JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **89-12-19-025 / PRECEDENTIAL**
ID: **CR-88-069-P / P-88-077-P**
DATE: **DECEMBER 19, 1989**
DISPOSITION: **SUSTAINED IN PART / DENIED IN PART**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A hearing was had in this matter, at which hearing Protestant was represented by ATTORNEY, Attorney, and the Business Tax Division was represented by OTC ATTORNEY, Assistant General Counsel. Exhibits, not herein itemized, were received into evidence, testimony was heard, and this case was submitted for decision.

FINDINGS OF FACT

1. AFFILIATE CO. is a chartered affiliate of COMPANY since May of 1965, and an Oklahoma, nonprofit corporation since November of 1969. The Internal Revenue Service granted AFFILIATE CO. nonprofit status under 26 U.S.C. Section 501(c)(4), requiring the annual filing of a form 990 return.

2. AFFILIATE CO. is a civic organization with the primary objective, "to develop Optimism as a philosophy of life; to promote an active interest in good government and civic affairs; to inspire respect for the law; to promote patriotism and work for international accord and friendship among all people; to aid and encourage the development of youth." (AFFILIATE CO. By-laws, page 1, Article II., Section 1; AFFILIATE CO. Articles of Incorporation, page 1, Article IV.)

3. AFFILIATE CO.'S primary activity is the sponsoring of little league athletic competitions for CITY area boys ages 5 through 14, and girls ages 5 through 19.

4. AFFILIATE CO. is managed and directed exclusively by volunteers. Only the non-member game officials, ticket takers, and concessions sales clerks receive compensation for their services.

5. AFFILIATE CO. raises its operating funds predominantly from admission ticket and concessions sales during the competitions. Every dollar of revenue raised is funneled back into the AFFILIATE CO. operating budget to maintain facilities and defray expenses.

6. Throughout the period at issue until January 17, 1986, the OTC had a written policy, identified as OTC memorandum 80-018, dated December 12, 1980, declaring that nonprofit civic organizations would not be required to collect and remit sales taxes on their fund-raising sales provided those organizations paid sales tax at the source on their purchases of property held for resale. To do this, no sales tax permit was necessary as AFFILIATE CO. was not claiming the "sale for resale" exemption. A statement of this policy was carried in a three-ring binder (field

audit manual) to audits by all OTC sales tax auditors. OTC witnesses testified that the sales tax auditors were instructed to follow and apply those statements of policy contained in the field audit manual.

Prior to December 12, 1980, the OTC applied the policy in practice from as early at 1961. Although there is some indication in the record that the OTC may have deviated from the policy on isolated occasions, the evidence showed that the OTC applied the policy consistently through the years to taxpayers such as AFFILIATE CO., i.e., civic youth organizations. The OTC knew that its policy deviated from the sales tax statutes in that there was no specific statutory exemption from sales taxation on sales by civic youth organizations, but the OTC adopted the policy for its convenience. The sales tax law at all pertinent times would have permitted civic youth organizations to have obtained sales tax permits, thus allowing those organizations to have avoided payment of sales tax on their purchases. The policy, in effect, defined which of two mutually exclusive sales transactions would bear the tax. In other words, it was the policy to require civic youth organizations to pay sales tax upon purchasing raw materials such as ice and cups, but not to require those organizations to collect and remit sales tax on concessions sales.

3 The OTC intended civic organizations to abide by the policy. AFFILIATE CO. knew of, relied on, and abided by the policy. In fact, it was apparent from the evidence that the policy was known generally among civic youth organizations in the CITY area. Until September of 1987, AFFILIATE CO. never collected sales taxes or filed sales tax returns for its ticket or concessions sales. Since its inception and until September, 1987, AFFILIATE CO. conducted its activities in strict accordance with the above stated OTC policy. AFFILIATE CO. always paid sales tax at the source, i.e., on its purchases of property held for resale. Further, until September of 1987, AFFILIATE CO. never had a sales tax permit. The evidence showed that similar civic youth organizations attempted to obtain sales tax permits from the OTC and were turned away because of the policy. Historically, some of AFFILIATE CO.'S suppliers offered to not charge AFFILIATE CO. sales tax, assuming AFFILIATE CO. was part of CITY, the Oklahoma municipality. AFFILIATE CO. purchasing agents, in such instances, would insist on paying sales taxes.

