

**JURISDICTION:** OKLAHOMA TAX COMMISSION - DECISION  
**CITE:** 99-03-30-002 / NOT PRECEDENTIAL  
**ID:** P9500290 / P9500298  
**DATE:** 03-30-99  
**DISPOSITION:** SUSTAINED IN PART / DENIED IN PART  
**TAX TYPE:** MIXED BEVERAGE / SALES / TOURISM  
**APPEAL:** NO APPEAL TAKEN

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence and the revisions to the audit, the undersigned finds:

1. During the audit period, the Corporation maintained two separate licenses, a mixed beverage license and a caterer license, issued by the Alcoholic Beverage Laws Enforcement Commission. The mixed beverage license was used by the Corporation for purposes of operating the restaurant at AN ANONYMOUS Museum in ANYTOWN, Oklahoma. The Corporation utilized the caterer license for purposes of operating a business known as ANYTOWN Catering.

2. At all times relevant to these proceedings, MR. PROTESTANT held the office of President for the Corporation and MS. PROTESTANT held the office of Treasurer.

3. Neither MR. PROTESTANT nor MS. PROTESTANT challenge their individual liability for the assessed sales tax.

4. A field audit of the available books and records of the Corporation was conducted by the Division. The auditor testified that during the initial audit interview he requested several items of information from PROTESTANTS, including information regarding special sales for banquets. He stated that although he was given and did review several special events catering contracts, he could not take these contracts into consideration in the audit since they were lacking the total amount of inventory purchased for the event, the amount of inventory used at the event and the total dollar amount received for putting on the event.

5. As a result of the audit, proposed mixed beverage gross receipt tax, sales tax and tourism tax assessments were issued against the Corporation. The amounts assessed for each of the tax types, inclusive of penalty and interest accrued through October 15, 1995, are as follows:

**SALES TAX<sup>1</sup>**

Tax:	\$15,317.78
Interest:	3,649.83
Penalty:	<u>1,531.78</u>
TOTAL:	\$20,499.39

**MIXED BEVERAGE TAX ASSESSED AGAINST PERMIT NO. XXX**

Tax:	\$ 6,302.77
Interest:	1,077.93
Penalty:	656.68
\$5/Day Penalty:	<u>700.00</u>
TOTAL:	\$ 8,737.38

**MIXED BEVERAGE TAX ASSESSED AGAINST PERMIT NO. YYY**

Tax:	\$18,158.25
Interest:	4,753.48
Penalty:	1,815.82
\$5/Day Penalty:	<u>1,045.00</u>
TOTAL:	\$25,772.55

**TOURISM TAX**

Tax:	\$ 203.84
Interest:	49.29
Penalty:	<u>20.38</u>
TOTAL:	\$ 273.51

6. PROTESTANTS timely filed a written protest to the proposed assessments.

7. At the hearing, PROTESTANTS presented evidence of several discrepancies between the purchases reported by the wholesalers and their actual purchases.

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<sup>1</sup> The proposed sales tax assessment was also issued against MR. PROTESTANT and MS. PROTESTANT, as officers of the Corporation and as individuals.

8. Subsequent to the hearing, the Division reviewed COMPANY ONE'S sales invoices for discrepancies. The Division did not review the sales invoices of COMPANY TWO. Based on this review, the Division removed certain purchases from the depletion audit and revised the assessments. The revised amounts of the assessments are as follows:

**SALES TAX**

Tax:	\$10,914.51
Interest:	4,272.65
Penalty:	<u>1,091.46</u>
TOTAL:	\$16,278.62

**MIXED BEVERAGE TAX ASSESSED AGAINST PERMIT NO. XXX**

Tax:	\$ 3,969.11
Interest:	1,273.58
Penalty:	396.91
\$5/Day Penalty:	<u>700.00</u>
TOTAL:	\$ 6,339.61

**MIXED BEVERAGE TAX ASSESSED AGAINST PERMIT NO. YYY**

Tax:	\$13,464.22
Interest:	5,555.38
Penalty:	1,346.42
\$5/Day Penalty:	<u>1,045.00</u>
TOTAL:	\$21,411.02

