

JURISDICTION: OKLAHOMA TAX COMMISSION DECISION
CITE: 2008-08-05-05 / NON-PRECEDENTIAL
ID: P-07-115-K
DATE: AUGUST 5, 2008
DISPOSITION: DENIED
TAX TYPE: SALES / MIXED BEVERAGE / TOURISM
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Protestant, COMPANY, formerly represented by ATTORNEY, Attorney at Law, LAW FIRM, is represented by PRESIDENT, President of the Corporation. The Audit Section of the Compliance Division of the Oklahoma Tax Commission (hereinafter "Division") is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

A depletion audit of Protestant's inventory available for sale for the periods inclusive of June, 2004 through March, 2007 was conducted by the Division. As a result of the audit, the Division by letters dated June 25 and June 29, 2007 issued proposed sales tax, mixed beverage gross receipts tax and tourism tax assessments against Protestant for the audit period. Protestant timely filed a written protest to the proposed assessments and requested a hearing.

On November 29, 2007, the protest was referred to the Office of the Administrative Law Judges ("ALJ's Office") for further proceedings consistent with the Uniform Tax Procedure Code¹ and the Rules of Practice and Procedure before the Oklahoma Tax Commission². The case was docketed as Case No. P-07-115-K and assigned to ALJ, Administrative Law Judge.³

A pre-hearing conference was scheduled for September 26, 2007, by *Prehearing Conference Notice* issued August 15, 2007.⁴ For good cause shown the parties were directed to file a status report on or before November 1, 2007, by *Order Granting Motion for Continuance* issued September 25, 2007.⁵ After several agreed to continuances and filings of status reports, the parties by *Status Report* filed April 1, 2008, advised that a resolution of the protest could not be reached and requested the scheduling of a hearing.

The hearing was scheduled for May 29, 2008, by *Notice of Hearing* issued April 2, 2008. A *Motion to Withdraw as Counsel of Record* was filed by Protestant's representatives on May 7, 2008, which Motion was granted by *Order* issued May 8, 2008. The *Order* also provided notice of the

¹ 68 O.S. 2001, § 201 et seq.

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

³ OAC, 710:1-5-22(b).

⁴ OAC, 710:1-5-28.

⁵ OAC, 710:1-5-30.

scheduled hearing to Protestant's president, PRESIDENT. The hearing was held as scheduled. A representative of Protestant neither appeared at the hearing nor responded to the *Notice*. The Division called one witness: AUDITOR, Auditor who testified with respect to the conduct of the audit and the records of the Division. Division's Exhibits A through K were identified, offered and admitted into evidence. Upon conclusion of the Division's case, the record was closed and the protest was submitted for decision.⁶

FINDINGS OF FACT

Upon review of the file and records, including the tape recording of the hearing, the Exhibits received into evidence and the pleadings of the parties, the undersigned finds:

1. Protestant d/b/a BUSINESS, operated a night club located at BUSINESS ADDRESS in Oklahoma City, Oklahoma. Protestant had several officers during the audit period with each serving as a single officer. Division's Exhibit A; Field Audit Write-up⁷.

2. A depletion audit of the liquor, wine and strong beer Protestant had available for sale during the periods inclusive of June, 2004 through March, 2007 ("audit period") was performed by the Division to determine whether Protestant correctly reported its sales. The regulation pour rates of 1.5 oz. for spirits, 6 oz. for wine and 12 oz. for bottle/can beer were used in conjunction with the prices for the Oklahoma City area from the 5th Edition Area Average Price List. No allowance was given for specials and the beginning and ending inventory were unknown. Division's Exhibit B; Field Audit Write-up.

3. After allowances of five percent (5%) for bottle/can beer, sixteen percent (16%) for liquor and ten percent (10%) for wine, the audit found Protestant had under-reported its sales during the audit period by an amount of \$321,066.86. Division's Exhibit B.

