

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2013-07-30-03 / NON-PRECEDENTIAL
ID: P-13-023-H
DATE: JULY 30, 2013
DISPOSITION: DENIED
TAX TYPE: SALES / MIXED BEVERAGE
APPEAL: NO APPEAL TAKEN

ORDER

The above matter comes on for entry of a final order of disposition by the Oklahoma Tax Commission. Having reviewed the files and records herein, including the Findings of Fact, Conclusions of Law and Recommendations made and entered by the Administrative Law Judge on the 2nd day of July, 2013, the Commission makes the following Findings of Fact and Conclusions of Law and enters the following order.

PROCEDURAL HISTORY

On February 1, 2013, the protest file was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*¹ and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.² On February 6, 2013, the Court Clerk (“Clerk”)³ mailed the letter to the Protestants that this matter had been assigned to ALJ, Administrative Law Judge (“ALJ”), and docketed as Case Number P-13-023-H. The letter also advised the Protestants that a Prehearing Teleconference Notice would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.⁴ On February 6, 2013, OTC ATTORNEY 1, Assistant General Counsel, and OTC ATTORNEY 2, Assistant General Counsel, filed an Entry of Appearance as Co-Counsel for the Division. On February 8, 2013, the Clerk mailed the Prehearing Teleconference Notice to the Protestants’ last-known address,⁵ setting the prehearing teleconference for March 11, 2013, at 2:45 p.m. On February 11, 2013, the U.S. Postal Service returned the Introductory Letter and the Prehearing Teleconference Notice to the Clerk marked “Return to Sender/Moved Left No Address/ Unable to Forward.” On February 11, 2013, the Clerk re-mailed the Introductory Letter and Prehearing Teleconference Notice to the Protestants.⁶

¹ OKLA. STAT. ANN. tit. 68, § 201 *et seq.* (West 2001).

² OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

³ OKLA. ADMIN. CODE § 710:1-5-10(c)(2) (June 25, 1999).

⁴ *Id.*

⁵ OKLA. STAT. ANN. tit. 68, § 208 (West Supp. 2013). The Clerk mailed the notice to the Protestants, Attention: MEMBER at BUSINESS ADDRESS.

⁶ *Id.* The Clerk re-mailed to the letters to Protestants, Attention: MEMBER , LAST KNOWN ADDRESS, which is MEMBER’S last-known address.

On March 11, 2013, the ALJ held the prehearing teleconference as scheduled. Division's Counsel appeared via telephone. The Protestants did not appear.⁷ On March 12, 2013, by letter, the ALJ directed the parties to submit a Joint Proposed Scheduling Order on or before April 10, 2013.⁸ On March 12, 2013, the Division filed the Status Report that the Field Agent checked the business address, which indicated closure as of December 31, 2012.

On April 9, 2013, the Division filed a Proposed Scheduling Order. On April 9, 2013, the ALJ issued a Scheduling Order, setting the hearing for May 21, 2013, at 10:00 a.m., with position letters and/or memorandum briefs due on or before May 14, 2013.⁹ On April 15, 2013, the Clerk re-mailed the Scheduling Order to MEMBER'S last-known address.¹⁰

On May 14, 2013, the Division filed its Brief.¹¹ The Protestants did not file a position letter and/or memorandum brief. On May 21, 2013, at 10:00 a.m. the ALJ convened the hearing. The Protestants did not appear at the hearing.¹² The Division called ADMINISTRATOR, Administrator, Field Audit Section, Compliance Division of the Oklahoma Tax Commission, who testified regarding the conduct of the Field Audit, the records provided by the Protestants, and as custodian of the Division's records. The Division identified and offered Exhibits A through K, which the ALJ admitted into evidence. At the conclusion of the hearing, the ALJ held the record open for thirty (30) days in order for the Division to provide copies of the work papers for the sales tax audit, mixed beverage tax audit, and copies of LLC's federal income tax returns for the 2009 and 2010 Tax Years. After the hearing, the Division provided work papers associated with the well/call/top brand (mixed beverage audit) and copies of the LLC's federal income tax returns for the 2009 and 2010 Tax years, which were identified as ALJ Exhibits 1 through 3, respectively.¹³ On May 22, 2013, by letter, the ALJ advised the Division to supplement ALJ's Exhibit 1, to include the auditor's work papers for the weighted average of the strong beer and the work papers for the 3.2 beer calculations, as there were price changes during

⁷ The U.S. Postal Service did not return the re-mailing of either letter. The Protestants did not contact the Clerk regarding the prehearing teleconference.

