JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2006-12-05-05 (Non-Precedential)
ID:	P-06-106-K
DATE:	DECEMBER 5, 2006
DISPOSITION:	DENIED
TAX TYPE:	SALES/TOURISM
APPEAL:	NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

. Protestant, OWNER d/b/a BAR appears pro se. The Audit Division of the Tax Commission ("Division") is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

As a result of a 3.2 beer depletion audit, the Division on May 22, 2006, caused to be issued proposed sales and tourism tax assessments against Protestant. Protestant timely protested the assessments by letter dated May 31, 2006. The letter of protest was not verified and a hearing on the protest was not requested.

On July 6, 2006, the protest 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 No. P-06-106-K and assigned to ALJ, Administrative Law Judge.[3]

A pre-hearing conference was scheduled for August 29, 2006, by *Prehearing Conference Notice* issued August 2, 2006.[4] The pre-hearing conference was held as scheduled. Protestant neither appeared at the conference nor responded to the *Notice*. By letter dated August 30, 2006, the parties were notified that the record in this cause would be closed and the case submitted for decision upon the filing of a *Verified Response to Protest* by the Division.[5] Protestant did not respond to this notice.

The *Division's Verified Response* was filed September 6, 2006. Attached to the *Response* were Exhibits A through F-2, including Exhibits C-1, C-2 and F-1. Protestant did not file a response to the *Division's Verified Response*.[6] The record in this cause was closed and the protest was submitted for decision on October 2, 2006.[7]

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[1] 68 O.S. 2001, § 201 et seq.

[2] Rules 710:1-5-20 through 710:1-5-47of 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(c).

[6] *See*, Note 5.

[7] *See*, 68 O.S. Supp. 2002, § 221(D) and *OAC*, 710:1-5-39(a).

FINDINGS OF FACT

Upon review of the file and records, including the *Division's Verified Response* and Exhibits attached thereto, the undersigned finds:

A. As set forth in the Statement of Facts, *Division's Verified Response*:

1. Protestant is the owner of several bars under federal identification number 12-345678, including a bar registered to do business under sales tax permit number 123456, known as BAR, located in BIG CITY, Oklahoma. Exhibit A.[8]

2. A mixed beverage and 3.2 beer depletion audit of BAR was begun in the spring of 2006, for the periods covering September 1, 2003, through January 31, 2006. Exhibits B[9] and C-1[10].

3. The Protestant provided a pour size statement and a price list. She also provided an ending inventory. Exhibit B.[11]

4. Although the Division's auditor attempted to secure additional records from the Protestant, she failed to respond to his written requests. Since the Protestant did not provide a beginning inventory, purchase invoices, daily or monthly sales records; [sic] the [depletion] audit[s] [were] based on Protestant's purchases.

5. The results of the mixed beverage depletion audit showed that the Protestant was within the allowable spillage rates. Therefore, she was not assessed for additional or unreported mixed beverage tax.

6. The 3.2 beer depletion audit was based on the purchase records that were supplied by the wholesalers or distributors, because the Protestant had no sales records. The auditor determined the Protestant's 3.2 beer sales by subtracting her reported mixed beverage sales from her [total] reported sales. The auditor then applied Protestant's prices to the known 3.2 beer purchases then subtracted her [reported] 3.2 beer sales. The balance was assessed as non-reported 3.2 beer sales. Exhibits C-1[12] and C-2[13].

7. The results of the 3.2 beer depletion audit revealed Protestant had non-reported 3.2 beer sales in the amount of $144,662.83.[14] Exhibit D.[15]

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[8] Business Registration filed with the Tax Commission on or about October 13, 1997.

[9] Prices and pour rate statement for 3.2 beer only executed by Protestant and the auditor on April 4, 2006.

[10] 3.2 beer purchase records request issued to WHOLESALER and DISTRIBUTOR by the auditor on April 4, 2006.

[11] *See*, Note 9.

[12] *See*, Note 10.

[13] 3.2 beer depletion audit work papers.

[14] Footnote original to Statement of Facts, *Division's Verified Response*. The footnote provides:

8. Tourism tax was assessed on all non-reported sales. Exhibit E.[16]

9. On or about May 22, 2006, the Division mailed notice to the Protestant of its proposed sales and tourism tax assessments. The Protestant filed a timely protest, claiming the Division made a mistake and that she is current on her tax payments. Exhibits F-1[17] and F-2[18].

10. The Division's proposed sales and tourism tax assessments are as follows:

Sales Tax:	$12,320.95	
Interest:	2,694.89	(through 6/30/06)
Penalty:	1,232.09	
Total:	$16,247.93	

Tourism Tax:	$ 144.66	
Interest:	26.96	(through 6/30/06)
Penalty:	14.04	
Total:	$ 185.66	

11. On August 9, 2006, the Division's attorney mailed a copy of the audit work papers to the Protestant, in response to her letter requesting a list of the taxes at issue.

12. The Administrative Law Judge notified the parties by mail of an August 29, 2006 pre-hearing conference. The Protestant failed to appear.

B. Additional factual findings:

1. Protestant individually owns and operates BAR as a sole proprietorship. Exhibit A.[19]

The actual non-reported sales amount of $144,692.78 (see Exhibit "C-2"), was mistakenly typed as $144,662.83 on the audit work papers and used as the basis for the sales tax assessment at issue. This $29.95 mathematical error in the Protestant's favor, resulted in the Division's acquiescence to the subsequent $2.55 sales tax error.

