

**JURISDICTION:** OKLAHOMA TAX COMMISSION - DECISION  
**CITE:** 2001-01-18-002 / NOT PRECEDENTIAL  
**ID:** P9600532  
**DATE:** 01-18-01  
**DISPOSITION:** SUSTAINED IN PART / DENIED IN PART  
**TAX TYPE:** MIXED BEVERAGE / SALES / TOURISM  
**APPEAL:** NO APPEAL TAKEN

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant, Protestant owned and operated a mixed beverage establishment known as the XXX CLUB in ANYTOWN, Oklahoma. Protestant purchased the XXX CLUB from her husband, at approximately the end of January, 1995. The XXX CLUB is a medium size club with a small customer base.

2. The subject of the current protest is the assessments of mixed beverage gross receipts tax, sales tax and tourism tax resulting from an audit of the alcoholic beverages available for sale (depletion audit) during the period of and including February 13, 1995 through April 30, 1996.

3. The audit was conducted by A Field Auditor. In performing the audit, the auditor met with THE bartender, and THE Manager. During this meeting, the auditor obtained the drink prices, conducted a pour test and obtained the pour rate for spirits and wine and took an inventory of the spirits and wine. The audit is based on Protestant's purchases of spirits and wine during the audit period since a beginning inventory was not provided to the auditor. The records of Protestant's liquor wholesaler, were utilized to determine Protestant's purchases of spirits and wine during the audit period.

4. As a result of the audit, the Division on September 12, 1996, caused to be issued against Protestant proposed mixed beverage gross receipts, sales and tourism tax assessments. The amounts assessed and in controversy, inclusive of penalty and interest accrued through October 15, 1996, are as follows:

#### MIXED BEVERAGE GROSS RECEIPTS TAX

Tax:	\$ 15,440.38
Interest:	964.51
Penalty:	<u>1,544.06</u>
Total:	\$ 17,948.95

**SALES TAX**

Tax:	\$ 9,972.04
Interest:	745.86
Penalty:	<u>997.20</u>
Total:	\$ 11,715.10

**TOURISM TAX**

Tax:	\$ 128.67
Interest:	8.04
Penalty:	<u>12.87</u>
Total:	\$ 149.58

5. The proposed assessments were timely protested. Protestant does not challenge the purchase records of the liquor wholesaler, nor the prices and pour rates utilized by the auditor.

6. The audit determined that Protestant had gross mixed beverage sales of \$172,024.71 during the audit period. A five percent (5%) allowance from gross sales was given for losses due to undetermined causes in the amount of \$8,601.24, which resulted in net taxable sales of \$163,423.47.

7. During the audit period Protestant reported mixed beverage sales of \$34,752.00. No additional taxes were due from reported sales. Net taxable sales less reported sales left a balance of unreported sales of \$128,671.47.

8. Protestant's financial records for the audit period, Schedule C to the 1995 and 1996 Federal Income Tax Returns, shows reported sales of \$84,890.00 for 1995 and \$79,500.00 for 1996. Protestant's records show sales of approximately \$7,000.00 per month for the audit period whereas the audit shows sales of approximately \$17,000.00 per month.

9. During the hearing, Protestant presented the testimony of four (4) witnesses concerning six (6) extraordinary or unusual events which resulted in the loss of liquor inventory.

a. The first unusual event involved the confiscation of all the liquor on the premises by the ABLE Commission because the transfer of inventory was not properly documented. This event occurred approximately two weeks after the change of ownership in early February, 1995. The bartender and one of the managers of the club testified that ABLE confiscated between 18 and 30 cases of liquor which would equate to approximately 180 to 240 bottles. The prior owner of the club testified that 48 bottles were confiscated, including 12 open bottles. Protestant did not present a copy of the ABLE agent's report of the confiscation.

b. The second unusual event also involved the confiscation of liquor by the ABLE Commission. The second confiscation occurred in late February or early March, 1995. The liquor was confiscated because Protestant reported an incorrect address for the club on the liquor license. Only unopened bottles in the store room were taken during the second confiscation. The manager of the club testified that 20 to 30 cases of liquor were confiscated. The bartender testified that 100 to 120 bottles were confiscated. The prior owner testified that over 40 bottles were confiscated. Again, a report of the confiscation was not submitted by Protestant.