⁸ The ALJ directed the Division to send out a Field Agent to check on the status of the Protestant.

⁹ The Clerk advised the Protestants of the updated address to LAST KNOWN ADDRESS, due to the returned mailings.

¹⁰ See Notes 5-6, *supra*.

¹¹ The Division did not attach exhibits to its Brief.

¹² The ALJ noted for the record that the Protestants did not contact the Division or the Clerk regarding the hearing.

¹³ **The copies of COMPANY'S federal income tax returns for the 2009 and 2010 Tax Years are not "FTI."**

the audit period.¹⁴ On May 23, 2013, OTC ATTORNEY 2 filed a Notice of Withdrawal as Co-Counsel of Record for the Division. On May 29, 2013, the Division filed a copy of the auditor's work papers for the weighted average of strong beer and the work papers for the 3.2 beer calculations, as Supplements to ALJ Exhibit 1. On May 30, 2013, the Division filed a copy of the auditor's work papers for the 3.2 beer depletion audit, as a Supplement to ALJ Exhibit 1. The ALJ admitted ALJ Exhibits 1 through 3, and the Supplements to ALJ Exhibit 1 into evidence.

By letter, the ALJ notified the parties that the record in this matter closed and the case submitted for decision on June 3, 2013. On June 17, 2013, by letter, the ALJ notified the parties that this matter was pulled from decision and the record re-opened for the Division to file all supporting work papers regarding the detail on monthly admissions reflected by Division's Exhibit I, 402.46 entitled "Taxable Admissions" on or before July 8, 2013, at which time the ALJ would reclose the record and re-submit this matter for decision.¹⁵ On June 19, 2013, the Division filed the auditor's work papers on "Taxable Admissions," as a supplement to ALJ Exhibit 1, which the ALJ admitted into evidence. By letter, the ALJ notified the parties that the record re-closed and the case re-submitted for decision on June 20, 2013.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, and the Division's Brief, the undersigned finds:

1. On January 14, 2004, the LLC ("LLC") filed a Business Registration for "BUSINESS" located at BUSINESS ADDRESS ("Business Address"). At the time of the audit, LLC was the owner of "BUSINESS" and COMPANY, ("COMPANY") was the owner of LLC. MEMBER was the Managing Member ("Managing Member") owning a fifty percent (50%) interest in LLC and COMPANY.¹⁶

2. On December 20, 2011, the Division mailed the audit notification letter to the LLC.¹⁷

3. On January 9, 2012, the Division held the opening conference via telephone with the Managing Member.¹⁸

¹⁴ The Clerk enclosed copies of the exhibits for the Protestants.

¹⁵ The letter mailed to the parties incorrectly references the Division's *Motion to Dismiss* in a companion case, P-13-022-H. The ALJ attached a copy of Division's Exhibit I, 402.46 to the letter.

¹⁶ Testimony of Administrator. Division Exhibit A. Managing Member signed the Business Registration on behalf of LLC. See Note 19, *infra*. See also ALJ Exhibits 2 and 3.

¹⁷ *Id.* Division Exhibit B.

