This matter comes before the Oklahoma Tax Commission upon the protest of COMPANY to proposed assessments of additional mixed beverage and sales taxes issued by the Business Tax Division on November 2, 1987.

A hearing on the protest was held before ALJ, Administrative Law Judge, who filed her Findings, Conclusions and Recommendations on March 20, 1989. The Commission granted Protestant's Application for Hearing en Banc and the parties' Motion to Enlarge the Issues at Oral Argument to include the statutory interpretation of the calculation of the gross receipts tax levied by 37 O.S. 1985 Supp., §576, et seq.

The only issue before the Administrative Law Judge was "whether the Tax Commission is estopped from collecting additional mixed beverage gross receipts tax and sales tax during this audit period when the Protestant relied upon public statements and written information for calculation of the tax that was given by a Tax Commission employee." The Administrative Law Judge recommended denial of the protest for the reason that estoppel does not lie against the State for mistakes or errors of its employees.

The Commission is not in disagreement with the Administrative Law Judge's Findings of Fact and Conclusions of Law; however, upon consideration of the tax calculation issue raised for consideration at the en banc hearing, the Commission has determined that the protest should be sustained, such that any amounts attributable to the calculation of the tax on the gross proceeds, rather than on the retail sales price, should be deleted from the assessments.

STATEMENT OF FACTS

On November 2, 1987, the Business Tax Division of the Oklahoma Tax Commission issued to the COMPANY proposed assessments of the mixed beverage gross receipts tax, penalty and interest of $1,581.53 and sales tax, penalty and interest of $985.10, for the period of July 1, 1985 through May 31, 1987. Both the sales and mixed beverage tax assessments were issued as a result of a depletion audit of Protestant's inventory and sales records. Protestant timely filed its protest to the proposed assessments and a hearing was held on October 11, 1988.

The Protestant objected to the assessments on the basis that the auditor used incorrect prices in performing the depletion audit, which resulted in additional sales and mixed beverage tax liabilities. The liability set forth in the assessments at issue is attributable, at least in part, to the Protestant's method of calculating the tax on the price which resulted after reducing the gross
amount collected from the customer by the mixed beverage and sales taxes. The Protestant did not raise any other objections to the assessments other than the pricing issue.

At the hearing before the Administrative Law Judge, the sole issue presented for determination was whether the Commission should be estopped from collecting the tax pursuant to its then current regulations because the taxpayer had relied upon prior public statements of a Commission employee on the proper method to compute the tax. PRESIDENT, President of the COMPANY, asserted that she calculated the tax based on instruction given by DIRECTOR, Director of the Commission's Alcohol and Tobacco Division, at a meeting in Tulsa on May 6, 1985. The liquor by the drink legislation had been passed earlier that year and DIRECTOR was invited to speak to the Tulsa Bar and Restaurant Association on the recently enacted mixed beverage tax laws. DIRECTOR advised the Tulsa group that the tax was included in the advertised price and was to be calculated on the selling price, not the advertised price.

In April 1986, the Commission issued Order No. 86-04-03-03 and Regulation XXX17.1 which set forth a method of calculating the tax which differed from the method advanced by DIRECTOR.

The statute which is the subject of this controversy is 37 O.S. 1985 Supp., §576, which provides; in pertinent part, as follows:

A. A tax at the rate of ten percent (10%) is hereby levied and imposed on the total gross receipts of a holder of a mixed beverage, caterer, or special event license, issued by the ABLE Commission, from:

1. The sale, preparation or service of mixed beverages;

2. The total retail value 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.

B. For purposes of this section:

1. "Mixed beverages" means mixed beverages as defined by Section 506 of Title 37 of the Oklahoma Statutes;

2. "Total gross receipts" means 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; and

3. "Total retail value" means the total amount of consideration that would be required for the sale, preparation or service of mixed beverages.

D. The gross receipts tax levied by this section is hereby declared to be a direct tax upon the receipt of consideration for any charges for admission to a mixed beverage establishment, for the sale, preparation or service of mixed beverages, ice, and nonalcoholic beverages to be mixed with alcoholic beverages, and the total retail value of complimentary or discounted mixed beverages. Provided that the gross receipts tax shall be included in the advertised price of the mixed beverage.

