

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 2000-12-14-003 / NOT PRECEDENTIAL
ID: P9700269
DATE: 12-14-00
DISPOSITION: DENIED
TAX TYPE: SALES / MIXED BEVERAGE / TOURISM
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Division, unable to contact taxpayer to obtain records and information to conduct an audit, performed a depletion audit of PROTESTANT d/b/a THE COMPANY for the period of December 7, 1993, through February 28, 1996, utilizing average prices and regulation pour sizes.

2. As a result of the audit, the Division caused to be issued a proposed assessment of mixed beverage gross receipts tax, sales tax, tourism tax, penalty and interest accrued through October 15, 1996, against PROTESTANT d/b/a THE COMPANY as follows:

Mixed Beverage Gross Receipts Tax

Tax	\$4,138.11
Interest	346.38
Penalty	441.16
\$5/Day Penalty	<u>1,400.00</u>
Total	\$6,325.65

Sales Tax

Tax	\$4,345.33
Interest	541.84
Penalty	<u>434.52</u>
Total	\$5,321.69

Tourism Tax

Tax	\$ 86.92
Interest	11.83
Penalty	<u>8.69</u>
Total	\$ 107.44

3. In an unverified letter of protest, Protestant stated that he sold the club on March 1, 1995, that he regained possession on May 1, 1995, that the club flooded that month and that subsequently on September 1, 1995, he sold the assets of the club. The protest letter indicated that copies of the club's ending inventory and a list of liquor that Protestant destroyed because of flood damage was enclosed.

4. As a result of additional information regarding destroyed liquor and an adjustment to the May, 1995, sales, the proposed assessments were amended to reflect the following amounts:

Mixed Beverage Gross Receipts Tax

Tax	\$3,888.65
Interest	621.55
Penalty	<u>1,816.22</u>
Total	\$6,326.42

Sales Tax

Tax	\$3,828.92
Interest	636.01
Penalty	<u>382.89</u>
Total	\$4,847.82

Tourism Tax

Tax	\$ 76.59
Interest	13.58
Penalty	<u>7.66</u>
Total	\$ 97.83

ISSUES AND CONTENTIONS

The issue presented for decision is whether Protestant sustained his burden of proving that the audit and resulting revised assessments are incorrect. Protestant contends that on September 1, 1995, he sold the assets of the club to a certain individual who Protestant asserts should be responsible for the taxes from September 1, 1995, until January 31, 1996. The Division contends that the records of the Tax Commission and the ABLE Commission indicate that Protestant's license was surrendered in March, 1996. Division further contends that since liquor purchases were made through February 9, 1996, using Protestant's mixed beverage permit, he is responsible for the assessed tax.

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-20¹. 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). Protestant failed to present any evidence to contradict the revised mixed beverage assessment. Accordingly, Protestant's protest should be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusion of law, it WAS DETERMINED that the protest of PROTESTANT d/b/a THE COMPANY, be denied. It WAS further DETERMINED that the amounts in controversy, inclusive of any additional accrued and accruing interest be fixed as the deficiencies 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.

¹Currently codified as Rule 710:20-5-8 of the *Oklahoma Administrative Code* (July 12, 1993).