4. By letter dated June 29, 2007, the Division caused to be issued against Protestant a proposed assessment of mixed beverage gross receipts tax in the amount of \$43,344.03 on the under-reported sales, interest at fifteen percent (15%) through July 31, 2007, in the amount of \$1,816.89, a \$5.00 per day delinquent report penalty on 13 delinquent mixed beverage gross receipts tax reports in the amount of \$3,900.00; for a total tax, interest and report penalty due within thirty (30) days of \$49,060.92, and a thirty (30) day delinquent penalty at ten percent (10%) in the amount of \$4,334.40; for a total tax, interest and penalty due after thirty (30) days of \$53,395.32. Division's Exhibit F.

5. The sales and tourism tax assessments are limited in scope to the results of the mixed beverage depletion audit only. Division's Exhibits C and D.

6. By letter dated June 25, 2007, the Division proposed the assessment of state and city sales taxes against Protestant in the aggregate amount of \$26,889.36, on the proposed under-

⁶ OAC, 710:1-5-39(a).

⁷ Official notice of the write-up is taken pursuant to OAC, 710:1-5-36.

reported mixed beverage sales, interest at fifteen percent (15%) through July 31, 2007, of \$9,541.55; for a total tax and interest due within thirty (30) days of \$36,430.91, and a thirty (30) day delinquent penalty at ten percent (10%) of \$2,688.93; for a total tax, interest and penalty due after thirty (30) days of \$39,119.84. Division's Exhibits C and E.

7. By letter dated June 29, 2007, the Division proposed the assessment of tourism tax against Protestant in the amount of \$321.07, on the proposed under-reported mixed beverage sales, interest at fifteen percent (15%) through July 31, 2007, of \$100.61; for a total tax and interest due within thirty (30) days of \$421.68, and a thirty (30) day delinquent penalty at ten percent (10%) of \$32.11; for a total tax, interest and penalty due after thirty (30) days of \$453.79. Division's Exhibits D and G.

8. Protestant timely protested the proposed assessments. Division's Exhibit H.

9. During the pendency of the protest, an officer of Protestant provided an ending inventory, sales summaries and a price list for the period of April 28, 2005 through October 31, 2005. The audit was revised to reflect a credit for the ending inventory and the prices provided for the period ending October 31, 2005. The pour rates established by regulation were used for the entire audit period and the area average drink prices were used for the remainder of the audit period. Division's Exhibits I, J and K.

10. The revised amounts in controversy with interest accrued through July 31, 2008, are as follows, to-wit:

Mixed Beverage Gross Receipts

Tax:	\$39,825.94
Interest:	9,054.99
Penalty:	<u>3,982.60</u>
TOTAL:	\$52,863.53

Sales

Tax:	\$24,860.54
Interest:	5,674.34
Penalty:	<u>2,486.05</u>
TOTAL:	\$33,020.94

Tourism

Tax:	\$ 296.84
Interest:	57.81
Penalty:	<u>29.68</u>
TOTAL:	\$ 384.34

Division's Exhibits I, J and K.

ISSUE AND CONTENTIONS

The issue presented for decision is whether it has been shown that the audit is incorrect.

In the letter of protest verified by PRESIDENT as President of Protestant, Protestant asserts in pertinent part:

Taxpayer protests these taxes, interest and penalties for the reason that said taxes are estimates only; and that Taxpayer's representatives mismanaged the operations of Taxpayer, failed to file timely and proper tax returns, and that Taxpayer was unaware of the failure by Taxpayer's managers.

The Division contends that Protestant has not met its burden of proving the audit is incorrect. In support of this contention, the Division asserts that Protestant has been given ample opportunities to produce records or documents to show in what respect the audit is incorrect but has failed to do so.

