JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2002-05-02-012 / NOT PRECEDENTIAL**
ID: **P9600193 / P9600193A / P9600193B**
DATE: **05-02-02**
DISPOSITION: **DENIED**
TAX TYPE: **MIXED BEVERAGE / SALES / TOURISM**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. CORPORATION is the general partner of LIMITED PARTNERSHIP. LIMITED PARTNERSHIP operates a restaurant located at XXX ANY STREET, in Oklahoma City.

2. CORPORATION holds the liquor license for THE RESTAURANT. OFFICER A holds the office of President for the Corporation. He is the Corporation's sole shareholder. OFFICER B holds the office of Secretary for the Corporation.

3. The vast majority of customers at RESTAURANT are regulars. OFFICER A testified that whether a customer was a regular or a new customer they would receive a "normal drink" which is a strong drink in comparison with other establishments. THE BARTENDER on duty when a majority of the drinks are served (day and early evening), testified that a "normal drink" at RESTAURANT is a strong drink and that she pours a strong drink unless requested otherwise or she is aware of the customer's preference. She stated that a strong drink is 1.75 ounces for short glasses and 2.25 to 2.5 ounces for tall glasses. A light drink in her estimate is 1 ounce for short drinks and 1.5 ounces for tall drinks.

4. Protestants' operations were the subject of an audit conducted by THE AUDITOR. The tax period subject to audit was February 1, 1992, through January 31, 1995.

5. The parties' first contact was February 15, 1995. The auditor met with OFFICER A. At this meeting, the auditor provided Protestant with an instruction sheet listing the information required for the audit and papers for purposes of recording Protestants' prices, pour sizes and glass sizes.

6. The pour statement completed by OFFICER A pursuant to this meeting lists pour sizes of 1.5 ounces for ten ounce well, call and premium drinks, 1 ounce for schnapps and 2.5 ounces for brandy, well rocks and doubles. OFFICER A testified that the pour sizes recorded on the statement are not based on actual experience, but are based on estimates provided to ABLE when the club initially opened. Protestants admitted that during the audit period pour tests of bartenders were never conducted and bartenders were never instructed on how to pour drinks. Except for one bartender who was only employed for a short period of time during the audit period, none of the bartenders utilized jiggers to pour drinks. THE BARTENDER testified in regard to the pour statement that normally the pour for well drinks is 1.5 to 2 ounces.

7. On March 16, 1995, THE BARTENDER performed pour tests for the auditor. THE BARTENDER testified that during the pour test she poured as she normally pours and that she was not instructed how to pour by the auditor. The pour tests resulted in an average pour size of 2.6 ounces for short drinks and 3.2 ounces for tall drinks.

8. Due to the discrepancy between the pour rates resulting from the pour statement and the pour test; and according to THE Audit Supervisor, because the Division "doesn't usually run into pour sizes of this magnitude", ABLE was contacted by the Division for purposes of conducting an operation at RESTAURANT whereby drink samples were obtained undercover. According to the ABLE agents, they entered RESTAURANT on July 5, 1995, at 2:45 p.m., ordered two drinks (a scotch and water and a screwdriver), poured the entire contents of each drink in a separate jar, sealed the jars and submitted the jars to the OSBI crime lab for analysis. The agents admitted they were not regular customers of RESTAURANT. The parties stipulated that the pour sizes of the drinks were 1.19 ounces and 2.38 ounces, respectively.

9. Based on the pour results obtained from the ABLE operation and the test performed by the bartender, the auditor reworked the initial audit by adjusting the pour rates and taking into account the category of drinks recorded by Protestants. The audit was reworked using a 1.875 ounce pour size for wells and calls used for fruit drinks, regulars and rocks and a 1.313 ounce pour size for all premium liquors and liquors used in regulars and rocks.

10. Protestants' accountant testified that the accounting system utilized by Protestants accurately reflected Protestants' sales during the audit period. According to OFFICER A, Protestants kept an accurate account of all sales during the audit period, but not complimentary drinks. OFFICER A stated that the majority of complimentary drinks were served to himself and his wife and that normally they had two drinks a piece generally on a daily basis. THE BARTENDER testified that OFFICERS A and B generally had three complimentary drinks each and OFFICER A sometimes had four.