**TOURISM TAX**

Tax:	\$ 169.71
Interest:	42.56
Penalty:	<u>4.85</u>
TOTAL:	\$ 217.12

9. In response to the revision, PROTESTANTS point out several other omissions of cancelled orders where no credit was given. The omissions for license number YYY are one (1) bottle of Cook's Champagne, 1255 bottles of Macon Village, One (1) bottle of Grandin Champagne and two (2) 1.5 liter bottles of Sebastiani Country Chardonnay. The omissions for license number XXX are single bottles of Barton's Gin, Barton's Rum, E & J Brandy, Kahlau, Jack Daniels, Wild Turkey, Dewar's, Glenlivet, Johnny Walker Black, Canadian Club, Crown Royal, Absolut, Beefeater's and Tanqueray and two (2) bottles each of Chivas and Stolichnaya.

10. PROTESTANTS placed into evidence several contracts and supporting documentation representing catering events which PROTESTANTS performed at cost and which if taken into account would reduce the average price for certain drinks. In response, the auditor testified that these contracts were not taken into consideration for the audit because he couldn't determine from the contracts the inventory used, the dollar value of the inventory or the total dollar value of the contract. He also testified that the sales value of the items would not only include the price of the drink, but all costs associated with getting the drink to the customer, including the bartender fee, license fee, glass rental, service fee, etc.

11. PROTESTANTS submitted three purchase invoices which they testified were neither signed by them nor received by them. PROTESTANTS explained that they allowed their catering license to be used by restaurants who had applied for but not received their liquor license. PROTESTANTS believe that some of the restaurants, without their knowledge, continued to purchase liquor through their license after they stopped allowing their license to be used.

12. PROTESTANTS also submitted purchase invoices, a contract and certain other documentation concerning their relationship with COMPANY THREE. PROTESTANTS had allowed the owner of COMPANY THREE to use their license to purchase liquor. PROTESTANTS testified that they filed reports for the liquor sales in accordance with what the owner said he sold. PROTESTANTS stated that the pour sizes and drink prices were the same or similar to their pour sizes and drink prices.

13. PROTESTANTS testified that the drink prices in the restaurant typically included sales tax. PROTESTANTS also testified that sales tax was included in drink prices for catered event on a fifty percent basis. PROTESTANTS admitted, but could not explain why they wrote and signed a statement at the time of the audit indicating that the "prices include liquor tax only."

14. PROTESTANTS testified that Cook's Champagne was sold at a \$1.50 per glass and that the remaining champagne was generally sold by the bottle. For audit purposes, Cook's Champagne was depleted at \$2.68 per drink or the average weighted price for wine. PROTESTANTS stated that at the time of the audit, the auditor requested information concerning wine prices, but did not request any information concerning champagne prices.

15. PROTESTANTS questioned the inclusion of a purchase invoice from AN ANONYMOUS Liquor Store in the depleted inventory. The auditor testified that he included the invoice because it was in PROTESTANTS' mixed beverage invoices. PROTESTANTS stated that the invoice represents an order by a customer which PROTESTANTS happened to pick up and for which PROTESTANTS were reimbursed. PROTESTANTS further stated that had they purchased the liquor they would have purchased it through their license from COMPANY ONE or COMPANY TWO.

16. PROTESTANTS also questioned the audit price of \$7.75 per three (3) ounce pour for Graham's Fine Ruby Port. The auditor testified that he used a three (3) ounce pour for Sherry in accordance with his experience in conducting mixed beverage audits. He also testified that he determined the price by comparing PROTESTANTS mark up with the cost of the wine. PROTESTANTS pointed out that this Sherry retails for \$10.88 per liter, that this was one of the items sold at a cost basis during catered events and that they should have grossed approximately \$300.00 per bottle using the auditor's figures.

### **ISSUES AND CONTENTIONS**

The issue presented for decision is whether PROTESTANTS have sustained their burden of proving that portions of the audit are erroneous.

