

**JURISDICTION:** OKLAHOMA TAX COMMISSION - DECISION  
**CITE:** 99-08-11-003 / NOT PRECEDENTIAL  
**ID:** P9700090 / P9700092 / P9700094  
**DATE:** 08-11-99  
**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, the Corporation owned and operated three (3) restaurants known as ANONYMOUS RESTAURANT. A mixed beverage tax permit for each of the locations was secured in the name of the Corporation.

2. OFFICER "A", OFFICER "B" and OFFICER "C" held the offices of President, Vice President and Secretary of the Corporation, respectively, during the audit period.

3. Protestants, OFFICER "A", OFFICER "B" and OFFICER "C", do not dispute their individual liability for the assessed sales tax.

4. A field audit of the Corporation's books and records for the period of November 1, 1993 through September 30, 1996 was conducted by the Division.

5. As a result of the audit, the Division on November 14, 1996, caused to be issued against the Corporation proposed mixed beverage gross receipts, sales and tourism tax assessments. The amounts assessed, inclusive of penalty and interest accrued through December 15, 1996, are as follows:

#### AUDIT NO. XXX

#### MIXED BEVERAGE GROSS RECEIPTS TAX

|           |               |
|-----------|---------------|
| Tax:      | \$ 3,203.27   |
| Interest: | 240.90        |
| Penalty:  | <u>320.33</u> |
| Total:    | \$ 3,764.50   |

#### SALES TAX

|           |               |
|-----------|---------------|
| Tax:      | \$ 2,219.59   |
| Interest: | 209.73        |
| Penalty:  | <u>221.96</u> |
| Total:    | \$ 2,651.28   |

**TOURISM TAX**

|           |             |
|-----------|-------------|
| Tax:      | \$ 26.69    |
| Interest: | 2.91        |
| Penalty:  | <u>2.67</u> |
| Total:    | \$ 32.27    |

AUDIT NO. YYY

**MIXED BEVERAGE GROSS RECEIPTS TAX**

|           |               |
|-----------|---------------|
| Tax:      | \$ 1,152.15   |
| Interest: | 57.77         |
| Penalty:  | <u>115.22</u> |
| Total:    | \$ 1,325.14   |

**SALES TAX**

|           |              |
|-----------|--------------|
| Tax:      | \$ 659.61    |
| Interest: | 114.84       |
| Penalty:  | <u>65.96</u> |
| Total:    | \$ 840.41    |

AUDIT NO. ZZZ

**MIXED BEVERAGE GROSS RECEIPTS TAX**

|           |               |
|-----------|---------------|
| Tax:      | \$ 1,610.48   |
| Interest: | 60.89         |
| Penalty:  | <u>161.05</u> |
| Total:    | \$ 1,832.42   |

**SALES TAX**

|           |               |
|-----------|---------------|
| Tax:      | \$ 1,115.93   |
| Interest: | 66.69         |
| Penalty:  | <u>111.60</u> |
| Total:    | \$ 1,294.22   |

**TOURISM TAX**

|           |             |
|-----------|-------------|
| Tax:      | \$ 13.43    |
| Interest: | .99         |
| Penalty:  | <u>1.34</u> |
| Total:    | \$ 15.76    |

6. The sales tax assessments were also issued against Protestants.

7. The proposed assessments were timely protested.

8. The proposed assessments result from a depletion audit of the mixed beverage inventory available for sale at each location. Each audit found mixed beverage sales were underreported. In audit no. XXX, mixed beverage sales were determined to be underreported by a total amount of \$26,693.89. In audit no. YYY, mixed beverage sales were determined to be underreported by a total amount of \$9,601.29. In audit no. ZZZ, mixed beverage sales were determined to be underreported by a total amount of \$13,420.64.

9. In performing the audits, the auditor reviewed the Corporation's sales tax records, daily cash reports, cash register tapes, federal form 1120 and each restaurant's price list. The auditor also reviewed the alcoholic beverage wholesaler's list of purchase invoices for each of the locations.

10. A pour test was performed on OFFICER "C" which indicated pour rates of one and a half ounces for mixed drinks, one ounce for shots, six ounces for house wines and three ounces for specialty wines. OFFICER "C" executed a pour statement affidavit attesting to the pour rates. The pour statement affidavit indicates that a jigger is used to pour mixed drinks.

11. MANAGER of the NORTH LOCATION, testified that a bartender's guide is used to mix drinks. She also stated that a jigger is used to measure each pour. The jigger has two sides. One side is calibrated at one ounce and the other side is calibrated at an ounce and a half.

