

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2013-11-26-02 / NON-PRECEDENTIAL
ID: P-13-040-H
DATE: NOVEMBER 26, 2013
DISPOSITION: DENIED
TAX TYPE: MIXED BEVERAGE / SALES
APPEAL: NO APPEAL TAKEN

ORDER

LLC d/b/a BUSINESS, and MEMBER¹, as a Member and as an Individual (“Protestants”) appear pro se.² The Field Audit Section, Compliance Division (“Division”) of the Oklahoma Tax Commission appears through OTC ATTORNEY, Assistant General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On March 6, 2013, the protest file was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*³ and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.⁴ On March 6, 2013, the Court Clerk (“Clerk”)⁵ mailed the Introductory Letter to the Protestants that this matter had been assigned to ALJ, Administrative Law Judge (“ALJ”), and docketed as Case Number P-13-040-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*.⁶ On March 8, 2013, OTC ATTORNEY, Assistant General Counsel, filed an Entry of Appearance as Counsel of record for the Division. On March 11, 2013, the Clerk mailed the Prehearing Teleconference Notice to the Protestants’ last-known address,⁷ setting the prehearing teleconference for April 8, 2013, at 10:30 a.m.

¹ The correct spelling of the Protestant’s first name is CORRECT NAME, not INCORRECT NAME. See Note 11, *infra*.

² “[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>.

³ OKLA. STAT. ANN. tit. 68, § 201 *et seq.* (West 2001).

⁴ OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

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

⁶ *Id.* Unless otherwise noted herein, the ALJ notifies the parties by letter.

⁷ OKLA. STAT. ANN. tit. 68, § 208 (West Supp. 2013). The Clerk mailed the notice to the Protestants, c/o MEMBER at MEMBER ADDRESS.

On April 8, 2013, at 10:30 a.m., the ALJ held the prehearing teleconference as scheduled. The parties appeared via telephone. On April 8, 2013, the ALJ directed the parties to submit a Status Report on or before May 8, 2013.

On May 8, 2013, the Division filed the Status Report advising that the taxpayer's number on the proposed assessments is a computer generated number from the Tax Commission's "One-Link" computer system, and that the parties continued to work on preliminary issues. On May 9, 2013, the ALJ directed the parties to file a status report on or before June 7, 2013.

The ALJ omits herein the Procedural History from June 8, 2013 to August 8, 2013. On August 9, 2013, the Division filed the Status Report advising it had been unable to reach the Protestants by mail or email, and that the Division was ready to proceed to hearing. On August 12, 2013, the Clerk mailed the Hearing Notice setting the hearing for September 23, 2013, at 1:30 p.m., with position letters and/or memorandum briefs due on or before September 16, 2013.

On September 16, 2013, the Division filed its Brief with the Clerk.⁸ The Protestants did not file a position letter and/or memorandum brief. On September 23, 2013, at 1:30 p.m., the ALJ convened the hearing as scheduled. The Protestants did not appear at the hearing.⁹ The Division called AUDITOR, Field Auditor III, 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 I, which the ALJ admitted into evidence. At the conclusion of the hearing, the ALJ closed the record in this matter and the case submitted for decision on September 23, 2013.

On October 2, 2013, the ALJ opened the record and pulled this matter from decision. From a review of the record there appeared to be a discrepancy in the Division's calculation of drink prices without mixed beverage tax and sales tax. The ALJ directed the Division to either explain the discrepancy or revise the proposed mixed beverage tax and sales tax assessments. On October 8, 2013, the Division filed a Status Report, which satisfactorily explained the method used to calculate drink prices without tax.¹⁰ The ALJ advised the parties and closed the record and submitted this case for decision on October 10, 2013.

⁸ The Division did not attach exhibits to its Brief.

⁹ The ALJ noted for the record that the Protestants did not contact the Division or the Clerk regarding the hearing.

¹⁰ See Note 20, *infra*.