PROTESTANTS challenge several aspects of the audit. PROTESTANTS argue that no consideration was given in the audit for events catered at cost and the variances in prices for catered events. PROTESTANTS also argue that no consideration was given for liquor returned to the wholesaler and liquor which was not received by them. PROTESTANTS additionally argue that the audit incorrectly excludes sales taxes from the price of the drinks and uses the incorrect prices for Cook's Champagne and Graham's Fine Ruby Port. PROTESTANTS further argue that the auditor erroneously included the purchase from AN ANONYMOUS LIQUOR STORE in its inventory. PROTESTANTS also request a waiver of the penalty assessed.

The Division contends that the assessments should be sustained. In support of this contention, the Division argues that PROTESTANTS have not sustained their burden of proving that the audit is incorrect.

**APPLICABLE LAW**

Mixed beverage gross receipts tax is levied and imposed on total gross receipts from: (1) the sale, preparation or service of mixed beverages; (2) the total retail value of complimentary or discounted mixed beverages; (3) ice or nonalcoholic beverages that are sold, prepared or served for the purpose of being mixed with alcoholic beverages and consumed on the premises where the sale, preparation or service occurs; and (4) any charges for the privilege of admission to a mixed beverage establishment which entitle a person to complimentary mixed beverages or discounted prices for mixed beverages. 37 O.S. Supp. 1987, § 576(A). Total gross receipts is defined to mean the total amount of consideration received as charges for admission to a mixed beverage establishment and 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. 37 O.S. Supp. 1987, § 576(B)(2).

In addition to the mixed beverage gross receipts tax levied and imposed under the provisions of Section 576(A), sales tax and tourism tax are levied and imposed on the gross receipts from the sale of drinks sold or dispensed by hotels, restaurants or bars, or other dispensers, and sold for immediate consumption upon the premises or delivered or carried away from the premises for consumption elsewhere. 68 O.S. 1991, §§ 1354(1)(l) and 50012(A)(2). The gross receipts for purposes of calculating sales tax is the total of the retail sale price received for the sale, preparation or service of mixed beverages, ice, and nonalcoholic beverages to be mixed with alcoholic beverages. 37 O.S. Supp. 1978, § 576(E).

The Tax Commission, pursuant to 37 O.S. Supp. 1985, § 586, adopted Regulation XXX-20.<sup>2</sup> This regulation adopts the depletion method for auditing the total gross receipts of a holder of a mixed beverage license or other person transacting business subject to Section 576 of the Oklahoma Alcoholic Beverage Control Act. The depletion method accounts for the number of drinks available for sale, preparation, or service from the total alcoholic beverages received. It has been determined to be a reasonable method for determining the total gross receipts subject to tax under Section 576(A). *Kifer v. Oklahoma Tax Commission*, 1988 OK CIV APP 34, 956 P.2d 162 (1997).

Rule 710:20-5-8(a) of the *Oklahoma Administrative Code* provides:

Every mixed beverage tax permit holder or any other person transacting business subject to the gross receipts tax shall be liable for the tax upon the gross receipts from such beverages (on the basis of the number of drinks available for sale, preparation, or service from the total alcoholic beverages received). Each permit holder or other person shall be liable for the gross receipts tax upon any and all disposition by his agents or employees or any other persons on the premises of the mixed beverage tax permit holders or other person, except upon seizure or other disposition of the alcoholic beverage by employees of the ABLE Commission, Tax Commission, or other law enforcement agencies in the execution of their official duties. [See: 37 O.S. §576]

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<sup>2</sup> Oklahoma Tax Commission Order No. 85-05-16-02. Currently codified as Rule 710:20-5-8 of the Oklahoma Administrative Code.

The burden of proof in all proceedings, unless otherwise provided by law, is on the taxpayer to show in what respect the action or proposed action of the Tax Commission is incorrect. Rule 710:1-5-47 of the *Oklahoma Administrative Code*. See, ***Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission***, 768 P.2d 359 (Okla. 1988) and ***Big Country Club, Inc. v. Humphreys***, 511 S.W. 2d 315 (Tex.Civ.App. 1974). In ***Big Country Club***, the issue before the court was whether the taxpayer or the taxing officials had the burden of proving the amount of tax due under a depletion audit. The court held that where records do not account for vast quantities of liquor purchased, and the state computes a tax on a reasonable formula, the burden is on the taxpayer to prove that the tax determination was unreasonable, or that it was achieved capriciously or arbitrarily. *Id.*, at 317.