[15] Sales tax audit work papers.

[16] Tourism tax audit work papers.

[17] Sales and tourism tax letters of assessment.

[18] Letter of protest dated May 31, 2006.

[19] *See*, Note 8. The Business Registration indicates that BAR is in the retail business of selling 3.2 beer and mixed drinks, that the date of first sales subject to sales/use tax was November 15, 1997, that the date of first sales of 3.2 beer by draught, bottle and can (on premise) was November 15, 1997 and that the date of first sales of mixed drinks was December 1, 1997.

2. The auditor applied a fourteen percent (14%) variance to the total ounces of 3.2 draught beer Protestant had available for sale and a five percent (5%) variance to the total cans and bottles of 3.2 beer Protestant had available for sale. Exhibit C-2.[20]

ISSUE AND CONTENTIONS

The issue presented for decision is whether Protestant is liable for the sales and tourism taxes as determined and assessed by the Division.

Protestant contends that a mistake was made by the Division. In support of this contention, Protestant argues that she pays all of her taxes based on her sales records and she is current on all of her tax payments.

The Division contends that Protestant is liable for the sales and tourism taxes assessed, including the penalties, and accrued and accruing interest. In support of this contention, the Division argues that Protestant failed to sustain her burden of proof to show the Division proposed assessments are incorrect.

CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter of law that:

1. The Tax Commission is vested with jurisdiction over the parties and the subject matter of this action. 68 O.S. Supp. 2002, § 221(D).

2. The collection, reporting and remittance of sales taxes are governed by the Oklahoma Sales Tax Code ("Code").[21] An excise tax is levied upon the gross receipts or gross proceeds of all sales, not otherwise exempted by the Code. 68 O.S. 2001, § 1354(A).

3. The remittance of tourism taxes is governed by the Oklahoma Tourism Promotion Act ("Act").[22] A gross receipts tax is levied on the sale of those services or items of tangible personal property as specified in § 50012 of the Act. *See*, 68 O.S. 2001, § 50011(4) and (7).

3. The sale[23] 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 is expressly made

[20] *See*, Note 13.

[21] 68 O.S. 2001, § 1350 et seq.

[22] 68 O.S. 2001, § 50010 et seq.

[23] Defined to mean "the transfer of either title or possession of tangible personal property for a valuable consideration regardless of the manner, method, instrumentality, or device by which the transfer is accomplished in this state". 68 O.S. 2001, § 1352(15); renumbered § 1352(21) by Laws 2003, c. 413, § 1, eff. Nov. 1, 2003. For purposes of the Act, "sale" is defined to mean "the furnishing or rendering of services or the transfer of title or possession of tangible personal property specified in Section 50012 of this title". 68 O.S. 2001, § 50011(7).

subject to sales and tourism taxes. 68 O.S. 2001, §§ 1354(A)(9) and 50012(A)(2)[24]. *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, notwithstanding the fact that manufacturers and importing distributors of alcoholic beverages are required to pay certain taxes.

4. 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 sales tax matters, "[t]he burden of proving that a sale was not a taxable sale shall be upon the person who made the sale." 68 O.S. 2001, § 1365(E). *See,* ***Dunn v. State ex rel. Oklahoma Tax Commission***, 1993 OK CIV APP 105, 862 P.2d 1285. Section 1365(E) further provides in part:

> It shall be the duty of every tax remitter required to make a sales tax report and pay any tax under [the Code] to keep and preserve suitable records of the 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 hereunder and such other records of goods, wares and merchandise, and other subjects of taxation under [the Code] as will substantiate and prove the accuracy of such returns. * * * All such records shall remain in Oklahoma and be preserved for a period of three (3) years, unless the Tax Commission, in writing, has authorized their destruction or disposal at an earlier date, and shall be open to examination at any time by the Tax Commission or by any of its duly authorized agents.

See, ***Kifer v. Oklahoma Tax Commission***, 1998 OK CIV APP 34, 956 P.2d 162. See also, 37 O.S. 2001, § 163.14(C).[25]

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[24] This Section provides in part:

> A. There is hereby levied a gross receipts tax of one-tenth of one percent (1/10 of 1%) on the gross receipts from the sales of the following:
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> 1. Any 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.

[25] This subsection provides:

> Each and every retail dealer shall keep accurate records of all sales of low-point beer, whether purchased or manufactured by the retail dealer, to consumers or users, and of all purchases of such beverages from wholesalers or otherwise; and such records shall be preserved for a period of three (3)

5. 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." Black's Law Dictionary 1064 (5th ed. 1979). 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.*

6. Protestant did not present any evidence whatsoever to show any error with respect to the audit and assessments proposed by the Division. Further, because Protestant did not provide the auditor with the records required to be kept and preserved under the Code and Act, the auditor's utilization of the depletion method to determine Protestant's total gross receipts from the sales of 3.2 beer subject to taxation is reasonable and proper. *See*, ***Kifer***, *supra* at ¶ 8. *See also,* ***Big Country Club, Inc. v. Humphreys***, 511 S.W.2d 315 (Tex.Civ.App.1974).

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

DISPOSITION

THEREFORE, based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestant, OWNER d/b/a BAR, be denied. It is further ORDERED that the amounts in controversy, inclusive of any additional accrued and accruing penalty and interest, be respectively fixed as the deficiencies 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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years and shall be open to inspection at all times by the Commission or any of its employees.