

**JURISDICTION:** OKLAHOMA TAX COMMISSION  
**CITE:** 2015-02-26-12 / NON-PRECEDENTIAL  
**ID:** P-13-074-K  
**DATE:** FEBRUARY 26, 2015  
**DISPOSITION:** DENIED  
**TAX TYPE:** WITHHOLDING, MIXED BEVERAGE, SALES  
**APPEAL:** NONE

### 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, the Commission hereby adopts the Findings of Fact, Conclusions of Law and Recommendation made and entered by the Administrative Law Judge on the 9<sup>TH</sup> day of January, 2015, appended hereto, together herewith shall constitute the Order of the Commission.

SO ORDERED

### FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

Now on this 9<sup>th</sup> day of January, 2015, the above styled and numbered cause comes on for decision pursuant to assignment regularly made by the Oklahoma Tax Commission to ALJ, Administrative Law Judge. Protestant, PROTESTANT is represented by his spouse, SPOUSE. The Compliance Division of the Oklahoma Tax Commission ("Division") is represented by OTC ATTORNEY, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

### STATEMENT OF THE CASE

As the result of an audit of Protestant's available records and the sales records of Protestant's wholesalers of alcoholic beverages and low-point beer, the Division on August 24, 2012, caused to be issued proposed withholding tax, sales tax and mixed beverage gross receipts tax assessments against Protestant. Protestant timely protested the assessments by letter mailed September 14, 2012. The letter of protest was not verified and a hearing was not requested. On November 13, 2012, Protestant sent a follow-up letter to the protest. This letter was also neither verified nor was a hearing requested.

On May 13, 2013, the protest, follow-up letter and the Division's audit file were referred to the Office of the Administrative Law Judges for further proceedings in accordance with the Uniform Tax Procedure Code<sup>1</sup> and the Rules of Practice and Procedure before the Office of the

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<sup>1</sup> 68 O.S. 2011, § 201 et seq.

Administrative Law Judges<sup>2</sup>. The protest was docketed as Case No. P-13-074-K and assigned to ALJ, Administrative Law Judge.<sup>3</sup>

A pre-hearing conference was scheduled for June 27, 2013, by *Prehearing Teleconference Notice* issued May 15, 2013.<sup>4</sup> By letter dated June 27, 2013, the parties were directed to file a status report on or before July 29, 2013. Additional status reports were requested from the parties through August 22, 2014. By *Status Report* filed August 22, 2014, the Division advised that Protestant had failed to respond to further requests for documentation and requested the scheduling of a hearing. By *Scheduling Order* issued August 25, 2014, the Division was directed to file a verified response to protest on or before September 22, 2014, Protestant was advised that a reply to the response could be filed on or before October 22, 2014, and the parties were notified that if a hearing was not requested, the record would be closed and the protest submitted for decision upon completion of the briefing schedule. Protestant did not file a response to the *Scheduling Order*.

On September 22, 2014, the *Division's Verified Response to Protest* (“*Verified Response*”) and Exhibits A through R were filed. Protestant did not file a reply to the *Verified Response*. On October 23, 2014, the record was closed and the protest was submitted for decision.<sup>5</sup>

### FINDINGS OF FACT

Upon review of the file and records, including the *Verified Response* and attached Exhibits, the undersigned finds:

A. Factual Basis for Assessment, *Verified Response* provides:

1. Protestant is the sole proprietor and operator of BAR 1 and BAR 2, two separate bars in CITY, Oklahoma that sell mixed beverages and 3.2 beer.<sup>6</sup> (“Exhibit A”).

2. On or about January 27, 2010, Protestant obtained consolidated sales tax permit number ### for BAR 1 and BAR 2, the physical locations of which were BUSINESS ADDRESS 1 and BUSINESS ADDRESS 2, respectively. (“Exhibit A” and “Exhibit B”).

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<sup>2</sup> Rules 710:1-5-20 through 710:1-5-49 of the *Oklahoma Administrative Code* (“OAC”).

<sup>3</sup> OAC 710:1-5-22(b).

<sup>4</sup> OAC 710:1-5-28(a).

<sup>5</sup> See, 68 O.S. 2011, § 221(D) and OAC 710:1-5-39(a).

<sup>6</sup> The *Field Audit Write Up* (“*Write Up*”) prepared July 26, 2012, indicates at page 2 that BAR 2 sold 3.2 beers only by bottles/cans and Draughts (Kegs). See also, the “3.2 Bottles/Cans” and “3.2 Draft” work papers of the wholesalers’ reports. Exhibit I to *Verified Response*. Only a sales tax permit was issued for the location of BAR 2. See, Exhibit B, pp. 2 to *Verified Response*.

