JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2005-07-19-03 (NON-PRECEDENTIAL)
ID:	P-04-010-K
DATE:	JULY 19, 2005
DISPOSITION:	SUSTAINED IN PART/DENIED IN PART
TAX TYPE:	SALES/TOURISM
APPEAL:	NONE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above styled and numbered cause comes on for decision pursuant to assignment regularly made by the Tax Commission to ALJ, Administrative Law Judge. CORPORATION and OFFICER (hereinafter referred to individually as "Corporation" and "Officer", respectively and collectively as "Protestants") are represented by ATTORNEY, Attorney at Law, LAW FIRM. The Audit Division of the Tax Commission (hereinafter "Division") is represented by the General Counsel's Office of the Tax Commission, OTC ATTORNEY, Assistant General Counsel.

STATEMENT OF THE CASE

The Division conducted a 3.2 beer depletion audit of the available records of the Corporation for the period of July 1, 2000 through May 31, 2003. As a result of the audit, the Division on July 11, 2003 caused to be issued against Protestants a proposed sales tax assessment and against the Corporation a proposed tourism tax assessment. Protestants timely protested the proposed assessments by letter dated September 4, 2003, wherein Protestants contested the entire proposed liability and requested a hearing.

On January 27, 2004, the Division forwarded its file, consisting of cover memorandums, the letter of protest and attached Power of Attorney, in triplicate, and the proposed assessment letters, to the Office of the Administrative Law Judges ("ALJ's Office") for further proceedings consistent with the Uniform Tax Procedure Code[1] and the Rules of Practice and Procedure Before the Oklahoma Tax Commission[2]. The case was docketed as Case No. P-04-010-K and assigned to ALJ, Administrative Law Judge[3].

A Notice of Prehearing Conference was issued February 3, 2004, scheduling this cause for a pre-hearing conference on March 9, 2004.[4] The pre-hearing conference was held at the appointed date and time with the parties' representatives in attendance. Pursuant to the pre-hearing conference, the parties were directed to file a status report with the ALJ's Office by May 12, 2004.

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[1] 68 O.S. 2001, § 201 et seq.

[2] Rules 710:1-5-20 through 710:1-5-47 of the *Oklahoma Administrative Code* ("*OAC*").

[3] *OAC*, 710:1-5-22(b).

[4] *OAC*, 710:1-5-28.

On or about May 11, 2004, Protestants' representative requested and a Subpoena Duces Tecum was issued to WHOLESALER directing the production of certain records, consisting of "[a]ll delivery receipts, invoices, and accounting records involving sales of 3.2 beer kegs to [the Corporation] in 2002, and 2003."[5] A Status Report was filed by Protestants' representative on May 11, 2004, wherein Protestants requested additional time to complete discovery. The request was unopposed. Pursuant to the request, the parties were directed by letter dated May 12, 2004, to file an additional status report with the ALJ's Office by June 23, 2004.

By Status Report filed June 17, 2004, by Protestants' representative and Memorandum filed June 21, 2004, by the Division's representative, the parties requested additional time to allow the Division to review the invoices obtained by Protestants from WHOLESALER. Pursuant to the requests, the parties were directed to file an additional status report with the ALJ's Office by August 2, 2004.

By Memorandum filed August 2, 2004, by the Division's representative and Status Report filed August 5, 2004, by Protestants' representative, the parties announced that they were ready to proceed with the hearing in this cause. A Notice of Hearing was issued August 3, 2004, scheduling this matter for hearing on August 31, 2004, at the hour of 9:30 a.m.[6]

The hearing was held on the scheduled date and at the appointed time, with the parties present. As a preliminary matter, the parties stipulated to the admission of Division's Exhibits A-1, A-2, B, C-1 through C-8, D, E-1 and E-2. Protestants called two (2) witnesses, FRIEND, a friend of OFFICER'S who tends to the bar while he is making deliveries, and OFFICER, through whom Protestants' Exhibits one (1) through thirty (30) were identified. Protestants' Exhibits one (1) through twenty-three (23) and twenty-six (26) through thirty (30) were admitted into evidence without objection. Protestants' Exhibits twenty-four (24) and twenty-five (25) were not admitted. The Division called one (1) witness, AUDITOR, Field Auditor. Upon conclusion of the hearing, the record in this cause was closed and the case was submitted for decision.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings of August 31, 2004, the exhibits admitted into evidence, the pleadings and the opening and closing statements of the parties, the undersigned finds:

1. Two businesses were operated under the corporate shell; namely, LOUNGE and BAR. Testimony of OFFICER and Protestants' Exhibits 1-14 and 29.

