NO. 96383-5

SUPREME COURT OF THE STATE OF WASHINGTON

LOWE'S HOME CENTERS, LLC,

Petitioner,

v.

DEPARTMENT OF REVENUE, STATE OF WASHINGTON,

Respondent.

DEPARTMENT OF REVENUE'S ANSWER TO BRIEFS OF AMICI CURIAE COUNCIL ON STATE TAXATION AND KOHL'S DEPARTMENT STORES, INC.

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I. INTRODUCTION

The Court of Appeals correctly held that Washington's sales tax and business and occupation (B&O) tax statutes addressing bad debts do not authorize sales or retailing B&O tax refunds on bad debts from consumer loans made by banks. Amici Council on State Taxation (COST) and Kohl's Department Stores, Inc. raise several arguments in support of Lowe's' petition for review, but none support this Court's review.

First, contrary to COST's argument, the Court of Appeals' decision casts no doubt on Washington's compliance with the uniform bad debt rules of the Streamlined Sales and Use Tax Agreement (SSUTA). The SSUTA does not require member states to authorize bad debt sales tax refunds on credit card loans made by banks, regardless of a seller's contractual promise to guarantee the profitability of the bank's credit card business. Even the Oklahoma Tax Commission, the sole taxing authority from a SSUTA member state that accepted Lowe's' "guaranty" theory, ultimately rejected its tax refund claim after discovering the true nature of its "guaranty."

Second, the tax policy concerns COST raises are issues for the Legislature to consider and do not support Lowe's' petition for review.

Third, the legislative history and statutory changes to RCW 82.08.037 do not support Kohl's' argument that the Legislature eliminated the requirement that a refund claimant must own the bad debt when it

amended the statute in 2004. Since it was first enacted, every version of RCW 82.08.037 has required the seller to have originated the unpaid debt obligation for which a bad debt sales tax credit or refund is claimed.

Finally, Kohl's' "substance over form" argument also is incorrect. The bad debt deductions taken by a seller for payments made in "guarantee" of a bank's profit margins on credit card loans are not equivalent in form or substance to the deductible bad debts of a seller that accepted a dishonored check as payment for taxable goods or services.

The Court of Appeals' decision is correct, and there is no need for this Court to grant review. This Court should deny review.

II. ARGUMENT

A. COST Offers No Sound Reason to Grant Lowe's' Petition for Review

1. The Court of Appeals correctly ruled the bad debt deductions Lowe's took on its federal tax returns do not provide a basis for a sales or B&O tax refund

COST argues the "plain meaning" of the bad debt tax statutes entitles Lowe's to a sales and B&O tax refund because Lowe's was eligible to deduct its guaranty payments to the Bank as bad debts on its federal tax returns. COST Br. at 4. But as the Court of Appeals correctly concluded, the plain meaning of the sales tax credit for "bad debts" allows a sales tax refund on unpaid debt obligations owed by the buyer to the

seller on a retail sale. *Lowe's Home Centers, LLC v. Dep't of Revenue*, ___ Wn. App. 2d ___, 425 P.3d 959 (2018). RCW 82.08.037 authorizes a credit or refund of "sales taxes previously paid on bad debts." Sales taxes are "paid on" the "selling price," which is the amount the buyer owes to the seller in exchange for the goods sold. RCW 82.08.010(1)(a). To qualify for a sales tax or retailing B&O tax refund on bad debts, a seller must have a bad debt loss on *a retail sale*. Lowe's did not incur bad debts on its retail sales; it collected the entire sale proceeds, including sales taxes, the same as with any other bank-issued credit card transaction.

Like the dissenting opinion below, COST mistakes Lowe's' profit-sharing bad debts for bad debts on which sales taxes were "previously paid." The bad debt deductions Lowe's took on its federal tax returns were not for sale proceeds Lowe's was unable to collect from the buyer; they were for contractual payments that reduced the amount of financing income Lowe's received under its profit-sharing agreement with the Bank.

This proper understanding of the facts shows that the Court of Appeals did not "artificially bifurcate" the private label credit card transactions from Lowe's' contractual reimbursements to GE Capital and its subsidiaries (Bank). *See* COST Br. at 5. Lowe's opted to get out of the business of extending credit to customers and, instead, licensed the right to offer credit under the Lowe's brand to the nation's largest issuer of private

label credit cards. CP 65. As a result, Lowe's received guaranteed, upfront payment of the entire sale proceeds, including the sales taxes it remitted.

There is nothing artificial about the distinction the Court of Appeals drew between Lowe's receipt of cash payment for the full price (including sales tax) of a retail sale and the bad debt expenses Lowe's incurred as a result of its contractual promise that the Bank would achieve its desired profit margins on the credit card accounts. To the contrary, it is well-established that the state's excise tax statutes are to be applied to each separate and distinct business transaction. *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 363, 841 P.2d 752 (1992). The Court of Appeals would have erred by conflating the tax attributes of Lowe's' retail sales with the tax attributes of its profit-sharing agreement with the Bank.

COST also claims the Court of Appeals' decision "threatens inconsistent application of the B&O tax deduction" for different types of business activities, but it does not explain how that might be so. COST Br. at 4. This Court's precedents make it abundantly clear that a taxpayer cannot "mix and match" its taxable revenues and deductible receipts for B&O tax purposes. *Cf. Rena-Ware Distributors, Inc. v. State*, 77 Wn.2d 514, 463 P.2d 622 (1970) (seller must pay service B&O tax on financing income from installment sales contracts even though its proceeds from the underlying retail sales were exempt). To qualify for a retailing B&O tax

deduction for bad debts, a seller must have incurred a bad debt on a retail sale. The Court of Appeals correctly held that Lowe's' could not offset it retailing B&O tax liability by bad debts that reduced its financing income.

COST also contends the Court of Appeals overlooked "critical facts that are very different" from those in *Home Depot USA, Inc. v. Dep't of Revenue*, 151 Wn. App. 909, 215 P.3d 222 (2009). COST Br. at 4. But the Court of Appeals did not overlook those facts. Instead, it correctly concluded the factual differences on which Lowe's relies are immaterial.

Unlike Home Depot, which paid a flat "service fee" to the Bank on private label credit card transactions, 151 Wn. App. at 923, Lowe's paid no upfront fees. Instead, Lowe's guaranteed the Bank would earn a "target" rate of return on the private label credit accounts. CP 41, 44, 141. If the profitability of the private label credit card program fell short of expectations, Lowe's was responsible for making up the shortfall. On the other hand, Lowe's was entitled to receive the excess profits generated by the credit accounts. Like the service fees Home Depot paid, Lowe's' contractual payments to the Bank were in exchange for valuable consideration it received from the Bank and, thus, were not equivalent to the bad debts of a seller that paid sales taxes on proceeds it never received.

The central holding of the *Home Depot* decision is that a sales tax refund for bad debts is only available to sellers that incur bad debts

"directly attributable to" a retail sale; it does not apply to bad debts from private label credit card loans made by third party lenders. 151 Wn. App. at 922. Here, the Court of Appeals correctly held that a seller's contractual agreement to cover a portion of a bank's bad debt losses on consumer loans does not trump the statutory requirement that the seller, itself, incurred a credit loss on a retail sale.

The undisputed facts in the record do not support COST's assertion that Lowe's customers had any kind of "continuing debt" obligation to Lowe's. Cost Br. at 6. To the contrary, the record establishes that the right to receive payment from a cardholder was "vested in the Bank." CP 136.

Lowe's did not, in fact, "guarantee" the Bank would collect *any* sale proceeds from its customers. Rather, Lowe's guaranteed the Bank would reach its "target return" on *a portfolio-wide basis*, taking into account the entirety of the Bank's collections. CP 44. The Bank could earn its target rate of return without collecting any part of the principal amount of the credit card loans: under its credit card agreements with customers, the Bank applied customer payments to financing charges, interest, late fees, NSF charges, and debt insurance premiums before allocating any amount to the principal loan amount, i.e. the taxable sale proceeds. It is entirely possible the Bank collected more than the principal loan amount before a customer defaulted, yet allocated none

of the cardholder's pre-write-off payments to the taxable "sales price."[1]

The purpose of the bad debt tax statutes is to provide a limited remedy to sellers that paid sales taxes and retailing B&O taxes on sale proceeds they could not collect from the buyer. *Home Depot*, 151 Wn. App. at 921. Essentially, the State guarantees a seller's recovery of the excise taxes it paid on sale proceeds it never received. The seller, itself, must absorb its losses with respect to the uncollectible selling price of the goods sold. Allowing sales tax refunds on contractual payments sellers make to banks to "guarantee" the profitability of the banks' credit card business goes far beyond the clear scope of the bad debt tax statutes. It would effectively make the State the guarantor not just of the excise tax portion of a buyer's unpaid debt obligation to a seller, but of the credit risk banks assume as an ordinary incident of the business of consumer lending. The Legislature never intended such an absurd result.

2. The Court of Appeals' decision is entirely consistent with the SSUTA's uniform rules on bad debts

There is no merit to COST's argument that the Court of Appeals' decision jeopardizes Washington's good standing as a member of the SSUTA. COST Br. at 7. The SSUTA's uniform rule on bad debts does not

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[1] *See* Corkery and Silver-Greenberg, *Profits from Store-branded Credit Cards Hide Depth of Retailer Troubles*, New York Times, May 11, 2017 (discussing national retailers' increasing reliance on the "rich profit stream" generated by high interest rates on store-branded credit cards to offset declining earnings from retail sales), available at https://www.nytimes.com/2017/05/11/business/dealbook/retailer-credit-cards-macys-losses.html.

require member states to give sales tax refunds to sellers for contractual payments they make in reimbursement of a third party lender's bad debts.

COST asserts nothing in the SSUTA requires the seller to carry its customer's unpaid debt obligation on its books and records. COST Br. at 3. The rule provisions excerpted in its brief show otherwise. First, the SSUTA ties the availability of a refund to "the federal definition of 'bad debt.'" SSUTA § 320.B. The pertinent federal regulation defines "bad debt" as a legally enforceable debt obligation "owed to the taxpayer" that proved uncollectible. 26 C.F.R. § 1.166-1(a). The subsection of the regulation dealing with "guaranty payments" does not change that definition. Rather, it explains for federal tax purposes when a taxpayer may deduct a contractual payment made in reimbursement of a *third-party* bad debt. *See* 26 C.F.R. § 1.166-9(a) (allowing deduction for a "payment" made as the "secondary obligor" on a third party "debt obligation").

Second, the SSUTA requires excluding amounts attributable to financing charges or interest, sales or use taxes charged on the purchase price, expenses incurred trying to collect any debt, and the value of repossessed property. SSUTA § 320.B. The mandatory exclusions in the SSUTA's bad debt rule clearly limit the scope of the deduction to the amount of uncollectible sale proceeds the seller is entitled to receive on a retail sale. The contractual payments Lowe's made to the Bank fall outside

the clear scope of the SSUTA's bad debt deduction because those payments made up for the Bank's unrealized finance charge income.

Third, the SSUTA's bad debt deduction applies only to amounts "written off as uncollectible in the claimant's books and records." SSUTA § 320.C. Contrary to COST's assertion, Lowe's did not, in fact, write-off its guaranty payments as "uncollectible." COST Br. at 7. The undisputed evidence in the record shows that the Bank, not Lowe's, wrote-off the uncollectible consumer debt obligations. CP 52, 113, 945.

Kohl's points out that a guarantor need not own the underlying debt to deduct guaranty payments under the federal tax code. Kohl's Br. at 4. That is true. But the bad debt deduction of a guarantor is not an amount "written off as uncollectible" within the meaning of the SSUTA's uniform bad debt rules or WAC 458-20-196, as the Court of Appeals correctly held. In requiring member states to use "the federal definition of 'bad debt' as the basis for calculating bad debt recovery," the SSUTA did not require states to allow sales tax refunds for any and all deductible bad debts incurred by sellers.

COST appends to its brief an administrative decision from Oklahoma that endorsed Lowe's' guaranty theory of entitlement to a bad debt sales tax refund. COST Br., Appendix A. The Court of Appeals correctly concluded the Oklahoma ALJ's findings and conclusions were

deeply flawed and unpersuasive for several reasons.[2] Lowe's, 425 P.3d at 971, n.10. Even the Oklahoma Tax Commission ultimately rejected Lowe's' bad debt refund claim after the true nature of its "guaranty" came to light on remand. *See Sales and Use Tax Protest of Lowe's Home Centers, Inc.,* No. P-09-195-H (Okla. Tax Comm'n Order May 17, 2018), *appeal docketed*, No. 117119 (Okla. Sup. Ct. June 18, 2018), at 25, n.15, 34, n.17 (copy attached as Appendix A). The Oklahoma case lends no support to Lowe's' petition for review.