4. On January 10, 2012, the Division e-mailed the records request and audit forms to the Managing Member.¹⁹

5. On January 29, 2012, the Division received the completed Statute of Limitations Waiver Agreement.²⁰

6. On February 24, 2012, Managing Member delivered the records requested to the Tax Commission's Tulsa office.²¹

7. Managing Member provided the Division with a Beginning and Ending Inventory, Price and Pour List for Use in a Mixed Beverage Depletion Audit and 3.2 Beer Depletion Audit, Brand Classification for Use in a Mixed Beverage Depletion Audit, Schedule of Non-Resale Items Purchased Tax Exempt from Sam's Club (\$1,678.79), and a Schedule of Red Bull (\$7,492.65), and Soda & Water (\$12,345.92) sold during the STS FA Period.²²

8. On April 26, 2012, the Division conducted a "Pour Test" at the Business Address to verify the two-ounce (2oz.) pour for Well/Call/Top Brand drinks. The Division allowed the two-ounce (2oz.) pour, instead of the standard one and one-half ounce (1.5oz.) pour. During the visit, the auditor observed two (2) pool tables owned by LLC, which did not have Tax Commission Coin Device Decals. The auditor sealed the pool tables and ordered a penalty letter on May 3, 2012.²³

¹⁸ The court file contains an audit packet, the Division forwarded as part of the protest file on this matter. The ALJ is taking judicial notice of the materials contained in the court file to complete the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See Division Exhibits F through K. See *also* ALJ Exhibit 1 and Supplements thereto.

²³ See Note 18, *supra*. COMPANY's federal returns for the 2009 and 2010 Tax Year reflect "Vending Income" of \$2,500.00 and \$2,287.00, respectively. There were other vending machines on the premises, but the auditor verified the vending machines were not owned by LLC and had current decals.

9. On June 22, 2012, the Division issued a mixed beverage tax (“ATG”) assessment against LLC for the field audit period (Audit 4579) of January 1, 2009 through December 31, 2011 (“ATG FA Period”),²⁴ as follows, to-wit:

Tax Due:	\$66,102.69*
Interest @ 15% through 07/31/2012:	5,242.94
Tax & Interest due within 30 Days:	\$71,345.63
30 day delinquent Penalty @ 10%:	<u>6,610.27</u>
Tax, Interest & Penalty due after 30 Days:	\$77,955.90

The ALJ has summarized the ATG FA in pertinent parts,²⁵ as follows, to-wit:

TABLE A
ATG DEPLETION AUDIT

		Less	Allowance	Adjusted Sales
Total Bottle Beer	\$ 19,349.79	0.05	\$ 967.49	\$18,382.30
Total Keg Beer	\$ 0.00	0.14	\$ 0.00	\$ 0.00
Total Liquor	\$656,049.23	0.16	\$104,967.88	\$551,081.35
Total Wine	\$ 10,424.43	0.10	\$ 1,042.44	\$ 9,381.99
Total Beverage	\$685,823.45			
Total Allowance	\$106,977.81			
Adjusted Beverage	\$578,845.64			
Admissions	\$154,753.95 ²⁶			
Net Total	\$733,599.59			
Less Total Reported	\$243,950.00			
Additional Taxable	\$489,649.59			
Additional Tax @ 13.5%	\$66,102.69*			

10. On June 22, 2012, the Division issued a sales tax (“STS”) assessment against the Protestants for the field audit period (Audit Number 4579) of January 1, 2009 through December 31, 2011 (“STS FA Period”),²⁷ as follows, to-wit:

Tax Due:	\$53,382.29
Interest @ 15% through 07/31/2012:	9,854.67

²⁴ Testimony of Administrator. See Division Exhibits C and E. See also ALJ Exhibit 1 and Supplements thereto. The price for a bottle of strong beer changed during the audit period from \$3.00 to \$3.50. The auditor determined the weighted average for strong beer was \$2.49. See Supplement to ALJ Exhibit 1, filed May 29, 2013 at 4.

²⁵ *Id.*

²⁶ See ALJ Exhibit 1, Supplement filed June 19, 2013. See also ALJ Exhibits 2 and 3.

²⁷ See Note 24, *supra*. See also Note 18, *supra*. The court file contains a copy of the sales tax assessment against COMPANY.

