JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2005-06-21-05
ID:	P-04-152-H
DATE:	JUNE 21, 2005
DISPOSITION:	DENIED
TAX TYPE:	SALES/MIXED BEVERAGE/TOURISM
APPEAL:	NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A hearing was held on April 26, 2005, at approximately 1:30 p.m. The Protestants failed to appear at the hearing or respond to the notice of hearing. The notice of hearing was forwarded to the Protestants' last known address.[1] It was noted for the record that the Protestants had not contacted the Division's representative, or the Office of Administrative Law Judge concerning the hearing. The Division called one witness, AUDITOR, Auditor, Field Audit Section, Audit Division, who testified regarding the records of the Division. The Division's Exhibits A through H were identified, offered, and admitted into evidence. Upon conclusion of the hearing, the record was closed and the case was submitted for decision on April 26, 2005.

On May 12, 2005, the record was reopened ten (10) days for the limited purpose of the Division providing copies of the proposed assessments of mixed beverage tax and tourism tax against PROTESTANT. On May 12, 2005, the Division's counsel filed a memorandum with this office advising that the Division did not issue a proposed assessment for tourism tax against PROTESTANT, but a copy of the proposed assessment of mixed beverage tax against PROTESTANT, as President of BUSINESS, INC.. (a suspended corporation), and as an individual, was attached thereto. There being no response or objection by the Protestant, the proposed assessment of mixed beverage tax against PROTESTANT is hereby designated as Division's Exhibit I, identified, offered, and admitted into evidence. On May 23, 2005, the record was closed and this matter was submitted for decision.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, and the position letters, the undersigned finds:

1. On October 22, 1997, a Business Registration Form ("Registration") was filed by PROTESTANT for BUSINESS, INC.. d/b/a BAR located at 123 FAKE STREET, BIG CITY, OK 99999.[2]

2. The Registration lists PROTESTANT as the owner and President of the BAR The Registration was signed by PROTESTANT.[3]

[1] OKLA. STAT. ANN. tit. 68, § 208 (West 2001).

[2] Division's Exhibit A.

[3] Division's Exhibit A.

3. PROTESTANT was the President of the BAR during the Field Audit Period ("Audit Period"), beginning November 1, 2001, and ending February 29, 2004.[4] The BAR was suspended as a corporation beginning March 19, 2003, and ending April 21, 2003.

4. During the Audit Period, the pour size for mixed drinks was 1.25 ounces.[5]

5. A 3.2 beer depletion audit and mixed beverage depletion audit were conducted by the Division using a pour size of 1.25 ounces for mixed drinks and the purchases made by the BAR from its wholesalers during the Audit Period.[6]

6. On July 26, 2004, the Division issued a Mixed Beverage Tax Assessment, Sales Tax Assessment,[7] and Tourism Tax Assessment for the Audit Period, with interest calculated through August 31, 2004, against the BAR, as follows:

	Tax	Penalty	Interest	Total
Mixed Beverage	$15,001.34	$1,500.13	$1,041.87	$17,543.34
Tourism	203.33	20.34	24.90	248.57
Sales	16,431.57	1,643.16	2,646.66	20,721.39
Total	$31,636.24	$3,163.63	$3,713.43	$38,513.30

A sales tax assessment was also issued by the Division against PROTESTANT as President of the BAR, and as an Individual.[8] The Division did not issue a proposed Tourism Tax assessment against PROTESTANT, but a proposed Mixed Beverage Tax Assessment was issued against PROTESTANT, for the period the BAR was suspended as a corporation, beginning March 19, 2003, and ending April 21, 2003, as follows:

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[4] Division's Exhibit B.

[5] Division's Exhibit C. At dispute was whether the correct pour rate during the Audit Period was 1.5 ounces as asserted by the Protestants, or the 1.25 ounce pour rate utilized by the Division. The pour rate is presumed to be 1.5 ounces, unless reasonable evidence of a different pour rate is shown. The Protestants submitted a worksheet from April 2004 to substantiate their claim of a 1.5 ounce pour, which is outside the Audit Period. The evidence does not bear out the Protestants' contention. However, the monthly worksheets provided by the Protestants, does constitute reasonable evidence that the BAR used a 1.25 ounce pour rate during the Audit Period, as asserted by the Division.

