JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2007-06-19-08 (NON-PRECEDENTIAL)
ID:	P-06-033-H, P-06-034-H, P-06-035-H, P-06-036-H, P-06-037-H
DATE:	JUNE 19, 2007
DISPOSITION:	SUSTAINED IN PART/DENIED IN PART
TAX TYPE:	SALES/MIXED BEVERAGE/TOURISM
APPEAL:	PENDING CIV. APP. TC-104864

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPANY 1 d/b/a BAR 1, COMPANY 2 d/b/a BAR 2, COMPANY 3 d/b/a BAR 3, COMPANY 4 and COMPANY 5 d/b/a BAR 5, and PRESIDENT, as President of COMPANY 1, COMPANY 2, COMPANY 3, COMPANY 4 and COMPANY 5 and as an Individual, appear pro se.[1] The Field Audit Section of the Audit Division ("Division"), Oklahoma Tax Commission, appears by and through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On February 13, 2006, the protest files were received by this office for further proceedings consistent with the Uniform Tax Procedure Code[2] and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.[3] On February 14, 2006, a letter was mailed to the Protestants stating that these matters had been assigned to ALJ, Administrative Law Judge, and docketed as Case Numbers P-06-033-H through P-06-037-H. The letter also advised the Protestants that a Notice of Prehearing Conference would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Oklahoma Tax Commission*. On March 10, 2006, the Division filed an Application to Join Cases. On March 15, 2006, there being no objection by the Protestants, an Order Granting Application to Join Cases was mailed to the parties. On March 16, 2006, the Notice of Prehearing Conference was mailed to the last known address of the Protestants, setting the prehearing conference for April 3, 2006, at 11:00 a.m.[4]

The prehearing conference was held as scheduled. On April 5, 2006, the parties were notified by mail that this matter had been set for hearing on June 13, 2006, at 9:30 a.m., with position letters or memorandum briefs being due on or before June 6, 2006.

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[1] "**pro se**" (proh **say** *or* **see**), *adv*. & *adj*. [Latin] For oneself; on one's own behalf; without a lawyer <the defendant proceeded pro se> <a pro se defendant>. -- Also termed *pro persona*; *in propria persona*; *propria persona*; *pro per*. See PROPRIA PERSONA. BLACK'S LAW DICTIONARY (8th ed. 2004), available at *http://westlaw.com*. (March 16, 2006).

[2] OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

[3] OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47. (June 11, 2005).

[4] OKLA. STAT. ANN. tit. 68, § 208 (West 2001). The notice was mailed to the Protestants c/o PRESIDENT, PRESIDENT'S ADDRESS.

On April 24, 2006, the Division filed a Request for Scheduling Order "to facilitate the timely receipt and response of any documents that the parties wished to offer or request, as well as to provide notification of the parties' witnesses and exhibits." On April 28, 2006, there being no objection by the Protestants, a Scheduling Order was issued setting the hearing for July 27, 2006, at 9:30 a.m. On July 20, 2006, the Brief of the Audit Division was filed. On July 25, 2006, Protestants' Request for Continuance was filed by the Division. On or about July 17, 2006, the Protestants had received adjustments to the proposed assessments and requested a continuance to provide additional information to the Division.

The Division concurred with the Protestants' request for a thirty (30) day continuance for two reasons:

- First, the Division wants to ensure the court that it allowed for the possibility of a further adjustment to the proposed tax assessments; and

- Second, the Protestants understand that the Division will not agree to any further requests for a continuance.

On July 28, 2006, an Amended Scheduling Order was issued setting the hearing on this matter for August 30, 2006, at 9:30 a.m. On August 22, 2006, the Brief of the Protestants was filed. On August 23, 2006, the Division advised the Protestants and this office by letter that the Division's witness had been summoned for jury duty through September 8, 2006. On August 29, 2006, there being no objection by the Protestants, an Amended Scheduling Order was issued setting the hearing in this matter for September 14, 2006, at 9:30 a.m.

A closed hearing[5] was held on September 14, 2006, at approximately 9:30 a.m. The Division called one witness, AUDITOR, Field Auditor, Audit Division, Oklahoma Tax Commission, who testified regarding the records of the Division. The Division's Exhibits A-1 through A-5, B-1 and B-2, C-1 and C-2, and D-1 through D-6 were identified, offered, and admitted into evidence. The Protestants called one witness, their accountant, ACCOUNTANT, who testified regarding the Protestants' bookkeeping and his review of the audit work papers, including the "revised" audit work papers. The Protestants' Exhibits 1 through 7 were identified, offered, and admitted into evidence. Upon conclusion of the hearing, the record was closed and the case was submitted for decision on September 14, 2006.

On September 26, 2006, the Protestants filed an "Offer of New Evidence." On September 28, 2006, the Division filed its "Objection to Protestants' Submission of Post-Hearing Material." On September 29, 2006, an "Order Denying Protestants' Offer of New Evidence" was issued and mailed to the parties.

[5] The Protestants invoked their right to a confidential hearing as provided by OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2006).

FINDINGS OF FACT

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

1. PRESIDENT owns and operates five (5) nightclubs, BAR 1, BAR 2, BAR 3, BAR 4 and BAR 5 (hereinafter referred to collectively as the "Clubs") located in the greater BIG CITY area.[6] PRESIDENT was last audited by the Division in 1986.

2. PRESIDENT stipulated on the record that at all times during the audit period she was the President of the Clubs.[7]

3. On or about April 2004, the Division conducted Mixed Beverage Depletion Audits and 3.2 Beer Depletion Audits on the Clubs for the period from May 1, 2001, to May 31, 2004. For purposes of the audits the period was split into two (2) separate periods (which will be explained herein): from May 1, 2001, to October 31, 2001 ("First Audit Period"), and from November 1, 2001, to May 31, 2004 ("Second Audit Period"). The Division used information on the Clubs provided by PRESIDENT, including, but not exclusive of, the beginning and ending inventories and records of purchases of 3.2 beer from BEER DISTRIBUTOR, BIG CITY, Oklahoma, prices, and pour sizes. The Division gave the Clubs credit for 3.2 beer and Alcoholic Beverages used for cooking. AUDITOR also used the Protestants' "Z-Tapes" in the 3.2 beer depletion audits to "arrive at the percentage of 3.2 beer sold below and above cost. [AUDITOR] averaged the 3.2 beer prices based on the average above cost price reflected in the z-tapes and applied 'cost' for the percentage of sales below cost" during the Audit Period.[8]

4. The Division made the following deductions in the 3.2 Beer Depletion Audits and Mixed Beverage Depletion Audits,[9] to-wit:

	05/01/01-10/31/01	11/01/01-05/31/04
Cans & Bottle Beer	Five Percent (5%)	Five Percent (5%)
Keg	Fourteen Percent (14%)	Fourteen Percent (14%)
Liquor	Sixteen Percent (16%)	Sixteen Percent (16%)
Wine	Ten Percent (10%)	Ten Percent (10%)

[6] Division's Exhibits A-1 through A-5.

[7] PRESIDENT began managing clubs when she was seventeen (17). During her career in the business, PRESIDENT has managed and/or owned sixty-two (62) clubs. At the time of the hearing PRESIDENT was a young sixty-four (64).

[8] Testimony of AUDITOR. *See* Protestants' Exhibit 5 and Exhibit 6. Protestants' Exhibit 5 is a representative sample of the information provided by PRESIDENT on all the clubs and consists of a summary prepared by the manager and "Z-Tapes." Key 1 is for 3.2 Bottle Beer. Key 2 is for 3.2 Keg Beer. Key 3 is for Food. Key 4 is for Mixed Beverages, Strong Beer, and Wine.

