

**JURISDICTION:** OKLAHOMA TAX COMMISSION  
**CITE:** 2019-01-10-04 / NON-PRECEDENTIAL  
**ID:** P-14-111-K  
**DATE:** JANUARY 10, 2019  
**DISPOSITION:** SUSTAINED IN PART, DENIED IN PART  
**TAX TYPE:** SALES/MIXED BEVERAGE  
**APPEAL:** NONE TAKEN

### **ORDER**

The above matter comes on for entry of a final order of disposition by the Oklahoma Tax Commission. Having reviewed the files and records herein, the Commission hereby adopts the Findings of Fact, Conclusions of Law and Recommendation made and entered by the Administrative Law Judge on the 15<sup>th</sup> day of February, 2018, appended hereto, together herewith shall constitute the Order of the Commission.

### **SO ORDERED**

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

Now on this 15<sup>th</sup> day of February, 2018, the above styled and numbered cause comes on for decision under assignment regularly made by the Oklahoma Tax Commission to ALJ, Administrative Law Judge. Protestants, COMPANY (“Company”) and MEMBER (“Member”) appear pro se. The Compliance Division of the Oklahoma Tax Commission (“Division”) is represented by AGC, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

#### **STATEMENT OF THE CASE**

A sales tax audit comparing the gross income on the income tax returns and income statements to the gross sales on the sales tax reports and a mixed beverage gross receipts tax depletion audit based on information provided by Protestants and Protestants’ wholesalers were conducted by the Division for the periods inclusive of November, 2010 through October, 2013 (“Audit Period”). As the result of the audits, the Division on June 27, 2014, issued proposed sales and mixed beverage gross receipts tax assessments against the Company and a proposed sales tax assessment against the Member. Protestants timely protested the assessments. The protest letter was not verified and a hearing was not requested.

On December 5, 2014, the protest, assessments and audit work papers were referred to the Office of Administrative Law Judges to initiate proceedings under the *Uniform Tax Procedure Code*<sup>1</sup> and the *Rules of Practice and Procedure before the Office of Administrative Law Judges*.<sup>2</sup> The protest was docketed as Case No. P-14-111-K.

A pre-hearing teleconference was scheduled for February 5, 2015. A *Joint Status Report in Lieu of Prehearing Teleconference* was filed January 28, 2015, requesting additional time to exchange documentation and discuss the issues. By letter dated January 29, 2015, the parties were instructed to file a status report by March 30, 2015. Monthly status reports for 31 months were filed advising inter alia: the parties were in communication, discussing the issues, and requesting, gathering, providing and reviewing additional documentation.

On October 9, 2017, the *Compliance Division's Notice of Revision* ("Revision") was filed. The *Revision* is based on prices for mixed drinks, wine and beer provided by the Member which caused an increase in the tax due for both the mixed beverage and sales tax audits. By letter dated October 10, 2017, Protestants were directed to file a response to the *Revision*. No response was filed.

On November 9, 2017, an *Order Directing Verified Response* ("Order") issued directing the Division to file a verified response, advising Protestants a reply could be filed, and notifying the parties that if a hearing was not requested, the record would close and the protest submit for decision upon completion of the procedural schedule. Protestants filed no response to the *Order*.

The *Division's Verified Response* ("Verified Response") with Exhibits A through J and Protestants' reply were filed in accordance with the *Order*. On January 11, 2018, the record closed and the protest submitted for decision.<sup>3</sup>

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

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

<sup>3</sup> 68 O.S. 2011, § 221(D) and OAC 710:1-5-39(a).

**FINDINGS OF FACT**

Upon review of the file and records, including the *Verified Response*, Protestants' reply and the exhibits, the undersigned finds:

A. STATEMENT OF THE FACTS, *Verified Response* provides:<sup>4</sup>

1. On or about September 30, 2013, a notice of audit letter was sent to Protestant, [the Company] advising it that it had been selected for an audit.

2. After receiving the Audit Notification Letter, Protestant, [the Member] responded to the letter on October 14, 2013.

3. During the audit process, Protestants were asked to complete several informational forms regarding the audit, including a statute of limitations waiver, members list, price list, brand classification, pour statement, and inventory agreement. These documents were completed by Protestants and returned to the auditor.<sup>5</sup>

4. A depletion audit was conducted by the Division using the information provided by Protestants in the audit forms compared to the sales of alcohol to Protestants reported by wholesalers.