2. The Business Registration form of the Corporation filed with the Oklahoma Tax Commission on October 7, 1991, indicates that the Corporation only did business as LOUNGE. Division's Exhibits A-1 and A-2.

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[5] *OAC*, 710:1-5-33(2).

[6] *OAC*, 710:1-5-29.

3. According to OFFICER, he renamed the business as BAR and LOUNGE when he acquired the Corporation in approximately 1987.

4. OFFICER stated the reason the Business Registration form of the Corporation only mentions LOUNGE is because the licenses of the Corporation were always in the name of LOUNGE and he kept it as such.

5. The LOUNGE is located at LOUNGE ADDRESS in Oklahoma City, Oklahoma. Testimony of OFFICER and Division's Exhibits A-1 and A-2.

6. The area of the lounge totals 1320 square feet inclusive of men and women bathrooms, a storage area, a video game, jukebox and pool table, two bar areas with stool seating, a reach-in cooler, and booth and table seating areas. Protestant's Exhibit 15. Adjoining the bar and accessible by a doorway from the lounge is Protestants' office space, additional storage areas, a work station, ice bin and a walk-in cooler. Protestants' Exhibit 16.

7. According to the testimony of BARTENDER and OFFICER, the walk-in cooler is very rarely used because once any kegs are delivered to the location, they are delivered by OFFICER to the customer.

8. Protestants delivery vehicle, a pick-up truck, was not properly marked during the audit period for transporting low-point beer. Protestants have since properly marked the vehicle. Testimony of OFFICER.

9. OFFICER is the President of the Corporation and the only officer listed for the Corporation on the Business Registration form. Division's Exhibits A-1 and A-2.

10. The Lounge is located in a blighted area of downtown Oklahoma City. Testimony of OFFICER.

11. The Lounge is open "most nights" from Noon to 9:00 p.m., Monday through Saturday and Noon to 6:00 p.m., on Sunday. Testimony of OFFICER and Division's Exhibit B.

12. The patronage of the Lounge on a typical day is five to seven customers with no more than three to four customers at any one time. Testimony of OFFICER and BARTENDER.

13. According to BARTENDER, the clientele of the Lounge live in the neighborhood in housing authorities, are retired, don't have a lot of money to spend, usually drink draughts and spend $5.00 per person.

14. BARTENDER only watches the Lounge on Fridays and Saturdays when OFFICER is out or on a delivery. Testimony of BARTENDER.

15. She has been watching the Lounge for OFFICER since approximately the first or second month of 2003. Testimony of BARTENDER.

16. The subject of these proceedings was the sale of 3.2 beer by the Corporation during the period of July 1, 2000 through May 31, 2003. Division's Exhibit B, E-1 and E-2.

17. 3.2 beer was sold in the lounge by the keg in 12 ounce glasses at a price of $1.00 per draught and in 60 ounce pitchers at a price of $4.50, and by the can and/or bottle at a price of $2.00. Packaged beer to go - only "Milwaukee's Best" - was also sold from the lounge in six packs at $3.75 and 12 packs at $7.50. Testimony of OFFICER and BARTENDER.

18. According to BARTENDER, the real business of the bar is the sale of kegs.

19. According to OFFICER, lounge sales are negligible. He keeps approximately twenty dollars in the cash register in the lounge. He estimated that he goes through approximately three (3) to five (5) kegs per month. Protestants' Exhibits 21 and 22.

20. With respect to the Records Request List (3.2 Beer) forwarded by the Division's Auditor to Protestant for purposes of performing the depletion audit, OFFICER testified that he thought the questionnaire was for his sales in the lounge only, that his answers represent Protestants' in-house bar sales only and that he did not see a place on the questionnaire where he could note the keg or package beer sales. Division's Exhibit B.

21. According to OFFICER, he never mentioned that the majority of Protestants' sales were keg sales because he did not understand that he was suppose to provide this information.

22. Protestants purchased kegs and case beers from WHOLESALER and DISTRIBUTOR during the audit period. Testimony of OFFICER and Division's Exhibit C-1.

23. WHOLESALER allows four (4) deliveries per week - Monday, Wednesday and Friday (regular stops), and Saturday (if needed) and DISTRIBUTOR delivers once a week - per order for the delivery. Testimony of OFFICER.

