JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2003-02-11-008 / PRECEDENTIAL**
ID: **P0000205**
DATE: **02-11-03**
DISPOSITION: **SUSTAINED IN PART / DENIED IN PART**
TAX TYPE: **SALES / MIXED BEVERAGE / TOURISM**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above matter comes on for entry of a final order of disposition by the Oklahoma Tax Commission. Having reviewed the files and records herein, the Commission denies the request for oral argument *en banc*. Statutes must be construed as a consistent whole, and every portion thereof be given effect if possible. *Cowart v. Piper Aircraft Corp*., 665 P. 2d 315, 317 (Okla. 1983). The individual paragraphs of 68 O.S. § 1212 cannot be split into separate, unrelated laws. *Fort Howard Paper Co. v. State ex rel. Oklahoma Tax Com'n*, 792 P.2d 87 (Okla.App.Div.2 1989). The Commission hereby adopts the Findings of Fact, Conclusions of Law and Recommendation made and entered by the Administrative Law Judge on the 14th day of October, 2002, EXCEPT FOR the last sentence of conclusion of law number 7 on page 9 of said Findings, Etc. In lieu thereof, we conclude as follows:

> The notice of suspension was not sent to the corporation at the last-known address of its president and managing officer, OFFICER A, as required by law. Without such notice being given, and in the absence of the registered agent's or managing officer's actual knowledge of the suspension, we conclude that the trustees, directors or officers of the corporation cannot be held personally liable for the corporation's post-suspension debts pursuant to 68 O.S.1991, § 1212. OKLA. CONST. ART. II, §7. As principal officer, however, PROTESTANT is personally liable for the sales tax portion of the assessment under the provisions of 68 O.S.1991, § 1361.

With the exception above stated, said Findings, Etc., appended hereto, together herewith shall constitute the Order of the Commission.

1. PROTESTANT CORPORATION, an Oklahoma corporation, did business as XYZ, a mixed beverage establishment which operated under sales tax permit number 999999 and mixed beverage tax permit number 999999.

2. On January 10, 1997, a notice that the corporate charter of PROTESTANT CORPORATION was suspended for failure to file franchise tax returns was mailed to PROTESTANT CORPORATION, in care of OFFICER A at 99999 E. Xst St., BIGCITY, Oklahoma. The notice was returned to the Commission stamped "return to sender" and "unclaimed".

3. PROTESTANT CORPORATION's corporate charter was reinstated on May 30, 2001.

4. A field auditor for the Tax Commission was assigned to perform the audit of XYZ in June 1998. THE AUDITOR contacted OFFICER A in September 1998 and requested a meeting to explain audit procedures and to provide a copy of a records request. The auditor met OFFICER A AND went over audit procedures, record requirements and answered questions. THE AUDITOR conducted an ending inventory in September 1998 and obtained prices and pour sizes. The pour sizes of 1.5 ounces for mixed drinks, rocks and shots and 3.0 ounces for doubles were reflected on a pour statement affidavit signed by OFFICER A. The prices of well, call, premium, shots, wine by the glass and strong beer were obtained pursuant to an interview by the auditor of the bartender on duty at XYZ on September 22, 1998. While the auditor was waiting for Protestant to gather records, it came to his attention that the establishment closed in July 1999, which changed the end of audit date from September 1998 to the close of business date. The tax period subject to audit was June 1, 1997, through August 2, 1999. THE AUDITOR explained that he obtained a list of all Protestant's purchases of spirits, wine and strong beer. At the close of the audit, the auditor met OFFICER A at his apartment and viewed a van containing 30 to 35 bottles of partial liquor. The auditor did not inventory the bottles.

5. Protestant failed to file sales, mixed beverage and tourism tax reports for several months of the audit period.[1] The auditor stated that he requested copies of reports and the back-up documentation, i.e., daily recap sheets and Z-tapes, from Protestant, but did not receive any of the requested documentation.

6. The mixed beverage depletion audit utilized the prices and pour sizes for liquor, wine and strong beer provided by Protestant and the inventory of liquor purchased during the audit period as shown on the invoices acquired from the liquor wholesalers. A beginning inventory was not provided; consequently, the 30 to 35 bottles of partial liquor were not considered in performing the audit.

