JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2004-01-08-03 / NOT PRECEDENTIAL**
ID: **P0200207 / P0200209**
DATE: **01-03-04**
DISPOSITION: **DENIED**
TAX TYPE: **SALES / MIXED BEVERAGE**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties stipulate to the following facts:

Stipulations of Fact

1. Protestants in the matter of the sales tax and mixed beverage tax protest, Case No. P-02-207, are ANONYMOUS ESTABLISHMENT d/b/a ANONYMOUS and OFFICER A, as President, OFFICER B, as Secretary/Treasurer, AND OFFICERS C, D, E , AND F as Vice Presidents, and as individuals.

2. Protestant in the matter of the mixed beverage tax protest, Case No. P-02-209, is ANONYMOUS ESTABLISHMENT d/b/a ANONYMOUS CATERER.

3. ANONYMOUS ESTABLISHMENT, an Oklahoma corporation, does business as ANONYMOUS, a hotel located in BIGCITY, OK, which contains four mixed beverage establishments and holds banquets. ANONYMOUS ESTABLISHMENT operated under sales tax permit number 999999 and mixed beverage tax permit numbers 888888 and 777777.

4. A FIELD AUDITOR for the Tax Commission, was assigned to perform an audit of ANONYMOUS ESTABLISHMENT. THE FIELD AUDITOR contacted the accounting manager, and OFFICER A, general manager of the hotel.

5. The auditor conducted a mixed beverage audit of the hotel bars, a mixed beverage audit of the caterer or banquet area, and a sales tax audit of the hotel.

6. THE FIELD AUDITOR used ANONYMOUS's beginning and ending inventories to conduct a depletion audit of ANONYMOUS's mixed beverage sales and determined how much liquor was available for sale. The mixed beverage depletion audit utilized the prices and pour sizes for liquor, wine and strong beer reflected in ANONYMOUS's advertisement to its customers. The auditor compared the total sales available, less any waste allowances, to the reported sales. The auditor did not conduct any test to determine what size of pour was actually made by the servers or any tests of the size of the jiggers used by the servers. ANONYMOUS asserts that the actual pour size used was 1.5 ounces rather than the 1.25 ounce pour size used by the auditor.

7. The auditor applied the current rates for waste spillage that went into effect in 2001: 5% waste on bottled beer, 14% waste on keg beer, 16% waste on liquor and 10% waste on wine.

8. Based upon the mixed beverage depletion audit, it was determined that Protestant had underreported its mixed beverage sales during the audit period, inclusive of the variance for undetermined losses. As a result, a proposed assessment of mixed beverage gross receipts tax was issued against ANONYMOUS ESTABLISHMENT d/b/a ANONYMOUS, in the following amounts:

Mixed Beverage Tax

Tax	$20,210.16
Interest @ 15% through 10/15/02	3,031.52
Tax, interest & report penalty due within 30 days	$23,241.68
30 day delinquent penalty @ 10%	2,021.02
Tax, interest & penalty due after 30 days	$25,262.70

A proposed assessment of mixed beverage gross receipts tax was issued against ANONYMOUS ESTABLISHMENT d/b/a ANONYMOUS CATERER, in the following amounts:

Mixed Beverage Tax

Tax	$ 993.59
Interest @ 15% through 10/15/02	149.04
Tax, interest & report penalty due within 30 days	$ 1,142.63
30 day delinquent penalty @ 10%	99.36
Tax, interest & penalty due after 30 days	$ 1,241.99

9. During the sales tax audit, the auditor reviewed four months of sales claimed as tax exempt sales to exempt entities. The auditor determined there were exemptions taken for nontaxable customers that were either taxable or lacking supporting documentation showing that the exempt entity was billed for and paid for the lodgings or banquet held at the hotel. ANONYMOUS was permitted to choose which four months would be reviewed. ANONYMOUS chose the following months to be reviewed: 2/2001, 4/2001, 6/2001 and 8/2001.