24. OFFICER stated that WHOLESALER delivers kegs once per regular stop days only, never twice and that Saturdays are hotshot days meaning he must call WHOLESALER ahead of time and give WHOLESALER the number of kegs needed and WHOLESALER will deliver that number of kegs and only that number of kegs.

25. OFFICER testified regarding fourteen (14) purchase invoices for the last three (3) month of 2002 from WHOLESALER which purportedly shows the delivery of fifty-one (51) kegs of beer to Protestants, but which OFFICER states Protestants did not receive. Protestants' Exhibits 17-20.

26. Four (4) of these invoices show a second delivery on the same day. The first two of these invoices are signed and Protestants have check stubs showing payment of the invoices. The second two of these invoices are not signed, show delivery late in the day and Protestants do not have check stubs showing payment of the invoices. Protestants' Exhibits 17 and 18.

27. The remaining invoices are not signed and Protestants do not have check stubs showing payment of the invoices. Protestants' Exhibits 17-20.

28. OFFICER initially testified that no deliveries of kegs are made when he is not at the bar, however, he later testified that if a delivery is made when he is not at the bar, he leaves a signed check for payment of the delivery.

29. OFFICER identified two (2) spreadsheets of Protestants' sales of beer during the periods of July, 2000 through December, 2001 and January, 2002 through May, 2003. Protestants' Exhibits 21 and 22. He stated that the spreadsheets represent Protestants total sales during these periods. He also stated that Protestants' accountant prepared the spreadsheets from the records of WHOLESALER and DISTRIBUTOR as to the number of kegs purchased during the audit period and Protestants' sales records during 2004. He further stated that based on this information, the accountant extrapolated what was sold during the audit period. OFFICER also testified that Protestants' sales are static from month to month and year to year and that the amounts reported on the spreadsheets are consistent with the amounts reported on Protestants' income tax returns.

30. Protestants do not have any Z tapes, cash register receipts or sales invoices for the audit period. Testimony of OFFICER.

31. Based on the spreadsheets, Protestants submitted amended sales tax reports for each month of the audit period which amended reports show additional sales tax due and owing in the aggregate amount of $9,841.05. Protestants' Exhibits 23 and 30. In response to the question, why are they filing amended reports, OFFICER testified that he was unclear as to certain aspects of the keg sales; i.e., delivery charges and equipment rental.

32. OFFICER testified that certain of the amended sales tax reports show deductions for non-taxable sales which were sales of kegs to two (2) caterers, CATERER 1 and CATERER 2. He stated that these two (2) caterers do not have the specialized equipment necessary to sell beer in keg form. He also stated that the caterers provided sales tax permit numbers for the sales. He further testified that he never inquired whether the caterers had 3.2 beer licenses and thought they had the licenses since he saw liquor and other beer - bottles and cans - to be dispensed when he delivered the kegs.

33. AUDITOR, Field Auditor, now Field Audit Supervisor, testified regarding her findings with respect to the audit of Protestants' sales of 3.2 beer. Division's Exhibit C-1. She stated the audit was instigated because information from WHOLESALER and DISTRIBUTOR indicated the beer purchases by Protestant were larger than the amount of sales reported from the consumption of such beer. The auditor relied on the information provided by Protestants on the Records Request List and the purchase information from WHOLESALER and DISTRIBUTOR. Testimony of AUDITOR.

34. The audit does not take into account packaged sales or keg sales. Testimony of AUDITOR. AUDITOR testified that although the Records Request List asks for all the prices for all sales, she was only given information regarding sales by the draught, pitchers, bottles and cans. She stated that she did receive Protestants' bank statements for 2002 and 2003, monthly income statements for January, 2001 through April, 2003, balance sheets or P & Ls for 2001, 2002 and 2003, and Protestants' 2001 federal income tax return. Division's Exhibits C-2, C-3 and C-5. She

also reviewed Protestants' sales and tourism tax reports for the audit period and Protestants' 2000, 2001 and 2002 franchise tax reports. Division's Exhibits C-4, C-6, C-7 and C-8 and testimony of AUDITOR. She stated that the results of the depletion audit were discussed with OFFICER, but that Protestant did not have any records to support keg sales, keg sales to caterers or package sales. She testified that Protestant did not have any Z tapes or cash register receipts and no ticket sales. She further testified that Protestants' sales journals did not breakout the different types of sales.