3. The tax policy considerations raised by COST do not weigh in favor of this Court's acceptance of review

COST argues that sellers should be allowed to recover sales taxes paid on defaulted private label credit card accounts as a matter of good tax policy. The Legislature is the appropriate forum to evaluate the tax policy considerations weighing for and against COST's proposal.

Although this is not the forum to debate tax policy, the Department notes that for each policy argument COST raises, there are countervailing

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[2] Three flaws stand out: First, the taxing authority stipulated that Lowe's "wrote-off" the bad debts on its books and records when, in fact, the Bank did. *Sales and Use Tax Protest of Lowe's Home Centers, Inc.,* No. P-09-195-H (Okla. Tax Comm'n Order Oct. 17, 2013), at 14, ¶ 30. CP 1103. Second, the ALJ mistakenly ruled that Lowe's' right to a sales tax refund for bad debts turned solely on whether it could deduct its guaranty payments as bad debts on its federal income tax returns. *Id.* at 34. CP 1123. Third, the ALJ disregarded the Oklahoma Supreme Court's holding that Oklahoma's bad debt statute "implicitly requires" the person claiming a bad debt deduction to be "the owner of the bad debt account." *Id.* at 29 (quoting *In re Sales Tax Claim for Refund of Home Depot*, 198 P.3d 902, 904 (Okla. Civ. App. 2008)). CP 1122.

policy concerns the Legislature should have the opportunity to consider. For example, consumer rights advocates may argue that providing tax incentives for private label credit card programs tends to harm consumers who get trapped in endless cycles of debt, compounded by finance charges and late fees, when sellers condition "discounts" or "rewards" on a buyer's use of a private label credit card to purchase goods.

Another potential issue is that allowing refunds on guaranty payments could expose the State to enormous and unforeseeable liabilities for sales tax refunds on bank-issued credit card accounts. The Court of Appeals' decision properly adheres to the principle that tax deduction statutes are to be strictly construed "to protect the State from unanticipated losses." *Lacey Nursing Center, Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 49-50, 905 P.2d 338 (1995) (citations omitted). The Legislature is in a better position than this Court to take account of the public policy concerns implicated by a broad interpretation of the bad debt statutes.

B. Kohl's Misreads the Legislative History and Falsely Analogizes a Guaranty Payment to a Dishonored Check

1. Every version of RCW 82.08.037 has required that the seller own the bad debt for which it claims a tax refund

Kohl's incorrectly asserts the Legislature fundamentally changed the scope of the sales tax refund for bad debts in 2004 when it substituted the phrase, "debts which are bad debts under 26 U.S.C. Sec. 166," with

"bad debts as that term is used in 26 U.S.C. Sec. 166." Kohl's Br. at 3. Kohl's argues that with this change the Legislature eliminated the requirement that a seller must own the bad debt. To the contrary, these two statutory phrases are synonymous. In fact, *every* version of RCW 82.08.037 has required that the seller, itself, originated the bad debt obligation for which a sales tax refund is claimed.

From 1982 through 2003, RCW 82.08.037 provided: "A seller is entitled to a credit or refund for sales taxes previously paid on debts which are deductible as worthless for federal income tax purposes." Laws of 1982, 1st Ex. Sess., ch. 35, § 35. In *Puget Sound National Bank v. Department of Revenue,* 123 Wn.2d 284, 868 P.2d 127 (1994), this Court interpreted the statute as applying only to bad debts sustained by "a seller," or the assignee of a seller's unpaid customer debt obligations. In *Home Depot*, the Court of Appeals followed *Puget Sound* in holding that former RCW 82.08.037 required that a seller cannot receive a sales tax refund on unpaid debts owed to third party lenders. 151 Wn. App. at 922.

The 2003 and 2004 amendments to RCW 82.08.037 did not change the scope of the sales tax refund for bad debts. The purpose of the amendments was to conform Washington's bad debt statute with the SSUTA's uniform bad debt rules and other provisions. Laws of 2003, ch. 168, § 1. Kohl's appears to concede the 2003 amendment did not make

any substantive change to the requirement that a seller must own the bad debt. But it argues the 2004 amendment eliminated that requirement.

The 2004 amendment of RCW 82.08.037 was part of a clean-up bill aimed at "correcting errors, omissions, and inconsistencies" in the 2003 legislation, and there is no indication in the legislative history or elsewhere that the Legislature intended the substantive change argued by Kohl's. Laws of 2004, ch. 153. The Legislature merely clarified that it did not intend "to affect the holding" of this Court in *Puget Sound* by adopting the SSUTA's uniform bad debt rules. Laws of 2004, ch. 153, § 301.

When the Legislature ultimately superseded the *Puget Sound* decision in 2010 (thereby disallowing the seller's assignment of a bad debt refund claim), it made it unmistakably clear that the right to a sales tax refund on bad debts applies only to sellers that originated the buyer's unpaid debt obligation. *See* Laws of 2010, ch. 23, § 1502(7) (only the seller that "generated the bad debt" may claim a sales tax refund). RCW 82.08.037 has never allowed sales tax refunds on bank-issued loans.

2. Bad debts from dishonored checks are fundamentally different from bad debts from a contractual guarantee

Kohl's contends the bad debt deductions taken by a seller on amounts paid in reimbursement of third party bad debts are identical, in substance and form, to the bad debt deductions taken by a seller for

dishonored checks. Kohl's Br. at 5. To the contrary, these two types of bad debts are fundamentally dissimilar in ways that confirm the soundness of the Court of Appeals' decision.

In the case of a dishonored check that proves uncollectible, the seller never receives payment from the buyer for the goods sold. The unpaid debt obligation is reflected on the seller's books as an account receivable equal to the amount the seller remains entitled to collect from the buyer.[3] The seller is out of pocket as to both the sale proceeds and the sales taxes it paid to the State on the buyer's behalf. If the account receivable proves uncollectible, the seller must sustain the loss as to the uncollectible sale proceeds, but it may recover the sales taxes and retailing B&O taxes it paid on its bad debts.

The federal bad debt deductions taken for guaranty payments are not equivalent to the uncompensated losses of a seller that accepted a bad check as payment. A guaranty payment is not deductible as a bad debt for federal tax purposes unless it was made in exchange for "reasonable consideration." 26 C.F.R. § 1.166-9(e). Lowe's concedes it received various kinds of benefits in exchange for its contractual guaranty. CP 454.

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[3] *See* CP 962-63 (IRS audit report explaining that upon a bank's refusal to pay a check, Lowe's would reverse the entry it made to its cash account for the face value of the check, record an account receivable for an equivalent amount, and pursue collection of the unpaid debt obligation due from the buyer).

For this reason, alone, the deductible bad debts of a guarantor are not economically equivalent to bad debts attributable to dishonored checks, and the Court of Appeals correctly concluded that Lowe's' guaranty payments do not provide the basis for a sales or B&O tax refund.

Moreover, it is factually inaccurate to assert the sale proceeds Lowe's received from the Bank were "taken back" when a customer defaulted. Kohl's Br. at 6. There was nothing contingent about Lowe's' receipt of cash payment of the entire amount it was entitled to collect from the buyer. Lowe's recorded the transaction as a cash sale, and it never made an entry on its books and records reflecting an unpaid debt obligation on the private label credit card transactions. CP 52, 113, 945. Lowe's did not, in fact, pay back anything when a customer defaulted on its credit card debt. Lowe's merely had to make up for any shortfalls in the Bank's "target" rate of return, which was measured by the *total amount* of the Bank's collections, *including financing charges*. CP 44.

Because the Bank usually exceeded its target rate of return, Lowe's actually received additional income under its profit-sharing agreement. Thus, Lowe's was in a better position than sellers like Home Depot that paid service fees on private label credit card transactions because Lowe's paid no transaction fees to the Bank and received a share of its profits.

Unlike in the case of a dishonored check, Lowe's actually received cash payment of the sales taxes and the selling price of the goods it sold. Lowe's' "Bad Debt Guarantee" merely reduced the amount of additional financing income it received from the Bank. This is a far cry from the bad debt loss of a seller that accepted a dishonored check as payment.

III. CONCLUSION

The Court of Appeals correctly applied the bad debt statutes in holding that Lowe's' is not entitled to a refund of sales taxes or retailing B&O taxes on bad debts owned by the Bank. Amici's arguments in support of Lowe's' petition for review do not withstand scrutiny. Review is not warranted under RAP 13.4(b).

RESPECTFULLY SUBMITTED this 28th day of December, 2018.

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 28th day of December, 2018, at Tumwater, WA.

Jamie Falter, Legal Assistant

APPENDIX A

BEFORE THE OKLAHOMA TAX COMMISSION
STATE OF OKLAHOMA

IN THE MATTER OF THE SALES TAX AND USE TAX PROTEST OF LOWE'S HOME CENTERS, INC.	)))	**CASE NO. P-09-195-H**

ORDER NO. 2018 05 17 21

The above matter comes on for entry of a final order of disposition by the Oklahoma Tax Commission ("Commission").[1] This cause came on for consideration as a result of the *Findings of Fact, Conclusions of Law and Recommendations* entered by the Administrative Law Judge ("ALJ") on the 23rd day of October, 2017. Lowe's Home Centers, Inc. ("Protestant or LHC") appeared through attorneys, John M. Allan, E. Kendrick Smith, and David Kutik, JONES DAY. The Compliance Division ("Division") of the Oklahoma Tax Commission appeared through Marjorie L. Welch, First Deputy General Counsel, Office of General Counsel, Oklahoma Tax Commission. Having reviewed the files and records herein, including the October 23, 2017 *Findings, Conclusions and Recommendations* ("*FCR* 10/23/2017") and the August 19, 2013 *Findings, Conclusions and Recommendations* ("*FCR* 08/19/2013") on which Commission Order No. 2013-10-17-03 was based, the Commission hereby vacates[2] the ALJ's October 23, 2017 *Findings, Conclusions and Recommendations*, and enters the following Order of the Commission.[3]

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[1] The Tax Commission is vested with jurisdiction over the parties and subject matter pursuant to 68 O.S. § 221(C) and *OAC* 710:1-5-38.

[2] "The Tax Commission may, in its discretion, vacate, modify, or affirm, in part or whole, the recommendations of the Administrative Law Judge." (*OAC* 710:1-5-41).

[3] "The Tax Commission will issue a written order in each case whether or not application for oral argument is made." *Id.*

STATEMENT OF THE CASE

This matter took on life on November 20, 2009, when the protest file of Lowe's Home Centers, Inc.[4] was received by the Office of Administrative Law Judges.[5] In general, this matter involves the question of whether, under the circumstances presented, and, if so, to what extent, Protestant qualifies for the deduction from taxable sales for bad debts provided by 68 O.S. § 1366 ("Bad Debt Statute"). The complicating factor is the financing arrangement into which LHC entered with various banks ("BANKS"),[6] whereby the BANKS would issue private label credit cards ("PLCC") to LHC customers ("Cardholders") which the Cardholders could use to purchase goods from LHC stores. In Tax Commission Order No. 2013-10-17-03, the Commission ruled that LHC qualified for the deduction based primarily on the assertion that LHC was a guarantor of Cardholder debt under the terms of the various PLCC Agreements. *See*, OTC Order No. 2013-10-17-03 at 31-32. While further review of the facts and agreements between LHC and their PLCC vendors has raised questions as to the validity and accuracy of the initial order, the Commission chooses not to revisit that issue at this time. However, the issue of

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[4] LHC is a corporation organized under North Carolina law with a principal place of business in Wilkesboro, North Carolina. LHC was at all times registered to conduct business in Oklahoma during the assessment period of November 1, 2004 through October 31, 2007 (the "Assessment Period"). *See*, OTC Order No. 2013-10-17-03 at 8.

[5] On November 22, 2011, the ALJ issued an *Order Bifurcating Proceedings* into two issues: 1) Whether Protestant properly took sales tax deductions on its Oklahoma sales tax returns during the period of November 1, 2004 through October 31, 2007 for purchases made on private label credit cards ("PLCC") when the PLCC accounts were written off as worthless and deducted on LHC's federal corporate income tax returns; and 2) Whether and to what extent Protestant is acting as a "contractor" under Oklahoma law when it contracts to affix tangible personal property to real property owned by its customers. *See*, (*FCR* 10/23/2017 at 1-2). In OTC Order No. 2015-02-26-13, the Commissioners concluded, in pertinent part, that the Protestant met the definition of "Contractor," as defined in the Sales Tax Code. The Protestant is engaged in a contractual arrangement for the improvement of real property. *See*, *Id.* at 45. *See also Lowe's Home Centers, LLC v. Indiana Dept. of State Revenue*, 23 N.E.3d 52 (*Pet. for Review denied*, June 4, 2015) (Held, taxpayer required to remit use tax for construction materials rather than collect sales tax from customers, and regulations distinguishing between lump sum contracts and "time and material" contracts for purposes of sales and use tax are invalid.).

