

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 2001-05-10-009 / NOT PRECEDENTIAL
ID: P0000114
DATE: 05-10-01
DISPOSITION: SUSTAINED IN PART / DENIED IN PART
TAX TYPE: MIXED BEVERAGE / SALES / TOURISM / WITHHOLDING
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Protestant, owned and did business as MY WAREHOUSE, a mixed beverage establishment in ANYTOWN, Oklahoma. Protestant's husband operated the club.

2. MY WAREHOUSE was in business from approximately November 4, 1996 to October 13, 1999.

3. A field auditor for the Tax Commission, was assigned to perform the audit of MY WAREHOUSE on January 19, 2000. Prior to the assignment date, MR. AUDITOR spoke with Protestant by telephone. During this conversation, MR. AUDITOR notified Protestant of the information he would need to perform the audit and attempted to schedule a meeting. Protestant advised the auditor that he would have to talk with her husband concerning the club. In early January, 2000, MR. AUDITOR contacted Protestant's husband and scheduled the meeting for February 1, 2000.

4. On February 1, 2000, the auditor met with Protestant and her husband at their home. During the meeting, the auditor obtained Protestant's pour sizes for mixed drinks, shots and wine, and Protestant's price structure for mixed drinks, shots, wine and beer. The auditor also obtained an executed pour statement affidavit and an executed statement of glass sizes, prices, pours and specials.

5. An ending inventory was not allowed for purposes of the out-of-business depletion audit. Protestant's husband claims that the disallowance of an ending inventory is due to the failure of the Commission to audit in a timely manner. He stated that MR. ANONYMOUS called the Commission on October 1, 1999, to advise that the club was going out of business and to inquire as to what to do with the remaining inventory. He further stated that the auditor advised him during the February 1, 2000 meeting that the ending inventory would not count because he could not go back more than three (3) years. Protestant's husband admitted that on the date of the meeting he did not have any records of a beginning inventory. The auditor testified that during the meeting he advised Protestant that he could only audit three (3) years back from that date. He stated that he also advised Protestant that an ending inventory could only be used if they had a beginning inventory for January 1, 1997. The auditor also stated that Protestant's husband advised him that they never took any inventories. He further stated that Protestant agreed to a purchases only audit and executed a waiver.

6. Protestant does not dispute the pour size and prices used for depleting the wine inventory.

7. A one and one-half ounce (1.5) pour size was utilized for depleting the liquor inventory. Protestant does not dispute this pour size except to the extent that well and call drinks were poured with a tail. The pour statement affidavit executed by Protestant's husband does not report that any drinks were poured with a tail.

8. Protestant disputes the prices utilized for depleting the liquor inventory. Protestant testified that he advised the auditor that his prices were \$3.00, \$2.50, \$2.00, \$1.00 for shots and \$2.00 for beer. The auditor testified that Protestant's husband advised him that the price structure was \$3.00 for calls, \$2.50 for wells, \$1.00 for shots and \$2.00 for beer. The price statement executed by Protestant's husband lists the prices as testified to by the auditor which according to the auditor were put on the statement as they were given to him by Protestant's husband at the February 1, 2000 meeting.

9. Protestant offered an exhibit reporting prices different than those utilized in the audit for certain mixed drinks. Protestant's husband admitted that he did not have cash register receipts from the audit period showing the prices for these drinks. Protestant's husband also stated that he did not have a price list, however, on cross-examination he testified that a price list was maintained. Protestant's husband also testified in rebuttal concerning the increase in prices for mixed drinks from \$2.50 and \$2.00 to \$3.00 and \$2.50 after the first few months of operation.

10. Protestant disputes the audit results of drinks containing more than one liquor (exotic drinks). Protestant's husband stated that although he only charged \$3.00 for these drinks the audit would result in a \$3.00 charge for each type of liquor poured in the drink. He admitted, however, that generally the amount of each type of liquor poured in an exotic drink was approximately half of that normally poured in a mixed drink.

11. Protestant disputes the audit results for a brand of liqueur known as THEMEISTER. The audit shows THEMEISTER was depleted at a pour rate of .5 ounces and a price of \$3.00. Protestant's husband testified that he gave most of it to the waitresses or sold it to them for \$1.00. The auditor testified that nothing was said about THEMEISTER at the February 1, 2000 meeting.

12. Protestant disputes the depletion of Montezuma Tequila. The audit shows Montezuma Tequila was depleted at a pour rate of 1.5 ounces and at a price of \$2.50. Protestant's husband testified that seventy percent (70%) of the Montezuma Tequila was sold as shots. The auditor admitted that Protestant advised him at the February 1, 2000 meeting that 70% of the Montezuma Gold Tequila was sold as shots.