c. The third unusual event involved a burglary of the club in March, 1995. The witnesses testified that unopened bottles of liquor in cases were taken out of the store room. The bartender testified that 12 to 15 cases were stolen. The manager testified that 6 to 7 cases were stolen. The prior owner testified that approximately 26 bottles were stolen. Each of the witnesses testified that the incident was reported to the police, however, a copy of the police report was not submitted. In addition, the prior owner of the club testified that although the stock is inventoried every week, an inventory or assessment of how many bottles were stolen was not taken.

d. The fourth unusual event involved employee theft by a female bartender who worked approximately three month for the club. The witnesses testified that overall approximately 20 bottles of liquor were stolen. The theft was investigated by a ex-army man hired by the former owner of the club. No official police report or insurance claim was filed over the incident.

e. The fifth unusual event involved a bar fight which occurred in 1995. The bartender and manager of the club estimated that 6 to 7 bottles of well liquor were broken during the fight. The prior owner of the club estimated that more than 15 bottles were broken. Although the police were called over the incident, the police report was not submitted. In addition, the witnesses estimated that anywhere from 3 to 16 bottles of liquor are broken each month in the club. The prior owner of the club testified that they do not keep a log of the stamp numbers of broken bottles

f. The sixth unusual event involved the contamination of dark liquor during the summers months by gnat and fruit flies. The witnesses testified that anywhere from 2 to 6 bottles per week were contaminated. The prior owner of the club testified that the contamination has been report (sic) to the ABLE Commission and the Health Department, however, no credit has been given for the contamination by ABLE.

10. Protestant ordered and received liquor on a weekly basis during the audit period. Protestant's witnesses testified that the average weekly purchase was approximately \$400.00. The auditor testified that Protestant's weekly purchase orders averaged \$610.00 for the months of February and March, 1995, \$534.00 for the month of April, 1995 and \$650.00 for the audit period. On direct examination, the auditor testified that there were no unusual purchases during the first three months of the audit period, however, on cross examination, the auditor admitted there were several purchases above the average during the first three to four months of the audit period. Three purchase orders; one in February, one in April and one in May, 1995, reflect purchases of \$892.00, \$701.00 and \$727.00, respectively.

11. The auditor testified that he did not know and was not told that Protestant had obtained her initial inventory from the prior owner of the club.

12. The auditor also testified that although he explained the procedures for providing documentation as to breakage, theft and other unusual events of inventory losses, he was not provided any documentation regarding such losses. On rebuttal, the bartender testified that he did not recall being advised to get documentation concerning unusual losses.

13. Regarding the contamination issue, the auditor testified that the dark sweet liquors are generally the cream liquors which are not taxed in the audit.

14. The auditor also testified that Protestant's purchases during the audit period approximated \$30,000.00 whereas Protestant's reported sales were only \$34,752.00.

15. The auditor also testified that the five percent (5%) allowance would approximate 90 to 100 bottles in this case which is fairly average. On cross examination, the auditor agreed that the five percent (5%) allowance would approximately equal the number of bottles Protestant's witnesses testified were broken during the audit period.

### **ISSUE AND CONTENTIONS**

The issue presented for decision is whether Protestant sustained her burden of proving in what respect the depletion audit is incorrect.

Protestant contends that the audit and assessments are grossly excessive under the evidence. In support of this contention, Protestant argues that the evidence proves she sustained inventory losses due to ABLE confiscations, a burglary, an employee theft, a bar fight, breakage and contamination.

The Division contends that the audit and assessments are based on substantial evidence and should be sustained. In support of this contention, the Division argues that Protestant has not documented the losses.

### **APPLICABLE LAW**

Mixed beverage gross receipts tax is levied and imposed on total gross receipts from:

(1) the sale, preparation or service of mixed beverages; (2) the total retail value of complimentary or discounted mixed beverages; (3) ice or nonalcoholic beverages that are sold, prepared or served for the purpose of being mixed with alcoholic beverages and consumed on the premises where the sale, preparation or service occurs; and (4) any charges for the privilege of admission to a mixed beverage establishment which entitle a person to complimentary mixed beverages or discounted prices for mixed beverages. 37 O.S. Supp. 1987, § 576(A).

Total gross receipts is defined to mean the total amount of consideration received as charges for admission to a mixed beverage establishment and 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. 37 O.S. Supp. 1987, § 576(B)(2).

In addition to the mixed beverage gross receipts tax levied and imposed under the provisions of Section 576(A), sales tax and tourism tax are levied and imposed on the gross receipts from the sale of drinks sold or dispensed by hotels, restaurants or bars, or other dispensers, and sold for immediate consumption upon the premises or delivered or carried away from the premises for consumption elsewhere. 68 O.S. 1991, §§ 1354(1)(I) and 50012(A)(2).