[6] Division's Exhibit D. Included in Exhibit D is a Business Tax-Mixed Beverage Audit Form signed by REPRESENTATIVE and AUDITOR. On the form, the type of inventory list to be used was checked and initialed by REPRESENTATIVE and AUDITOR indicating that "In the absence of knowledge of the actual beginning inventory, it is assumed for the purpose of this audit that the beginning and ending inventories are the same. Therefore neither the beginning nor ending inventories will be used in depletion calculations."

[7] *See* Division's Exhibits E, F, and G. Sales tax and tourism tax were assessed on the unreported sales of mixed beverages and unreported sales of 3.2 beer.

[8] *See* Division's Exhibit G. The Division sent the assessment to the last known address of PROTESTANT.

	Tax	Penalty	Interest	Total
Mixed Beverage	$600.05	$60.00	$116.25	$776.30

7. On August 11, 2004, the Division received a timely protest from the Protestants.[9]

8. The BAR'S beer wholesaler, WHOLESALER, corrected the purchase records of the BAR, prior to the Division's audit. The records utilized by the Division for the 3.2 beer depletion audit were correct.

9. The letter submitted by the Protestants was insufficient to substantiate catering during the Audit Period. No adjustment to the proposed assessments should be made based upon the evidence.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[10]

2. A tax of thirteen and one-half percent (13.5%) is imposed on the total gross receipts of a holder of a mixed beverage license issued by the Alcohol Beverage Law Enforcement Commission ("ABLE") from the sale, preparation, or service of mixed beverages, the retail value of complimentary or discounted beverages, ice or nonalcoholic beverages to be mixed with alcoholic beverages consumed on the premises, and any charge for admission, which entitles a person to a complimentary or discounted mixed beverage.[11]

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[9] Division's Exhibit H. The basis of the protest was stated as follows:

1. 3.2 beer was over stated because of error on the supplier (letter enclosed).
2. We use a 1.5 oz, not 1.25 oz for our drinks.

The court file contains an audit packet, which was forwarded by the Division as part of the protest file on this matter. The Administrative Law Judge is taking judicial notice of the materials contained in the court file for the purpose of completing the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (2004). A copy of the letter referred to in the protest letter is contained in the court file. AUDITOR testified that the comptroller of WHOLESALER was contacted regarding the refund and that WHOLESALER'S records were corrected prior to the Division conducting the audit. No adjustments to the Division's calculations were necessary.

On February 7, 2005, REPRESENTATIVE faxed a memo to this office, which reiterated that the proper pour size was 1.5 oz., but it also stated that taxes were paid under the wrong mixed beverage permits for two (2) clubs that were catered during the audit period. A letter was included from "PUB," but no records were provided to this office or to the Division to substantiate the claims. Another monthly worksheet was provided to establishment a 1.5 oz pour size, but the worksheet was for April 2004, which is outside the Audit Period.

[10] OKLA. STAT. ANN. tit. 68, § 221(D) (West 2001).

[11] OKLA. STAT. ANN tit. 37, § 576 (West 2001). *See also* OKLA. ADMIN. CODE § 710:20-5-8 (2004).

3. The authorized method of auditing a mixed beverage establishment is the depletion method.[12] 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.[13]

4. Upon audit of the books and record 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 (1.5 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*.[14]

5. An audit[15] may be conducted to determine if the correct amount of tax payable has been collected.

6. The tax levied by the Oklahoma Sales Tax Code[16]shall be paid by the consumer or user to the vendor[17] as trustee for and on account of this state and each and every vendor shall collect from the consumer or user the full amount of the tax or an amount equal as nearly as possible or practicable the average equivalent thereof.[18]

7. The Protestants were assessed additional sales tax on the unreported sales of mixed beverages and unreported sales of 3.2 beer during the Audit Period.[19]

8. The sales of "[a]ny food, confection, or drink sold or dispensed by hotels, restaurants or bars, and sold for immediate consumption upon the premises or delivered or carried away from the premises for consumption elsewhere" are subject to tourism tax (1/10 of 1%).[20]

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[12] OKLA. ADMIN. CODE § 710:20-5-8 (2004).