Tax & Interest due within 30 Days: \$63,236.96
 30 day delinquent Penalty @ 10%: 5,338.30
 Tax, Interest & Penalty due after 30 Days: \$68,575.26

The ALJ has summarized the STS FA in pertinent parts,²⁸ as follows, to-wit:

TABLE B
3.2 BEER DEPLETION
BOTTLES/CANS

A	B	C	D	E	F	G	H
BEG. INV./2009	CASES LDF	CASES A&B	CASES TOTAL	BOTTLES Cs X 24	\$1.39 ²⁹ PER BOTTLE	5.00% VARIANCE	BTL/CAN SALES
TOTALS	348	1,107	1,455	36,145	\$50,241.55	\$2,512.08	\$ 47,729.47
2010	351	1,130	1,481	35,544	\$49,406.16	\$2,470.31	\$ 46,935.85
2011/END INV.	259	861	1,120	25,969	\$36,096.91	\$1,804.85	\$ 34,292.06
GRAND TOTAL	958	3,098	4,056	97,658 ³⁰	\$135,744.62	\$6,787.23	\$128,957.39

TABLE C
3.2 BEER DEPLETION DRAFT BEER

A	B	C	D	E	F	G	H	I	J
BEG. INV./2009	1/2 KEGS LDF	1/6 KEGS LDF	1/2 KEGS A&B	1/6 KEGS A&B	TOTAL DRAFT OZ'S @ 43.92 OZ. ³¹ (INCLUDES PITCHERS)	TOTAL DRAFT	TOTAL DOLLAR DRAFT@ \$4.16 ³² (INCLUDES PITCHERS)	14% VARIANCE	DRAFT SALES
TOTALS	44	0	59	0	212,883	4,847	\$20,163.78	\$2,822.93	\$17,340.85
2010	49		48		192,448	4,382	\$18,228.23	\$2,551.95	\$15,676.27
2011/END INV.	24		30		109,395	2,491	\$10,361.64	\$1,450.63	\$ 8,911.01
G. TOTAL	117		137		514,726	11,720 ³³	\$48,753.65	\$6,825.51	\$41,928.14

²⁸ Division Exhibit E. See ALJ Exhibit 1 and Supplements filed thereto.

²⁹ See ALJ Exhibit 1, Supplement filed May 29, 2013 at 3.

³⁰ The Protestants' 3.2 beer wholesalers provided the purchase information, which the auditor divided by 12 for each year. See ALJ Exhibit 1, Supplement filed May 30, 2013 at 402.42.

³¹ See Note 29, *supra*.

³² *Id.*

³³ *Id.*

TABLE D
TOTAL 3.2 BEER DEPLETION

A	B	C	D	E	F	G	H	I
YEAR	BTL/CAN SALES	DRAFT SALES	TOTAL 3.2 BEER SALES PER AUDIT	RED BULL SALES	SODA/MISC. SALES	TOTAL TAXABLE SALES PER AUDIT	REPORTED SALES (LESS ATG SALES)	DIFFERENCE (OVER REPORTED SALES)
2009	\$47,729.47	\$17,340.86	\$65,070.33	\$2,273.00	\$4,012.40	\$71,355.73	\$57,770.00	\$13,585.73
2010	\$46,935.89	\$15,676.29	\$62,612.18	\$2,020.60	\$4,321.12	\$68,953.90	\$50,442.00	\$18,511.90
2011	\$34,292.03	\$8,911.02	\$43,203.05	\$3,199.05	\$4,012.40	\$50,414.50	\$46,008.00	\$ 4,406.50
G.TOTAL	\$128,957.39	\$41,928.17	\$170,885.56	\$7,492.65³⁴	\$12,345.92³⁵	\$190,724.13	\$154,220.00	\$36,504.13³⁶

UNDER-REPORTED 3.2 BEER	\$ 36,504.13*
UNDER-REPORTED ATG SALES:	\$334,895.64 ³⁷
TAXABLE ADMISSIONS FOR 2009:	\$ 95,830.00 ³⁸
TAXABLE ADMISSIONS FOR 2010:	\$ 85,001.00 ³⁹
TAXABLE ADMISSIONS FOR 2011:	\$ 72,864.00 ⁴⁰
TOTAL UNDER-REPORTED SALES:	<u>\$625,094.77⁴¹</u>
NON-RESALE ITEMS PURCHASED EXEMPT FROM SAM'S CLUB	\$ 1,678.79⁴²
GRAND TOTAL UNDER-REPORTED SALES	\$626,773.56
TIMES COMBINED SALES TAX RATE ⁴³ OF 8.517%:	\$ 53,382.30⁴⁴

³⁴ Division Exhibit K. See Note 23, *supra*.