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 July 18, 2008, LLC d/b/a BUSINESS ("LLC") filed a Business Registration for the "BUSINESS" located at BUSINESS ADDRESS ("Business Address"). MEMBER was the sole and managing member ("Managing Member") of the LLC.¹¹

2. On August 8, 2011, the Division mailed the audit notification letter to the LLC.¹²

3. On September 29, 2011, the Division e-mailed the records request and audit forms to the Managing Member. The Division conducted the opening conference via telephone with the Managing Member the same day.¹³

4. On September 29, 2011, by e-mail, the Division received the completed Statute of Limitations Waiver Agreement setting the audit period of September 1, 2008 through August 31, 2011 ("Audit Period"). The LLC did not sell wine, low-point (3.2 beer) or charge admissions during the Audit Period.¹⁴

5. On November 4, 2011, the Managing Member provided the Brand Classifications (Well, Call, and Premium) to the Division and a Pour Statement.¹⁵

6. On November 11, 2011, the Managing Member provided the Price List, which reflects that sales tax and mixed beverage tax was included in the price of drinks.¹⁶ The LLC did not run specials, use liquor, or strong beer in cooking.¹⁷ The Managing Member provided the

¹¹ Testimony of Field Auditor. Division's Exhibit A. Managing Member signed the Business Registration on behalf of LLC.

¹² *Id.* Division's Exhibit B.

¹³ The court file contains an audit packet, which the Division forwarded as part of the protest file on this matter. The Administrative Law Judge is taking judicial notice of the materials contained in the court file (Field Audit Write Up) to complete the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999). On February 25, 2009, the LLC posted a \$1,500.00 Surety Bond.

¹⁴ *Id.*

¹⁵ Testimony of Field Auditor. Division's Exhibits G through H.

¹⁶ *Id.*

¹⁷ *Id.*

Division with the LLC's Ending Inventory.¹⁸ During the Audit Period, the LLC changed the price of Guinness Draft Beer from \$2.00 to \$3.00.¹⁹

7. The Field Auditor's Price Calculations, less mixed beverage tax ("ATG") and sales tax ("STS"), are as follows,²⁰ to-wit:

CATEGORY	DRINK CODE	PRICE	LESS APPLICABLE TAX
6pt Bottle Beer	B1	\$3.00	\$2.46
6pt Bottle Beer	B2	\$4.00	\$3.28
6pt Low Price Beer	B3	\$2.00	\$1.64
6pt Draft Beer	D	\$3.00	\$2.46
Call	C	\$4.00	\$3.28
Premium	P	\$5.00	\$4.10
Schnapps	S	\$2.00	\$1.64
Sam Adams Cider	SA	\$4.00	\$3.28
Super Premium	SP	\$6.00	\$4.92
Well	W	\$3.00	\$2.46

8. The Pour Statement reflects that the Managing Member, who was the LLC's only bartender, dispensed drinks using a two-ounce (2oz.) "free pour" for spirits and two (2) ounce shots. The Division disallowed the two-ounce (2oz.) "free pour" for spirits and shots, choosing the standard one and one-half ounce (1.5oz.) pour. Other than the Pour Statement, there was no corroborating evidence supporting the two-ounce (2oz.) "free pour."²¹

¹⁸ Testimony of Field Auditor. Division's Exhibit F.

¹⁹ *Id.*

²⁰ *Id.* Division's Exhibit G. Using a \$3.00 drink as an example, after the ATG and STS are removed, the base price of the drink is \$2.46 (\$3.00/1.22017 or ATG-13.5%/State STS-4.5%/City STS-3.167%/County STS-0.85%)

²¹ *Id.* See Note 15, *supra*.

9. The ALJ has summarized the ATG Audit Work Papers,²² as follows, to-wit:

TABLE A
ATG DEPLETION AUDIT

		Less	Allowance	Adjusted Sales
Total Bottle Beer	\$139,671.18	0.05	\$ 6,983.56	\$132,687.62
Total Keg Beer	\$ 36,599.07	0.14	\$ 5,123.87	\$ 31,475.20
Total Liquor	\$150,682.63	0.16	\$24,109.22	\$126,573.41
Total Wine	\$ 0.00	0.10	\$ 0.00	\$ 0.00
Total Beverage	\$326,952.88			
Total Allowance	\$ 36,216.65			
Adjusted Beverage	\$290,736.23			
Admissions	\$ 0.00			
Net Total	\$290,736.23			
Less Total Reported	\$ 14,898.00			
Additional Taxable	\$275,838.23*			
Additional Tax @ 13.5%	\$37,238.16*			