5. The audit resulted in a finding by the auditor of underreported taxable sales of mixed beverages in the amount of \$492,183.04. Additional mixed beverage tax due was assessed on that amount and resulted in a mixed beverage tax assessment in the amount of \$66,444.71.

6. During the audit period, Protestant underreported sales tax during the regular course of business. A review of the records provided by Protestant compared against sales tax returns filed with the Commission revealed underreported sales tax from the beginning of the audit period through April 2013. Also, additional sales tax due was assessed on the amount of underreported mixed beverage from the audit.

7. The combined total of the underreported gross sales and additional mixed beverage sales resulted in a finding by the auditor of additional taxable sales in the amount of \$1,906,669.40. Additional sales tax due was assessed on that amount and resulted in a sales tax assessment in the amount of \$159,206.91.

8. On or about June 27, 2014, an assessment letter was sent to each Protestant notifying them that additional sales tax was being assessed as a result of the audit of their records.

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<sup>4</sup> The references to the Exhibits supporting the statements are omitted.

<sup>5</sup> The auditor notes that the records request, inventory agreement and brand classification list were not completed and returned. A pour rate of 1.5 ounces for well, call, premium and super-premium drinks as listed on one of the price lists and the regulation pour rate of 6 ounces for wine sold by the glass were used. *Field Audit Write Up* ("Write Up"), pp. 2. Official notice pursuant to OAC 710:1-5-36(a).

9. On or about June 27, 2014, an assessment letter was sent to Protestant [the Company] notifying it that additional mixed beverage tax had been assessed as a result of the audit of its records.

10. On or about August 20, 2014, Protestants timely protested the mixed beverage and sales tax assessments.

11. During the course of this protest, Protestant was provided an opportunity to review the workpapers of the auditor. Protestant's representative made handwritten corrections regarding prices of alcoholic beverages that were sold.

12. The auditor reviewed the corrected workpapers submitted by Protestant's representative and made adjustments based on those corrections. The Division submitted a revised assessment as a result of the corrected prices. The revision resulted in an assessed tax for mixed beverage sales in the amount of \$67,354.60 and an assessed tax for sales tax in the amount of \$159,768.81.

13. This matter is properly before the Court

B. ADDITIONAL FINDINGS OF FACT:

1. The Company was selected for audit due to a low mixed beverage tax ratio (purchases to reported sales) of 0.42. *Write Up*, pp. 2.

2. The Company is a domestic limited liability company formed October 15, 2004. Secretary of State website, (official notice).<sup>6</sup> The report shows the Company's status as "[i]n existence". *Id.*

3. Protestants operate an upscale restaurant with an extensive wine list. *Write Up*, pp. 2.

4. The records provided by Protestants to the auditor included:

- Completed/signed Statute of Limitation Waiver Agreement
- Completed/signed List of Members
- Completed/signed Price Lists
- Completed/Signed Pour Statement

Exhibit C to *Verified Response*.

5. The Statute of Limitation Waiver Agreement permitted assessment or refund of several tax types, inclusive of "alcohol" and sales tax by June 30, 2014, for the Audit Period. *Id.*

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<sup>6</sup> *Id.* <https://www.sos.ok.gov/corp/corplInformation.aspx?id=3512051232>.

6. In response to the audit notification, Protestants write in part:

In the course of evaluating the records we had in storage, it became evident to us, that not only were many of our records illegible but that there had been an under-reporting of our sale and mixed beverage taxes for a number of months. Beginning in April 2013 our new cash register system has provided us with good information and our report submissions and payments of tax have been complete and accurate.

Exhibit B to *Verified Response*.

7. The auditor notes that Protestants reported sales increased by a factor of over 7 after the new cash register system was installed. *Write Up*, pp. 3.

7. The depletion audit was conducted on Protestants' purchases of alcoholic beverages during the Audit Period since beginning and ending inventories were not provided. *Write Up*, pp. 2-3; Exhibit C to *Verified Response*.

8. A pour rate of 1.5 ounces for mixed beverages as listed on one of the price lists and the regulation 6 ounces for wine sold by the glass were used to deplete inventory. One of the price lists Reports a 5 ounce pour for wine. *Write Up*, pp. 2; Exhibit C to *Verified Response*.

9. The prices as listed for mixed drinks, wine and strong beer were adjusted to exclude mixed beverage gross receipt and sales taxes, although both price lists report that said taxes are not included in the prices. *Write Up*, pp. 3; Exhibit C to *Verified Response*.