[9] Division's Exhibits D-1 through D-5.

5. The Division issued the following proposed Mixed Beverage Tax ("ATG") assessments:[10]

DATE ISSUED		TAX PERIOD	ATG	INTEREST	PENALTY	TOTAL
06/24/05	BAR1	05/01/01-05/31/04	$ 4,868.00	$ 250.14	$ 486.80	$ 5,604.94
03/21/05	BAR 2	12/01/01-05/31/04	1,640.04	215.00	164.00	2,019.04
05/02/05	BAR 3	05/22/01-05/31/04	5,835.49	866.37	583.55	7,285.41
03/17/05	BAR 5	02/01/03-05/31/04	1,915.08	251.06	191.51	2,357.65
TOTAL			$14,258.61	$1,582.57	$1,425.86	$17,267.04

6. The Division issued the following proposed Sales Tax ("STS") assessments:[11]

DATE ISSUED		AUDIT PERIOD	STS	INTEREST	PENALTY	TOTAL
06/24/05	BAR 1 PRESIDENT	05/01/01-05/31/04	$ 9,599.80	$2,094.87	$ 959.98	$12,654.65
03/21/05	BAR 2 PRESIDENT	12/01/01-05/31/04	4,423.81	1,016.69	442.40	5,882.90
05/02/05	BAR 3 PRESIDENT	05/01/01-05/31/04	7,211.33	1,490.56	721.12	9,423.01
08/26/05	BAR 4 PRESIDENT	05/01/01-05/31/04	4,920.47	1,403.05	492.05	6,815.57
03/17/05	BAR 5 PRESIDENT	02/01/03-05/31/04	3,517.49	567.77	351.75	4,437.01
TOTAL			$29,672.90	$6,572.94	$2,967.30	$39,213.14

[10] The ATG audit of COMPANY 4 resulted in $50.00 or less in ATG. It is the Division's policy not to issue an assessment when an audit results in that amount. Testimony of AUDITOR.

[11] Division's Exhibits B-1 and B-2.

7. The Division issued the following proposed Tourism Tax ("STR") assessments:

DATE ISSUED		AUDIT PERIOD	STR	INTEREST	PENALTY	TOTAL
06/24/05	BAR 1	05/01/01-05/31/04	$110.31	$23.78	$11.03	$145.12
03/21/05	BAR 2	12/01/01-05/31/04	54.66	12.56	5.47	72.69
05/02/05	BAR 3	05/01/01-05/31/04	87.35	17.77	8.74	113.86
08/26/05	BAR 4	05/01/01-05/31/04	57.75	16.39	5.77	79.91
TOTAL			$310.07	$70.50	$31.01	$411.58

Initially, AUDITOR included food sales (mostly for Birthday Cakes) for all the Clubs for both the First Audit Period and Second Audit Period, but removed the food sales for all years, except 2003, for which records were available.[12]

8. Pursuant to written requests from PRESIDENT, the Division granted an extension of ninety (90) days to protest each of the proposed assessments[13] against PRESIDENT and the Clubs, with letters of protest being received by the Division,[14] as follows:

DATE REQUESTED DATE MAILED RECEIPT BY DIVISION		DATE ISSUED	EXPIRATION DATE	PROTEST RECEIVED
06/27/05 06/28/05 06/30/05	BAR 1 PRESIDENT	07/06/05	11/21/05	09/14/05
03/05/05	BAR 2 PRESIDENT	03/22/05	08/19/05	08/10/05
04/30/05 05/03/05	BAR 3 PRESIDENT	05/06/05	09/26/05	09/14/05
03/05/05	BAR 5 PRESIDENT	03/18/05	08/15/05	08/10/05

[12] Testimony of AUDITOR. *See* Division's Exhibits D-1 through D-5.

[13] Division's Brief, Page 3. The court files contain audit packets, which were forwarded by the Division as part of the protest files in these matters. The Administrative Law Judge is taking judicial notice of the materials contained in the court files for the purpose of completing the factual details and background of these audits. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999).

[14] Division's C-1 and C-2.

9. On July 12, 2006, the Division made adjustments[15] to each of the proposed assessments based upon information provided by PRESIDENT, as follows, to-wit:

	TAX PERIOD	ATG	INTEREST (07/31/06)	PENALTY	TOTAL
BAR 1[16]	05/01/01-05/31/04	$ 2,865.81	$ 97.24	$ 286.58	$ 3,249.63
BAR 2[17]	12/01/01-05/31/04	1,268.58	404.56	126.86	1,800.00
BAR 3[18]	05/22/01-05/31/04	1,547.56	299.88	154.76	2,002.20
BAR 5[19]	02/01/03-05/31/04	1,463.77	466.80	146.38	2,076.95
TOTAL		$ 7,145.72	$1,268.48	$ 714.58	$ 9,128.78

[15] The adjustments made by AUDITOR were based upon information provided by PRESIDENT on June 6, 2006. Adjustments were made to all of the audits. The beginning and ending inventories not included in the original audits were included; price adjustments were made on the 3.2 beer audits based on the spreadsheets provided. The ATG drink price for BAR 3 was changed to reflect the $2.00 drink price (less tax). AUDITOR also reworked the calculations on the batch drinks on all of the clubs and applied the batch drink price and pour to all of the Jagermiester, Southern Comfort, and Yukon Jack. These were the brands PRESIDENT had indicated were used exclusively in batch drinks. AUDITOR used a 50/50 split on the other primary brands used in the batch drinks (Evan Williams, McCormick Vodka, Seagrams VO, McCormick Rum, and Rio Gold Tequila). The price and pour used on these brands were calculated at regular price and pour at 50% and batch price and pour at 50%. *See* the cover letter dated Wednesday, July 12, 2006, on Division's Exhibits D-1 through D-5.

[16] Division's Exhibit D-5.

[17] Division's Exhibit D-1.

[18] Division's Exhibit D-4.

[19] Division's Exhibit D-3.

	AUDIT PERIOD	STS	INTEREST (07/31/06)	PENALTY	TOTAL
BAR 1[20] PRESIDENT	05/01/01-05/31/04	$ 6,230.99	$2,183.16	$ 623.11	$ 9,037.26
BAR 2[21] PRESIDENT	12/01/01-05/31/04	4,390.88	1,854.19	439.11	6,684.18
BAR 3[22] PRESIDENT	05/01/01-05/31/04	3,531.25	1,258.92	353.11	5143.28
BAR 4[23] PRESIDENT	05/01/01-05/31/04	3,428.45	1,255.85	342.85	5,027.15
BAR 5 PRESIDENT[24]	02/01/03-05/31/04	3,285.54	1,157.30	328.55	4,771.39
TOTAL		$20,867.11	$7,709.42	$2,086.73	$30,663.26

	AUDIT PERIOD	STR	INTEREST (07/31/06)	PENALTY	TOTAL
BAR 1	05/01/01-05/31/04	$ 71.75	$ 24.82	$ 7.17	$ 103.74
BAR 2	12/01/01-05/31/04	54.42	22.92	5.44	82.78
BAR 3	05/01/01-05/31/04	43.42	15.33	4.34	63.09
BAR 4	05/01/01-05/31/04	40.17	14.64	4.02	58.83
TOTAL		$ 209.76	$ 77.71	$ 20.97	$ 308.44

10. On or about July 27, 2006, PRESIDENT provided the Division with information for additional deductions for "Spoilage," "Breakage," and "Theft" at the Clubs during the Audit Periods.[25]

11. ACCOUNTANT testified that the Clubs all opened at 9:00 a.m. and closed at 2:00 a.m., six (6) days a week, and that PRESIDENT "ran her places with an iron fist" because of employee theft, conducting two (2) inventory audits per day at each of the Clubs and making managers mark and date "whiskey bottles" after each inventory audit.

