

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 99-04-08-003 / NOT PRECEDENTIAL
ID: P9600002
DATE: 04-08-99
DISPOSITION: SUSTAINED IN PART / DENIED IN PART
TAX TYPE: MIXED BEVERAGE / SALES / TOURISM
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant herein, the Corporation owned and operated a restaurant known as THE RESTAURANT, located within the premises of the ANONYMOUS Motel in ANYTOWN, Oklahoma. A mixed beverage license for purposes of operating a mixed beverage establishment within the premises of the restaurant was secured in the name of the Corporation. CORPORATE OFFICER "A" (OFFICER "A") held the offices of President and Treasurer for the Corporation.

2. The subject of the current protest is the assessments of mixed beverage gross receipts tax, sales tax and tourism tax resulting from an audit of the alcoholic beverages available for sale (depletion audit) during the period of and including May 11, 1993 through May 31, 1995.

3. The audit was conducted by THE FIELD AUDITOR, during the course of two (2) meetings with the principals of the Corporation at the establishment. The first meeting was held on May 15, 1995, where the auditor inspected the premises and requested records to conduct the audit. The records request included Protestants' price list, beginning and ending inventories, withholding records, sales records and a pour sample. The second meeting was held on June 16, 1995, where the auditor was given the price list and the beginning and ending inventories and was able to conduct a pour test on the two (2) main bartenders for the establishment in the presence of one of the principals of the Corporation.

4. The auditor testified that she requested each bartender to pour four types of drinks from a measured bottle. The auditor then measured the liquid remaining in the measured bottle after each bartender poured the four drinks. The average pour of the first bartender was 1.63 ounces. The average pour of the second bartender was 1.56 ounces. Based on these pour tests, the auditor used a pour rate of 1.6 ounces for purposes of performing the depletion audit.

5. The auditor also conduct pour tests for house wines, specialty wines and champagne. These tests resulted in averages of 6 ounces for house wines, 6 ounces for specialty wines and 4.25 ounces for champagne.

6. Each bartender executed a pour statement affidavit attesting to the average pour

rates indicated by the pour tests. Statements by one of the bartenders and the general manager of the restaurant taken after the protest was filed indicate that it was their understanding that they were instructed to attempt to pour around 1.5 ounces during the pour tests. The auditor testified that she instructed the bartenders to pour their normal or usual pours for the pour tests.

7. Although Protestants did not conduct pour tests on its bartenders during the audit period, Protestants estimate that their average pour rates were 1.8 ounce for mixed drinks, 2 ounces for shots and 8 ounces for wine. According to the testimony of OFFICER "A", Protestants' estimates are based on the following factors; (1) that THE RESTAURANT is an upscale restaurant and bar which catered to upscale clientele, (2) that because of these customers the bartenders were instructed to pour to their satisfaction which usually involved premiums, (3) that the glasses used in the restaurant and bar were unusually constructed which required a larger pour to affect volume and taste, (4) that on average the ratio of liquor costs to receipts less taxes ran approximately 28.8% which was verified on a daily, weekly, monthly and yearly basis and (5) that Protestants sold a substantial amount of exotic drinks which contained more than one type of liquor and/or were served in larger glasses.

8. Protestants do not dispute the prices and inventory utilized by the auditor in conducting the depletion audit and do not have any reason to believe that their losses exceeded the five percent (5%) allowed in the audit.

9. According to the testimony of OFFICER "A", Protestants replaced their six (6) ounce wine glasses with eight (8) ounce wine glasses during the first year of operation as the glasses were broken.

10. According to the testimony of the auditor, she did not take exotic drinks into account in performing the audit because the necessary information to take them into account, inclusive of (1) the percentage of use, (2) the pour sizes, and (3) the prices were not provided. According to OFFICER "A", the information regarding exotic drinks, except the percentage of use and recipes, was made available to the auditor.