3. On or about February 25, 2010, Protestant obtained mixed beverage permit number ###.<sup>7</sup> (“Exhibit A” and “Exhibit C”).

4. The Division mailed an audit notification letter to Protestant on March 05, 2012. (“Exhibit D”).

5. Audit forms and a records request were mailed to Protestant on March 09, 2012.<sup>8</sup> (“Exhibit E”).

6. The Protestant provided records to the Division on April 14, 2012. (“Exhibit F”).

7. After an adjustment for beginning and ending inventory provided by Protestant, the auditor conducted an audit based on Protestant’s records to calculate total gross receipts for mixed beverages. To the extent that the records provided were incomplete or inaccurate, the Division used wholesale records to ensure the accuracy of the audit. (“Exhibit A” and “Exhibit G”).

8. As a result of the mixed beverage depletion audit, and by letter dated August 24, 2012, the Division proposed to assess mixed beverage tax against [Protestant], doing business as BAR 1 and BAR 2, in the amount of \$29,446.93 for the audit period February 25, 2010 through April 30, 2012. (“Exhibit H”).

9. The Division conducted a 3.2 beer depletion audit based on wholesale purchases of 3.2 beer and a pricing schedule supplied by Protestant. (“Exhibit A” and “Exhibit I”).

10. As a result of the 3.2 beer depletion audit and unreported mixed beverage sales, and by letter dated August 24, 2012, the Division proposed to assess sales tax against [Protestant], doing business as BAR 1 and BAR 2, in the amount of \$50,449.80 for the audit period January 27, 2010 through April 30, 2012. (“Exhibit J”).

11. The Division conducted an audit of Protestant’s withholding records representing six of the twenty-one month audit period which reflected payments to employees for which withholding taxes were neither withheld, reported, nor remitted. These wages were averaged and extrapolated to estimate unreported wages for each period. (“Exhibit A” and “Exhibit K”).

12. As a result of the withholding audit, and by letter dated August 24, 2012, the Division proposed to assess withholding tax against [Protestant], doing business as BAR 1 and

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<sup>7</sup> The permit is exclusive to the location of BAR 1. Exhibits B and C to *Verified Response*.

<sup>8</sup> The *Write Up* indicates that initial contact with Protestant was made on March 8, 2012, that Protestant had not received the audit notification letter because he had moved and that the records request and applicable audit forms were mailed to Protestant’s new address, *Id.*, pp. 2.

BAR 2, in the amount of \$1,152.00 for the period March 31, 2010 through December 31, 2011. (“Exhibit L”).

13. By letter dated September 12, 2012, Protestant protested the proposed sales tax, mixed beverage tax, and withholding tax assessments. (“Exhibit M”).

14. On May 14, 2013, the office of the Administrative Law Judge [sic] transmitted to the General Counsel’s Office the above-referenced matter docketed as a protest to the protest of the proposed sales tax, mixed beverage tax, and withholding tax assessments. (“Exhibit N”).

15. By mail and fax on September 19, 2013 and October 07, 2013, respectively, Protestant provided additional documentation in support of its protest. (“Exhibit O”).

16. The Division reviewed the additional documentation in support of the protest and determined it was not sufficient to show the assessment was incorrect as it was either dated outside the scope of the protest or otherwise unsubstantiated. (“Exhibit A”).

17. By letters dated February 24, 2014, April 24, 2014, and June 24, 2014, the Division requested additional documentation from Protestant, but received no response. (“Exhibit P”).

18. By Status Report filed August 22, 2014, the Division informed the Administrative Law Judge that Protestant had failed to respond to numerous requests for documentation, and for that reason, the Division requested this matter proceed to a hearing. (“Exhibit Q”).

19. By Scheduling Order issued August 25, 2014, the Administrative Law Judge ordered the Division to file a verified response on or before September 22, 2014. (“Exhibit R”).

B. Additional findings:

1. Protestant was selected for audit because of a low mixed beverage tax ratio (purchases to reported sales). *Write Up*, pp. 2.

2. The *Write Up* indicates that BAR 2 was closed in October, 2011, however the “3.2 Bottles/Cans” and “3.2 Draft” work-papers of the wholesalers’ reports show purchases by the BAR 2 into December, 2011, *Id.*, pp. 2. *See*, Exhibit I to *Verified Response*.

