

**JURISDICTION:** OKLAHOMA TAX COMMISSION  
**CITE:** 2020-04-28-04 / NON-PRECEDENTIAL  
**ID:** P-16-093-K  
**DATE:** APRIL 24, 2020  
**DISPOSITION:** DENIED  
**TAX TYPE:** SALES / USE  
**APPEAL:** NONE TAKEN

### **ORDER**

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, the Commission hereby adopts the Findings of Fact, Conclusions of Law and Recommendation made and entered by the Administrative Law Judge on the 27<sup>th</sup> day of February, 2019, appended hereto, together herewith shall constitute the Order of the Commission.

### **SO ORDERED**

### **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION**

NOW on this 27<sup>th</sup> day of February, 2020, the above styled and numbered cause comes on for decision under assignment regularly made by the Oklahoma Tax Commission to ALJ, Administrative Law Judge. Protestant, LLC is represented by ATTORNEY 1 and ATTORNEY 2, Attorneys at Law, FIRM. The Compliance Division (“Division”), Oklahoma Tax Commission is represented by AGC, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

### **STATEMENT OF THE CASE**

An audit of the records provided by Protestant; namely, federal income tax returns and bank statements resulted in the proposed assessments of sales and use taxes, interest and penalties against Protestant for the periods of December, 2012 through June, 2015, and July, 2012 through June, 2015, respectively. Protestant timely protested the proposed assessments.

On June 15, 2016, the sales and use tax protest letters were referred by the Tulsa Office of General Counsel to the Office of Administrative Law Judges to initiate proceedings under the

Uniform Tax Procedure Code<sup>1</sup> and the Rules of Practice and Procedure before the Office of Administrative Law Judges (“ALJ’s Office”)<sup>2</sup>. On June 24, 2016, the Division’s audit records were forwarded to the ALJ’s Office. The protest was docketed as Case No. P-16-093-K and assigned to undersigned.

A pre-hearing teleconference was scheduled for August 18, 2016. A *Status Report in Lieu of Prehearing Conference* filed August 17, 2016, wherein the parties advised they were in communication and Protestant had submitted additional information for the Division’s review.

Joint status reports were filed from September 16, 2016 to July 30, 2018, indicating the exchange of information, the gathering and submission of supporting documentation and the need for review. A *Notice of Sales and Use Tax Revision (“1<sup>st</sup> Revision”)* filed September 12, 2018, inclusive of addendums to field audit write ups, audit summary sheets and audit work papers. Protestant’s *Response and Partial Objection to the Notice of Sales and Use Tax Revision (“Response”)* filed October 12, 2018, inclusive of Exhibits 1 through 7.

Pursuant to the *Response*, a hearing was scheduled for December 18, 2018. An *Unopposed Motion to Strike Hearing* filed December 11, 2018, indicating a revision of the revised assessments was imminent based on information provided by Protestant. The motion was granted by order issued December 12, 2018, and the parties were instructed to file a status report.

A *Joint Status Report* was filed as directed. On January 28, 2019, a *Second Notice of Sales and Use Tax Revision (“2<sup>nd</sup> Revision”)* filed inclusive of addendums to field audit write ups, audit summary sheets and audit work papers. An *Amended Second Notice of Sales and Use Tax Revision (“Amended 2<sup>nd</sup> Revision”)* filed February 6, 2019, indicating the interest calculations in the *2<sup>nd</sup> Revision* did not take into account payments made with the protests. On February 27, 2019, Protestant’s *Response and Partial Objection to the Amended Second Notice of Sales and Use Tax Revision* filed.

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<sup>1</sup> 68 O.S.2011, § 201 et seq., as amended.

<sup>2</sup> Rules 710:1-5-20 through 710:1-5-49 of the *Oklahoma Administrative Code (“OAC”)*.

