

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2013-08-20-05 / NON-PRECEDENTIAL
ID: P-12-134-H
DATE: AUGUST 20, 2013
DISPOSITION: DENIED
TAX TYPE: SALES / MIXED BEVERAGE
APPEAL: NO APPEAL TAKEN

ORDER

OWNER, d/b/a BUSINESS (“Protestant”) appears pro se.¹ The Field Audit Section, Compliance Division (“Division”) of the Oklahoma Tax Commission appears through OTC ATTORNEY, First Deputy General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On July 9, 2012, the protest file was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*² and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.³ On July 10, 2012, the Court Clerk (“Clerk”)⁴ mailed the letter to the Protestant that this matter had been assigned to ALJ, Administrative Law Judge (“ALJ”), and docketed as Case Number P-12-134-H. The letter also advised the Protestant 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*.⁵ On July 10, 2012, OTC ATTORNEY filed an Entry of Appearance as Counsel for the Division. On July 13, 2012, the Clerk mailed the Prehearing Teleconference Notice to the last-known address⁶ of the Protestant, setting the prehearing teleconference for August 7, 2012, at 3:00 p.m.

¹ “[P]ro 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 (9th ed. 2009), available at <http://web2.westlaw.com>.

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

³ OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

⁴ OKLA. ADMIN. CODE § 710:1-5-10(c)(2) (June 25, 1999).

⁵ *Id.*

⁶ OKLA. STAT. ANN. tit. 68, § 208 (West Supp. 2013). The Clerk mailed the notice to the Protestant at TEXAS ADDRESS.

On August 7, 2012, at 3:00 p.m., the ALJ conducted the prehearing teleconference as scheduled. On August 8, 2012, by letter, the ALJ advised the parties that a status report was to be filed on or before September 7, 2012.

On September 7, 2012, the Division filed the Status Report advising that the Protestant provided some of the records requested, but the parties needed additional time for the production and review of the remaining records. On September 7, 2012, the ALJ advised the parties to file a status report on or before October 8, 2012.

On October 8, 2012, the Division filed the Status Report advising it needed additional time to review the records produced by the Protestant. On October 8, 2012, the ALJ advised the parties to file a status report on or before November 7, 2012.

On November 7, 2012, the Division filed the *Notice of Mixed Beverage and Sales Tax Revisions* (“*First Revisions*”), with work papers attached as Exhibits A and B. On November 8, 2012, the ALJ advised that the Protestant could file a response to the *First Revisions* on or before December 7, 2012 and the parties were to file a status report on or before January 7, 2013.

The Protestant did not file a response to the *First Revisions* on or before December 7, 2012.

On January 7, 2013, the Division filed the Status Report advising this matter could not be resolved without a hearing. On January 8, 2013, by letter, the ALJ advised the parties this matter was set for hearing on February 28, 2013, at 9:30 a.m., with position letters and/or memorandum briefs due on or before February 21, 2013.

On February 19, 2013, the Division filed its Position Letter, with Exhibits A through K, attached thereto. On February 26, 2013, the Protestant filed a Motion/Application for Continuance due to a travel conflict. On February 27, 2013, the ALJ issued an Order Granting the Motion for Continuance. The ALJ struck the hearing scheduled for February 28, 2013 from the docket and reset the hearing for April 1, 2013, at 1:30 p.m.

On April 1, 2013, at 1:30 p.m., the ALJ convened an open hearing.⁷ The parties waived Opening Statements. The parties, through OTC ATTORNEY, announced that the Protestant had a sales journal, ending inventory, and other additional records available for the Division’s review, including statements from bartenders, percentage of liquor into multi-liquor drinks, and actual beer invoices, which potentially could affect both the proposed mixed beverage sales and sales tax assessments. The Protestant requested sixty (60) days to produce the records. OTC ATTORNEY also advised that the Division had not allowed the variance on 3.2 beer.⁸ The Protestant testified on his own behalf about the running of the business, records, and the Division’s audit. The Division called AUDITOR, Field Auditor, Field Audit Section,

⁷ The Protestant waived confidentiality. See OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2013).

