JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2006-10-31-02 (Non-Precedential)
ID:	P-05-149-K
DATE:	OCTOBER 31, 2006
DISPOSITION:	DENIED
TAX TYPE:	SALES
APPEAL:	NONE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATEMENT OF THE CASE

An out-of-business depletion method field audit of the business of COMPANY, (a limited liability company) d/b/a RESTAURANT was conducted by the Division. The audit determined that additional mixed beverage gross receipt, sales and tourism taxes were due for the period of July 1, 2003 through February 15, 2005, and as a result thereof, the Division caused to be issued a proposed assessment of sales tax, interest and penalty against Protestant, as a member of COMPANY and as an individual. Protestant in his individual capacity timely protested the proposed sales tax assessment and requested an oral hearing should the matter not be resolved informally.

On October 5, 2005, the Division's file was referred 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 protest was docketed as Case Nos. P-05-149-K and assigned to ALJ, Administrative Law Judge.[3]

A pre-hearing conference was scheduled for November 30, 2005, by *Prehearing Conference Notice* issued November 8, 2005.[4] The conference was conducted as scheduled and a *Prehearing Conference Order and Notice of Hearing* was issued December 2, 2005, setting forth dates for exchanging preliminary witness lists and documents, conducting discovery, exchanging final witness lists and documents, and filing factual stipulations and pre-trial briefs or position letters.[5] A hearing was also scheduled by the *Order* for April 13, 2006.[6]

After several agreed to continuances and for good cause shown,[7] an open hearing[8] was held on June 8, 2006, by *Notice of Hearing* issued April 28, 2006[9]. Two witnesses testified on behalf of

[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(a).

[5] *OAC*, 710:1-5-28(b).

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

[7] *OAC*, 710:1-5-30.

[8] Protestant waived his right to a confidential hearing. *See*, 68 O.S. Supp. 2005, § 205.

[9] *See*, Note 6.

Protestant, Protestant who testified with respect to his involvement with the business, and ACCOUNTANT, Accountant, who testified in regard to his dealings with the business. Upon objection based on relevancy, Protestant's Exhibits T-2 and T-3 were denied admission. Exceptions to the rulings were taken and noted for the record. The Division called one (1) witness AUDITOR, Auditor, Audit Division, who testified with respect to the records of the Division and the information reviewed in performing the audit. Division's Exhibits 1 through 11 were identified, offered and admitted into evidence without objection. Upon conclusion of the hearing, the record was closed and the protest was submitted for decision.[10]

FINDINGS OF FACT

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

1. COMPANY was a domestic limited liability company that owned and operated or did business as RESTAURANT, a food, low-point beer and mixed beverage establishment, located in CITY, Oklahoma. Division's Exhibits 1[11] and 2[12]. *See*, Secretary of State's official website, www.sos.state.ok.us.

2. COMPANY operated the RESTAURANT under sales tax permit number XXX issued January 28, 1996. Division's Exhibit 1, page 3.

3. In or around April, 2001, INVESTOR CO. (a domestic for profit business corporation) purchased COMPANY, Protestant was brought in as a partner and MANAGER was designated as the managing partner. Testimony of Protestant.

4. MANAGER managed the operations of the business from April, 2001 to July, 2003 when either the Tax Commission or the ABLE Commission shut down the business. Testimony of Protestant.

5. During the period of July 8, 2003 through February 13, 2005, Protestant and PRESIDENT were the "managers" of COMPANY. Division's Exhibit 2. During this period, the sole "member" of COMPANY was INVESTOR CO. PRESIDENT was the President and Protestant was the Secretary of the INVESTOR CO. Testimony of Protestant and Division's Exhibits 2 and 3[13].

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[10] *OAC*, 710:1-5-39(a).

[11] *Business Registrations* filed with the Commission on or about January 21, 1996 and February 13, 2001.

[12] *Amended and Restated Operating Agreement of COMPANY Oklahoma Limited Liability Company* executed by Protestant and PRESIDENT as Managers and PRESIDENT as President of INVESTOR CO. Inc., Member, and effective July 8, 2003.

[13] *Oklahoma Tax Commission/Audit Division Taxpayer's List of Principal Officers, Partners or Members (LLC)* executed by Protestant as Secretary on May 23, 2005 for INVESTOR CO./COMPANY, LLC d/b/a RESTAURANT for the audit period of July 8, 2003 through February 13, 2005.