13. Protestant disputes the withholding tax assessment. Protestant's husband testified that he did not employ anyone during the audit period and did not pay anyone a salary. Protestant's husband admitted the club had waitresses on Friday and Saturday nights, however, he stated that they worked for tips and he did not have any control over the hours they worked. He also stated that he was pressured by the auditor into saying he had two (2) part-time employees who worked approximately twenty (20) hours per week at \$5.80 per hour. The auditor testified that he could not remember Protestant's husband stating the waitresses worked strictly for tips. The auditor also stated that during the February 1, 2000 meeting, Protestant's husband told him he had two part-time employees. The auditor's notes of the meeting indicate "two employees at twenty hours per week."

14. The out of business depletion and the withholding tax audits concern the period of January 1, 1997 through October 31, 1999.

15. As a result of the audits, the Division on March 15, 2000, caused to be issued proposed mixed beverage gross receipts, sales, tourism and withholding tax assessments against Protestant in the following amounts¹:

MIXED BEVERAGE GROSS RECEIPTS TAX

| | |
|-----------|-------------|
| Tax: | \$ 4,036.17 |
| Interest: | 250.46 |
| Penalty: | 403.62 |
| Total: | \$ 4,690.25 |

SALES TAX

| | |
|-----------|-------------|
| Tax: | \$ 2,522.61 |
| Interest: | 157.58 |
| Penalty: | 252.26 |
| Total: | \$ 2,932.45 |

TOURISM TAX

| | |
|-----------|-------------|
| Tax: | \$ 45.37 |
| Interest: | 1.69 |
| Penalty: | <u>4.53</u> |
| Total: | \$ 51.19 |

¹ Interest on the proposed assessment was accrued through April 15, 2000.

WITHHOLDING TAX

| | |
|-----------|--------------|
| Tax: | \$ 290.00 |
| Interest: | 76.85 |
| Penalty: | <u>72.50</u> |
| Total: | \$ 439.35 |

16. A protest to the proposed assessments was timely filed.

17. The audit is based exclusively on the alcoholic beverage inventory purchased during the audit period as confirmed by the wholesalers' report of purchase invoices. Protestant does not dispute the depleted inventory.

18. The sales and tourism tax assessments are based exclusively on the proposed under reported mixed beverage gross receipts.

19. The audit determined that mixed beverage sales were under reported by a total amount of \$33,634.78.

20. The withholding tax assessment is based on the tax rates of single and zero dependents.

ISSUE

The issue presented for decision is whether Protestant sustained the burden of proving that the audits and resulting assessments are incorrect.

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)(l) 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 disposition of mixed beverages shall be taxed in a manner other than by simply computing sales from cash register receipts. See, *Kifer v. Oklahoma Tax Commission*, 1998 OK CIV APP 34, 956 P.2d 162 (1997). In *Kifer*, the Court found:

'Total gross receipts' includes 'total retail value' of drinks. 'Total retail value' is defined as the 'total amount of consideration that would be required for the sale, preparation or service of mixed beverages.' Section 506(33) of the [Oklahoma Alcoholic Beverage Control Act, 37 O.S. 1991, §§ 502 et seq.] defines 'sale' as 'any transfer, exchange or barter in any manner or by any means whatsoever, and includes and means all sales made by any person, whether as principal, proprietor or as an agent, servant or employee.'

The Tax Commission, pursuant to 37 O.S. Supp. 1985, § 586, adopted Regulation XXX-20.² 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). *Kifer, supra*.

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]

²Oklahoma Tax Commission Order No. 85-05-16-02. Currently codified as Rule 710:20-5-8 of the Oklahoma Administrative Code.

(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 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 (Okl. 1988) and ***Big Country Club, Inc. v. Humphreys***, 511 S.W. 2d 315 (Tex.Civ.App. 1974).

In ***Big Country Club***, the issue before the court held that where records do not account for vast quantities of liquor purchased, and the state computes a tax on a reasonable formula, the burden is on the taxpayer to prove that the tax determination was unreasonable, or that it was achieved capriciously or arbitrarily. *Id.*, at 317.

The standard of review in administrative proceedings is preponderance of the evidence. *Oklahoma Tax Commission Order No. 99-04-08-003* (citing Oklahoma Tax Commission Order No. 91-10-17-061). That means "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which shows that the fact sought to be proved is more probable than not or best accords with reason and probability." BLACK'S LAW DICTIONARY, 1064 (5th ed. 1977).