11. As a result of the depletion audit, mixed beverage gross receipt tax, sales tax and tourism tax were assessed on the proposed underreported sales of \$65,694.97. It is undisputed that Protestants do not owe any additional taxes on their reported sales for the approximately 480 day audit period. The amounts assessed for each of the tax types, inclusive of penalty and interest accrued through September 15, 1995, are as follows:

SALES TAX¹

Tax	\$5,180.04
Interest	542.80
Penalty	518.01
TOTAL	\$6,240.85

MIXED BEVERAGE TAX

Tax	\$7,883.40
Interest	298.06
Penalty	<u>788.34</u>
TOTAL	\$8,969.80

TOURISM TAX

Tax	\$65.70
Interest	7.84
Penalty	<u>6.56</u>
TOTAL	\$80.10

12. Protestants filed a timely protest to the proposed assessments.

13. Protestants' records indicate a difference in the amount of underreported sales of \$63,416.57. The pour rate differences (1.6 ounces for liquor and 6 ounces for wine versus 1.8 and 2 ounces for liquor and 8 ounces for wine) accounts for \$53,475.37 of the difference. The difference also takes into account the deletion of cooking wine and sherry in the amount of \$1,941.20 and the deletion of the alleged sales from May 11, 1993 to May 15, 1993 by another entity in the amount of \$8,000.00.

14. The Division admits and agrees to the removal of Gallo Cooking Sherry from the depletion inventory.

15. A Licensing Supervisor with the Alcoholic Beverage Laws Enforcement Commission (ABLE), testified that the ABLE license was issued to Protestants effective May 11, 1993. ABLE also granted permission to Protestants on May 11, 1993, to purchase all of the stock of alcoholic beverages from the prior owner.

¹The proposed sales tax assessment was also issued against OFFICER "A" and OFFICER "B", as officers of the Corporation and as individuals. Whether OFFICER "B" is liable for the assessed sales tax, penalty and interest is not the subject of this proceeding. Protestant, OFFICER "A", does not challenge his individual liability for the assessed sales tax, penalty and interest.

16. Protestants admit that a "substantial amount" of champagne and sparkling wine was given away during their grand opening and new years eve parties.

ISSUES AND CONTENTIONS

Three issues are presented for decision. The first issue is whether Protestants sustained their burden of proving that the pour rates utilized by the Division for the depletion of the liquor and wine are incorrect. The second issue is whether the beginning date of the audit is incorrect. The third issue is whether the depletion method of auditing the sale of alcoholic beverages is authorized by statute.

Protestants contend that the pour rates for liquor and wine are incorrect. In support of this contention, Protestants argue that the average pour rates for liquor were 1.8 ounces for mixed drinks and 2.0 ounces for shots and the average pour rate for wines was 8 ounces. The basis for these averages is the instructions to the bartenders to pour to the customers' satisfaction, the unusual construction of the glasses, the substantial amount of exotic drinks that were served and the ratio of liquor costs to receipts less taxes. Protestants also contend that the inventory from the prior owner should not be included in the depletion audit. In support of this contention, Protestants argue that they opened for business on May 15, 1993. Finally, Protestants contend that the depletion method of auditing liquor sales is invalid. In support of this contention, Protestants argue that the depletion method is not authorized by statute.

The Division contends that the assessments should be sustained. In support of this contention, the Division argues that reasonable evidence of different pour rates for liquor and wine have not been provided and that the records of the ABLE Commission verify that Protestants purchased the inventory from the prior owner. The Division further argues that the pour rate for liquor should not be adjusted for exotic drinks since Protestants failed to present sufficient evidence of the factors necessary for incorporating exotic drinks in the audit. The Division also argues that the depletion method is authorized by statute.

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)(I) and 50012(A)(2). The gross receipts for purposed 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-20.² 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). See, *Kifer v. Oklahoma Tax Commission*, 1998 OK CIV APP 34, 956 P.2d 162 (1997).

Rule 710:20-5-8 of the Oklahoma Administrative Code provides:

(a) **Liability in general.** 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]

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

(b) Audit procedures.

(1) Upon audit of the books and records of a mixed beverage establishment for Gross Receipts Tax, it shall be assumed that spirits have been dispensed at the average rate of one and one-half fluid ounce (1 and ½ oz.), except for drinks with recipes calling for more than one type of spirit or for double portions of spirits, or upon reasonable evidence of a different rate of use.

(2) Wines will be presumed to have been dispensed at the average rate of six ounces (6 oz.) per serving. The Tax Commission may use an average rate greater or less than those set out in this Rule upon reasonable evidence of a different rate of use.

(3) A deduction may be allowed from the gross receipts tax liability determined by an audit for losses due to undetermined causes, not to exceed five percent (5%) of the total gross receipts.