3. The records provided by Protestant to the auditor included:

Completed/Signed Records Request  
Completed/Signed Power of Attorney  
Completed/Signed Inventory Agreement  
Completed/Signed Price List  
Completed/Signed Pour Statement

Completed/Signed Brand Classification  
Handwritten BAR 1 & BAR 2 2010 and 2011 monthly sales summary  
March 29, 2012 liquor inventory  
Daily Sales Records for 09/10, 10/10, 11/10, 04/11, 05/11, 06/11

*Write Up*, pp. 3. See, Exhibit F to *Verified Response*.

4. The audited mixed beverage gross receipts of \$286,364.42 for the audit period of February 25, 2010 through April 30, 2012 were calculated utilizing the depletion method. *Write Up*, pp. 3 and 4. See, Exhibit A, para. 13 to *Verified Response* and Exhibit G to *Verified Response*.

5. The total amount of liquor, wine and strong beer available for sale during the audit period was provided by Protestant's wholesalers. Exhibit G to *Verified Response*.

6. The total amount of liquor, wine and strong beer was adjusted by adding the beginning inventory and subtracting the ending inventory provided by Protestant and adding purchases of Smirnoff (strong beer) from LDF. *Write Up*, pp. 3 and Exhibits F and G to *Verified Response*.

7. The prices for mixed drinks, inclusive of well, call, premium, super premium, schnapps, brandy and margaritas were provided by Protestant along with a pour rate of 1.5 ounces for mixed drinks and shots.<sup>9</sup> *Write Up*, pp. 4 and Exhibit F to *Verified Response*.

8. The prices for wine by the glass and strong beers by the bottle/can were also provided by Protestant. *Write Up*, pp. 4 and Exhibit F to *Verified Response*.

9. The regulation pour rate of 6 ounces for wine was used in the audit because "[t]he wine pour size was not provided". *Write Up*, pp. 4 and Exhibit F to *Verified Response*.

10. The prices for mixed drinks, wine and strong beer used in the depletion audit were adjusted to exclude the mixed beverage gross receipts and sales taxes included in those prices. *Write Up*, pp. 4 and Exhibit A to *Verified Response* and Exhibit F, Price Workpaper to *Verified Response*.

11. No price changes were reflected during the audit period. *Write Up*, pp. 4 and Exhibit F, Price list for Use in Mixed Beverage and 3.2 Beer Depletion Audits to *Verified Response*.

12. The audited mixed beverage gross receipts were adjusted by a "total allowance" of \$41,778.01<sup>10</sup> and reported mixed beverage gross receipts of \$26,461.00 to arrive

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<sup>9</sup> All liquor was depleted at 1.5 ounces because although Protestant listed a 2 ounce pour rate for rocks and a 3 ounce pour rate for doubles, records showing the percentage of rocks and double to all drinks were not provided.

<sup>10</sup> The allowances are five percent (5%) of the total bottles/cans of strong beer available for sale, sixteen percent (16%) of the total mixed beverages available for sale and ten

at unreported mixed beverage gross receipts of \$218,125.41 for the audit period. Exhibit G to *Verified Response*.

13. Protestant failed to file mixed beverage gross receipts tax reports for the period inclusive of the months of January, 2012 through April, 2012. *Write Up*, pp. 4 and Exhibits G and H to *Verified Response*.

14. As a result of the mixed beverage audit, a total aggregate amount of \$35,576.26 was assessed consisting of tax in the amount of \$29,446.93, interest<sup>11</sup> accrued through October 31, 2012, in the amount of \$1,984.64, a \$5.00 per day delinquent report penalty<sup>12</sup> in the amount of \$1,200.00 on the four (4) delinquent reports, and a 30 day delinquent penalty<sup>13</sup> in the amount of \$2,944.69. Exhibit H to *Verified Response*.

15. The audited additional gross receipts subject to state, city and county sales taxes amounted to \$593,527.07 for the audit period of January 27, 2010 to April 30, 2012 and consisted not only of the unreported mixed beverage gross receipts of \$218,125.41, but audited

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percent (10%) of the total wine available for sale by the glass. OAC 710:20-5-8(b)(3).

<sup>11</sup> See, 37 O.S. Supp. 2005, § 579(C) which provides that "if the gross receipts tax levied pursuant to the provisions of Section 576 of this title is not paid on or before the twentieth day of each month, the tax shall be delinquent and interest and penalty shall accrue on and from the twenty-first day of each month, pursuant to the provisions of the Uniform Tax Procedure Code." The relevant provision of the Uniform Tax Procedure Code provides: "[i]nterest upon any amount of state tax determined as a deficiency, under the provisions of Section 221 of this title, shall be assessed at the same time as the deficiency and shall be paid upon notice and demand of the Oklahoma Tax Commission at the rate of one and one-quarter percent (1 ¼%) per month from the date prescribed in the state tax law levying such tax for the payment thereof to the date the deficiency is assessed." 68 O.S. Supp. 2009, § 217(B).