11. During the month of May, 1996, a 30 day study was conducted by PROTESTANTS' ACCOUNTANT to estimate the pour size of "regular drinks" at RESTAURANT (the "ACCOUNTANT test"). According to OFFICER A, the array of drinks available during the ACCOUNTANT test and the audit period were the same and the pour sizes were typical. OFFICER A admitted that the bartenders were aware of the study being conducted by THE ACCOUNTANT during the test period.

12. THE BARTENDER testified that for the ACCOUNTANT test a beginning and ending inventory of liquor was taken, every drink served was recorded on a ticket and the depletion of inventory was tracked. PROTESTANTS' ACCOUNTANT testified that the test used a beginning inventory of liquor in ounces, added thereto purchased inventory in ounces and subtracted therefrom an ending inventory of liquor in ounces.

13. The ACCOUNTANT test resulted in pour sizes for "regular drinks" of 2.19 ounces and 2.46 ounces depending on the pour rate assumptions for drinks other than "regular drinks." PROTESTANTS' ACCOUNTANT testified that the pour rate assumptions for drinks other than "regular drinks" which resulted in a 2.19 ounce pour size for "regular drinks" are based on the pour sizes for such drinks given to him by OFFICER A and THE BARTENDER. These pour rate are 3 ounces for rocks, 3.5 ounces for doubles and Russians, 2 ounces for small fruit, 2.5 ounces for tall fruit and 1 ounce for Schnapps. He stated that the pour rate assumptions for drinks other than "regular drinks" which resulted in a 2.46 ounce pour size for "regular drinks" are based on the pour sizes for such drinks as used in the revised audit. These pour rates are 2.5 ounces for rocks, doubles, Russians and tall fruit and 1.25 ounces for small fruit.

14. Utilizing pour rates of 2.486 and 2.471 ounces, PROTESTANTS' ACCOUNTANT depleted the liquor inventory available for sale during the audit period as recorded by the auditor on the audit work papers. His analysis shows an under reporting of liquor sales by an amount of $35,191.36 and a mixed beverage gross receipts tax due of $7,038.27. THE ACCOUNTANT concluded that the under reported sales are due from the complimentary drinks served during the audit period.

15. PROTESTANTS' ACCOUNTANT testified that the pour rate assumptions for drinks other than "regular drinks" are critical in determining the pour size of the "regular drinks". He stated that the inventory used in the test period included all liquors on the premises during the period. He admitted that the results of his test are flawed since some exempt liquors were included, however, because the number of exotic drinks served at RESTAURANT is minimal, the outcome of his test would not be significantly skewed. THE ACCOUNTANT concluded that based on his test, the Division's pour size for "regular drinks" is low and that this leads to an exaggerated number of drinks served and dollar volume of sales during the audit period.

16. THE AUDITOR testified regarding a meeting held on June 18, 1996, between the representatives of the Protestants and the Division. She stated that pursuant to this meeting the Division agreed to rework the audit a final time using the following pour rates: 1.5 ounces for regular drinks, 3.25 ounces for Russians, 3 ounces for rocks, and 2.5 ounces for tall fruit drinks. The Division also agreed that Russians represented 12% of the well liquor sales. THE AUDIT SUPERVISOR, who was present at the meeting, testified that the Division split the difference between Protestants' pour size for regular drinks and the Division's pour size for regular drinks for the final audit because in his opinion no one knows what the pour size was.

17. The final audit reflects a balance of unreported sales of $107,136.03. The amounts proposed for assessment based on this balance, inclusive of interest accrued through August 15, 1996, are as follows:

MIXED BEVERAGE GROSS RECEIPTS

Tax:	$ 12,856.32
Penalty:	1,285.63
Interest:	2,884.75
Total:	$ 17,026.70

SALES

Tax:	$ 8,972.64
Penalty:	897.26
Interest:	2,013.31
Total:	$ 11,883.21

TOURISM

Tax:	$ 107.14
Penalty:	10.71
Interest:	25.45
Total:	$ 143.30

18. OFFICER A admitted that he only kept inventory during the audit period for purposes of ordering inventory, not for depletion purposes. He stated that he was unaware that the taxes were based on the depletion of inventory. He further admitted that he did not keep records of breakage, returned drinks or spills, but believes that such would fall within the five percent (5%) variance allowed by the audit.

ISSUE

The issue presented for decision is whether Protestants presented sufficient evidence to prove that the pour size used in the audit to deplete the "regular drinks" liquor inventory is erroneous.

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 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.[1] 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]

[1] Oklahoma 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 □ 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 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).