⁸ See Note 67, *infra*.

Compliance Division of the Oklahoma Tax Commission, who testified regarding her conduct of the Field Audit, the insufficiency of records provided by the Protestant, and as custodian of the Division's records.

The Division identified and offered Exhibits A through L, which the undersigned admitted into evidence without objection. The parties waived Closing Arguments. At the conclusion of the hearing, the ALJ held the record open in order for the Protestant to provide the additional records announced by OTC ATTORNEY at the beginning of the hearing and for the Division to issue its revisions. On April 2, 2013, by the letter, the ALJ confirmed the announcements at the end of the hearing, as follows, to-wit:

- Protestant to provide additional records to the Division for review on or before **May 31, 2013**.
- Division to file a *Status Report* with the Court on or before **June 3, 2013**, indicating whether Protestant has provided additional records.
- If Protestant has provided records, the Division is directed to file *Notices of Revisions* on or before **July 8, 2013**. Such revision to the Sales Tax Audit to include the underlying work papers as to the particular categories (estimated 3.2 beer sales, admissions and other sales) attached as Exhibits to the Revision.
- The Division is directed to file copies of the mixed beverage reports for the Audit Period on or before **July 8, 2013**. Copies of the ATG reports will be marked as ALJ's *Exhibit 1* for purposes of the record.
- After the *Notices of Revisions* are filed and reviewed, the parties will be notified by letter when the record is closed and the case submitted for decision.

On April 3, 2013, the Division filed the Submission of ALJ Exhibit 1, with copies of ATG Reports for August 2009 through November 2011.⁹ The ALJ admitted ALJ Exhibit 1 into evidence.

On June 3, 2013, the Division filed the Status Report advising the ALJ that the Protestant had provided records, which the Protestant sent for the Field Auditor's review. On June 20, 2013, the Division filed the *Notice of Second Mixed Beverage and Sales Tax Revisions* ("Second Revisions"), with Exhibits A through C, attached thereto, which the ALJ identified as ALJ Exhibit 2 and admitted into evidence. By letter, the ALJ acknowledged the filing of the *Second Revisions*, the closing of the record and that the case submitted for decision on June 21, 2013.

FINDINGS OF FACT

⁹ The Division noted that there were differences between the admissions amounts reflected on the work papers for the months of October 2009, August 2010, September 2010, and December 2010, which the Field Auditor corrected for the revision.

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, Division's Brief, and Division's *Second Revisions*,¹⁰ the undersigned finds:

1. The Protestant operated an establishment located at BUSINESS ADDRESS, under sales tax permit number ### and mixed beverage permit number ### during August 1, 2009 through November 30, 2011 ("FA Period").¹¹ The Protestant sold mixed beverages, wine, strong beer, and 3.2 beer. The Protestant did not sell draft beer during the FA Period.¹²

2. On February 10, 2012, the Division advised the Protestant that his mixed beverage ("ATG") bond might be available for return because the business was no longer in operation.¹³ The Division advised the Protestant to provide supplemental ATG Reports or an explanation of shortage, including ending inventory, and its disposition, if applicable, within thirty (30) days.¹⁴

3. On March 8, 2012, the Protestant provided the Division with his Ending Inventory (\$4,556.96).¹⁵

4. The Field Auditor calculated the sales to purchases (costs) ratio after giving consideration for the Ending Inventory as 1.07. Noting there was a \$1,500.00 cash bond in place, the Field Auditor calculated the expected ATG sales, offset the calculation by reported sales, and gave an allowance for Ending Inventory.¹⁶

¹⁰ ALJ Exhibit 2.

¹¹ Division Exhibit C.

¹² *Id.* Testimony of Field Auditor.

¹³ *Id.* The Protestant had paid a cash bond of \$1,500.00, as security, when he received the mixed beverage permit.

¹⁴ *Id.* Division Exhibit A. The Protestant reported mixed beverage sales of \$144,007.00 during the FA Period, but purchased \$139,688.47 in liquor, which is a ratio of 1.03 (sales divided purchases).

