

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 98-02-12-013 / NOT PRECEDENTIAL
ID: P9500094
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, the Corporation owned and operated a mixed beverage establishment known as PROTESTANT CORPORATION in ANONYMOUS CITY, Oklahoma.

2. During the audit period, OFFICER ONE held the office of President for the Corporation. OFFICER TWO held the office of Vice-President for the Corporation for a portion of the audit period.

3. Neither OFFICER ONE nor OFFICER TWO dispute their individual liability for the sales tax of the Corporation.

4. A field audit of the books and records of the Corporation was conducted by the Division.

5. As a result of the audit, the Division on June 30, 1994, caused to be issued proposed mixed beverage gross receipts, sales and tourism tax assessments against the Corporation for the period of December 31, 1991 through October 31, 1993. The amounts assessed, inclusive of penalty and interest accrued through July 15, 1994, are as follows:

MIXED BEVERAGE GROSS RECEIPTS TAX

Tax:	\$8,603.07
Interest:	923.23
Penalty:	<u>860.31</u>
Total:	\$10,386.61

SALES TAX¹

Tax:	\$ 22,857.17
Interest:	3,711.64
Penalty:	<u>2,285.76</u>
Total:	\$ 28,854.57

TOURISM TAX

Tax:	\$ 351.65
Interest:	35.17
Penalty:	<u>35.17</u>
Total:	\$ 421.99

6. Protestants timely protested the proposed assessments.

7. The mixed beverage gross receipts tax assessment and a portion of the sales and tourism tax assessments result from a depletion audit conducted by the Division on the Corporation's mixed beverage sales.

8. The remainder of the sales and tourism tax assessments involve taxes assessed on sales of nonintoxicating beer and wine coolers and miscellaneous sales.

9. In performing the depletion audit, the auditor reviewed the books and records of the Corporation and the information provided by OFFICER ONE and OFFICER TWO, inclusive of prices for mixed drinks, pour sizes, glass sizes and inventory.

10. Except for that portion of the inventory represented by purchase invoices from a retail package store located in the same strip shopping mall as Protestants' business, Protestants do not dispute the prices, pour sizes and inventory used for performing the depletion audit.

11. The auditor testified that she included the retail liquor purchases in the depletion audit because the invoices were found in the Corporation's business records. The Corporation's business records were located at OFFICER TWO'S office. OFFICER TWO was the bookkeeper for the Corporation. She stated that she did not remember determining whether the retail purchases were claimed as expenses on the 1992 and 1993 income tax returns of the Corporation.

¹ Sales tax assessments were also issued against THE OFFICERS, as officers of the Corporation and as individuals. The status of OFFICER ONE and OFFICER TWO as principal officers of the Corporation is not in dispute. OFFICER ONE was an officer of the Corporation for the entire audit period and the amount of the sales tax assessment issued against him equals the amount assessed against the Corporation. OFFICER TWO was an officer of the Corporation for the period of August 24, 1992 through October 31, 1994. The amount of the sales tax assessment issued against him is \$19,046.03, inclusive of tax in the amount of \$14,425.42, interest accrued through July 15, 1994 in the amount of \$3,178.04, and penalty in the amount of \$1,442.57.

12. The amount of the retail liquor purchases totalled \$1,112.98, inclusive of sales tax. The auditor estimated the sales from these purchases to be five (5) times the total or \$5,564.90. This amount less the five percent (5%) variance was included in the balance of underreported mixed beverage sales of \$71,692.26.

13. The auditor also determined that for sales tax purposes Protestants had unreported gross receipts of \$351,649.01 for the audit period. This amount includes \$157,233.75 from unreported nonintoxicating beer and wine cooler sales, and miscellaneous sales and \$194,415.26 from unreported mixed beverage sales.

14. Protestants do not dispute the assessment of sales tax on the unreported nonintoxicating beer and wine cooler sales. Protestants also do not dispute the assessment of sales tax on the portion of the unreported mixed beverage sales which does not include the receipts from the retail liquor purchases.

15. The amount of gross receipts from miscellaneous sales at issue is \$58,310.75. This amount was determined by adding the amount of miscellaneous sales reported by Protestants on their monthly income statements for the period of January, 1992 through December, 1992 with an estimated amount of miscellaneous sales for the period of January, 1993 through October, 1993. The estimate is based on the reported miscellaneous sales divided by twelve. This figure was then multiplied by ten. The auditor testified that the estimate of miscellaneous sales for 1993 is supported by the amount reported as gross receipts on the 1993 federal income tax return of the Corporation.

16. The auditor testified that the mixed beverage establishment had approximately five to six pool tables. She stated that she does not remember whether the pool tables were stamped as vending machines. She further testified that she did not give any consideration to the miscellaneous sales representing receipts from the pool tables since the miscellaneous sales were run through the cash register and Protestants' monthly income statements included a line for reporting receipts from "machines".

17. Several invoices reflect the purchase of caps, shirts, tee shirts and jackets by Protestants during the audit period.

ISSUE AND CONTENTIONS

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

Protestants challenge two aspects of the audit and assessments. First, Protestants contend that the depletion of the liquor purchased from the retail package store is incorrect. In support of this contention, Protestants argue that this liquor was purchased for personal consumption, that the auditor never determined whether the cost of this liquor was claimed as an expense on the income tax returns of the Corporation and that the club was never cited for refilling violations.

Second, Protestants contend that the miscellaneous income is not subject to sales tax. In support of this contention, Protestants argue that no consideration was given to the pool tables which could have generated this income.

The Division contends that the audit and 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 Protestants did not present any evidence to refute the findings of the auditor.

The Division admits that an adjustment to the assessments is necessary to exclude the sales taxes paid on the retail liquor purchases.

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. The gross receipts or gross proceeds from each sale of tangible personal property is subject to sales tax. 68 O.S. 1991, § 1354(1)(A). The phrase tangible personal property is all inclusive and not limited except by specific exemption. ***Magnolia Petroleum Co. v. Oklahoma Tax Commission***, 326 P.2d 821 (Okl. 1958). The burden of proving that a sale is not a taxable sale is on the person who made the sale. 68 O.S. 1991, § 1365(C).

6. 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).

7. Here, Protestants failed to present any evidence in support of their challenges to the audit and proposed assessments. The evidence presented in this cause clearly supports the findings of the auditor.

8. Except to the extent that sales tax on the retail liquor purchases was included in the audit, Protestants' protest to the audit and proposed assessments should be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is DETERMINED that the protests of PROTESTANT CORPORATION AND ITS OFFICERS be denied. It is further DETERMINED that the assessments be adjusted to exclude the sales tax from the retail liquor purchases and that the resultant amounts of the assessments be respectively fixed, jointly and severally, 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.