

STATE OF ALABAMA  
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

§

v.

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DOCKET NO. S. 91-198

CAPT'N JIM'S CATFISH & SEAFOOD§  
a partnership composed of James W. Kelley  
Kenneth R. Prevett, Jr. and the  
Estate of Gerald E. Boyd  
1513 Antioch Road §  
Andalusia, AL 36420,

Taxpayer. §

FINAL ORDER

The Revenue Department assessed State, Covington County and City of Andalusia sales tax against Capt'n Jim's Catfish and Seafood, a partnership composed of James W. Kelley, Kenneth R. Prevett, Jr. and the Estate of Gerald E. Boyd for the period December 1, 1989 through March 31, 1990; and also State, Covington County and City of Andalusia sales tax against Capt'n Jim's Catfish and Seafood, a partnership composed of James W. Kelley and Kenneth R. Prevett, Jr. for the period April 1, 1990 through August 31, 1990. Kenneth R. Prevett, Jr. (Taxpayer) appealed to the Administrative Law Division and a hearing was conducted on January 7, 1992. The Taxpayer represented himself. Assistant counsel Duncan Crow represented the Department.

FINDINGS OF FACT

The Revenue Department audited capt'n Jim's Catfish Seafood Restaurant and determined that additional sales tax was owed for the period in issue. The Department examiner also determined that Kelley, Boyd and the Taxpayer were all partners from December, 1989

through March, 1990, but that Kelley and the Taxpayer were the only partners from April until the business closed in August, 1990. Separate assessments were entered accordingly. The issue in dispute is whether the Taxpayer was a partner in the business and therefore liable for the business's delinquent sales tax. The relevant facts are as follows:

The Taxpayer owns and operates a service station in Andalusia, Alabama. The Taxpayer was approached by Kelley and Boyd in mid-1989 about joining them in opening a seafood restaurant. The Taxpayer was interested because he owned and was making \$600.00 a month bank payments on some kitchen equipment that he had purchased for an earlier, unsuccessful restaurant venture.

Although there was no written agreement between the parties, the men decided to open the restaurant and agreed that Kelley would cook and operate the business, Boyd would provide the initial financing and handle the books, and the Taxpayer would provide the kitchen equipment.

Boyd and Kelley opened a checking account for the business in early December, 1989 and the business opened in mid-December 1989.

Boyd and Kelley applied for a sales tax license with the Department on January 13, 1990. The Taxpayer was listed as a partner on the application, but the Taxpayer didn't sign the application until May 14, 1990, when a revenue agent went to his service station and asked him to sign. The Taxpayer claims that he

didn't understand what he was signing and signed only because the revenue agent told him that it would not cost him anything.

The restaurant was initially successful and the Taxpayer, Boyd and Kelley each received \$500.00 from the business for the months of January and February, 1990. However, in March, 1990 a disagreement arose between the three men and Boyd began writing personal checks on the business' checking account. Boyd also tried to get Kelley and the Taxpayer to sign a written partnership agreement. The Taxpayer refused. To prevent Boyd from raiding the checking account, in late March, 1990 Kelley and the Taxpayer closed the old checking account and opened a new account in their names. The Taxpayer signed at least three checks on the new account.

Boyd formally withdrew from the partnership effective April 1, 1990 and Kelley operated the business by himself from that time until August, 1990, when the business closed. The Taxpayer received no money from the business after March,, 1990.

The Taxpayer claims that he was not a partner in the business and was only leasing the equipment to the business.

The Department contends that the Taxpayer was a partner because (1) there was no written lease agreement for the kitchen equipment; (2) the Taxpayer opened a checking account for the business; (3) the Taxpayer signed the sales tax application, and (4) the Department examiner was informed by several people that the

business began as an equal three man partnership. Those individuals included the CPA that handled the books for the business from December, 1989 through March, 1990, Boyd's attorney, and even the Taxpayer's attorney. The Taxpayer's attorney also stated that the Taxpayer left the partnership in March, 1990.

#### CONCLUSIONS OF LAW

The existence of a partnership or whether an individual is a partner in a partnership must be decided on the particular facts of each case. McCrary v. Butler, 540 So.2d 736 (1989). A written partnership agreement is not necessary and a partnership can be implied by the actions and obligations of the parties. Waters v. Union Bank of Repton, 320 So.2d 957 (1979). Important factors in determining whether an individual is a partner are the extent to which the individual has the right to manage and control the business, and also whether the individual shares in the losses and profits of the business. Adderholt v. Adderholt, 426 So.2d 457 (1983).

In this case the evidence shows that the Taxpayer was initially a partner and remained a partner until the partnership split up in March, 1990. Although the Taxpayer explained why he opened a bank account and signed the sales tax application for the business, those acts show that he was more involved in the business than as a lessor of the kitchen equipment. The Taxpayer's attorney

also stated that the Taxpayer withdrew as a partner in March, 1990, which indicates that he was a partner prior to that time. Finally, and most importantly, the Taxpayer received \$500.00 from the business in both January and February 1990, the same amount received by the other two partners.

However, the evidence also indicates that the Taxpayer ceased to be a partner when the partnership split up and Kelley took over the business by himself effective April, 1990. The important fact leading to that conclusion is that the Taxpayer received no payments or other income from the business and was in no way involved with the business after March, 1990.

The above considered, the assessments against all three partners for the period December, 1989 through March, 1990 is made final, with applicable interest. However, the Taxpayer should be removed from the assessments for the period April 1, 1990 through August, 1990 and those assessments should be made final against Kelley only.

Entered on February 11, 1992.

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BILL THOMPSON  
Chief Administrative Law Judge