35. On cross-examination, AUDITOR admitted that the questionnaire does not ask for keg sales and that she never visited the location of the business. Testimony of AUDITOR. She stated that the business is listed as a "lounge" on the business registration and that in her experience lounges generally do not have much carry-out business. She agreed that although Protestants' amended sales tax reports for the audit period are reporting approximately $128,000.00 in sales which were not originally reported, the audit attributes an additional $125,000.00 to $130,000.00 in sales not included in the amended reports. Testimony of AUDITOR.

36. The audit for calendar years 2001 and 2002, breaks down Protestants' sales by Case beer and Keg beer. Division's Exhibit C-1.

37. For case beer, it was presumed that cases were sold at 24 bottles or cans per case. The number of cases purchased times the number of bottles or cans per case equalled the number of drinks for sale. The number of drinks for sale times price ($2.00) less tax equalled $1.85 per drink. The price per drink times the number of drinks for sale equalled gross sales. Gross sales less waste (five percent (5%) variance) equalled taxable sales. As determined by the audit, taxable sales of case beer for 2001 and 2001 was $85,161.42. Division's Exhibit C-1.

38. For keg beer, it was presumed that kegs were sold at 1,984 ounces per keg because there was no information provided the auditor except for sales by the pitcher and by the glass. The total number of kegs purchased by Protestants during calendar years 2001 and 2002 times 1,984 ounces per keg equalled the gross number of drinks for sale. The gross number of drinks for sale times 56 ounces - the weighted average of beer sold when factoring in sales by the glass and sales by the pitcher with sales by the pitcher representing ninety percent (90%) of total sales of keg beer - equalled the number of drinks available for sale from keg beer. The number of drinks available for sale times price ($3.56) - weighted average of sales by the glass (ten percent (10%) at $1.00) and sales by the pitcher (ninety percent (90%) at $4.50) - less tax equalled gross sales. Gross sales less waste (fourteen percent (14%) variance) equalled taxable sales. As determined by the audit, taxable sales of keg beer for 2001 and 2002 was $143,135.86. Division's Exhibit C-1.

39. Taxable sales of case and keg beer for 2001 and 2002 was $228,297.28. Taxable sales less reported sales equalled a taxable difference of $174,337.28. The taxable difference was divided by 24 to arrive at the monthly average of $7,264.05 which was used for the remaining audit periods in 2000 and 2003. As determined by the audit, total additional taxable sales for the audit period was $254,241.75. Division's Exhibit C-1.

40. The auditor testified that she reviewed Protestants' income statements or P & Ls for the 2001 and 2002 time period. Division's Exhibit C-2. The income statements indicated that Protestants' sales for this time period would have been $149,005.97. Division's Exhibits C-1 and

C-2. Protestants only reported sales of $53,960.00 to the Tax Commission in 2001 and 2002. Division's Exhibit C-1. The auditor also compared the P & Ls for 2001 with Protestants' 2001 federal income tax return. Testimony of AUDITOR. The 2001 federal tax return reports sales of $73,085.00. Division's Exhibit C-5.

41. There was testimony during the hearing regarding sales of hot dogs and other items. According to the testimony, these sales were de minimis.

42. The sales tax reports filed for the audit period report a deduction of $200.00 per month as non-taxable sales. Division's Exhibit C-4. The auditor testified that she was advised by OFFICER that this was an estimate of the sales for resale to caterers. She stated that the deductions were not supported by sales invoices, sales tax or 3.2 beer permit numbers of the caterers and that she was not provided anything with a name, address or signature indicating sales were for resale. She further stated that as a retailer, Protestants were not licensed to sell for resale and there was no evidence that the caterers had 3.2 beer licenses which allows them to purchase and resell.

43. The auditor testified that the information from Protestants' bank statements supports the finding that there were more sales than originally reported by Protestants. Division's Exhibit C-3.

44. As a result of the audit, the Division by letter dated July 11, 2003, proposed the assessment of additional sales tax, interest and penalty against Protestants for the audit period in the aggregate amount of $27,492.19, consisting of tax in the amount of $20,602.52, interest accrued through August 15, 2003 in the amount of $4,829.24 and a thirty (30) day delinquent penalty @ ten percent (10%) in the amount of $2,060.43. Division's Exhibits D and E-1.

45. The Division also proposed the assessment of additional tourism tax, interest and penalty against the Corporation for the audit period in the aggregate amount of $331.76, consisting of tax in the amount of $254.10, interest accrued through August 15, 2003, in the amount of $52.11 and a thirty (30) day delinquent penalty @ ten percent (10%) in the amount of $25.55. Division's Exhibits D and E-2.

