

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 2003-01-21-002 / NOT PRECEDENTIAL
ID: P9500055
DATE: 01-21-03
DISPOSITION: SUSTAINED IN PART / DENIED IN PART
TAX TYPE: SALES / MIXED BEVERAGE / TOURISM
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. THE RESTAURANT located in ANYCITY, Oklahoma, was at all times relevant to this proceeding owned by Protestant. Protestant sold the business in January 1994.
2. The Audit Division conducted a mixed beverage depletion audit of PROTESTANT d/b/a THE RESTAURANT for the period from March 1, 1991, through September 30, 1993.
3. As a result of the audit, letters of proposed assessment dated April 5, 1994, were issued for the following amounts:

Mixed Beverage Tax

Tax	\$4,364.85
Interest through 5/15/1994	432.04
Penalty through 5/15/1994	<u>436.49</u>
Total	\$5,233.38

Sales Tax

Tax	\$2,728.04
Interest through 5/15/1994	271.15
Penalty through 5/15/1994	<u>272.81</u>
Total	\$3,272.00

Tourism Tax

Tax	\$ 36.37
Interest through 5/15/1994	3.18
Penalty through 5/15/1994	<u>3.64</u>
Total	\$ 43.19

4. A timely protest was filed on April 27, 1994. In his protest, the Protestant objected to the pour size used in the audit.

5. The auditor testified that she spoke with Protestant's wife on two occasions prior to conducting the audit. THE AUDITOR stated that she requested a pour statement, price list and other information be provided.

6. After several months, Protestant had failed to provide the auditor with the requested information. As a result, the auditor utilized the liquor purchases made during the audit period, average prices taken from the Area Average Price List (1st Ed., July '91) and the regulation pour rate of one and one-half ounces (1.5 oz.) for spirits and six ounces (6 oz.) for wine to conduct the audit.

7. At the rehearing, Protestant performed a pour demonstration as evidence of his contention that a larger pour size was appropriate. For the demonstration, the full-time bartender at THE RESTAURANT during the audit period, poured a "rocks drink" in the same manner that he had done while working at THE RESTAURANT, using a glass identical to those used at the restaurant. He first packed the glass with ice, filled the glass to the "dimple" then poured the liquid into a measuring device. The test resulted in a pour rate of slightly more than two ounces (2 oz.).

8. THE BARTENDER also performed a pour demonstration with wine using a wine glass identical to those used at THE RESTAURANT. He poured the wine in the same manner as he had done at THE RESTAURANT by filling the glass to about one inch from the top of the glass. The liquid was measured and resulted in a pour size of slightly more than six ounces (6 oz.).

9. Protestant testified that the glasses used in the demonstration had been obtained from THE RESTAURANT and were identical to the glasses in use at the restaurant during the audit period.

10. CUSTOMER A and CUSTOMER B, both regular customers at THE RESTAURANT during the audit period, testified that they had witnessed THE BARTENDER pouring drinks while at the restaurant. They further testified that the drinks poured during the demonstrations were poured in the same manner as they had witnessed at THE RESTAURANT.

11. The Division contends that the Protestant has failed to provide reliable evidence that a larger pour size was given at THE RESTAURANT.

ISSUE

Whether the Protestant has presented reasonable evidence to establish that a pour rate larger than the default rate of one and one-half ounces (1.5 oz.) for spirits and six ounces (6 oz.) for wine should have been used for the mixed beverage audit.

APPLICABLE LAW

This matter arises under the Oklahoma Alcoholic Beverage Control Act, 37 O.S. 1991, § 576, the Oklahoma Sales Tax Code, 68 O.S. 1991, § 1354, and the Oklahoma Tourism Promotion Act, 68 O.S. 1991, § 50012.

The holder of a mixed beverage license issued by the ABLE Commission is subject to a twelve (12) percent gross receipts tax levied upon the sale of mixed beverages. 37 O.S. 1991, § 576(A).¹ Total gross receipts means the total amount of consideration received as admission charges and the total retail value received for the sale, preparation or service of mixed beverages, ice or non-alcoholic beverages to be mixed with alcoholic beverages. 37 O. S. 1991, § 576(B)(2).²

Sales and tourism taxes are also 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 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).