10. On August 14, 2012, the Division issued an ATG assessment against the LLC for the Audit Period (Audit 6363),²³ as follows, to-wit:

Tax Due:	\$37,238.16*
Interest @ 15% through 09/30/2012:	5,754.06
Tax & Interest due within 30 Days:	\$42,992.22
30 day delinquent Penalty @ 10%:	<u>3,723.82</u>
Tax, Interest & Penalty due after 30 Days:	\$46,716.04

²² *Id.*

²³ *Id.* Division's Exhibits C, E, and I. The price for a Guinness "draft" changed during the Audit Period from \$2.00 to \$3.00 (beginning 01/01/2010). The auditor determined the weighted average for Guinness "draft" was \$2.42. (171 Kegs Audit Period. 100 (58%) Kegs at \$2.00 from 04/02/09 to 12/30/09. 71 (42%) Kegs at \$3.00 from 01/01/10 to 03/10/11. Average Price \$1.16 and \$1.26 or \$2.42)

On August 14, 2012, the Division issued STS assessments against the LLC and Managing Member for the Audit Period (Audit 6363),²⁴ as follows, to-wit:

Tax Due:	\$23,493.14
Interest @ 15% through 09/30/2012:	3,630.17
Tax & Interest due within 30 Days:	\$27,123.31
30 day delinquent Penalty @ 10%:	<u>2,349.32</u>
Tax, Interest & Penalty due after 30 Days:	\$29,472.63

11. On February 13, 2013, the Division received a timely filed protest to the proposed ATG and STS assessments.²⁵

CONCLUSIONS OF LAW
MIXED BEVERAGE TAX

1. The Oklahoma Legislature vested the Tax Commission with jurisdiction over the parties and subject matter of this proceeding.²⁶

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)²⁷ 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.²⁸

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 *Kifer*²⁹ that the “Tax Commission rule using taxpayer’s drinks available for sale, rather than

²⁴ *Id.*

²⁵ *Id.* Division’s Exhibit D. The Managing Member indicated in the protest letter that he did not receive his STS assessment. On December 18, 2012, the Division re-mailed the STS assessments to the Protestants at MEMBER ADDRESS.

²⁶ See OKLA. STAT. ANN. tit. 68, § 207 (West 2001). See also OKLA. STAT. ANN. tit. 68, § 221(C) (West Supp. 2013).

²⁷ See OKLA. ADMIN. CODE § 710:20-5-8(a) (May 25, 2002). See also OKLA. ADMIN. CODE § 710:20-5-5 (May 25, 2002).

²⁸ OKLA. STAT. ANN. tit. 37, § 576 (West 2009).

²⁹ *Kifer v. Oklahoma Tax Commission*, 1998 OK CIV APP 34, 956 P.2d 162.

actual cash register receipts, in calculating the mixed beverage gross receipts tax does not violate the intent of the Alcoholic Beverage Control Act.”³⁰

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.³¹

5. Rules promulgated pursuant to the Administrative Procedures Act³² are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court.³³ 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.³⁴

6. In conducting a Mixed Beverage Depletion Audit, the Division follows the audit procedures established by Section 579(G) of Title 37 (“ATG Audit Statute”) and Tax Commission Rule 710:20-5-8(b) (“ATG Audit Rule”)³⁵:

- (1) Upon audit of the books and records of a mixed beverage establishment for Gross Receipts Tax, it shall be assumed that spirits³⁶ have been dispensed at the average rate of one and one-half fluid ounce (1 and ½ oz.),³⁷

³⁰ *Id.* at ¶ 1.

³¹ OKLA. STAT. ANN. tit. 37, § 579 (West 2009). See OKLA. STAT. ANN. tit. 37, § 501 *et seq.* (West 2009).

³² OKLA. STAT. ANN. tit. 75, § 250 *et seq.* (West 2002).

³³ OKLA. STAT. ANN. tit. 75, § 306(C) (West 2002).

³⁴ OKLA. STAT. ANN. tit. 75, § 308.2(C) (West 2002).

³⁵ See OKLA. ADMIN. CODE § 710:20-5-8(b) (May 25, 2002).