In regard to the use of specialty drinks for purposes of a depletion audit, a taxpayer's must present evidence of four factors. Oklahoma Tax Commission Order No. 92-08-04-027. Evidence of the pour sizes, prices, recipes and percentage of specialty drinks sold to total drinks sold must be presented. *Id.*

Every employer making payment of wages shall deduct and withhold from the wages paid each employee a tax. 68 O.S. 1991, § 2385.2(a). "Employer" is defined as "any person transacting business in or deriving any income from sources within the State of Oklahoma for whom an individual performs or performed any service, of whatever nature, as the employee of such person". 68 O.S. 1991, § 2385.1(b). "Employee" is defined to mean "any `resident individual', * * *, performing services for an employer, * * *, and every other individual performing services within the State of Oklahoma, the performance of which services constitutes, establishes, and determines the relationship between the parties as that of employer and employee." 68 O.S. 1991, § 2385.1(c). "Wages" is defined as "all remuneration for services performed by an employee for his employer", unless specifically exempted. 68 O.S. 1991, § 2385.1(e).

Generally, the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. Rule 710:90-1-2(A)(i)(Employee) of the *Oklahoma Administrative Code*. An employer/employee relationship exists if the employer has the right to direct or control the manner in which the services are performed whether the employer actually directs or controls the means or methods. OAC, Rule 710:90-1-2(A)(ii)(Employee).

Generally, the medium in which or the name by which remuneration is paid or designated is immaterial to the determination of whether the remuneration constitute wages for which taxes must be withheld. OAC, Rule 710:90-1-2(A) and (B)(Wages). Wages includes salaries, tips, fees if paid as compensation for services performed by the employee for his employer. OAC, Rule 710:90-1-2(B)(Wages).

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. An employer/employee relationship exists if the employer has the right to direct or control the manner in which the services are performed whether the employer actually directs or controls the means or methods. OAC, Rule 710:90-1-2(A)(ii)(Employee). Wages for purposes of withholding includes tips if paid as compensation for services performed by the employee for his employer. OAC, Rule 710:90-1-2(B)(Wages).

6. 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 (Okl. 1988).

7. Protestant failed to present sufficient evidence to show the pour size and prices utilized for depleting the liquor inventory are incorrect.

8. Protestant failed to present sufficient evidence to show that specialty or exotic drinks should be given consideration for purposes of the depletion audit. Oklahoma Tax Commission Order No. 92-08-04-027.

9. Protestant failed to present sufficient evidence to show the depletion of THEMEISTER at a pour rate of 1.5 ounces and a price of \$3.00 is incorrect.

10. Protestant's evidence regarding an error in the depletion of Montezuma Gold Tequila is sufficient. Seventy percent (70%) of the Montezuma Gold Tequila should be depleted as shots.

11. The evidence supports a conclusion that Protestant employed two (2) part-time employees during the audit period. The auditor erred, however, by attributing twenty (20) hours per week to each employee. The withholding tax audit should be adjusted to reflect the employment of two (2) individuals at twenty (20) hours per week or ten (10) hours per individual.

12. Protestant's protest to the proposed assessments should be sustained in part and denied in part.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it WAS DETERMINED that the protest of the Protestant be sustained in part and denied in part. It WAS further DETERMINED that the audits be adjusted in accordance herewith and that the resultant amounts, inclusive of any additional accrued and accruing interest, be fixed as the deficiencies due and owing.

ADDENDUM TO FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

NOW on this 18th day of April, 2001, the ***Findings, Conclusions and Recommendations*** ("Findings") issued on February 9, 2001, 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, tourism tax, and withholding 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 March 12, 2001.
2. That the Division revised the mixed beverage gross receipts tax assessment to an amount of \$5,152.43, consisting of tax in the amount of \$3,925.66, interest accrued through April 15, 2001, in the amount of \$834.20, and penalty in the amount of \$392.57.
3. That the Division revised the sales tax assessment to an amount of \$3,220.18, consisting of tax in the amount of \$2,453.53, interest accrued through April 15, 2001, in the amount of \$521.30, and penalty in the amount of \$245.35.
4. That the Division revised the tourism tax assessment to an amount of \$57.22, consisting of tax in the amount of \$44.45, interest accrued through April 15, 2001, in the amount of \$8.33, and penalty in the amount of \$4.44.
5. That the Division revised the withholding tax assessment to an amount of zero.
6. That the aggregate amount in controversy is \$8,429.83.
7. That the revisions comply with the recommendations set forth in the Findings.
8. That Protestant was provided notice of the revisions.
9. 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 WAS 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 February 9, 2001, 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

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upon the Commission. Thus, similar issues may be determined on a case-by-case basis.