[6] LHC executed separate private label credit card agreements ("Agreements") that were effective during the Assessment Period. The Agreements provided that GE Capital Financial, Inc., Monogram Credit Bank of Georgia, and GE Money Bank (collectively, the "BANKS") would extend credit to LHC's customers. *See*, OTC Order No. 2013-10-17-03 at 12.

the calculation of the amount of the bad debt to be allowed was left unresolved; specifically, whether "the stipulated sales tax, exclusive of penalty and interest ... must be adjusted for PLCC cardholder payments applied by the Banks to debt cancellation insurance, fees, and interest, in accordance with the Bad Debt Statute and Rule [*OAC* 710:65-11-2]." *Id.* at 35-36. An additional remaining issue is whether LHC sourced bad debt taken on the face of sales tax reports filed for months during the audit period to the correct city/county.[7]

On April 29, 2016, the ALJ issued *Findings, Conclusions and Recommendations on Issue No. One (Sub-Issues 1 and 2).* The ALJ concluded, "Based upon a review of the record, the Protestant has failed to meet its burden of proof, by preponderance of the evidence, that the Division's disallowance of the Bad Debt Deduction claimed by the Protestant on its sales tax reports during the Assessment Period was incorrect and in what respects." *See FCR* 04/29/2016 at 24. "The ALJ recommend[ed] denial of the protest to the Division's disallowance of the Bad Debt Deduction, based upon the facts and circumstances..., set forth [therein]." *See, Id.* at 25.

On May 11, 2016, the Protestant *moved for Clarification and for Reconsideration* ("*Motion for Clarification/Reconsideration*"), with Exhibits A through D, attached thereto. *See, FCR* 10/23/2017 at 8. On July 21, 2016, the ALJ issued an *Order Granting Protestant's Motion for Clarification/Reconsideration, Issue No. One (Sub-Issues 1 and 2).* Subsequent to briefing by the parties,[8] the ALJ closed the record and submitted the matter for decision as of April 11,

[7] On July 20, 2015, the Division filed its *Statement of Remaining Issues and Objection to "Proposed" Sampling Methodology for Determination of City/County Bad Debt*, stating: "Division hereby advises the Court that there are two remaining issues to be decided. The first is whether the bad debt credit claimed by [Protestant] must be adjusted for Private Label Credit Card ("PLCC") cardholder payments applied by the issuer of the PLCC ("Banks") to debt cancellation insurance, fees and interest prior to the Banks providing [Protestant] the amount of bad debt which was reported by [Protestant] on filed sales tax reports. The second issue is whether [Protestant] sourced bad debt taken on the face of sales tax reports filed for months during the audit period to the correct city/county." *FCR* 10/23/2017 at 5.

[8] As part of the briefing process, the Protestant filed its *Reply to Compliance Division's Response to Account Specific Information Provided by [Protestant]*, proposing Dr. Wayne B. Thomas as an expert witness "[to] further

2017. Pursuant to *OAC* § 710:1-5-38 (July 11, 2013), the ALJ submitted the matter for decision on the following specified pleadings:

1. Stipulated facts and Issue, including Exhibits A through D, E (CD), and F through V, submitted on October 15, 2012;
2. Order No. 2013-10-17-03 dated October 17, 2013, adopting the *Findings of Fact, Conclusions of Law and Recommendations* made and entered by the Administrative Law Judge on August 19, 2013;
3. Protestant's *Status Report* on Issue No. 1, including Exhibits A through D; submitted June 8, 2015.
4. *Statement of Remaining Issues and Objection to "Proposed" Sampling Methodology for Determination of City/County Bad Debt* submitted July 20, 2015;
5. Letter of the Administrative Law Judge dated August 14, 2015;
6. *Division Response on Sub-Issue Two* submitted September 18, 2015;
7. Scheduling *Order* dated September 29, 2015;
8. *Joint* Stipulation *of Facts and Issues* dated November 17, 2015;
9. *Brief of Compliance Division – Issue One (Sub-Issues 1 and 2)*, submitted November 25, 2015;
10. *Protestant's Response in Opposition to Division's Brief*, including Exhibits 1 through 6, submitted December 15, 2015;
11. *Reply of the Compliance Division*, submitted January 5, 2016;
12. *Findings, Conclusions and Recommendations* filed April 29, 2016;
13. Protestant's *Motion for Clarification and for Reconsideration*, including Exhibits A through D; submitted May 11, 2016;
14. *Response of the Compliance Division to Protestant's Motion for Clarification and for Reconsideration* submitted May 26, 2016;
15. Protestant's *Reply Brief in Support of Its Motion for Clarification and for Reconsideration* submitted June 6, 2016;
16. *Order Granting Protestant's Motion for Clarification and Motion for Reconsideration*;
17. *Response to Account Specific Information* filed by the Division on February 13, 2017, including Exhibits A and B; and
18. *Protestant's Reply to Compliance Division's Response*, including Exhibits A through C; filed on March 15, 2017.

See, FCR 10/23/2017 at 13.

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assist the Court in resolving these ... issues." *FCR* 10/23/2017 at 11. Protestant attached Dr. Thomas' notarized "Expert Affidavit" and his Curriculum Vitae to its *Reply to Compliance Division's Response to Account Specific Information Provided by [Protestant]* as Exhibit A. *Id.* at 12. The ALJ qualified Dr. Thomas as an expert witness pursuant to 12 O.S. §§ 2702, 2703 and 2704. *Id.* By "Expert Affidavit", "Dr. Thomas ("Expert Witness") testified on the accuracy and reasonableness of certain sampling methodologies for allocating sales tax bad debt deductions among various localities in Oklahoma." *Id.*

Based on the Commission's review of the facts and circumstances of this matter, the Commission finds it necessary to reject the recommendations contained in the *Findings, Conclusions and Recommendations* dated October 23, 2017.

RELEVANT FACTS

1. LHC deducted bad debts on its Oklahoma sales tax returns ("Sales Tax Returns") filed during the Assessment Period (November 1, 2004 through October 31, 2007) including bad checks, third-party credit card chargebacks and bad debts related to PLCC accounts. OTC Order No. 2013-10-17-03 at 11, ¶ 19.

2. The Division reviewed and allowed all bad debt deductions related to bad checks and third-party credit card chargebacks, but disallowed the bad debt deductions related to PLCC accounts taken by LHC during the Assessment Period in the total principal sum of $9,984,481.60 ("Disallowed Claims"). *Id.* at 11-12, ¶ 20.

3. LHC entered into private label credit card agreements with GE Capital Financial, Inc., Monogram Credit Bank of Georgia, and GE Money Bank (collectively, the "Banks" or "BANKS"), that were effective during the Assessment Period, to extend credit to LHC's customers. *Id.* at 12, ¶ 21.

4. During the Assessment Period, a customer seeking to purchase goods from LHC could submit a PLCC application with the Banks at an LHC store location. The Banks reviewed the credit application and determined whether to establish a credit account. *Id.* at 13, ¶ 26.

5. Specifically, the Agreements provide:

> Bank, in its sole discretion, shall determine the creditworthiness of individual applicants under the Program, the range of credit limits to be made available to individual Cardholders, whether to suspend or terminate credit privileges of any Cardholder, and the credit criteria to be used in evaluating applicants in connection with the Program, and shall establish all of the terms and conditions of the Credit Card Agreement and may modify all such terms and conditions from

> time to time in its sole discretion. Subject to prior consultation with the Policy Committee, Bank shall have the sole right to establish the finance charge rates, annual fees, late fees, returned check fees and all other terms and conditions relating to the Accounts, and to amend or modify such rates, fees and/or terms from time to time.

See, ALJ-OK-LHC 00000154.[9]

6. If the credit application was approved, LHC's customer (the "Cardholder") acquired a PLCC from the Banks and could then purchase goods from LHC using the PLCC. OTC Order No. 2013-10-17-03 at 13, ¶ 26.

7. Within a day or two of the PLCC transactions, the Banks remitted payment for the credit card purchases made by Cardholders to LHC by electronic means. LHC collected and remitted Oklahoma sales tax during the Assessment Period on the retail sale of its products to Cardholders who paid for the products using a PLCC. *Id.* at 13, ¶ 17. Upon transfer of the payments to LHC and LHC's remittance of the sales taxes due from the sale, LHC was no longer involved in the transaction or relationship with the customer and the Banks enjoyed all profits and monies as a result of interest, private credit insurance and other fees that arose out of the original transaction with LHC. *See*, ALJ-OK-LHC 00000154-00000155.[10]

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[9] References herein to provisions of the Agreements are made with respect to the "Amended and Restated Business Revolving Charge Program Agreement" between LHC and GE CAPITAL FINANCIAL, INC. dated January 31, 2003. The other Agreements between LHC and the BANKS contain substantially the same provisions.

[10] Sections 3.02(a) and (b) the Agreement state:

> (a) Bank is and shall be the sole and exclusive owner of all Accounts, Account Documentation, Indebtedness, Cardholder data, Charge Transaction Data, Charge Slips, Credit Slips and receipts or evidences of payment for Purchases by Cardholders and shall be entitled to receive all payments made by or on behalf of Cardholders on Accounts. *** ***Retailers acknowledge and agree that they have no right, title or interest in or to any of the foregoing and no right to any payments made by or on behalf of Cardholders on Accounts or any proceeds with respect to the Accounts.*** *** [A] collection procedures shall be under the sole control and discretion of Bank and may be modified from time to time by Bank.
>
> (b) The primary and ***exclusive right to receive payments*** by or on behalf of Cardholders with respect to Indebtedness ***shall be vested in Bank.*** In this regard, ***Bank shall be entitled to retain for its account all Program Revenues***, if any, and shall bear all Program Expenses, with respect to the Accounts and Indebtedness.

8. Under the Agreements between the customer and the Banks, PLCC Cardholder payments made to and retained exclusively by the Banks were applied to the Cardholder's account balance in the following order: (1) debt cancellation insurance, (2) fees (such as late fees), (3) interest, and (4) principal. OTC Order No. 2013-10-17-03 at 13, ¶ 28.

9. Pursuant to the Agreements,

> "**Program**" means all aspects of the private label credit card program established and maintained by Bank pursuant to this Agreement. "**Program Revenues**" means all income and revenue generated by the Program, including, without limitation, Cardholder finance charges, late fees, returned check fees, Insurance Program and Value-Added Program revenues, and any other fees or income collected with respect to the Program.

See, ALJ-OK-LHC 00000140, 00000149 (Emphasis original.).

10. The parties agreed that LHC would enjoy the benefits of any refunds of sales tax due arising from non-payments by customers. Specifically, Article IV, section 4.05(b) of the Agreement states:

> Bank agrees that Retailers and not Bank shall have the right to claim any available sales tax deductions related to Net Write-Offs borne by Retailers pursuant to Section 4.02 *** Bank agrees to provide to Retailer on a monthly basis such reasonable information as Retailers require to support a deduction for such Write-Offs. Bank will use commercially reasonable efforts to summarize such information on a state-by-state basis and such information shall be the exclusive of all recovery expenses, late fees, insurance and finance charges.

See ALJ-OK-LHC-00000161.

11. The Division has not verified the bad debt deductions related to PLCCs taken on LHC's Sales Tax Returns during the Assessment Period and disallowed by Division. OTC Order No. 2013-10-17-03 at 14, ¶ 34.

12. As reflected above, the Agreements mandate that the Banks retain detailed information on actual PLCC bad debt and provide a summary of the information to LHC on a

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Agreement at 16-17, Sections 3.02(a) and 3.02(b); ALJ-OK-LHC 00000154-00000155 (Emphasis added.).

state-by-state basis. During the Assessment Period, LHC deducted on its Sales Tax Returns the Oklahoma PLCC bad debt amounts provided LHC by the Banks, less amounts subsequently recovered. *Id.* at 14, ¶ 33.

CONCLUSIONS OF LAW

1. The Tax Commission has promulgated rules as provided by law for compliance with the Oklahoma Administrative Procedures Act, 75 O.S. §§ 250 *et seq.* (2002), and to facilitate the administration, enforcement, and collection of taxes under the Oklahoma Sales Tax Code. 68 O.S. §§ 1351 *et seq.* (2017).

2. The rules promulgated under the Administrative Procedures Act are presumed to be valid and binding on the persons they affect and have the force of law. *See Toxic Waste Impact Group, Inc. v. Leavitt*, 1988 OK 20, 755 P.2d 626.

