JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2002-07-16-18 / NOT PRECEDENTIAL**
ID: **P9900349**
DATE: **07-16-02**
DISPOSITION: **DENIED**
TAX TYPE: **SALES / MIXED BEVERAGE / TOURISM / WITHHOLDING**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

NOW on this 5th day of June, 2002, the above styled and numbered cause CAME on for consideration pursuant to assignment regularly made by the Oklahoma Tax Commission to AN Administrative Law Judge. Protestant LLC is represented by A Member/Manager. The Account Maintenance Division is represented by AN Assistant General Counsel, General Counsel's Office of the Oklahoma Tax Commission. A prehearing conference was scheduled in this matter and notice was sent to Protestant at its last known address. No representative for Protestant appeared for the prehearing conference, scheduled for February 25, 2002, and reset on March 11, 2002. Thereafter, notice was served upon the parties that this cause would be closed and the matter submitted for decision upon the filing of a verified response to the protest by the Account Maintenance Division (hereinafter "Division"). Protestant did not file a response to this notice. Accordingly, this matter was submitted for an examination into the merits of the protest pursuant to 68 O.S. Section 221(D).

FINDINGS OF FACT

1. Protestant owned and operated an establishment known as "XYZ" located at 999 East ANONYMOUS in BIGCITY.

2. Protestant operated the establishment under sales tax permit number XXXXXX and mixed beverage tax permit number ZZZZZZ.

3. A proposed assessment for sales, mixed beverage, tourism and withholding taxes was issued against Protestant on October 12, 1999, for the following periods and in the following amounts, inclusive of interest and penalty:

Tax Type	Amount	Period
Sales Tax	$80,095.00	10/97 - 3/98; 5/98 - 10/99
Mixed Beverage Tax	$73,902.00	9/97, 12/97, 4/98 - 8/98
Tourism Tax	$359.00	10/97, 1/98 - 10/99
Withholding Tax	$2,702.00	10/97 - 9/99

4. On November 10, 1999, Protestant filed a timely protest to the proposed

assessment stating that "the proposed assessments are high" and that "the actual sales, tourism and mixed beverage taxes would be lower than proposed".

5. Pursuant to information that the business went into receivership on June 30, 1998, the Division adjusted its assessments. The revised amounts in controversy are as follows:

Sales Tax

October 1997 through March 1998

Sales Tax[1]	$ 2,549.86
Interest to 5-31-02	1,658.40
Penalty	281.66
Total $ 4,489.92	

Mixed Beverage Tax

September 1997, December 1997 and April 1998 through June 1998

Mixed Beverage Tax[2]	$ 8,601.24
Interest to 5-31-02	5,427.21
Penalty	940.00
$5 per day Penalty	10,520.00
Total $ 25,488.45	

Tourism Tax

October 1997 and January 1998 through April 1998

Tourism Tax[3]	$32.58
Interest to 5-31-02	20.40
Penalty	3.26
Total $56.24	

[1] The sales tax liability is based on amounts reported but not remitted by the Protestant.

[2] The mixed beverage tax liability was estimated by the Division because Protestant failed to file actual reports.

[3] Except for the month of April, 1998, which was estimated by the Division, the tourism tax liability is based on amounts reported but not remitted by Protestant.

Withholding Tax

October 1997 through June 1998

Withholding Tax[4]	$750.00
Interest to 5-31-02	464.36
Penalty	187.50
Total $ 1,401.86	

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and the subject matter of this action. 68 O.S. 1991, Section 207.

2. Sales tax is levied upon the gross receipts from the sale of foods, confections and drinks sold or dispensed by hotels, restaurants or other dispensers for immediate consumption upon the premises or carried away from the premises for consumption elsewhere. 68 O.S. 1991, Section 1354.1(I).

3. The incidence of the levy of the sales tax is on the consumer who is required to pay the tax to the vendor. 68 O.S. Supp. 1993, Section 1361(A). The vendor is required to collect the full amount of the sale tax from the consumer, *Id.*; and remit the same to the Tax Commission, 68 O.S. Supp. 1996, Section 1362(A). The vendor is personally liable for the full amount of the sales tax. 68 O.S. Supp. 1993, Section 1361(A).

4. A "vendor" is "any person making sales of tangible personal property or services in this state, the gross receipts or gross proceeds from which are (subject to sales tax)." 68 O.S. Supp. 1994, Section 1352(S)(1).

5. "Person" is defined to include a limited liability company. 68 O.S. Supp. 1993, Section 1352(12).

6. 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, Section 576(A) and (B).

[4] The withholding tax liability was estimated by the Division because Protestant failed to file actual reports.

7. Every holder of a mixed beverage permit holder must file a monthly mixed beverage tax report and pay the tax due for the preceding month. 37 O.S. 1991, Section 579(A) and (B).

8. Tourism tax is imposed on all sales in the amount of one-tenth of one percent of the gross receipts from the sale of "any food, confection, or drink sold or dispensed by hotels, restaurants or bars. . . ." 68 O.S. 1991, Section 50012(A)(2).

9. Section 2385.2 of Title 68 sets forth the requirement that employers who make payments of wages must withhold a set amount. Section 2385.3 requires that the amount withheld must be paid to the Tax Commission on a quarterly or monthly basis, depending on the amount withheld.

10. An "employer" is any person, including any limited liability company, who transacts business in or derives any income from sources within Oklahoma for whom an individual performs or performed any service, of whatever nature, as employee of such person and who controls the payment of the wages for such service. 68 O.S. Supp. 1993, Section 2385.1(b).

11. The Tax Commission is statutorily authorized to make an assessment "from any information in its possession or obtainable by it." 68 O.S. 1991, Section 221(a).

12. 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).

13. Protestant has wholly failed to come forward with any evidence in support of its protest and, therefore, has failed to meet the burden of proving in what respect the proposed assessment is incorrect.

14. The protest should be denied.

DISPOSITION

It is the DETERMINATION of the undersigned, based upon the specific facts and circumstances of this case, that the sales, mixed beverage, tourism and withholding tax protest of PROTESTANT LLC be denied.

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.