6. Pursuant to the *Amended and Restated Operating Agreement*, "[t]he management of the company [was] vested in PRESIDENT [sic] and [Protestant] (Managers)" and "[a]ll of the business and affairs of the Company [were to be] conducted by the Managers." Division's Exhibit 2, Article VI, Management and Operation of COMPANY.

7. Neither after INVESTOR CO. purchased COMPANY, nor during the relevant time period to this proceeding (July 1, 2003 through February 15, 2005) was a Business Registration for COMPANY filed with the Commission to show either the change in ownership of COMPANY or to specify the Manager(s) responsible for withholding or collection and remittance of taxes. Testimony of AUDITOR.

8. Protestant was listed as the "Tax Matters Partner" in the *Amended and Restated Operating Agreement*. Division's Exhibit 2, Article IX, Tax Matters.

9. Mixed beverage, wine, strong beer and low-point beer depletion audits were performed by the Division utilizing the wholesalers' reports of COMPANY'S purchases, the prices of mixed drinks, wine, strong beer and low-point beer provided by Protestant and the regulation pour rates. Testimony of AUDITOR. Division's Exhibits 4[14]; 5[15]; 6[16], pages 12-14[17]; and 7[18], pages 29-41[19]. *See, OAC*, 710:20-5-8(b)(1) and (2). Based on this information, the Auditor determined the amount of mixed beverages, wine, strong beer and low-point beer, in dollars; that COMPANY had available for sale during the audit period of July 1, 2003 through February 15, 2005. Testimony of AUDITOR. Division's Exhibits 6, pages 2-10 and 7, page 8. COMPANY'S reported gross receipts from the sales of mixed beverages, wine, strong beer, food and low-point beer during the audit period[20] were compared with the amounts determined by the audit that COMPANY had available for sale and the aggregate deficiencies were subjected to the assessments of mixed beverage gross receipts tax, sales tax and tourism tax as unreported sales. Testimony of AUDITOR. Division's Exhibits 6, page 1; 7, pages 8 and 10; 8[21], pages 17 and 18; and 9[22].

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[14] *Price List and Other Information for Mixed Beverage Depletion* executed by Protestant as Secretary on May 3, 2005 for INVESTOR CO. COMPANY, LLC d/b/a RESTAURANT, *Oklahoma Tax Commission Pour Statement* and audit work-papers.

[15] *Oklahoma Tax Commission Field Audit Division Mixed Beverage Depletion Audit Inventory Agreement* executed by Protestant as Secretary on May 23, 2005 for RESTAURANT for the audit period of July 8, 2003 through February 13, 2005.

[16] Mixed beverage gross receipts tax audit work-papers.

[17] Listings of *Mixed Beverage Tax Wholesaler Invoices* for WHOLESALERS.

[18] Sales tax audit work-papers.

[19] *XYZ WHOLESALER, L.L.C. Sales History Inquiry Report* and *Customer Sales History Report of DISTRIBUTOR.*

[20] Despite being on a court or administrative ordered payment plan for the collection of the tax liability incurred during the time MANAGER managed the business, COMPANY failed to file mixed beverage gross receipts tax reports for the periods of August, 2003 and October, 2003 through October, 2004; sales tax reports for the periods of August, 2003 and October, 2003 through February, 2005; and tourism tax reports for the periods of December, 2003 through February, 2005. Testimony of Protestant and AUDITOR. Division's Exhibits 6, page 11; 7, pages 8 and 11 through 28; and 8, pages 1 through 16.

[21] Tourism tax audit work-papers.

10. The audit determined that COMPANY had an aggregate of unreported gross receipts during the audit period of $741,103.62, consisting of unreported mixed beverage, wine and strong beer sales receipts of $331,632.23, estimated unreported food sales receipts of $44,675.00 and unreported low-point beer sales receipts of $364,796.38. Division's Exhibits 6, page 1; and 7, pages 4, 5 and 8.

11. As a result of the audit, the Division on June 24, 2005, caused to be issued a proposed assessment of sales tax, interest and penalty against Protestant, as a member of COMPANY and as an individual, in the aggregate amount of $75,876.12, consisting of tax in the amount of $62,067.40, interest accrued through August 15, 2005, in the amount of $7,601.96 and penalty in the amount of $6,206.76. Division's Exhibit 9, page 2.

12. Protestant timely protested the proposed sales tax assessment by letter dated August 17, 2005. Division's Exhibit 10.