<sup>12</sup> 37 O.S. Supp. 2005, § 579(E), which provides:

If the report required by subsection A of this section is not filed with the Tax Commission on or before the twentieth day of the month, the Tax Commission may assess an additional penalty of Five Dollars (\$5.00) for each day thereafter that the report is not filed pursuant to the provisions of this section. The Tax Commission may waive the penalty assessed pursuant to the provisions of the Uniform Tax Procedure Code; provided, however, the additional penalty, if assessed, shall not exceed an amount equal to twice the amount of tax due for the period for which such report was required to be filed, or the sum of Three Hundred Dollars (\$300.00), whichever is greater.

<sup>13</sup> See, Note 11. The relevant penalty provision of the Uniform Tax Procedure Code provides: "[i]f any tax due under state sales, use, tourism, mixed beverage gross receipts, or motor fuel tax laws, or any part thereof, is not paid within fifteen (15) days after such tax becomes delinquent a penalty of ten percent (10%) on the total amount of tax due and delinquent shall be added thereto, collected and paid. However, the Tax Commission shall not collect the penalty assessed if the taxpayer remits the tax within thirty (30) days of the mailing of a proposed assessment or voluntarily pays the tax upon the filing of an amended return." 68 O.S. Supp. 2009, § 217(C), emphasis added.

unreported 3.2 beer and miscellaneous gross receipts of \$375,401.66. Exhibit I to *Verified Response*.

16. The total 3.2 beer available for sale at BAR 1 and BAR 2 for the calendar years of 2010 and 2011 were provided by Protestant's 3.2 beer wholesalers. *Write Up*, pp. 6 and Exhibit I to *Verified Response*.

17. Protestant's 3.2 beer purchases for BAR 1 for the first four (4) months of 2012 were estimated based on the monthly average 3.2 beer purchases made by BAR 1 during 2011. Exhibit I to *Verified Response*.

18. Protestant's total audited gross receipts from sales of 3.2 beer bottles/cans were calculated by multiplying Protestant's price of \$2.50 for a bottle or can less sales tax or \$2.30 by the number of bottles and cans available for sale less a five percent (5%) allowance. Exhibit I, 3.2 Bottles/Cans work paper to *Verified Response*.

19. Protestant's total audit gross receipts from sales of 3.2 beer draughts were calculated by dividing the number of ounces available for sale by the pour rate of 10 ounces as reported by Protestant and multiplying the same by the \$1.00 price less sales tax or \$0.92 less a fourteen percent (14%) allowance. Exhibit I, 3.2 Draft work paper to *Verified Response*.

20. Sales of Red Bull, sodas and chips were estimated at \$49.40 per month based on records of those sales during the months of September, 2010 through November 2010, and May and June, 2011. Exhibit I to *Verified Response*.

21. The total audited gross receipts were adjusted by reported gross receipts less mixed beverage gross receipts of \$66,409.00 to arrive at the unreported 3.2 beer and miscellaneous gross receipts. Exhibit I, Total 3.2 Beer Sales work paper to *Verified Response*.

22. As a result of the sales tax audit, a total aggregate amount of \$63,016.97 was assessed consisting of tax in the amount of \$50,449.80, interest<sup>14</sup> accrued through October 31, 2012, in the amount of \$7,522.17, and a 30 day delinquent penalty<sup>15</sup> in the amount of \$5,045.00. Exhibit J to *Verified Response*.

23. Records provided by Protestant for the months of September through November, 2010 and April through June, 2011 reflected payouts to several individuals for work performed. *Write Up*, pp. 6 and Exhibit K, Wages Paid\*Daily Sheets to *Verified Response*.

24. The payouts were totaled and divided by six (6) to arrive at estimated unreported taxable wages of \$960.17 per month. *Write Up*, pp. 6 and Exhibit K, Wages Paid\*Daily Sheets to *Verified Response*.

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<sup>14</sup> See, 68 O.S. Supp. 2009, § 217(B).

<sup>15</sup> See, 68 O.S. Supp. 2009, § 217(C).

25. The estimated unreported taxable wages were multiplied by five percent (5%) to arrive at unreported withholding taxes of \$48.00 per month or \$144.00 per quarter. *Write Up*, pp. 7 and Exhibit K, Withholding – Wage Audit Summary to *Verified Response*.