7. A 3.2 beer depletion audit was also conducted for the period of June 1, 1997, through August 2, 1999. With the exception of the 1997 3.2 beer sales, which were based on a projection due to unavailability of the purchase invoices for that period, the sales tax depletion audit of the 3.2 beer was performed by obtaining the purchase invoices from the distributors, which were separate from the liquor invoices. After a discussion with OFFICER A regarding regular 3.2 beer prices and happy hour prices,

[1] Protestant did not file mixed beverage gross receipts tax reports or tourism tax reports for the months of May 1998 through August 1999. Neither did Protestant file sales tax reports for March 1998 and May 1998 through August 1999.

the auditor allowed 40% of Protestant's 3.2 beer sales at reduced happy hour prices[2] and 60% at regular prices[3], resulting in an average price of 75 CENTS for draft beer and an average price of $1.44 for cans and bottles.

8. The mixed beverage depletion audit found that Protestant had underreported its mixed beverage sales during the audit period, inclusive of the 5% variance for undetermined losses. As a result, a proposed assessment of mixed beverage gross receipts tax was issued against PROTESTANT CORPORATION, a suspended corporation; OFFICER A, as President of a suspended corporation and as an individual; and OFFICER B, as Vice President of a suspended corporation and as an individual, in the following amounts:

Mixed Beverage Tax

Tax	$24,854.91
Interest through 7/15/00	3,094.94
Delinquency Penalty	2,485.49
$5 a day Penalty	4,200.00
Total	$34,635.34

9. The sales and tourism audits not only included the underreported mixed beverage sales, but also included the underreported 3.2 beer sales. As a result, proposed sales and tourism tax assessments were issued against PROTESTANT CORPORATION, a suspended corporation, d/b/a XYZ, in the following amounts:

Sales Tax

Tax	$41,756.04
Interest through 7/15/00	9,773.87
Delinquency Penalty	4,175.58
Total	$55,705.49

Tourism Tax

Tax	$ 528.02
Interest through 7/15/00	102.95
Delinquency Penalty	52.81
Total	$ 683.78

[2]The happy hour prices used by the auditor for 3.2 beer were $1.25 for bottles and cans and 50¢ for draws.

[3]The regular prices used by the auditor for 3.2 beer were $1.75 for bottles and cans and $1.00 for draws.

10. The sales and tourism tax assessments were also issued against OFFICER A and OFFICER B, as officers of PROTESTANT CORPORATION, a suspended corporation, and as individuals.

11. A timely letter of protest was filed objecting to the amounts at issue.

12. The auditor changed the draft beer pour from the 12 ounce pour utilized in the 3.2 beer audit to 16 ounces, resulting in amended sales and tourism tax assessments, as follows:

Sales Tax	
Tax	$40,097.37
Interest through 9/19/01	16,373.26
Penalty	4,009.75
Total	$60,480.38

Mixed Beverage Tax	
Tax	$24,854.91
Interest through 9/19/01	7,456.47
Penalty	2,485.49
Total	$34,796.87

Tourism Tax	
Tax	$ 506.49
Interest through 9/19/01	186.75
Penalty	50.66
Total	$ 743.90

13. By *Order* issued October 25, 2001, a ruling was made that OFFICER B's liability is not at issue and therefore is not included in this cause, and that OFFICER A's individual liability for the mixed beverage and tourism tax assessments be included in this cause.

14. OFFICER A testified that at the September 1998 meeting, the auditor presented him with a stack of papers; that the only part of the Pour Statement Affidavit that was visible was the signature line; that although he signed the Pour Statement Affidavit he did not read the document; and that he was unaware of the interview of THE BARTENDER. OFFICER A further testified that at the meeting at his apartment, he showed the auditor four boxes of records, i.e., daily sheets, Z-tapes and receipts, which OFFICER A estimated constituted about 80% of the records of the corporation for the audit period.