(4) In addition, a deduction may be allowed from the gross receipts tax liability determined by an audit or other investigation of the books and records of a mixed beverage tax permit holder, for alcoholic beverages that are:

(A) consumed in food as verified by the audit;

(B) destroyed due to breakage for which the permit holder has retained the container or that portion thereof that has the unbroken seal and the identification stamp affixed thereto for full unopened bottles or for partial bottles destroyed by breakage for which the permit holder has completed a breakage affidavit listing the date of the occurrence, the brand and type of liquor, the size bottle, the identification stamp number, the approximate amount left in the bottle by 1/10ths, and the cause of the breakage. The affidavit shall be signed by the permit holder and two witnesses;

(C) stolen or destroyed by a disaster such as a fire or flood, provided that reasonable evidence is provided to support a claim. Reasonable evidence might include a copy of a police or sheriff's crime report, or an insurance claim detailing the inventory destroyed by brand, size, and type of liquor;

(D) not consumed, and exist or existed, at the close of a taxable period in question, provided that the amount and nature of the unconsumed inventory has been verified by agents of the Tax Commission, ABLE Commission, or verified by invoice to a mixed beverage permittee or wholesaler approved to purchase the inventory by the ABLE Commission. Partially filled bottles which are not included in a transferred inventory should be verified by a Tax Commission or ABLE Commission agent or agents.

(5) If an establishment was selling alcoholic beverages prior to the starting date of the audit period being used by the Commission in its audit, the establishment shall be required to furnish the Commission with a beginning inventory of all liquor, wine, and strong beer on hand if an ending inventory is offered for audit purposes. When the permittee is unable or unwilling to furnish such an inventory, then no beginning or ending inventories shall be considered for the audit period used and the audit will be conducted solely on the taxpayer's purchases made during the audit period.

A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect, and in what respect. 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 (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.*

Evidence of exotic drinks shall not be utilized in a depletion audit unless the taxpayer presents evidence of the pour sizes, prices, recipes and percentage of use. *Oklahoma Tax Commission Order No. 92-08-04-027*.

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)(l) 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). See, *Kifer v. Oklahoma Tax Commission*, 1998 OK CIV APP 34, 956 P.2d 162 (1997).

5. The pour rates utilized in depleting the inventory were established by pour tests conducted of the bartenders in the presence of a principal of the business. Protestants counter the pour rates and pour tests by presenting evidence of estimated average pour rates based principally on a ratio of liquor costs to receipts less taxes. Protestants failed to show, however, the relationship of the ratio to the estimated average pour rates. Further, Protestants failed to present any evidence to corroborate the estimated average pour rate for wines and failed to submit evidence of the necessary factors for incorporating exotic drinks in the depletion formula. Accordingly, Protestants failed to sustain their burden of proving by a preponderance of the evidence that the pour rates utilized by the Division in conducting the depletion audit were incorrect.

6. The evidence conclusively proves that Protestants' ABLE license was in effect on May 11, 1993. Whether Protestants started business on May 11, 1993 is irrelevant since the evidence also proves that Protestants purchased the inventory of the prior owner. Accordingly, the inventory of the prior owner was properly included in the depletion audit of Protestants.

7. To the extent the Division has agreed to the removal of Gallo Cooking Sherry from the depleted inventory, Protestants' protest should be sustained. In all other respects, Protestants' protest to the proposed assessments should be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it WAS DETERMINED that the protest of Protestants, CORPORATION and CORPORATE OFFICER "A", be sustained in part and denied in part. It WAS further DETERMINED that the audit be adjusted in accordance herewith and that the resultant amounts, inclusive of any additional accrued and accruing interest, be fixed as the deficiencies respectively due and owing.

ADDENDUM TO FINDINGS, CONCLUSIONS AND DETERMINATION

NOW on this 8TH day of March, 1999, the Findings, Conclusions and DETERMINATION issued on January 26, 1999, in the above styled and numbered cause CAME 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 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 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 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 to an amount of \$13,012.12, consisting of tax in the amount of \$7,878.94, penalty in the amount of \$787.89, and interest accrued through February 15, 1999, in the amount of \$4,345.29.
3. That the Division revised the sales tax assessment to an amount of \$8,550.05, consisting of tax in the amount of \$5,177.12, penalty in the amount of \$517.71, and interest accrued through February 15, 1999, in the amount of \$2,855.22.
4. That the Division revised the tourism tax assessment to an amount of \$108.44, consisting of tax in the amount of \$65.66, penalty in the amount of \$6.57, and interest accrued through February 15, 1999, in the amount of \$36.21.
5. That the revisions comply with the DETERMINATION set forth in the Findings, Conclusions and DETERMINATION.
6. That Protestants were provided notice of the revisions.
7. 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 Findings, Conclusions and DETERMINATION:

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

THEREFORE, the Findings, Conclusions and DETERMINATION issued on January 26, 1999, WAS 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.