26. As a result of the withholding tax audit, a total aggregate amount of \$1,524.08 was assessed consisting of tax in the amount of \$1,152.00, interest accrued through October 31, 2012, in the amount of \$256.88, and a delinquent penalty in the amount of \$115.20.<sup>16</sup> Exhibit L to *Verified Response*.

27. Protestant's representative lists herself as manager of the business. Exhibit F to *Verified Response*.

28. In the price list initially given to the auditor, Protestant listed the following prices for the following categories of drinks with no reported price changes:

3.2 Beer-Bottles	\$2.50
Strong Beer-Bottles	3.50
Well	3.75
Call	4.00
Premium	4.25
Super-Premium	5.00
Schnapps	3.75
Brandy	4.00
Margaritas	4.25
Wine-Glass	3.50

Exhibit F to *Verified Response*.

29. In the November 13, 2012 letter of follow-up to the protest, Protestant writes that the prices were changed in May, 2011 to the prices listed on the initial price list and reported the following prices for the period of January, 2010 to May, 2011:

3.2 Beer-Bottles	\$2.00
3.2 Beer-Cans	1.50
3.2 Beer-Draft	0.75
Strong Beer-Bottles	3.00
Well	3.25
Call	3.50
Premium	4.00
Super-Premium	4.50
Schnapps	3.25
Brandy	3.25
Margaritas	3.50

<sup>16</sup> Interest and penalty on delinquent withholding taxes are imposed by 68 O.S. Supp. 2005, § 2358.6(A).

Wine-Glass 3.00

Exhibit M to *Verified Response*.

30. In an October 7, 2013 facsimile to Counsel for the Division, Protestant writes: “[w]e raised prices 08-2012” and lists the following prices as the prices prior to August, 2012:

3.2 Beer-Bottles	\$2.00
3.2 Beer-Cans	1.50
Strong Beer-Bottles	3.00
Well	3.25
Call	3.50
Premium	3.75
Super-Premium	4.50
Schnapps	3.25
Brandy	3.50
Margaritas	4.00
Wine-Glass	3.00

Exhibit O to *Verified Response*.

31. In the facsimile, Protestant also wrote that “canned beer is and always stayed at \$1.50” and listed the prices for BAR 2 as \$1.50 cans, \$1.00 mugs and \$2.50 pitchers. Exhibit O to *Verified Response*.

32. Protestant also identified the “department keys” for the previously provided cash register receipts for April 19, 2010, April 20, 2010, February 12, 2010, October 4, 2010, and May 10, 2010. Exhibit O to *Verified Response*.

33. While several entries on the cash register receipts show \$2.00 for a department 01 sale, several other entries show \$2.50 and none reflect \$1.50 for a department 01 sale. Exhibit O to *Verified Response*.

34. In the follow-up letter to the protest, Protestant reports taking six (6) cases of bottled beers per week during 2010 as complimentary beer for the owners. Exhibit M to *Verified Response*.

35. The price listed for the beers is \$2.50. Exhibit M to *Verified Response*.

36. In the “Notes”<sup>17</sup> provided to the auditor for June, 2011, September, 2010 and October, 2010, Protestant reports taking two (2) cases of complimentary beer per week. Exhibit F to *Verified Response*.

37. In the note for November, 2010, Protestant reports taking three (3) to five (5) cases of complimentary beer per week. Exhibit F to *Verified Response*.

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<sup>17</sup> Identified in the *Write Up* as “Daily Sales Records”. *Id.*, pp. 3.

38. The price listed for the complimentary beer on each of the “Notes” is \$2.50. Exhibit F to *Verified Response*.

### ISSUE AND CONTENTIONS

The issue presented for decision is whether Protestant sustained the burden of proving by a preponderance of the evidence that the audits and assessments are erroneous.

In the letter of protest, Protestant asserts that the audit must be incorrect and agrees to submit more paper work which is certain to change the outcome. In the follow-up letter, Protestant advises that the information provided to the auditor contained “a few mistakes”. The mistakes are not articulated; however, Protestant is apparently concerned with the prices originally reported to the auditor and the lack of any discount off the price of the complimentary beers consumed by the owners.

The Division contends that the protest should be denied because Protestant has failed to show that the assessments are incorrect. In support of this contention, the Division argues that the audits were based on Protestant’s records and were performed in accordance with Oklahoma’s revenue statutes and the regulations of the Commission. The Division further argues that the additional documentation provided by Protestant should not affect the audits because the information is not relevant (outside the audit period) or is otherwise unsubstantiated.

