

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 2001-01-04-002 / NOT PRECEDENTIAL
ID: P9700071
DATE: 01-04-01
DISPOSITION: DENIED
TAX TYPE: MIXED BEVERAGE / SALES / TOURISM
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. PROTESTANT operated a restaurant and bar during the audit period in ANYTOWN, Oklahoma, near A LAKE. The Audit Division of the Oklahoma Tax Commission, "Division" hereafter, contacted the Protestant to conduct a mixed beverage depletion audit for mixed beverage tax, sales tax and tourism tax. Protestant did not effectively cooperate with the Division's auditors during the audit and failed to provide necessary information to conduct the audit. The Division used information obtained from tax reports filed by Protestant with the Tax Commission and purchase invoices for liquor purchased from liquor wholesalers in order to conduct the audit. Also, the Division obtained a pour statement for Protestant on August 2, 1995, from a bartender/manager of the restaurant in 1993 and 1994, who stated that the pour size for mixed beverages at Protestant's restaurant was 1.5 ounces or 4 counts. This statement is located, in Division's Exhibit A page 24.

2. The Division used the records of liquor purchases and the pour size of 1.5 ounces to determine the number of drinks available for sale or consumption by Protestant and the tax that should have been remitted on the gross receipts from the number of available drinks. 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 dated September 18, 1995, to Protestant for the period of September 1, 1992, through December 31, 1994 for mixed beverage tax, sales tax and tourism tax. By letter of September 30, 1995, Protestant timely filed his written protest against these proposed assessments. By letter of February 13, 1996, the Division revised its assessment based on additional information submitted by the Protestant. The proposed assessments as revised stand as follows:

	Mixed Beverage Tax	Sales Tax	Tourism Tax
Tax	\$10,408.87	\$4,336.87	\$86.74
Interest	1,882.08	839.46	15.72
Penalty	1,040.85	433.69	8.67
TOTAL	\$13,331.80	\$5,610.02	\$111.13

3. The Protestant's witness in this case testified that the Division used the wrong pour size in its audit. The Division's pour size was 1.5 ounces which it obtained during the audit from Protestant's bartender. Protestant had several bartenders, however. ANOTHER bartender at Protestant's restaurant, testified that the pour size in the audit should have been 2 ounces.

PROTESTANT stated that the bartenders never used a jigger to measure liquor used in mixed drinks served at the bar. Rather, the bartender would "free pour" the liquor using a 4-count method whereby the bartender would count 1, 2, 3, 4 as the liquor was poured for the cocktail and stop the pour at the count of 4. At the hearing a pour test was performed using this method and the pour resulted in approximately a 1.75 ounce serving. PROTESTANT performed the test but also testified that each bartender would free pour a drink differently which could yield a different result.

4. The Division's depletion audit of the liquor purchases used a 1.5 ounce pour size. The proposed assessments for mixed beverage tax, sales tax and tourism tax were all based on the depletion audit. The Protestant did not provide beginning or ending inventory records.

ISSUE

Whether the Division properly based the depletion audit on a 1.5 ounce pour size rather than a 2-ounce pour size in order to determine the number of drinks available for sale or consumption.

CONCLUSIONS OF LAW

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

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 (Okla. 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 (Okla. 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. 91-10-17-061. *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 employee of Protestant. The Protestant failed to provide the required records to the Division during the audit. OAC 710-20-5-7(a) imposes the following records requirement:

Required records. Every mixed beverage tax permit holder shall keep and maintain, for a period of at least 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. During the audit the Protestant did not return the auditors telephone calls, failed to attend scheduled meetings and failed to provide the required records after being requested to do so.

5. The pour statement obtained by the Division during the audit from an employee of Protestant 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.

6. The pour statement obtained contemporaneously with the audit of Protestant and entered as evidence by the Division at the hearing of this matter is more probative of the true facts of this case than is the Protestant's testimony at hearing. The Protestant's witness stated that when bartenders free pour mixed beverages, the pour rate can vary significantly. The pour test conducted at the hearing did not produce a 2 ounce pour. Also, the Protestant had an opportunity during the audit to provide better information to the auditor but elected not to do so. Under the circumstances at Protestant's restaurant where the bartenders free poured mixed beverages, a 1.5 ounce pour rate is a reasonable assumption upon which to base the depletion audit. The Protestant has failed to carry its burden of proof by a preponderance of the evidence that the proposed assessment is incorrect.

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

DISPOSITION

It is the DETERMINATION of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the sales tax, mixed beverage tax and tourism tax protest OF PROTESTANT, 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.