

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 2002-04-09-003 / NOT PRECEDENTIAL
ID: P0000033 / P0000035 / P0000037
DATE: 04-09-02
DISPOSITION: DENIED AS TO CORPORATIONS AND OFFICER X /
 SUSTAINED AS TO OFFICER Z
TAX TYPE: SALES / MIXED BEVERAGE / TOURISM / FRANCHISE / USE
APPEAL: OKLA SUP CT 97,692 / DISMISSED

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Protestants operated three businesses during the audit period at issue in this case covering May 1, 1996 through April 30, 1999, which were: (a) CORPORATION A, doing business in ANYTOWN, Oklahoma; (b) CORPORATION B, doing business in ANYTOWN, Oklahoma; and (c) CORPORATION C, doing business in ANONYMOUS, Oklahoma.

2. The Protestants, OFFICER X and OFFICER Z, were the only officers named in the franchise tax returns filed with the Oklahoma Tax Commission during the audit period. OFFICER X signed all of the tax returns, signed all of the checks in payment of the taxes, and was the President of all three corporations. OFFICER Z was an officer in name only and had no authority within the three corporations nor did she perform any duties with regard to the business of the corporations.

3. The Division performed an audit of CORPORATION A, CORPORATION B, and CORPORATION C for the period May 1, 1996 through April 30, 1999, and determined that the three corporations were deficient in reporting and remitting sales tax, mixed beverage tax, tourism tax, use tax, and franchise tax to the State. OFFICERS X AND Z were assessed as officers of the three corporations for sales taxes only. The Division issued its proposed assessments to CORPORATION A on December 3, 1999. The Division issued its proposed assessments to CORPORATION B and CORPORATION C on November 30, 1999. All of the Protestants timely filed protests against all proposed assessments by letter of December 14, 1999. The proposed assessments are as follows:

CORPORATION A

	Sales	Mixed Beverage	Use	Tourism
Tax	\$ 58,190.22	\$ 10,125.11	\$ 185.69	\$ 705.28
Interest	17,789.85	957.03	50.56	218.75
Penalty	5,819.05	1,012.51	18.58	70.56
TOTAL	\$ 81,799.12	\$ 12,094.65	\$ 254.83	\$ 994.59

CORPORATION B

	Sales	Mixed Beverage	Use	Tourism	Franchise
Tax	\$ 25,344.73	\$ 8,909.39	\$ 206.84	\$ 279.15	\$ 422.50
Interest	7,515.70	842.12	41.68	76.94	131.44
Penalty	2,534.53	890.94	20.69	27.94	42.25
TOTAL	\$ 35,394.96	\$ 10,642.45	\$ 269.21	\$ 384.03	\$ 596.19

CORPORATION C

	Sales	Mixed Beverage	Use	Tourism	Franchise
Tax	\$ 24,433.46	\$ 3,654.74	\$ 93.97	\$ 325.78	\$ 538.75
Interest	5,060.37	345.45	16.38	58.18	107.82
Penalty	2,443.34	365.47	9.40	32.58	53.88
TOTAL	\$ 31,937.17	\$ 4,365.66	\$ 119.75	\$ 416.54	\$ 700.45

4. The Protestants met with the Division on September 21, 2000, to discuss the audit and provide additional documentation. At that meeting the Division agreed to revise the sales tax assessments only by adjusting the "3.2 beer" or low point beer depletion audit by allowing a 10% reduction in the beer inventory available for sale as an allowance for spillage and waste. The original audit was based on a 5% allowance for spillage and waste. The Division used a 5% allowance for spillage and waste for the depletion audit for mixed beverages and strong beer but refused to allow a 10% reduction on the mixed beverage and strong beer audit. Therefore, the Division revised its sales tax assessment on March 31, 2001 as follows:

	CORPORATION A	CORPORATION B	CORPORATION C
Sales Tax	\$ 52,420.35	\$ 20,714.67	\$ 11,635.17
Interest	25,816.28	9,848.51	4,326.60
Penalty	5,242.06	2,071.49	1,163.52
TOTAL	\$ 83,478.69	\$ 32,634.67	\$ 17,125.29

5. A hearing was held in this matter on February 21, 2001, at which time the parties agreed to try this case on briefs submitted to the Administrative Law Judge pursuant to OAC 710:1-5-38. The parties did not file any stipulations but did attach affidavits and exhibits to their briefs and this case was thereafter submitted for decision without further hearing.