3. Great weight is accorded an agency's construction of a statute when the administrative interpretation is made contemporaneously with the enactment of the statute and the construction is longstanding and continuous by the agency charged with its execution. *Schulte Oil Co., Inc. v. Oklahoma Tax Commission*, 1994 OK 103, 882 P.2d 65.

4. Where the Legislature is made repeatedly aware of the operation of the statute according to the construction placed upon it by an agency and the Legislature has not expressed its disapproval with the agency's construction, the Legislature's silence may be regarded as acquiescence in the agency's construction. *R.R. Tway, Inc. v. Oklahoma Tax Commission*, 1995 OK 129, 910 P.2d 972. The agency's construction is given controlling weight and will not be disregarded except in cases of serious doubt. *Cox v. Dawson*, 1996 OK 11, 911 P.2d 272.

5. The rules and regulations of an administrative agency which implement the provisions of a statute are valid unless they are beyond the scope of the statute, are in conflict

with the statute, or are unreasonable. *Arkansas Louisiana Gas Co. v. Travis*, 1984 OK 33, 682 P.2d 225; *see also, Boydston v. State*, 1954 OK 327, 277 P.2d 138. Generally, it is presumed that administrative rules and regulations are fair and reasonable and that the complaining party has the burden of proving the contrary by competent and convincing evidence. *State ex rel. Hart v. Parham*, 1966 OK 9, 412 P.2d 142.

6. The goal of any inquiry into the meaning of a legislative act is to ascertain and give effect to the intent of the legislature. The law-making body is presumed to have expressed its intent in a statute's language and to have intended what the text expresses. Hence, where a statute is plain and unambiguous, it will not be subject to judicial construction, but will be given the effect its language dictates. Only where the intent cannot be ascertained from a statute's text, as occurs when ambiguity or conflict (with other statutes) is shown to exist, may rules of statutory construction be employed. *Blitz U.S.A., Inc. v. Oklahoma Tax Com'n,* 2003 OK 50, ¶ 14, 75 P.3d 883. *See YDF, Inc. v. Schlumar, Inc.*, 2006 OK 32, 136 P.3d 656, 658 ("Test for ambiguity in statute is whether statutory language is susceptible to more than one reasonable interpretation.").

7. Statutory construction presents a question of law. *Id.*

8. The legislature will not be presumed to have intended a *vain or absurd* result. *Strelecki v. Oklahoma Tax Com'n*, 1993 OK 122, 872 P.2d 910.

9. Tax statutes are penal in nature. Where there is reasonable doubt about the taxing act's meaning, all ambiguity must be resolved in favor of the taxpayer. Legislative intention—ascertained from a general consideration of the entire act—must be given effect. Nonetheless, courts cannot enlarge the taxing act's ambit to make its provision's applicable to cases not clearly within the Legislature's contemplation or to fill lacunae in the revenue law in a manner

that would distort the enactment's plain language. *Globe Life and Acc. Ins. Co. v. Oklahoma Tax Commission*, 1996 OK 39, ¶¶ 11-14, 913 P.2d 1322.

10. Tax exemptions, deductions, and credits depend entirely on legislative grace and are strictly construed against the exemption, deduction or credit. *TPQ Investment Corp. v. Oklahoma Tax Commission,* 1998 OK 13, ¶ 8, 954 P.2d 139, 141. To be allowed, authority for the deduction sought must be clearly expressed. *Home-State Royalty Corporation v. Weems*, 1935 OK 1043, 175 Okla. 340, 52 P.2d 806 (1935). None may be allowed in absence of a statutory provision therefor. *Id. See, New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440, 54 S.Ct. 788, 78 L.Ed. 1348 (1934).

11. For purposes of determining the correct Oklahoma income tax and in administering the provisions of 68 O.S. § 2375(H), "[w]hen the [IRS] changes the Federal Income Tax Return by issuing its final determination, the Tax Commission shall have the authority to audit each and every item of income, deduction, credit or any other matter related to the return where such items or matters relate to allocation or apportionment between the State of Oklahoma and some other state or the federal government even if such items or matters were not affected by revisions made in such final determination;" otherwise, the Commission is bound by the revisions made in such final determination. *OAC* § 710:50-3-8(d) (June 11, 2005); 68 O.S. § 2375(H)(4).

12. In addition to information required on any state tax return or report prescribed by the Oklahoma Tax Commission, upon request or demand for production of information by the Commission, or its duly authorized agent, a state taxpayer shall furnish any information deemed necessary to determine the amount of state tax liability. Notwithstanding 68 O.S. § 205, the Commission shall have the power to compel the production of books, records or papers of any

person, firm, association, partnership, corporation or other legal entity regarding the business, property, assets or effects of any Oklahoma taxpayer which may be necessary to a determination of state tax liability of such taxpayer, including any books, records or papers necessary to obtain or verify information necessary for resolution of a protest by a taxpayer to an assessment of tax or additional tax or to the resolution of a claim for refund filed by a taxpayer. If the information is deemed confidential or proprietary by the person, firm, association, partnership, corporation or other legal entity, no production can be compelled pending a hearing on the nature and extent of the production of privileged and confidential information. 68 O.S. § 248.

13. In the administration of any state tax law, the Tax Commission may make, or cause to be made by its employees or agents, an examination or investigation of the place of business, the tangible personal property, equipment and facilities, and the books, records, papers, vouchers, accounts and documents of any taxpayer. It shall be the duty of every taxpayer and of every director, officer, agent, or employee of every taxpayer to exhibit to the Tax Commission, or to the employees or agents of such Tax Commission, the place of business, the tangible personal property, equipment and facilities, and the books, records, papers, vouchers, accounts and documents of such taxpayer, and to facilitate any such examination or investigation so far as it may be in his or her power so to do. 68 O.S. §§ 103, 206(a).

14. When books, records, papers, vouchers, accounts or documents of a taxpayer are in the possession of any person, firm or corporation other than the taxpayer, any member of the Tax Commission may compel by subpoena the production of such books, records, papers, vouchers, accounts or documents by the party in possession for inspection by employees or agents of the Tax Commission. 68 O.S. §§ 103, 206(b); *see*, *Dunn v. State ex rel. Oklahoma Tax Comm'n*, 1991 OK CIV APP 3, ¶ 6, 805 P.2d 125, 127 ("[T]he duty of a "taxpayer" to provide

documents on request of the OTC, and/or the subpoena power of OTC to compel production of documents is statutory." *Id.* citing 68 O.S. §§103, 206.)

15. An auditor for the Commission may suggest a sample sales/use tax audit rather than a detailed audit. The auditor shall select the periods to sample and apply the results to all the periods of the audit. The auditor shall prepare forms to be signed by the taxpayer stating they agree with the periods and method chosen for the sample. *OAC* 710:65-5-2.

16. The burden of establishing the right to, and the validity of a bad debt credit is on the vendor. *OAC* § 710:65-11-2(d).

17. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[11]

18. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects. *See Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

THE CONTROVERSY

At the base of this controversy is Oklahoma's Bad Debt Statute, 68 O.S. § 1366, and Bad Debt Rule, *OAC* 710:65-11-2. In its Order finding Protestant qualified for the sales tax Bad Debt Deduction, the Commission determined: "The language of the Bad Debt Statute is plain and unambiguous, so it will not be subject to judicial construction, but will be given the effect its language dictates. *See* OTC Order No. 2013-10-17-03, at 30, citing *Globe Life and Acc. Ins. Co.*

[11] OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999):

> In all administrative proceedings, unless otherwise provided by law, the burden of proof shall be upon the protestant to show in what respect the action or proposed action of the Tax Commission is incorrect. If, upon hearing, the protestant fails to prove a prima facie case, the Administrative Law Judge may recommend that the Commission deny the protest solely upon the grounds of failure to prove sufficient facts which would entitle the protestant to the requested relief.

v. Oklahoma Tax Commission, 1996 OK 39, ¶¶ 11-14, 913 P.2d 1322. In OTC Order No. 2013-10-17-03 and in subsequent proceedings to determine the amount of the bad debt deduction for sales tax purposes, the Division took the position "that the amount of the credit claimed by Protestant on its sales tax returns for the Assessment Period exceeded the amount allowed by the Oklahoma Bad Debt Statute to the extent the Banks received and applied payments from PLCC cardholders to finance charges and interest." *See*, Division's *Statement of Remaining Issues and Objection to "Proposed" Sampling Methodology for Determination of City/County Bad Debt* at 4-5; *see also*, OTC Order No. 2013-10-17-03 at 35.

Based on an asserted ambiguity of the Bad Debt Rule, the Protestant argued that the Cardholder Agreement controls the allocation of pre-write-off cardholder payments. *See*, Protestant's *Response in Opposition to Division's Brief* at 4-10. As such the Banks applied the Cardholder's payments to the account balance in the following order: (1) debt cancellation insurance, (2) fees (such as late fees), (3) interest, and (4) principal. *Id.* at 3; OTC Order No. 2013-10-17-03 at 13, ¶ 28.

The Division contends that any calculation of the sales tax liability shall be exclusive of any payments applied to something other than principal and sales tax, thus requiring all payments to be recalculated to reflect payment(s) by the customer being applied to those liabilities first. *See*, *FCR* 10/23/17 at 28, quoting Division's *Brief-Issue One (Sub-Issues 1 and 2)* at 6 ("The Oklahoma Bad Debt Statute and rule promulgated pursuant thereto require a vendor to adjust the amount of its bad debt to exclude financing charges and interest in calculating the amount of the bad debt credit. Pursuant to statute and rule, the adjustment to bad debt was required to be made by LHC prior to making a bad debt claim on the face of its sales tax reports during the Assessment Period."); *See also supra* note 7.

THE BAD DEBT CREDIT/DEDUCTION

Statutory and Regulatory Synopsis:

A credit for sales tax paid on bad debts is allowed against subsequent remittances of sales tax under 68 O.S. § 1366. Since the initial enactment of the credit, the Legislature has revisited this issue three (3) times, each time forbidding the payments by the customer being applied to something other than the principal and sales tax amounts and entrusting the Tax Commission with authority to promulgate rules and regulations to enforce the Legislature's requirements.

The bad debt credit provision was first enacted by the legislature in 1980 through the amendment of 68 O.S. § 1307. *See*, OTC Order No. 97-09-18-003 (Precedential) at 6, n.3, citing Laws 1980, c. 288, § 3, eff. July 1, 1980. Contemporaneously, in order to implement the provisions of Section 1307(e)[12], the predecessor to Section 1366, the Commission "adopt[ed] a policy rule setting ***guidelines for the determination of credit*** against current sales tax liability for sales tax paid on sales which thereafter become worthless and are charged off for income tax purposes as bad debts, pursuant to § 1307 of Title 68 of the Oklahoma Statutes." OTC Order No. 81-01-09-01 at 1 (Emphasis added.) The Commission's July 1, 1980 policy guidelines state:

> (1) ***If the amount of an account found to be worthless and charged off for the income tax purposes includes both taxable and non-taxable receipts (interest, carrying charges and any expense incurred in attempting to collect the debt, etc.) a credit for sales tax paid on the bad debt may be allowed only with respect to the unpaid amount of the account receivable upon which tax has been paid, or that portion of the purchase price remaining unpaid at the time repossession has been completed.***
>
> (2) Credit taken against current tax liabilities, must be supported by records verifying the following:
>
> 1. Date of sales;
> 2. Name and address of purchaser;
> 3. Amount of purchase price or contract price;
> 4. Amount of sales tax paid; and,

[12] Repealed by Laws 1981, SB 227, c. 313, § 3, emerg. eff. June 29, 1981.

5. Evidence that the account receivable found to be worthless has been actually charged off as a bad debt for income tax purposes as of or after July 1, 1980, or that the repossession process has been completed as of or after July 1, 1980.

(3) If any accounts for which a credit has been allowed against sales tax liability are thereafter collected, the amount so collected shall be included in the total gross receipts subject to sales tax on the first return filed after such collection and the amount of the tax thereon shall be paid with the return.

(4) No credit is allowable for expenses incurred by the vendor in attempting to enforce collection of an account receivable, or for that portion of a debt recovered that is retained by or paid to a third party in collecting the account.

(5) In the case of a repossession, a bad debt credit shall be allowed only to the extent that the vendor sustains a net loss of gross receipts upon which the tax has been paid.

OTC Order No. 81-01-09-01 at 2-3 (Emphasis added.); *see also*, OTC Order No. 97-09-18-003 (Precedential) at 6-7.

As originally enacted in 1981, Section 1366, provided:

> Taxes paid on gross receipts represented by accounts receivable which, on or after July 1, 1980, are found to be worthless and actually charged off for income tax purposes or the unpaid portion of any account at the time repossession is accomplished under the terms of a conditional sales contract, may be credited upon subsequent reports and remittances of the tax levied in this article, ***in accordance with the rules and regulations of the Tax Commission.*** If such accounts are thereafter collected, the same shall be reported and the tax shall be paid upon the amount so collected.