[20] Division's Exhibit D-5.

[21] Division's Exhibit D-1.

[22] Division's Exhibit D-4.

[23] Division's Exhibit D-2.

[24] Division's Exhibit D-3.

[25] Protestant's Exhibit 2.

12. On August 9, 2006, the Division sent PRESIDENT a letter declining to make any further adjustments because the Division had requested the information during the course of the audits and before the adjustments were made on July 12, 2006.[26]

13. On September 26, 2006, PRESIDENT filed an "Offer of New Evidence." On September 28, 2006, the Division filed its "Objection to Protestants' Submission of Post-Hearing Material."

14. On September 29, 2006, an "Order Denying the Protestants' Offer of New Evidence" was issued and mailed to the parties.

CONCLUSIONS OF LAW

A. MIXED BEVERAGE TAX

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[27]

2. Before November 1, 2001, a tax of twelve percent (12%) is imposed on the total gross receipts of a holder of a mixed beverage license, and effective November 1, 2001, 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 (on the basis of the number of drinks available for sale, preparation, or service from the total alcoholic beverages received),[28] 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.[29]

3. The authorized method of auditing a mixed beverage establishment is the depletion method.[30] 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.[31] In 1997, the Oklahoma Court of Civil Appeals found in

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[26] *See* Procedural History herein and Protestant's Brief filed August 22, 2006, and attachments thereto. *See also* Division's Exhibit D-6, which is an example of the "Information and Document Request" provided to PRESIDENT for each of the Clubs, prior to the beginning of the audits. "Police Reports" or "Insurance Reports" for any loss of liquor is 32 of 33 on the request.

[27] OKLA. STAT. ANN. tit. 68, § 221(D) (West Supp. 2006).

[28] *See* OKLA. ADMIN. CODE § 710:20-5-8(a) (May 25, 2002).

[29] OKLA. STAT. ANN tit. 37, § 576 (West 2001).

[30] *See* Note 28 and 29.

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

Kiefer that the "Tax Commission rule using taxpayer's drinks available for sale, rather than actual cash register receipts, in calculating the mixed beverage gross receipts tax does not violate the intent of the Alcoholic Beverage Control Act."[32]

4. Rules promulgated pursuant to the Administrative Procedures Act[33] are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court.[34] 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.[35]

5. 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.[36]

6. In conducting a Mixed Beverage Depletion Audit, the Division follows the audit procedures established by Section 579(G) of Title 37 ("ATG Audit Statute") and Tax Commission Rule 710:20-5-8(b) ("ATG Audit Rule"):[37]

> (1) Upon audit of the books and records of a mixed beverage establishment for Gross Receipts Tax, it shall be assumed that spirits[38] have been dispensed at the average rate of one and one-half fluid ounce (1 and ½ 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.
> (2) Wines[39] will be presumed to have been dispensed at the average rate of six ounces (6 oz.) per serving. The Tax Commission may use an average rate

[32] Id. at ¶ 1.

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

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

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

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

[37] *See* Note 28.

[38] OKLA. STAT. ANN. tit. 37, § 506(38) (West Supp. 2006):

> "Spirits" means any beverage other than wine, beer or light beer, which contains more than one-half of one percent (½ of 1%) alcohol measured by volume and obtained by distillation, whether or not mixed with other substances in solution and includes those products known as whiskey, brandy, rum, gin, vodka, liqueurs, cordials and fortified wines and similar compounds; but shall not include any alcohol liquid completely denatured in accordance with the Acts of Congress and regulations pursuant thereto;

[39] OKLA. STAT. ANN. tit. 37, § 506(40) (West Supp. 2006):

> "Wine" means and includes any beverage containing more than one-half of one percent (½ of 1%) alcohol by volume and not more than twenty-four percent (24%) alcohol by volume at sixty (60) degrees Fahrenheit obtained by the fermentation of the natural contents

> greater or less than those set out in this Rule upon reasonable evidence of a different rate of use.
>
> …

The provisions of the ATG Audit Statute and ATG Audit Rule *were not the same for the First Audit Period and the Second Audit Period*. Effective November 1, 2001, the ATG tax rate was increased from twelve percent (12%) to thirteen and one-half percent (13.5%).[40]

Prior to November 1, 2001, paragraph (b)(3) of the ATG Audit Rule[41] provided the following:

> (3) A deduction may be allowed from the gross receipts tax liability determined by an audit for losses due to undetermined causes, *not to exceed five percent (5%) of the total gross receipts.* [Emphasis added.]

Effective November 1, 2001, the ATG Audit Statute was amended adding section (G),[42] (*effectively eliminating the five percent (5%) deduction from gross receipts for losses due to undetermined causes*), which states as follows, to-wit:

> G. In addition to any other authority granted by law, the Tax Commission is hereby authorized to audit any mixed beverage, beer and wine, caterer or special event licensee to determine if the correct amount of tax payable under Section 576 of this title has been collected; provided, *if such an audit reveals that the amount collected is within the following percentages of the amount of tax payable, the taxpayer shall be deemed to be in compliance:*
>
> 1. For spirits, eighty-four percent (84%) to one hundred sixteen percent (116%);
>
> 2. For wine, ninety percent (90%) to one hundred ten percent (110%);
>
> 3. For beer sold at draft and not in original packages, eighty-six percent (86%) to one hundred fourteen percent (114%); and
>
> 4. For beer sold in original packages, ninety-five percent (95%) to one hundred five percent (105%). [Emphasis added.]

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of fruits, vegetables, honey, milk or other products containing sugar, whether or not other ingredients are added, and includes vermouth and sake, known as Japanese rice wine;

[40] *See* OKLA. STAT. ANN. tit. 37, § 576 (West 2001).

[41] *See* OKLA. ADMIN. CODE § 710:20-5-8(b)(3) (June 25, 1998).

[42] OKLA. STAT. tit. 37, § 579(G) (West Supp. 2001).

The ATG Audit Rule was amended to conform to the Amended ATG Audit Statute, effective May 25, 2002.[43]

In conducting the audits the Division charged the correct amount of gross receipts tax for the First Audit Period (12%) and the correct amount of gross receipts tax for the Second Audit Period (13.5%).

However, the Division did not follow the correct audit procedures for the First Audit Period on BAR 1, BAR 2, BAR 3, and BAR 4. During the First Audit Period, the *ATG Audit Rule provided a deduction for losses due to undetermined causes not to exceed five percent (5%) from the gross receipts liability determined by an audit.*

For the Second Audit Period, the Division followed the correct audit procedures on the Clubs. After deducting sixteen percent (16%) for spirits, ten percent (10%) for wine, fourteen percent (14%) for beer sold at draft and not in original packages, and five percent (5%) for beer in original packages, the Division determined that the Clubs were not in compliance and had under-reported mixed beverage sales during the Second Audit Period. The Division did allow an additional deduction for alcoholic beverages that were consumed in food as verified by AUDITOR.[44]

B. REMAINING ISSUE ON MIXED BEVERAGE DEPLETION AUDITS

The remaining issue between the parties regarding the Mixed Beverage Depletion Audits for the Audit Period is "whether the information provided to the Division by PRESIDENT complies with the ATG Audit Rule for additional deductions for alcoholic beverages that are destroyed due to breakage and for alcoholic beverages that are stolen?"