ISSUES

1. Whether the depletion audit for mixed beverage gross receipts tax properly calculated the taxes due?
2. Whether the depletion audit method was properly used to calculate the sales tax due on sales of low point beer?
3. Whether OFFICERS X AND Z are principal officers of CORPORATION A, CORPORATION B and CORPORATION C?

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission has jurisdiction of this protest, 68 § 207.
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*, 1988 OK 91, 768 P.2d 359. 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 Co. v. Oklahoma Tax Commission*, 1976 OK 23, 570 P.2d 315. 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 Protestants have the burden of proof to show in what respects the proposed assessments are incorrect pursuant to OAC 710:1-5-47. The standard burden of proof in administrative proceedings is "preponderance of evidence," Oklahoma Tax Commission Order No. 91-10-17-061. "Preponderance of evidence" is 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 also means evidence which is more credible and convincing to the mind or that which best accords with reason and probability.
4. The Protestants' brief did not provide any evidence upon which to review the proposed assessments for use tax, tourism tax and franchise tax and therefore, the protests filed against those assessments must be denied.

**A. Mixed Beverage Gross Receipts Tax and Sales Tax Audit
of Mixed Beverage and Strong Beer Sales**

5. The Protestants argue that the division did not use the correct pour size for the mixed beverage depletion audit and therefore the mixed beverage audit is flawed. The Division's auditor used the pour sizes which she observed in pour tests during the audit. The Division also allowed a deduction from the depletion audit of 5 percent for losses or waste due to undetermined causes. The Protestants argued that the deduction for waste should be 20-25 percent. The Division's audit complied with the audit procedures provided in OAC 710:20-5-8(b) regarding pour sizes and the 5 percent loss deduction. The Protestants have not presented any evidence which would require an adjustment to the audit.

6. The Division calculated the sales tax and mixed beverage tax assessments based on the depletion audit method whereby the tax is assessed on the number of drinks available for sale upon which no taxes were paid. The evidence submitted in this case does not demonstrate that the Protestants maintained the records required by OAC 710:20-5-7 which could be used by the division as an alternative method to the depletion audit. The depletion audit was the most appropriate method available to the Division to evaluate the Protestants' tax compliance and was properly used in this case. The depletion audit method for determining tax liability is an accepted and reasonable method for auditing tax compliance for mixed beverage gross receipts tax, *Kifer v. Oklahoma Tax Commission*, 1998 OK CIV APP 34, 956 P.2d 162.

7. The Protestants also assert that the Oklahoma Tax Commission's rules concerning liability and audit of mixed beverage tax permit holders is invalid in that the applicable rules were not properly adopted. After reviewing this argument, the Administrative Law Judge concluded that the applicable rules promulgated in the Oklahoma Administrative Code are valid.

B. Depletion Audit for Sales Tax on Low Point Beer

8. The Protestants argue that the Division may not use the depletion audit method to calculate sales tax due on beer sales. The Protestants argue that there is no "rational basis" for a distinction between low point beer and strong beer. The beer depletion audit is "unconstitutionally vague" and "singles out beer for different or special treatment." The Protestants do not cite any authority which supports the conclusion that taxes assessed in this case on the sale of low point beer are in violation of either the State or federal constitution and this tribunal concludes that there is no such violation. The depletion audit for low point beer was properly conducted in this case, *Kifer v. Oklahoma Tax Commission*, supra.

9. The Protestants have not offered any evidence or authority which would carry the burden of proving that the assessments in this case are incorrect in any respect.

C. Liability of Principal Officers

10. The principal officers of a corporation are personally liable for the sales tax assessed against the corporation, 68 O.S. §§ 253,1361(A). Section 253 provides that the liability of a principal officer for sales tax shall be determined in accordance with the standards for determining liability for federal withholding tax pursuant to the Internal Revenue Code of 1986. The federal courts look to three factors to identify the "responsible person" who is actually responsible for an employer's failure to withhold and pay over the tax which include the person's status, duty, and authority within the corporation, *Heimark v. U.S.*, 18 Cl.Ct. 15, 89-2 USTC 9499 (1989).