CONCLUSIONS OF LAW

1. The Tax Commission has jurisdiction over the subject matter and parties to this proceeding. 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 (Okl. 1988).

6. Here, the undersigned finds that the most demonstrable and telling evidence of the pour size for "regular drinks" is the testimony of the bartender, THE BARTENDER. Her testimony in this regard was consistent and persuasive. In addition, she stood in the best position to estimate the actual pour size. The other evidence regarding the pour size is either contrived, based on conjecture or too isolated to be persuasive. The "ACCOUNTANT test" is based on pour size assumptions not found in the record and is admittedly flawed. The Division has waggled between at least three different pour sizes and struck upon its final pour size based on "splitting the difference." The samples obtained by the ABLE agents, although generally considered good evidence because of its objectiveness, were obtained when the principal bartender was not serving drinks. Accordingly, the undersigned finds that the pour size for "regular drinks" is 1.75 ounces.

7. Protestants' protest to the proposed mixed beverage gross receipts, sales and tourism tax assessments should be sustained to the extent the Division utilized a 1.5 ounce pour rather than a 1.75 ounce pour for "regular drinks." Otherwise, Protestants' protest to the proposed assessments should be denied.

DISPOSITION

Based upon the above and foregoing findings of fact and conclusions of law, it is DETERMINED that the protest of PROTESTANT CORPORATION, OFFICER A, and OFFICER B, be sustained in part and denied in part. It is further DETERMINED that the proposed assessment be adjusted in accordance herewith and that the resultant amount of tax, penalty and interest be fixed as the amount due and owing.

ORDER DENYING MOTION FOR RECONSIDERATION, SUPPLEMENTING THE FINDINGS, CONCLUSIONS AND RECOMMENDATIONS BY ADDENDUM AND RECOMMENDING THE WAIVER OF A PORTION OF THE ACCRUED INTEREST

NOW on this 11th day of April, 2002, the Notice of Tourism, Mixed Beverage, & Sales Tax Adjustment filed by the Audit Division of the Tax Commission in response to the Findings, Conclusions and Recommendations (hereinafter "Findings") issued in this cause on February 22, 2002, and the Response and Objection of OFFICERS A AND B of PROTESTANT CORPORATION, and as Individuals filed by Protestants come on for consideration. The Audit Division of the Tax Commission (hereinafter "Division") is represented by AN Assistant General Counsel, General Counsel's Office of the Tax Commission. PROTESTANT OFFICERS are represented by AN Attorney at Law.

Upon review of the file and records, the undersigned finds that the errors urged by Protestants are addressed by the Findings, that Protestants have not alleged the discovery of any new evidence or law, and that the Findings, adequately and accurately explain the decision.

The undersigned further finds that the Division, as directed by the Findings and in accordance therewith, revised the proposed mixed beverage, sales and tourism tax assessments and provided notice of the revisions to Protestants. Protestants' Response to the Division's proposed revisions protests the accrued interest, citing the delay in issuing the Findings.

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

1. That notice of the revisions to the assessment were filed of record in this cause on April 3, 2002.

2. That the Division revised the mixed beverage tax assessment to an amount of $21,131.99, consisting of tax in the amount of $9,689.92, penalty in the amount of $968.99, and interest accrued through April 30, 2002, in the amount of $10,473.08.

3. That the Division revised the sales tax assessment to an amount of $14,751.15, consisting of tax in the amount of $6,762.76, penalty in the amount of $676.27, and interest accrued through April 30, 2002, in the amount of $7,312.12.

4. That the Division revised the tourism tax assessment to an amount of $171.16, consisting of tax in the amount of $80.75, penalty in the amount of $8.08, and interest accrued through April 30, 2002, in the amount of $82.33.

5. That the revisions comply with the recommendation set forth in the Findings.

6. That Protestants were provided notice of the revisions.

7. That Protestants filed the Response and Objection wherein Protestants challenged the Findings and objected to the amount of interest accrued.

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

> It is further recommended that the amount in controversy, as revised, exclusive of any interest accrued from July 1, 1997 through March 1, 2002, be fixed as the deficiency due and owing.

DISPOSITION

THEREFORE, IT IS ORDERED that Protestants' Motion for Reconsideration should be and the same is hereby denied. Further, IT IS DETERMINED that the Findings issued on February 22, 2002, be amended to include and incorporate the above and foregoing findings of fact and recommendation, inclusive of the RECOMMENDATION to waive a portion of the accrued interest.

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.