JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **98-02-12-011 / NOT PRECEDENTIAL**
ID: **P9500132**
DATE: **02-12-98**
DISPOSITION: **DENIED**
TAX TYPE: **MIXED BEVERAGE / SALES / TOURISM**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant herein, Protestant owned and operated a mixed beverage establishment known as ANONYMOUS CLUB in ANONYMOUS CITY, Oklahoma.

2. A field audit of Protestant's books and records was conducted by the Division. The audit was occasioned by Protestant's request for credit due from several amended sales and mixed beverage tax returns. The amendment to the returns reflected the deduction of taxes from the reported gross receipts.

3. As a result of the audit, the Division denied the request for credit and on March 10, 1995, caused to be issued proposed mixed beverage gross receipts, sales and tourism tax assessments against Protestant for the period of January 1, 1991 through August 31, 1994. The request for credit was denied because the audit determined that Protestant had actually underreported gross receipts for the audit period. The amounts assessed, inclusive of penalty and interest accrued through April 15, 1994, are as follows:

MIXED BEVERAGE GROSS RECEIPTS TAX

Tax:	$ 3,826.08
Interest:	331.77
Penalty:	382.61
Total:	$ 4,540.46

SALES TAX

Tax:	$ 3,935.67
Interest:	394.24
Penalty:	475.56
Total:	$ 4,805.47

TOURISM TAX

Tax:	$ 37.09
Interest:	3.22
Penalty:	3.71
Total:	$ 44.02

4. Protestant timely protested the proposed assessments.

5. The mixed beverage gross receipts and tourism tax assessments and a portion of the sales tax assessment result from the depletion audit conducted by the Division.

6. The remainder of the sales tax assessment involves taxes due from three adjusted reports (May/93, July/93 and August/93) and two no remit reports (March/94 and June/94).

7. In performing the depletion audit, the auditor reviewed Protestant's books and records and the information provided by Protestant, inclusive of prices for mixed drinks, pour sizes, glass sizes and inventory. The auditor depleted the spirits using a weighted average pour size of 1.5 ounces notwithstanding the pour statement affidavit of Protestant indicating a pour rate of 1.25 ounces. The weighted average pour size was determined by comparing the tests of metered spouts and shot glasses with the glass sizes.

8. An undercover investigation of Protestant's pour rate was conducted by AN ANONYMOUS AGENT of the ABLE Commission on December 1, 1995. The investigation indicated a pour rate of 1.599 ounces.

9. On August 27, 1996, the depletion audit was revised to take into account an average pour size of 1.599 ounces for mixed drinks. The amounts in controversy, inclusive of interest and penalty accrued through October 15, 1996, are as follows:

MIXED BEVERAGE GROSS RECEIPTS TAX

Tax:	$ 2,864.56
Interest:	894.69
Penalty:	286.46
Total:	$ 4,045.71

SALES TAX

Tax:	$ 2,894.95
Interest:	957.15
Penalty:	371.48
Total:	$ 4,223.58

TOURISM TAX

Tax:	$ 23.87
Interest:	7.46
Penalty:	2.39
Total:	$ 33.72

ISSUE AND CONTENTIONS

The issue presented for decision is whether Protestant sustained his burden of proving that the audit and resulting revised assessments are incorrect.

The Division contends that the audit and revised assessments are based on substantial evidence and should be sustained. In support of this contention, the Division argues that the evidence presented in this cause supports the findings of the auditor. The Division further argues that Protestant did not present any evidence to refute the findings of the auditor.

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. 1991, § 207.

2. Mixed beverage gross receipts tax is levied and imposed on the total retail sales price received for the sale, preparation or service of mixed beverages, ice, and nonalcoholic beverages to be mixed with alcoholic beverages, the total retail value of complimentary or discounted mixed beverages and the total amount of consideration received as charges for admission to a mixed beverage establishment which entitle the person to complimentary or discounted mixed beverages. 37 O.S. Supp. 1987, § 576(A) and (B).

3. Sales and Tourism taxes are also levied and imposed on the sale, preparation or service of mixed beverages, ice, and nonalcoholic beverages to be mixed with alcoholic beverages. 68 O.S. 1991, §§ 1354(1)(I) and 50012(A)(2). The retail sales price received for the sale, preparation or service of mixed beverages, ice, and nonalcoholic beverages to be mixed with alcoholic beverages is used in calculating gross receipts for sales tax purposes. 37 O.S. Supp. 1987, § 576(E).

4. The authorized method of auditing a mixed beverage establishment is the depletion method. Regulation XXX-20. This method accounts for the number of drinks available for sale, preparation, or service from the total alcoholic beverages received. ***Id***. It is a reasonable method for determining the total gross receipts subject to tax under Section 576(A). Oklahoma Tax Commission Order No. 93-04-22-008.

5. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect, and in what respect. ***Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission***, 768 P.2d 359 (Okl. 1988). The standard burden of proof in administrative proceedings is "preponderance of evidence." *Black's Law Dictionary*, 1064 (5th ed. 1979). See, Oklahoma Tax Commission Order No. 91-10-17-061. "Preponderance of evidence" means "[E]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." ***Id***. It is also defined to mean "evidence which is more credible and convincing to the mind ... [T]hat which best accords with reason and probability." ***Id***. In Oklahoma the standard does not require the exclusion of every other reasonable conclusion. ***Chickasha Cotton Oil Co. v. Hancock***, 306 P.2d 330 (Okl. 1957).

6. Here, Protestant failed to present any evidence to contradict the revised assessments. Further, the findings of the auditor are clearly supported by substantial evidence. Accordingly, Protestant's protest should be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is DETERMINED that the protest be denied. It is further DETERMINED that the amounts in controversy, inclusive of any additional accrued and accruing interest, be fixed as the deficiencies due and owing.

OKLAHOMA TAX COMMISSION

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