### CONCLUSIONS OF LAW

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

#### Jurisdiction and Burden of Proof

1. Jurisdiction of the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S. 2011, § 221(D).

2. The taxpayer has the burden of proof to show the action or proposed action of the Oklahoma Tax Commission is incorrect, and in what respect. *OAC 710:1-5-47. In re Adway Properties, Inc.*, 2006 OK CIV APP 14, 130 P.3d 302; *Geoffrey, Inc. v. Oklahoma Tax Commission*, 2006 OK CIV APP 27, 132 P.3d 632. If the taxpayer fails to prove a prima facie case, the protest may be denied solely on the grounds of failure to prove sufficient facts which would entitle the taxpayer to the requested relief. *OAC 710:1-5-47; Continental Oil Company v. Oklahoma Tax Commission*, 1976 OK 23, 570 P.2d 315.

3. The burden of proof standard is “preponderance of evidence.” 2 Am.Jur.2d *Administrative Law* § 357. “Preponderance of evidence” means “[e]vidence which is of greater weight or more convincing than the evidence offered in opposition to it; that is, evidence which as a whole shows the fact sought to be proved is more probable than not \* \* \* evidence which is more credible and convincing to the mind \* \* \* that which best accords with reason and probability.” BLACK’S LAW DICTIONARY 1064 (5<sup>th</sup> ed. 1979). Each element of the claim must

be supported by reliable, probative, and substantial evidence of sufficient quality and quantity as to show the existence of the facts supporting the claim are more probable than their nonexistence. 2 Am.Jur.2d *Administrative Law* § 357.

### Mixed Beverage Gross Receipts Tax

1. A mixed beverage gross receipts tax of thirteen and one-half percent (13.5%) is levied and imposed on the total gross receipts<sup>18</sup> of a holder of a mixed beverage, caterer, or special event license from: (1) the sale, preparation or service of mixed beverages<sup>19</sup>; (2) the total retail value<sup>20</sup> 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 beverage establishment which entitle a person to complimentary mixed beverages or discounted prices for mixed beverages. 37 O.S. 2001, § 576(A). The mixed beverage gross receipts tax is a direct tax and is in addition to the excise tax levied by § 553 of title 37, sales tax levied by § 1354 of title 68, and any municipal or county sales taxes. 37 O.S. 2011, § 576(C) and (D).

2. On or before the twentieth day of the month immediately following the month of receipt, every mixed beverage tax permit holder, or any person transacting business subject to the gross receipts tax levied by § 576 of Title 37 of the Oklahoma Statutes, shall file with the Tax Commission a monthly report for each place or location of business which report shall include: (1) “gross receipts for the month for the sale, preparation or service of mixed beverages, ice and nonalcoholic beverages mixed with alcoholic beverages”; (2) “gross receipts for the month from charges for the privilege of admission to a mixed beverage establishment which entitle a person to complimentary mixed beverages or discounted prices for mixed beverages”; (3) “total retail value of complimentary or discounted alcoholic beverages served for the month”; and (4) “such other information as may be required by the Tax Commission to enable it to collect taxes imposed as provided by law”. 37 O.S. Supp. 2005, § 579(A). Mixed beverage gross receipts tax

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<sup>18</sup> Defined to mean “the total amount of consideration received as charges for admission to a mixed beverage establishment \* \* \* and the total retail sale 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).

<sup>19</sup> Defined to mean “one or 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”. 37 O.S. Supp. 2005, § 506(22). See, 37 O.S. 2001, § 576(B)(1). “Alcoholic beverage” means alcohol, spirits, beer, and wine as those terms are defined [by § 506 of Title 37] 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. Supp. 2005, § 506(3).

<sup>20</sup> Defined to mean “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).

shall be calculated by multiplying the tax rate, thirteen and one-half percent (13.5%), and the total gross receipts for each month from the sale, preparation or service of mixed beverages, ice and nonalcoholic beverages mixed with alcoholic beverages, the total gross receipts of charges received for admission to mixed beverage establishments which entitle a person to complimentary or discounted prices for mixed beverages, and the total retail value of complimentary or discounted mixed beverages. 37 O.S. Supp. 2005, § 579(B).

3. The Oklahoma Tax Commission is authorized to audit any mixed beverage, beer and wine, caterer or special event licensee to determine if the correct amount of tax payable under § 576 has been collected. 37 O.S. Supp. 2005, § 579(G). A licensee shall be deemed to be in compliance if the audit reveals that the amount collected is within the following percentages of the amount of tax payable:

1. For spirits, eighty-four percent (84%) to one hundred sixteen percent (116%);
2. For wine, ninety percent (90%) to one hundred ten percent (110%);
3. For beer sold at draft and not in original packages, eighty-six percent (86%) to one hundred fourteen percent (114%); and
4. For beer sold in original packages, ninety-five percent (95%) to one hundred five percent (105%).