10. One of the price lists reports "white wine primarily-house" is used in cooking. The other price list reports "2 cases of Toasted Head Chardonnay for cooking", which was exempted from the depletion audit. *Id.*

11. The total strong beer, liquor and wine available for sale as reported by the wholesalers of \$724,040.12 was adjusted by a "total allowance" of

\$87,788.08<sup>7</sup> and reported mixed beverage gross receipts of \$117,496.00 to arrive at underreported mixed beverage gross receipts of \$492,183.04 for the Audit Period. Exhibit D to *Verified Response*.

12. The depletion audit resulted in an assessment of a total aggregate amount of \$79,970.32 against the Company, comprising mixed beverage gross receipt tax of \$66,444.71, interest<sup>8</sup> accrued through July 31, 2014, of \$6,881.14, and a 30 day delinquency penalty<sup>9</sup> of \$6,644.47. Exhibit G to *Verified Response*.

13. In response to the records request, Protestants submitted income statements for calendar years 2010, 2011 and 2012 and federal income tax returns for tax years 2010 and 2011. Exhibit E to *Verified Response*.

14. No information for 2013 and no purchase invoices or daily sales information was provided. *Write Up*, pp. 3.

15. The sales tax audit was conducted by comparing the gross sales on the income tax returns and income statements which reported the same annual

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<sup>7</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 percent (10%) of the total wine available for sale by the glass. OAC 710:20-5-8(b)(3).

<sup>8</sup> See, 37 O.S. Supp. 2014, § 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. 2014, § 217(B).

<sup>9</sup> See, Note 9. 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 and interest within sixty (60) days of the mailing of a proposed assessment or voluntarily pays the tax upon the filing of an amended return." 68 O.S. Supp. 2014, § 217(C), emphasis added.

sales totals to the reported sales from the sales tax reports. Exhibit E to *Verified Response, Write Up*, pp. 3.

16. The underreported sales for the two month period of 2010 were arrived at by dividing the reported monthly sales by total reported sales for 2010 to come to a percentage, multiplying the gross sales for 2010 as reported on the income statements and income tax returns by the percentage to come to expected sales for the month, and subtracting from the expected sales the reported sales for the month. Exhibit E to *Verified Response*.

17. The underreported sales for the three month period of 2013 were arrived at by dividing the gross sales reported on the income statements and income tax returns for 2010, 2011 and 2012 by 36 and subtracting from that figure the reported sales for the month. *Id.*

18. The sales tax audit determined that Protestants had underreported sales of \$1,414,486.36. *Id.* To this amount, the underreported mixed beverage gross receipts of \$492,183.04 were added, to arrive at total taxable underreported sales for the Audit Period of \$1,906,669.40. *Id.*

19. The sales tax audit resulted in an assessment of a total aggregate amount of \$214,058.23 against the Company and the Member, comprising sales tax of \$159,206.91, interest accrued through July 31, 2014, of \$38,930.64, and a 30 day delinquency penalty of \$15,920.68. Exhibit F to *Verified Response*.

20. Proposed assessment letters were mailed to Protestants at their last known address on June 27, 2014. Exhibits F and G to *Verified Response*. The letters were returned unclaimed, and re-mailed on July 25, 2014. Note 6.

21. *The Taxpayer's List of Principal Officers, Partners or Members (LLC)* dated November 8, 2013, reports the Member has been an owner of the Company from 2004 to present. Exhibit B to *Verified Response*.

22. The auditor in a note to the file memorializing a teleconference had with the Member on April 18, 2014, writes:

Lots of wine and liquor used in cooking. Also, he comps a lot of drinks and bottles of wine as well as a [sic] having a substantial amount of personal consumption. Explained that the latter two are taxable at full retail.

High food cost (est at 45%): fresh fish, quail, venison, choice beef, higher-end produce.

Note 6.

23. In a follow up e-mail to the teleconference, the auditor writes: “[y]ou are going to provide a comprehensive list of wine and liquors consumed in cooking during the period 11-01-10 thru 10-31-13.” *Id.*

24. In response to the e-mail, the Member writes: “I have attached the audit spreadsheet, I have all the prices listed as drinks only as we aren’t the kind of place that serves a lot of drinks as shots. Also, if there is no price listed it is most likely used as an ingredient in either cooking or other drinks and not sold individually, for example Triple Sec would be served in Margaritas so we would charge the tequila price for the drink, we would never serve it on its own nor do we have a cost associated with it.” *Id.*

25. The *Compliance Division’s Notice of Revision* is based on the drink prices; Exhibit I to *Verified Response*, provided by Protestants, Exhibit J to *Verified Response*.

