



## OSCPA/Oklahoma Tax Commission Meeting - Questions/Comments February 9, 2023

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### 990 and OK 512E Returns

- When filing a Federal Form 990 for a non-profit entity, is it necessary to also mail a copy of Form 990 and attach the OK 512E filled out with all zeroes?

*If you were required to file an annual information return with the IRS, you will need to enclose a copy of the information return including any supporting schedules.*

- Can you please clarify if the OK 512E is required in this situation?

*Yes, every organization will need to make a return for each year. Okla. Admin. Code § 710:50-17-1 states that any corporation doing business within or deriving income from sources within Oklahoma is required to file an Oklahoma Corporation Income Tax Return, whether or not a tax is due.*

### Form 586 Pass-Through Entity Election

- There seems to be inconsistency relating to the 586 election. Some clients who did not file for the 586 election were notified recently that their application was approved and they were assessed taxes and penalties. Please explain how the 586 election procedure works.

*The OTC records a PTE election on a taxpayer's account when a Form 586 is properly submitted via mail or election request is submitted via OkTAP. If an election is received on or before the statutory deadline for a given tax year, the election is effective for that year. If the election is received after the deadline, the election will be effective for the subsequent year.*

- Why does the OTC suspend a loss in a PTE year when it is allowed at the federal level?

*A valid PTE election requires the income or losses related to the PTE to stay with the PTE entity; the PTE effectively stands in the shoes of its members/partners to become the taxpayer. The Pass-Through Entity Tax Equity Act of 2019 does not provide different treatment if the entity reports a loss instead of income. Absent a statutory provision that allows an electing PTE to pass losses to its members (while still giving effect to the election*

*if the PTE has income instead), the OTC cannot allow losses to be distributed to the members. The Act specifically provides that if the pass-through entity election results in a net entity loss for Oklahoma income tax purposes in any tax year, the net entity loss may be carried back and carried forward by the electing pass-through entity for Oklahoma income tax purposes as set forth Title 68, Section 2358(A)(3)(b). See 68 O.S. § 2355.1P-4(D). (Note: This provision is allowable for Net Entity Losses applicable to other periods subject to the PTE Election only.)*

- There have been a few occasions in 2022 where the penalty and interest were paid on the day the S Corp's PTE return was filed and the OTC took the amount paid as the tax due and charged P&I in addition to the amount filed. Is this normal practice?

*Payments of tax liabilities made by a taxpayer are applied in the manner designated by the taxpayer, where specific instructions are provided, or in order to tax first, then interest, then penalty. Penalty and interest are calculated at the statutory rate based on the amount of tax due and the date the tax was paid. OTC will systematically calculate P&I in accordance with the statute regardless of the amount reported or paid by the taxpayer. If a balance is due in addition to the amount reported and paid on the return, an assessment will be issued. Differences in payments received vs amounts claimed on the return may result in remaining tax balance due and the taxpayer will be notified by letter of the change.*

*The OTC does not increase a taxpayer's tax balance simply because a penalty and/or interest payment is made with the tax, and by statute, OTC can only charge interest and penalty on the underlying tax. If you have an example of a specific taxpayer account where you believe the situation described above has occurred, please contact us so we can review the account.*

## Sales Tax

- Regarding sales tax on items reported on Form 4797, are there more profitable or more easily documented avenues for widows and widowers who sold equipment through auction?

*If an item subject to sales tax is sold through auction then the auctioneer is responsible for collection and remittance of sales tax to the OTC. The auctioneer will need to provide a detailed invoice showing what was sold and any fees associated with the sale. The best practices to report the sales on the 4797 would be including a copy of the invoice with the return and providing a description on the 4797 that details the following:*

- *Designate the transaction as "Auction/Sold at Auction"*
- *The function of the item, i.e. farm, construction, etc.*
- *The exact description of the item (for example, not just equipment but combine, tractor, etc.)*

- Would it be possible to have a presentation for OSCPA members relating to areas where the OTC sees a majority of mistakes? If not, are there other opportunities for taxpayer/client education on sales tax?

