JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2000-09-28-002 / PRECEDENTIAL**
ID: **P9600285**
DATE: **09-28-00**
DISPOSITION: **DENIED**
TAX TYPE: **SALES / MIXED BEVERAGE / TOURISM**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. PROTESTANT, doing business as COMPANY "A", or COMPANY "B", located in ANYTOWN, Oklahoma, operated a bar with her husband since 1957. PROTESTANT operated the bar alone after her husband's death in 1995. PROTESTANT held the sales tax permit XXXXXX and a non-intoxicating beverage license or "3.2 beer license" for that business in her name for the entire time that she and her husband operated the business. PROTESTANT never held a mixed beverage license from the Alcoholic Beverage Laws Enforcement Commission nor a mixed beverage tax permit from the Oklahoma Tax Commission for her business. PROTESTANT filed the sales tax reports for the business and signed all registration forms for the business. PROTESTANT'S SPOUSE did not hold any licenses for the business nor did he file any tax returns for the business.

2. PROTESTANT'S SPOUSE was a liquor bootlegger all of his life. After opening COMPANY "A" in 1957, PROTESTANT'S SPOUSE continuously sold half-pint bottles of whiskey and vodka from his business, which he obtained from other bootleggers that transported illegal liquor into Oklahoma from TWO OTHER STATES. After the repeal of liquor prohibition in Oklahoma in 1959, PROTESTANT'S SPOUSE obtained his liquor inventory from licensed retail liquor stores and illegally resold the half-pint bottles to patrons of his business without a license. PROTESTANT'S SPOUSE also operated an illegal poker parlor and dice game in the back of the bar. PROTESTANT'S SPOUSE would sell his half-pint bottles to his gambling patrons and to others when the licensed stores were closed on Sunday, during elections or after hours. The atmosphere of COMPANY "A" was a rough and tumble beer joint described as a gun and knife club patronized mostly by regular customers.

3. On August 14, 1995, OFFICER ONE and OFFICER TWO of the ANYTOWN Police Department were called out to COMPANY "A", also known as COMPANY "B", to investigate a disturbance at the bar. At that time OFFICER ONE and OFFICER TWO spoke with PROTESTANT about her liquor license after the officers observed that mixed drinks were being served to the patrons. The police officers then contacted AN EMPLOYEE with the Alcoholic Beverage Laws Enforcement Commission and AN ANONYMOUS DEPUTY of the ANONYMOUS County Sheriff's Department. The police officers, AN EMPLOYEE WITH THE ABLE Commission and AN ANONYMOUS DEPUTY then obtained a written Search Waiver from PROTESTANT and conducted a search of the business premises. From this search AN EMPLOYEE WITH THE ABLE COMMISSION

obtained samples of mixed beverages being served at the bar, 110 bottles of unstamped beverages were confiscated, and business records and price lists indicating sales of mixed beverages were seized and removed from the premises.

4. The ABLE Commission then provided the records seized from COMPANY "A" to the Oklahoma Tax Commission for audit to determine whether any applicable taxes were owed. The Audit Division of the Oklahoma Tax Commission then conducted an audit of these records and assessed the following taxes for the audit period April 1, 1993, to February 29, 1996:

	Tax	**Interest**	**Penalty**	**Total**
Mixed Beverage Tax	$8908.89	$ 334.08	$890.89	$10,133.86
Sales Tax	$4590.38	$1169.10	$459.04	$ 6,218.52
Tourism Tax	$ 102.01	$ 27.15	$ 10.23	$ 139.39

5. The Audit division issued each of these tax assessment letters to PROTESTANT on April 10, 1996, by certified mail. PROTESTANT received these assessment letters on April 11, 1996, and timely filed her protest to these assessments on April 15, 1996.

ISSUES

The issues raised by the Protestant in this case are the following:

1. Whether the Oklahoma Tax Commission has proper jurisdiction over this case.

2. Whether any mixed beverages were ever sold at COMPANY "A".

3. Whether the auditing methods used by the Audit Division properly determined the correct amount of taxes assessed.

4. Whether the Audit Division can properly assess the subject taxes against a person that does not hold a "mixed beverage license."

CONCLUSIONS OF LAW

I. JURISDICTION

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission, 68 O.S. 1991 §207, 3.7 O.S. 1991 §545(B).

2. PROTESTANT held a sales tax permit and a non-intoxicating beverage license issued by the Oklahoma Tax Commission which allowed her to engage in the business conducted at COMPANY "A" pursuant to 68 O.S. §1364, permits to do business and 37 O.S. §163.8, permits for the retail sale of nonintoxicating beverages (low-point beer). Persons or taxpayers who have been granted permits by the Oklahoma Tax Commission are subject to audit, 68 O.S. §221 and 37 O.S. §163.13, OAC 710:65-5-1 and OAC 710:20-2-11.

3. PROTESTANT also sold "mixed beverages" as that term is defined in 37 O.S. §506(21) but did not hold the mixed beverage tax permit required by 37 O.S. §577(A). Those sales are taxable subject to 37 O.S. §576. Any person transacting business subject to the mixed beverage gross receipts tax is required to file a monthly report and pay the tax pursuant to 37 O.S. §579 regardless of whether the taxpayer holds the required permit. OAC 710:20-5-8(a) provides that "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." OAC 710:20-5-3 also imposes a reporting requirement on PROTESTANT. If any taxpayer shall fail to make any report as required by any state tax law, the Tax Commission may determine the correct amount of tax for the taxable period from any information in its possession or obtainable by it pursuant, to 68 O.S. §221(a). Therefore, the Audit Division of the Oklahoma Tax Commission has jurisdiction to issue the proposed assessment of taxes to PROTESTANT.

