audit period as January 1, 2008 through December 31, 2010. Exhibit A.
8. In response to the records request, Protestants provided: (1) "Bank Statements for 2008, 2009, and January through November, 2010"; (2) "Profit/Loss statements and General Ledgers for January, February, and March, 2010"; (3) "Tax Returns (Form 1120S and 512S) for tax years 2008 and 2009"; and (4) "Miscellaneous cash register tapes ('Z tapes' for the audit period were no [sic] provided)". Exhibit J; *Field Audit Write Up*, pp. 2-3.
9. By letter dated January 19, 2011, Protestants were granted additional time to provide any remaining records. Exhibit B.
10. According to the *Field Audit Write Up*, the CSGS Computation was utilized to determine Protestants' sales because the records provided were "incomplete and problematic". The auditor noted in the *Write Up*:

Several problems were noted with the records. No records supporting daily sales were furnished. Deposits made were scheduled from [Protestants'] bank statements, but there was not enough detail to determine the taxability of the deposits. Examination of the profit/loss statements * * * showed that sales booked to the account Sales-Grocery were \$17,841.88 for January 2010 while taxable sales reported to the Commission for the same period were \$3,908. Sales-Grocery for the three months ended March 31, 2010 were \$57,686.93 while taxable sales reported to the Commission for the same three month period were \$12,793. This is one category of taxable sales and doesn't include Beer and Deli sales. * * * For 2008, total sales reported to the Tax Commission were \$1,607,921, while total sales per the tax return were \$2,367,038 and deposits to the bank account totaled \$1,729,602.⁹ For 2009, total sales reported to the Tax Commission were \$1,523,992, while total sales per the tax return were \$1,797,096 and deposits to the bank account totaled \$1,639,191. For 2010, total sales reported to the Tax Commission were \$1,722,630 while bank deposits were \$1,728,251 (2010 tax return not yet available).

11. The CSGS Computation calculates a convenience store's expected gross taxable sales in various categories based on the dollar amount of 3.2 beer purchases. In this case, the national average sales margins and product mixes from the National Association of Convenience Stores ("NACS") 2008 State of the Industry Report were utilized in the computation. *Field Audit Write Up*, pp. 3.
12. Protestants purchased 3.2 beer from WHOLESALER 1 and WHOLESALER 2 during the audit period. These wholesalers reported the dollar amount of their 3.2 beer sales to Protestants. *Field Audit Write Up*, pp. 3.
13. Utilizing this methodology, Protestants' unreported taxable sales for the audit period were calculated to be \$3,895,576.02. *Field Audit Write Up*, work papers.
14. As a result of the audit, the Division by letters dated March 31, 2011, proposed the assessment of additional sales tax, interest and penalties against Protestants as follows

⁹ In the response to the *Revision* filed August 24, 2012, it was noted: "the numbers being compared here are from different periods and reflect a distorted view of the 2008 information. The reported sales and deposits are correct but not for the year of 2008 but for the AUDIT period, which begins on April 1, 2008." (Emphasis original). Evidence by official notice. OAC 710:1-5-36.

Sales Tax:	\$ 326,254.48
Interest to 04/30/11:	58,345.23
Negligence Penalty @ 25%	<u>81,563.62</u>
Tax, Interest & Penalty due within 30 days:	\$ 466,163.33
Penalty:	<u>32,625.45</u>
Total:	\$ 498,788.78

Exhibits C and D.

15. Protestants timely protested the proposed assessment by facsimile dated and received May 2, 2011. Exhibit F.

16. On May 11, 2011, Protestants provided the following additional records to the Division:

- Cash register Z Tapes for 2008, 2009, and 2010
- General Ledgers for 2008, 2009, 2010
- Monthly P&L Statements for 2008, 2009, 2010
- 2010 Federal and State Income Tax Returns (Form 1120S and 512S)
- Vendor invoices for 2008, 2009, and 2010

Exhibits G and H. With respect to these records, the auditor noted:

The additional records were examined and the * * * Z Tapes and vendor invoices were scheduled. Several details were noted about the records. There is a discrepancy between amounts on the Z Tapes and the amounts reported to the Tax Commission, particularly between sales tax collected and sales tax remitted (see attached Statement 1¹⁰).