*The OTC provided a tax menagerie regarding different sales tax audits (transfer of tangible property, exemptions and 1099K sales) in 2022 through our CPE program. We also have a phone line and email address available for taxpayers and tax professionals to contact as needed. The information is available on our website. The OTC is always willing to meet with members of the OSCPA to discuss compliance issues and audit trends at a high-level.*

- It seems like the OTC may data-mining returns which include Form 4797 for asset sales which may be subject to sales tax. Due to the change in the 1031 / like-kind exchange rules in 2018, equipment and other personal property that is traded in is now required to be reported on Form 4797 as if it was sold, with the trade-in allowance as the deemed sales price. Consequently, there are frequently dispositions reported on Form 4797 which are not actual sales. The taxpayer did not sell the equipment / personal property and received no payment, so why would sales tax be assessed?

*If it is a like-kind exchange of equal value not subject to sales tax then the amount reported on the 4797 should be \$0. Items that are not furniture, equipment or fixtures that are sold would not be reviewed by the OTC, because those items would not be subject to sales tax. The sales tax audit discovery program is iterative and with each new tax year/discovery iteration the OTC, with the assistance of our IT department, strives to refine, streamline, and enhance our procedures and practices.*

- Sales tax on the replacement property is calculated on the full cost of the replacement property (no adjustment for the trade-in)

*If the item is a trade-in then the taxpayer is required to pay sales tax on the new item minus the value of the trade-in (only for items that are subject to sales tax).*

- Sales tax on the property given up is collected by the dealer when the equipment traded in is subsequently sold.

*For property that is given up/repossessed the sales tax is collected and remitted by the dealer/reseller when the property is resold and the taxpayer gave up or had property repossessed would not be subject to sales tax on that item.*

- How should we describe these transactions on the Form 4797 so that OTC would know this is a trade and not a taxable sale?

*To describe the transaction on the 4797 the taxpayer or tax preparer would need to include the following in the Description box:*

- *Designate the transaction as "Trade-in"*
- *The function of the item, i.e. farm, construction, etc.*

- The exact description of the item (for example, not just equipment but combine, tractor, etc.)
  - The three items above will help the OTC determine which items would be subject to sales tax.
  - The taxpayer can also include an invoice of the trade with the return to detail which items.
  - The OTC will still review the items listed and ask for more information as deemed necessary.

## SB 1339

- What services are now taxable (effective 1-1-23) under Senate Bill 1339?

*Senate Bill 1339 expanded the definition of “marketplace facilitator” to mean a person that facilitates the sale at retail of a marketplace seller’s product, defined as tangible personal property, services, or other transactions **currently taxable under the Oklahoma Sales Tax Code**. Marketplace facilitators making sales of Oklahoma lodging may now be required to collect and remit state and local taxes.*

*While Oklahoma’s sales tax levy currently imposes sales tax on sales/rentals of tangible personal property, certain enumerated services such as telecommunications and other transactions including sales of admissions and lodging, **no new services** have been added to the sales tax levy pursuant to Senate Bill 1339 or any other measure enacted in 2022.*

*For hotels making sales of lodging in Oklahoma through their website and through a marketplace facilitator, the hotel will report and remit the gross receipts and corresponding tax related to its direct sales to customers in Oklahoma to the Tax Commission. The sales made through a marketplace facilitator should be recorded on the hotel’s sales tax report in Part J. Sales Tax Exemption Schedule on either line 3w “Marketplace Facilitator” or 3x “Other legal sales tax exemptions” and in the box marked “Explain” indicate the name of the marketplace facilitator.*

## H.B. 3418. 68 O.S. §2358.6A -- Expensing for Qualified Property

- Will you clarify and confirm that for any qualified property placed in service after 12/31/2021 a subtraction from federal AGI (or taxable income) is allowed in computing Oklahoma taxable income for the full 100% cost of the qualified property?

*Taxpayers have the option to deduct the full cost of the qualified property on their Oklahoma return, but must add back any amounts that are depreciated on the federal return for the asset such that the total depreciation of the asset does not exceed 100% of the cost of the asset. The statute was meant to allow for continued 100% depreciation of an asset in the year it is placed in service, in contrast to the phase out at the federal level.*

*It simply allows for a difference in timing of the depreciation of an asset on the state and federal levels.*

- This is true regardless of the taxpayer's choice on their federal return to either, bonus depreciate, section 179 expense, or depreciate the qualified asset?