ISSUES AND CONTENTIONS

The issue presented for decision is whether Protestant is personally liable for the assessed sales tax delinquency of COMPANY, as a manager of the limited liability company for the period of July 1, 2003 through February 15, 2005.

Protestant contends that he should be found innocent of any liability for the delinquent sales taxes of COMPANY. In support of this contention, Protestant argues that he was a passive owner and had no activity, involvement or knowledge in or of the operations of COMPANY in any meaningful way which would render him liable for the taxes. In furtherance of this statement and as proof, Protestant asserts that once he was notified of the tax problems, he directed that his name be put on the operating account of COMPANY and he saw to it that the funds remaining from the closure of the business were paid to the Tax Commission. Protestant further contends that the statute concerning personal liability with respect to limited liability companies expressly provides that those managers or members which are specified as responsible for the withholding or collection and remittance of taxes shall be liable and that here, no evidence has been presented to show he was specified as responsible for the collection and remittance of taxes for COMPANY. Protestant argues that OWNER and/or PRESIDENT were responsible for the collection and remittance of the taxes.

The Division contends that the evidence presented shows Protestant was a manager of COMPANY during the audit period and that the evidence further shows no manager or member of COMPANY was specified as responsible for the collection and remittance of the taxes in any filing with the Tax Commission subsequent to the formation of the *Amended and Restated Operating Agreement* or during the audit period. Accordingly, the Division argues that by law Protestant is personally liable for the taxes. The Division further contends that any evidence of who was responsible for the collection and remittance of taxes pre-dating the *Amended and Restated Operating Agreement* and all evidence regarding Protestant's knowledge of or involvement in the

[22] Proposed mixed beverage gross receipts tax, sales tax and tourism tax assessment letters dated June 24, 2005.

operations of COMPANY is irrelevant to the determination of whether Protestant is liable for the assessed sales taxes.

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. Supp. 2002, § 221(D).

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Code").[23] Sales tax is levied on the gross receipts or gross proceeds of all sales not otherwise exempted by the Code. 68 O.S. 2001, § 1354(A). The sale of "tangible personal property" and specifically, the sale of "[f]ood, 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 expressly made subject to sales tax. 68 O.S. 2001, § 1354(A)(9). *See, OAC*, 710:65-19-5(a) which provides:

> Persons selling alcoholic beverages to purchasers for use or consumption are required to remit sales tax to the Commission upon the total retail value from such sales, pursuant to *OAC*, 710:20-5-4[24], notwithstanding the fact that

[23] 68 O.S. 2001, § 1350 et seq.

[24] This rule provides:

> **Calculation of gross receipts tax for mixed beverage transactions**
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> (a) **Advertised price; admission charge**. The advertised price of a Mixed Beverage shall be the sum of the total retail sales price and the Gross Receipts Tax levied thereon. Admission charges to a Mixed Beverage establishment which entitle a person to complimentary mixed beverages or discounted prices for mixed beverages are subject to the Gross Receipts Tax.
> (b) **Records**. On and after June 29, 1987, Mixed Beverage Permittees shall maintain records of the total retail prices of all drinks and the Gross Receipts Tax shall be calculated on the individual total retail price of each drink and added thereto from the advertised price.
> (c) **Calculation of tax**.
> (1) A mixed beverage tax permit holder shall report the following:
> (A) The total amount received for mixed beverages sold, prepared or served at the total retail price;
> (B) The total retail value, computed at the total retail price, of all mixed beverages sold, prepared or served either upon a discounted or complimentary basis;
> (C) The total amount received for ice or nonalcoholic beverages sold, prepared, or served for the purpose of being mixed with alcoholic beverages and consumed on the premises where the sale, preparation, or service of mixed beverages occurs; and
> (D) The total gross amount received as admission charges which entitle a person to complimentary mixed beverages or discounted prices for mixed beverages.
> (2) The sum of the four amounts in (1) of this subsection, multiplied by the 13.5% tax rate, shall constitute the amount of the Gross Receipts Tax.
> (d) **Example**. If the total retail sales price for a mixed drink is $3.00, each drink sold, and each drink served as a "complimentary drink" incurs a Forty-one Cent Gross Receipts Tax which shall be added to the total retail price to form an advertised price of $3.41. Sales tax shall be calculated on the total retail price of $3.00.

> manufacturers and importing distributors of alcoholic beverages are required to pay certain taxes.