The remaining portion of the ATG Audit Rule[45] is essentially the same for the First Audit Period and Second Audit Period:

> (4) In addition, a deduction may be allowed from the gross receipts tax liability determined by an audit or other investigation of the books and records of a mixed beverage tax permit holder, for alcoholic beverages that are:
>
> (A) consumed in food as verified by the audit;
>
> (B) *destroyed due to breakage* for which the permit holder has retained the container; or that portion thereof that has the unbroken seal <and the identification stamp affixed thereto for full unopened bottles>;[46] or for partial

[43] OKLA. ADMIN. CODE § 710:20-5-8(b)(3) (May 25, 2002).

[44] *See* Findings of Fact No. 2 herein. *See also* Division's Exhibits D-1 through D-5.

[45] OKLA. ADMIN. CODE § 710:20-5-8(b)(4) (June 25, 2002).

[46] This portion of the rule was deleted when the rule was amended effective May 25, 2002.

> bottles destroyed by breakage for which *the permit holder has completed a breakage affidavit listing the date of the occurrence, the brand and type of liquor, the size bottle, the approximate amount left in the bottle by 1/10ths, and the cause of the breakage. The affidavit shall be signed by the permit holder and two witnesses;*
>
> (C) *stolen* or destroyed by a disaster such as a fire or flood, *provided that reasonable evidence is provided to support a claim. Reasonable evidence might include a copy of a police or sheriff's crime report; or an insurance claim detailing the inventory destroyed by brand, size, and type of liquor;*
>
> (D) not consumed, and exist or existed, at the close of a taxable period in question, provided that the amount and nature of the unconsumed inventory has been verified by agents of the Tax Commission, ABLE Commission, or verified by invoice to a mixed beverage permittee or wholesaler approved to purchase the inventory by the ABLE Commission. Partially filled bottles which are not included in a transferred inventory should be verified by a Tax Commission or ABLE Commission agent or agents. [Emphasis added.]

On July 17, 2006, the Division was provided with two (2) folders[47] for each of the Clubs. The Division was to review the information and make any further adjustments for "Breakage" and "Theft," but "[s]ince the Division requested this information during the course of the audit and again, before the last set of revisions was completed, the Division declines to make any further adjustments at this time, and suggests you present your evidence at hearing," which the Protestants did identify and offer, and which was admitted into evidence over the objection of the Division. PRESIDENT testified that she had not provided the information earlier because she did not realize what the Division had been requesting since the beginning of the audits.

One folder for each of the Clubs contains "Mixed Beverage Breakage Affidavits" and "3.2 Beer Spoilage Reports" (which will be discussed later herein). The ATG Breakage Affidavits use the same "form," as follows, to-wit:

[47] Protestants' Exhibit 2.

OKLAHOMA TAX COMMISSION
MIXED BEVERAGE BREAKAGE AFFIDAVIT

_____
Name of Taxpayer as it appears on Permit

_____
Trade Name of Business

_____
Mixed Beverage Tax Permit Number

STATE OF OKLAHOMA
SS _____
COUNTY OF _____

I do hereby swear and affirm that the following container or containers were broken or damaged on this date. _____.

Brand/Type	Bottle Size	Level by Tenths	Stamp Number[48] (reason)
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

I declare under the penalties of perjury, that this form has been examined by me and to the best of my knowledge and belief is true and correct.

_____
Signature of Taxpayer or Manager

_____
Witness

_____
Witness

Must be signed by two (2) witnesses.

38

The ATG Breakage Affidavits submitted by PRESIDENT for each of the Clubs during the Audit Periods contains information necessary to comply with the ATG Audit Rule and is signed by two (2) witnesses and by PRESIDENT. The ATG Breakage Affidavits support additional deductions for "Breakage" during the Audit Period.

The second folder for each of the Clubs contains a handwritten summary of inventory that PRESIDENT asserts was stolen during the Audit Periods, along with copies of "TRACIS Witness Statements," handwritten statements by PRESIDENT, "Citizen Crime Reports" signed by PRESIDENT, and some "Dispatch Call Summaries."

It is PRESIDENT'S position that the information provided is "reasonable evidence" in compliance with the ATG Audit Rule to support the deduction for "Theft" during the Audit Periods. PRESIDENT also asserts that since the ATG Audit Rule does not define "what constitutes a police or sheriff's crime report," the "TRACIS Witness Statements" and "Citizen

[48] The ATG Audit Rule does not require a stamp number.

Crime Reports" should be sufficient. ACCOUNTANT testified that he executed two (2) internet searches for "crime reports" and "official police report" utilizing the OSCN (www.oscn.net) and was not able to locate any information.[49] ACCOUNTANT also testified that the Internal Revenue Service would accept the information for Federal Income Tax purposes, according to Internal Revenue Service Publication No. 547, Casualties, Disasters, and Thefts.[50]

During the hearing the Division took the position that the ATG Audit Statute and ATG Audit Rule already give sufficient percentages to account for reasonable deductions for "Breakage" and "Theft." AUDITOR testified that she had never had a taxpayer request any additional deductions for "Breakage" or "Theft" during any of the mixed beverage audits or 3.2 beer audits that she had conducted. However, AUDITOR also testified that she had examined information provided by PRESIDENT, resulting in a written memorandum,[51] which appears to have been attached to the Division's letter to PRESIDENT dated August 9, 2006, the text of which, in pertinent part, is as follows:

> Per PRESIDENT'S request, I have reviewed the documentation provided on July 27, 2006.
> PRESIDENT requested a continuance in order to provide police reports and other documentation to show theft in her clubs.
> This information was requested during the audit and again before the last revision was made to the audits.
> It is my opinion that additional revisions to the audits should not be made at this time and the documentation provided should be presented at the hearing on August 30, 2006.
> The documentation provided includes "Citizen Crime Reports". I am not sure if these are considered official police reports.
> The items listed as stolen on what appears to be official police reports do not include beer, liquor or wine. The police reports are also missing pages.
> PRESIDENT also provided handwritten "witness statements" and a "confession letter". Again, I do not know if the witness statements and confession letter should be considered sufficient documentation to support the theft.
> Please advise PRESIDENT of the above.

Although the ATG Audit Rule does not contain definitions for "police or sheriff's crime report," the ATG Audit Rule[52] does provide the following, to-wit:

[49] Testimony of ACCOUNTANT. *See* Protestants' Exhibits 3 and 4.

[50] Protestants' Exhibit 1.

[51] Protestants' Exhibit 6.

[52] OKLA. ADMIN. CODE § 710:20-5-8(4)(C) (May 25, 2002).

> (4) In addition, a deduction may be allowed from the gross receipts tax liability determined by an audit or other investigation of the books and records of a mixed beverage tax permit holder, for alcoholic beverages that are:
>
> …
>
> (C) stolen or destroyed by a disaster such as fire or flood, provided that reasonable evidence is provided to support the claim. Reasonable evidence might include a copy of a police or sheriff's crime report; or an insurance claim detailing the inventory destroyed by brand, size, and type of liquor;
>
> …

The "TRACIS" witness statements and "Citizen Crime Reports" are all handwritten signed and dated by PRESIDENT. All of the statements and reports follow the same basic format. A typical example from the BAR 1 folder, dated July 12, 2001, states, as follows, to-wit:

> Inventory 5-11-01/7-11-01
> Keg 3, 46/c short. 12 Bt-So Comfort, Parrot Bay,
> and Yukon Jack.
> 4 gal [?], 4 gal [?](1/c 12 PK of [?] mix-

None of the statements or reports (relating to the "Theft" of ATG or 3.2 Beer) contains a "complaint number," the name and signature of the "interviewing officer, ID, Division, Location" or any indication that the statements or reports were filed with the appropriate law enforcement authorities.