³⁵ *Id.*

³⁶ See ALJ Exhibit 1, Supplement filed May 30, 2013 at 2.

³⁷ See Note 28, *supra*.

³⁸ *Id.* See ALJ Exhibit 1, Supplement filed June 19, 2013. See *also* ALJ Exhibits 2 and 3.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See Note 28, *supra*.

⁴² See Note 24, *supra*.

⁴³ State (4.5%) plus City of Tulsa (3.0%) plus Tulsa County (1.017%) equals 8.517%.

⁴⁴ The Division's calculation is off by a penny (\$0.01) due to rounding. See Note 28, *supra*.

11. On August 20, 2012, the Division received a timely filed protest to the proposed sales tax and mixed beverage tax assessments (Audit 4579 and ATG Permit 409856).⁴⁵

12. From the record, it does not appear that the Division issued a proposed sales tax assessment for the STS FA Period against the Managing Member.

13. The protestant had reported mixed beverage sales of \$243,950.00 during the audit period.⁴⁶

14. Protestant had a cost of \$108,052.63 for beverages subject to mixed beverage tax.⁴⁷

CONCLUSIONS OF LAW

A. MIXED BEVERAGE TAX

1. The Oklahoma Legislature vested the Tax Commission with jurisdiction over the parties and subject matter of this proceeding.⁴⁸

2. 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)⁴⁹ 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.⁵⁰

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

⁴⁵ *Id.* Division Exhibit D. The envelope is post-marked August 17, 2012 and file-stamped August 20, 2012. The Managing Member does not state the basis for the protest.

⁴⁶ Division’s Exhibit E

⁴⁷ See Supplement to ALJ’s Exhibit 1, filed June 19, 2013.

⁴⁸ See OKLA. STAT. ANN. tit. 68, § 203 (West Supp. 2013). See also OKLA. STAT. ANN. tit. 68, § 221(C) (West Supp. 2013).

⁴⁹ See OKLA. ADMIN. CODE § 710:20-5-8(a) (May 25, 2002). See also OKLA. ADMIN. CODE § 710:20-5-5 (May 25, 2002).

⁵⁰ OKLA. STAT. ANN tit. 37, § 576 (West 2009).

*Kifer*⁵¹ 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.”⁵²

4. The Oklahoma Legislature authorized the Tax Commission 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.⁵³

Rules promulgated pursuant to the Administrative Procedures Act⁵⁴ are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court.⁵⁵ 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.⁵⁶

5. 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”)⁵⁷:

- (1) Upon audit of the books and records of a mixed beverage establishment for Gross Receipts Tax, it shall be assumed that spirits⁵⁸ have been dispensed at the average rate of one and one-half fluid ounce (1 and ½ oz.),⁵⁹

⁵¹ *Kifer v. Oklahoma Tax Commission*, 1998 OK CIV APP 34, 956 P.2d 162.

⁵² *Id.* at ¶ 1.

⁵³ OKLA. STAT. ANN. tit. 37, § 579 (West 2009). See Note 47, *supra*. See also OKLA. STAT. ANN. tit. 37, § 501 *et seq.* (West 2009).

⁵⁴ OKLA. STAT. ANN. tit. 75, § 250 *et seq.* (West 2002).

⁵⁵ OKLA. STAT. ANN. tit. 75, § 306(C) (West 2002).

⁵⁶ OKLA. STAT. ANN. tit. 75, § 308.2(C) (West 2002).

⁵⁷ See OKLA. ADMIN. CODE § 710:20-5-8(b) (May 25, 2002).