*Yes.*

- In other words, a taxpayer could elect to expense a qualified asset and thereby reduce federal AGI (or taxable income), then in computing Oklahoma taxable income may elect to fully expense the qualified property from federal AGI to arrive at Oklahoma taxable income?

*If the taxpayer elects to fully expense the cost of the qualified property in Oklahoma, any amounts depreciated on the federal return must be added back to avoid more than 100% of the cost of the asset being depreciated.*

- Your admin rules 710:50-15-69.1 and 710:50-19-5—Add back of federal depreciation for Oklahoma income tax purposes:
  - Your current rules say that if full Oklahoma expensing is elected, then in **future tax years** any depreciation on such asset is added back to Oklahoma taxable income.
    - So, if full expensing of the asset was elected on the federal return, then the add-back in any future year is zero, correct?

*If in year 1 the taxpayer elects full expensing of an asset for both federal and state purposes, then the federal amount depreciated must be added back for state purposes in year 1. There would be no required add back in year 2 because there would be no federal depreciation taken for the asset in year 2. This statutory provision benefits taxpayers who wish to depart from the federal phase out treatment for state purposes, but it does not permit depreciation of more than 100% of the cost of the asset.*

- The bill language does not mention any requirement to add-back anything. From what authority do the admin rules draw to require such an add-back?

68 O.S. § 2358.6A authorizes decoupling of the federal and state treatment for depreciation of a qualified property by allowing for 100% of the cost of an asset to be expensed for state purposes in the year the property is placed in service. The rule is intended to address those situations where the federal and state treatment does not align. For example, if you deduct 100% of the cost of an asset in year 1 for state purposes, but capitalize it and depreciate over time on the federal level, then the add back in the rule gives a mechanism to adjust for those amounts depreciated at the federal level in the future years. The rule prevents more than 100% of the cost of the asset being depreciated.

- Your proposed rules suggest that in years after 2022, if the taxpayer elects to fully expense qualified property in computing Oklahoma taxable income, then an add-back is also required for the corresponding federal depreciation.
  - The bill language does not mention any requirement to add-back anything. From what authority do the admin rules draw to require such an add-back?

*See above.*

## Withholding Taxes

- We understand the burden of proof falls on the taxpayer to show Oklahoma withholding related to W-2s. However, the information provided by the Social Security Administration does not show Oklahoma withholding on the requested W-2 information. When a previous employer is out of business, it's very difficult for the taxpayer to substantiate Oklahoma withholding. Does the OTC maintain records for payroll withholding with the thinking that W-2 information is required to be filed with the OTC? Is it permissible to estimate the Oklahoma income tax withholding?

*Oklahoma has been maintaining records for the last several years for verification purposes only and not as a resource to the taxpayer. We use the employer reported information for verification purposes only.*

*Taxpayers should not estimate withholding; they should do everything possible to show proof of withheld amounts.*

*The OTC retains the right to review withholding documentation on the return and ask for additional documentation if needed. It is ultimately the taxpayer's responsibility to retain proper documentation and records to substantiate any amount claimed on the return. However, the OTC does remain committed to working with the taxpayer if there are extenuating circumstances that prevent obtaining the proper documentation.*

## Communication with Tax Preparers and Taxpayers

- Regarding PDF attachments on electronically filed returns, there are times when a notice is sent to a taxpayer requesting information even though the requested information is included in a pdf attachment with the electronically filed return. Are there procedures to review the pdf attachments before issuing a notice? Should the tax preparer handle this differently?

*Some professional tax software allow for PDF attachments, but not all. When returns are electronically filed, the system recognizes the return and may recognize that there is an attachment, but cannot verify the contents of the attachment without manual intervention.*

*The guide for e-filers suggests submitting unsupported documents by 511EF.*

- Does OTC have plans to utilize a secure eFax system? This would be helpful when OTC employees ask for certain documents to be emailed, which can sometimes be unsecure.

*OTC does not have a secure e-fax system and does not recommend CPAs or taxpayers submit documents that are unsecure. Any documents we request can be submitted securely through OkTAP.*

- Regarding OKTAPS, there have been instances where requested information was sent vis that system, but clients still receive notices as if the information was not sent.