9. The OTC did not revoke the policy internally until January 17, 1986. The OTC did not revoke the policy publicly until May 19, 1986, upon the adoption of Sales Tax Regulation 13-34.

10. In late January, 1985, AFFILIATE CO. received a letter dated January 25, 1985, from the OTC Sales and Use Tax Division advising AFFILIATE CO. that it had been selected for a sales and use tax audit.

11. AFFILIATE CO. complained to state legislators about the impending audit, and refused initially to cooperate. AFFILIATE CO. ultimately agreed to cooperate, and made their books and records available for examination to the OTC field auditor, AUDITOR.

12. AUDITOR audited AFFILIATE CO. for the audit period October 1, 1981, through September 30, 1984. AUDITOR completed his field work in July of 1985, and submitted his work papers to AFFILIATE CO. showing preliminary calculations of sales tax due for the audit period, based on AFFILIATE CO. sales records. AUDITOR advised AFFILIATE CO. that his

work papers did not constitute a bill, and further advised AFFILIATE CO. to wait for a formal written proposed assessment, to be sent by mail, before paying. AFFILIATE CO. did not agree to AUDITOR'S audit determinations and maintained throughout the audit that it was not liable for the taxes because of having paid sales tax "at the source".

13. AFFILIATE CO. complained to state legislators and OTC officials about AUDITOR'S audit determinations, and the apparent reversal of OTC policy.

14. AFFILIATE CO. never received a proposed assessment for sales tax due as a result of AUDITOR'S audit. OTC records show that a state legislator requested the OTC "hold off from assessing (youth athletic organizations)." The OTC honored this request, but failed to advise AFFILIATE CO. of any such decision regarding the assessment of sales tax. OTC witnesses admitted, that in retrospect, the OTC should have advised AFFILIATE CO. at the time that no notice of proposed assessment would be forthcoming.

15. Not having heard anything from the OTC following AUDITOR'S audit, AFFILIATE CO. reasonably concluded that its argument had prevailed. AFFILIATE CO. thus continued its adherence to the established OTC policy, a policy which was at that time still a part of the Division field audit manual.

16. In late January of 1987, the newly-formed Business Tax Division of the OTC reinstituted the sales tax audit program of civic youth organizations that had remained dormant since the summer of 1985, approximately 19 months. OTC field auditors were assigned "on a priority basis" to bring up to date "the assessments" on AFFILIATE CO.

17. On March 16, 1987, the OTC assigned field auditor AUDITOR 2 to re-audit AFFILIATE CO. for the sales tax period October 1, 1981, through September 30, 1984, and to expand the audit to cover the sales tax period October 1, 1984, through June 30, 1987. The OTC so notified AFFILIATE CO. by letter dated March 17, 1987, making no explanation to AFFILIATE CO. as to why the original audit was to be, apparently, duplicated.

18. AUDITOR 2 performed the audit as assigned, fielding the persistent and often heated objections of AFFILIATE CO. AFFILIATE CO., as before, maintained that it was not required to pay sales taxes on its fund-raising sales because of its faithful payment of sales taxes on its purchases of raw materials to be resold in the concessions. AFFILIATE CO. also objected to the second audit on the grounds that the OTC had not afforded AFFILIATE CO. its "day in court" following the first audit. AUDITOR 2 completed her audit on August 28, 1987, proposing an assessment against AFFILIATE CO. for the period October 1, 1981, through June 30, 1987, of $43,368.50 in tax, $17,837.65 in interest, and $4,336.85 in penalty.

19. By letter dated October 2, 1987, the OTC formally notified AFFILIATE CO. of a proposed assessment of $65,543.00 in tax, penalty and interest as a result of AUDITOR 2'S audit.

20. AFFILIATE CO., with extension, timely filed its protest of the proposed assessment, in January of 1988.

21. Beginning September 1, 1987, AFFILIATE CO. began collecting and remitting sales taxes on its sales, and stopped paying sales tax when purchasing items for resale. That same month, AFFILIATE CO. applied for a sales tax permit. The OTC issued the permit in November of 1987. Since that time, AFFILIATE CO. has consistently collected and remitted sales tax to the OTC under protest.

22. On July 1, 1988, GOVERNOR signed into law an amendment to 68 O.S. §1356, to be effective July 1, 1989, which states:

> Section 1356. Exemptions-Governmental and nonprofit entities.
>
> There are hereby specifically exempt from the tax levied by this Article:
>
> * * *
>
> (M) The first Seventy-five Thousand Dollars ($75,000.00) each year from sale of tickets and concessions at the athletic events by each organization exempt from taxation pursuant to the provisions of Section 501(c) (4) of the Internal Revenue Code.