*Id.*

#### Sales Tax

1. The collection, reporting and remittance of sales taxes are governed by the Oklahoma Sales Tax Code (“Code”).<sup>21</sup> An excise tax is levied upon the gross receipts or gross proceeds of all sales, not otherwise exempted by the Code. 68 O.S. Supp. 2007, § 1354(A).

2. The sale<sup>22</sup> of “[f]ood, confections, and all drinks sold or dispensed by hotels, restaurants, or other dispensers, and sold for immediate consumption upon the premises or delivered or carried away from the premises for consumption elsewhere” is expressly made subject to sales taxes. 68 O.S. Supp. 2007, § 1354(A)(10).

3. The total gross receipts subject to sales tax from the sale of mixed beverages is the “total of the retail sale price received for the sale, preparation or service of mixed beverages,

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<sup>21</sup> 68 O.S. 2001, § 1350 et seq., as amended.

<sup>22</sup> Defined to mean “the transfer of either title or possession of tangible personal property for a valuable consideration regardless of the manner, method, instrumentality, or device by which the transfer is accomplished in this state”. 68 O.S. Supp. 2007, § 1352(22).

ice, and nonalcoholic beverages to be mixed with alcoholic beverages”. 37 O.S. 2001, § 576(E). *See, OAC 710:65-19-5(a)* which provides:

Persons selling alcoholic beverages to purchasers for use or consumption are required to remit sales tax to the Commission upon the total retail value from such sales, pursuant to *OAC 710:20-5-4*, notwithstanding the fact that manufacturers and importing distributors of alcoholic beverages are required to pay certain taxes.

4. Each person required to make a sales tax report “shall include in the gross proceeds derived from sales to consumers or users, the “sales value”<sup>23</sup> of all tangible personal property which has been purchased for resale, \* \* \* and withdrawn from stock in trade for use or consumption during the taxable period covered by such report, and shall pay the tax on the sales value of this \* \* \* property”. 68 O.S. Supp. 2004, § 1362(D). *See also, OAC 710:65-1-7(2)*.<sup>24</sup>

5. Generally, “it shall be the duty of all tax remitters, on or before the twentieth day of each month, to deliver to the OTC, upon forms prescribed and furnished by it, sales tax reports signed under oath, showing the gross receipts or gross proceeds arising from all sales taxable or nontaxable \* \* \* during the preceding calendar month.” 68 O.S. Supp. 2004, § 1365(A). *See, OAC 710:65-3-4(a) (2)*.<sup>25</sup> A “tax remitter” is “any person required to collect, report, or remit the tax imposed by the [Code]”. 68 O.S. Supp. 2007, §1352(27). “[E]ach and every vendor in this state shall collect from the consumer or user the full amount of the tax levied by the [Code]”. 68 O.S. Supp. 2007, § 1361(A)(1). A “vendor” is “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 [Code]”. 68 O.S. Supp. 2007, § 1352(28) (a).

6. It is presumed for purposes of the proper administration of the provisions of the Code that “all gross receipts are subject to tax until they are shown to be tax exempt”, *OAC 710:65-1-4(A)*; and all sales of tangible personal property are subject to tax until the

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<sup>23</sup> In this case, “sales value” means “the larger of either the vendor’s cost at the time the exempt purchase of goods was made, or the price at which it would be sold to the vendor’s best customer in the ordinary course of business.” *OAC 710:65-1-2*.

<sup>24</sup> This rule provides that any business which purchases tangible personal property for resale, manufacturing or further processing and withdraws such property, either from its inventory or after such inventory has been manufactured or processed for its own use or consumption, has made a taxable sale, the sales value of which is taxable and must be reported on its sales tax report for the month the property is withdrawn.

<sup>25</sup> This rule provides that the contents of the monthly sales tax report shall disclose “[t]he ‘sales value’ of all withdrawals from inventory of goods initially purchased exempt from sales tax, including all items withdrawn for gifts, donations, prizes or business or personal use.”

contrary is established, *OAC 710:65-3-30(b)*. The burden of proving that a sale is not a taxable sale is on the person who made the sale. 68 O.S. Supp. 2004, § 1365(F).