¹⁵ *Id.* Division Exhibit B. Because the Protestant estimated losses during the FA Period for breakage, theft, etc., the Division disallowed the losses without documentation to support the losses.

¹⁶ *Id.* See Note 11, *supra*.

5. On May 18, 2012, the Division issued a ATG assessment against Protestant for the FA Period of August 1, 2009 through November 30, 2011 (“ATG FA Period”),¹⁷ as follows, to-wit:

Tax Due:	\$48,973.10
Interest @ 15% through 06/30/2012:	3,875.00
Tax & Interest due within 30 Days:	\$52,848.10
30 Day Delinquent Penalty @ 10%:	<u>4,897.31</u>
Tax, Interest & Penalty due after 30 Days:	\$57,745.41

6. On May 18, 2012, the Division issued a sales tax (“STS”) assessment against Protestant for the FA period of August 1, 2009 through November 30, 2011 (“STS FA Period”),¹⁸ as follows, to-wit:

Tax Due:	\$32,195.28
Interest @ 15% through 06/30/2012:	2,553.57
Tax & Interest due within 30 Days:	\$34,748.85
30 day delinquent Penalty @ 10%:	<u>3,219.53</u>
Tax, Interest & Penalty due after 30 Days:	\$37,968.38

7. On June 26, 2012, by facsimile, the Division received a timely filed protest to the proposed ATG and STS assessments for the FA Period. The Protestant states the basis of the protest in pertinent parts, “...We never had a field Audit, Inventory Audit, or records Audit. We are asking these (2) files to be re-evaluated and corrected at once. You cannot charge us off assumptions of the amount of liquor purchased.”¹⁹

8. On July 30, 2012, OTC ATTORNEY sent the Protestant a letter with a thirty-three (33) item document request, as well as a questionnaire.²⁰

9. On September 10th, October 9th, and November 5th, the Protestant provided documents and the questionnaire.²¹

¹⁷ *Id.* See Division Exhibit E.

¹⁸ *Id.* See Division Exhibit D.

¹⁹ *Id.* See Division Exhibit F.

²⁰ Division Exhibit G.

²¹ Testimony of Field Auditor. See Division Exhibit L. The letter states as follows, to-wit:

10. The Field Auditor revised the ATG FA utilizing the prices and pour sizes provided by the Protestant. The STS FA was also revised utilizing the underreported ATG sales from the revised ATG FA, depletion of 3.2 beer purchases, admissions, games, and other miscellaneous sales provided by the Protestant.²²

11. On November 7, 2012, the Division filed *First Revisions*, with work papers attached thereto, as Exhibit A and B.²³

12. Based upon the *First Revisions*, the proposed ATG FA and STS FA assessments were revised,²⁴ as follows, to-wit:

ATG Tax Due:	\$29,933.01
Interest @ 15% through 12/31/2012:	4,613.43
30 day delinquent Penalty @ 10%:	<u>2,993.30</u>
Tax, Interest & Penalty:	\$37,539.74
STS Tax Due:	\$38,425.89
Interest @ 15% through 12/31/2012:	5,922.39
30 day delinquent Penalty @ 10%:	<u>3,842.59</u>
Tax, Interest & Penalty:	\$48,190.87

-
1. The price for domestic beer ever Friday was 25 cents, Cheap liquor prices were a dollar for well drinks such as: McCormick gin, Tequila, Vodka, and rum.
 2. All drink distributed in my establishment were free pour using a 1.5 shot glass served in 16oz and 9oz cup.
 3. Admission Charge was \$4.00 on Saturday, free on Thursday and Friday.
 4. Sale tax and mixed beverage tax was included in all sale in the establishment where appropriate.

This is the bulk of my files, I will send bank statement and the rest of my books in a few days I am having them sent to me.

²² *Id.* See Division Exhibits H and I.