Added by Laws 1981, c. 313, § 2, emerg. eff. June 29, 1981. (Emphasis added.)

By OTC Order No. 86-05-19-03, the Commission adopted Regulation 13-58 which provided in pertinent part:

> The credit for bad debts is limited to the tax shown on the invoice that is being charged off as a bad debt. The credit may be taken only after it has been charged off on the vendor's federal income tax return. If a portion of an account receivable is written off, only the proportionate share of the tax charged on the original invoice

> may be taken as a credit. This tax credit is allowable only to the person who remitted and reported the tax to the Oklahoma Tax Commission. Form 13-9 will be used to request a credit or refund. This form can be obtained from the Sales Tax Division.

OTC Order No. 97-09-18-003 (Precedential), citing OTC Order No. 86-05-19-03 and quoting Regulation 13-58 (Recodified as Rule 13.008.02 of the Oklahoma Tax Commission Permanent Rules (March 10, 1989).[13]

The Commission amended Rule 13.008.02 in 1991 to conform the language of the rule to the 1990 amendments to 68 O.S. § 1336 which permitted cash basis taxpayers to also claim a credit for bad debts. As amended in 1990, Section 1366 provided:

> Taxes paid on gross receipts represented by accounts receivable which, on or after December 31, 1990, are found to be worthless or uncollectible and that are eligible to be claimed if the taxpayer kept accounts on a cash basis or could be eligible to be claimed if the taxpayer kept accounts on an accrual basis, as a deduction pursuant to Section 166 of the Internal Revenue Code, or the unpaid portion of any account at the time repossession is accomplished under the terms of a conditional sales contract, may be credited upon subsequent reports and remittances of the tax levied in this article, ***in accordance with the rules and regulations of the Tax Commission***. If such accounts are thereafter collected, the same shall be reported and the tax shall be paid upon the amount so collected.

Amended by Laws 1990, c. 339, § 18, emerg. eff. May 31, 1990 (Emphasis added.). The concomitant Rule 13.008.02 stated:

> RULE 13.008.02: CREDIT FOR BAD DEBT
>
> The vendor may take a ***credit*** against the current month remittances ***for sales tax previously paid*** which have been determined to be worthless ***and*** have been or will be ***actually charged off on the vendor's books*** for the month and will be or have been written off or could be eligible to be claimed if taxpayer kept accounts on a cash basis or could be eligible to be claimed if the taxpayer kept

[13] The Commission adopted Rule 13.008.02, Oklahoma Tax Commission Permanent Rules (March 10, 1989), "revoking in their entirety all prior Commission Regulations on Sales and Use Taxes-Oklahoma Tax Commission Regulations Nos. 13-1 through 13-61."

records on the accrual basis on the current year's Income Tax Return, or for the unpaid portion of an account at the time of a repossession.

The fact that a credit has been taken against the current month must be so indicated on the face of the sales tax report. If the accounts are thereafter collected, the amount received shall be included in the gross receipts for the period in which the account is collected.

The burden of establishing the right to, and the validity of a bad debt credit is on the vendor. In order to verify each credit taken for a bad debt, the vendor must retain and make available:

1. The name of the purchaser/debtor;
2. The date of the sale or sales giving rise to the bad debt;
3. The price of the property and the amount of sales tax charged thereon;
4. The amount of interest, finance and service charges charged to the debt or account;
5. Whether the property was retained by the vendor or repossessed;
6. Any amounts charged to the debt or account representing costs of collection;
7. The dates and amounts of any payments made on the debtor's account;
8. Any portion of the debt or account which represents a charge that was not subjected to the tax in the original transaction; and
9. Records documenting that the account has been or will be written off or could be eligible to be claimed if taxpayer kept accounts on a cash basis or could be eligible to be claimed if taxpayer kept records on the accrual basis on the Federal Income Tax Return for the year, or that the item was repossessed.

The above information may be requested by the Commission at any time.

The credit for bad debts is limited to the tax shown on the invoice that is being or will be charged off as a bad debt and must be adjusted to reflect any remuneration previously taken on a sales tax report. This tax credit is allowable only to the person who remitted and reported the tax to the Commission. Subsequent recoveries of bad debts that have been taken as a credit are to be reported in the month of the recovery.

Id., *see also*, OTC Order No. 96-05-28-002 (Precedential) at 36-37 (May 28, 1996), 1996 WL 686148 at *17 (Emphasis added.).

In OTC Order No. 96-05-28-002 (Precedential) (May 28, 1996), 1996 WL 686148 at *17, the Commission provided a brief review of legislative and rule making actions pertaining to

the Bad Debt Statute and the Bad Debt Rule and noted that OTC Rule 13.008.02 was "recodified and renumbered as Rule 710:65-11-2, Oklahoma Administrative Code." *Id.* Pursuant to *OAC* 710:65-11-2, "[t]he ***following documentation is required for establishing the validity of the credit***:

> (c) The burden of establishing a right to, and the validity of a bad debt credit is on the vendor. In order to verify each credit taken for a bad debt, the vendor must retain and make available:
>
> 1) The name of the purchaser/debtor;
> 2) The date of the sale or sales giving rise to the bad debt;
> 3) The price of the property and the amount of sales tax charged thereon;
> 4) The amount of interest, finance and service charges charged to the debt or account;
> 5) Whether the property was retained by the vendor or repossessed;
> 6) Any amounts charged to the debt or account representing costs of collection;
> 7) The dates and amounts of any payments made on the debtor's account;
> 8) Any portion of the debt or account which represents a charge that was subjected to the tax in the original transaction; and
> 9) Records documenting that the account has been or will be written off or could be eligible to be claimed if taxpayer kept accounts on a cash basis or could be eligible to be claimed if taxpayer kept records on the accrual basis on the Federal Income Tax Return for the year, or that the item was repossessed."

1996 WL 686148 at *17 (Emphasis added.), *OAC* 710:65-11-2(c).

The protestant in OTC Order No. 96-05-28-002 (Precedential) contended that it was entitled to a credit for sales taxes remitted on bad debts which it realized during the audit period. *Id.* at *18. The Division refused to allow an adjustment to the assessment based on the information submitted by the protestant, arguing, in relevant part, that the information provided was deficient in several particulars, including the back-up documentation necessary to comply with Rule 710:65-11-2 of the Oklahoma Administrative Code. *Id.* "Considering the Division's arguments," the Commission found:

> PROTESTANT did not comply with the requirements for establishing the validity of the bad debt credit under Rule 710:65-11-2 of the Oklahoma Administrative Code. ***The Rule and its attendant requirements are a proper function of the Tax Commission's authority granted in 68 O.S. 1991, §§ 203 and 1366, for the administration and enforcement of the provisions of Section 1366.*** Accordingly, PROTESTANT's request for a bad debt expense adjustment to the assessment [is] denied.

1996 WL 686148, at *18 (Emphasis added.).

The "Streamlined Sales and Use Tax Administration Act" and Oklahoma's Bad Debt Statute and Rule:

Effective November 1, 2003 the Oklahoma legislature enacted certain amendments to the Oklahoma Sales Tax Code (68 O.S. § 1350 et seq.) which, in relevant part, enacted the "Streamlined Sales and Use Tax Administration Act" ("SSUTA"), authorized and directed the Commission to enter into the Streamlined Sales and Use Tax Agreement,[14] and modified procedures for taxes due pursuant to bad debts. *See*, Laws 2003, c. 413, §§ 1-29 (SB 708). As amended in conformance with Section 320 (Uniform Rules for Recovery of Bad Debts) of the Streamlined Sales and Use Tax Agreement ("SSUTA"), the Bad Debt Statute reads as follows:

> **§ 1366. Deduction from taxable sales for bad debts**
>
> A. There is herein provided a deduction to the vendor from taxable sales for bad debts. Any deduction taken that is attributed to bad debts shall not include interest.
>
> B. The federal definition of "bad debt" in 26 U.S.C., Section 166 shall be the basis for calculating bad debt recovery. However, the amount calculated pursuant to 26 U.S.C., Section 166, shall be adjusted to exclude:
>
> 1. Financing charges or interest;
> 2. Sales or use taxes charged on the purchase price;
> 3. Uncollectible amounts on property that remain in the possession of the seller until the full purchase price is paid; and
> 4. Expenses incurred in attempting to collect any debt and repossessed property.

[14] [3] The Streamlined Sales and Use Tax Agreement can be viewed at http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%Amended%20through%209-17-15.

C. Bad debts may be deducted on the return for the period during which the bad debt is written off as uncollectible in the claimant's books and records and is eligible to be deducted for federal income tax purposes if the taxpayer kept accounts on a cash basis or could be eligible to be claimed if the taxpayer kept accounts on an accrual basis. For purposes of this subsection, a claimant who is not required to file federal income tax returns may deduct a bad debt on a return filed for the period in which the bad debt is written off as uncollectible in the claimant's books and records and would be eligible for a bad debt deduction for federal income tax purposes if the claimant was required to file a federal income tax return.

D. If a deduction is taken for a bad debt and the debt is subsequently collected in whole or in part, the tax on the amount so collected must be paid and reported on the return filed for the period in which the collection is made.

E. When the amount of bad debt exceeds the amount of taxable sales for the period during which the bad debt is written off, a refund claim may be filed within the statute of limitations for refund claims provided in Section 227 of this title; however, the statute of limitations shall be measured from the due date of the return on which the bad debt could first be claimed.

F. Where filing responsibilities have been assumed by a certified service provider, the certified service provider may claim, on behalf of the seller, any bad debt allowance provided by this section. The certified service provider must credit or refund the full amount of any bad debt allowance or refund received to the seller.

G. For the purposes of reporting a payment received on a previously claimed bad debt, any payments made on a debt or account are applied first proportionally to the taxable price of the property or service and the sales tax thereon, and secondly to interest, service charges, and any other charges.

H. In situations where the books and records of the party claiming the bad debt allowance support an allocation of the bad debts among the states which are members of the Streamlined Sales and Use Tax Agreement, the allocation will be permitted.

68 O.S. § 1366, Amended by Laws 2003, c. 413, § 15, eff. Nov. 1, 2003. The provisions of 68 O.S. 2003 § 1366 accommodate, and practically mirror, each of the SSUTA Uniform Rules for Recovery of Bad Debts.

Contemporaneous with the amendments to 68 O.S. § 1366 in order to conform to the SSUTA, the Commission amended *OAC* 710:65-11-2 ("Bad Debt Rule") to state as follows:

> **710:65-11-2. Sales tax deduction for bad debt**
> (a) A vendor may take a deduction for bad debts on the return for the period during which the bad debt is written off as uncollectible in the vendor's books and records and is eligible to be deducted for Federal Income Tax purposes, if the vendor kept accounts on a cash basis, or could be eligible to be claimed if the vendor kept accounts on an accrual basis. For purposes of this Section a vendor who is not required to file Federal Income Tax Returns may deduct a bad debt on a return filed for the period in which the bad debt is written off as uncollectible in the vendor's books and records and would be eligible for a bad debt deduction if the vendor were required to file a Federal Income Tax Return.
> (b) The fact that a deduction has been taken against the current month must be so indicated on the face of the sales tax report. If the accounts are thereafter collected, the amount received shall be included in the gross receipts for the period in which the account is collected.
> (c) The "bad debt" deduction is calculated based upon the federal definition provided in 26 U.S.C. § 166 and the amount should be adjusted to exclude:
>
> *(1) Financing charges or interest;*
> *(2) Sales or use taxes charged on the purchase price;*
> *(3) Uncollectible amounts on property that remain in the possession of the seller until the full purchase price is paid; and,*
> *(4) Expenses incurred in attempting to collect any debt and repossessed property.* [68 O.S.Supp.2003, § 1366(B)]
>
> (d) The burden of establishing the right to, and the validity of a bad debt deduction is on the vendor. In order to verify each deduction taken for a bad debt, the vendor must retain and make available:
>
> (1) The name of the purchaser/debtor;
> (2) The date of the sale or sales giving rise to the bad debt;
> (3) The price of the property and the amount of sales tax charged thereon;
> (4) The amount of interest, finance and service charges charged to the debt or account;
> (5) Whether the property was retained by the vendor or repossessed;
> (6) Any amounts charged to the debt or account representing costs of collection;
> (7) The dates and amounts of any payments made on the debtor's account;
> (8) Any portion of the debt or account which represents a charge that was not subjected to the tax in the original transaction; and
> (9) Records documenting that the account has been or will be written off or could be eligible to be claimed if taxpayer kept

accounts on a cash basis or could be eligible to be claimed if taxpayer kept records on the accrual basis on the Federal Income Tax Return for the year, or that the item was repossessed.