3. Sales taxes are trust fund taxes. See, 68 O.S. 2001, § 1361(F). Personal liability for the sales taxes imposed by the Code ensues to "[e]very person required to collect [the] tax" and "all managers and members [of a limited liability company] under a duty to collect and remit taxes for the limited liability company" or "[i]f no managers or members have been specified to be under the duty of withholding and remitting taxes, * * * all managers and members". 68 O.S. 2001, § 361(A). *See*, 68 O.S. 2001, § 253 which in pertinent part provides:

> When the Oklahoma Tax Commission files a proposed assessment against * * * limited liability companies for unpaid sales taxes, * * * the Commission shall file such proposed assessments against * * * the managers or members personally liable for the tax. * * * Managers or members of any limited liability company shall be liable for the payment of any tax as prescribed by this section if the managers or members were specified as responsible for withholding or collection and remittance of taxes during the period of time for which the assessment was made. If no managers or members were specified to be responsible for the duty of withholding and remittance of taxes during the period of time for which the assessment was made, then all managers and members shall be liable.

4. "[I]n the case of a limited liability company, Section 253 looks only to the managers or members specified as responsible (or in the case no managers or members are specified all managers or members) and does not require a determination of the responsible person or persons in accordance with the standards of determining liability for payment of federal withholding tax because that standard is limited to determining liability of a principal officer of a corporation." See, Oklahoma Tax Commission Order Nos. 2005-08-16-015, 2002-04-17-004 and 2001-07-10-027.

5. 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. The burden of proof and the burden of persuasion on each issue are borne by the taxpayer, the proponent of the issues. In administrative proceedings, the burden of proof standard is "preponderance of evidence." 2 Am.Jur.2d *Administrative Law* § 357. 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 * * *evidence which is more credible and convincing to the mind * * *that which best accords with reason and probability." Black's Law Dictionary 1064 (5th ed. 1979). Each element of the claim must be supported by such reliable, probative, and substantial evidence of sufficient quality and quantity as to show the existence of the facts supporting the claim are more probable than their nonexistence. 2 Am.Jur.2d *Administrative Law* § 357.

6. Here, the evidence shows Protestant was a manager of COMPANY during the period of time for which the assessment was made. Further, the evidence shows that no managers or members of COMPANY were specified to be responsible for the duty of withholding and

remittance of taxes during the period of time for which the assessment was made.[25] Accordingly, Protestant as a manager of COMPANY during the period of time for which the assessment was made is by law personally liable for the assessed sales taxes. 68 O.S. 2001, §§ 1361(A) and 253.

7. Protestant's protest to the proposed sales tax assessment should be and the same is hereby denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestant, PROTESTANT, be denied. It is further ORDERED that the amount in controversy, inclusive of such additional accrued and accruing interest, be fixed as the deficiency due and owing.

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.

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[25] *See*, *OAC*, 710:65-9-1 and 710:65-9-3 which rules in pertinent part provide:

> **710:65-9-1. Obtaining a sales tax permit to do business**
> (a) **General provisions**. Every person desiring to engage in a business within this state who will regularly and continuously make sales subject to taxation from an established place of business * * * must secure from the Commission every three (3) years a written sales tax permit for a fee of Twenty Dollars ($20.00) prior to engaging in such business in this state. Each such person shall file with the Commission an application for a permit to engage in or transact business in this state, setting forth such information as the Commission may require. The application shall be signed by an owner or authorized representative of the business, and, in the case of a corporation, by an officer thereof.
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> **710:65-9-3. Change in ownership of business; new sales tax permit**
> (a) When the ownership status of a business which holds a sales tax permit, changes from one type of business ownership, such as sole proprietor, partnership or corporation, to another type of business ownership, the former owner must turn in its sales tax permit pursuant to 710:65-3-9 and the new owner must apply for a new sales tax permit
> (b) A new sales tax permit and sales tax permit number is required for corporations which are sold or transferred only if ownership of the business is transferred to a different corporation or other owner.
> (c) A new sales tax permit and number is required for partnerships if fifty percent (50%) of the partnership interest or any one of the general partners enters or leaves the partnership. The change of limited partners does not require a new permit.

See, 68 O.S. 2001, § 1364. *See also in general*, Division's Exhibit 1, page 3, lines 5 and 9; and the Oklahoma Tax Commission official website, www.tax.ok.gov/forms/busregpk.pdf, page A, item 5, wherein the information required on the Business Registration includes information regarding who is the managing member of a limited liability company and who is responsible for withholding and remitting withholding taxes.