²³ *Id.* See Procedural History herein. The Division notes, "The *Notice* contains a typographical error in the amount of sales tax. As shown on the work papers attached to the *Notice* as Exhibit "B", the amount of sales tax is \$38,425.89 not the \$8,425.89 reflected on the first page of the *Notice*. In all other respects, the text of the *Notice* correctly reflects the auditor's work papers."

²⁴ Division Exhibit J.

13. On November 8, 2012, the ALJ advised the Protestant that a response to the *First Revisions* could be filed on or before December 7, 2012, and the parties are directed to file a status report on or before January 7, 2012.²⁵

14. The Protestant did not file a response to the *First Revisions*.²⁶

15. On June 20, 2013, the Division filed its *Second Revisions*, with the work papers attached thereto, as Exhibits A and B,²⁷ as follows, to-wit:

The ALJ has summarized the *Second Revisions* in pertinent parts,²⁸ as follows, to-wit:

TABLE A
ATG DEPLETION AUDIT

	DEPLETION	LESS	ALLOWANCE	ADJUSTED SALES
TOTAL BOTTLED BEER	\$ 12,162.24	5%	\$ 608.11	\$ 11,554.13
TOTAL KEG BEER	\$ 0.00	14%	\$ 0.00	\$ 0.00
TOTAL SPIRITS	\$381,887.06	16%	\$61,101.93	\$320,785.13
TOTAL WINE	\$ 1,997.79	10%	\$ 199.78	\$ 1,798.01
TOTAL BEVERAGE	\$396,047.09		\$61,909.82	\$334,137.27

Sales After Adjustments:	\$334,137.27
Reported Sales:	\$149,957.00
Additional Taxable Sales:	\$184,180.27

²⁵ Division Exhibit K.

²⁶ See Procedural History herein.

²⁷ *Id.* See Note 10, *supra*. The Field Auditor notes that changes were made for the following reasons, to-wit:

ATG FA

- Amaretto, Bols Schnapps, and Dekuyper Schnapps have been exempted as mixes.
- The prices on Montezuma and Juarez Tequila, Viaka Vodka, and Taaka Gin have been changed to the well drink price.
- Credit for the ending inventory was given on lines 101 and 126.

STS FA

- The Budweiser special price of 25 cents was factored into the beer prices.
- Miscellaneous sales from the sales journal were substituted for the estimated miscellaneous sales.
- A 5% allowance was given on the sales of 3.2 beer.

²⁸ *Id.* The Protestant reported and remitted Admissions on his ATG reports for ATG FA Period.

ATG on Additional Taxable Sales at 13.5%:	\$ 24,864.34
Interest through 07/31/2013:	6,007.85
Penalty @ 10% for Failure to Remit:	<u>2,486.43</u>
Total Tax, Interest, and Penalty:	\$ 33,358.62

TABLE B
3.2 BEER DEPLETION/
SALES TAX AUDIT

A	B	C	D	E	F	G	H
	CASES PREMIUM	COORS & MILLER (ESTIMATED) ²⁹	CASES TOTAL	BOTTLES Cs X 24	\$0.64 ³⁰ PER BOTTLE	5.00% VARIANCE	NET BEER SALES
AUG-DEC 2009	365	99	464	11,125	\$ 7,120.13	\$ 356.01	\$6,764.12
2010	504	136	640	15,362	\$ 9,831.63	\$ 491.58	\$9,340.05
2011	394	106	500	12,009	\$ 7,685.84	\$ 384.29	\$7,301.54
TOTAL	1263	341	1,604	38,496	\$24,637.59	\$1,231.88	\$23,405.71

I	J	K	L	M	N	O
	MISC. SALES ³¹	ADMISSION CHARGES ³²	REPORTED ATG SALES	TOTAL SALES	REPORTED SALES	UNDER- REPORTED SALES
AUG- DEC 2009	\$ 425.00	\$14,826.00	\$ 32,830.00	\$ 54,845.12	\$16,261.00	\$ 38,584.12
2010	\$1,128.80	\$33,927.00	\$ 87,691.00	\$132,086.85	\$28,489.00	\$103,597.85
2011	\$ 370.00	\$10,647.00	\$ 29,436.00	\$ 47,754.54	\$ 7,877.00	\$ 39,877.54
TOTAL	\$1,923.80	\$59,400.00	\$149,957.00	\$234,686.51	\$52,627.00	\$182,059.51