23. On November 9, 1988, AFFILIATE CO. filed a claim for refund, with interest, of $11,983.74 of sales tax remitted to the OTC for the sales tax period September 1, 1987, through June 30, 1988. By letter dated November 29, 1988, the OTC advised AFFILIATE CO. that the refund claim was denied. AFFILIATE CO. timely filed its protest and application for hearing of the denial of the refund claim on December 21, 1988.

ISSUES

I. Whether the Oklahoma Tax Commission had a longstanding policy, on which AFFILIATE CO. relied, of allowing civic organizations to pay sales taxes on their purchases, and not requiring them to collect taxes on their sales.

> A. Whether the Oklahoma Tax Commission can retroactively assess taxes to AFFILIATE CO. for sales made while the policy was in effect.

II. Whether the Oklahoma Tax Commission should be estopped from assessing sales taxes for the audit period prior to May 19, 1986.

III. Whether AFFILIATE CO. should be allowed a credit against the assessment for the amount of sales taxes paid on its purchases.

IV. Whether a recalculation of the sales tax assessment utilizing a formula to net out the taxes due from the total gross receipts is permissible by statute.

V. Whether the sales taxes collected and remitted by AFFILIATE CO. for the period September, 1987, through June, 1988, were erroneously collected and remitted and must be refunded.

APPLICABLE LAW

AFFILIATE CO., as a nonprofit corporation, primarily is involved in sponsoring little league athletic events. The operating funds are predominantly raised through admission ticket and concessions sales. Although AFFILIATE CO. did not collect and remit sales taxes on the sales, the Oklahoma Sales Tax Code is clear that such transactions are taxable. The pertinent provisions of Section 1354 of Title 68 of the Oklahoma Statutes are as follows:

> 1. There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code, an excise tax of . . . of the gross receipts or gross proceeds of each sale of the following:
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> * * *
>
> (I) Foods, confections, and all drinks sold or dispensed by hotels, restaurants, or other dispensers, and sold for immediate consumption upon the premises or delivered or carried away from the premises for consumption elsewhere;
>
> * * *
>
> (L) Tickets for admission to or voluntary contributions made to places of amusement, sports, entertainment, exhibition, display, or other recreational events or activities, including free or complimentary admissions which have a value equivalent to the charge that would have otherwise been made;
>
> * * *

AFFILIATE CO. does not dispute the taxability of the transactions in which it engaged, nor does AFFILIATE CO. assert that the transactions were statutorily exempt from taxation pursuant to the sales tax exemptions for nonprofit entities in Section 1356 of Title 68. Clearly, the transactions were taxable and there were no applicable exemptions.

When AFFILIATE CO. purchased its supplies it paid sales taxes. If AFFILIATE CO. had obtained a sales tax permit pursuant to 68 O.S. 1981, §1364, it could have purchased its supplies exempt from tax and collected tax on its sales. The exemption to which AFFILIATE CO. would have been entitled had the proper statutory procedures been followed and had the appropriate permits been procured is contained in Section 1357 of Title 68:

> There are hereby specifically exempted from the tax levied by this article:
>
> * * *

(D) Sales for resale to persons engaged in the business of reselling the articles purchased, whether within or without the state, provided that such sales to residents of this state are made to persons to whom sales tax permits have been issued as provided in this article.

* * *

I.

The evidence presented amply establishes that the Oklahoma Tax Commission had a policy that organizations such as the little league athletic organization in this case were provided an administrative exemption from collection and remission of sales taxes so long as the organization paid sales taxes when purchasing the items which would later be resold. The fact that this policy existed was established through the testimony not only of the individuals connected with AFFILIATE CO., who believed it was OTC policy, but through the testimony and exhibits of the OTC employees, the retired OTC employee, and memoranda of the Sales and Use Tax Division. The testimony also established that the policy was not revoked until January, 1986 by memorandum of the Sales Tax Division, and a regulation addressing the taxability of these sales was not adopted until May, 1986.

