

STATE OF ALABAMA,	§	STATE OF ALABAMA
DEPARTMENT OF REVENUE,		DEPARTMENT OF REVENUE
	§	ADMINISTRATIVE LAW DIVISION
vs.		
	§	DOCKET NO. S. 92-169
HILLCREST PLAZA PACKAGE STORE,		
a partnership composed of	§	
Thomas D. Lunceford and		
Jennifer C. Lunceford	§	
6165 Airport Blvd.		
Mobile, AL 36609,	§	
Taxpayers.	§	

FINAL ORDER ON APPLICATION FOR REHEARING

An Opinion and Preliminary Order was entered in this case on February 26, 1993 directing the Department to recompute the Taxpayers' sales tax liability for the period in issue. A Final Order was subsequently entered on March 17, 1993 holding that the Taxpayers owed \$66,476.16, with additional interest due after March 20, 1993. The Taxpayer (Thomas Lunceford) timely applied for a rehearing as follows:

REQUEST FOR REHEARING

The Taxpayer first ask for a rehearing on the on the (sic) matter of the ABC Board collecting sales tax on the wholesale price paid by the Taxpayer. The ABC Board Administrator, Revenue Department Commissioner, and Revenue Department Secretary all have admitted in writing to this fact, Taxpayer Exhibits numbers unknown. The memorandum from ABC Administrator Broadwater was sent to Liquor Licensees and is in fact the correct method for removing the sales tax from the list price before the wholesale transaction is completed. Deputy Administrators memorandum was sent to the Revenue Department in an attempt to cover up the fact that the ABC Board had been and still was charging sales tax on wholesale sales. If Your Honor will check the math in these two memorandum and the Law in ALA. CODE TITLE 28 having to do with the legal Mark-up allowed to be added to the cost of liquor by the ABC Board, he will find that

the memorandums and the Law do not agree. If the ABC Board did not charge sales tax, they charged more Mark-up than the Law allowed.

The second area (that) the Taxpayer ask for a rehearing on is that there were no records submitted for the period 1986 through 1991. The Taxpayer has enclosed a copy of a report from this period which will also show that the Taxpayer did not collect sales tax on the consumer excise tax. These records were provided to the Department during the audit but were ignored.

The Taxpayer also ask for rehearing on the grounds that the of (sic) Act #92-343, Amended and Passed April 30, 1992, Concurred in Senate Amendment May 5, 1992, and Signed by the Governor May 7, 1992 at 5:41 p.m. has not been adhered to in this case.

The Taxpayer ask that he be afforded the same rights and privileges that the Department has afforded the ABC Board.

The Taxpayer would also ask that the question he has posed from the outset of this matter also be addressed.

If the ABC Board was not charging sales tax on wholesale sales and (was) only making extra profit, why in 1989 did the ABC Board change their pricing and remove an amount identical to the amount the Taxpayer is claiming he was over charged?

The Taxpayer's arguments will be addressed in the order they are raised.

The Taxpayer again argues that he paid sales tax on his wholesale bottle purchases from the ABC Board. Again, I disagree.

The ABC Board did charge the same price on both wholesale and retail bottle sales. However, that fact alone does not prove that the Board collected sales tax on its wholesale bottle sales. Rather, the wholesale bottle price included additional markup or profit to offset the Board's higher costs associated with wholesale bottle sales.

The May 10, 1982 memo from Joe Broadwater (Exhibit 1) and the June 29, 1982 memo from Jennie Lazenby (Exhibit 2) both state that the "markup on these (wholesale bottle) sales is higher than both retail and case lot wholesale sales to offset the increased costs associated with bottle wholesale sales. . . . Sales tax is not included in the wholesale price, whether the purchase is by case or bottle."

The Taxpayer argues that if the Board was not charging sales tax on the wholesale sales, then it charged a greater markup than allowed by law. That may or may not be true, but in either case it is not relevant here. The ABC Board was not required to collect and in fact cannot legally charge sales tax on wholesale sales. The Taxpayer cannot be allowed a credit by the Department for tax he never paid and that certainly was never remitted by the ABC Board to the Department. If the Taxpayer believes he was overcharged by the ABC Board, the issue should be raised with the ABC Board and not the Revenue Department.

The Taxpayer next disputes my finding that no sales records were submitted for the period 1986 through 1991. The Taxpayer provided sales records for 1982 through 1986 during the initial audit in 1986. The only records offered after 1986 were composite sales summaries for 1988, 1989 and 1990. There is no evidence that daily sales or any records other than the summaries were offered or provided after 1986. But even if some daily records for 1986 through 1991 had been provided, I would still hold that the

Department's method for computing the Taxpayers' liability was reasonable and based on substantial evidence and should be upheld.

The Taxpayer has not overcome the prima facia correctness of the Department audit.

The Taxpayer argues that the "daily sales summary" submitted along with his application proves that he didn't collect sales tax on consumer excise tax. The summary shows gross sales of liquor, wine, beer and other items for the day in question, but there is no way of knowing if the consumer taxes are included in the gross sales amounts. Consequently, the record does not prove that sales tax wasn't collected on the consumer excise taxes.

Act 92-343 also is not applicable because, as stated, the Taxpayer cannot prove that he did not collect sales tax on the consumer excise taxes.

Finally, I do not understand the Taxpayer's statement that he should be afforded the same rights by the Department as afforded to the ABC Board. Also, the fact that the ABC Board may have reduced its wholesale bottle price in 1989 is not relevant to the Taxpayer's sales tax liability for the period in issue.

The Taxpayer clearly and substantially underpaid his sales tax from 1982 through April, 1988, but he has fortuitously escaped liability for that period (except November, 1986 and March and August, 1987) because the Department failed to timely assess the additional tax due. However, tax was timely assessed for the months November, 1986, March and August, 1987, and for the period

after April, 1988, and at the least the Taxpayer owes the tax, penalties and interest due for those periods as set out in the Final Order.

The above considered, the Taxpayer's application is denied and the Final Order previously issued on March 17, 1993 is affirmed.

The Taxpayers may appeal to circuit court from this Final Order on Application for Rehearing within 30 days pursuant to Code of Ala. 1975, 40-2A-9(g).

Entered on April 2, 1993.

BILL THOMPSON
Chief Administrative Law Judge