(e) The information in subsection (d) may be requested by the Commission at any time.

(f) The deduction for bad debts is limited to the amount shown on the invoice that is being or will be charged off as a bad debt. This tax deduction is allowable only to the person who remitted and reported the tax to the Commission. Subsequent recoveries of bad debts that have been taken as a deduction are to be reported in the month of the recovery. [**See:** 68 O.S. §1366]

(g) *When the amount of bad debt exceeds the amount of taxable sales for the period during which the bad debt is written off, a refund claim may be filed within the statute of limitations for refund claims provided in Section 227 of this title; however, the statute of limitations shall be measured from the due date of the return on which the bad debt could first be claimed.*

(h) *Where filing responsibilities have been assumed by a certified service provider, the certified service provider may claim, on behalf of the seller, any bad debt allowance provided by this section. The certified service provider must credit or refund the full amount of any bad debt allowance or refund received to the seller.*

(i) *For the purposes of reporting a payment received on a previously claimed bad debt, any payments made on a debt or account are applied first proportionally to the taxable price of the property or service and the sales tax thereon, and secondly to interest, service charges, and any other charges.*

(j) *In situations where the books and records of the party claiming the bad debt allowance support an allocation of the bad debts among the states which are members of the Streamlined Sales and Use Tax Agreement, the allocation will be permitted.* [68 O.S.Supp.2003, § 1366]

OAC § 710:65-11-2 (June 25, 2004) (Emphasis original.)

The Commission's Interpretation and Application of the Bad Debt Statute and Rule:

To begin, the Commission recognizes that the Legislature is authorized to outline by general law the general scope and purpose of the laws and delegate to an administrative commission the power to promulgate administrative rules and regulations. *See* OTC Order No. 96-05-28-002/Precedential, 1996 WL 686148 (Okl.Tax.Com.) citing, *Associated Industries of Okla. v. Industrial Welfare Comm.*, 185 Okla. 177, 90 P.2d 899 (1939). Further, in addition to the specific directive to issue rules and regulations as to sales tax deductions pursuant to Sec. 1366, the Tax Commission is authorized to promulgate reasonable rules and regulations with

respect to the administration and enforcement of each and every provision of any state tax law. 68 O.S. §203. Section 203 provides:

> The Oklahoma Tax Commission is hereby authorized to enforce the provisions of the [Uniform Tax Procedure Code] and to promulgate and enforce any reasonable rules with respect thereto. The Tax Commission may also prescribe, promulgate and enforce all necessary rules for the purpose of making and filing all reports required under any state tax law, and such rules as may be necessary to ascertain and compute the tax payable by any taxpayer subject to taxation under any state tax law; and ***may, at all times exercise such authority as may be necessary to administer and enforce each and every provision of any state tax law.***

Id. (Emphasis added.)

Since the Commission has declared the Bad Debt Statute to be clear and unambiguous, it is axiomatic that those provisions of the Bad Debt Rule that simply restate or paraphrase the equivalent provisions of the Bad Debt Statute are clear and unambiguous as well. Accordingly, , the amount of "bad debt" claimed shall not include: 1) Finance charges or interest (68 O.S. 2003 §§ 1366(A) and 1366(B)(1), *OAC* 710:65-11-2(c)(1) (June 25, 2004), SSUTA §§ 307(A) and 307(B) (Nov. 19, 2003)); 2) Sales or use taxes charged on the purchase price (68 O.S. 2003 § 1366(B)(2), *OAC* 710:65-11-2(c)(2) (June 25, 2004), SSUTA § 307(B) (Nov. 19, 2003)); 3) Uncollectible amounts on property that remain in the possession of the seller until the full purchase price is paid (68 O.S. 2003 § 1366(B)(3), *OAC* 710:65-11-2(c)(3) (June 25, 2004), SSUTA § 307(B) (Nov. 19, 2003)); and 4) Expenses incurred in attempting to collect any debt and repossessed property (68 O.S. 2003 § 1366(B)(4), *OAC* 710:65-11-2(c)(4) (June 25, 2004), SSUTA § 307(B) (Nov. 19, 2003)).

Clearly, a Bad Debt Deduction cannot include any of the charges itemized in 68 O.S. 2003 § 1366(B) and *OAC* 710:65-11-2(c); therefore, "[i]n order to verify each deduction taken for a bad debt, the vendor must retain and make available" (*OAC* 710:65-11-2(d)): "The amount of interest, finance and service charges charged to the debt or account" (*OAC* 710:65-11-

2(d)(4)); "Any amounts charged to the debt or account representing costs of collection" (*OAC* 710:65-11-2(d)(6)); "The dates and amounts of any payments made on the debtor's account" (*OAC* 710:65-11-2(d)(7)); "Any portion of the debt or account which represents a charge that was not subjected to the tax in the original transaction" (*OAC* 710:65-11-2(d)(8)). "The information in [*OAC* 710:65-11-2(d)] may be requested by the Commission at any time." *OAC* 710:65-11-2(e). "The burden of establishing the right to, and the validity of a bad debt deduction is on the vendor." *OAC* § 710:65-11-2(d) (June 25, 2004).

The reason these charges cannot be included in the sales tax credit/deduction for bad debt is that normally no sales tax is collected for these charges. *See*, OTC Order No. 97-09-18-003 (Precedential) at 6, n.3, citing Laws 1980, c. 288, § 3, eff. July 1, 1980; *see also*, OTC Order No. 81-01-09-01 at 2-3 (Credit for sales tax paid on bad debt allowed only with respect to the unpaid amount of the account receivable upon which tax has been paid.); OTC Order No. 97-09-18-003 (Precedential), citing OTC Order No. 86-05-19-03 and quoting Regulation 13-58 (Recodified as Rule 13.008.02 of the Oklahoma Tax Commission Permanent Rules (March 10, 1989) (Credit for bad debts limited to tax shown on invoice being charged off as bad debt and must be adjusted to reflect any remuneration previously taken on a sales tax report.).

POSITIONS AND ARGUMENTS

In its Order finding Protestant qualified for the Bad Debt Deduction, the Commission determined: "The language of the Bad Debt Statute is plain and unambiguous, so it will not be subject to judicial construction, but will be given the effect its language dictates." *See* OTC Order No. 2013-10-17-03 at 30, citing *Globe Life and Acc. Ins. Co. v. Oklahoma Tax Commission*, 1996 OK 39, ¶¶ 11-14, 913 P.2d 1322. However, the Division's verification of the bad debt deductions related to PLCCs taken on LHC's Tax Returns during the Assessment

Period and disallowed by the Division was left unresolved by OTC Order No. 2013-10-17-03. *Id.* at 36.

At this stage, the primary controversy concerns Protestant's position that the Bad Debt Rule is ambiguous, and because of that ambiguity, the Banks are permitted to, and did, apply PLCC Cardholder payments "to the Cardholder's account balance in the following order: (1) debt cancellation insurance; (2) fees (such as late fees), (3) interest, and (4) principal." *See*, OTC Order No. 2013-10-17-03 at 13, ¶ 28; *see also*, *FCR* 10/23/2017 at 32 ("The Protestant's position is that the Cardholder Agreement controls **Pre-Write-Off** payments." (Emphasis original.))[15] The Division notes that "[Protestant] has also argued that the adjustment required by statute and rule applies only to payments received after an account is written off." *FCR* 10/23/2017 at 28; *see also*, *Division's Brief-Issue One (Sub-Issues 1 and 2)* at 7, citing, *Protestant's Reply Brief* filed January 17, 2013 at 10-11.

The Division argues that "[n]either the cardholder's PLCC agreement nor [Protestants] contract with the Banks can alter Oklahoma law applicable to the bad debts claimed by the vendor, [Protestant], for purchases made with a PLCC." *FCR* 10/23/2017 at 23-24, quoting *Division's Brief-Issue One (Sub-Issues 1 and 2)* at 5-6. The Division reads the various provisions of the Bad Debt Statute and Rule to require that payments made by a cardholder be applied first to the purchase price and the proportional tax prior to any allocation of payments to financing charges and interest in calculating the amount of the bad debt credit. *FCR* 10/23/2017 at 28; *see also*, *Division's Brief-Issue One (Sub-Issues 1 and 2)* at 6-8. "The Division submits

[15] The Commission notes that these arguments are presented well after the Commission issued OTC Order No. 2013-10-17-03 holding that Protestant was entitled to the Bad Debt Deduction. Rather than revisiting OTC Order No. 2013-10-17-03 at this time, the Commission limits this discussion to the issues of the alleged ambiguity of the Bad Debt Rule and the allocation of Cardholder payments. The question of whether Protestant's position regarding the Bad Debt Rule and the allocation of Cardholder payments based on third party contracts would have altered the Commission's position regarding the applicability of the Bad Debt Deduction remains open.

that the amount of the credit claimed by Protestant on its sales tax returns for the Assessment Period exceeded the amount allowed by the Oklahoma Bad Debt Statute to the extent the Banks received and applied payments from PLCC cardholders to finance charges and interest." *FCR* 10/23/2017 at 29, quoting Division's *Statement of Remaining Issues and Objection to "Proposed" Sampling Methodology for Determination of City/County Bad Debt* at 4-5.

The ALJ takes the position that the Bad Debt Rule is ambiguous because of the divergence of the positions taken by the Protestant and the Division. *See, FCR* 10/23/2017 at 31-32, citing *Blitz U.S.A., Inc. v. Oklahoma Tax Com'n,* 2003 OK 50, ¶ 14, 75 P.3d 883. *See YDF, Inc. v. Schlumar, Inc.*, 2006 OK 32, 136 P.3d 656, 658 ("Test for ambiguity in statute is whether statutory language is susceptible to more than one reasonable interpretation."). Quoting *Wilder v. Oklahoma Tax Commission*, 2012 OK CIV APP 91, ___ P.3d ___, 2012 WL 4903035, the ALJ states: "the 'striking opposing views of its meaning' demonstrates the Bad Debt Rule is ambiguous." *FCR* 10/23/2017 at 32. The essential qualification needed to support an assertion that a statute is ambiguous based on divergent positions is that the interpretation be ***reasonable.*** *Wilder*, 2012 OK CIV APP 91, ¶ 24 (Emphasis added.).

Having read and analyzed the Bad Debt Rule in conjunction with the Bad Debt Statute and Section 320 of SSUTA, the Commissioners are convinced that the Bad Debt Rule is not ambiguous nor unlike provisions adopted by numerous other states and the legislative intent and purpose for 68 O.S. § 1366 is ascertainable from the specific language of the statute. *Am. Airlines, Inc. v. State, ex rel. Oklahoma Tax Comm'n*, 2014 OK 95, ¶¶ 32-33, 341 P.3d 56, 64–65, citing *Naylor v. Petuskey,* 1992 OK 88, ¶ 4, 834 P.2d 439, 440; *Ledbetter v. Howard,* 2012 OK 39, ¶ 12, 276 P.3d 1031, 1035 (Cardinal rule of statutory construction is to ascertain and give effect to the legislative intent and purpose as expressed by the statutory language.). The

legislative intent will be ascertained from the whole act in light of its general purpose and objective considering relevant provisions together to give full force and effect to each. *State ex rel. Dept. of Human Services v. Colclazier,* 1997 OK 134, ¶ 9, 950 P.2d 824, 827; *Keating v. Edmondson,* 2001 OK 110, ¶ 8, 37 P.3d 882, 886.

The Commission finds the Division's positions and arguments to be reasonable and persuasive. It is unreasonable to presume that the Legislature intended to permit vendors to avoid applying customer payments to the purchase price and proportional tax by diverting customer payments first to items on which no sales tax was collected: 1) "Financing charges or interest" (68 O.S. §§ 1366(A) and 1366(B)(1)); or to 2) Expenses incurred in attempting to collect any debt and repossessed property" (68 O.S. § 1366(B)(4)). Protestant's reading of the prepositional phrase, "for the purposes of reporting a payment received on a previously claimed bad debt" contained in Section 1366(G), to preclude the requirement that "pre-write-off payments" be applied first to the purchase price and proportional tax is not reasonable and distorts the coherent symmetry of the legislation. Holding otherwise would suggest the Legislature intended to allow for private companies to be able to avoid remittance of trust taxes in favor of retaining profits for non-taxable charges, thus subordinating the State's interest in the transaction to last in line, which clearly contravenes the plain language of the statute.

