JURISDICTION: **OKLAHOMA TAX COMMISSION DECISION**
CITE: **2008-07-29-24 / NON-PRECEDENTIAL**
ID: **P-07-143-K**
DATE: **JULY 29, 2008**
DISPOSITION: **SUSTAINED IN PART / DENIED IN PART**
TAX TYPE: **SALES**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestant, PROTESTANT appears pro se. The Compliance Division of the Oklahoma 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 depletion audit of the mixed beverage and low-point beer inventory available for sale of COMPANY d/b/a BUSINESS for the period of August 20, 2004 through April 30, 2007; the Division on June 28, 2007, proposed the assessment of sales tax, interest and penalty against Protestant, as a member of COMPANY and as an individual for the period of August 20, 2004 through March 6, 2006. Protestant timely protested the assessment by letter postmarked July 12, 2007. The letter of protest was not verified and a hearing on the protest was not requested.

On October 10, 2007, the Division referred the protest 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-07-143-K and assigned to ALJ, Administrative Law Judge.[3]

A pre-hearing conference was scheduled for November 27, 2007, by *Prehearing Conference Notice* issued November 2, 2007.[4] The pre-hearing was held as scheduled. Pursuant to the request of the parties, a hearing was scheduled for January 8, 2008, by *Notice of Hearing* issued December 4, 2007.[5] Upon *Motion for Continuance* and for good cause shown, the hearing scheduled for January 8, 2008, was stricken and rescheduled for February 13, 2008, by *Notice of Hearing* issued December 31, 2007.[6]

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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(b) and 710:1-5-29.

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

The *Brief of the Compliance Division of the Oklahoma Tax Commission* ("*Brief*") was filed February 4, 2008. Exhibits A through G were attached to the *Brief*. On the day of the hearing, Protestant, a South Carolina resident, telephoned the ALJ's Office and advised that he did not intend to attend the hearing, but rather would stand on his protest letter and documents he had already submitted for consideration. Upon advice from the Division's representative that they would also stand on their *Brief* and attached exhibits; the hearing was stricken, the record was closed and the protest was submitted for decision.[7]

FINDINGS OF FACT

Upon review of the file and records, including the *Brief* of the Division and attached exhibits, the undersigned finds:

1. COMPANY ("LLC") owned and operated a retail mixed beverage and low-point beer establishment known as BUSINESS located outside the city limits of CITY, Oklahoma. Exhibits A and B.

2. Protestant was a member of the LLC during the periods inclusive of August 20, 2004 through March 6, 2006. Exhibit A.

3. Protestant does not dispute that he was responsible for the withholding or collection and remittance of taxes during the periods he was a member of the LLC. Exhibits E and G. See, 68 O.S. 2001, § 253.

4. A depletion audit of the inventory the LLC had available for sale was conducted by the Division by and through AUDITOR; auditor, for the periods inclusive of August 20, 2004 through April 30, 2007 ("audit period"). Exhibits B and C.

5. The LLC's inventory available for sale for the audit period was provided by and through the purchase records of the LLC's wholesalers. Statement of Facts No. 3, *Brief* of the Division.

6. The LLC's prices charged for mixed drinks and low-point beer, pour sizes and glass sizes were provided on January 31, 2007, by the present member and owner of the LLC. Exhibit B. The list of principal officers, partners or members indicates that this person became a member of the LLC on March 7, 2006. Exhibit A.

7. The price list reports that no specials were run and that there had been no change in pour sizes during the audit period. Exhibit B.

8. Protestant did not provide any records for purposes of performing the depletion audit. Statement of Facts No. 4, *Brief* of the Division.

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

9. The audit determined that the LLC had under-reported its gross sales during the period Protestant was a member by a total amount of $222,029.49, inclusive of unreported 3.2 beer sales of $174,973.67 and unreported mixed beverage sales of $74,055.82. Exhibit C.