The ATG Audit Rule does not define "police or sheriff's crime report," nor does it define "an insurance claim," but the rule does require that the claim be supported by "reasonable evidence." Implicit in the requirement for "reasonable evidence to support a claim for theft" is that the statement or report must be reported to the proper police or sheriff's department and must be substantiated by the report of such police or sheriff's department. The same requirement for an insurance claim would apply. The insurance claim must be reported to the taxpayer's insurance company and must be substantiated by the report of such insurance company. The statements and reports provided to the Division for each of the Clubs do not constitute "reasonable evidence" to support an additional deduction for "Theft."

C. SALES TAX AND TOURISM TAX

1. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Sales Tax Code").[53] The Sales Tax Code levies "upon all sales,[54] not otherwise

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

[54] OKLA. STAT. ANN. tit. 68, § 1352(21)(a) (West Supp. 2006):

> "Sale" means 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

exempted . . . an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds[55] of each sale of . . . tangible personal property. . . ."[56] Oklahoma Statutes authorize incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.[57]

2. The tax levied by the Oklahoma Sales Tax Code[58] shall be paid by the consumer or user to the vendor[59] 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 to the average equivalent thereof.[60]

3. All sales of drinks sold or dispensed by hotels, restaurants, or other dispensers, and sold for immediate consumption upon the premises, are subject to sales tax, unless otherwise exempted by the Sales Tax Code.[61]

4. For the purpose of proper administration of the provisions of the sales and use tax laws, it is presumed that all gross receipts are subject to tax until they are shown to be tax exempt. The burden of proving that a sale of tangible personal property or enumerated service is an exempt sale is upon the vendor.[62]

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the transfer is accomplished in this state, or other transactions as provided by this paragraph, including but not limited to:

a. the exchange, barter, lease, or rental of tangible personal property resulting in the transfer of the title to or possession of the property,

…

[55] OKLA. STAT. ANN. tit. 68, § 1352(11) (West Supp. 2006).

[56] OKLA. STAT. ANN. tit. 68, § 1354(A)(1) (West Supp. 2006).

[57] OKLA. STAT. ANN. tit. 68, § 1370 et seq. (West Supp. 2006) and OKLA. STAT. ANN. tit. 68, § 2701 (West Supp. 2006).

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

[59] "Vendor" is defined as "any person making sales of tangible personal property or services in this state, the gross receipts or gross proceeds from which are taxed by the Oklahoma Sales Tax Code." OKLA. STAT. ANN. tit. 68, § 1352(27)(a) (West Supp. 2006).

"Person" is defined to include "any individual" or "[any] corporation." OKLA. STAT. ANN. tit. 68, § 1352(17) (West Supp. 2006).

[60] OKLA. STAT. ANN. tit. 68, § 1361(A) (West Supp. 2006). *See also Wal-Mart Stores, Inc. v. Oklahoma Tax Commission*, 1991 OK CIV APP 73, 817 P.2d 1281.

[61] OKLA. STAT. ANN. tit. 68, § 1354(A)(9) (West Supp. 2006).

[62] OKLA. ADMIN. CODE § 710:65-1-4 (June 26, 1994).

5. The Division used the depletion method to audit the sale of 3.2 beer.[63] This method accounts for the number of drinks available for sale, preparation, or service from the total 3.2 beer sales reported. It is a reasonable method for determining the total gross receipts subject to sales and tourism tax.[64]

6. The Low Point Beer Act[65] and Oklahoma Tax Commission Rules do not provide for any deductions for spillage, breakage, or theft of 3.2 Beer. However, the Division has a long standing policy to allow the same "percentages" for 3.2 beer audits that are allowed for strong beer under the ATG Audit Rule. Before October 31, 2001, the Division allowed an across the board five percent (5%) deduction in a 3.2 beer audit, and beginning November 1, 2001, five percent (5%) for 3.2 beer in bottles and fourteen percent (14%) for 3.2 beer kegs.[66] The same policy would also apply to the taxpayer being able to submit information to the Division to support addition deductions for "Breakage" and "Theft," just as the Division does under the ATG Audit Rule.

7. PRESIDENT provided "3.2 Beer Spoilage Reports" for each of the Clubs during the Audit Period. Each report describes the "Type of Spoilage," the "Date of Occurrence," and the "Quantity of 3.2 Beer." Each report is also signed by an employee and the manager of each club. The "3.2 Beer Spoilage Reports" are sufficient to support an addition deduction for "Spoilage/Breakage" during the Audit Period.

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%).[67]

9. Vendors shall keep records and books of all sales and all purchases of tangible personal property. Vendors must maintain complete books and records covering receipts from all sales and distinguishing taxable from nontaxable receipts.[68]

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[63] OKLA. STAT. ANN. tit. 37, § 163.2(1) (West 2001):

> In the administration of Section 163.1 et seq. of this title, the following words and phrases are given the meanings respectively indicated:
>
> 1. "Low-point beer" means and includes beverages containing more than one-half of one percent (½ of 1%) alcohol by volume, and not more than three and two-tenths percent (3.2%) alcohol by weight, including but not limited to beer or cereal malt beverages obtained by the alcoholic fermentation of an infusion of barley or other grain, malt or similar products;

[64] The Division uses the same depletion method for mixed beverages subject to gross receipts tax. *See* OKLA. STAT. ANN. tit. 37, § 579 (West 2001) and OKLA. ADMIN. CODE § 710:20-5-8 (May 25, 2002). *See also Kifer v. Oklahoma Tax Commission*, 1998 OK CIV APP 34, 956 P.2d 162, which upheld the Tax Commission using the depletion method rather than actual cash register receipts.

[65] OKLA. STAT. ANN. tit. 37, § 163.1 et seq. (West 2001).

[66] *See* Note 42.

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

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."[69]

11. When the Tax Commission issues a proposed assessment against a corporation for unpaid sales tax, the Commission shall file assessments against the principal officers of the corporation personally liable for the tax. The principal officers of the corporation shall be liable for the payment of sales tax during the period of time for which the assessment is made. The liability of a principal officer for sales tax shall be determined in accordance with the standards for determining liability for payment of federal withholding tax.[70]

12. In this matter there is no dispute that PRESIDENT was the President of the Clubs during the Audit Period and a principal officer responsible for the collection and remittance of sales tax.

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[68] OKLA. ADMIN. CODE § 710:65-3-30 (June 26, 2003). *See* OKLA. ADMIN. CODE § 710:65-3-31 (June 26, 1994).

[69] OKLA. STAT. ANN. tit. 68, § 1361(A) (West Supp. 2006). *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) (May 15, 2006).