26. The auditor notes for the revision:

When the taxpayer provided a price only and no indication of ‘drink’ or ‘bottle’ it was assumed if the price were reasonable they agreed with the original audit classification. This classification was not changed, with the exception of Andre Spumate [sic]. The taxpayer listed a price of \$46.80/280.00. Our original assessment listed this as an exempt. The price was used to reflect \$46.80 a bottle. The taxpayer listed several case prices. Case prices were not allowed as no

documentation or explanation was provided. When '\$0.00' was followed by an explanation this product was exempted. If no explanation was given the original audit classification was not changed.

Exhibit J to *Verified Response*.

27. The auditor further notes that when glass and bottle prices are both provided, bottle prices are always used and regarding "Beaucastel Chateau Du Pape" where Protestants noted the six bottle were not sold, "no ending inventory was allowed, original audit code was not changed." *Id.*

28. The revised amounts in controversy, inclusive of interest accrued through October 31, 2017, are \$113,921.72 for mixed beverage gross receipt tax and \$309,581.21 for sales tax. *Id.*

### ISSUE AND CONTENTIONS

The issue presented for decision is whether Protestants have shown that the audit and assessments are in any respect erroneous.

In the letter of protest, Protestants question the accuracy of the credit given for taxes reported and paid, and the information obtained from outside sources to calculate the underreported mixed beverage sales. In the reply to the *Verified Response*, Protestants argue that they accurately reported all sales and mix beverage taxes. They declare they were never advised how wine and liquor used in cooking, nor how waste beyond breakage would be accounted for in the audit. They also assert that they purchased many items of wine and liquor during the audit period that were not consumed, but are included in the audit. Further, Protestants argue that the paperwork they used to report changes contain many errors as to "pour amounts and other factors."

The Division contends that the protest should be denied because Protestants failed to show the assessments are incorrect. In support thereof, the Division argues that credit for the taxes reported and paid by Protestants during the audit period was given, citing the audit work papers. The Division further argues that despite giving ample time and opportunity, Protestants

have presented no evidence to demonstrate any further adjustments to the proposed assessments are warranted. The Division further contends that the Member is personally liable for the sales tax due on the underreported sales. To support this contention, the Division argues that the Member has offered no argument or evidence to show he was not responsible for collection and remittance of sales tax for the Company during the audit period.

### CONCLUSIONS OF LAW

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

#### I. 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; Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission*, 1988 OK 91, 768 P.2d 359, 362, citing *Continental Oil Co. v. Oklahoma State Bd. of Equalization*, 1976 OK 23, 570 P.2d 315, 317.

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.

4. An order of the Tax Commission must be supported by substantial evidence. *Dugger v. State ex rel. Oklahoma Tax Commission*, 1992 OK 105, 834 P.2d 964. Likewise, the audit upon which a portion of the record is formed and order issued, must be supported by substantial evidence. Oklahoma Tax Commission Order No. 2003-07-22-09, 2003 WL 2347117.

5. An audit is supported by substantial evidence when an evidentiary foundation for the audit has been established. Usually the evidentiary foundation will be established by the records reviewed by the auditor. Where an evidentiary foundation has been established, the taxpayer must prove the action of the Tax Commission in assessing the tax is incorrect, and in what respect. *OAC 710:1-5-47*; *Enterprise Management Consultants, Inc.*, supra. However, where an evidentiary foundation has not been laid or the records upon which the audit is based establish no basis for assessing a tax, the audit and assessment in the initial instance cannot be sustained as supported by substantial evidence. *Dugger*, supra.

## II. ADMINISTRATIVE RULES AND REGULATIONS

1. Rules promulgated under the Administrative Procedures Act<sup>10</sup> are presumed to be valid until declared otherwise by a court of competent jurisdiction. 75 O.S. 2011, § 306(C). 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. 75 O.S. 2011, § 308.2(C).

2. The rules and regulations of an administrative agency which implement a statute are valid unless they are beyond the scope of the statute, conflict with the statute or are unreasonable. See, *Arkansas Louisiana Gas Co. v. Travis*, 1984 OK 33, 682 P.2d 225; *Boydston v. State*, 1954 OK 327, 277 P.2d 138. Agency rules need not be specifically authorized by statute, but must generally reflect the intent of the Legislature as expressed in the statute. *Jarboe Sales Company v. Oklahoma Alcoholic Beverage Laws Enforcement*

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<sup>10</sup> 75 O.S. 2011, § 250 et seq., § 301 et seq.