10. By letter dated June 28, 2007, the Division proposed an assessment against Protestant of state and county sales taxes in the aggregate amount of $11,118.63 on the under-reported sales, interest at fifteen percent (15%) through August 31, 2007 of $3,129.90, for a total of tax and interest due within thirty (30) days of $14,248.53, and a thirty (30) days delinquent penalty at ten percent (10%) of $1,111.88, for a total tax, interest and penalty due after thirty (30) days of $15,360.41. Exhibits C and D. See, 68 O.S. Supp. 2004, § 217(C).

11. Protestant timely protested the proposed assessment by letter postmarked July 12, 2007, asserting that "certain brands of beer were sold for .99 cents everyday and penny beer two nights a week and never sold any beer over [$]1.75 * * *." Exhibit E.

12. During the pendency of this case, Protestant submitted copies of two (2) advertisements of the LLC's daily drink specials which appeared in the CITY PAPER during 2005. Exhibit F. Protestant also submitted a written statement of other prices and the percentage of sales sold at the special prices. Protestant admits he doesn't have any records or z-tapes to support the other prices and sales percentages. Exhibit G.

ISSUE AND CONTENTIONS

The issue presented for decision is whether Protestant sustained his burden of proving by preponderance of evidence that the proposed assessment is incorrect, and in what respect.

Protestant contends that the audit does not take into consideration drink specials or the prices for a twelve ounce glass of draught beer and beer sold by the pitcher.

The Division contends that additional documentation must be provided to support revising the prices and pour sizes used in the audit.

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").[8] 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).

[8] 68 O.S. 2001, § 1350 et seq.

3. The sale[9] 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 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, notwithstanding the fact that manufacturers and importing distributors of alcoholic beverages are required to pay certain taxes.

See, 37 O.S. 2001, § 576(E).[10]

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.

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[9] 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.

[10] This subsection provides:

> The total of the retail sale price received for the sale, preparation or service of mixed beverages, ice, and nonalcoholic beverages to be mixed with alcoholic beverages shall be the total gross receipts for purposes of calculating the sales tax levied in the [Code].

See, ***Kifer v. Oklahoma Tax Commission***, 1998 OK CIV APP 34, 956 P.2d 162. See also, 37 O.S. 2001, §§ 163.14(C)[11] and 552.

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. Here, Protestant presented sufficient evidence to show the LLC offered daily drink specials. However, Protestant failed to submit sufficient evidence in support of the other drink prices and the percentage of specials to total sales.

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

DISPOSITION

THEREFORE, based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestant, PROTESTANT, be sustained in part and denied in part. It is further ORDERED that the assessed tax be revised in accordance herewith and that the resultant amount, inclusive of the statutory interest and penalty, be fixed as the deficiency due and owing.

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The *Findings, Conclusions and Recommendations* issued on March 14, 2008, in the above styled and numbered cause, comes on for consideration of a recommendation as to the amount of the deficiency which should be confirmed by an order of the Tax Commission.

The Division, as directed by the *Findings, Conclusions and Recommendations*, revised the proposed sales tax assessment and provided notice of the revisions to Protestant. Protestant has not challenged the revisions proposed by the Division.

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

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[11] 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) years and shall be open to inspection at all times by the Commission or any of its employees.

1. That notice of the revisions to the audit was filed of record in this cause on May 15, 2008.

2. That the revised audit determined the LLC had underreported its gross sales during the period Protestant was a member by a total of $206,135.44, inclusive of unreported 3.2 beer sales of $132,079.63 and unreported mixed beverage sales of $74,055.81.

3. That the revised assessment proposes a total amount due against Protestant of $15,431.12, consisting of state and county sales tax of $10,306.74, interest through June 15, 2008, of $4,093.71, and penalty of $1,030.67.

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

5. That Protestant was provided notice of the revisions.

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

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

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

THEREFORE, the *Findings, Conclusions and Recommendations* issued on March 14, 2008, is amended to include and incorporate the above and foregoing findings of fact and recommendation.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are generally applicable or are limited in time and/or effect. Non-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.