[70] The full text of OKLA. STAT. ANN. tit. 68, § 253 (West 2001) is as follows:

> When the Oklahoma Tax Commission files a proposed assessment against corporations or limited liability companies for unpaid sales taxes, withheld income taxes or motor fuel taxes collected pursuant to Article 5, 6 or 7 of this title, the Commission shall file such proposed assessments against the principal officers of the corporations or the managers or members personally liable for the tax. The principal officers of any corporation shall be liable for the payment of any tax as prescribed by this section if such officers were officers of the corporation during the period of time for which the assessment was made. 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 member shall be liable.
>
> The liability of a principal officer for sales tax, withheld income tax or motor fuel tax shall be determined in accordance with the standards for determining liability for payment of federal withholding tax pursuant to the Internal Revenue Code of 1986, as amended, or regulations promulgated pursuant to such section.

Section 253 sets out the trust taxes (which cannot be discharged in bankruptcy) for which a principal officer of a corporation that is also a "responsible person" is held personally liable, regardless of whether a corporation is in good standing or suspended. The current Business Registration Form on the signature line in part states, "I further acknowledge and agree that sales, withholding and motor fuel taxes are trust taxes for the State of Oklahoma and that any use of these trust funds other than timely remittance to the State of Oklahoma is embezzlement and can result in criminal prosecution." The current form is available on-line at *http://www.oktax.state.ok.us*.

13. Oklahoma Statutes provide for the collection of interest and penalty on delinquent tax.[71] "All penalties or interest imposed by [Title 68], or any state tax law, shall be recoverable by the Tax Commission as a part of the tax with respect to which they are imposed. . . ."[72]

14. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[73]

15. The protests should be sustained in part and denied in part, in accordance with the findings of fact and conclusions of law as set out herein.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the protests of the Clubs to the proposed mixed beverage assessments, sales tax assessments, and tourism tax assessments should be sustained in part and denied in part.

It is further ORDERED that PRESIDENT'S protests to the proposed sales tax assessments should be sustained in part and denied in part.

It is further ORDERED that the audits should be adjusted in accordance with the findings of fact and conclusions of law herein and that the revised amounts of tax and penalty should be fixed as the amounts due and owing, inclusive of interest, accrued and accruing.

ADDENDUM TO FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

The *Findings, Conclusions and Recommendations* issued on October 18, 2006, in the above styled and numbered cause, comes on for consideration of the recommendations as to the amount of the deficiency which should be confirmed by an order of the Tax Commission.

On November 28, 2006, the Division, as directed by the *Findings, Conclusions and Recommendations,* filed an *Addendum to Brief*, revising the proposed Mixed Beverage Tax ("ATG"), Sales Tax ("STS"), and Tourism Tax ("STR") Assessments and provided notice of the

[71] OKLA. STAT. ANN. tit. 68, § 217 (West 2001).

[72] OKLA. STAT. ANN. tit. 68, § 217(G) (West 2001).

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

revisions to the Protestants. On March 7, 2007, the Protestants filed a "Preliminary Challenge of PRESIDENT to Calculations of Auditor."[74]

Upon consideration of the *Findings, Conclusions, and Recommendations* and the revisions to the proposed assessment(s), the undersigned finds that the following findings should be added to and incorporated in the *Findings, Conclusions and Recommendations*:

1. On November 28, 2006, the Division filed an *Addendum to Brief* submitting work papers for the revised ATG, STS, and STR Assessments, as directed in the *Findings, Conclusions and Recommendations.*

2. The Division's *Addendum to Brief* states that the proposed assessments were revised as follows, to-wit:

> The mixed beverage and 3.2 beer waste and spillage allowances concerning the assessments within the "First Audit Period" were revised for BAR 1, BAR 3 and BAR 4, based on the prior statute and audit rule *providing a deduction for losses due to undetermined causes not to exceed five percent (5%) from the gross receipts liability determined by an audit.*[75]

The proposed assessments were also revised to reflect the Additional "Spoilage" during the Audit Period.

> The audit revisions increased the aggregate principal tax assessment by $451.74.

3. The following paragraph on Page Eleven (11) of the *Findings, Conclusions and Recommendations* should be corrected as follows, to wit:

> However, the Division did not follow the correct audit procedures for the First Audit Period on BAR 1 and BAR 3. During the First Audit Period, the *ATG*

[74] The Preliminary Challenge was filed by PROTESTANTS' ATTORNEY, Attorney at Law. The Protestants appeared pro se at the time of hearing. On November 20, 2006, PROTESTANTS' ATTORNEY filed an Entry of Appearance on behalf of the Protestants.

[75] In Footnote No. 1 of the *Addendum to Brief*, the Division notes that "… BAR 2 did not open until December 1, 2001, following the statutory amendment that eliminated the across-the-board five percent (5%) spillage and waste deduction. Therefore, no adjustments were required for this establishment."

Audit Rule provided a deduction for losses due to undetermined causes not to exceed five percent (5%) from the gross receipts liability determined by an audit.

4. The Division issued the following revisions to the proposed ATG Assessments:

	AUDIT PERIOD	ATG	INTEREST (THRU 12/31/06)	PENALTY	TOTAL
BAR 1	05/01/01-05/31/04	$ 2,992.96[76]	$ 430.46[77]	$299.29[78]	$ 3,722.71[79]
BAR 2	12/01/01-05/31/04	$ 1,242.47[80]	$ 474.35	$124.25	$ 1,841.07
BAR 3	05/22/01-05/31/04	$ 1,569.51[81]	$ 466.84[82]	$156.95[83]	$ 2,193.30[84]

[76] The Division revised the First Audit Period (05/01/01-10/31/01) to the statutorily correct five percent (5%) across-the-board deduction provided by ATG Audit Rule, before the Amendment to Section 579 of Title 37, effective November 1, 2001. The Division also revised the proposed assessment for Additional "Spoilage" during the Second Audit Period (11/01/01-05/31/04). The revisions resulted in a credit for the First Audit Period for tax ($1,837.77), which was deducted from the revised Second Audit Period tax of $4,830.72, resulting in tax due for the Audit Period of $2,992.96.

[77] The revisions for the First Audit Period resulted in an interest credit ($1,413.82), which was deducted from the revised Second Audit Period interest of $1,844.28 resulting in interest due for the Audit Period of $430.46.

[78] The revisions for the First Audit Period penalty resulted in a credit ($183.78), which was deducted from the revised Second Audit Period penalty of $483.07, resulting in penalty due for the Audit Period of $299.29.

[79] The total revisions for the First Audit Period ($3,435.37) were deducted from the total tax, interest, and penalty for Second Audit Period, $7,158.07, resulting in a total amount due for the Audit Period of $3,722.71.

[80] The Division revised the proposed ATG Assessment by allowing Additional "Spoilage" as follows:

Total Bottle Beer:	$ (468.85)
Total Keg Beer:	0.00
Total Liquor:	(7,128.04)
Total Wine:	(16.35)
Total Allowance:	$(7,613.24) reducing Additional Taxable Sales to $9,203.49, times 13.5%, equals $1,242.47 in ATG for the Audit Period

[81] *See* Note 4. The Division also revised the proposed assessment to reflect the Additional "Spoilage" during the Audit Period (05/22/01-05/31/04). The revisions resulted in a credit for the First Audit Period for tax ($341.58), which was deducted from the revised Second Audit Period tax of $1,911.09, resulting in tax due for the Audit Period of $1,569.51.

[82] The revisions for the First Audit Period resulted in an interest credit ($262.78), which was deducted from the revised Second Audit Period interest of $729.62 resulting in interest due for the Audit Period of $466.84.

[83] The revisions for the First Audit Period penalty resulted in a credit ($34.16), which was deducted from the revised Second Audit Period penalty of $191.11, resulting in penalty due for the Audit Period of $156.95.