Reversal of OTC policy has been addressed several times by the Oklahoma courts through the years. Tulsa Tribune Co. v. Oklahoma Tax Commission, 768 P.2d 891 (Okla. 1989); Oral Roberts University v. Oklahoma Tax Commission, 714 P.2d 1013 (Okl. 1985); Peterson v. Oklahoma Tax Commission, 395 P.2d 388 (Okl. 1964); Oklahoma Tax Commission v. Liberty National Bank and Trust Co. of Oklahoma City, 289 P.2d 388 (Okl. 1955). The decision that has received the most notoriety is Oral Roberts University v. Oklahoma Tax Commission.

In Oral Roberts University, the Oklahoma Supreme Court prohibited the Oklahoma Tax Commission from reversing its long standing interpretation of a sales tax exemption available to churches. After 37 years of adhering to an interpretation of the exemption, the Oklahoma Tax Commission suddenly reversed its position claiming its previous interpretation to have been in error. The Court held that the Oklahoma Tax Commission was powerless to reverse a long standing interpretation because (a) the previous interpretation had become entrenched and (b) the Oklahoma Tax Commission offered no cogent reason for the reversal.

The Oral Roberts University decision has served as precedent for decisions following thereafter. See, e.g., Tulsa Tribune Co. v. Oklahoma Tax Commission, 768 P.2d 891 (Okla. 1989). In each instance, the Oklahoma Tax Commission has sought to reverse a previous interpretation of an ambiguous statute. Because the Oklahoma Tax Commission has not reversed the previous policy for cogent reasons, the Court, utilizing an Oral Roberts University analysis, has held for the taxpayer.

The Liberty Bank case was cited with approval in Oral Roberts. The facts giving rise to Liberty Bank are distinguishable from those occurring in Oral Roberts University and the successor cases. In Liberty Bank the taxpayer requested the Commission's permission to go on a reserve for bad debts basis of accounting for tax purposes. The Commission requested the

taxpayer to advise if the Commissioner of Internal Revenue had consented to that basis of accounting, to which taxpayer responded that he had. The Oklahoma Tax Commission failed to advise Liberty Bank whether its request was granted or denied. The taxpayer set up its records on a reserve for bad debts basis, and for the three next succeeding years the Oklahoma Tax Commission received and accepted taxpayer's tax returns without complaint. Four years following the initial request a field audit was conducted, the auditor noted the taxpayer's method of accounting, but no correction was made. Three years thereafter another field audit was conducted and the Commission disallowed the method utilized by taxpayer which resulted in an additional tax liability.

The question presented on appeal was whether the taxpayer was entitled to treat bad debts on its tax returns by a deduction from income of an addition to a reserve for bad debts. The Oklahoma Tax Commission maintained that there was an absence of statutory authorization for the method utilized by the taxpayer. The Court responded to the Commission's argument as follows:

> Commission's contention might have merit had it ever taken such a position prior to this time. The Oklahoma statute in question has been substantially the same since 1931. Commission has consistently since 1931 interpreted such statute as authorizing a reserve for bad debts method of writing off bad debts.
>
> 289 P.2d at 391.

After the controversy had arisen in that case, the Commission amended its regulation to disallow the reserve for bad debts method to national banks. The Court gave the regulation no weight in determining the case, stating "such an interpretation promulgated for the first time after the controversy in question arose, carries no presumption of correctness." Id. at 393.

Although not directly on point, the issue presented in Liberty Bank is similar enough to the issue presented herein to serve as precedent for a decision in this protest. The Division has issued a proposed assessment to AFFILIATE CO. for the audit period October 1, 1981, through June 30, 1987, which would reverse a policy of the Commission that can be traced back in time for 25 years. The policy may very well have existed prior to 1961, and most likely did, but the testimony established that the policy was well entrenched. This policy was even documented in the auditor's manual by memorandum dated December 20, 1980. When a field audit of AFFILIATE CO. was conducted in 1985, and the issue arose of the propriety of the manner in which AFFILIATE CO. paid sales tax at the source but did not collect sales tax on its sales, the Division issued no proposed assessment nor advised AFFILIATE CO. to change its method of operation. One month before the end of the audit period of the second field audit, the Oklahoma Tax Commission promulgated a regulation in which the former policy was revoked. Importantly, the audit period encompassed a period when an internal written policy was in effect to which AFFILIATE CO. complied.

In Liberty Bank the Supreme Court held in favor of the taxpayer saying:

> We are of the opinion that commission's own consistent administrative interpretation of a tax statute for a period of over 20 years must prevail over a contrary interpretation now suggested by it for the first time.