ALLEGED AMBIGUITY AND STATUTORY CONSTRUCTION

Should it be determined there is a need to employ rules of statutory construction to the Bad Debt Rule, the Commission interprets the Bad Debt Deduction as a whole, including the Bad Debt Statute, the Bad Debt Rule, and Section 320 of SSUTA together with other provisions of the Sales Tax Code. *See, In re Marriage of Sager*, 2010 OK CIV APP 130, ¶ 18, 249 P.3d 91, 95, citing *Taylor v. State Farm Fire and Casualty Company,* 1999 OK 44, ¶ 19, 981 P.2d 1253,

1261 (Different statutes on the same subject are generally to be viewed as *in pari materia* and must be construed as a harmonious whole.) "All legislative enactments *in pari materia* are to be interpreted together as forming a single body of law that will fit into a coherent symmetry of legislation." *Id.* As the Oklahoma Supreme Court recognized over 100 years ago:

> We are familiar with the rules and cases on statutory construction declaring the doctrine that where the statute is plain and unambiguous there is no room for construction by the courts ...; but the very warp of the woof of the whole law on the subject of the construction of written laws is ... as follows:
>
> A thing within the intention is regarded as within the statute though not within the letter, and a thing within the letter is not within the statute unless within the intention. The several provisions of the statute should be construed together in the light of the general objects and purposes of the enactment, and so as to give effect to the main intent, although particular provisions are thus construed not according to their literal reading. The intention is to be gathered from the necessity or reason of the enactment, and the meaning of words enlarged or restricted according to the true intent. That which is implied is as much a part of the statute as that which is expressed. When the literal enforcement of a statute would result in great inconvenience and cause great injustice, and lead to consequences which are absurd and which the Legislature could not have contemplated, the courts are bound to presume that such consequences were not intended, and adopt a construction which will promote the ends of justice and avoid the absurdity.

Webster v. City of Bixby, 509 F. App'x 787, 794 (10th Cir. 2013) ("not selected for publication") cited pursuant to Fed. R. App. P. 32.1,[16] citing *Town of Eufaula v. Gibson*, 22 Okla. 507, 98 P. 565, 569 (1908). These words still resonate.

Even applying the rules of statutory construction to 68 O.S. § 1366 and *OAC* 710:65-11-2 to address Protest's claim of ambiguity, the Commission still finds no support for Protestant's position. At base, Protestant argues that the provision of 68 O.S. § 1366(G) precludes the

[16] Pursuant to Fed. R. App. P. 32.1,

> **(a) Citation Permitted.** A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:
> **(i)** designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and
> **(ii)** issued on or after January 1, 2007.

Commission from requiring that pre-write-off Cardholder payments be applied first to the purchase price and proportional tax before application to interest, service charges and any other charges. The Bad Debt Statute and Rule state:

> For the purposes of reporting a payment received on a previously claimed bad debt, any payments made on a debt or account are applied first proportionally to the taxable price of the property or service and the sales tax thereon, and secondly to interest, service charges, and any other charges.

See, 68 O.S. § 1366(G) and *OAC* 710:65-11-2(i). The Commission addresses Protestant's claim by answering two questions: 1) Whether a vendor may apply payments made on a debt or account first to interest, service charges, and any other charges, and lastly to the taxable price of the property or service and the sales tax thereon, regardless of when the payments are received; and 2) Whether a vendor may avoid a statutory schematic by entering into contractual agreements whereby a third party financing entity may divert customer payments to interest, service charges, and any other charges on which sales tax was not collected and paid to the State of Oklahoma.

Application of Customer and/or PLCC Cardholder Payments:

The Commission adopted its first policy guidelines for the determination of the bad debt credit against sales tax liability immediately following the legislature's amendment of 68 O.S. § 1307 to provide for the credit. *See* OTC Order No. 81-01-09-01. In adopting these initial policy guidelines, the Commission interpreted the legislative intention that: "If the amount of an account found to be worthless and charged off for the income tax purposes includes both taxable and non-taxable receipts (interest, carrying charges and any expense incurred in attempting to collect the debt, etc.) a credit for sales tax paid on the bad debt may be allowed only with respect to the unpaid amount of the account receivable upon which tax has been paid." *Id.* The enactment of the bad debt credit provision as interpreted by Commission policy guidelines

anticipated that a customer's debt would be carried on the books of the vendor; making it highly improbable that a vendor would be able to divert customer payments to items on which tax had not been paid. These policy guidelines then provided for verification that the credit did not include items on which sales tax had not been paid by requiring the vendor to support the credit taken with records verifying amount of the purchase price or contract price and the amount of sales tax paid. *Id.* The policy guidelines then provide for the reporting of subsequently collected amounts and disallowing expenses incurred by the vendor in attempting to enforce collection of an account receivable, or ***for that portion of a debt recovered that is retained by or paid to a third party in collecting the account.*** *Id.* (Emphasis added.)

With knowledge of the Commission policy guidelines for claiming the bad debt credit, the legislature adopted the guidelines when it initially enacted 68 O.S. § 1366 and in subsequent amendments when it required the credit to be administered "***in accordance with the rules and regulations of the Tax Commission.***" *See* Laws 1981, c. 313, § 2, emerg. eff. June 29, 1981; Laws 1990, c. 339, § 18, emerg. eff. May 31, 1990. (Emphasis added.) Following the 1990 Amendment, the Commission adopted Rule 13.008.02 which made clear that "the ***burden of establishing the right to and the validity of a bad debt credit is on the vendor.***" *Id.* "In order to verify each credit taken for a bad debt, the vendor must retain and make available" the following nine categories of information to the Commission. *Id.* This burden and the verification requirements of the Bad Debt Rule survived each amendment of the Bad Debt Statute, including the amendment of the Rule effective June 24, 2004 to conform to the amendment of the Bad Debt Statute to conform to SSUTA. The verification component of the 2004 version of the Bad Debt Rule states in pertinent part:

(d) The burden of establishing the right to, and the validity of a bad debt deduction is on the vendor. ***In order to verify each deduction*** taken for a bad debt, ***the vendor must retain and make available***:

***

(3) The price of the property and the amount of sales tax charged thereon;

(4) The amount of interest, finance and service charges charged to the debt or account;

***

(6) Any amounts charged to the debt or account representing costs of collection;

(7) The dates and amounts of any payments made on the debtor's account;

(8) Any portion of the debt or account which represents a charge that was not subjected to the tax in the original transaction;

****

(e) The information in subsection (d) may be requested by the Commission at any time.

***

(i) *For the purposes of reporting a payment received on a previously claimed bad debt, any payments made on a debt or account are applied first proportionally to the taxable price of the property or service and the sales tax thereon, and secondly to interest, service charges, and any other charges.*

OAC § 710:65-11-2 (June 25, 2004). The intent and purpose of these provisions is to permit the Commission to verify the validity of each deduction by establishing the base debt (i.e. the price of the property and the sales tax charged thereon); to assure that no amounts of interest, finance and service charges, costs of collection, or any other charge that was not subjected to the tax in the original transaction are charged to the debt or account; and to verify amounts of any payments made on the debtor's account are allocated appropriately (i.e. applied first proportionally to the taxable price of the property or service and the sales tax thereon, and secondly to interest, service charges, and any other charges.).

The Commission finds Protestant's position that the language of 68 O.S. 2003, § 1366(G) and *OAC* § 710:65-11-2(i) (June 25, 2004) only requires a vendor to apply amounts collected

from a customer after the bad debt is claimed first proportionally to the taxable price of the property or service and the sales tax thereon to be unreasonable and a distortion of the coherent symmetry of the Bad Debt Statute and Rule. The language of 68 O.S. 2003, § 1366(G) and *OAC* § 710:65-11-2(i) (June 25, 2004) simply indicates that amounts collect on a previously claimed bad debt are to be applied the same as those amounts collected on a debt or account prior to a bad debt claim. It is unreasonable to presume the legislature intended to permit vendors to apply payments on an account prior to a bad debt claim to be diverted to payment of charges on which no sales tax was collected prior to allocation to the sales price and the proportional tax paid thereon.

Validity of Contractual Agreements Affecting the Bad Debt Credit/Deduction:

Next, the Commission addresses whether a vendor may avoid a statutory schematic by entering into contractual agreements whereby a third party financing entity may divert customer payments to interest, service charges, and any other charges on which sales tax was not collected and paid to the State of Oklahoma before allocation of payments first proportionally to the taxable price of the property or service and the sales tax thereon. Protestant takes the position that all payments made by a Cardholder to the Bank prior to the bad debt being deducted are controlled by the Cardholder Agreement and therefore not subject to the mandatory recalculation provision of the deduction. *See*, *FCR* 10/23/17 at 32, citing Protestant's *Response in Opposition to Division's Brief* at 10. The Division responds that such contractual relationships cannot alter Protestant's obligations under the Bad Debt Statute and the rule promulgated pursuant thereto. Division's *Reply-Issue One (Sub-Issues 1 and 2)* at 2. The Commission agrees with the Division's position.

The often reiterated rule is that existing statutes and settled law at the time and place a contract is made is a part of, and must be read into the contract. *Tom P. McDermott, Inc. v. Bennett*, 1964 OK 197, 395 P.2d 566, 570, citing *Nichols v. Callaway*, 200 Okl. 328, 193 P.2d 294; *Hixon et al. v. Snug Harbor Water & Gas Co.*, Okl., 381 P.2d 308; *see also, Welty v. Martinaire of Oklahoma, Inc.*, 1994 OK 10, 867 P.2d 1273, 1276, citing *East Central Oklahoma Elec. Co-op., Inc. v. Public Serv. Co.*, 469 P.2d 662 (Okla.1970) ("The existing applicable law is part of every contract as if it were expressly referred to or incorporated within the agreement."); *see also, Farley v. Bd. of Ed. of City of Perry*, 1917 OK 83, 62 Okla. 181, 162 P. 797 ("The existing law of the state is implied and presumed to be a part of every contract, and such contracts are made with reference to the laws governing the same in force at the time, notwithstanding the express terms therein apparently to the contrary."). Further, "A contract consists not only of the agreement of the parties expressed in words, but also such covenants as are reasonably implied; and covenants are implied in a contract, first, when so clearly a part of the contract that the court can say the parties considered them so without the necessity of writing them into the contract, or, second, where implying such covenants is necessary to carry out the expressed agreements." *Indian Territory Illuminating Oil Co. v. Rosamond*, 1941 OK 410, 190 Okla. 46, 120 P.2d 349, 356–357, quoting *Wright v. Fidelity & Deposit Co.*, 176 Okl. 274, 54 P.2d 1084, 1085.

Indeed Protestant and BANKS anticipated the application of Oklahoma law regarding the Bad Debt Deduction by specifically stating in the Agreements:

> Bank agrees that Retailers and not Bank shall have the right to claim any available sales tax deductions related to Net Write-Offs borne by Retailers pursuant to Section 4.02. *** Bank agrees to provide Retailers on a monthly basis such reasonable information as Retailers request to support a deduction for such Write-Offs. Bank will use commercially reasonable efforts to summarize such

information on a state-by-state basis and such information shall be exclusive of all recovery expenses, late fees, insurance and finance charges.

See supra, Finding of Fact No. 10 at p.7, ¶ 12; *see also* ALJ-OK-LHC 00000161.

The Commission finds that Protestant may not avoid or circumvent the legal obligations of a vendor by contracting with Banks to provide financing to a customer for the purchase price of goods and/or services together with the statutory sales tax levied thereon by which the Banks may redirect payments made by Cardholders to payment of other items on which sales tax was not collected, including debt cancellation insurance, fees and interest, before allocating any portion of the Cardholder's payment to the purchase price and the proportional sales tax paid thereon.[17] Phrased as a response to the first issue presented in *FCR* 10/23/17, the Bad Debt Deduction claimed by Protestant must be adjusted for PLCC cardholder payments which BANKS applied to (a) debt cancellation insurance; (b) fees; (c) interest; or (d) any other charge on which sales tax was not collected and remitted to the State of Oklahoma. Protestant has the burden of establishing the right to and the validity of its claimed Bad Debt Deduction by providing any information and/or documents requested by the Commission, including but not limited to the information and/or documents identified by the Bad Debt Rule which Protestant is required to retain. *See OAC* § 710:65-11-2(d); *see also* 68 O.S. §§ 103, 203, 206, and 248.

SOURCING BAD DEBT TO COUNTIES AND MUNICIPALITIES

The question posed is whether Protestant correctly sourced bad debt taken on the face of the sales tax report filed for the Assessment Period to Municipalities and/or counties. *FCR* 10/23/17 at 33. After briefly stating the positions of the parties, the ALJ concluded: "The

[17] Protestant's position brings into play the question of whether the Agreements alter the character of the original debt that Protestant allegedly guaranteed. The original debt consisted of the purchase price and the sales tax charged to which the customer's payments must be applied first. Under the Agreements, the original debt is recharacterized as debt to which Cardholder payments are applied after application to payment of items on which no sales tax was collected. Based on the Commission's findings with regard to the questions posed, the Commission declines to address this issue at this time.