The gross receipts for purposes of calculating sales tax is the total of the retail sale price received for the sale, preparation or service of mixed beverages, ice, and nonalcoholic beverages to be mixed with alcoholic beverages. 37 O.S. Supp. 1978, § 576(E).

The Tax Commission, pursuant to 37 O.S. Supp. 1985, § 586, adopted Regulation XXX-20.<sup>1</sup> This regulation adopts the depletion method for auditing the total gross receipts of a holder of a mixed beverage license or other person transacting business subject to Section 576 of the Oklahoma Alcoholic Beverage Control Act. The depletion method accounts for the number of drinks available for sale, preparation, or service from the total alcoholic beverages received. It has been determined to be a reasonable method for determining the total gross receipts subject to tax under Section 576(A). See, *Kifer v. Oklahoma Tax Commission*, 1998 OK CIV APP 34, 956 P.2d 162 (1997).

Rule 710:20-5-8 of the Oklahoma Administrative Code provides:

(a) **Liability in general.** 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). Each permit holder or other person shall be liable for the gross receipts tax upon any and all disposition by his agents or employees or any other persons on the premises of the mixed beverage tax permit holders or other person, except upon seizure or other disposition of the alcoholic beverage by employees of the ABLE Commission, Tax Commission, or other law enforcement agencies in the execution of their official duties. [See: 37 O.S. § 576]

(b) **Audit procedures.**

(1) Upon audit of the books and records of a mixed beverage establishment for Gross Receipts Tax, it shall be assumed that spirits have been dispensed at the average rate of one and one-half fluid ounce (1 and ½ oz.), except for drinks with recipes calling for more than one type of spirit or for double portions of spirits, or upon reasonable evidence of a different rate of use.

(2) Wines will be presumed to have been dispensed at the average rate of six ounces (6 oz.) per serving. The Tax Commission may use an average rate greater or less than those set out in this Rule upon reasonable evidence of a different rate of use.

(3) A deduction may be allowed from the gross receipts tax liability determined by an audit for losses due to undetermined causes, not to exceed five percent (5%) of the total gross receipts.

(4) In addition, a deduction may be allowed from the gross receipts tax

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<sup>1</sup>Oklahoma Tax Commission Order No. 85-05-16-02. Currently codified as Rule 710:20-5-8 of the Oklahoma Administrative Code.

liability determined by an audit or other investigation of the books and records of a mixed beverage tax permit holder, for alcoholic beverages that are:

(A) consumed in food as verified by the audit;

(B) destroyed due to breakage for which the permit holder has retained the container or that portion thereof that has the unbroken seal and the identification stamp affixed thereto for full unopened bottles or for partial bottles destroyed by breakage for which the permit holder has completed a breakage affidavit listing the date of the occurrence, the brand and type of liquor, the size bottle, the identification stamp number, the approximate amount left in the bottle by 1/10ths, and the cause of the breakage. The affidavit shall be signed by the permit holder and two witnesses;

(C) stolen or destroyed by a disaster such as a fire or flood, provided that reasonable evidence is provided to support a claim. Reasonable evidence might include a copy of a police or sheriff's crime report, or an insurance claim detailing the inventory destroyed by brand, size, and type of liquor;

(D) not consumed, and exist or existed, at the close of a taxable period in question, provided that the amount and nature of the unconsumed inventory has been verified by agents of the Tax Commission, ABLE Commission, or verified by invoice to a mixed beverage permittee or wholesaler approved to purchase the inventory by the ABLE Commission. Partially filled bottles which are not included in a transferred inventory should be verified by a Tax Commission or ABLE Commission agent or agents.

(5) If an establishment was selling alcoholic beverages prior to the starting date of the audit period being used by the Commission in its audit, the establishment shall be required to furnish the Commission with a beginning inventory of all liquor, wine, and strong beer on hand if an ending inventory is offered for audit purposes. When the permittee is unable or unwilling to furnish such an inventory, then no beginning or ending inventories shall be considered for the audit period used and the audit will be conducted solely on the taxpayer's purchases made during the audit period.