A hearing was scheduled for April 25, 2019, by *Notice of Hearing* issued February 28, 2019. A closed hearing was held as scheduled.<sup>3</sup> As a preliminary matter, the Division conceded the penalties included on the *Amended 2<sup>nd</sup> Revision* are not due and owing under the authority of 68 O.S.Supp.2016, § 217(C) and agreed to remove the same from the revised assessments. DIRECTOR, Protestant's Clinical Director testified regarding the audit's opening conference, Protestant's books and records and supplying the requested documentation to Protestant's counsel. AUDITOR, Field Auditor testified regarding the conduct of the audit, the records reviewed, and the reasons for the assessments and revisions to the assessments. Division's Exhibit A and Protestant's Exhibit A were identified and admitted into evidence without objection. Following closing statements, the record closed and the protest submitted for decision.

#### FINDINGS OF FACT

Upon review of the file and records, including the digital recording of the hearing, the exhibits and the pleadings, the undersigned finds:

A. General Information:

1. Protestant was formed in 2010 as a single member LLC. Sales Tax Field Audit Write Up ("STS Write Up").<sup>4</sup>
2. Protestant sells and leases to pediatric patients: home ventilators, oxygen therapy, CPAP and BIPAP equipment, nebulizers, suction equipment, feeding and aspiration tubes, pulse oximeters, apnea monitoring and tracheostomy supplies. *Id.*
3. All items sold or leased by Protestant require a prescription. *Id.*
4. Protestant leases office space, a workshop and warehouse in an industrial park in Tulsa, Oklahoma. *Id.*
5. Protestant files sales tax reports under its sales tax permit number with an effective date of May 26, 2011, on a semi-annual basis. *Id.*

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<sup>3</sup> Confidentiality was invoked. 68 O.S.2011, § 205.

<sup>4</sup> Evidence by official notice. *OAC* 710:1-5-36(a).

6. An audit notification letter, records request, power of attorney form, officer's list, statute of limitation waiver agreement, authorization to use E-mail and pre-audit questionnaire were sent to Protestant on October 9, 2015. Division's Exhibit A.

7. The records request was for the period of July 1, 2012 through June 30, 2015 ("Audit Period") and required a response by October 26, 2015. *Id.*

8. On January 27, 2016, an opening conference at Protestant's business location. Testimony of Auditor.

9. Prior to the opening conference, the Division had received executed copies of the power of attorney, statute of limitation waiver agreement and authorization to use E-mail. *Id.*

10. Copies of Protestant's bank statements for the audit period were provided at the opening conference. *Id.*

11. Subsequent to the conference, the Division received copies of the single member's federal income tax returns and summary financial statements. Payment/adjustment reports by patient and patient list detailing primary and secondary insurance for the period of July, 2014 through June, 2015, was also received. Testimony of Auditor; STS Write Up.

12. Payment/adjustment reports and patient list detailing insurance information could only be provided for the July, 2014 through June, 2015 period due to a crash of Protestant's old accounts receivable system server which could not be repaired and the data was lost. *Id.*

13. The Division never received all of the documents initially requested prior to the issuance of the proposed assessments. Testimony of Auditor.

14. Before the issuance of the proposed assessments Protestant only provide summary reports, not detailed records for the audit after repeated requests and did not respond to repeated e-mails requesting clarification or information regarding the documentation provided. STS Write Up.

15. Protestant provided the information requested to their counsel, but does not know when their counsel turned the documentation over to the Division. Testimony of DIRECTOR.

B. Sales Tax Assessment:

16. Total sales reported on the sales tax reports were compared with total sales reported on the general ledger and the income tax returns for 2013 and 2014 without differences. STS Write Up.

17. Only summary general ledger reports, not detailed reports were provided for the initial audit and assessment. Testimony of Auditor; STS Write Up.

18. A comparison of total sales reported on the sales tax reports to the total bank deposits for the audit period found \$316,386.44 in bank deposits were not reported on the sales tax reports. *Id.*

19. Detailed patient payment records from the new account receivable system were compared to the sales tax reports with the sales tax reports being understated by \$46,364.99 for the July, 2014 to December, 2014 period and overstated by \$69,548.90 for the January, 2015 to June, 2015 period. STS Write Up.