In Order No. 86-04-03-03, the Commission observed that the proviso in subsection (D) of Section 576 providing that the "gross receipts tax shall be included in the advertised price of the mixed beverage," had been interpreted by some taxpayers to authorize or require the deduction of the ten percent gross receipts tax from the gross retail price of a mixed beverage in order to arrive at a retail sale price received for the sale, preparation of such mixed beverages, and that such interpretation was erroneous and contrary to law.

The Order set forth the following finding regarding the correct calculation of the gross receipts tax on mixed beverages:

(6) The Commission further finds that the gross receipts tax is to be included in the sale price of a mixed beverage or admission charge as a part of the license/permit holder's cost of the product sold; and is therefore calculated upon the total gross amount received for a mixed beverage or admission charge, without any deduction from or discounting of the total selling price.

(7) The Commission further finds that the attached Regulation No. XXX-17.1, incorporated by reference, illustrates the foregoing findings and states the prior and existing policy of this Commission; and that said regulation is therefore 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; and that said regulation should therefore be approved and adopted.

Regulation XXX-17.1 provided for the following calculation method:
B. Calculation of Tax.

A mixed beverage tax permit holder shall report that following:

(1) The total gross amount received for mixed beverages sold, prepared or served at the regular price;

(2) The total retail value, computed at the regular price, of all mixed beverages sold, prepared or served either upon a discounted or complimentary basis; and

(3) The total gross amount received as admission charges.

(4) The sum of the above three amounts, multiplied by the 10% tax rate, shall constitute the amount of the gross receipts tax.

C. Example.

(1) If the price regularly charged for a mixed drink is $3.00, each drink sold, and each drink served as a "complimentary drink," incur a $.30 gross receipts tax.

At the en banc hearing held on July 26, 1989, Protestant challenged the proposed assessments on the theories that the Commission Order and Regulation are incorrect and that the Commission is estopped from applying the regulation to Protestant because she relied upon prior public statements to the contrary made by a Commission employee.

THE ESTOPPEL DEFENSE

Protestant asserts that the Oklahoma Tax Commission should be estopped from enforcing Order No. 86-04-03-03 and Regulation XXX-17.1 because the Protestant relied upon prior public statements of the Director of the Alcohol and Tobacco Division of the Oklahoma Tax Commission for the proper calculation of the gross receipts tax.

The Administrative Law Judge properly concluded that the facts and circumstances of this protest fit squarely within the rule that estoppel will not lie for mistakes and errors of government employees. The information provided the Protestant at the meeting in Tulsa in May 1985 was neither Commission policy nor long-standing construction of an ambiguous statute, but rather was an interpretation of new legislation by an employee of the Tax Commission.

In State ex rel. Oklahoma Tax Commission v. Emery. 645 P.2d 1048 (Okl. App. 1982), the Court held that laches and estoppel do not apply against the state acting in its sovereign capacity because of mistakes or errors of its employees. Also, in State ex rel. Cartwright v. Dunbar. 618 P.2d 900 (Okl. 1980), the Court observed that it is fundamental that a state and its
subdivisions cannot be estopped from protecting public rights when public officials have acted erroneously or failed to act and that the taxpayers in question may not rely upon estoppel to defeat the imposition of taxes upon their taxable interests.

The rule that estoppel will not lie against the state acting in its sovereign capacity due to mistakes or errors of its employees in clearly applicable to the facts in this case. The Commission is not estopped from enforcing its regulation against Protestant because Protestant relied upon prior statements of a Commission employee which were contrary to the calculation method set forth in the regulation.

**THE TAX CALCULATION ISSUE**

Protestant has called into question the validity of Commission Order No. 86-04-03-03 and Regulation XXX-17.1, which set forth the Commission interpretation of 37 O.S. 1985 Supp. §576(D), as to the proper method of calculating the mixed beverage tax. This is the first administrative proceeding before the Commission in which the Regulation and Order have been challenged as an erroneous interpretation of the applicable statute; this is, therefore, a case of first impression.