46. Protestants timely protested the proposed assessments by letter dated September 4, 2003.

ISSUES AND CONTENTIONS

The issues presented for decision are issues of fact. The first issue is whether Protestants presented sufficient evidence to prove that the 3.2 beer depletion audit and resulting sales and tourism tax assessments erroneously attribute an excessive number of kegs to Protestants. The second issue is whether Protestants presented sufficient evidence to prove that the audit and resulting assessments erroneously attribute Protestants' sales of keg beer only by the glass or pitcher and Protestants' sales of case beer only by the bottle or can. The third issue is whether Protestants presented sufficient evidence to prove that the audit and assessment erroneously include kegs sold for resale by Protestants to caterers.

Protestants stipulates to the applicability of the Oklahoma Sales Tax Code to the sales which are the subject of this proceeding, less and except the sales for resale claimed by Protestants.

Protestants further stipulate that the purchases of 3.2 beer as attributed to them by the audit and assessment are correct, less and except the number of kegs purportedly purchase by them from Premium in the last three (3) months of 2002. Page 2 of the Memorandum Brief of Taxpayers filed August 24, 2004.

Protestants contend that the audit and assessments erroneously attribute an excessive number of kegs to Protestants. Protestants claim the audit attributes an extra 54 kegs to them, while the invoices submitted by Protestants to prove their contention only total 51 kegs. In support of their contention, Protestants argue that the copies of the invoices obtained from WHOLESALER are not signed, are for cash sales in excess of what Protestant ordinarily and customarily purchased, and are not reflective of the practice and custom of WHOLESALER because they show multiple deliveries on the same day or deliveries at the wrong time of day. Protestants also contend the depletion audit is incorrect because it does not factor in the take-out sales of packaged beer and kegs. In support of this contention, Protestants argue that only a small part of its sales are in-lounge sales and the vast majority of sales are carry-out or delivery sales of kegs and carry-out sales of multi-packs of cans and bottles. In support of this argument, Protestants assert that the dimensions of the bar area and the ordinary and normal business traffic in the bar makes the number of in-lounge sales claimed in the assessment improbable and physically impossible. Protestants further contend that the audit is incorrect because it does not take into account the number of kegs sold to the two (2) catering companies for resale. Protestants request that the amended sales tax reports be accepted for filing and that the amounts reported thereon be found to be the amounts due and owing in this matter.

The Division contends that the audit and assessments are not erroneous and the amounts proposed thereby should be found to be due and owing. In support of this contention, the Division argues that Protestants failed to maintain the proper records required to show its transactions included keg and packaged beer sales. The Division further argues that not only does the law prohibit a "retail dealer" from selling any low-point beer except at retail, for consumption or use, but that Protestants failed to comply with the "good faith" requirements of the statute to relieve themselves from liability for the sales to the two (2) caterers.

CONCLUSIONS OF LAW

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

2. All sales of "[f]oods, confections, and all drinks sold or dispensed by hotels, restaurants, or other dispensers, and sold for immediate consumption upon the premises or delivered or carried away from the premises for consumption elsewhere" are subject to sales tax. 68 O.S. 2001, § 1354(A)(9). Likewise, 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. 68 O.S. 2001, § 50012(A)(2).

3. "The sale of meals or non-alcoholic * * * beverages is subject to sales tax, and any person or establishment making such sales will be considered a vendor and will be required to hold

a valid sales tax permit." OAC, 710:65-19-110(a). "Such person or establishment will then be required to charge, collect, and remit the appropriate sales tax to the Commission based on the total gross receipts * * *." *Id*.

4. Each and every vendor, except as otherwise provided in § 1361(C)[7], is required to collect from the consumer or user the full amount of the tax levied by § 1354(A), or an amount equal as nearly as possible or practicable to the average equivalent thereof. 68 O.S. 2001, § 1361(A). *See*, ***Wal-Mart Stores, Inc. v. Oklahoma Tax Commission***, 1991 OK CIV APP 73, 817 P.2d 1281. "All sales are presumed to be subject to sales tax unless specifically exempted by the Sale Tax Code[8], [and] [v]endors are liable for the sales tax collected as well as for tax that should have been collected." OAC, 710:65-7-6(a).