A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect, and in what respect. Rule 710:1-5-47 of the *Oklahoma Administrative Code*. See, ***Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission***, 768 P.2d 359 (Okla. 1988). In administrative proceedings, the burden of proof 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.*

### 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-20. 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).

6. Here, the evidence shows that Protestant sustained losses of liquor inventory. Therefore the undersigned finds that Protestant should receive credit for such inventory as follows:

- a. The first ABLE confiscation of alcoholic beverages occurred in early February, 1995. The wholesaler's list of purchase invoices shows Protestant made two purchases of alcoholic beverages on January 20, 1995. Because the club was operating between the date of these purchases and the date of the confiscation and the inventory of the prior owner was on the premises, Protestant should receive credit of no more than eighty percent (80%) of the alcoholic beverages reflected on the purchase invoices of January 20, 1995. Protestant should not receive any credit for the transferred inventory since this was a purchases only audit and the transferred inventory was not taken into account in the audit.
- b. The second ABLE confiscation of alcoholic beverages occurred in late February or early March, 1995. The wholesaler's list of purchase invoices shows Protestant made four purchases of alcoholic beverages between and including the dates of February 15, 1995 and March 8, 1995. Protestant should receive credit for no more than fifty percent (50%) of the alcoholic beverages reflected on these purchase invoices because (1) the club was operating for less than two weeks between the first confiscation and the second confiscation, (2) the first confiscation involved all of the alcoholic beverages of the club on the premises, opened and unopened bottles, (3) the second confiscation only involved the unopened bottles of alcoholic beverages in the store room of the club, and (4) the size of the club and the small customer base.
- c. The burglary occurred in March, 1995. The wholesaler's list of purchase invoices shows Protestant made three more purchases of alcoholic beverages in March, 1995. Protestant should receive credit for 26 bottles of liquor because the testimony of the prior owner is more credible than the other two witnesses due to the fact that ABLE had just previously confiscated the alcoholic beverages from Protestant's store room.
- d. Protestant should receive credit for the 20 bottles of liquor involved in the employee theft.
- e. Protestant should receive credit for no more than twenty-five percent (25%) of the seven bottles of well liquor broken in the bar fight. As shown by the evidence, the five percent (5%) allowance accounts for the bottles Protestant's witnesses testified were broken during the audit period. Accordingly, no further credit should be allowed for breakage.
- f. Protestant should not receive any credit for contamination. The evidence

indicated that the contamination involved dark sweet liquor which are generally cream liquors that are not taxed in a depletion audit.

7. Protestant's protest to the proposed assessments should be sustained to the extent indicated above and denied in all other respects.

### DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is DETERMINED that the protest OF XXX CLUB be sustained in part and denied in part. It is further DETERMINED that the proposed assessments be revised in accordance herewith and that the resultant amounts, inclusive of any additional accrued and accruing interest, be fixed as the deficiencies due and owing.

### OKLAHOMA TAX COMMISSION

#### ADDENDUM TO FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

NOW on this 10<sup>th</sup> day of January, 2001, the ***Findings, Conclusions and Recommendations*** ("Findings") issued on May 19, 2000, in the above styled and numbered cause come on for consideration of additional findings of fact and a recommendation as to the amount of the deficiency which should be confirmed by an order of the Tax Commission.

The Division, as directed by the Findings, revised the proposed mixed beverage gross receipts tax, sales tax, and tourism tax assessments and provided notice of the revisions to Protestant. Protestant has not challenged the revisions proposed by the Division.

Upon consideration of the Findings and the revisions to the assessments, the undersigned finds that the following Findings of Fact should be added to and incorporated in the Findings:

1. That notice of the revisions to the assessments was filed of record in this cause on October 27, 2000.
2. That the Division revised the mixed beverage gross receipts tax assessment to an amount of \$25,581.92, consisting of tax in the amount of \$14,354.19, interest accrued through November 30, 2000, in the amount of \$9,792.31, and penalty in the amount of \$1,435.42.

3. That the Division revised the sales tax assessment to an amount of \$16,521.65, consisting of tax in the amount of \$9,270.41, interest accrued through November 30, 2000, in the amount of \$6,324.20, and penalty in the amount of \$927.04.
4. That the Division revised the tourism tax assessment to an amount of \$210.19, consisting of tax in the amount of \$119.62, interest accrued through November 30, 2000, in the amount of \$78.61, and penalty in the amount of \$11.96.
5. That the aggregate amount in controversy is \$42,313.76.
6. That the revisions comply with the recommendations set forth in the Findings.
7. That Protestant was provided notice of the revisions.
8. That Protestant did not file a response to the revisions.

The undersigned further finds that the following Recommendation should be added to and incorporated in the Findings:

It is further DETERMINED that the amounts in controversy, inclusive of any additional accrued and accruing interest, be respectively fixed as the deficiency due and owing.

THEREFORE, the *Findings, Conclusions and Recommendations* issued on May 19, 2000, are amended to include and incorporate the above and foregoing findings of fact and recommendation.

**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.