The issue is whether the "advertised price" proviso in 37 O.S. Supp. 1985, §576(D) means that the taxpayer is to discount the advertised price by the tax rate to arrive at a price upon which the tax is calculated as asserted by Protestant; or whether it means that the tax is included in the sales price of a mixed beverage as part of the permit holder's cost of the product sold, as stated in Commission Order No. 86-04-03-03, such that the tax is calculated on the total amount collected from the customer.

The cardinal rule for construction of statutes is to ascertain the intention of the legislature by consideration of the statutory language. *Walker v. St. Louis - San Francisco Ry. Co.* 671 P.2d 672 (Okl. 1983). In this case, the intent of the Legislature in adding the advertised price proviso to §576(D) is not clear. The proviso was added by the Legislature to subparagraph (D) of Section 576 several months after the statute was originally enacted. 1985 Okla. Sess., Ch. 195, p. 837. The meaning of the proviso is not free from ambiguity. As pointed out in Commission Order No. 86-04-03-03, the 1985 proviso was subject to two interpretations, which had made the Order and Regulation necessary in order to provide uniformity. In 1987, one year after the Commission Order and Regulation was promulgated, the Legislature amended §576 by deleting the advertised price proviso from §576(D) and adding the following language to Subparagraph (B)(2): "The advertised price of a mixed beverage shall be the sum of the total retail sale price and the gross receipts tax levied thereon." It is undisputed that subsequent to the amendment, the proper method of calculating the tax is to multiply the tax rate by the retail sales price, which is the advertised price less tax.

The intention of the Legislature in amending a statute may be either to effect a change in existing law or to clarify that which was previously doubtful. *Magnolia Pipe Line Co. v. Oklahoma Tax Commission.* 167 P.2d 884, 887 (Okla. 1946). There is a presumption that an
amendment of a statute is intended to alter the former rule where the meaning of the former rule was clear or judicially settled. *Gordon v. Browning*. 572 P.2d 603 (Okl. App. 1977).

In *Magnolia Pipe Line Co.*, the court observed that where the meaning of the former statute was subject to serous doubt, or where controversies concerning its meaning had arisen, it may be presumed that the amendment was made to more clearly express the legislative intention previously indefinitely expressed. See also *Board of Educ. Vici Pub. Schools v. Morris*. 656 P.2d 258 (Okl. 1983). In *Magnolia Pipe Line*, the court found that the 1935 act under consideration was poorly drawn and plainly ambiguous and held that the 1941 amendment raised no presumption of a legislative intention to alter the existing law, since it is just as reasonable to presume that the Legislature intended only to clarify uncertainties of the former law.

In this case, the former rule was neither clear nor judicially settled. The Commission Regulation was an interpretation of a new statute which was subject to more than one interpretation. Of particular importance is that the Legislature amended the statute in the legislative session immediately following the adoption of the regulation. The 1987 amendment left no room for doubt as to the Legislature's intent regarding the price upon which the tax is to be calculated. Under these facts and circumstances, the Legislature appears to have been clarifying the statute, rather than changing it.

Due to the subsequent clarification of the legislature's intent in regard to the price upon which the tax is to be calculated, the Commission finds its Order No. 86-04-03-03 and Oklahoma Tax Commission Regulation XXX-17.1 do not correctly set forth the proper method of calculating the gross receipts tax on mixed beverages pursuant to 37 O.S. 1985 Supp., §576, et seq. and such Order and regulation should be declared invalid.

**DISPOSITION**

NOW THEREFORE, Order No. 86-04-03-03 and Regulation XXX-17.1 are hereby declared invalid and IT IS HEREBY ORDERED that the protest of COMPANY to the proposed assessments of mixed beverage and sales taxes issued on November 2, 1987, be and the same is hereby sustained as to the Protestant's objection to the tax calculation method utilized in the Commission audit. The Division audit staff is directed to delete from the assessments the amounts which are attributable to the calculation of the tax on the total gross proceeds, rather than the retail sales price. Any remaining liability is hereby declared due and owing.

The invalidation of Order No. 86-04-03-03 and Regulation XXX-17.1 applies to this case, all similar cases which are now pending before the Commission, and to protests to assessments timely filed subsequent to this Order.

It is further determined that the statement of law contained herein is precedential in nature; thus, it is hereby ordered that this document be expunged of the protestant's name and identifying data and that it be made available for public inspection.

**OKLAHOMA TAX COMMISSION**