Protestant has met its burden of proof, by preponderance of the evidence, that the Protestant correctly sourced the bad debt taken on the face of the sale tax reports filed for the Audit Period to Municipalities and/or Counties." *Id.* at 35. The Commission specifically rejects this conclusion and finds the conclusion to be unsupported by the evidence presented. The Commission finds its position is reflected by that presented by the Division, much of which is repeated as follows.

Pursuant to 68 O.S. §§ 2702 and 1371, the Commission has entered into contractual agreements with all cities and counties in Oklahoma for the assessment, collection and enforcement of sales taxes levied by the cities and counties. Under the agreement, the Commission is accountable to cities and counties for the proper collection of their taxes. The Commission is also responsible for the refunding of sales taxes previously collected. *FCR* 10/23/17 at 33, quoting Division's *Brief-Issue One (Sub-Issues 1 and 2)* at 8.

As a general rule, Protestant collects, reports, and remits the municipal and/or county sales tax on its sales to PLCC cardholders using the store location where the sale is made. In claiming PLCC bad debt on the face of returns filed during the Assessment Period, Protestant did not reduce the taxable sales for the Municipalities and/or counties who received sales tax on the sales that were written off as bad debt as Protestant did for its bad check and fraudulent credit card chargeback bad debts. Rather, Protestant deducted from municipal and/or county taxable sales PLCC bad debt based on the ratio of each store location's total net taxable sales to total Oklahoma net taxable sales for all store locations. *Id.* Protestant's method of allocating bad debt to municipalities and/or counties based on a ratio of each store location's previous month's total net taxable sales to total net taxable sales for all stores in Oklahoma does not permit verification of the amount of sales tax charged on the sale or the appropriate allocation of that portion of the

bad debt claim to the municipality and/or county that previously received the sales tax. *See FCR* 10/23/17 at 33, citing Division's *Brief-Issue One (Sub-Issues 1 and 2)* at 9.

The supporting documentation required by the Bad Debt Rule contains the information necessary to determine which municipalities and/or counties received sales tax on the sale for which the bad debt is being claimed. This information is used to insure that the municipalities and/or counties that received the sales tax on the sale on which the bad debt claim is made are charged appropriately for the claim made. *Id.* During the Assessment Period, Protestant allocated bad debt to municipalities and/or counties using a mathematical calculation without regard to the actual sales that gave rise to the bad debt claim. The Commission finds that such allocation method is incorrect under the Bad Debt Statute and Rule and prevents the Commission from fulfilling its obligations pursuant to 68 O.S. §§ 2702 and 1371.

SAMPLING METHODOLOGIES

The ALJ phrases as a third issue: **"Whether the Gross Sales Method and the Sampling Proposal represents a 'reasonable sampling methodology' for sourcing PLCC bad debts to Municipalities and/or Counties."** *FCR* 10/23/17 at 35 (Emphasis original.). The Commission finds that the ALJ's focus on justifying Protestant's Sampling Proposal, including use of the opinions of Protestant's Expert Witness to support that justification, is misguided and does nothing more than obfuscate resolution of the substantive issues in this matter. Regardless of whether Protestant's Sampling Proposal represents a 'reasonable sampling methodology', it probably does not represent the only 'reasonable sampling methodology' and the ALJ does not have the authority to direct the Division to select one sampling methodology over another, or to even consider Protestant's Sampling Proposals. *See OAC* 710:65-5-2.

Throughout *FCR* 10/23/17, much ado is made of "Stipulation 34". *See, Id.* at 40. Stipulation 34 refers to OTC Order No. 2013-10-17-03 at 14, ¶ 34 which states:

> Division has not verified the bad debt deductions related to PLCCs taken on LHC's Sales Tax Returns during the Assessment Period and disallowed by Division. Should LHC's protest be sustained, LHC and Division agree that the amount of the PLCC bad debt deductions will have to be verified by a reasonable sampling method to be agreed upon by the parties. If the bad debt deductions cannot be verified, or a sampling method cannot be agreed upon, LHC and Division agree to submit the issue(s) to the Court for determination.

Regardless of Stipulation 34, the Commission finds the Division does not possess the authority to abdicate or abrogate its responsibilities pursuant to the Oklahoma Sales Tax Code, 68 O.S. § 101 et seq., specifically 68 O.S. §§ 203 and 206 and *OAC* 710:65-5-2, even if convenient to do so.[18]

Protestant asserts it "proposed to the Division various methodologies for sourcing its Bad Debt Deduction claim among the various taxing jurisdictions within the state [and] the Division has rejected each proposal, but has yet to suggest any alternative methodology." *FCR* 10/23/17 at 38, citing Protestant's Reply to [Division's] Response to Account Specific Information Provided by [Protestant] at 1-2. To be clear, *OAC* 710:65-5-2, **Sales/use/tax audits of sample periods,** provides:

> An auditor for the Commission ***may*** suggest a sample sales/use tax audit rather than a detailed audit. The ***auditor shall*** select the periods to sample and apply the results to all the periods of the audit. The ***auditor shall*** prepare forms to be signed by the taxpayer stating they agree with the periods and method chosen for the sample.

[18] "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of the governing law." *Keota Mills & Elevator v. Gamble*, 2010 OK 12, ¶ 19, 243 P.3d 1156, 1162 (Footnotes omitted.) "A stipulation between the parties or their counsel cannot control the action of the court in a matter of law, although they may stipulate respecting facts." *Id.* quoting *First Nat. Bank of Cordell v. City Guaranty Bank of Hobart et. al.*, 1935 OK 1105, ¶ 0, 174 Okla. 545, 51 P.2d 573 (Footnotes omitted.).

Id. (Emphasis added.) Here, the disallowance of Protestant's bad debt credit occurred during the conduct of an audit. However, the auditor did not suggest a sample for auditing the bad debt credit taken by Protestant. Neither did the auditor select periods to sample or prepare forms to be signed by the taxpayer stating they agree with the periods and method chosen for the sample as stated in the rule. The disallowance of Protestant's bad debt credit claim was based on a detailed audit of the sales tax returns filed by Protestant. *Division's Reply – Issue One (Sub-Issues 1 and 2)* at 4. The search for an "acceptable sampling methodology" by Protestant relates not to a sales tax audit, but to the allocation of the disallowed bad debt credits to the local municipalities and/or counties to which the original local sales tax was paid.

Should the Division elect to use a sampling methodology for sourcing PLCC bad debts to Municipalities and/or Counties, the first criterion for the sampling methodology must be that it permits the Division to determine the allocation of the bad debt credit to the municipality and/or county to which the sales tax was paid. Otherwise, the assignment of a bad debt deduction could result in a locality being charged with a refund of sales tax it never collected. That absurdity is one the Commission chooses not to entertain.

In *FCR* 10/23/17, the ALJ presents the following as an additional finding of fact:

> Regarding the [Protestant's] PLCC arrangement, the Cardholder's relationship is with the Bank. The Bank grants credit to the Cardholder and owns, maintains, and collects on the Cardholder's PLCC account. [Expert Witness] understand[s] that the Bank applied Cardholder payments made on accounts first to debt cancellation insurance, then to late fees, then to interest, and finally to reduce principal. This method is both common practice and permitted under Generally Accepted Accounting Principles. In [Expert Witness's] opinion, requiring a retailer to allocate payments made on current accounts in a manner inconsistent with how it maintains its books and records is unreasonable, ***unless mandated by law***.

Id. at 18-19, citing Expert Witness Affidavit, Page 4, Exhibit A to Protestant's *Reply to Compliance Division's Response to Account Specific Information Provided by [Protestant]*, at 4-

5 (Emphasis added.). The Commission finds that a sampling methodology that does not permit allocation of a bad debt deduction to the municipality and/or county to which the sales tax was paid is not a reasonable sampling methodology and is contrary to law.

Finally, Protestant asserts the following, to which the Commission responds:

1. "[T]he Division's approach to auditing the Protestant is rigid and inflexible." *FCR* 10/23/17 at 40.

The Commission notes that "Tax exemption, deductions, and credits depend entirely on legislative grace and are strictly construed against the exemption, deduction or credit. *TPQ Investment Corp. v. Oklahoma Tax Commission,* 1998 OK 13, ¶ 8, 954 P.2d 139, 141. *See* "Conclusion of Law" No.10, *supra* at 9, ¶ 10.

2. "The Division has been trying to audit the Protestant like it is a local retailer, but it is not. Being a national retailer, with twenty-six (26) locations in the State of Oklahoma, the Bad Debt Deduction claimed by the Protestant comprises thousands of transactions using PLCCs." *FCR* 10/23/17 at 41.

The Commission finds nothing in the Bad Debt Statute or the Sales Tax Code permitting the Commission to treat Protestant differently because of its larger size. Unless specifically directed to treat entities of varied size or type differently, taxation statutes are designed to be applied equally to all persons and entities regardless of whether it is convenient for the parties or creates a problem for compliance. Further, the Commission would observe that such a determination is best left to the Oklahoma legislature where constitutional considerations may be weighed.

SUMMARY OF CONCLUSIONS AND FINDINGS

1. All vendors must apply all customer payments on a debt or account, including payments made on PLCC accounts, first proportionally to the taxable price of the property or service and the sales tax thereon, and secondly to debt cancellation insurance, fees, interest, service charges, and any other charges on which sales tax was not collected. Protestant admits that the Banks applied PLCC cardholder payments to the Cardholder's account balance in the following order: (1) debt cancellation insurance, (2) fees (such as late fees), (3) interest, and (4) principal.

2. Protestant may not avoid or circumvent the legal obligations of a vendor by contracting with Banks to provide financing to a customer for the purchase price of goods and/or services together with the statutory sales tax levied thereon by which the Banks may redirect payments

made by Cardholders to payment of other items on which sales tax was not collected, including debt cancellation insurance, fees and interest, before allocating any portion of the Cardholder's payment to the purchase price and the proportional sales tax paid thereon.

3. During the Assessment Period, Protestant allocated bad debt to municipalities and/or counties using a mathematical calculation without regard to the sales that gave rise to the bad debt claim. The Commission finds that such allocation method is incorrect under the Bad Debt Statute and Rule and prevents the Commission from fulfilling its obligations pursuant to 68 O.S. §§ 2702 and 1371.

4. The Commission finds that any sampling methodology that does not permit a precise allocation of a bad debt deduction to the municipality and/or county to which the sales tax was paid is not a reasonable sampling methodology, and could result in an inequitable harm to those political subdivisions. In Oklahoma, the Gross Sales Method and Protestant's Sampling Proposal do not constitute a reasonable sampling methodology for sourcing PLCC bad debt claims to Municipalities and/or Counties and is contrary to law.

WHEREFORE, premises considered, the Commission vacates the *Findings, Conclusions and Recommendations* filed in this matter on October 23, 2017, to the extent not specifically included in this Order by reference. The Commission finds that Protestant has not met its burden of establishing the validity of the claimed bad debt deduction. The Commission orders the protest of Protestant be denied based upon the facts and circumstances of this case, all as more fully set forth herein.

P-09-195-H

Dated this 17th day of May, 2018.

SO ORDERED MAY 17 2018.

OKLAHOMA TAX COMMISSION

ASSISTANT SECRETARY

STEVE BURRAGE, CHAIRMAN

CLARK JOLLEY, VICE-CHAIRMAN

THOMAS E. KEMP, JR., SECRETARY-MEMBER

I do hereby certify that the above and foregoing is a true copy of the original document now on file in the offices of the Oklahoma Tax Commission. Witness my hand and official seal of the Oklahoma Tax Commission, this MAY 17 2018

Thomas E. Kemp, Jr., Secretary-Member
By:
Assistant Secretary
Oklahoma Tax Commission

/kt

2018 05 17 21

OKLAHOMA TAX COMMISSION

STATE OF OKLAHOMA

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DATE OF MAILING:

May 18, 2018

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Re: Lowe's Home Centers, Inc.; Case No. P-09-195-H

Transmittal and Certificate of Mailing or Service

Transmitted here with is a certified copy of the Oklahoma Tax Commission Order No. 2018-05-17-21 issued in the above matter.

I hereby certify that on the above date a true and correct copy of the above referenced Order was e-copied to the Office of the General Counsel of the Oklahoma Tax Commission, the Administrative Law Judge, and a certified copy was mailed by U.S. Mail to the person whose name and address appears above.

OKLAHOMA TAX COMMISSION

Laura Moore
Headquarters Division

ATTORNEY GENERAL'S OFFICE - REVENUE & FINANCE DIVISION

December 28, 2018 - 11:11 AM

Transmittal Information

Filed with Court:	Supreme Court
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Appellate Court Case Title:	Lowe's Home Centers, LLC v. Department of Revenue, State of Washington
Superior Court Case Number:	15-2-02994-8

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