*This may be a timing issue: documents may have been received via OkTAP, but the auditor still needs to review the documents and update the account to prevent an additional letter from generating. Some letters are batch issued, but if a specific auditor requested information, then an OkTAP secure response can be directed to that auditor.*

*As long as the information requested has been received, there is no need to send another letter. Occasionally we receive only partial information or information that is not responsive to the original request. This may result in a subsequent letter asking for the same information again.*

- There are times when notices received from the OTC do not contain sufficient information to explain the change made. Is there a better way for tax preparers to understand what notice of change was made?

*The OTC is in the process of implementing a "Customer Centric Communications Program," through which we are reviewing all existing letter templates to ensure clarity and ease of understanding for taxpayers.*

- Would the OTC be willing to receive POAs electronically or as a fax? Currently, they can only be mailed which can create a time lag.

*POAs can be submitted by mail or electronically on OkTAP. We highly recommend submission through OkTAP as that is the most secure method.*

- Currently Oklahoma amended returns are not e-fileable although federal amended returns are. Is there a plan to open the e-file option for Oklahoma amended returns?

*Amended returns for certain tax years can be submitted electronically.*

- Sometimes tax preparers receive conflicting notices. For example, one notice may be sent saying money is owed. Then immediately following, the taxpayer is sent a notice stating

there was an overpayment. Can you explain how the system works and if there is anything we can do to prevent confusion?

*Our adjustment letters show only the line items of the tax return. On an original tax filing, we do not show or have a place for return payments or credits transferred that are not labeled to show on the tax return. The financial side of processing a tax return is different. Example: Taxpayer submits a payment with an accompanying voucher, Form 511-V (this is a return payment that posts after the tax return and is not labeled on the tax return). We adjust the return to either reduce or increase the tax due, but didn't adjust the withholding, estimates, or extension line. If the 511-V payment is larger than the corrected tax, there will be an overpayment which could generate an additional letter. 2<sup>nd</sup> example: Taxpayer original filing reports tax due and pays with filing. Later a return line item is adjusted. Original may have shown tax due and correction now shows a corrected tax due. It will not show the payments taxpayer made through billings or payment with the original.*

- Would it be possible to include the taxpayer's name, or first four letters of the name, rather than only an account number when OTC generates payment receipt emails? It would help with identifying the correct account.

*The payment receipt emails do include the taxpayer name if it was provided, as well as additional information which will allow us to locate the payment if it has not posted yet.*

- Can the OTC provide tax practitioners with a directory of OTC staff persons who specifically work directly with tax professionals?

*Please utilize the dedicated email address available for tax practitioners: [taxprofessionalquestion@tax.ok.gov](mailto:taxprofessionalquestion@tax.ok.gov).*

*Contact list of applicable OTC staff persons will be provided.*

- A client received a notice dated December 16, 2022 allowing 30 days to respond on an issue. However, on December 28, 2022, the client received a notice of proposed tax assessment despite having allowed 30 days to respond with the previous notice. Can you explain this?

*A partial response may have been received from the taxpayer within the initial 30 days which resulted in the assessment being readied. If that is the case, the auditor would have considered the information provided in preparing the proposed assessment. (Instances of this issue should be significantly reduced through implementation of the new Customer Centric Communications Program.)*



## Oklahoma Capital Gains Deduction

- There is a situation where a SMLLC is making a Section 351 transfer to a C corporation in exchange for stock in the C corporation. The SMLLC assets have been held for 15 years. The new stock will have the basis and holding period of the assets being transferred for federal tax purposes.
  - What is the holding period for purposes of meeting the Oklahoma Capital Gain deduction?
  - Or when does the holding period start for purposes of the Oklahoma capital gain deduction?

*This question appears to seek guidance on a specific taxpayer matter rather than a general policy of the OTC. If you would like an answer as it relates to a particular set of facts, you may request a letter ruling pursuant to Okla. Admin. Code § 710:1-3-73.*

*With respect to calculating a holding period for purposes of the Oklahoma Capital Gains Deduction, 68 O.S. § 2358(F)(2)(a)(3) specifically states that for purposes of the deduction, the holding period “shall include any additional period when the property was held by another individual or entity, if such additional period is included in the taxpayer’s holding period for the asset pursuant to the Internal Revenue Code.”*

## Stroble v. Oklahoma Tax Commission, Tribal, Etc.

- If the Oklahoma Supreme Court rules in favor of the taxpayer in the case of *Stroble v. Oklahoma Tax Commission*, Case No. 120806, what will it mean?