APPLICABLE LAW

Mixed beverage gross receipts tax is levied and imposed on total gross receipts⁸ from: (1) the sale, preparation or service of mixed beverages⁹; (2) the total retail value¹⁰ of complimentary or discounted mixed beverages; (3) ice or nonalcoholic beverages that are sold, prepared or served for the purpose of being mixed with alcoholic beverages and consumed on the premises where the sale, preparation or service occurs; and (4) any charges for the privilege of admission to a mixed

⁸ "Total gross receipts" means "the total amount of consideration received as charges for admission to a mixed beverage establishment as provided in [§ 576(A)(4)] and the total retail sales price received for the sale, preparation or service of mixed beverages, ice, and nonalcoholic beverages to be mixed with alcoholic beverages. The advertised price of a mixed beverage shall be the sum of the total retail sale price and the gross receipts tax levied thereon." 37 O.S. 2001, § 576(B)(2).

⁹ "Mixed beverages" are defined to mean "one of more servings of a beverage composed in whole or part of an alcoholic beverage in a sealed or unsealed container of any legal size for consumption on the premises where served or sold by the holder of a mixed beverage, beer and wine, caterer, or special event license", (emphasis added). 37 O.S. 2001, § 506(22). See, 37 O.S. 2001, § 576(B)(1).

"Alcoholic beverage" means "Alcohol, spirits, beer, and wine as those terms are defined herein and also includes every liquid or solid, patented or not, containing alcohol, spirits, wine or beer and capable of being consumed as a beverage by human beings, but does not include low-point beer as that term is defined in Section 163.2 of this title." 37 O.S. 2001, § 506(3).

"Beer" is defined to mean "any beverage containing more than three and two-tenths percent (3.2%) of alcohol by weight and obtained by the alcoholic fermentation of an infusion or decoction of barley or other grain, malt or similar products. 'Beer' may or may not contain hops or other vegetable products. 'Beer' includes, among other things, beer, ale, stout, lager beer, porter and other malt or brewed liquors, but does not include sake, known as Japanese rice wine." 37 O.S. 2001, § 506(5).

¹⁰ "Total retail value" means "the total amount of consideration that would be required for the sale, preparation or service of mixed beverages." 37 O.S. 2001, § 576(B)(3).

beverage establishment which entitle a person to complimentary mixed beverages or discounted prices for mixed beverages. 37 O.S. 2001, § 576(A).

In addition to the mixed beverage gross receipts tax levied and imposed under the provisions of § 576(A) of Title 37 and the excise tax levied pursuant to § 553 of Title 37, sales taxes (state, municipal and county) and tourism tax are levied and imposed on the gross receipts from the sale of 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, (emphasis added). 68 O.S. 2001, §§ 1354(A)(10), 2701, 1370 and 50012(A)(2). The gross receipts for purposes of calculating sales tax is 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. 37 O.S. 2001, § 576(C).

Pursuant to 37 O.S. Supp. 1985, § 586, the Tax Commission adopted Regulation XXX-20¹¹, which adopts a depletion method for determining the total gross receipts of a holder of a mixed beverage license or other person transacting business subject to Section 576 of the Oklahoma Alcoholic Beverage Control Act. This method accounts for the number of drinks available for sale, preparation, or service from the taxpayer's wholesale purchases and inventory on hand. It has been determined to be a reasonable method for determining the total gross receipts subject to tax under § 576(A); *Kifer v. Oklahoma Tax Commission*, 1998 OK CIV APP 34, 956 P.2d 162, wherein the Court held, "[a]n examination of § 576 makes it clear Commission must tax mixed beverages in a manner other than by simply computing sales from cash register receipts."

OAC, 710:20-5-8 provides:

(a) **Liability in general.** Every mixed beverage tax permit holder or any other person transacting business subject to the gross receipts tax shall be liable for the tax upon the gross receipts from such beverages (on the basis of the number of drinks available for sale, preparation, or service from the total alcoholic beverages received). Each permit holder or other person shall be liable for the gross receipts tax upon any and all disposition by his agents or employees or any other persons on the premises of the mixed beverage tax permit holders or other person, except upon seizure or other disposition of the alcoholic beverage by employees of the ABLE Commission, Tax Commission, or other law enforcement agencies in the execution of their official duties. [See: 37 O.S. § 576]

(b) **Audit procedures.**

(1) Upon audit of the books and records of a mixed beverage establishment for Gross Receipts Tax, it shall be assumed that spirits have been dispensed at the average rate of one and one-half fluid ounce, 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.