20. The sales tax assessment was based on the bank statements because the only records Protestant provided to support their sales did not reconcile to the amounts reported on their sales tax reports. Testimony of Auditor; STS Write Up.

21. Upon review of the bank statements, payments received from Medicaid were identified. *Id.*

22. The Medicaid deposits were exempted despite detailed reconcilable records of the payments. Sales tax was assessed on the remaining deposits. *Id.*

23. Total deposits for the audit period were \$3,007,656.40, less Medicaid deposits of \$2,128,044.28, leaving audited taxable sales of \$879,612.12. STS Write Up.

24. By letter dated March 24, 2016, the Division proposed the assessment of sales tax, interest and penalty against Protestant in the aggregate amount of \$104,142.90, inclusive of state, municipal and county tax of \$74,916.59, interest of \$21,734.62 and penalty of \$7,491.69. Sales Tax Letter of Assessment.<sup>5</sup>

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<sup>5</sup> See, note 4.

25. Protestant provided patient payment reports and an alphabetical listing of patients detailing the patient's primary and secondary insurance for the period of July, 2014 through June, 2015. STS Write Up.

26. From the patient payment reports, the Auditor determined that Medicaid paid as secondary insurance on five patient accounts and noted that taxable sales would be reduced by \$30,857.97 if those patients were exempt. STS Write Up.

27. From the alphabetical listing of patients, the Auditor determined that 23 patients had Medicaid as secondary insurance, but primary insurance paid 100% of the bill and noted that taxable sales would be reduced by \$153,253.13 if these patient were exempt. *Id.*

28. Protestant timely protested the sales tax assessment by letter dated May 23, 2016, and included an estimated payment of \$15,342.87. Sales Tax Letter of Protest.<sup>6</sup>

29. On September 12, 2018, the Division filed the *1<sup>st</sup> Revision*. *1<sup>st</sup> Revision*.<sup>7</sup> Regarding the sales tax assessment, three issues were identified: (1) Additional Taxable Sales; (2) Fixed Asset Purchases; and (3) Off the Record Deposits. *Id.* Under Additional Taxable Sales, the Auditor writes: “[d]uring the protest period the Taxpayer performed a detailed review of the regular deposits to determine the amounts which were taxable and \$127,463.13 will be assessed as Sales Tax Issue 1.” *Id.* Under Fixed Asset Purchases, the Auditor noted that Taxpayer provided documentation to support many of the fixed assets assessed in the Use Tax Assessment, but did not include invoices showing sales tax was paid on a purchase of office chairs at a cost of \$1,518.79. *Id.* Under Off the Record Deposits, the Auditor noted that during the protest period Taxpayer provided detailed analysis of deposits to the bank statements and a schedule of cash withdrawals from sales that were never deposited in the amount of \$105,129.70. *Id.*

30. Additional taxable sales under the *1<sup>st</sup> Revision* were reported as \$234,111.62. *Id.* The aggregate amount of sales tax, interest and penalty due under the *1<sup>st</sup> Revision* was reported as

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

\$34,130.51, inclusive of state, municipal and county taxes of \$19,939.32, interest accrued through September 30, 2018 of \$12,197.23 and penalty of \$1,993.96. *Id.*

31. Protestant filed a *Response* to the *1<sup>st</sup> Revision* on October 12, 2018. *Response*.<sup>8</sup> In the *Response*, Protestant conceded Issue 1, and took exception with Issues 2 and 3, stating a copy of the invoice showing tax was paid on the purchase was included as an exhibit with the protest of the use tax assessment, and there were no Off the Record Deposits, rather all receipts were deposited and fully recorded by the bank before the withdrawal of any funds being recorded. *Id.*

32. On January 28, 2019, the *2<sup>nd</sup> Revision* was filed. *2<sup>nd</sup> Revision*.<sup>9</sup> The *2<sup>nd</sup> Revision* resulted in the removal of Issues 2 and 3 from the assessment, stating sufficient documentary evidence was submitted as Exhibit 1 to the *Response* and documentary evidence was sufficient to determine that the amounts listed as withdrawals from deposits were counter checks written and not amounts withheld from the deposits. *Id.*