*The OTC cannot speculate on the meaning of a hypothetical opinion of the Supreme Court.*

- If the Oklahoma Supreme Court decides the *Stroble* case in favor of the taxpayer will the Oklahoma Tax Commission seek to have the U. S. Supreme Court reverse or change that decision?

*In the event of a decision in favor of the taxpayer from the Oklahoma Supreme Court, the OTC will engage required stakeholders (e.g., the Oklahoma Attorney General’s Office and Office of the Governor) in a decision about how best to proceed.*

- If the Oklahoma Supreme Court (and/or the U. S. Supreme Court) enters a final decision in favor of the taxpayer in the *Stroble* case, will the Oklahoma Tax Commission follow the decision with respect to other taxpayers who are Muscogee (Creek) Nation tribal members who receive income from and reside within the geographic boundaries of the Muscogee (Creek) Nation reservation described and held to still exist in the *McGirt* case?

*To ensure fair administration of the Oklahoma tax code, the OTC applies current statutes, regulations and case law; decisions of the Oklahoma Supreme Court and United States Supreme Court are binding on the OTC.*

- Are protests of denial of allowance of the exempt tribal income adjustment by individual taxpayers who are tribal members of the Cherokee, Chickasaw, Choctaw, and Seminole Nations pending before an Administrative Law Judge of the Oklahoma Tax Commission or the Oklahoma Tax Commission?

The OTC cannot comment on specific taxpayer matters which are the subject of pending litigation. However, we can confirm that there have been protests filed by tribal members from a number of different tribes.

- If the Oklahoma Supreme Court (and/or the U. S. Supreme Court) enters a final decision in favor of the taxpayer in the *Stroble* case, will the Oklahoma Tax Commission follow the decision with respect to other taxpayers who are tribal members of, and who receive income from and reside within the respective expanded geographic boundaries of the reservations of the Cherokee, Chickasaw, Choctaw, and Seminole Nations?

*To ensure fair administration of the Oklahoma tax code, the OTC applies current statutes, regulations and case law; decisions of the Oklahoma Supreme Court and United States Supreme Court are binding on the OTC.*

- Is the Tax Commission going to publish rules or general guidance for taxpayers who pay Oklahoma income tax describing the meaning and effect of the decision in the case of *In the Matter of the Income Tax Protest of Raytheon Company*, 512 P. 3d 333 (Okla. 2022) with respect to Oklahoma income tax, estimated payments and income tax refunds?

*At this time there are no plans to publish rules, however this will be re-evaluated later this year. Currently there is pending legislation to address and clarify the issues related to the recent court decision.*

- Please explain the relationship of 68 O. S., § 2373, interpreted and applied in the *Raytheon* case, and the right of a taxpayer to file a claim for refund and be entitled to use procedures and seek remedies stated under the Uniform Tax Procedure Code, 68 O. S., §§201, et seq.?

*If a taxpayer believes they are entitled to an income tax refund under the Court's rationale in *Raytheon* and it is denied by the OTC based on a filed return, the taxpayer has the right to protest the decision. Timely filing of a protest will protect the rights of the taxpayer while giving the OTC an opportunity to further review available documentation to determine whether a refund is appropriate.*

- Please explain the rebate rules and procedures involved in the Oklahoma Emission Reduction Technology Rebate Program to be administered by the Department of Environmental Quality and the Oklahoma Tax Commission as provided in the Oklahoma Emission Reduction Technology Incentive Act.

*HB 3568 (2022) created the Oklahoma Emission Reduction Technology Rebate Program, providing a rebate of up to 25% of documented expenditures made in Oklahoma that are directly attributable to the implementation of a qualified Emission Reduction Project. Rebate payments may not exceed \$10 million total in any fiscal year. The Department of Environmental Quality shall approve or disapprove all claims for a rebate payment and shall notify the OTC. Upon notification the OTC will issue a rebate payment for all approved claims from the Oklahoma Emission Reduction Technology Incentive Revolving Fund. The fund shall consist of all monies from public or private donations, contributions, and gifts received for the benefit of the fund and any amounts appropriated by the Oklahoma legislature. Currently no funds have been appropriated by the legislature.*

*It is the OTC's understanding that the Oklahoma Department of Environmental Quality is currently in the process of promulgating rules related to HB 3568.*