4. 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 v. Oklahoma Tax Commission*, 768 P.2d 359 (Okl. 1988). Failure to provide evidence which is sufficient to show an adjustment to the proposed assessment is warranted will result in the denial of the protest, *Continental Oil Company v. Oklahoma Tax Commission*, 570 P.2d 315 (Okl. 1977). The burden of proving a sale is not a taxable sale is on the person who made the sale, 68 O.S. §1365(c).

II. SALES OF MIXED BEVERAGES

5. The Audit Division conducted its audit of COMPANY "A" from business records seized by the ANYTOWN Police Department, the ANONYMOUS County Sheriff's Department and the Alcoholic Beverage Laws Enforcement Commission when officers of those agencies witnessed the sale of mixed beverages at COMPANY "A" in the presence of PROTESTANT. Those officers testified as to their investigation of this matter at the hearing in this case. PROTESTANT and her friend and former employee of COMPANY "A", ANONYMOUS FRIEND, testified contrary to the law enforcement officers and indicated that no mixed beverages were sold at the bar. PROTESTANT and ANONYMOUS FRIEND both testified that PROTESTANT'S SPOUSE was an eccentric type who would operate his business as he saw fit regardless of the opinion of men or the rule of law. Illegal liquor was continuously sold at the business and an illegal gambling operation was conducted in the back room. The reputation of the bar was infamous. But despite all of this, PROTESTANT and ANONYMOUS FRIEND adhered to their testimony that the one rule that was strictly enforced at COMPANY "A" was that no mixed beverages would be served in violation of state law.

6. The standard burden of proof in administrative proceedings is "preponderance of evidence," see Oklahoma Tax Commission Order No. 91-10-17061. Black's Law Dictionary, 1064 (5th ed. 1979), defines "preponderance of evidence" as "evidence 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." It is also defined to mean "evidence which is more credible and convincing to the mind . . . that which best accords with reason and probability."

7. The law enforcement officers' testimony regarding their investigation of COMPANY "A" is more credible than the inconsistent or inaccurate self-serving statements offered by the Protestant in this case. After weighing the evidence offered in this case, the preponderance of the evidence demonstrates that the proprietors of COMPANY "A" sold mixed beverages to the patrons and did not remit or report mixed beverage gross receipts tax, sales tax and tourism tax on those sales as required by state law at 37 O.S. §576, 68 O.S. §1354, and 68 O.S. §50012.

III. AUDITING METHODS

8. The Protestant's memorandum filed January 2, 1997, in this case raises the issue of, "the numbers method used by the Alcohol and Beverages Commission Agents to determine tourism and mixed beverage taxes." The Protestant offered into evidence her individual income tax returns for the year 1994, 1995 and 1996. The Protestant did not offer any further business records. The Audit Division conducted its audit using the records available to it which were seized by the law enforcement officers from the COMPANY "A" on August 14, 1995, pursuant to state law at 68 O.S. §221.

9. The Protestant did not submit the records for mixed beverage sales required by OAC 710:20-5-7 or for sales taxes required by OAC 710:65-3-30 and 31. The personal income tax returns were insufficient to show in what respect the proposed assessment is incorrect and therefore the Protestant failed to carry her burden of proof placed upon her by OAC 710:1-5-47 concerning administrative hearings, in that she failed to prove sufficient facts which would entitle the Protestant to the relief she requested. The Oklahoma Court of Appeals has upheld the Audit Division's method of determining the gross receipts taxes due in *Kifer v. Oklahoma Tax Commission*, 1998 OK CIV APP 34, 956 P.2d 162. The Court held that the taxpayer is responsible for record keeping and that if a taxpayer fails to make reports or to keep proper records, the Tax Commission may use a formula depletion method to determine the tax imposed by the statute. The audit methods used by the Division in the case at bar, based on the records available, properly determined the tax liability assessed herein.

IV. TAXATION OF PERSONS THAT DO NOT HOLD MIXED BEVERAGE TAX PERMITS

10. The Protestant urges the position that the mixed beverage gross receipts tax is imposed only on the holder of a mixed beverage license issued by the ABLE Commission pursuant to 37 O.S. §572. Since the Protestant does not hold a mixed beverage license issued by the ABLE Commission, she contends that she is not subject to the mixed beverage gross receipts tax. The violation of state law in this regard does not provide the Protestant with a defense to the assessment of gross receipts taxes on her sales of mixed beverages.

11. Title 37 O.S. §545(B) expressly provides that all of the procedures and remedies contained in the Uniform Tax Procedure Code for the assessment and collection of taxes may be applied to enforce the provisions of the Oklahoma Alcoholic Beverages Control Act by the Oklahoma Tax Commission to collect the taxes levied on alcoholic beverages. Title 37 O.S. §576 imposes the mixed beverage gross receipts tax and 37 O.S. §577 requires the Protestant to obtain a license from the Tax Commission. Title 37 O.S. §579 requires that every mixed beverage tax permit holder, or any person transacting business subject to the gross receipts tax levied by Section 576 shall file a monthly report of gross receipts tax due and remit a tax payment for the amount due to the Tax Commission. Under the facts established in this case, the Protestant sold mixed drinks and has a clear obligation imposed by state law to report and pay the taxes due' regardless of her violation.of the state licensure laws. OAC 710:20-5-8(9) clearly states the Protestants liability as follows:

> 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).

12. Based on the Findings of Fact and Conclusions of Law stated above, the Protestant's protest to the proposed assessment should be denied.

DISPOSITION

It WAS DETERMINED based upon the specific facts and circumstances of this case, that the sales tax, mixed beverage tax and tourism tax protest of PROTESTANT, d/b/a COMPANY "A" be denied.

Oklahoma Tax Commission