¹ 37 O. S. 1991, § 576 provides in pertinent part:

A. A tax at the rate of twelve percent is hereby levied and imposed on the total gross receipts of a holder of a mixed beverage, caterer, or special event license, issued by the ABLE Commission, 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.

² 37 O. S. 1991, § 576 further provides:

B. For purposes of this section: . . .

2. "Total gross receipts" means the total amount of consideration received as charges for admission to a mixed beverage establishment as provided in paragraph 4 of subsection A of this section and the total retail sale price received for the sale, preparation or service of mixed beverages, ice, and nonalcoholic beverages to be mixed with alcoholic beverages. The advertised price of a mixed beverage shall be the sum of the total retail sale price and the gross receipts tax levied thereon; . . .

The Tax Commission, pursuant to 37 O.S. Supp. 1985, § 586, adopted Regulation XXX-20.³ 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). See *Kifer v Oklahoma Tax Commission*, 1998 OK CIV APP 34, 956 P.2d 162 (1997).

Oklahoma Administrative Code 710:20-5-8 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]

(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 2 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.

³ Oklahoma Tax Commission Order No. 85-05-16-02. Currently codified as 710:20-5-8 of the *Oklahoma Administrative Code*.

(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. *Oklahoma Administrative Code 710:1-5-47*. See, *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission*, 768 P.2d 359 (Okla. 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. . . . That which best accords with reason and probability." BLACK'S LAW DICTIONARY, 1064 (5th ed. 1977).

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Oklahoma 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),(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. Protestant performed a pour test at the rehearing using a glass identical to the one used at THE RESTAURANT. The bartender packed the glass with ice, filled the glass with liquid to the "dimple", then poured the liquid into a measuring device. The pour test for a "rocks drink" resulted in a pour size of approximately two ounces (2 oz.). This evidence is supported by the testimony of the bartender and Protestant, who each testified that it was restaurant policy to fill a glass to the "dimple". The bartender and regular patrons at the restaurant testified that this policy was strictly followed. The bartender testified that the drink he poured in the demonstration was done in accordance with THE RESTAURANT'S policy. The testimony, in addition to the pour test, provides reasonable evidence that, as to "rocks drinks", a pour size of two ounces (2 oz.) rather than the default one and one-half ounces (1.5 oz.) should have been used to conduct the mixed beverage audit.

6. Protestant's claim that a pour size of eight ounces (8 oz.) for wine should have been used in the audit is based solely on speculation and is not supported by the evidence. The pour test for wine performed at the rehearing resulted in a pour size of approximately six ounces (6 oz.). Protestant has failed to provide adequate evidence that a larger pour size for wine should have been used.

7. Protestant's protest to the proposed mixed beverage gross receipts, sales and tourism tax assessments should be sustained to the extent the Division utilized a one and one-half ounce (1.5 oz.) pour rather than a two ounce (2 oz.) pour for "rocks drinks". Otherwise, Protestant's protest to the proposed assessment should be denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is DETERMINED that the protest of PROTESTANT d/b/a THE RESTAURANT be sustained in part and denied in part. It is further DETERMINED that the audit 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, respectively.

ADDENDUM TO FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

On October 25, 2002, *Findings, Conclusions and Recommendations* were issued in the above styled and numbered cause. The undersigned DETERMINED that the audit be adjusted in accordance with the conclusions therein and that the resultant amounts, inclusive of any additional accrued and accruing interest, be fixed as the deficiencies due and owing. Pursuant to that recommendation, the Audit Division has filed audit revisions, reflecting zero amount due for sales tax, mixed beverage tax and tourism tax. Notice of the revisions were sent to Protestant's representative on December 2, 2002, and nothing has been filed in response. Accordingly, the following Recommendation should be added to and incorporated in the *Findings, Conclusions and Recommendations*:

It is further DETERMINED that no additional mixed beverage gross receipts tax, sales tax, or tourism tax is due.

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.