*Commission*, 2003 OK CIV APP 23, 65 P.3d 289. As a general rule, it is presumed that administrative rules and regulations are fair and reasonable, and the complaining party must prove the contrary by competent and convincing evidence. *State ex rel. Hart v. Parham*, 1966 OK 9, 412 P.2d 142.

3. Great weight is accorded an agency's construction of a statute when the administrative interpretation is made contemporaneously with the enactment of the statute and the construction is longstanding and continuous by the agency charge with its execution. *Schulte Oil Co., Inc. v. Oklahoma Tax Commission*, 1994 OK 103, 882 P.2d 65. Where the Legislature is made repeatedly aware of the operation of the statute according to the construction placed upon it by an agency and the Legislature has not expressed its disapproval with the agency's construction, the Legislature's silence may be regarded as acquiescence in the agency's construction, *R.R. Tway, Inc. v. Oklahoma Tax Commission*, 1995 OK 129, 910 P.2d 972; and the agency's construction is given controlling weight and will not be disregarded except in cases of serious doubt, *Cox v. Dawson*, 1996 OK 11, 911 P.2d 272.

### III. 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>11</sup> of a holder of a mixed beverage, caterer, or special event license from: (1) the sale, preparation or service of mixed beverages<sup>12</sup>; (2) the total

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<sup>11</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 may be the sum of the total retail sale price and the gross receipts tax levied thereon". 37 O.S. Supp. 2014, § 576(B)(2).

<sup>12</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. 2014, § 506(22). "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. 2014, § 506(3).

retail value<sup>13</sup> of complimentary or discounted mixed beverages; (3) ice or nonalcoholic beverages sold, prepared or served to be 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. Supp. 2014, § 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. Supp. 2014, § 576(C) and (D).

2. The Oklahoma Tax Commission may 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. 2014, § 579(G). A licensee is deemed compliant if the audit reveals that the amount collected is within these 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.*

3. “Every mixed beverage tax permit holder or any other person transacting business subject to the gross receipts tax shall be liable for the tax upon the gross receipts from such beverages (on the basis of the number of drinks available for sale, preparation, or service from the total alcoholic beverages received).” *OAC* 710:20-5-8. In accord, *Kifer v. Oklahoma Tax Commission*, 1998 OK CIV APP 34, ¶ 13, 956 P.2d 162, 166.

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<sup>13</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. Supp. 2014, § 576(B)(3).

4. “A deduction may be allowed from the gross receipts tax liability determined by an audit or other investigation of the books and records of a mixed beverage tax permit holder.”

*OAC 710:20-5-8(b)(4)*. The deductions are for alcoholic beverages:

- (A) consumed in food as verified by the audit;
- (B) destroyed due to breakage for which the permit holder has retained the container; or that portion thereof that has the unbroken seal; or for partial bottles destroyed by breakage for which the permit holder has completed a breakage affidavit listing the date of the occurrence, the brand and type of liquor, the size bottle, the approximate amount left in the bottle by 1/10ths, and the cause of the breakage. The affidavit shall be signed by the permit holder and two witnesses;
- (C) stolen or destroyed by a disaster such as a fire or flood, provided that reasonable evidence is provided to support a claim. Reasonable evidence might include a copy of a police or sheriff’s crime report; or an insurance claim detailing the inventory destroyed by brand, size, and type of liquor;
- (D) not consumed, and exist or existed, at the close of a taxable period in question, provided that the amount and nature of the unconsumed inventory has been verified by agents of the Tax Commission, ABLE Commission, or verified by invoice to a mixed beverage permittee or wholesaler approved to purchase the inventory by the ABLE Commission. Partially filled bottles which are not included in a transferred inventory should be verified by a Tax Commission or ABLE Commission agent or agents.

*Id.* If an ending inventory is offered for the audit, any establishment selling alcoholic beverages prior to the starting date of the audit period must furnish a beginning inventory of all liquor, wine, and strong beer on hand. *OAC 710:20-5-8(b)(5)*. If the permit holder is unable or unwilling to furnish a beginning inventory, the audit will consist solely of taxpayer’s purchases during the audit period. *Id.*

#### IV. SALES TAX

1. The collection, reporting and remittance of sales taxes are governed by the Oklahoma Sales Tax Code (“Code”).<sup>14</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. 2011, § 1354(A).

