JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **99-05-10-014 / NOT PRECEDENTIAL**
ID: **P9600194 / P9600194A**
DATE: **05-10-99**
DISPOSITION: **DENIED**
TAX TYPE: **MIXED BEVERAGE / SALES / TOURISM**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Corporation owned and operated a mixed beverage establishment in ANYTOWN, Oklahoma.

2. Protestant held the office of President of the Corporation.

3. A field audit of the Corporation's books and records for the period of December 1, 1992 through November 30, 1995 was conducted by the Division.

4. As a result of the audit, the Division on March 7, 1996, caused to be issued against the Corporation proposed mixed beverage gross receipts, sales and tourism tax assessments. The Division also issued a proposed sales tax assessment against Protestant[1]. The amounts assessed, inclusive of penalty and interest accrued through April 15, 1996, are as follows:

MIXED BEVERAGE GROSS RECEIPTS TAX

Tax:	$20,040.98
Interest:	3,425.50
Penalty:	2,004.11
Total:	$25,470.59

SALES TAX

Tax:	$15,141.59
Interest:	2,979.31
Penalty:	1,514.17
Total:	$19,635.07

[1]Protestant does not challenge her individual liability for the assessed sales tax.

TOURISM TAX

Tax:	$196.97
Interest:	41.54
Penalty:	19.73
Total:	$258.24

5. The proposed assessments were timely protested.

6. The proposed assessments result from a depletion audit of the mixed beverage inventory available for sale and a comparison of the Corporation's reported sales with the Corporation's monthly sales worksheets. According to the depletion audit, mixed beverage sales were underreported by a total amount of $161,789.04. The comparison of reported sales with the monthly sales worksheets found that mixed beverage sales were unreported in the amount of $5,219.35 and that sales were unreported in the amount of $35,179.69.

7. In performing the depletion audit, the auditor reviewed the information provided by Protestant, inclusive of the mixed beverage price list with specials and recipes, the monthly sales worksheets and the mixed beverage purchase invoices on hand.

8. The auditor also performed a pour test on Protestant which indicated pour rates of one ounce for spirits and two ounces for wine. Protestant executed a pour statement affidavit attesting to the pour rates. Protestant and the auditor testified that pour rates on any given occasion can vary up or down. Protestant indicated, however, that she instructed her bartenders to pour one ounce.

9. All mixed beverage purchases made during the audit period were from COMPANY ONE of ANYTOWN. Protestant submitted certain invoice which she indicated were signed by individuals who did not work for her. The auditor's cross check of these invoices with the records of COMPANY ONE Sales and the master invoice list in the Tax Commission's data base indicated that all but two of the invoice were included in the audit. Each of the remaining invoices in question reflected that the product was delivered to the business location of the mixed beverage establishment. In addition, these invoices have the Corporation's ABLE license number and customer code imprinted thereon.

10. A Certified Public Accountant, testified that he was unable to reconcile the audit report with the Corporation's general ledger and financial statements. His comparison of reported sales with the general ledger and financial statements of the Corporation indicated that sales taxes were slightly overreported and mixed beverage taxes were slightly underreported for the audit period.

ISSUE AND CONTENTIONS

Two issues are presented for decision. The first issue is whether the Corporation and Protestant sustained their burden of proving that the audit and resulting assessments are incorrect. The second issue is whether the depletion method of auditing the sale of alcoholic beverages is authorized by statute.

Protestant contends that the audit and assessments are unreasonable and should be dismissed. In support of this contention, Protestant argues that the one ounce pour rate is restrictive based on the evidence that the pour rate may vary on any given occasion. Protestant also argues that the records of COMPANY ONE are suspect and should be audit for accuracy. Protestant further argues that taxes on the sale of alcoholic beverages should be based on revenue rather than on the inventory available for disposition.

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 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. 1991, § 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. 1991, § 576(E).

4. The authorized method of auditing a mixed beverage establishment is the depletion method. Regulation XXX-20[2]. 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). ***Kifer v. Oklahoma Tax Commission***, 1998 OK CIV APP 34, 956 P.2d 162 (1997).

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, Protestant failed to present any evidence to contradict the audit findings. As indicated by Protestant, notwithstanding whether the pour rate may vary up or down on any given occasion which does not in itself prove the pour rate should be adjusted, she instructed her bartenders to pour one ounce. In addition, the purchase invoices not only reflected delivery at the business location of the mixed beverage establishment, but the Corporation's ABLE license number and customer code. The audit findings are clearly supported by substantial evidence.

7. The 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 the CORPORATION AND ITS CORPORATE OFFICER be denied. It WAS further DETERMINED that the amounts in controversy, inclusive of any additional accrued and accruing interest, be fixed as the deficiencies respectively 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.

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