[84] The total revisions for the First Audit Period ($638.52) were deducted from the total tax, interest, and penalty for Second Audit Period, $2,831.82, resulting in a total amount due for the Audit Period of $2,193.30.

BAR 4	05/01/01-05/31/04	$ 0.00[85]	$ 0.00	$ 0.00	$ 0.00
BAR 5	02/01/03-05/31/04	$ 1,444.95[86]	$ 551.65	$144.50	$ 2,141.10
	TOTAL	$ 7,249.89	$1,923.30	$724.99	$ 9,898.18

5. The Division issued the following revisions to the proposed STS Assessments:

	AUDIT PERIOD	STS	INTEREST (THRU 12/31/06)	PENALTY	TOTAL
BAR 1 PRESIDENT	05/01/01-05/31/04	$ 6,509.59[87]	$2,689.65	$ 650.97	$ 9,850.21
BAR 2 PRESIDENT	12/01/01-05/31/04	$ 4,342.54	$2,108.44	$ 434.25	$ 6,885.23
BAR 3 PRESIDENT	05/22/01-05/31/04	$ 3,668.17	$1,545.88	$ 366.82	$ 5,580.87
BAR 4 PRESIDENT	05/01/01-05/31/04	$ 3,503.38	$1,503.89	$ 350.34	$ 5,357.61
BAR 5 PRESIDENT	02/01/03-05/31/04	$ 3,185.81	$1,321.41	$ 318.58	$ 4,825.80
	TOTAL	$21,209.49	$9,169.27	$2,120.96	$32,499.72

[85] The audit did not result in a proposed ATG Assessment for BAR 4.

[86] The Division revised the proposed ATG Assessment for Additional "Spoilage" as follows:

Total Bottle Beer:	$(216.32)
Total Keg Beer:	0.00
Total Liquor:	(4,906.12)
Total Wine:	(35.58)
Total Allowance:	$(5,158.02) reducing Additional Taxable Sales to $10,703.33, times 13.5%, equals $1,444.95 in ATG for the Audit Period

[87] The Division revised the proposed STS Assessments for each of the Clubs using the Protestants "Spillage and Breakage" Reports for 3.2 beer, in additional to the standard deduction of five percent (5%). The Additional ATG Taxable Sales of $20,468.41 were added to the Unreported 3.2 Beer Sales of $54,340.16, and Unreported Food Sales (mostly Birthday Cakes) of $140.00 resulting in Unreported Additional Sales in the amount of $74,948.57. This same method was used to calculate STS and STR for the Audit Period.

6. The Division issued the following revisions to the proposed STR Assessments:

	AUDIT PERIOD	STR	INTEREST (THRU 12/31/06)	PENALTY	TOTAL
BAR 1	05/01/01-05/31/04	$ 74.95[88]	$ 30.63	$ 7.50	$113.08
BAR 2	12/01/01-05/31/04	$ 53.84	$ 26.08	$ 5.38	$ 85.30
BAR 3	05/22/01-05/31/04	$ 45.10	$ 18.86	$ 4.51	$ 68.47
BAR 4	05/01/01-05/31/04	$ 41.05	$ 17.55	$ 4.11	$ 62.71
BAR 5	02/01/03-05/31/04	$ 0.00[89]	$ 0.00	$ 0.00	$ 0.00
	TOTAL	$214.94	$93.12	$21.50	$329.56[90]

7. On December 18, 2006, at 11:00 a.m., a teleconference was held with the parties at the request of the undersigned to discuss the revisions to the proposed assessments.[91] Specifically, AUDITOR answered questions regarding the 3.2 Beer Audit Recap for the calculation of sales tax. The 3.2 Beer Audit Recap for BAR 1 was used as the representative sample of the 3.2 Beer Audit Recaps for all of the Clubs. There are no mathematical errors on the BAR 1 3.2 Beer Audit Recap. What appear to be mathematical errors are due to the size of the font, making some figures illegible. AUDITOR also explained that the figures under the column of the calculations titled "Est. Food Sales" are taken from the "Z-Tapes" from each of the clubs, in this case BAR 1. AUDITOR further explained that sample months are taken from BAR 1 "Z-Tapes" resulting in an estimated figure, and that is why the figure is the same for each

[88] *See* Note 14.

[89] The audit did not result in a proposed STR Assessment for BAR 5.

[90] The figures in this chart contained several small mathematical errors in addition of one or two cents. The numbers recorded here reflect the corrected figures.

[91] PROTESTANTS' ATTORNEY by telephone on behalf of the Protestants, along with PROTESTANT and ACCOUNTANT (Protestants' Bookkeeper). OTC ATTORNEY appeared by telephone on behalf of the Division, along with AUDITOR.

month. These food sales are separate from the food sales listed on the STS and STR work papers for 2003 (mostly for Birthday Cakes).

8. On January 4, 2007, a copy of BAR 1's 3.2 Beer Audit Recap, referred to by the undersigned during the December 18, 2006, teleconference, was mailed to PROTESTANTS' ATTORNEY at his request.

9. On March 7, 2007, the Protestants filed the *Preliminary Challenge of PRESIDENT to Calculations of Auditor* ("Preliminary Challenge").

In its Preliminary Challenge, the Protestants state "…we have located the auditor's 'Combined Schedule D. for only two of the five businesses." "We have not been furnished the Combined Schedule D for the remaining businesses… [W]e have not been able to determine that the auditor allowed for breakage and spillage, as directed by this Honorable Court."

The Division issued proposed ATG Assessments on four (4) of the five (5) Clubs. There was no proposed ATG Assessment on BAR 5. The Division's work papers contain only two (2) Combined Schedule D's (BAR 1 and BAR 3).

The Audit Period on these two (2) Clubs had to be split into the First Audit Period (05/01/01-10/31/01) and Second Audit Period (11/01/01-05/31/04) because of the Amendment to Section 579 of Title 37, effective November 1, 2001. The Amendment increased the gross receipts tax from Twelve percent (12%) to Thirteen and one-half percent (13.5%), provided audit parameters for each category of alcoholic beverage, and effectively eliminated the across-the-board five percent (5%) deduction from gross receipts for losses due to undetermined causes contained in the ATG Audit Rule.

In the *Findings, Conclusions and* Recommendations, the undersigned concluded that the Division had not followed the ATG Audit Rule for the First Audit Period, when it used the audit

parameters for each category of alcoholic beverages, instead of using the across-the-board five percent (5%) deduction from gross receipts for losses due to undetermined causes for BAR 1 and BAR 3. The Division did not issue a proposed ATG Assessment against BAR 4 and the Audit Period for BAR 2 and BAR 5 both have a start date after November 1, 2001. That is why the Division's work papers contain only two (2) Combined Schedule Ds.

The Division's STS work papers clearly credit BAR 4 for over-reported sales, the pertinent part of the calculation of which is as follows, to-wit:

Year	Reported Sales	Difference	Unreported 3.2 Beer Sales
2001 (May-Dec)	$ 93,145.00	($23,989.04)	($23,989.04)
2002	$ 67,846.00	$21,469.47	$ 0.00
2003	$ 44,982.00	$35,471.77	$32,952.19
2004 (Jan-May)	$ 24,090.00	$ 8,037.46	$ 8,037.46
Total	$230,063.00	$40,989.66[92]	

The Division's STS work papers for BAR 4 correctly reflect the credit for 2001, as set out above.

10. The work papers attached to Exhibit 1 of the Division's *Addendum to Brief* titled "PROTESTANT'S Adjustment Work Paper" correctly recites the difference between the proposed assessments of ATG, STS, and STR for the Clubs, as "Revised July 2006" and as "Revised November 2006." This set of work papers does not reflect credits.

