JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2000-12-19-003 / NOT PRECEDENTIAL**
ID: **P9700005**
DATE: **00-12-19**
DISPOSITION: **DENIED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. THE COMPANY d/b/a MY COMPANY was a mixed beverage establishment or bar located in ANYTOWN, Oklahoma, and operated under sales tax permit number XXXXXX. JOHN DOE was the President of the corporation and MR. ANONYMOUS was the Vice President and Secretary. MR. ANONYMOUS had check signing authority for the corporation and does not dispute that he was an officer responsible for the payment of taxes. MR. ANONYMOUS owned a 20% share of the corporation.

2. During the audit period Mr. ANONYMOUS was listed on the franchise tax return filed by the corporation and Mr. ANONYMOUS signed the return and paid the franchise tax.

3. The Audit Division of the Oklahoma Tax Commission conducted a mixed beverage depletion audit of THE COMPANY for the period March 1, 1994, to March 15, 1996. At the time the audit was conducted, the bar had closed its business. The Division auditor contacted JOHN DOE to obtain the business records for the bar. JOHN DOE provided drink prices and pour size information to the auditor but no other information or records of the business were produced. The Division used the records of liquor purchases from liquor wholesalers and the pour size provided to determine the number of drinks available for sale or consumption by THE COMPANY and the tax that should have been remitted on the gross receipts from the number of drinks available. The tax which should have been remitted was then compared to the taxes actually reported and remitted on tax returns filed with the Tax Commission. Based on this information, the Division issued proposed assessment letters for sales tax for the audit period to THE COMPANY and MR. ANONYMOUS as an officer of THE COMPANY on November 27, 1996. MR. ANONYMOUS timely protested this assessment by letter of December 19, 1996. The current sales tax liability under protest stands as follows:

Sales Tax	$17,038.70
Interest	10,209.33
Penalty	1,782.16
TOTAL	$29,030.19

4. At hearing, MR. ANONYMOUS asserted that the audit was incorrect because the prices charged that were used by the auditor were incorrect and the amount of sales included in the audit was incorrect. However, MR. ANONYMOUS did not provide any further business records which demonstrated different prices or sales figures. MR. ANONYMOUS did produce some bank statements showing deposits, but the Division's auditor testified that those deposits were consistent with the amounts included in the audit.

ISSUES

1. Whether the proposed assessment for sales tax is based on incorrect sales volume and sales prices.

2. Whether MR. ANONYMOUS is jointly and severally liable for the entire sales tax assessed or only for the part attributed to his 20% share in the corporation.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission has jurisdiction for this protest, 68 O.S. § 207, 37 O.S. § 545 (B).

A. The Sales Tax Assessment

2. 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).

3. 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."

4. The Division performed its audit on information obtained through liquor wholesalers regarding Protestant's liquor purchases. The pour size was obtained from an officer of THE COMPANY. The Protestant failed to provide the required records to the Division during the audit. OAC 710-20-57(a) imposes the following records requirement:

> Required records. Every mixed beverage tax permit holder shall keep and maintain, for a period of at lease three (3) years, records and information on all alcoholic beverages purchased or received, and sold or otherwise disposed of, as follows:
>
> (1) Copies of all invoices of purchases or receipts of alcoholic beverages and beer with alcoholic content in excess of 3.2% by weight;

(2) All cash register records and receipts;

(3) Copies of all lists of prices charged for the sale, preparation or service of alcoholic beverages by brand name or category or type of mixed alcoholic beverage;

(4) Dates of changes, either increase or decrease, in any price for any sale, preparation or service of any mixed beverage;

(5) Dates of additions and deletions of items from the price list of mixed beverages; and

(6) Records of daily admissions and admission charges.

MR. ANONYMOUS had an opportunity after the audit to provide better information to the auditor while this case was pending a hearing but was unable to do so.

5. The pour statement obtained by the Division during the audit from an officer of THE COMPANY carries great weight in this hearing. State law at 68 O.S.§221(a) provides that when a taxpayer fails to make a report, the Tax Commission may determine the correct amount of tax from any information in its possession or obtainable by it. 68 O.S. § 206 authorizes the agents of the Tax Commission to take the statement of any employee of a taxpayer that will facilitate the examination of the taxpayer's records. The pour statement obtained during the audit in the case at bar was properly relied on to perform the depletion audit. MR. ANONYMOUS has failed to carry his burden of proof by a preponderance of the evidence that the proposed assessment is incorrect.

B. Officer's Liability For Sales Tax

6. MR. ANONYMOUS argues at hearing that since he owned a 20% share of the corporation, his liability for the assessed taxes should be limited to that extent. There is no authority upon which a corporate officer's liability is limited to his ownership percentage of the corporation. Title 68 O.S. § 1361 (A) provides that in the case of a corporation, each principal officer of the corporation shall be personally liable for the tax. This rule is reiterated in OAC 710:65-7-3. Since "each principal officer" is personally liable for the entire tax assessed, a principal officer cannot limit his liability visa-vis the Tax Commission, as imposed by state law, by virtue of a private agreement with another officer. Rather, each officer is liable for the entire tax as it stands assessed. Under Section 1361, the Tax Commission may look to one or several "principal officers" to liquidate the tax assessment in any amount up to the entire amount assessed. Therefore, MR. ANONYMOUS must look to his fellow officers for contribution to the liability. MR. ANONYMOUS liability for the taxes assessed is therefore not limited to his ownership percentage.

7. The Protestant's protest to the proposed assessment should be denied.

DISPOSITION

It WAS the DETERMINATION of the undersigned, based upon the specific facts and circumstances of this case, that the sales tax protest of MR. ANONYMOUS, as an officer of THE COMPANY d/b/a MY COMPANY, be denied.

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.