JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2000-09-28-012 / NOT PRECEDENTIAL**
ID: **P9600538 / P960538A**
DATE: **09-28-00**
DISPOSITION: **DENIED**
TAX TYPE: **SALES / MIXED BEVERAGE / TOURISM**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. THE CORPORATION operated a restaurant in ANYTOWN, Oklahoma, doing business first as COMPANY ONE and later as COMPANY TWO during the audit period. MR. "A" was the President and only officer of THE CORPORATION ("THE CORPORATION") as stated on the Franchise Tax Return filed with the Oklahoma Tax Commission.

2. The Audit Division of the Oklahoma Tax Commission ("Division") conducted a mixed beverage depletion audit on THE CORPORATION using information regarding liquor purchases by THE CORPORATION from liquor wholesalers for the audit period July 1, 1993 to December 31, 1995. The following amounts were assessed:

	Sales Tax	Mixed Beverage Tax	Tourism Tax
Tax	$3,188.30	$4,680.08	$39.00
Interest	451.66	409.67	6.98
Penalty	318.83	468.01	3.90
$5.00/per day penalty		6,313.73	
TOTAL	$3,958.79	$11,871.49	$49.88

3. The Division issued these proposed assessments to THE CORPORATION on July 18, 1996. MR. "A" filed a written protest on behalf of himself as an officer and on behalf of THE CORPORATION by letter of August 9, 1996. THE CORPORATION held all permits and licenses for the restaurant during the audit period including mixed beverage permit XXXXXX and sales tax permit YYYYYY. This audit was conducted as an out-of-business audit when COMPANY TWO ceased operations. No information or business records were received from THE CORPORATION to conduct this audit.

ISSUES

1. Whether THE CORPORATION is the taxpayer responsible for the taxes assessed.

2. Whether THE CORPORATION has sustained its burden of proof to show in what respect the proposed action of the Division is incorrect.

3. Whether the cancellation of THE CORPORATION'S sales tax permit during the audit period relieves THE CORPORATION from further liability for the taxes assessed.

4. Whether the $ 5.00 per day penalty imposed by 37 O.S. §579 was properly assessed.

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission, 68 O.S.§207.

I. THE CORPORATION IS RESPONSIBLE FOR THE TAXES ASSESSED

2. THE CORPORATION operated a restaurant for the entire audit period doing business first as COMPANY ONE and then as COMPANY TWO. No other person or entity ever held the required licenses and permits other than THE CORPORATION. No other person or entity ever purchased liquor from liquor wholesalers during the audit period other than THE CORPORATION. THE CORPORATION contended that the restaurant was sold to COMPANY TWO of AN ANONYMOUS CORPORATION, however no written evidence of a sale was produced at the hearing. Most notably, THE CORPORATION did not offer a contract of sale or any business records to evidence the purported sale.

3. Oklahoma Tax Commission OAC 710:65-3-9 requires that a vendor who is closing the business for which the sales tax permit was issued, must file a final return with the Commission within fifteen (15) days after discontinuing such business and submit his sales tax permit. Also, OAC 710:65-9-3 requires that when the ownership status of a business which holds a sales tax permit changes, the former owner must turn in its sales tax permit and the new owner must apply for a new sales tax permit. THE CORPORATION never returned its sales tax permit to the Commission but used the permit number to purchase inventory for resale and to report its sales taxes throughout the audit period.

4. The evidence presented in this case demonstrates that THE CORPORATION is responsible for the taxes assessed herein. MR. "A" is individually responsible for the sales taxes assessed as the principle officer of the corporation pursuant to 68 O.S. § 1361(A).

II. THE CORPORATION HAS NOT CARRIED ITS BURDEN OF PROOF

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 (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 (Old. 1977). The burden of proving a sale is not a taxable sale is on the person who made the sale, 68 O.S. 1991, §1365(C).

6. 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.

7. In the case at bar, the undersigned finds that THE CORPORATION has offered no evidence that would sustain its burden of proving that no taxes are owed. OAC 710:65-3-30 requires that vendors must maintain complete books and records covering receipts from all sales. OAC 710:65-3-31 requires that at a minimum a vendor must maintain (1) a sales journal and cash register tapes which record daily sales, (2) a record of merchandise purchased and (3) a true and complete inventory. Also, OAC 710:20-5-7 requires mixed beverage permit holders to maintain the following required records; (1) copies of all purchase invoices, (2) cash register records, (3) list prices and preparation of mixed beverages, (4) dates of changes of price or preparation, (5) dates of additions or deletions to price list and (6) records of daily admission charges. THE CORPORATION did not provide any of the required records to the Division during the audit or after the protest was on file or at the hearing in this case. MR. "A"'s oral testimony unsupported by documentary evidence of business records ordinarily kept in the course of business as required by OAC is insufficient.

III. THE CANCELLATION OF THE CORPORATION'S SALES TAX PERMIT DOES NOT RELIEVE IT FROM THE ASSESSED TAXES

8. Testimony at trial indicated that THE CORPORATION'S sales tax permit had been canceled during 1994. No evidence of this was offered at the hearing, such as a Commission Order. Although it is unlawful for any person to operate a restaurant without a sales tax permit, see 68 O.S. §1364(E), the fact that a restaurant is operated without a permit does not relieve the vendor from the responsibility of collecting and remitting the tax, see 68 O.S. §§1361 and 1362. The duty to collect and remit the tax imposed by the sales tax code is imposed on the vendor of the taxable item whether or not the vendor properly holds a permit. The violation of the permit requirement in the statute does not provide a basis for THE CORPORATION'S defense in avoidance of the tax assessed.

9. THE CORPORATION also did not prove that another entity or corporation was responsible for the sales tax because THE CORPORATION did not turn in its permits and licenses to the Commission as required but used its permits and licenses throughout the audit period. There was no documented evidence of any transfer of ownership or responsibility from THE CORPORATION to another taxpayer presented in the hearing of this matter.

IV. THE PENALTY IMPOSED BY 370.§579 WAS PROPERLY ASSESSED

10. Title 37 O.S.§579(E) imposes a $5.00 per day penalty for each day that a monthly mixed beverage tax report is not filed pursuant to law. The penalty, if assessed, shall not exceed an amount equal to twice the amount of gross receipts tax due. The mixed beverage tax due, according to Division's Exhibit A admitted at hearing, is $4,680.08. The penalty is limited to twice this amount or $9,360.16. The actual $5.00 per day penalty assessed on Division's Exhibit A is $6,313.73 which is less than twice the amount of gross receipts tax due,and therefore is authorized by Section 579.

11. THE CORPORATION asserts that another corporation is liable for the mixed beverage tax during the audit period. However, THE CORPORATION did not carry its burden of proving that another taxpayer is responsible for the tax because THE CORPORATION presented no probative evidence to establish that fact.

12. 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, THE CORPORATION and MR. "A", be denied. It WAS further DETERMINED that the amount in controversy, inclusive of any additional accrued and accruing interest, be fixed as the deficiency 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.