³⁶ 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;

³⁷ The Division disallowed the two-ounce (2oz.) “free pour” claimed by the Managing Member on the Pour Statement for spirits. Other than the Pour Statement,

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) Wines³⁸ 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.³⁹ “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. . . .”⁴⁰

8. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.⁴¹

DISCUSSION

For the ATG Audit Period, the Division followed the correct audit procedures, as summarized by Table A. After deducting sixteen percent (16%) for spirits, five percent (5%) for strong beer (bottles only), and fourteen percent (14%) for beer sold at draft and not in original packages,⁴² the Division determined that the LLC was not in compliance and had under-reported mixed beverage sales during the ATG Audit Period. The Division used the Price List and Pour Statement (except the two (2) oz. “free pour” for spirits and shots) signed by the Managing Member, deducted the LLC’s Ending Inventory, and deducted reported ATG sales during the ATG Audit Period.⁴³

there was no corroborating evidence. See Note 20, *supra*.

³⁸ 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;

³⁹ OKLA. STAT. ANN. tit. 68, § 217 (West Supp. 2013).

⁴⁰ OKLA. STAT. ANN. tit. 68, § 217(G) (West Supp. 2013).

⁴¹ See *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com’n*, 1988 OK 91, 768 P.2d 359.

⁴² See Notes 29 and 35, *supra*.

⁴³ See Notes 14-23, *supra*.

CONCLUSIONS OF LAW
B. SALES TAX

9. The Oklahoma Sales Tax Code (“Sales Tax Code”) governs the collection and remittance of sales tax.⁴⁴ The Sales Tax Code levies “upon all sales,⁴⁵ not otherwise exempted . . . an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds⁴⁶ of each sale of . . . tangible personal property. . . .”⁴⁷ Oklahoma Statutes authorize incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.⁴⁸

10. The tax levied by the Sales Tax Code⁴⁹ shall be paid by the consumer or user to the vendor⁵⁰ as trustee for and on account of this state and each and every vendor shall collect from

⁴⁴ OKLA. STAT. ANN. tit. 68, § 1350 *et seq.* (West 2008).

⁴⁵ 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:

- 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,

⁴⁶ OKLA. STAT. ANN. tit. 68, § 1352(12) (West 2008).

⁴⁷ OKLA. STAT. ANN. tit. 68, § 1354(A)(1) (West 2008).

⁴⁸ OKLA. STAT. ANN. tit. 68, § 1370 *et seq.* (West 2008) and OKLA. STAT. ANN. tit. 68, § 2701 (West Supp. 2013).

⁴⁹ See Note 44, *supra*.

⁵⁰ “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).

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.⁵¹

11. 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.⁵²

12. 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.⁵³

13. 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.⁵⁴

14. 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.⁵⁵

15. Oklahoma Statutes provide for the collection of interest and penalty on delinquent tax.⁵⁶ “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. . . .”⁵⁷

16. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.⁵⁸

⁵¹ 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.

⁵² *Id.*

⁵³ OKLA. STAT. ANN. tit. 68, § 1354(A)(10) (West 2008).

⁵⁴ OKLA. ADMIN. CODE § 710:65-1-4 (June 26, 1994).

⁵⁵ OKLA. ADMIN. CODE § 710:65-3-30 (July 1, 2008). See OKLA. ADMIN. CODE § 710:65-3-31 (June 26, 1994).

⁵⁶ See Note 39, *supra*.

⁵⁷ See Note 40, *supra*.

⁵⁸ See Note 41, *supra*.

DISCUSSION

A review of the record, specifically the STS Audit Period Work Papers, reflects that the Division followed the correct audit procedures.⁵⁹

CONCLUSION

The Protestants have failed to meet their burden of proof, by preponderance of the evidence, that the Division's proposed mixed beverage tax assessment and sales tax assessments are incorrect and in what respects.

⁵⁹ See Note 23, *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 mixed beverage assessment and sales tax assessments be denied.

It is further ORDERED that the total amount of mixed beverage tax, and penalty assessed for the ATG Audit Period be fixed as the LLC's deficiency and that those amounts be determined as due and owing, including interest, accrued and accruing.

It is further ORDERED that the total amount of sales tax, and penalty assessed for the STS Audit Period be fixed as the Protestants' deficiency and that those amounts be determined as due and owing, including interest, accrued and accruing.

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."