JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2004-02-12-03 / NOT PRECEDENTIAL**
ID: **P020174A**
DATE: **02-12-04**
DISPOSITION: **DISMISSED**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

NOW on this 11th day of December, 2003, the above-styled and numbered cause comes on for decision pursuant to Rule 710:1-5-38 of the *Oklahoma Administrative Code ("OAC")*. Protestant appears pro se. The Audit Division of the Tax Commission (hereinafter "Division") is represented by AN Assistant General Counsel, General Counsel's Office of the Tax Commission.

By agreement of the parties, this cause was submitted for decision by the filing of documents which were admitted into the record for consideration in this cause and written position statements.

Upon review of the file and records in this cause, the undersigned finds:

FINDINGS OF FACT

1. THE CORPORATION (hereinafter "Corporation") was organized under the laws of the State of Oklahoma and filed its Certificate of Incorporation with the Secretary of State of the State of Oklahoma in November, 1998.

2. The Corporation owned and operated a mixed beverage establishment in ANYTOWN, Oklahoma during the period of December 15, 1998 through early April, 2001.

3. The Corporation started business on December 15, 1998, however, its initial sales of mixed beverages and 3.2 beer were not made until early January, 1999.

4. Protestant admits that he was the majority shareholder of the stock of the Corporation and held the office of President of the Corporation from its inception until December 31, 1999, when he sold his stock to his business partner MR. A and another individual by the name of MR. B and resigned as President of the Corporation.

5. During Protestant's tenure with the Corporation, the Corporation did business as "The Club".

6. After Protestant sold his interest in the Corporation to MR. A and MR. B, the club was shut down for a period of approximately four months for remodeling and thereafter the club was operated under the name of "Club X".

7. The Corporation ceased operations in or around early April, 2001, when the owners were locked out of the club location by the landlord of the property.

8. The Division, by and through THE Auditor, conducted an out of business mixed beverage depletion audit of the operations of the Corporation for the audit period of December 15, 1998 through January 31, 2001.

9. The audit of the mixed beverages available for sale was performed by using the liquor purchase records provided by the liquor wholesalers, area average prices and regulation pour sizes.

10. By letter dated November 6, 2001, the Division caused to be issued a proposed sales tax assessment against Protestant, as President and Secretary/Treasurer of THE CORPORATION d/b/a Club X, and as an individual, for the period of December 15, 1998 through June 30, 2000, in the aggregate amount of $14,182.50, consisting of sale tax in the amount of $10,802.62, interest accrued through December 15, 2001, in the amount of $2,299.62 and penalty in the amount of $1,080.26.

11. Protestant timely protested the proposed sales tax assessment and submitted evidence to show he sold his interest in the Corporation and resigned as President of Corporation on December 31, 1999.

12. Based on the information submitted by Protestant, the Division revised the assessment against Protestant to include only the period of December 15, 1998 through December 31, 1999, and by letter dated June 6, 2002, proposed the assessment of sales tax, interest and penalty against Protestant for this period in the aggregate amount of $13,027.95, inclusive of sales tax in the amount of $8,908.21, interest accrued through June 15, 2002, in the amount of $3,228.92 and penalty in the amount of $890.82.

13. During the pendency of the protest, Protestant and/or MR. A submitted to the Division ending inventories for "The Club" dated December 31, 1999 and "Club X" dated February 17, 2001.

14. Based on this information, the Division revised the assessment against Protestant a second time and by letter dated March 24, 2003, proposed the assessment of sales tax, interest and penalty against Protestant in the aggregate amount of $2,745.37, inclusive of sales tax in the amount of $1,716.15, interest accrued through May 15, 2003, in the amount of $857.60 and penalty in the amount of $171.62.

15. According to Protestant, "On Premise Postings" of prices for each quarter of 1999, were submitted to the Division as early as July, 2000, by MR. A.

16. The price lists show prices for all well drinks, doubles and single shots, all schnapps, all premiums, doubles and single shots, all wine brands and all imported beers.

17. A letter dated August 6, 2002, addressed to THE Audit Supervisor, and subscribed and sworn to by MR. C, the lessee of the premises subsequent to the lock out, states he took down posters in the premises showing CLUB X advertised $1.00 well drinks all day every day. He further averred that he understood the success of the previous clubs was "cheap drinks-large volume", that the books of the club showed cheap drink prices and that he destroyed the liquor on hand pursuant to the direction of the ABLE Commission.

18. By affidavit submitted in this cause, THE Audit Supervisor, averred that "[a]lthough Protestant provided a price schedule, the prices were not substantiated by any supportive evidence * * * [t]herefore, the Division calculated the revised audit based on area average pricing."

ISSUES AND CONTENTIONS

The issue presented for decision is whether Protestant sustained his burden of proving that the audit is flawed because the Division used "area average prices" for mixed beverages rather than the "On Premise Posting" of prices for mixed beverages submitted in this cause.

During the pendency of the protest, Protestant raised several issues with respect to the method and information used by the Division to perform the audit and issue the assessment. After reviewing the file and records it appears that all but one of the issues raised by Protestant have been resolved. The one issue remaining, as best as the undersigned can determine, involves the failure of the Division to use Protestant's prices for mixed beverages.