The federal court in *Barnett v. U.S.*, 988 F.2d 1449 (5th Cir 1993) considered the following indicia of authority to determine responsibility: (1) whether the person is an officer or member of the Board of Directors; (2) owns substantial amount of stock in the company; (3) manages the day-to-day operations; (4) has authority to hire and fire employees; (5) makes decisions as to disbursement of funds and payment of creditors; (6) possesses the authority to sign checks. The crucial inquiry, however, is whether the person has significant control over the disbursement of funds, *Hockstein v. U.S.*, 900 F.2d 543 (2nd Cir. 1990).

11. The evidence submitted in this case demonstrates that OFFICER Z does not have sufficient authority within any of the corporations to be a person responsible for sales taxes because she was an officer in name only and did not perform any duties within the three corporations. OFFICER X admits he is the person responsible for sales taxes assessed against CORPORATION B and CORPORATION C. However, OFFICER X disputes that he is a principal officer of CORPORATION A.

The evidence admitted in this case shows that for each year within the audit period, OFFICER X filed franchise tax returns which he signed and which list OFFICER X as the President of CORPORATION A and OFFICER Z as the Vice President. OFFICER X also signed the bank draft on CORPORATION A's banking account in payment of the franchise taxes in each year. This evidence indicates that OFFICER X is the principal officer of CORPORATION A because no other person was named as an officer at any time.

OFFICER X states that he sold one half of his stock in CORPORATION A to another person, but OFFICER X still owned one half of the stock, which is a substantial amount, and retained his position as President. Therefore, OFFICER X is the only person who qualifies as a principal officer of CORPORATION A liable for the sales tax.

12. The protest of OFFICER Z should be sustained. The protest of CORPORATION A, CORPORATION B, CORPORATION C and OFFICER X should be denied.

ORDER ON MOTION FOR REHEARING

NOW, on this 20th day of September, 2001, the Motion for Rehearing filed by Protestants in the above styled and numbered cause comes on for consideration. Upon review of the file and records, including the Motion for Rehearing, the Response to Motion for Rehearing and the Findings, Conclusions and Recommendations issued in this cause on June 21, 2001, the undersigned finds that Protestants motion should be granted in part and denied in part.

The Protestants raised the issue of the submission of recently discovered z tapes for which Protestant requests the Division's review. In its response, the Division reviewed the z tapes pertaining to this issue and did reduce its assessment of tax amounts down in Protestants favor. Therefore the Motion for Rehearing should be granted on this issue to allow the revisions outlined in the Division's response as follows:

CORPORATION A

	TAX	INTEREST	PENALTY	TOTAL
Mixed Beverage	\$ 10,125.11	\$ 3,740.73	\$ 1,012.51	\$ 14,878.35
Sales	49,962.90	28,875.32	4,996.22	83,834.44
Tourism	604.71	352.15	60.52	1,017.38
Use	185.69	101.70	18.58	305.97
TOTAL	\$ 60,878.41	\$ 33,069.90	\$ 6,087.83	\$ 100,036.14

CORPORATION C

	TAX	INTEREST	PENALTY	TOTAL
Mixed beverage	\$ 3,654.74	\$ 1,350.25	\$ 365.47	\$ 5,370.46
Sales	9,889.61	4,516.70	988.98	15,395.29
Tourism	131.86	56.62	13.18	201.66
Use	93.97	42.26	9.40	145.63
Franchise	538.75	255.93	53.88	848.56
TOTAL	\$ 14,308.93	\$ 6,221.76	\$ 1,430.91	\$ 21,961.60

The Protestants list 19 issues in addition to the z tape issue upon which Protestants cite error and wish to be reheard. The undersigned finds that the Protestants have not presented any facts, evidence or authority relative to the issues presented which could be reviewed in rehearing. The undersigned further finds that the relevant issues presented in this case have been fully considered and the decision is supported by substantial evidence.

THEREFORE, IT IS ORDERED that the Motion for Rehearing of Protestant is granted in part to accept the Division's reduction of tax amounts assessed as requested by the Protestant and set out herein. The remainder of the Motion for Rehearing is hereby denied.

DISPOSITION

It is the DETERMINATION of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the protest of CORPORATION A, CORPORATION B, CORPORATION C, and OFFICER X, as President, and as an individual, be denied. It is further DETERMINED that the protest of OFFICER Z be sustained.

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.