33. Additional taxable sales under the *2<sup>nd</sup> Revision* were reported as \$127,463.13. *Id.* The aggregate amount of sales tax, interest and penalty due was reported as \$18,944.07, inclusive of state, municipal and county taxes of \$10,856.05, interest accrued through February 28, 2019 of \$7,002.42 and penalty of \$1,085.60. *Id.*

34. The *Amended 2<sup>nd</sup> Revision* filed February 6, 2019, reflects the interest calculation in the *2<sup>nd</sup> Revision* did not take into account the estimated payments made with the protests. *Amended 2<sup>nd</sup> Revision*.<sup>10</sup> Interest was reduced to \$2,503.55 and the aggregate amount due was reduced to \$14,445.19. *Id.*

35. Protestant filed a *Response* to *Amended 2<sup>nd</sup> Revision*. *Response*.<sup>11</sup> Protestant conceded the amount of sales tax and interest due, but objected to the assessment of penalty since the tax and interest was paid within sixty (60) days of the assessment and requested that interest

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

be paid on the overpayment of the tax and interest. *Id.* Protestant also requested costs and attorney fees because the assessment was without a reasonable basis or frivolous. *Id.*

36. Additional records of Medicaid and primary insurance information would have affected the initial assessment. Testimony of Auditor.

C. Use Tax Assessment:

37. On February 5, 2016, the Auditor obtained copies of the Federal income tax returns and summary financial statement for the audit period. Use Tax Field Audit Write Up (“SCU Write Up”).<sup>12</sup>

38. From the bank statements, the Auditor determined there were over \$450,000.00 and \$4,000.00 credit card and debit card purchases, respectively during the audit period. Testimony of Auditor.

39. The Auditor requested, but did not receive all of Protestant’s purchase invoices for the audit period. Testimony of Auditor; SCU Write Up.

40. The use tax audit was based on certain line item expenses reported on Schedule C to the income tax returns and certain fixed asset purchases reported on Schedule C-1 to the income tax returns. *Id.*

41. The line items from Schedule C included: advertising expenses; rent or lease expenses – vehicles, machinery, and equipment and other business property; repairs and maintenance; supplies; and other expenses. SCU Write Up.

42. The Auditor admitted that use tax was assessed on amortization and other non-taxable expenses included in the line item “other expenses”. She stated that once she had documentation to determine use tax was assessed on non-taxable expenses, the expenses were removed from the use tax audit.

43. Use tax was assessed on a total of \$548,735.00 in purchases made during the audit period. SCU Write Up.

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<sup>12</sup> *Id.*

44. By letter dated April 12, 2016, the Division proposed the assessment of use tax, interest and penalty against Protestant in the aggregate amount of \$67,025.37, inclusive of state, municipal and county taxes of \$46,735.77, interest accrued through April 30, 2016 of \$15,616.03 and penalty of \$4,673.57. Use Tax Assessment Letter.<sup>13</sup>

45. Protestant timely protested the use tax assessment by letter dated June 13, 2016, and included an estimated payment of \$512.00. Use Tax Letter of Protest.<sup>14</sup>

46. In the *1<sup>st</sup> Revision* filed September 12, 2018, two issues regarding the use tax audit were identified: Purchases from Out of State and Fixed Asset Purchases. Under Purchases from Out of State, the Auditor noted that the detailed general ledger requested in the audit notification letter of October 9, 2015 was not received until December 19, 2016, and that the additional information including invoice copies of the transactions requested thereafter were not completely received until January 26, 2018. *Id.* Upon review of the complete documentation, the Auditor found Protestant had recorded purchases of \$32,898.41 for which sufficient documentation to support that sales/or use tax was paid could not be determined or the documentation revealed that sales/or use tax was not paid on the taxable transaction. *Id.* The Auditor further found that Protestant had submitted receipts totaling \$2,117.51 in which sales tax was paid on items purchased for resale and netted those receipts against the taxable transactions for an audited amount of \$30,780.90. *Id.* Under the Fixed Asset Purchases, the Auditor noted that Protestant had sufficiently documented all but one purchase recorded on its books on June 30, 2013, in the amount of \$1,796.00. *Id.*