7. It is the duty of every tax remitter required to make a sales tax report and pay any tax under the Code to keep and preserve suitable records of the gross daily sales together with invoices of purchases and sales, bills of lading, bills of sale and other pertinent records and documents which may be necessary to determine the amount of tax due, and substantiate and prove the accuracy of such returns. 68 O.S. Supp. 2004, § 1365(F); *OAC 710:65-3-30*<sup>26</sup>; and *Dunn v. State ex rel. Oklahoma Tax Commission*, 1993 OK CIV APP 105, 862 P.2d 1285. See, *Kifer v. Oklahoma Tax Commission*, 1998 OK CIV APP 34, 956 P.2d 162. See also, 37 O.S. 2001, § 163.14(C).<sup>27</sup>

### Withholding Tax

1. Every employer<sup>28</sup> making payment of wages shall deduct and withhold from the wages paid each employee<sup>29</sup> a tax in an amount determined in accordance with a table fixing graduated rates of tax to be withheld. 68 O.S. 2001, § 2385.2(A).

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<sup>26</sup> This rule provides in part:

(a) 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.

(1) Such books and records must clearly document all the information (deductions as well as gross receipts) required for tax returns and shall, at all times during business hours of the day, be subject to inspection and audit by the Commission or its duly authorized agents and employees.

<sup>27</sup> This subsection provides:

Each and every retail dealer shall keep accurate records of all sales of low-point beer, whether purchased or manufactured by the retail dealer, to consumers or users, and of all purchases of such beverages from wholesalers or otherwise; and such records shall be preserved for a period of three (3) years and shall be open to inspection at all times by the Commission or any of its employees.

<sup>28</sup> Defined as "any person (including any individual, \* \* \*) transacting business in or deriving any income from sources within the State of Oklahoma for whom an individual performs or performed any service, of whatever nature, as the employee of such person". 68 O.S. 2001, § 2385.1(b); *OAC 710:90-1-2*.

<sup>29</sup> Defined as "any 'resident individual,' as defined by Section 2353 of this title, performing services for an employer, either within or without, or both within and without, the State of Oklahoma, and every other individual performing services within the State of Oklahoma, the performance of which services constitutes, establishes, and determines the relationship between the parties as that of employer and employee." 68 O.S. 2001, § 2385.1(c); *OAC 710:90-1-2*.

2. In general, “the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished.” *OAC 710:90-1-2(A) (i)*. “An employee is subject to the will and control of the employer, not only as to what shall be done, but how it shall be done.” *OAC 710:90-1-2(A) (ii)*. However, “[i]t is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.” *Id.*

3. “Every employer required to deduct and withhold taxes under Section 2385.2 of this title shall pay over the amount so withheld as taxes to the Oklahoma Tax Commission \* \* \* and shall file a quarterly return in such form as the Tax Commission shall prescribe”. 68 O.S. Supp. 2009, § 2385.3(A). “Every employer who fails to withhold or pay to the Tax Commission any sums herein required to be withheld or paid shall be personally and individually liable therefor to the State of Oklahoma.” 68 O.S. Supp. 2009, § 2385.3(E). “If any employer fails to withhold the tax required to be withheld by Section 2385.2 of this title and thereafter the income tax is paid by the employee, the tax so required to be withheld shall not be collected from the employer but such employer shall not be relieved from the liability for penalties or interest otherwise applicable because of such failure to withhold the tax.” 68 O.S. Supp. 2009, § 2385.3(F).

### ANALYSIS

1. Protestant did not maintain the records required by the statutes and regulations. Where a taxpayer does not maintain proper records, the Tax Commission is authorized to use an alternative method to determine the taxpayer’s gross receipts from sales of alcoholic beverages and low point beer. *Kifer, supra* at ¶ 12. The depletion method is neither arbitrary nor capricious. *Id.*, at ¶ 13.

2. The information utilized in the audits was provided by Protestant’s suppliers and Protestant’s representative, Protestant’s spouse and manager of BAR 1. The information was neither archaic nor complex. The additional information submitted subsequent to the audit; however, was unsubstantiated, contradictory in certain aspects and in other respects, non-supportive of the proposition for which it was submitted.

3. Protestant did not provide the brands or costs of the complimentary beer, nor did Protestant maintain records of spillage, breakage and theft. In addition, Protestant represents that the complimentary beer was accounted for in the monthly reports. A credit of five percent (5%) of the total retail value of the bottled beer was allowed in the audit.

4. Protestant failed to show the audits and assessments are incorrect.

**RECOMMENDATIONS**

THEREFORE, based on the above and foregoing findings of fact and conclusions of law, it is recommended that the protest of Protestant, PROTESTANT be denied. It is further recommended that the amounts in controversy, inclusive of any additional accrued 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.

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. 2014) 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.”