Id. at 392. This holding was based on the rule handed down by the Court many years ago in McCain v. State Election Board, 144 Okla. 85, 289 P. 759 (1930):

> It is a well settled rule that the contemporaneous construction of a statute by those charged with its execution and application, especially when it has long prevailed, while not controlling, is entitled to great weight and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous. The courts are especially reluctant to overturn a long standing executive or departmental construction where great interests have grown up under it and will be disturbed or destroyed by the announcement of a new rule, or where parties who have contracted with the government upon the faith of such construction will be prejudiced.

Id. at 762. The Oral Roberts University decision was also based on the applicable rule stated by the McCain court.

In the instant protest the policy was not based on statute and the Commission, as an agency, is mandated to follow the statutes as written. However, it cannot be overlooked that great interests had grown up under the Commission's administration of those sales tax provisions and that AFFILIATE CO. would be severely prejudiced by the retroactive reversal of the Commission's policy. There is no question that the Commission erroneously administered the sales tax provisions for at least 25 years before reversing its policy by published regulation on May 19, 1986, and that the reversal of the Commission's erroneous administration most certainly was for a cogent reason since the administration was not supported by statutory authority. However, it would be unconscionable for the Commission to retroactively apply a reversal in policy to encompass six years of sales made by AFFILIATE CO. when the policy that AFFILIATE CO. was adhering to was firmly entrenched until 1986. This is further aggravated by the fact that the audit of AFFILIATE CO. in 1985 did not result in proposed assessment of sales taxes or instruction by the Division that AFFILIATE CO. should procure a permit and collect sales taxes. Based on the foregoing analysis and the precedential decisions in this area, AFFILIATE CO.'S protest to the proposed assessment for the audit period up to the effective date of Regulation 13-34, must be sustained.

The sales tax auditors were notified in December 1985 that the audit memorandum pertaining to civic organizations should be removed from their manuals. In May 1986, the Commission adopted Regulation 13-34, which was duly filed and published. The Regulation provides in pertinent part:

> Regulation 13-34 EXEMPTION-SALES BY CHARITABLE, FRATERNAL, CIVIC, EDUCATIONAL SOCIETIES AND NON-PROFIT ORGANIZATIONS
> The gross proceeds derived from sales of tangible personal property and services by fraternal, civic or educational societies or organizations are taxable within the meaning of the Act. The disposition of the proceeds of such sales has no bearing on the application of the tax.

This regulation was adopted pursuant to the Commission's statutory authority to promulgate such regulations as may be necessary for administration of the tax laws. 68 O.S. §203.

The regulation itself served as the formal reversal of the previous Commission policy, and was notice to the public of the reversal. From that point forward, AFFILIATE CO. was responsible for procuring a sales tax permit and collecting tax on its sales. Publication of the regulation was notice under the law. There is no statutory requirement that taxpayers be individually notified of regulations which would affect them.

II.

AFFILIATE CO. has also asserted an estoppel argument against the collection of the sales taxes for the audit period. The only remaining portion of the audit period still at issue, however, to which estoppel could lie as a defense to collection of the uncollected sales tax, is from the effective date of Regulation 13-34 to June 30, 1987. Resolution of Issue I encompassed the audit period prior to promulgation of Regulation 13-34.

It is generally recognized that the State will not be estopped by unauthorized acts of its officers. State ex rel. Cartwright v. Dunbar, 618 P.2d 900 (Okl. 1980). Notably, the estoppel defense has not been applied by the Oklahoma Supreme Court in tax matters. When the Court upheld a lower court's ruling that estoppel would lie against the State, the Court found that the facts and circumstances of the particular case implicated a prevailing public interest, which the Court determined excepted the case from the general rule. Burdick v. Indep. School District, 702 P.2d 48 (Okl. 1985). The Burdick case, however, did not involve a tax matter.

AFFILIATE CO. specifically asserted at hearing that the Commission should be estopped from collecting sales taxes for the periods prior to May 19, 1986, the date of publication of the regulation. Thus, AFFILIATE CO. does not assert that estoppel should lie against the State following the date of the publication of the regulation. Nevertheless, once the prior policy was reversed and the reversal was manifested in the form of a regulation, which served as notice to the public of the policy, any public interest which might have justified invocation of estoppel for the audit period following May 19, 1986, was considerably diminished, if not extinguished, and was certainly not compelling. Estoppel will not lie as a defense to collection of the sales taxes.

III.