Under-Reported Sales:	\$182,059.51
Under-Reported ATG Sales:	\$184,180.27³³
Total Under-Reported Sales:	\$366,239.78³⁴
Times Combined Sales Tax Rate³⁵ of 8.875%:	\$ 32,503.78³⁶

²⁹ Testimony of Field Auditor. The Division has been having trouble getting purchase records from Coors and Miller, particularly in the Lawton area. The Field Auditor estimated the Protestant's purchases using the income statement provided by the Protestant.

³⁰ See Note 10, *supra*.

³¹ *Id.* The Sales Journal included soft drinks, energy drinks, snacks, and games.

³² *Id.*

³³ See Note 28, *supra*.

³⁴ *Id.*

³⁵ State (4.5%) plus City of Lawton (4.125%) plus Comanche County (0.25%) equals 8.875%.

Interest through 07/31/13:	\$ 7,853.73
Penalty at 10% for failure to remit:	\$ 3,250.38
Total	\$ 43,607.89

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.³⁷

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),³⁸ 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.³⁹

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.⁴⁰ In 1997, the Oklahoma Court of Civil Appeals found in *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.”⁴¹

4. Rules promulgated pursuant to the Administrative Procedures Act⁴² are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court.⁴³ They

³⁶ The Division’s calculation is off by a penny (\$0.01) due to rounding. See Note 28, *supra*.

³⁷ OKLA. STAT. ANN. tit. 68, § 221(C) (West Supp. 2013).

³⁸ See OKLA. ADMIN. CODE § 710:20-5-8(a) (May 25, 2002).

³⁹ OKLA. STAT. ANN. tit. 37, § 576 (West 2009).

⁴⁰ *Kifer v. Oklahoma Tax Commission*, 1998 OK CIV APP 34, 956 P.2d 162.

⁴¹ *Id.* at ¶ 1.

⁴² OKLA. STAT. ANN. tit. 75, § 250 *et seq.* (West 2002).

⁴³ OKLA. STAT. ANN. tit. 75, § 306(C) (West 2002).

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.⁴⁴

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.⁴⁵

6. In conducting a Mixed Beverage Depletion Audit, the Division follows the audit procedures established by Section 579(G) of Title 37⁴⁶ (“ATG Audit Statute”) and Tax Commission Rule 710:20-5-8(b) (“ATG Audit Rule”)⁴⁷:

(1) Upon audit of the books and records of a mixed beverage establishment for Gross Receipts Tax, it shall be assumed that spirits⁴⁸ 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) Wines⁴⁹ 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

⁴⁴ OKLA. STAT. ANN. tit. 75, § 308.2(C) (West 2002).

⁴⁵ OKLA. STAT. ANN. tit. 37, § 501 *et seq.* (West 2009).

⁴⁶ OKLA. STAT. ANN. tit. 68, § 579(G) (West 2009).

⁴⁷ See OKLA. ADMIN. CODE § 710:20-5-8(b) (May 25, 2002).

⁴⁸ 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;

⁴⁹ 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;

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

...

DISCUSSION

For the ATG FA Period, the Division followed the correct audit procedures. After deducting sixteen percent (16%) for spirits, ten percent (10%) for wine, and five percent (5%) for strong beer (bottles only), the Division determined that Protestant was not in compliance and had under-reported mixed beverage sales during the ATG FA Period. The Division did not allow fourteen percent (14%) for beer sold at draft⁵⁰ and not in original packages or an additional deduction for alcoholic beverages consumed in food as verified by the Division.⁵¹ The Division made adjustments, deducted the Protestant's Ending Inventory, and reported ATG sales during the FA Period.⁵² The ALJ summarized the ATG depletion audit on Table A herein.⁵³

B. SALES TAX

I. 3.2 BEER DEPLETION AUDIT/SALES TAX AUDIT

1. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Sales Tax Code").⁵⁴ The Sales Tax Code levies "upon all sales,⁵⁵ not otherwise exempted . . . an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds⁵⁶ of each sale of . . . tangible personal property. . . ."⁵⁷ Oklahoma Statutes authorize

⁵⁰ The Protestant only sold "bottle" strong beer and does not sell strong beer by the keg. See Note 12, *supra*.