11. The Division's revisions as set forth in the work papers comply with the recommendations set forth in the *Findings, Conclusions and Recommendations* issued on October 18, 2006, with the exception of the following, to-wit:

> The following items are missing from the Division's Post-Hearing Revision (Work Paper Titled Additional "Spoilage") for BAR 5:

[92] The work papers contained a one cent mathematic error in addition. The total herein reflects the corrected figure.

02/04/03	One (1) After Shock 10/10th
	One (1) B & B Fifth 10/10th
	One (1) Chambord One (1) liter 10/10th
02/14/03	Two (2) Cases of Corona
04/28/03	One (1) Case of Corona
07/04/03	Two (2) Bottles of Corona

The following items are missing from the Division's Post-Hearing Revision (Work Paper Titled Additional "Spoilage") for BAR 3:

08/07/01	4 Bud Light
08/10/01	2 Bud Light
08/31/01	3 Bud Light
01/14/03	12 Budweiser (2 were picked up instead of 12)
07/04/01	Cherry Brandy One Liter 10/10th
	Southern Comfort One Half Gallon 6/10th
	Yukon Jack One Half Gallon 5/10th
	Rio Tequila One Half Gallon 6/10th
	Kahlua One Half Gallon 7/10th

The Division properly denied the Additional ATG "Spoilage" for BAR 3 at the time of the revisions because the report was "undated." However, the Protestants' Preliminary Challenge supplies the missing date of July 4, 2001, which bridges the gap in the reports for 2001.

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

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the protests of the Clubs to the proposed ATG Assessments, STS Assessments, and STR Assessments should be sustained in part and denied in part.

It is further ORDERED that PRESIDENT'S protests to the proposed STS Assessments should be sustained in part and denied in part.

It is further ORDERED that the audits should be adjusted in accordance with the *Addendum to Findings of Fact and Conclusions of Law* herein and that the revised amounts of

tax and penalty should be fixed as the amounts due and owing, inclusive of interest, accrued and accruing.

THEREFORE, the *Findings, Conclusions and Recommendations* issued on October 18, 2006, are amended to include and incorporate the above and foregoing *Addendum to Findings, Conclusion, and Recommendations*.

SECOND ADDENDUMM TO
FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

The *Addendum to Findings, Conclusions and Recommendations* issued on March 22, 2007, in the above styled and numbered cause, comes on for consideration of the recommendations as to the amount of the deficiency which should be confirmed by an order of the Tax Commission.

On April 5, 2007, the Division, as directed by the *Addendum to Findings, Conclusions and Recommendations*, filed a *Second Addendum to Brief*, revising the proposed Mixed Beverage Tax ("ATG"), Sales Tax ("STS"), and Tourism Tax ("STR") Assessments and provided notice of the revisions to the Protestants. On April 5, 2007, the Protestants filed a *Motion for Rehearing or Reconsideration*.

Upon consideration of the *Addendum to Findings, Conclusion, and Recommendations* and the revisions to the proposed assessment(s), the undersigned finds that the following findings should be added to and incorporated in the *Findings, Conclusions and Recommendations*:

1. On April 5, 2007, the Division filed a *Second Addendum to Brief* submitting work papers for the revised ATG, STS, and STR Assessments, as directed in the *Addendum to Findings, Conclusions and Recommendations*, as follows, to-wit:

	AUDIT PERIOD		PREVIOUS TAX LIABILITY	CURRENT TAX LIABILITY	"TAX" DIFFERENCE
BAR 3[93] PRESIDENT	05/22/01-05/31/04	ATG	$1,569.51	$1,558.32	($11.19)
		STS	$3,668.17	$3,659.19	($ 8.98)
		STR	$ 45.10	$ 45.00	($ 0.10)
		TOTAL	$5,282.78	$5,262.51	($20.27)

	AUDIT PERIOD		PREVIOUS TAX LIABILITY	CURRENT TAX LIABILITY	"TAX" DIFFERENCE
BAR 5[94] PRESIDENT	02/01/03-05/31/04	ATG	$1,444.95	$1,429.29	($15.66)
		STS	$3,185.81	$3,175.93	($ 9.88)
		STR	$ 0.00	$ 0.00	$ 0.00
		TOTAL	$4,630.76	$4,605.22	($25.54)

2. The Division issued the following revisions to the proposed ATG Assessments:

	AUDIT PERIOD	ATG	INTEREST (THRU 04/30/07)	PENALTY	TOTAL
BAR 3	05/22/01-05/31/04	$1,558.32	$535.08	$155.83	$2,249.23

[93] The Division notes the following item was not removed from BAR 3:

07/04/01 Rio Tequila One Half Gallon 6/10th : The Taxpayer did not purchase a "half gallon" (1.75 liter) bottle of this brand during the period of 05/22/01 through 10/31/01 per the Division's records which were provided by licensed liquor wholesalers.…

[94] The Division notes the following items were not removed from BAR 5:

02/04/03 One (1) After Shock 10/10th: Bottle size not provided.
02/04/03 One (1) B&B Fifth 10/10th: Taxpayer did not purchase a "fifth" (.750 liter) of this brand per the information provided by licensed liquor wholesalers. The taxpayer purchased one 1 liter bottle. See Mixed Beverage Tax Audit Inventory Work paper, line 24, (page 4).
02/04/03 One (1) Chambord One (1) liter 10/10th: Taxpayer did not purchase a one liter bottle of this brand per the information provided by licensed liquor wholesalers. The taxpayer purchased one .750 liter bottle. See Mixed Beverage Audit Inventory Work paper, line 47, (page 1).…

BAR 5	02/01/03-05/31/04	$1,429.29	$616.16	$142.93	$2,188.38

3. The Division issued the following revisions to the proposed STS Assessments:

	AUDIT PERIOD	STS	INTEREST (THRU 04/30/07)	PENALTY	TOTAL
BAR 3 PRESIDENT	05/22/01-05/31/04	$3,659.19	$1,722.78	$365.92	$5,747.89
BAR 5 PRESIDENT	02/01/03-05/31/04	$3,175.93	$1,474.28	$317.60	$4,967.81

4. The Division issued the following revisions to the proposed STR Assessments:

	AUDIT PERIOD	STR	INTEREST (THRU 04/30/07)	PENALTY	TOTAL
BAR 3 PRESIDENT	05/01/01-05/31/04	$44.99	$21.04	$4.50	$70.53[95]

5. On April 5, 2007, the Protestants filed a *Motion for Rehearing or Reconsideration.* On April 11, 2007, the Protestant's motion was denied by an order issued by the undersigned.

The Division's revisions as set forth in the *Second Addendum to Brief* comply with the recommendations set forth in the *Addendum to Findings, Conclusions and Recommendations* issued on March 22, 2007.

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

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the protests of the Clubs to the proposed ATG Assessments, STS Assessments, and STR Assessments should be denied.

It is further recommended that PRESIDENT'S protests to the proposed STS Assessments should be denied.

[95] The STR on the work paper added up to $44.99 not $45.00, reducing the total by one penny.

It is further ORDERED that the revised amounts of tax and penalty should be fixed as the amounts due and owing, inclusive of interest, accrued and accruing.

THEREFORE, the *Findings, Conclusions and Recommendations* issued on October 18, 2006, are amended to include and incorporate the above and foregoing *Second Addendum to Findings, Conclusion and Recommendations*.

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.