The next issue is whether AFFILIATE CO. should be entitled to set off, against any deficiency finally determined, the amount of any sales taxes it paid for the items it purchased for

resale. This process, known as equitable recoupment, would only apply to the portion of the audit period that is still at issue.

"Recoupment" means a deduction from a money claim through a process whereby cross demands arising out of the same transaction are allowed to compensate one another and the balance only to be recovered. National Cash Register Co. v. Joseph, 299 N.Y. 200, 86 N.E.2d 561 (N.Y. 1949). While the courts have differing viewpoints of what constitutes the "same transaction" for setting off one claim against the other, the Oklahoma Supreme Court has taken a rather broad interpretation of "same transaction" in the estate tax decision of Estate of Kasishke v. Oklahoma Tax Commission, 541 P.2d 848 (Okl. 1975), wherein the Court concluded that the entire estate tax return should be treated as a single transaction for purposes of recoupment. In the New York decision of National Cash Register Co. v. Joseph, the New York Court allowed a sales tax vendor to set off sales taxes it had erroneously paid to the city for the same period as the assessment. Thus, New York likewise interpreted "same transaction" in a broad manner.

AFFILIATE CO. has plead an equitable right to set off the amount of taxes it should have collected against the amount of taxes it allegedly erroneously paid during the audit period. Under a broad interpretation of "same transaction", recoupment could be had; however, recoupment cannot be had unless the taxpayer has a valid claim to offset against the proposed assessment. AFFILIATE CO.'S obstacle to prevailing under the recoupment doctrine is that for the period still at issue, AFFILIATE CO. cannot show that the taxes it paid to its vendors were paid in error and should be offset against the taxes which are due.

The law has been discussed previously that sales taxes were due on AFFILIATE CO.'S purchases unless exempt under Section 1357(D) as "sales for resale." The exemption extends to those persons to whom sales tax permits have been issued. AFFILIATE CO. cannot establish a valid claim for taxes erroneously paid for the period following the promulgation of Regulation 13-34, since AFFILIATE CO. did not hold a sales tax permit. For AFFILIATE CO. to establish a valid claim for taxes erroneously paid following the date of publication of Regulation 13-34, it was necessary that AFFILIATE CO. possess a sales tax permit. Since AFFILIATE CO. did not hold a permit, its purchases were not tax exempt, and AFFILIATE CO. properly paid taxes on its purchases. AFFILIATE CO. has no right to recoupment.

IV.

AFFILIATE CO. suggests in its final issue that the Oklahoma Tax Commission should recalculate the sales taxes due by utilizing a formula that would "back out" from AFFILIATE CO.'S gross receipts the sales taxes due. AFFILIATE CO. demonstrates the calculation as follows: If state/city sales tax rate is 5% per dollar sales price, a vendor must charge the consumer $1.05. If the vendor has charged only $1.00, then he should be deemed to have collected only 95.25 cents for the sales price of the item, and 4.75 cents for the tax. AFFILIATE CO.'S Brief at 29.

AFFILIATE CO. claims that in reality it collected only 95.25 cents for each dollar of its sales since by statute, the sales tax required to be collected must be held in trust by the vendor and "obviously, one cannot hold in trust that which he has not actually collected." AFFILIATE

CO.'S brief at 30. AFFILIATE CO'S argument cannot be sustained because it is not supported by the facts and statutory law.

AFFILIATE CO. did not collect sales tax. To utilize a formula to "back" sales tax out of the gross receipts collected would be to engage in a fiction. Section 1361 of the Sales Tax Code addresses the requirement of the consumer to pay sales tax on the sales price of an article:

> (A) The tax levied by this article shall be paid by the consumer or user to the vendor as trustee for and on account of this state. Each and every vendor in this state shall collect from the consumer or user the full amount of the tax levied by this article, or an amount equal as nearly as possible or practicable to the average equivalent thereof.
>
> (B) Vendors shall add the tax imposed by this article, or the average equivalent thereof, to the sales price, charge, consideration, gross receipts or gross proceeds of the sale of tangible personal property or services taxed by this article, and when added such tax shall constitute a part of such price or charge, shall be a debt from the consumer or user to vendor until paid, and shall be recoverable at law in the same manner as other debts.