5. It is the duty of every tax remitter "to keep and preserve suitable records of gross daily sales together with invoices of purchases and sales, bills of lading, bills of sale and other pertinent records and documents which may be necessary to determine the amount of tax due" and if the remitter "makes sales for resale to keep records of such sales" * * * "for a period of three (3) years". (Emphasis added). 68 O.S. 2001, § 1365(E) and OAC, 710:65-3-30(a). The minimum records requirement for vendors selling tangible personal property is: "(1) [s]ales journal or log of daily sales in addition to cash register tapes and other data which will provide a daily record of the gross amount of sales, (2) [a] record of the amount of merchandise purchased * * * [consisting of] copies of all vendors' invoices and taxpayers' copies of purchase orders must be retained serially and in sequence as to date, [and] (3) [a] true and complete inventory of the value of stock on hand taken at least once each year." (Emphasis added). OAC, 710:65-3-31(a). For vendors making sales for resale, "the vendor's records for each transaction for which exemption is claimed shall be in detail sufficient to show: (1) [t]he name and address of the customer, (2) [t]he character of the transaction, (3) [t]he date, (4) [t]he amount of gross receipts or gross proceeds; and (5) [s]uch other information as may be necessary to establish the nontaxable character of such transaction under the Sales Tax Code." OAC, 710:65-3-33(b). Vendors making sales for resale "shall also keep a record of the purchaser's resale number issued by the Commission." OAC, 710:65-3-33(c). "The failure to obtain and keep a record of the purchaser's resale number shall create a presumption that the sale was not a sale for resale. The vendor may, however, present other documentary evidence from its books and records to overcome this presumption." *Id*.

6. A vendor is relieved of liability for any sales tax or the duty to collect any sales tax imposed upon the vendor with respect to any sale for which the vendor, in good faith, timely accepts from a consumer properly completed documentation certified by the Tax Commission that such consumer is exempt from the tax on such transactions. 68 O.S. 2001, § 1361.1. Three requirements must be met before the vendor is relieved of liability, to-wit: (1) "[g]ood faith requires that the vendor strictly comply with statutory requirements; (2) [t]imely acceptance from a consumer requires that documentation be in the possession of the vendor at the time the exempt transaction occurs. In the case of continued sales to the same purchaser, the vendor must have, on file, a sales tax permit, card, or exemption letter for each renewal interval. If no renewal interval is provided by

[7] The provisions of § 1361(C) are not applicable to this proceeding.

[8] 68 O.S. 2001, § 1350 et seq.

statute, the renewal period will be deemed three (3) years, except in the case of entities with specific statutory exemptions who have established eligibility as set out in (d)(5) of this Section; [and] (3) [p]roperly completed documentation certified by the Oklahoma Tax Commission."
(Emphasis original). OAC, 710:65-7-6(c). Properly completed documentation in the case of a transaction involving a sale for resale is: (1) [a] copy of the purchaser's sales tax permit, or if unavailable, the purchaser's name, address, sales tax permit number, and its date of expiration. If a copy of the sales tax permit is unavailable, and if the information provided has not been previously verified, it must be verified by either calling the Taxpayer Assistance Division or by reference to the sales tax permit list obtained pursuant to OAC 710:65-9-6; (2) [a] statement that the articles purchased are purchased for resale; (3) [t]he signature of the purchaser or a person authorized to legally bind the purchaser; (4) [c]ertification on the face of the invoice, bill or sales slip or by a separate document, that says the purchaser is engaged in reselling the articles purchased; and (5) [i]n cases where purchases are made on regular basis, and the certification indicates that all purchases are for resale, then subsequent purchases may be made without further certification until the expiration date of the permit." (Emphasis original). OAC, 710:65-7-8.

7. Rules promulgated pursuant to the Administrative Procedures Act[9], are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court. 75 O.S. 2001, § 306(C). 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. 75 O.S. 2001, § 308.2(C).

Great weight is accorded an agency's construction of a statute when the administrative interpretation is made contemporaneously with the enactment of the statute and the construction is longstanding and continuous by the agency charge with its execution. ***Schulte Oil Co., Inc. v. Oklahoma Tax Commission***, 1994 OK 103, 882 P.2d 65. Where the Legislature is made repeatedly aware of the operation of the statute according to the construction placed upon it by an agency and the Legislature has not expressed its disapproval with the agency's construction, the Legislature silence may be regarded as acquiescence in the agency's construction, ***R.R. Tway, Inc. v. Oklahoma Tax Commission***, 1995 OK 129, 910 P.2d 972; and the agency's construction is given controlling weight and will not be disregarded except in cases of serious doubt, ***Cox v. Dawson***, 1996 OK 11, 911 P.2d 272.