⁵¹ *Id.* See also Note 28, *supra*.

⁵² See Notes 21 and 27, *supra*.

⁵³ See Note 28, *supra*.

⁵⁴ OKLA. STAT. ANN. tit. 68, § 1350 *et seq.* (West 2008).

⁵⁵ OKLA. STAT. ANN. tit. 68, § 1352(22)(a) (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:

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

...

⁵⁶ OKLA. STAT. ANN. tit. 68, § 1352(12) (West 2008).

incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.⁵⁸

2. The tax levied by the Oklahoma Sales Tax Code⁵⁹ shall be paid by the consumer or user to the vendor⁶⁰ 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.⁶¹

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.⁶²

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.⁶³

5. The Division used the depletion method to audit the sale of 3.2 beer.⁶⁴ This method accounts for the number of drinks available for sale, preparation, or service from the total 3.2

⁵⁷ OKLA. STAT. ANN. tit. 68, § 1354(A)(1) (West 2008).

⁵⁸ OKLA. STAT. ANN. tit. 68, § 1370 *et seq.* (West 2008) and OKLA. STAT. ANN. tit. 68, § 2701 (West Supp. 2013).

⁵⁹ See Note 54, *supra*.

⁶⁰ “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).

⁶¹ 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.

⁶² OKLA. STAT. ANN. tit. 68, § 1354(A)(10) (West 2008). See Note 54, *supra*.

⁶³ OKLA. ADMIN. CODE § 710:65-1-4 (June 26, 1994).

⁶⁴ 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:

beer sales reported. It is a reasonable method for determining the total gross receipts subject to sales tax.⁶⁵

6. The Low Point Beer Act⁶⁶ 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.⁶⁷ 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, but in this matter the Protestant did not provide such information.

7. 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

8. Oklahoma Statutes provide for the collection of interest and penalty on delinquent tax.⁶⁹ “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. . . .”⁷⁰

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;

⁶⁵ 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). 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.

⁶⁶ OKLA. STAT. ANN. tit. 37, § 163.1 *et seq.* (West 2009).

⁶⁷ See Notes 46-47, *supra*.

⁶⁸ OKLA. ADMIN. CODE § 710:65-3-30 (July 1, 2008). See OKLA. ADMIN. CODE § 710:65-3-31 (June 26, 1994).

⁶⁹ OKLA. STAT. ANN. tit. 68, § 217 (West Supp. 2013).

⁷⁰ OKLA. STAT. ANN. tit. 68, § 217(G) (West Supp. 2013).

9. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.⁷¹

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 Table B herein.⁷²

CONCLUSION

The Protestant has failed to meet his burden of proof, by preponderance of the evidence that the Division's proposed assessments for the ATG FA and STS FA Period are incorrect and in what respects.

⁷¹ See *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

⁷² See Notes 28-36, *supra*.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case that the protest to the proposed assessments for the ATG FA and STS FA Period be denied.

The COMMISSION further ORDERS that the total amount of ATG, STS, and penalty assessed for the FA Periods be fixed as the Protestant's deficiency and that those amounts be determined as due and owing, including interest, accrued and accruing.⁷³

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."

⁷³ *See* Note 19, *supra*. The protest letter includes a request for waiver of penalty and interest. The Office of Administrative Law Judges does not have the authority to waive penalty and interest. The authority to waive penalty and interest rests exclusively with the Commissioners or their designee, pursuant to OKLA. STAT. ANN. tit. 68, § 220 (West Supp. 2013).