* * *

The proposed assessment for the audit period still at issue is calculated on the gross receipts of AFFILIATE CO. for the property sold in accordance with Section 1361 requirements. 68 O.S. §1361. The gross receipts collected were established by audit, to which no challenge was made to accuracy, and sales taxes must be calculated based on the total gross receipts charged for the property sold. AFFILIATE CO.'S assertion that the sales taxes should be backed out of the gross receipts cannot be sustained since it has been admitted that sales taxes were not added to the sales prices of the items sold.

V.

AFFILIATE CO. began collecting and remitting sales taxes on its sales beginning September 1, 1987. In November, 1988, AFFILIATE CO. filed a claim for refund of the sales taxes remitted from September 1, 1987, through June 30, 1988, asserting as a grounds for such refund claim that under the precedent of the Oklahoma Supreme Court decision of Oral Roberts University v. Oklahoma Tax Commission, the previous policy of the Oklahoma Tax Commission could not be revoked. Therefore, the taxes were erroneously remitted and should be refunded, according to AFFILIATE CO.

The reversal of policy issue was addressed previously in Issue I. While the Oklahoma Tax Commission cannot retroactively apply a reversal of policy, it was determined that there existed a cogent reason for reversal of the policy. After May 19, 1986, when the regulation was promulgated, there was no question of AFFILIATE CO.'S statutory duty to collect and remit sales taxes on its sales. A refund of taxes erroneously remitted is sustainable only if they were remitted through error of fact, or computation, or misinterpretation of law. 68 O.S. 1981, §227.

In accordance with the resolution of the other issues in this protest, AFFILIATE CO.'S refund claim has no merit.

CONCLUSIONS OF LAW

In view of the above and foregoing findings of fact and law applicable thereto, the undersigned Administrative Law Judge concludes as follows:

1. The Oklahoma Tax Commission has jurisdiction in this matter.

2. The Oklahoma Sales Tax Code, since 1936, has not contained an express statutory sales tax exemption for sales made by civic organizations. An exemption was enacted in 1988 exempting the first $75,000 of sales; however, the newly enacted statute was not in effect during the audit period. See 68 O.S. Supp. 1988, §1356(m).

3. Since 1961, the Oklahoma Tax Commission has had a policy of not requiring civic organizations such as Protestant to collect and remit sales taxes on their fund-raising sales provided such organizations paid sales taxes on their purchases of items for resale.

4. This Oklahoma Tax Commission policy was reversed through published Regulation 13-34 on May 19, 1986.

5. The reversal of this policy is sustainable because the policy was not based on statute.\

6. The reversal of the Oklahoma Tax Commission policy must be given prospective application since retroactive application would prejudice the interests of AFFILIATE CO., which knew of and relied on the former Oklahoma Tax Commission policy.

7. Estoppel will not lie against the Oklahoma Tax Commission as a defense to the collection of the sales tax assessment for the portion of the audit period May 19, 1986, through June 30, 1987.

8. AFFILIATE CO. is not entitled to set off against the sales tax deficiency the amount of any sales taxes it paid for the items it purchased for resale. Although the Oklahoma Tax Commission's proposed assessment of sales tax for the portion of the audit period following promulgation of Regulation 13-34, is valid, AFFILIATE CO.'S claim that it erroneously paid sales taxes on its purchases of items for that period was not valid. AFFILIATE CO. properly paid sales taxes on its purchases, since AFFILIATE CO. did not have a sales tax permit which would have entitled AFFILIATE CO. to purchase the items tax exempt.

9. AFFILIATE CO., as a vendor, must add sales tax to the sales price of each sale of tangible personal property or services made. 68 O.S. §1361(B). AFFILIATE CO. did not collect sales tax. A formula cannot be utilized to "back" sales tax out of the gross receipts collected by AFFILIATE CO.

10. AFFILIATE CO.'S protest to the proposed assessment of sales tax is sustained for the period October 1, 1981, through May 18, 1986, and denied from May 19, 1986, through June 30, 1987.

11. The sales taxes remitted by AFFILIATE CO. from September 1, 1987, through June 30, 1988, were properly collected on sales made by AFFILIATE CO. under 68 O.S. §1354. AFFILIATE CO.'S claim for refund of those sales taxes is denied.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the sales tax protest of AFFILIATE CO. be sustained for the period October 1, 1981, through May 18, 1986, and denied for the period May 19, 1986, through June 30, 1987. Further, it is the ORDER of the OKLAHOMA TAX COMMISSION that the claim for refund for the period September 1, 1987, through June 30, 1988, be denied.

OKLAHOMA TAX COMMISSION