¹¹ Oklahoma Tax Commission Order No. 85-05-16-02. Currently codified at OAC, 710:20-5-8. Amended at 10 Ok Reg. 3831, eff. 7-12-93; 15 Ok Reg. 2800, eff. 6-25-98; 19 Ok Reg. 1507, eff. 5-25-02.

(2) Wines 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 greater or less than those set out in this Rule upon reasonable evidence of a different rate of use.

(3) An audit may be conducted to determine if the correct amount of tax payable has been collected. The taxpayer will be deemed in compliance if the audit reveals that the amount of tax collected is:

(A) For spirits, within Eighty-four percent to One Hundred Sixteen percent (84-116%) of the amount of tax payable.

(B) For wine, within Ninety percent to One Hundred Ten percent (90-110%) of the amount of tax payable.

(C) For beer sold at draft and not in original packages, within Eighty-six percent to One Hundred Fourteen percent (86-116%) of the amount of tax payable.

(D) For beer in original packages, within Ninety-five percent to One Hundred Five percent (95-105%) of the amount of tax payable.
[See: 37 O.S. Supp. 2001, § 579]

(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; or for partial 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.

(5) If an establishment was selling alcoholic beverages prior to the starting date of the audit period being used by the Commission in its audit, the establishment shall be required to furnish the Commission with a beginning inventory of all liquor, wine, and strong beer on hand if an ending inventory is offered for audit purposes. When the permittee is unable or unwilling to furnish such an inventory, then no beginning or ending inventories shall be considered for the audit period used and the audit will be conducted solely on the taxpayer's purchases made during the audit period.

CONCLUSIONS OF LAW

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

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

2. The sale, preparation or service of mixed beverages, inclusive of wine and strong beer; complimentary or discounted mixed beverages; ice or nonalcoholic beverages that are sold, prepared or served for the purpose of being mixed with alcoholic beverages; and any charges for admission to a mixed beverage establishment which entitle a person to complimentary or discounted mixed beverages are subject to mixed beverage gross receipts taxes, sales taxes and tourism taxes. 37 O.S. 2001, § 576(A) and (D); 68 O.S. 2001, §§ 1354(A)(10) and 50012(A)(2). The taxes are imposed on the total retail sales price received for the sale, preparation or service of mixed beverages, ice and nonalcoholic beverages to be mixed with alcoholic beverages, the total retail value of complimentary or discounted mixed beverages and the total amount of consideration received as charges for admission to a mixed beverage establishment which entitle the person to complimentary or discounted mixed beverages. 37 O.S. 2001, § 576(A), (B)(2) and (E).

3. The authorized method for determining the total gross receipts of a holder of a mixed beverage, caterer, or special events license, issued by the ABLE Commission is the depletion method. OAC, 710:20-5-8; *Kifer*, supra.

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. The standard of review in administrative proceedings is preponderance of the evidence. 2 Am.Jur.2d Administrative Law § 357; Oklahoma Tax Commission Order No. 91-10-17-061. That means "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which shows that the fact sought to be proved is more probable than not or best accords with reason and probability." BLACK'S LAW DICTIONARY, 1064 (5th ed. 1977).

5. Utilizing the depletion method, taxes were assessed on the number of drinks available for sale, calculated on the gross receipts that should have been generated from the sale of those drinks. Although several continuances were granted to allow Protestant time to produce records or show what its gross receipts were, Protestant has failed to do so.

6. Protestant's protests to the proposed mixed beverage gross receipts tax, sales tax and tourism tax assessments; as revised, should be and the same are hereby denied.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the protest of Protestant, COMPANY, be denied. It is further ORDERED that the amounts in controversy, inclusive of any additional accrued and accruing interest, be 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.