[13] *Kifer v. Oklahoma Tax Commission*, 1998 OK CIV APP 34, 956 P.2d 162.

[14] OKLA. ADMIN. CODE § 710:20-5-8(B)(1) (2004).

[15] OKLA. ADMIN. CODE § 710:20-5-8(b) (2004).

[16] OKLA. STAT. ANN. tit. 68, § 1350 et seq. (West 2001).

[17] "Vendor" is defined as "any person making sales of tangible personal property or services in this state, the gross receipt or gross proceeds from which are taxed by the Oklahoma Sales Tax Code." OKLA. STAT. ANN. tit. 68, § 1352(27)(a) (West 2001).

"Person" is defined to include "any individual" or "[any] corporation." OKLA. STAT. ANN. tit. 68, § 1352(12) (West 2001).

[18] OKLA. STAT. ANN. tit. 68, § 1361(A) (West 2001). *See also Wal-Mart Stores, Inc. v. Oklahoma Tax Commission*, 1991 OK CIV APP 73, 817 P.2d 1281.

[19] OKLA. STAT. ANN. tit 37, § 576 (West 2001). *See also* OKLA. ADMIN. CODE § 710:65-19-5 (2004).

[20] OKLA. STAT. ANN. tit. 68, § 50012(A)(2) (West 2001).

9. The BAR was assessed additional tourism tax on the unreported sales of mixed beverages and unreported sales of 3.2 beer during the Audit Period.[21]

10. "Every person required to collect any tax imposed by the [the Oklahoma Sales Tax Code], and in the case of a corporation, each principal officer thereof, shall be personally liable for the tax."[22]

11. Each officer of a corporation, whose right to do business in the State of Oklahoma has been suspended, shall, as to debts of such corporation, which may be created or incurred with his knowledge, approval, and consent, within this state after such suspension and before the reinstatement of the right of the corporation to do business in the State of Oklahoma, be held liable for such debts.[23]

12. The Tax Commission is authorized to promulgate and enforce any reasonable rules and regulations as may be necessary to facilitate the uniform and orderly collection of the gross receipts tax levied pursuant to the provisions of the Oklahoma Alcoholic Beverage Control Act.[24]

13. Rules promulgated pursuant to the Administrative Procedures Act,[25] are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court.[26] They are valid and binding on the persons they affect, have the force of law, and are prima facie evidence of the proper interpretation of the matter to which they refer.[27]

14. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.[28]

15. The Protestants have failed to show that the proposed assessments issued are incorrect and in what respects.

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[21] OKLA. ADMIN. CODE § 710:75-1-4 (2004). *See also* OKLA. ADMIN. CODE § 710:75-1-8 (2004).

[22] OKLA. STAT. ANN. tit. 68, § 1361(A) (West 2001). *See also* OKLA. STAT. ANN. tit. 68, § 253 (West 2001). The Tax Commission identifies the "President, Vice-President, Secretary, Treasurer, or Secretary/Treasurer as principal officers." OKLA. ADMIN. CODE § 710:65-7-3-(1) (2004).

[23] OKLA. STAT. ANN. tit. 68, § 1212 (West 2001).

[24] OKLA. STAT. ANN. tit. 37, § 501 et seq. (West 2001).

[25] OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2001).

[26] OKLA. STAT. ANN. tit. 75, § 306(C) (West 2001).

[27] OKLA. STAT. ANN. tit. 75, § 308.2(C) (West 2001).

[28] *See Enterprise Management Consultants, Inc. v. State ex rel Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

DISPOSITION

It is the ORDER OF THE OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the protests should be denied. It is further ORDERED that the total amount of sales tax, mixed beverage tax, and tourism tax as assessed against each of the Protestants should be fixed as the Protestants' deficiency and that those amounts be determined as due and owing, including interest accrued and accruing.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are 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.