⁵⁸ OKLA. STAT. ANN. tit. 37, § 506(38) (West 2009):

“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;

⁵⁹ The Division verified the two-ounce (2oz.) pour claimed by the Managing

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) Wines⁶⁰ 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.

...

7. Oklahoma Statutes provide for the collection of interest and penalty on delinquent tax.⁶¹ “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. . . .”⁶²

8. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.⁶³

9. Section 576(A)(4) of title 37 of the Oklahoma Statutes imposes the mixed beverage tax on admission charges “which entitle a person to complimentary mixed beverages or discounted prices for mixed beverages.” The Oklahoma Tax Commission has promulgated an administrative rule, OAC 710:20-5-5(a)(6) to provide for the determination of when an admission charge can be said to “entitle a person to complementary mixed beverages or discounted prices for mixed beverages.” The rule provides that a gross profit ratio of less than 350% (3 ½ times cost) shall be considered a lower price than can reasonably be expected without an admission charge.

DISCUSSION

Member on the Pour Statement, instead of the statutory one and one-half ounce (1 1/2 oz.) pour for spirits. See Note 24, *supra*.

⁶⁰ OKLA. STAT. ANN. tit. 37, § 506(40) (West 2009):

“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 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;

⁶¹ OKLA. STAT. ANN. tit. 68, § 217 (West Supp. 2013).

⁶² OKLA. STAT. ANN. tit. 68, § 217(G) (West Supp. 2013).

⁶³ See *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com’n*, 1988 OK 91, 768 P.2d 359.

For the ATG FA Period, the Division followed the audit procedures, as summarized by Table A. After deducting sixteen percent (16%) for spirits, ten percent (10%) for wine, and five percent (5%) for strong beer (bottles only), and fourteen percent (14%) for beer sold at draft and not in original packages,⁶⁴ the Division determined that Protestant was not in compliance and had under-reported mixed beverage sales during the ATG FA Period and had failed to report the charge for admission into “BUSINESS.” The Division used the Price List and Pour Statement signed by the Managing Member, deducted the Protestants’ Beginning and Ending Inventory, and deducted reported ATG sales during the ATG FA Period.⁶⁵

The proposed assessment for mixed beverage tax includes an amount attributable to mixed beverage tax on \$154,753.95 of admission charges. The auditor determined that these admission charges were subject to mixed beverage tax based on the Tax Commission Rule OAC 710:20-5-5(a)(6) which provides that admissions charges are subject to mixed beverage tax when there is a gross profit ratio of less than 350% (3 ½ times cost). In making this determination it appears that the auditor utilized the reported mixed beverage sales of protestant which were \$243,950.00 and were less than 3 ½ times the protestant’s cost of \$108,052.63. The depletion audit indicated that, after adjustment for statutory and rule allowances, the mixed beverage sales for the audit period were \$578,845.64 which is greater than 3 ½ times protestant’s cost of \$108,052.63. The rule does not specify whether the gross profit ratio should be calculated by using the reported sales or by using the amount of mixed beverage sales estimated by the depletion audit after providing for the statutory and rule allowances. We find that the estimated sales as determined by the depletion audit after providing for the statutory and rule allowances is the proper measure of sales to use in order to compute the gross profit ratio when determining if admission charges are taxable pursuant to OAC 710: 20-5-5(a)(6).

B. SALES TAX

10. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code (“Sales Tax Code”).⁶⁶ The Sales Tax Code levies “upon all sales,⁶⁷ not otherwise

⁶⁴ See Note 24, *supra*.

⁶⁵ *Id.* See ALJ Exhibit 1 and Supplements filed thereto. See also ALJ Exhibits 2 and 3.

⁶⁶ OKLA. STAT. ANN. tit. 68, § 1350 *et seq.* (West 2008).