15. Protestant disputes the part of the sales tax audit related to the depletion of the 3.2 beer sales. Protestant presented a compilation and copies of Z-tapes available for the months of January, February, March, May and June of 1999. Protestant calculated an average of the daily 3.2 beer sales on the available Z-tapes and multiplied the average by the number of days that XYZ was open, to arrive at an estimate of the beer sales for the month. For the above-referenced months, estimated 3.2 beer sales from the Z-tapes were less that those from the depletion audit. The only records submitted at hearing were for the five months previously referenced.

16. Protestant disputes the pour size of 1.5 ounces utilized to deplete the liquor inventory. Protestant submitted affidavits from THE Day Manager/Bartender AT XYZ and THE Bartender, XYZ. Both stated that they worked in the position of bartender and had experience to know the size and quantity of servings and that XYZ used a measure (free pour and jigger) of 2.0 ounces in all recipes or servings.

17. OFFICER A challenges his individual liability for the mixed beverage taxes at issue, because he was unaware that the corporation was not in good standing.

18. Additionally, Protestant submitted two identical copies of an XYZ flier, which indicated that "Happy Hour" was Monday through Friday, 5:00 p.m. until 7:00 p.m. and that draws were 50 CENTS and longnecks were $1.25. The notation "Double Cocktails" appeared several times on the flier.

19. Copies of bank statements[4] for XYZ were also submitted. OFFICER A testified that the statements were for the only bank account used by PROTESTANT CORPORATION d/b/a XYZ. He indicated that some amounts owed by the club were paid in cash and noted on daily log sheets. Although OFFICER A thought the information on the bank statements represented more closely the club's actual sales than the amount determined by the auditor, he could not estimate the percentage of sales represented on those statements.

ISSUE

Whether Protestant sustained its burden of proof showing in what respect the action or proposed action of the Tax Commission is incorrect.

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.

[4]These statements covered the periods July 1997 through June 1998, August 1998 through January 1999, April 1999, July 1999 and August 1999.

2. If a report required by Article 12 of Title 68 and the tax levied is not filed and paid as provided for in subsection (c) of Section 1208 of Title 68, the Tax Commission may enter an order directing the suspension of the corporate charter and the forfeiture of rights thereunder. 68 O.S. 1991, § 1212(a).

3. Notice of the suspension and forfeiture is to be forwarded by certified mail, return receipt requested, to the last-known address of the registered agent or managing officer of the corporation. 68 O.S. 1991, § 1212(d).

4. "Last-known address" means the last address given for such person as it appears on the records of the division of the Tax Commission giving such notice. 68 O.S. Supp. 1993, § 208.

5. An officer of a corporation whose right to do business in state has been forfeited shall be held liable as to any debts of such corporation incurred with his knowledge, approval and consent within the state after the forfeiture and before reinstatement of the corporation's right to do business in the state in the same manner as if the officer was a partner. 68 O.S. 1991, § 1212(c).

6. Partners are jointly and severally liable for obligations of the partnership. 54 O.S. Supp. 1998, § 1-306.

7. The then Business Tax Division mailed the *Notice of Suspension and Forfeiture*, dated January 10, 1997, to PROTESTANT CORPORATIONC c/o OFFICER A, at 99999 E. Xst St., BIGCITY, Oklahoma. Division's *Sales Tax Permit Renewal Notice* signed by OFFICER A, dated October 22, 1996, and stamped received on October 26, 1996, indicated that OFFICER A was the owner of PROTESTANT CORPORATION, d/b/a XYZ, and that his mailing address was 9999 S. 999th St. E. Ave. The file and record in this cause does not contain any document filed with the Division between October 26, 1996, and January 10, 1997, which indicates a mailing address for OFFICER A other than the 9999 S. 999th St. E. Ave. address. The notice of suspension was not sent to the last-known address of OFFICER A and, therefore, the mixed beverage gross receipts and tourism taxes cannot be properly assessed against OFFICER A as an individual.

8. 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).

9. The Oklahoma Alcohol Beverage Control Act 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. . . ." 37 O.S. 1991, § 506(33).

10. Sales tax and tourism tax 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).

11. The traditional type of taxable "sale" under the Sales Tax Code consists of "the transfer [within this State] of either title or possession of tangible personal property for a valuable consideration. . . ." 68 O.S. Supp. 1996, § 1352(M).