In civil cases, the standard burden of proof 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 (Okla. 1957).

In regard to the use of specials or specialty drinks for purposes of a depletion audit, a taxpayer's must present evidence of four factors. Oklahoma Tax Commission Order No. 92-08-04-027. Evidence of the pour sizes, prices, recipes and percentage of specialty drinks sold to total drinks sold must be presented. *Id.*

### 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 burden of proof in all proceedings before the Tax Commission is on the taxpayer to show that the proposed assessment is incorrect, and in what respect. ***Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission***, 768 P.2d 359, 362 (Okla. 1988). The burden of proof never shifts, ***Owens v. Sun Oil Company***, 482 P.2d 564 (10th Cir. 1973), although the burden of going forward with the evidence to counteract the proofs of the other party, may shift from side to side during the course of the proceedings. See, generally, 31A C.J.S. *Evidence*, §§ 120-129 (1996).

6. Sufficient evidence was presented to prove that PROTESTANTS did not receive credit for several cancelled purchase orders. The inventory listed in paragraph 9 of the Findings of Fact should be removed from the audit.

7. PROTESTANTS did not present sufficient evidence to cause the removal of the three purchase invoices from the audit. PROTESTANTS are liable for any and all dispositions of alcoholic beverages by any agent, servant or employee of the licensee. See, 37 O.S. 1991, § 506(13) and (33) and Rule 710:20-5-8(a) of the *Oklahoma Administrative Code*.

8. PROTESTANTS did not present sufficient evidence to prove that a reduction in the average weighted price of the drinks is warranted for events catered at cost or for the variances in prices for catered events. See, Oklahoma Tax Commission Order No. 92-08-04-027. PROTESTANTS failed to show the prices for the drinks at catered events, the inventory used at catered events and the percentage of drinks sold at catered events to total drinks sold.

9. PROTESTANTS did not present any evidence to refute their prior statement that the drink prices included liquor taxes only. Therefore, the exclusion of sales taxes from the price of the drinks was not erroneous.

10. PROTESTANTS presented sufficient evidence to prove that the incorrect prices were used in the audit for Cook's Champagne and Graham's Fine Ruby Port. The prices for these drinks should be reduced to \$1.50 for Cook's Champagne and \$2.68 for Graham's Fine Ruby Port.

11. Sufficient evidence was presented to remove AN ANONYMOUS LIQUOR STORE invoice from the audit inventory.

12. PROTESTANTS' protest to the proposed assessments should be sustained in part and denied in part.

**DISPOSITION**

Based on the above and foregoing findings of fact and conclusions of law, it WAS DETERMINED that the protest of PROTESTANTS, THE CORPORATION, MR. PROTESTANT and MS. PROTESTANT, be sustained in part and denied in part. It WAS further DETERMINED that the audit be revised in accordance herewith and that the resultant amounts be respectively fixed as the deficiencies due and owing.

**ORDER GRANTING RECONSIDERATION AND AMENDING FINDINGS, CONCLUSIONS AND DETERMINATION**

NOW on this 30th day of November, 1998, the response filed by PROTESTANTS to the revision of the audit submitted by the Division in accordance with the Findings, Conclusions and DETERMINATION issued on August 26, 1998, comes on for consideration. PROTESTANTS response is being treated as a Motion for Reconsideration filed out of time. In the response, PROTESTANTS challenge the conclusions regarding the denial of the inclusion of sales tax in the drink prices and denial of a reduction of the average weighted drink prices for events catered at cost.

Upon review of the file and records, including the Findings, Conclusions and DETERMINATION issued in this cause on August 26, 1998 (hereinafter "Findings"), the undersigned finds:

1. That the error urged by PROTESTANTS regarding the denial of a reduction of the average weight price for drinks for events catered at cost is addressed by the Findings.
2. That PROTESTANTS in support of their challenge to the exclusion of sales tax from the drink prices have submitted additional documentation.
3. That such documentation is sufficient to refute PROTESTANTS prior statement indicating the prices for drinks did not include sales tax.
4. That the following finding of fact be added to and incorporated in Paragraph 13 of the Findings of Fact appearing on page 6 of the Findings, to-wit:

PROTESTANTS submitted documentation showing that the prices for drinks in the restaurant included sales tax. PROTESTANTS also submitted documentation supporting their testimony that drink prices at catered events included sales tax on a fifty percent (50%) basis.