¹⁰ The following is a reproduction of Statement 1:

Okie Express Inc
dba Okie Express

OKLAHOMA TAX COMMISSION
Comparison of Taxpayer Z Tapes and Sales Tax Reports Filed
Audit Period: 04/01/2008 - 01/31/2011

FEI: 73-1280299
Permit: 040384

Statement 1

	Total Sales Per Z Tapes	Total Sales Per Sales Tax Reports	Diff
04/01/2008 - 12/31/2008	1,408,556.23	1,607,921.00	(199,364.77)
2009	1,455,257.59	1,523,992.00	(68,734.41)
2010	1,588,694.91	1,722,630.00	(133,935.09)
	4,452,508.74	4,854,543.00	(402,034.26)

	Total Taxable Sales Per Z Tapes	Total Taxable Sales Per Sales Tax Reports	Diff
04/01/2008 - 12/31/2008	300,242.86	100,366.00	199,876.86
2009	422,362.46	85,264.00	337,098.46
2010	401,407.02	96,363.00	305,044.02
	1,124,012.34	281,993.00	842,019.34

	Total Sales Tax Per Z Tapes	Total Sales Tax Per Sales Tax Reports	Diff
04/01/2008 - 12/31/2008	26,412.47	8,318.18	18,094.29
2009	35,391.85	7,066.56	28,325.29
2010	34,120.93	8,044.75	26,076.18
	95,925.25	23,429.49	72,495.76

The year-end profit and loss statements prepared by accountant match amounts reported on income tax returns and sales tax reports. However, beer purchases are much higher than amounts shown as beer sales and the statements show balances in the Cash Over/Under account in the amounts of \$272,552, \$266,018, and \$306,264 for 2008, 2009, and 2010 respectively.

Vendor invoices were provided for beer purchases, tobacco, candy, energy drinks, soda, and hot food items. Beer purchase invoices appeared to be substantially complete; however no invoices were provided for groceries, bait and tackle, or other miscellaneous items. Therefore, vendor invoices could not be used to calculate the [Protestants'] product mix. A comprehensive price list was not provided, so actual margins could not be confirmed.

Overall, the additional records provided * * * were found to be insufficient to warrant a change in the initial audit findings.*Id.*

17. The *Subpoena Duces Tecum* and *Order to Produce Discovery* listed the records to be produced for the audit period inclusive of records for the month of January, 2011. Evidence by Official Notice. OAC 710:1-5-36. No additional records were provided. DIVISION WITNESS' testimony.
18. The proposed assessments were revised by *Compliance Division's Notice of Revision ("First Revision")*¹¹ filed July 12, 2012. The *First Revision* utilizes the Updated CSGS Computation to estimate Protestants' expected taxable sales.¹² Based on this methodology, Protestants' total unreported taxable sales for the audit period were \$3,239,480.93 resulting in a proposed amount due as follows:

19.

Sales Tax:	\$ 271,306.53
Interest to 7/31/11:	99,530.41
Penalty:	27,130.65
Negligence Penalty:	<u>67,826.63</u>
Total:	\$ 465,794.22

¹¹ Evidence by official notice. OAC 710:1-5-36

¹² The Updated CSGS Computation accounts for stores in the 2008 NACS Annual Report that do not sell beer, adds 17 product categories, provides a further adjustment to the product mix if specific categories of items are not sold, and adds adjustments for non-taxable items and taxable phone cards.

20. In the first *Addendum to Field Audit Write Up* (“*First Addendum*”) attached to the *First Revision*, the auditor noted:

The [Protestant’s] records were examined and the following was noted:

2010

- Refunds per Z Tapes are \$161,218.42 or over 10% of total sales
- Sales tax collected per Z tapes was \$34,120.93 versus \$8,044.75 sales tax remitted to the Tax Commission
- Bank Deposits are \$1,728,250.64 vs total sales per Z Tapes of \$1,588,694.91
- Gross sales per 2010 1120S are \$2,089.348
- P&L * * * ties to 1120S and shows \$306,246.12 of Cash Over/Under
- Taxable sales reported to OTC are \$1,722,630
- Grocery purchases per invoices are \$79,331.99 vs grocery sales per Z Tapes of \$194,718.91
- Fuel purchases per invoices are \$1,169,075.68 vs fuel sales per Z Tapes of \$954,132.83
- Tobacco purchases per invoices are \$99,162.07 vs tobacco sales per Z Tapes of \$254,319.07
- Beer purchases per wholesalers are \$186,867.42 vs beer sales per Z Tapes of \$144,317.61