47. The aggregate amount of use tax, interest and penalty due under the *1<sup>st</sup> Revision* was reported as \$4,948.33, inclusive of state, municipal and county taxes of \$2,774.57, interest accrued through September 30, 2018 of \$1,896.30 and penalty of \$277.46. *Id.*

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

48. In the *Response* filed October 12, 2018, Protestant conceded that it lacked sufficient information to prove use tax was not due on \$14,588.84 in purchases during the audit period, but presented a receipt for the fixed asset purchase showing sales tax was paid on the purchase.

49. In the *2<sup>nd</sup> Revision* filed January 28, 2019, the Auditor noted that a mistake was made by including the fixed asset purchases in both the sales and use tax audits, that \$6,990.57 in purchases were likely Oklahoma transactions and not subject to use tax, that Protestant's schedule to the *Response* showed certain purchases were services or consumed out of state and that documentation was provided to remove the fixed asset purchase.

50. The aggregate amount of use tax, interest and penalty due under the *2<sup>nd</sup> Revision* was reported as \$2,325.08, inclusive of state, municipal and county taxes of \$1,242.51, interest accrued through February 28, 2019 of \$958.32 and penalty of \$124.25.

51. The *Amended 2<sup>nd</sup> Revision* filed February 6, 2019, reflects the interest calculation in the *2<sup>nd</sup> Revision* did not take into account the estimated payments made with the protest. Interest was reduced to \$446.70 and the aggregate amount due was reduced to \$1,813.46. *Id.*

52. In the *Response to Amended 2<sup>nd</sup> Revision*, Protestant conceded the amount of use tax and interest due, but objected to the assessment of penalty since the tax and interest was paid within sixty (60) days of the assessment. Protestant also requested that interest be paid on the overpayment of tax and interest. *Id.* Protestant further requested costs and attorney fees because the assessment was without a reasonable basis or frivolous. *Id.*

### CONCLUSIONS OF LAW

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

#### I. JURISDICTION AND BURDEN OF PROOF

1. Jurisdiction of the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S.2011, § 221.

2. The taxpayer has the burden of proof to show the action or proposed action of the Oklahoma Tax Commission is incorrect, and in what respect. *OAC 710:1-5-47. In re Adway*

*Properties, Inc.*, 2006 OK CIV APP 14, ¶ 9, 130 P.3d 302, 304; *Geoffrey, Inc. v. Oklahoma Tax Commission*, 2006 OK CIV APP 27, ¶ 2, 132 P.3d 632, 634. 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 relief requested. *OAC 710:1-5-47*; *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission*, 1988 OK 91, 768 P.2d 359, 362, (citing *Continental Oil Co. v. Oklahoma State Bd. of Equalization*, 1976 OK 23, 570 P.2d 315, 317).

3. 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 (5<sup>th</sup> 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.

4. 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, 968. 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.

5. An audit is supported by substantial evidence when an evidentiary foundation for the audit has been established. Usually the evidentiary foundation will be established by the records reviewed by the auditor. Where an evidentiary foundation has been established, the taxpayer must prove the action of the Tax Commission in assessing the tax is incorrect, and in what respect. *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

establish no basis for assessing a tax, the audit and assessment in the initial instance cannot be sustained as supported by substantial evidence. *Dugger, supra*.

## II. VENDOR RESPONSIBILITY

1. It is presumed for purposes of the proper administration of the Code that “all gross receipts<sup>15</sup> 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 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).

2. The holder of a license or permit issued by the Commission must comply with the tax laws applicable to the permit or license, 68 O.S.2011, §§ 212(A)(2) and (4), and 1364(J); and the provisions of the Uniform Tax Procedure Code, 68 O.S.2011, § 212(A)(1).