12. The testimony indicates that the Gallo Sherry purchased during the audit period was exclusively used in cooking. Approximately 12 bottles of Gallo Sherry were used every month to a month and a half to make sauces. The frequency of the use of Gallo Sherry in cooking is corroborated by the fact that approximately 300 bottles of Gallo Sherry were purchased during the 35 month audit period.

13. The audits are exclusively based on the purchases of alcoholic beverages during the audit period. Protestants were in business prior to the audit and beginning inventories were not provided to the auditor.

14. In response to the directive of the undersigned, the Division on April 27, 1998, filed a report showing the removal of the Gallo Sherry from the depletion inventory and the resulting assessment amounts. The report indicates that no Gallo Sherry was found in the depletion inventory of audit no. ZZZ. The report further indicates that the removal of the Gallo Sherry would result in the following assessment amounts:

AUDIT NO. XXX

**MIXED BEVERAGE GROSS RECEIPTS TAX**

|                    |               |
|--------------------|---------------|
| Tax:               | \$ 2,592.87   |
| Interest(6/15/98): | 777.86        |
| Penalty:           | <u>259.29</u> |
| Total:             | \$ 3,630.02   |

**SALES TAX**

|                    |               |
|--------------------|---------------|
| Tax:               | \$ 1,779.36   |
| Interest(6/15/98): | 614.67        |
| Penalty:           | <u>177.94</u> |
| Total:             | \$ 2,571.97   |

**TOURISM TAX**

|                    |             |
|--------------------|-------------|
| Tax:               | \$ 21.61    |
| Interest(6/15/98): | 7.82        |
| Penalty:           | <u>2.16</u> |
| Total:             | \$ 31.59    |

AUDIT NO. YYY

**MIXED BEVERAGE GROSS RECEIPTS TAX**

|                    |               |
|--------------------|---------------|
| Tax:               | \$ 1,060.61   |
| Interest(6/15/98): | 291.60        |
| Penalty:           | <u>106.06</u> |
| Total:             | \$ 1,458.27   |

**SALES TAX**

|           |              |
|-----------|--------------|
| Tax:      | \$ 607.21    |
| Interest: | 242.23       |
| Penalty:  | <u>60.73</u> |
| Total:    | \$ 910.17    |

**ISSUE AND CONTENTIONS**

Three issues are presented for decision. The first issue is whether Protestants sustained their burden of proving that the Gallo Sherry was used in cooking and thus exempt from the depletion audit. The second issue is whether Protestants sustained their burden of proving that the pour sizes utilized in depleting the spirits and wine are incorrect. The third issue is whether the Division erred in failing to take into account the ending inventories.

Protestants contend that the audit and assessments are incorrect. In support of this contention, Protestants argue that the Gallo Sherry was used exclusively in cooking, that the pour sizes were two ounces for mixed drinks and seven ounces for wine and that the audit does not take the ending inventories into account.

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.

**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 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>1</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). 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 ABE Commission, Tax Commission, or other law enforcement agencies in the execution of their official duties. [**See:** 37 O.S. § 576]

(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.

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<sup>1</sup>Oklahoma Tax Commission Order No. 85-05-16-02. Currently codified as Rule 710:20-5-8 of the Oklahoma Administrative Code.

(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 (Okla. 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.*

### 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. 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 (Okla. 1988).

6. Here, Protestants presented sufficient evidence to prove the Gallo Sherry was used in cooking and should be exempted from the depletion inventory pursuant to Rule 710:20-5-8(b)(4)(A) of the Oklahoma Administrative Code. The record, however, is devoid of any evidence of a different pour rate for spirits and wine. See, Rule 710:20-5-8(b)(1) and (2). In addition, the evidence indicates that the establishments were selling alcoholic beverages prior to the starting date of the audit and beginning inventories were not produced. See, Rule 710:20-5-8(b)(5).

7. Protestants' protest to the proposed assessments should be sustained to the extent that Gallo Sherry was included in the depletion inventory, otherwise Protestants' protest should be denied.

8. Protestants' request for a waiver of penalty and interest and the Division's recommendation should be reserved for ruling by the Tax Commission.

### DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it WAS DETERMINED that the protest of the Protestants be sustained in part and denied in part. It WAS further DETERMINED that without consideration of the request for waiver of penalty and interest, the revised assessment amounts, inclusive of any additional accrued and accruing interest, be fixed as the deficiencies due and owing, respectively.

### 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.