2009

- Refunds per Z Tapes are \$32,667.11 or over 2% of total sales
- Sales tax collected per Z tapes was \$35,391.85 versus \$7,066.56 sales tax remitted to the Tax Commission
- Bank Deposits are \$1,639,191.02 vs total sales per Z Tapes of \$1,455,257.59
- Gross sales per 2009 1120S are \$1,797,096
- P&L * * * ties to 1120S and shows \$266,017.96 of Cash Over/Under
- Taxable sales reported to OTC are \$1,523,992
- Grocery purchases per invoices are \$62,173.42 vs grocery sales per Z Tapes of \$211,998.16
- Fuel purchases per invoices are \$924,620.06 vs fuel sales per Z Tapes of \$835,714.61
- Tobacco purchases per invoices are \$88,345.72 vs tobacco sales per Z Tapes of \$194,588.19
- Beer purchases per wholesalers are \$192,589 vs beer sales per Z Tapes of \$167,512

4/1/2008-12/31/2008

- Refunds per Z Tapes are \$150,438.31 or over 10% of total sales
- Sales tax collected per Z tapes was \$26,412.47 versus \$8,318.18 sales tax remitted to the Tax Commission
- Bank Deposits are \$1,729,602.78 vs total sales per Z Tapes of \$1,408,556.23
- Gross sales per 2008 1120S are \$2,367,038
- P&L * * * shows \$272,551.32 of Cash Over/Under
- Taxable sales reported to OTC are \$1,607,921
- Grocery purchases per invoices are \$54,910.12 vs grocery sales per Z Tapes of \$136,348.02
- Fuel purchases per invoices are \$974,319.53 vs fuel sales per Z Tapes of \$1,002,040.63
- Tobacco purchases per invoices are \$54,906.42 vs tobacco sales per Z Tapes of \$110,580.57
- Beer purchases per wholesalers are \$147,222.73 vs beer sales per Z Tapes of \$124,782.40

Jan-11

In January 2011, after receiving notification of the audit, [Protestants] reported \$42,429 of taxable sales to the Tax Commission. This compares to \$3,908 of taxable sales reported for January 2010. When compared to taxable sales calculated by NACS worksheet, [Protestants] reported \$6,913.66 more taxable sales than calculated by NACS worksheet.

For the reasons listed above, the [Protestants'] records were not used in the audit. The audit was revised and assessed using the updated NACS calculation worksheets. The NACS calculation worksheets have been revised to use the 2008 NACS Annual Report and to adjust total store product mix to reflect only 74.79% of member stores selling beer.

21. In response to the *First Revision*, Protestants' representative besides noting that a comparison of reported sales and deposits for 2008 to sales reported on the 2008 1120S distorts the facts¹³, writes that "the NACS product mix * * * is not applicable to [Protestants]". In support of this statement, the representative cited the store's and property's lack of aesthetic appeal, the store's location and the store's proximity to the better equipped and more appealing competition. The representative admits that

¹³ Note 9.

Protestants do “not keep the best set of books and records”, blaming the same on the time demands in managing the store. The representative suggests that Protestants’ unreported taxable sales for the audit period should only include the amounts recorded in the entry “cash over/under” since the origin of these deposits cannot be adequately determined. The sales tax owed on these deposits was calculated as \$65,466.78.

22. The *Compliance Division’s Second Notice of Revision* (“*Second Revision*”)¹⁴ was filed on November 26, 2012, inclusive of the *Second Addendum*, schedules prepared by the auditor and summary reports. Exhibit J. The *Second Revision* is based on the records previously obtained from Protestants and were used to revise the assessment, “to the extent possible[.]” Based on this methodology, Protestants’ total unreported taxable sales for the audit period were \$1,947,944.00 resulting in a proposed amount due as follows:

Sales Tax:	\$ 163,140.31
Interest to 12/31/12:	69,942.90
Penalty:	16,314.05
Negligence Penalty:	<u>40,785.07</u>
Total:	\$ 290,182.33

Exhibit J.

23. The methodology used to calculate the *Second Revision* is described as follows:

Our revised assessment starts with the amount of the entities gross revenue. The gross revenue that was used was sourced from various documents filed by, or were provided by, the [Protestants]. The assessment then allowed all exemptions from sales tax that were substantiated * * * through wholesale invoices for motor fuel, news media and tobacco products. These invoices * * * were calculated and subtracted from gross income. A markup of 18.1% was applied to the cigarette/tobacco purchases provided by the [Protestants]. This markup was determined by using NACS average margins. The minimum markup (Unfair Trade Act) of 6% was applied to the motor fuel purchases provided by the [Protestants]. [Protestants] w[ere] also given credit for the reported taxable sales. The residual amount was estimated to be the underreported taxable sales that were utilized in determining the assessment. An additional 25% penalty was added to the assessment due to the [Protestants] not providing adequate records.