⁶⁷ OKLA. STAT. ANN. tit. 68, § 1352(22)(a) and (c) (West 2008):

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

exempted . . . an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds⁶⁸ of each sale of . . . tangible personal property. . . .”⁶⁹ Oklahoma Statutes authorize incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.⁷⁰

11. The tax levied by the Oklahoma Sales Tax Code⁷¹ shall be paid by the consumer or user to the vendor⁷² 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.⁷³

12. Every person required to collect any tax imposed by the Sales Tax Code, and in the case of a limited liability company, all managers and members under a duty to collect and remit taxes for the limited liability company shall be liable for the tax. If no managers or members have been specified to be under the duty of withholding and remitting taxes, then all managers and members shall be liable for the sales tax.⁷⁴

13. 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

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

...
c. the sale, gift, exchange, or other disposition of admission, dues, or fees to clubs, places of amusement, or recreational or athletic events or for the privilege of having access to or the use of amusement, recreational, athletic or entertainment facilities,

⁶⁸ OKLA. STAT. ANN. tit. 68, § 1352(12) (West 2008).

⁶⁹ OKLA. STAT. ANN. tit. 68, § 1354(A)(1) (West 2008).

⁷⁰ OKLA. STAT. ANN. tit. 68, § 1370 *et seq.* (West 2008) and OKLA. STAT. ANN. tit. 68, § 2701 (West Supp. 2013).

⁷¹ See Note 65, *supra*.

⁷² “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(28)(a) (West 2008).

“Person” is defined to include “any individual” or “[any] corporation.” OKLA. STAT. ANN. tit. 68, § 1352(18) (West 2008).

⁷³ OKLA. STAT. ANN. tit. 68, § 1361(A) (West 2008). See also *Wal-Mart Stores, Inc. v. Oklahoma Tax Commission*, 1991 OK CIV APP 73, 817 P.2d 1281.

⁷⁴ *Id.*

exempted by the Sales Tax Code.⁷⁵

14. 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.⁷⁶

15. The Division used the depletion method to audit the sale of 3.2 beer.⁷⁷ 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 tax.⁷⁸

16. 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.⁷⁹

17. Oklahoma Statutes provide for the collection of interest and penalty on delinquent tax.⁸⁰ “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. . . .”⁸¹

⁷⁵ OKLA. STAT. ANN. tit. 68, § 1354(A)(10) (West 2008).

⁷⁶ OKLA. ADMIN. CODE § 710:65-1-4 (June 26, 1994).

⁷⁷ OKLA. STAT. ANN. tit. 37, § 163.2(1) (West 2009):

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 ($\frac{1}{2}$ 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;

⁷⁸ The Division uses the same depletion method for mixed beverages subject to gross receipts tax. See OKLA. STAT. ANN. tit. 37, § 579 (West 2009) and OKLA. ADMIN. CODE § 710:20-5-8 (May 25, 2002).

⁷⁹ OKLA. ADMIN. CODE § 710:65-3-30 (July 1, 2008). See OKLA. ADMIN. CODE § 710:65-3-31 (June 26, 1994).

⁸⁰ See Note 60, *supra*.

⁸¹ See Note 61, *supra*.

18. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.⁸²

DISCUSSION

For the STS FA Period, the Division followed the correct audit procedures. The ALJ summarized the 3.2 beer depletion audit and the STS FA on Tables B, C, and D herein.⁸³

ORDER

The protest to the proposed sales tax assessment is denied. The protest to the proposed mixed beverage tax assessment is remanded to the Office of the Administrative Law Judge with directions to require the Division to revise the mixed beverage tax assessment consistent with the findings set out in this order and to allow the protestant an opportunity to respond to such revision.

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.

NOTE: The distinction between a Commission Order designated as “Precedential” or “Non-Precedential” has been blurred because all OTC Orders resulting from cases heard by the Office of Administrative Law Judges are now published, not just “Precedential” Orders. *See* OKLA. STAT. ANN. tit.68, § 221(G) (West Supp. 2009) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002). *See also* OTC Orders 2009-06-23-02 and 2009-06-23-03 (June 23, 2009), which also conclude the language of the Statute is “clear and unambiguous.”

⁸² See Note 62, *supra*.

⁸³ See Notes 28-44, *supra*.