3. In lieu of monthly reports, tax remitters<sup>16</sup> or taxpayers classified as Group Three Vendors or tax remitters or taxpayers whose total tax liability for any one month does not exceed Fifty Dollars (\$50.00) may file semiannual reports and remit taxes due by the twentieth day of January and July of each year for the preceding six-month period. 68 O.S.2011, § 1365(E). “Such reports shall show such further information as the Tax Commission may require to enable it to compute correctly and collect the tax levied” and the Commission, in addition to the information required on reports, may request and the taxpayer must furnish any information deemed necessary for a correct computation of the tax. 68 O.S.2011, § 1365(A).

4. Every tax remitter required to make a sales tax report and pay any tax under the Code must keep and preserve for three (3) years suitable records of the gross daily sales 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 tax due and such other records of goods,

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<sup>15</sup> “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”. 68 O.S.2011, § 1352(12)(a).

<sup>16</sup> Defined to mean “any person required to collect, report or remit the tax imposed by the Oklahoma Sales Tax Code.” 68 O.S.2011, § 1352(27).

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)*<sup>17</sup>. 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)*.<sup>18</sup>

5. Documentation must support all deductions from gross receipts, to-wit:

Where the nature of a business is such that charge and time sales are made, or where the nature of the business is such that a portion of its sales are for resale, or are within the protection of the Commerce Clause of the Constitution of the United States, or consist of nontaxable services, or are exempt under any provision of the Oklahoma Sales Tax Code, then records as will clearly indicate the information required in filing returns must be kept.

To support deductions made on the tax return, the vendor's records for each transaction for which exemption is claimed shall be in detail sufficient to show:

- (1) The name and address of the customer,
- (2) The character of the transaction,
- (3) The date,
- (4) The amount of gross receipts or gross proceeds, and
- (5) Such other information as may be necessary to establish the nontaxable character of such transaction under the Sales Tax Code.

*OAC 710:65-3-33(a) and (b)*.

6. "A taxpayer is responsible for record keeping." *Kifer v. Oklahoma Tax Commission*, 1998 OK CIV APP 34, ¶ 11, 956 P.2d 162, 165. In *Kifer*, the Commission, due to insufficient record keeping by the taxpayer, estimated taxpayer's gross receipts from the sale of

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<sup>17</sup> 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.

<sup>18</sup> This rule in general provides that every vendor shall file a report 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.

mixed beverages based on the number of drinks available for sale utilizing a depletion method of taxpayer's purchases from the wholesaler and the inventory on hand. *Id.* 163. The Court of Civil Appeals held that "substantial evidence supports the position of the Commission in its method of determining [the] taxes due", adopting the reasoning of the Texas Court of Civil Appeals in *Big Country Club, Inc. v. Humphreys*<sup>19</sup>, wherein that Court found "[w]e think common sense would dictate that if a taxpayer fails to make reports or to keep proper records, some formula must be devised to determine the tax imposed by legislative authority" and holding "any other rule would make it impossible for the state to collect the taxes owed". *Id.* 165-166.

### III. ATTORNEY FEES AND COSTS

1. Attorney fees ordinarily are not recoverable absent some statutory authority or enforceable contract. *Oklahoma Tax Commission v. Ricks*, 1994 OK 115, 885 P.2d 1336, 1339, (citations omitted).<sup>20</sup> Court cost, witness fees and attorney fees are recoverable against any state agency, board or commission by the respondent in any proceeding brought before any state administrative tribunal by such state entity if the tribunal or court of proper jurisdiction determines the proceeding was brought without reasonable basis or was frivolous. 12 O.S.2011, § 941(B). Section 941(B) is intended to be a check on the power of state agencies to commence civil or administrative proceedings against private parties. *Shackelford v. Oklahoma Military Department*, 1996 OK CIV APP 13, 919 P.2d 448, 450.