¹⁴ Evidence by official notice. OAC 710:1-5-36.

Exhibit J, pp. 3.

24. Protestants' gross receipts for the audit period were determined as follows:
- April, 2008 through December, 2008 – Gross income as reported on the 2008 Federal and Oklahoma Income Tax Returns (\$2,367,038) and 2008 P&L Statements (\$2,345,462) were factored at 75% to estimate gross receipts for the nine month period. Exhibits M and Q.
 - 2009 – P&L Statements (\$1,797,256) which according to the Write Up matched the Federal and Oklahoma Income Tax Returns. Exhibit Q.
 - 2010 – P&L Statements (\$2,089,453). Exhibit Q.
 - January, 2011 – Sales Tax Report, Line 1 (\$148,766). Exhibit P.
25. Protestants' estimated gross receipts from sales of motor fuel for the audit period were \$3,252,096.00 based on documented purchases multiplied by a mark-up of six percent (6%). Exhibits J and R.
26. Protestants' estimated gross receipts from sales of tobacco products for the audit period were \$286,291.00 based on documented purchases multiplied by a mark-up of 18.1%¹⁵. Exhibits J and R.
27. Protestants did not provide any news/media purchase invoices. Exhibits J and S.
28. Protestants' reported taxable sales for the audit period were \$324,422.00. Exhibits J and R.
29. The Division has abandoned the assessment of the 25% negligence penalty. Hearing announcement by Division's Counsel.
30. The amount in controversy is \$249,397.26, exclusive of interest and accrued from December 31, 2012. Exhibit J.

¹⁵ 2008 NACS Annual Report of average margins from sales of tobacco products.

ISSUE AND CONTENTIONS

The issue presented for decision is whether Protestants sustained their burden of proving that the audit resulting in the *Second Revision* is incorrect, and in what respect.

Protestants have not offered any factual or legal challenges to the *Second Revision*. Protestants were granted the opportunity to present arguments in the form of a response and additional records, but have not.

The Division contends that the protest should be denied because Protestants have failed to show by a preponderance of the evidence that proposed amount due is erroneous. In support of this contention, the Division argues that the audit is supported by substantial evidence because it is based on the records provided by Protestants. The Division further argues that Protestants were given ample opportunity to produce additional records or documents, but failed to do so.

CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter of law that:

1. Jurisdiction of the parties and the subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S. 2011, § 221(D).
2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code (“Code”).¹⁶ An excise tax is levied upon the gross receipts or gross proceeds of all sales, not otherwise exempted by the Code. 68 O.S. 2011, § 1354(A). Incorporated cities, towns, and counties are authorized to levy taxes as the Legislature may levy for purposes of state government, including a consumer sales tax. 68 O.S. 2011, §§ 2701 et seq. and 1370 et seq., as amended.
3. The sale of “tangible personal property”¹⁷ is expressly made subject to sales tax. 68 O.S. 2011, § 1354(A)(1). “Sale” is defined to mean “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 * * *”. 68 O.S. 2011, § 1352(22); *OAC* 710:65-1-2. It is presumed for purposes of the proper administration of the provisions of the Code that “all gross receipts are subject to tax until they are shown to be tax exempt”, *OAC* 710:65-1-4(A); and all sales of tangible personal property are

¹⁶ 68 O.S. 2011, § 1350 et seq., as amended.

¹⁷ Defined by the Code to mean “personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses” and “includes electricity, water, gas, steam and prewritten computer software.” 68 O.S. 2011, § 1352(24).

subject to tax until the contrary is established, *OAC 710:65-3-30(b)*. The burden of proving that a sale is not a taxable sale is on the person who made the sale. 68 O.S. 2011, § 1365(F).

4. Every tax remitter¹⁸ required to make a sales tax report and pay any tax under the Code has the duty to keep and preserve for a period of three (3) years 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 and such other records of goods, wares and merchandise, and other subjects of taxation under the Code as will substantiate and prove the accuracy of such returns. 68 O.S. 2011, § 1365(F). See, *OAC 710:65-3-31(a)*¹⁹. The records and books shall cover receipts from all sales and distinguish taxable from nontaxable receipts, and must clearly document all the information (deductions as well as gross receipts) required for the sales tax report. *OAC 710:65-3-30(a)(1)*. See, *OAC 710:65-3-4(a)(1)* and (3).²⁰
5. Every person required to collect any tax imposed by the Code is personally liable for the tax. 68 O.S. 2011, § 1361(A)(1). “[I]n the case of a corporation, each principal officer²¹ thereof, shall be personally liable for the tax.” *Id.* See, 68 O.S. 2011, § 253.²²

¹⁸ Defined to mean “any person required to collect, report or remit the tax imposed by the [Code]. A tax remitter who fails, for any reason, to collect, report, or remit the tax shall be considered a taxpayer for purposes of assessment, collection, and enforcement of the tax imposed by the [Code]”. 68 O.S. 2011, § 1352(27)

¹⁹ This rule provides:

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.
- (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.

