**JURISDICTION:** **OKLAHOMA TAX COMMISSION - DECISION**
**CITE:** **98-02-26-011 / NOT PRECEDENTIAL**
**ID:** **P9500304**
**DATE:** **02-26-98**
**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, Protestants owned and operated a mixed beverage establishment known as ANONYMOUS CORPORATION in ANONYMOUS CITY, Oklahoma.

2. PROTESTANT OFFICER was the President of ANONYMOUS CORPORATION.

3. At the time of the audit Protestants were out-of-business. After at least two unsuccessful attempts to contact Protestants to obtain records and information to conduct a final audit, the Division performed an in-house depletion audit utilizing the wholesalers' reports of liquor purchases, average prices for the ANONYMOUS CITY area and regulation pour sizes.

4. As a result of the audit, the Division caused to be issued proposed mixed beverage gross receipts, sales and tourism tax assessments against ANONYMOUS CORPORATION for the period of February 28, 1992 through February 28, 1994. The amounts assessed, inclusive of penalty and interest accrued through June 30, 1995, are as follows:

### MIXED BEVERAGE GROSS RECEIPTS TAX

| | |
|---|---|
| Tax: | $ 10,866.90 |
| Interest: | 2,105.33 |
| Penalty: | 1,164.76 |
| $5/Day Penalty: | 275.00 |
| Total: | $ 14,411.99 |

### SALES TAX

| | |
|---|---|
| Tax: | $ 5,626.11 |
| Interest: | 1,091.31 |
| Penalty: | 562.61 |

| | |
|---|---|
| Total: | $ 7,280.03 |

**TOURISM TAX**

| | |
|---|---|
| Tax: | $ 86.56 |
| Interest: | 17.79 |
| Penalty: | 8.66 |
| Total: | $ 113.01 |

5. The sales tax assessment was also issued against PROTESTANT OFFICER as President of ANONYMOUS CORPORATION and as an individual. PROTESTANT OFFICER does not challenge his personal liability for the sales tax of ANONYMOUS CORPORATION.

6. Protestants timely protested the proposed assessments.

7. At the hearing, Protestants only challenged the regulation pour rate utilized in performing the audit. PROTESTANT OFFICER testified that the bartender whom he employed for approximately a year and a half of the two year audit consistently poured more than an ounce and a half per drink. PROTESTANT OFFICER'S testimony and two affidavits received into evidence from friends of PROTESTANT OFFICER attest to a pour rate by this bartender of over two ounces. The pour rate of the bartender was explained as, "she would fill a five ounce rocks glass two-thirds full for shots and mixed drinks".

8. The bartender was not called as a witness in this cause.

9. The affidavits indicate that the affiants observed the bartender pouring drinks during regular business hours. According to the testimony of PROTESTANT OFFICER, the well station for the bartender was below the level of the bar, the club was dark since it was a dance club and the bartender free poured instead of using a shot glass.

## ISSUE

The issue presented for decision is whether Protestants sustained their burden of proving that the use of the regulation pour rate in performing the depletion audit is incorrect.

## 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[1]. 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).

6. Here, the testimony and statements presented by Protestants are not only contradictory, but are self-serving. In addition, no basis has been laid to support the conclusions. The testimony and statements do not constitute "reasonable evidence of a different rate of use" and do not overcome the assumption "that spirits are dispensed at the average rate of one and one-half fluid ounce". Rule 710:20-5-8(b)(1) of the ***Oklahoma Administrative Code***. Accordingly, Protestants' protest to the proposed assessments 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 respectively 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.

[1]Currently codified as Rule 710:20-5-8 of the Oklahoma Administrative Code (July 12, 1993).