2. "Section 941(B) allows for a fee award only in a 'proceeding brought before any state administrative tribunal by any state agency' [.]" *Shackelford, supra*, (citing *State ex rel. Dept. of Human Serv. v. Perkins*, 1995 OK CIV APP 42, 893 P.2d 1019, 1020 (emphasis original)). In *Shackelford*, the Court of Appeals found that "[a]ppellee's suggestion that OMD commenced a 'proceeding' by firing him and forcing him to seek redress from the Commission is without merit" and that "[a]n agency's decision to terminate one of its employees is not a 'proceeding' brought

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<sup>19</sup> 511 S.W.2d 315 (Tex.Civ.App. 1974).

<sup>20</sup> Restatement of the "American Rule" that all litigants, even the prevailing one, must bear their own attorney fees. The rule is subject to bad faith and other statutory and contractual exceptions. BLACK'S LAW DICTIONARY 75 (5<sup>th</sup> ed. 1979).

before an administrative tribunal.” *Id. See*, Oklahoma Tax Commission Order No. 94-07-07-024, (citing *Allen v. State of Oklahoma ex rel. Board of Trustees of the Oklahoma Uniform Retirement System for Justices and Judges*, 1988 OK 99, 769 P.2d 1302, 1309)<sup>21</sup>, wherein the Commission determined, “it is at least arguable that [Section 941(B)] does not apply to proceedings brought before the Commission” because the proceeding before the administrative tribunal is brought by the filing of a timely protest to the proposed assessment by the Protestant, rather than the issuance of the proposed assessment. Section 941 only applies to actions brought by the state. *State ex rel. Dept. of Human Serv. v. Perkins*, *supra* 1020.

3. “Prevailing party” is not the statutory test for determining an award of attorney fees under § 941. *Miller v. State ex rel. Department of Public Safety*, 1996 OK CIV APP 71, 926 P.2d 797, 800. “Section 941 fees are not proper simply because a state agency is unsuccessful in its legal action.” *State ex rel. State Insurance Fund v. Great Plains Care Center, Inc.*, 2003 OK 79, ¶ 21, 78 P.3d 83, 90, (citing *State ex rel. Oklahoma Bar Association v. Armstrong*, 1992 OK 130, 863 P.2d 1107, 1108). There are several factors to consider in determining whether an action by the state is frivolous. *Id.* The factors include, but are not limited to, whether the issue is one of first impression involving the statutory interpretation of conflicting provisions, a lack of statutory definitions, and the timing of the proceeding as it relates to applicable law. *Id.*, (citing *Matter of Williams Natural Gas Co.*, 1992 OK 83, 837 P.2d 1387, 1390-1391).

4. Section 941 “requires a threshold factual determination by the trial court that a party has acted improperly” which must consider “the substantive statutory basis and evidentiary burden of proof” in considering the reasonableness of the agency’s initiation of the action. *State ex rel. Oklahoma Dept. of Public Safety v. Five Thousand Eight Hundred Nine Dollars (\$5,809.00) in U.S. Currency*, 1991 OK CIV APP 82, 817 P.2d 750, 751-752. There, the Court of Appeals found

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<sup>21</sup> In *Allen*, a retired judge’s request that he receive credit for active military service was denied in an administrative hearing by the Board of Trustees of the Oklahoma Public Employees Retirement System. *Id.* 1304. At note 38, the Court found that § 941(A), the court equivalent to administrative tribunals in § 941(B); could not be applied to award a request for attorney fees because the action was not originally brought by the state.