With respect to the remaining issue in this cause, Protestant contends that "On Premise Posting" of prices for mixed beverages was kept in the normal course of business, that the posting was submitted to the Division for consideration as early as July, 2000 and that it was submitted by MR. A, not himself. Protestant further contends that it was his understanding that the posting of prices was required by the ABLE Commission. Protestant further contends that during 1999, the price lists were done quarterly, not week by week, because the prices seldom changed, that the success of the club was due to low prices and that he reported and paid taxes on $242,967.00 in gross sales which amount of sales could not have been generated by a new club in ANYTOWN, but for the low prices.

The Division contends that Protestant has not sustained his burden of proving that the proposed assessment as last revised by the Division is incorrect and therefore, Protestant's protest should be denied. In support of this contention, the Division argues that although Protestant provided information to the Division during the pendency of the litigation to warrant an adjustment to the proposed sales tax assessment, no other documentation has been offered which would allow further adjustments.

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. 2001, ‚221(D).

2. The burden of proof in all proceedings before the Tax Commission, unless otherwise provided by law, is on Protestant to show in what respect the action or proposed action of the Tax Commission is incorrect. Rule 710:1-5-47, ***Oklahoma Tax Commission Permanent Rules***. The denial of a protest to a proposed assessment is appropriate where the party opposing the proposed action fails to provide evidence which is sufficient to entitle the party to the relief requested. See, ***Continental Oil Company v. Oklahoma State Board of Equalization***, 570 P.2d 315 (Okl. 1977).

3. In civil cases, a category of proceedings to which administrative proceedings are ascribed, the standard burden of proof is "preponderance of evidence." ***Black's Law Dictionary***, 1064 (5th ed. 1979). See, Oklahoma Tax Commission Order No. 91-10-17-061. "Preponderance of evidence" means "[E]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Id. It is also defined to mean "evidence which is more credible and convincing to the mind ... [T]hat which best accords with reason and probability." Id. In Oklahoma the standard does not require the exclusion of every other reasonable conclusion. ***Chickasha Cotton Oil Co. v. Hancock***, 306 P.2d 330 (Okl. 1957).

4. Here, the Division conducted an out of business mixed beverage depletion audit using the liquor purchase records provided by the liquor wholesalers, area average prices and regulation pour sizes. It was not until after the performance of the audit and issuance of the assessments that the principals of the Corporation were aware of the need to submit records to refute the results of the audit. From what records have been submitted by the principals it is apparent that the principals created and maintained adequate records of the operation of the business.

The Division argues that the price schedules submitted by the principals of the Corporation are "not substantiated by any supportive evidence." Evidently, the Division does not believe that Protestant could maintain the prices supposedly charged and stay in business and that Protestant made up the price list. The Division, however, has not offered any evidence in opposition to the price list.

The "On Premise Posting" of prices was submitted by the principals of the Corporation at a time when they understood the operation of their business had been audited and the audit was performed without a review of their records. Although the prices for mixed beverages on the "On Premise Posting" are low, at least in comparison to the "area average prices", the prices on the "On Premise Posting" have been substantiated by the sworn statement of a disinterested person. Further, notwithstanding whether the rules of the ABLE Commission required the posting of mixed beverage prices, Protestant believed that the posting of prices was required. See, *OAC*, 710:20-5-4(b).

All told the undersigned finds that the Division erred by failing to use the "On Premise Posting" of mixed beverage prices in performing the audit of the Corporation's business.

5. Accordingly, Protestant's protest should be sustained.

Based on the above and foregoing findings of fact and conclusions of law, it is recommended that the protest of Protestant be sustained. It is further recommended that the second revised proposed assessment be revised in accordance herewith and that the resulting liability be fixed as the deficiency due and owing.

ADDENDUM TO
FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

NOW on this 4th day of February, 2004, the ***Findings, Conclusions and Recommendations*** ("Findings") issued on December 11, 2003, in the above styled and numbered cause come on for consideration of additional findings of fact and a recommendation as to the amount of the deficiency which should be confirmed by an order of the Tax Commission.

The Division, as directed by the Findings, revised the proposed sales tax assessment and provided notice of the revisions to Protestant. Protestant has not challenged the revisions proposed by the Division.

Upon consideration of the Findings and the revisions to the assessment, the undersigned finds that the following Findings of Fact should be added to and incorporated in the Findings:

1. That notice of the revisions to the assessment was filed of record in this cause on January 8, 2004.

2. That the Division revised the sales tax assessment to an amount of zero.

3. That the aggregate amount in controversy is zero.

4. That the revisions comply with the recommendations set forth in the Findings.

5. That Protestant was provided notice of the revisions.

6. That Protestant did not file a response to the revisions.

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

> Further, because there is no amount in controversy as last determined by the Division, it is recommended that this cause be dismissed.

THEREFORE, the ***Findings, Conclusions and Recommendations*** issued on December 11, 2003, are amended to include and incorporate the above and foregoing findings of fact and recommendation.

DISPOSITION

DISMISSED.

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.