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<sup>14</sup> 68 O.S. 2011, § 1350 et seq., as amended.

2. The sale 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. 2011, § 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, ice, and nonalcoholic beverages to be mixed with alcoholic beverages”. 37 O.S. Supp. 2014, § 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. It is presumed for the proper administration 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 contrary is established, *OAC 710:65-3-30(b)*. The burden of proving a sale is not a taxable sale is on the person who made the sale. 68 O.S. 2011, § 1365(F).

#### V. MEMBER LIABILITY FOR SALES TAX

1. The tax levied by the Code is paid by the consumer or user to the vendor as trustee for and on account of this state and every vendor must collect from the consumer or user the full amount of the tax or an amount equal nearly as possible or practicable to the average equivalent thereof. 68 O.S. Supp. 2014, § 1361(A).

2. Every person required to collect any tax imposed by the Code is personally liable for the tax. *Id.* “Any sum or sums collected or accrued or required to be collected or accrued under the Code shall be deemed to be held in trust for the State of Oklahoma, and, as trustee, the collecting vendor \* \* \* shall have a fiduciary duty to the State of Oklahoma in regards to such sums and shall be subject to the trust laws of this state.” 68 O.S. Supp. 2014, § 1361(F).

3. Included in the definition of "Vendor" is "any person making sales of tangible personal property or services in this state, the gross receipt or gross proceeds from which are taxed by the \* \* \* Code[.]" 68 O.S. 2011, § 1352(28)(a). A "person" under the Code includes "any individual, company, partnership, joint venture, joint agreement, association, mutual or otherwise, limited liability company, corporation". 68 O.S. 2011, § 1352(18).

4. When a proposed assessment is filed against a corporation, limited liability company or other legal entity for unpaid sales taxes, a proposed assessment must be filed against the individuals personally liable for the tax. 68 O.S. Supp. 2014, § 253(A). An individual is personally liable for the tax if, during the time for which the assessment was made, the individual was responsible for collection and remittance of taxes or had direct control, supervision or responsibility for filing returns and making payments of the tax due. 68 O.S. Supp. 2014, § 253(B). Personal liability is determined under the Internal Revenue Code standards for determining liability for the payment of federal withholding tax. 68 O.S. Supp. 2014, § 253(C).

#### ANALYSIS

1. Protestants have the burden of proof. *OAC* 710:1-5-47. Protestants have presented no evidence much less substantial evidence to support their arguments of error with the audits.

2. The audit work papers confirm that credits were given for the sales and mixed beverage gross receipt taxes reported and paid during the audit period. The audit file shows Protestants were asked, but never provided a "comprehensive list of wine and liquors consumed in cooking". However, the specific wine identified as consumed in cooking on one of the price lists was exempted.

3. Verified documentation of "waste-spoilage" above the spillage allowance was never submitted. Verified documentation of wine or liquor not consumed and existing at the close of the audit period was not provided.

4. The pour rate utilized for depleting mixed beverages is the pour rate identified by Protestants using “posi-pour spouts”. Protestants received the benefits of a 6 ounce pour rate for wine rather than the 5 ounces reported and in the reduction of their prices for mixed beverages despite their reports that taxes were not included in the prices.

5. An audit must be supported by substantial evidence. Oklahoma Tax Commission Order No. 2003-07-22-09, 2003 WL 2347117. Protestants’ gross sales were compiled from their income tax returns and income statements, which returns and statements recorded their gross receipts or sales and total income, respectively. The Division has not shown or alleged that the reported gross sales were understated.

6. The reported gross sales would have included Protestants’ gross receipts or total income from sales of food, mixed beverages, wine and beer. In other words, the sales picked up as underreported in the sales tax audit included underreported mixed beverage sales. By including the underreported mixed beverage sales in the total taxable underreported sales, the mixed beverage sales are subjected to sales tax twice. The underreported mixed beverages sales must be removed from the sales tax audit and assessment.

### **RECOMMENDATIONS**

The protest to the sales tax assessment should be sustained in part and denied in part. The revised sales tax assessment should be further revised in accordance herewith and the resultant amount, inclusive of penalty and accrued and accruing interest, fixed as the deficiency due and owing by the Company and the Member, respectively. The protest to the mixed beverage gross receipts tax assessment should be denied.

### **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 2014) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002).