5. That Paragraph 9 of the Conclusions of Law appearing on page 13 of the Findings be deleted and replaced by the following, to-wit:

PROTESTANTS submitted sufficient evidence to refute their prior statement regarding the exclusion of sales tax from the drink prices. The evidence proves that the drink prices in the restaurant included sales tax. The evidence further proves that sales tax was included in the drink prices at catered events on a fifty percent basis.

6. That the following DETERMINATION be added to and incorporated in the DETERMINATION of the Findings, to-wit:

It WAS further DETERMINED that the audit be revised to include sales tax in the restaurant drink prices and, on the basis of fifty percent (50%), in the catered event drink prices.

THEREFORE, IT WAS ORDERED that the Response of PROTESTANTS which is being treated as a Motion for Reconsideration should be and the same WAS hereby granted. IT WAS FURTHER ORDERED that the Findings, Conclusions and DETERMINATION issued in this cause on August 26, 1998, should be and the same WERE hereby amended to add and incorporate the above and foregoing findings of fact, conclusions of law and DETERMINATION.

#### **ADDENDUM TO AMENDED FINDINGS, CONCLUSIONS AND DETERMINATION**

NOW on this 8th day of March, 1999, the Amended Findings, Conclusions and DETERMINATION issued on November 30, 1998, in the above styled and numbered cause come on for consideration of additional findings of fact and a DETERMINATION as to the amount of the deficiency which should be confirmed by an order of the Tax Commission.

The Division, as directed by the Amended Findings, Conclusions and DETERMINATION, revised the proposed mixed beverage gross receipts tax, sales tax, and tourism tax assessments and provided notice of the revisions to PROTESTANTS. PROTESTANTS have not challenged the revisions proposed by the Division.

Upon consideration of the Amended Findings, Conclusions and DETERMINATION, and the revisions to the assessments, the undersigned finds that the following Findings of Fact should be added to and incorporated in the Amended Findings, Conclusions and DETERMINATION:

1. That notice of the revisions to the assessments was filed of record in this cause on February 16, 1999.
2. That the Division revised the mixed beverage gross receipts tax assessment for Permit No. YYY to an amount of \$19,514.47, consisting of tax in the amount of \$9,913.03, penalty in the amount of \$991.30, \$5/day penalty accrued through February 15, 1999, in the amount of \$1,045.00, and interest accrued through February 15, 1999, in the amount of \$7,565.14.

3. That the Division revised the mixed beverage gross receipts tax assessment for Permit No. XXX to an amount of \$5,537.52, consisting of tax in the amount of \$2,771.60, penalty in the amount of \$281.76, \$5/day penalty accrued through February 15, 1999, in the amount of \$620.00, and interest accrued through February 15, 1999, in the amount of \$1,864.16.
4. That the Division revised the sales tax assessment to an amount of \$14,634.06, consisting of tax in the amount of \$7,940.94, penalty in the amount of \$794.10, and interest accrued through February 15, 1999, in the amount of \$5,899.02.
5. That the Division revised the tourism tax assessment to an amount of \$195.13, consisting of tax in the amount of \$105.71, penalty in the amount of \$10.57, and interest accrued through February 15, 1999, in the amount of \$78.85.
6. That the revisions comply with the DETERMINATION set forth in the Amended Findings, Conclusions and DETERMINATION.
7. That PROTESTANTS were provided notice of the revisions.
8. That PROTESTANTS did not file a response to the revisions.

The undersigned further finds that the following DETERMINATION WAS added to and incorporated in the Amended Findings, Conclusions and DETERMINATION:

It WAS further DETERMINED that the amounts in controversy, inclusive of any additional accrued and accruing penalty and/or interest, be respectively fixed as the deficiency due and owing.

THEREFORE, the Amended Findings, Conclusions and DETERMINATION issued on November 30, 1998, WERE amended to include and incorporate the above and foregoing findings of fact and DETERMINATION.

**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.