JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2001-10-18-018 / NOT PRECEDENTIAL**
ID: **P9700105**
DATE: **10-18-01**
DISPOSITION: **SUSTAINED IN PART / DENIED IN PART**
TAX TYPE: **SALES / MIXED BEVERAGE**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. PROTESTANT'S PRESIDENT operated a restaurant in Oklahoma City, Oklahoma, doing business as PROTESTANT BUSINESS. Auditors from the Audit Division of the Oklahoma Tax Commission, "Division" hereafter, contacted PROTESTANT'S PRESIDENT to conduct a sales tax and mixed beverage tax audit on the business. In order to conduct its audit, the Division requested PROTESTANT'S business records including inventory records, cash register tapes, pour statement and drink recipes. PROTESTANT'S PRESIDENT provided all of this information except for the drink recipes. The information provided by PROTESTANT'S PRESIDENT and his liquor wholesaler was used by the Division to conduct the audit of PROTESTANT BUSINESS. The pour statement provided by PROTESTANT'S PRESIDENT in Division's Exhibit C page 25 indicated a mixed drink pour size of 1.25 ounce, Rocks pour of 2.5 ounce, shots pour of 1.25 ounce, doubles pour of 2.5 ounce, schnapps pour of 1.25 ounce, wine pour of 10 ounces and strong draw beer pour of 10 ounces.

2. The Division conducted a mixed beverage depletion audit of PROTESTANT BUSINESS based on the pour sizes provided for the audit period of January 1, 1994, to July 7, 1995. The Division issued its assessment letters on February 11, 1997, for sales tax and mixed beverage tax. PROTESTANT'S PRESIDENT timely filed a written protest to both of these assessments by his letter of February 17, 1997. The Division then revised its assessment and notified the taxpayer of the revised assessments by letters of March 28, 1997. The revised assessments are as follows:

	Sales Tax	**Mixed Beverage Tax**
Tax	$ 267.59	$ 383.42
Interest	66.97	95.80
Penalty	26.76	38.34
TOTAL	$ 361.32	$ 517.56

By letter of April 2, 1997, PROTESTANT'S PRESIDENT reasserted his protest to these assessments.

3. At the hearing of this matter, PROTESTANT'S PRESIDENT called five former employees of PROTESTANT BUSINESS to testify regarding pour sizes of beer and mixed drinks. Four of those witnesses identified Protestant's Exhibit #1 as the menu of PROTESTANT BUSINESS that states the beer on tap was drawn in an 18-ounce serving glass. The employees A, B, C, AND D each testified that the keg beer or draft beer was only served in 18-ounce glasses. Protestant's Exhibit #2 admitted into evidence was a glass identified by the witnesses as one of the same glasses used at PROTESTANT BUSINESS to serve beer. A pour test of Protestant's Exhibit #2 was performed at the hearing which demonstrated that the glass held 18 ounces of liquid. EMPLOYEE D testified that he reviewed the pour statement submitted by PROTESTANT'S PRESIDENT and pointed out to him that the 10-ounce pour size for beer on that statement was incorrect. The Division based its pour size for beer and all other drinks on the pour statement in Division's Exhibit C.

4. PROTESTANT'S PRESIDENT also asked his witness to testify as to pour sizes for mixed beverages, particularly specialty drinks or exotic drinks which contained more than one kind of liquor. None of the witnesses were able to testify as to the pour sizes for mixed drinks and no recipes for mixed drinks served at PROTESTANT BUSINESS were ever entered into evidence. The testimony concerning pour sizes for drinks other than beer was equivocal and unconvincing. The Division based its audit on the pour sizes provided by PROTESTANT'S PRESIDENT contemporaneously with the conduct of the audit in this case.

ISSUE

The issue raised in the hearing of this protest is whether the Division used the correct pour size for mixed beverages in the mixed beverage depletion audit for PROTESTANT BUSINESS.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission has jurisdiction of this protest, 68 O.S. § 207, 37 O.S. § 545(8).

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, Inc. 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. 1991, § 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 "[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.* It is also defined to mean "evidence which is more credible and convincing to the mind . . . [T]hat which best accords with reason and probability." *Id.*

4. The Protestant herein has carried its burden of proving that the pour size for draft beer is 18 ounces rather than the 10 ounces reported by PROTESTANT'S PRESIDENT on the pour statement. The audit should be adjusted in order to take into account the 18-ounce pour size for draft beer and the protest should be granted as to that issue.

5. The Protestant has not carried its burden of proving that any other adjustments to the audit should be made. The pour size for mixed beverages was provided by PROTESTANT'S PRESIDENT during the audit. The Division correctly determined the mixed beverage and sales taxes due based on the depletion audit method using the records and information supplied by PROTESTANT BUSINESS and its liquor wholesaler. Under this method the mixed beverage and sales taxes were assessed on the number of drinks available for sale calculated on the gross receipts that should have been generated from the sale of those drinks. The Protestant did not present sufficient evidence at the hearing which could demonstrate that the assessment is incorrect. *OAC* 710:20-5-7 requires all mixed beverage tax permit holders to maintain records of:

> (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.

The taxpayer is responsible for record keeping and when a taxpayer fails to make reports or keep proper records, the depletion audit method is a reasonable method to calculate the tax due, *Kifer v. Oklahoma Tax Commission*, 1998 OK CIV APP 34, 956 P.2d 162. In this instance the taxpayer failed to provide information necessary to make an adjustment to the audit either during the audit or during the hearing of this matter.

6. The Protestant's protest to the proposed assessment should be denied in part and granted in part.

DISPOSITION

It is the DETERMINATION of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the sales tax and mixed beverage tax protest of PROTESTANT d/b/a, PROTESTANT BUSINESS, be denied in part and granted in part as set out above.

ADDENDUM TO FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

The Division, as directed by the Findings, adjusted the sales and mixed beverage tax assessment and provided notice to Protestant on April 26, 2001. Protestant challenged the adjustment proposed by the Division by letter of May 3, 2001. The Division further adjusted the sales and mixed beverage tax assessment based on the May 3rd letter and provided notice of these adjustments to Protestant on May 23, 2001. The Protestant further challenged the adjustment proposed by the Division by letter of June 12, 2001. No further adjustments to the audit were made by the Division.

Upon consideration of the Findings and the adjustment to the assessment, the following Findings of Fact should be added to and incorporated in the Findings:

1. That final notice of the adjustment to the assessments was filed of record in this cause on May 23, 2001.

2. That the Division revised the sales tax assessment to an amount of $131.94, consisting of tax in the amount of $66.57, interest accrued through June 3, 2001, in the amount of $58.71, and penalty in the amount of $6.66.

3. That the Division revised the mixed beverage tax assessment to an amount of $189.02, consisting of tax in the amount of $95.39, interest accrued through June 3, 2001, in the amount of $84.09, and penalty in the amount of $9.54.

4. That the aggregate amount in controversy for sales tax is $131.94, and for mixed beverage tax is $189.02.

5. That the adjustment complies with the recommendations set forth in the findings.

6. That the Protestant was provided notice of the adjustment.

7. That the Protestant did file a response to the adjustments which did not indicate that any further adjustment should be made.

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

THEREFORE, the Findings, Conclusions and Recommendations issued on September 29, 2000, are amended to include and incorporate the above and foregoing.

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.