The rules and regulations of an administrative agency which implement the provisions of a statute are valid unless they are beyond the scope of the statute, are in conflict with the statute or are unreasonable. *See*, ***Arkansas Louisiana Gas Co. v. Travis***, 1984 OK 33, 682 P.2d 225; ***Boydston v. State***, 1954 OK 327, 277 P.2d 138. Agency rules need not be specifically authorized by statute, but must generally reflect the intent of the Legislature as expressed in the statute. ***Jarboe Sales Company v. Oklahoma Alcoholic Beverage Laws Enforcement Commission***, 2003 OK CIV APP 23, 65 P.3d 289. As a general rule, it is presumed that administrative rules and regulations are fair and reasonable, and that the complaining party has the burden of proving the contrary by competent and convincing evidence. ***State ex rel. Hart v. Parham***, 1966 OK 9, 412 P.2d 142.

[9] 75 O.S. 1991, § 250 et seq., § 301 et seq.

8. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect, and in what respect. OAC, 710:1-5-47. *See*, ***Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission***, 1988 OK 91, 768 P.2d 359. In administrative proceedings, the burden of proof standard 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*.

9. Here, Protestants failed to show that they sold beer by the keg or in packages during the audit period. Further, Protestants failed to show that they sold beer by the keg to caterers for resale during the audit period. Not only did Protestants fail to present one sales invoice or a single cash register tape showing the sale of beer by the keg for resale or otherwise or beer in the package during the audit period, but Protestants business was not represented to be a keg or package beer dealer during the audit period. Accordingly, the audit and assessments properly depleted all of Protestants' keg sales by the glass or pitcher only and properly depleted all of Protestants' case sales by the bottle or can only. Further, the audit and assessments properly included kegs sold to caterers.

10. Protestants presented sufficient evidence to prove they did not purchase the 51 kegs of beer attributed to them by WHOLESALER during last three (3) months of 2002. Accordingly, the audit and assessment should be revised to remove 51 kegs from the total kegs purchased.

11. Protestants' protest should be sustained in part and denied in part, in accordance with the above conclusions of law.

DISPOSITION

Based upon the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestants, COMPANY and OFFICER, be sustained in part and denied in part. It is further ORDERED that the audit be adjusted in accordance herewith and that the resultant amounts, inclusive of accrued interest and penalty, be fixed as the amounts due and owing.[10]

ADDENDUM TO FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

The *Findings, Conclusions and Recommendations* issued on April 12, 2005, in the above styled and numbered cause, comes on for consideration of a recommendation as to the amount of the deficiency which should be confirmed by an order of the Tax Commission.

[10] This recommendation is made without consideration of any waiver of penalty and/or interest which Protestants may request.

The Division, as directed by the *Findings, Conclusions and Recommendations*, revised the proposed sales and tourism tax assessments and provided notice of the revisions to Protestants. Protestants have not challenged the revisions proposed by the Division.

Upon consideration of the *Findings, Conclusions and Recommendations* and the revisions to the assessments, the undersigned finds that the following findings should be added to and incorporated in the *Findings, Conclusions and Recommendations*:

1. That notice of the revisions to the assessments were filed of record in this cause on May 9, 2005.

2. That the Division revised the sales tax assessment to an amount of $31,992.54, consisting of tax in the amount of $19,950.78, penalty in the amount of $1,994.97, and interest accrued through May 31, 2005, in the amount of $10,046.79.

3. That the Division revised the tourism tax assessment to an amount of $387.25, consisting of tax in the amount of $246.05, penalty in the amount of $24.50, and interest accrued through May 31, 2005, in the amount of $116.70.

4. That the revisions comply with the recommendation set forth in the *Findings, Conclusions and Recommendations*.

5. That Protestants were provided notice of the revisions.

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

The undersigned further finds that the following should be added to and incorporated in the *Findings, Conclusions and Recommendations*:

> It is further ORDERED that the amount in controversy, as revised, inclusive of any additional accrued and accruing interest, be fixed as the deficiency due and owing.

THEREFORE, the *Findings, Conclusions and Recommendations* issued on April 12, 2005, is amended to include and incorporate the above and foregoing findings of fact and recommendation.

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.