12. A taxable "sale" under the Sales Tax Code also consists of "[t]he disposition for consumption or use in any business or by any person of all goods, wares, merchandise, or property which has been purchased for resale, manufacturing, or further processing." 68 O.S. Supp. 1996, § 1352(M)(2). See, 68 O.S. Supp. 1996, § 1362(C).[5]

When a taxpayer fails to make a report or return as required by state tax law, the Tax Commission is authorized to determine the amount of tax due for such period based on any information which is in its possession or is otherwise obtainable. 68 O.S. 1991, § 221.

13. The authorized method of auditing a mixed beverage establishment is the depletion method. Regulation XXX-20[6]. 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).

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[5]This subsection provides:

> Except as otherwise provided by subsection C of Section 1361 of this title, each person required pursuant to the provisions of the Oklahoma Sales Tax Code to make a sales tax report shall include in the gross proceeds derived from sales to consumers or users, the sales value of all tangible personal property which has been purchased for resale, manufacturing, or further processing, and withdrawn from stock in trade for use or consumption during the taxable period covered by such report, and shall pay the tax on the sales value of this tangible personal property withdrawn from stock in trade for consumption or use.

[6]Currently codified as 710:20-5-8 of the *Oklahoma Administrative Code* (July 12, 1993).

14. 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).

15. In *Big Country Club, Inc. v. Humphreys*, 511 S.W.2d 315, 317 (Tex. Civ.App. 1974), 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.

16. 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). 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 State Board of Equalization*, 570 P.2d 315 (Okl. 1977).

17. Protestant challenges the assessment based on the auditor's failure to take into consideration its "double cocktail" specials. No evidence was provided as to what actually constituted a "double cocktail" or as to the amount of sales attributable to them. *Oklahoma Administrative Code 710:20-5-7* requires maintenance of specific records as to complimentary or discounted sales, such as register receipts and detailed price lists showing the amount and the period of any such sales. Such records are required to be kept for at least three (3) years and failure to do so leaves the auditor with no way to account for sales attributable to such specials. Therefore, Protestant's evidence regarding "double cocktails" is insufficient to warrant an adjustment to the audit.

18. Protestant challenges the pour size used to deplete the liquor inventory. The auditor established the pour size through a document signed by Protestant. Protestant disputes the pour size used in the audit, but has not offered any evidence that would justify changing it. The pour size as determined prior to the assessments being issued and signed by both parties is the most credible evidence presented in this matter and should not be disturbed.

19. Next, Protestant challenges the 3.2 beer sales calculated by the auditor. Except for the periods in 1997, the 3.2 beer sales were determined based on the purchase invoices, with an allowance of a reduction of 40% of Protestant's 3.2 beer sales at a reduced happy hour price. The evidence submitted by Protestant was incomplete and not as reliable as the purchase invoices because it would not reflect all the possible 3.2 beer sales, i.e., unrecorded sales and withdrawals from inventory, made during the audit period.

20. Additionally, Protestant challenges the audit practice of not using an ending inventory when a beginning inventory is unavailable. Retailers are mandated by law to keep records of inventories of alcoholic beverages. 37 O.S. 1991, § 561. Further, *Oklahoma Administrative Code 710:20-5-8* states that "when the permittee is unable or unwilling to furnish such a [beginning] inventory, then no beginning or ending inventories shall be considered for the audit period and the audit will be conducted solely on the taxpayer's purchases made during the audit period."

21. Protestant's protest to the proposed assessments should be denied in part and sustained in part.

DISPOSITION

It is the DETERMINATION of the undersigned Administrative Law Judge, based upon the specific facts and circumstances of this case, that the sales tax, mixed beverage tax and tourism tax protest of PROTESTANT CORPORATION, a suspended corporation, d/b/a XYZ, and that the sales tax protest of OFFICER A, as President and as an individual, be denied. It is the further DETERMINATION of the undersigned that the mixed beverage and tourism tax protest of OFFICER A, as President and as an individual, be sustained.

OKLAHOMA TAX COMMISSION