10. As a result of the audit, proposed sales tax assessments were issued against ANONYMOUS ESTABLISHMENT, OFFICERS A, B, C, D, E, AND F. AS OFFICERS and as individuals, in the amount of $10,450.63. The assessment is based upon an extrapolation of the period examined to cover the entire 3-year audit.

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

In addition to the parties' factual stipulations the undersigned finds as follows:

12. The proposed sales tax assessment issued by letter dated August 29, 2002, not only included sales tax on the unreported mixed beverage sales but also included other audit deficiencies regarding the collection and remittance of sales tax on other transactions taxable under the Sales Tax Code.

13. A proposed tourism tax assessment resulting from unreported sales of mixed beverages was issued against ANONYMOUS ESTABLISHMENT d/b/a ANONYMOUS in the aggregate amount of $761.64, consisting of tax in the amount of $527.39, interest calculated through October 15, 2002, in the amount of $181.49, and penalty in the amount of $52.76.

14. The only unresolved issue for hearing relates to the appropriateness of the 1.25 ounce pour size used in the mixed beverage depletion audit to deplete the liquor inventory for well, call and premium drinks.[1]

ISSUE AND CONTENTIONS

Whether the Protestants sustained their burden of proving that the 1.25 ounce pour size utilized in the depletion audit is erroneous.

Protestants contend the price lists provided to the auditor listing the products sold, the prices and the amount of liquor utilized in each drink were only written instructions for the minimum amount of liquor to be used per drink, not the actual measurement poured. Rather than amounts listed on the price lists, Protestants contend the audit should reflect the 1.5 ounce pour rate designated in the Tax Commission's rules for use, absent reasonable evidence of another rate.

The Division contends Protestants' advertized pour sizes, as provided on the price lists, constitute reasonable evidence of a different rate of use than the rate designated in the Tax Commission's rules and are the ones that should be used for calculation of the audit.

[1] Although the undersigned recognizes that any adjustment to the mixed beverage depletion audit would affect the assessed sales and tourism taxes related to the unreported mixed beverage sales, the sales and tourism taxes are not disputed by Protestant.

CONCLUSIONS OF LAW

The parties stipulate to the following authority:

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S. ∋ 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. 37 O.S. ∋ 576.

3. The authorized method of auditing a mixed beverage establishment is the depletion method. *Oklahoma Administrative Code 710:20-5-8*. This method accounts for the number of drinks available for sale, preparation or service from the total alcoholic beverages received. It is a reasonable method for determining the total gross receipts subject to tax under 68 O.S. ∋ 576. *Kifer v. Oklahoma Tax Commission*, 1998 OK CIV APP 34, 956 P.2d 162 (1997). *Oklahoma Administrative Code 710:20-5-8(b)(1)* and *(2)* provide as follows:

> (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, 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.
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> (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.

In addition to the parties' stipulations, the undersigned concludes as follows:

4. Protestants' challenge is to the pour rate of 1.25 ounces used by the auditor in calculating the number of well, call and premium drinks available for sale. Under the audit procedures set forth in *Oklahoma Administrative Code 710:20-5-8*, spirits are presumed to be dispensed at an average rate of 1.5 ounces unless reasonable evidence of a different rate of use is shown. The price lists provided by Protestants constitute reasonable evidence of a different rate of use as to the pour size at issue and, therefore, is the pour rate to be utilized.

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 (Okla. 1988). Protestants failed to present any evidence to contradict the mixed beverage gross receipts tax assessments. Accordingly, Protestants' protest should be denied.

DISPOSITION

It is the recommendation of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the mixed beverage tax protest of ANONYMOUS ESTABLISHMENT, d/b/a ANONYMOUS and OFFICER A, as President, OFFICER B, as Secretary/Treasurer, OFFICER C, as Vice President, OFFICER D, as Vice President, OFFICER E, as Vice President and OFFICER F, as Vice President, and as individuals, and ANONYMOUS ESTABLISHMENT d/b/a ANONYMOUS CATERER 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.