that the facts surrounding the seizure and the failure of the person transporting the currency to offer proof of the legitimate origins of the currency may be properly considered in evaluating the reasonableness of the agency's action. *Id.* 752. “[T]he agency’s action under the facts as found by the agency must be such that a reasonable agency would not have so acted.” *Id.*, (quoting the Court of Appeals of Oregon in *SAIF v. Harris*, 69 Or.App. 736, 687 P.2d 1119 (1984)). “[T]he ‘without reasonable basis’ test ‘assumes that the proponent has a valid legal theory but can offer little or nothing in the way of evidence to support the claim’” and “a claim is frivolous ‘if the proponent can present no rational argument based on the evidence or law in support of that claim’”. *Id.* 752-753, (quoting the Supreme Court of Colorado in *Board of County Commissioners of the County of Jefferson v. Auslaender*, 745 P.2d 999, 1000 (Colo. 1987)). “[A] matter is frivolous when it has ‘no legitimate legal or factual basis and is so totally devoid of merit as to be regarded as facially unworthy of consideration.’” *State Insurance Fund*, *supra* ¶ 22, (quoting *Shabazz v. Keating*, 1999 OK 26, ¶ 13, 977 P.2d 1089, 1095).

5. “It is the moving party’s burden to prove the requested attorney fees are authorized.” *Oklahoma Dept. of Public Safety*, *supra* 753, (citing *Cory v. City of Norman*, 1988 OK CIV APP 7, 757 P.2d 851, 852). All doubts regarding whether a proceeding is frivolous must be resolved in favor of the party against whom the fees are sought. *State Insurance Fund*, *supra* ¶ 22, (citing *Shabazz*, *supra* ¶ 13 and *TRW/Reda Pump v. Brewington*, 1992 OK 31, 829 P.2d 15, 23).

## ANALYSIS

1. Protestant cites 68 O.S.2011, § 2374 for the proposition that interest should be paid by the Tax Commission on the overpayment of the sales and use taxes and interest. Section 2374 is not applicable to this proceeding. First, § 2374 provides for the payment of interest to a taxpayer on the refund of income taxes. Second, the taxpayer must pay the tax within thirty (30) of the assessment and give notice of an intention to sue for the recovery of the tax in a state or federal court having jurisdiction of the parties and subject matter. 68 O.S.2011, § 226(b) and (c). Third,

§ 226 only applies to cases in which the taxes complained of are claimed to be an unlawful burden on interstate commerce, or the collection thereof violative of any Congressional Act or provision of the Federal Constitution, or in cases where jurisdiction is vested in the Courts of the United States. 68 O.S.2011, § 226(c).

2. Protestant seeks costs and attorney fees under 12 O.S.2011, § 941(B), arguing the audits and assessments were without a reasonable basis or frivolous. Section 941(B) only applies to actions brought by the state. *State ex rel. Dept. of Human Serv. v. Perkins*, supra 1020. As the Commission has determined, “it is at least arguable that [§ 941(B)] does not apply to proceedings brought before the Commission” because the proceeding is brought by filing a timely protest by the Protestant, rather than the issuance of the proposed assessment. Oklahoma Tax Commission Order No. 94-07-07-024.

Regarding the sales tax audit, § 1357.6(A) offers no guidance whether the exemption applies to Medicare/Medicaid program recipients or to only the costs reimbursed by Medicare/Medicaid. Regarding the use tax audit, the Auditor based the assessment on the only records she received. Like the person in *State ex rel. Oklahoma Dept. of Public Safety v. Five Thousand Eight Hundred Nine Dollars (\$5,809.00) in U.S. Currency*, supra, Protestant offered little assistance in the performance of the audits. It was only after the assessments were issued that documentation was provided and at a dilatory pace to warrant revisions to the assessments. An evidentiary foundation for the audit and assessment was established by the records reviewed by the Auditor.

Finally, that additional sales and use taxes were found due and owing for the audit period per se shows the audits and assessments were neither without reasonable basis nor frivolous.

### RECOMMENDATIONS

Protestant’s requests for interest on the overpayment, and costs and attorney fees should be denied.

## OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are generally applicable or are limited in time and/or effect. Non-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.

NOTE: The distinction between a Commission Order designated as “Precedential” or “Non-Precedential” has been blurred because all OTC Orders resulting from cases heard by the Office of Administrative Law Judges are now published, not just “Precedential” Orders. *See* OKLA. STAT. ANN. tit.68, § 221(G) (West 2014) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002).