²⁰ This rule in general provides that every vendor shall file a monthly report for sales made the preceding month disclosing among other things: (1) total gross receipts for the preceding month from sales, both taxable and non-taxable, and (2) deductions allow by law. Deductions not specifically delineated on the face of the report must be fully explained in the space provided.

²¹ The “principal officers” of a corporation are identified by the Commission as the (1) President, (2) Vice President, (3) Secretary, (4) Treasurer, or (5) Secretary/Treasurer. *OAC 710:65-7-3(1)*.

²² This provision generally provides that the Tax Commission is under a duty to assess the principal officers of the corporation for unpaid sales taxes when the Tax Commission files

6. In administrative proceedings, the burden of proof is on the taxpayer to show in what respect the action or proposed action of the Tax Commission is incorrect. *OAC 710:1-5-47. In re Adway Properties, Inc.*, 2006 OK CIV APP 14, 130 P.3d 302; *Geoffrey, Inc. v. Oklahoma Tax Commission*, 2006 OK CIV APP 27, 132 P.3d 632. The burden of proof standard is “preponderance of evidence.” 2 Am.Jur.2d *Administrative Law* § 357. “Preponderance of evidence” means “[e]vidence which is of greater weight or more convincing than the evidence offered in opposition to it; that is, evidence which as a whole shows the fact sought to be proved is more probable than not * * * evidence which is more credible and convincing to the mind * * * that which best accords with reason and probability.” BLACK’S LAW DICTIONARY 1064 (5th ed. 1979). Each element of the claim must be supported by reliable, probative, and substantial evidence of sufficient quality and quantity as to show the existence of the facts supporting the claim are more probable than their nonexistence. 2 Am.Jur.2d *Administrative Law* § 357. If the taxpayer fails to prove a prima facie case, the protest may be denied solely on the grounds of failure to prove sufficient facts which would entitle the taxpayer to the requested relief. *OAC, 710:1-5-47; Continental Oil Company v. Oklahoma Tax Commission*, 1976 OK 23, 570 P.2d 315.
7. An order of the Tax Commission must be supported by substantial evidence. *Dugger v. State ex rel. Oklahoma Tax Commission*, 1992 OK 105, 834 P.2d 964. Likewise, the audit upon which a portion of the record is formed and order issued, must be supported by substantial evidence. Oklahoma Tax Commission Order No. 2003-07-22-09, 2003 WL 2347117.

An audit is supported by substantial evidence when an evidentiary foundation for the audit has been established. In a majority of cases, the evidentiary foundation will be established by the records reviewed by the auditor. In those cases where an evidentiary foundation has been established, the taxpayer has the burden of proving in what respect the action of the Tax Commission in assessing the tax is incorrect. *OAC 710:1-5-47; Enterprise Management Consultants, Inc.*, supra. However, where an evidentiary foundation has not been laid or the records upon which the audit is based do not establish a basis for assessing a tax, the audit and assessment in the initial instance cannot be sustained as being supported by substantial evidence. *Dugger*, supra.

ANALYSIS

The audit resulting in the *Second Revision* clearly and unmistakably shows Protestants understated their taxable receipts for sales tax purposes. Did Protestants understate those receipts by the amount of \$1,947,944.00 for the audit period? The presumption is “all gross

a proposed assessment against the corporation for said taxes. The principal officers are liable for the tax if they were officers of the corporation during the period for which the assessment was made.

receipts are subject to tax until they are shown to be tax exempt”. *OAC 710:65-1-4(A)*. Protestants failed to come forward with any evidence to show the audited unreported receipts are not taxable receipts.

Further, the proposed amount due as reflected by the *Second Revision* is the result of a typical audit. Protestants’ records show that the audited unreported receipts were generated from the operation of a convenience store. What the records do not show is the receipts are from sales of items not subject to sales tax.

The Officer of the Company has not alleged in any previously filed pleadings that he was not a principal officer of the Company during the period of the assessment.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestants, COMPANY and OFFICER, be denied. It is further ORDERED that the amount in controversy, inclusive of any additional accrued and accruing interest, be fixed as the deficiency due and owing by Protestants, respectively.

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.”