

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. 92-171

RED BRAHMA CLUB, INC.  
Highway 331 South  
Opp, Alabama 36467,

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§

Taxpayer.

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### FINAL ORDER

The Revenue Department assessed State and Covington County sales tax against Red Brahma Club, Inc. ("Taxpayer" or "club") for the period November 1987 through April 1991. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on August 24, 1994. Richard Goff represented the Taxpayer. Assistant counsel Wade Hope represented the Department.

The Revenue Department computed the assessments in issue using an indirect audit method involving bank deposits, cash payouts, and estimated door receipts. The issue is whether the audit was properly conducted based on the best information available. If so, the audit should be upheld. If not, the audit should be reduced or dismissed.

The Taxpayer operated a private lounge/nightclub in Covington County, Alabama during the period in issue. The club sold liquor, beer and snacks at retail, and provided live entertainment on Friday, Saturday, and sometimes Sunday nights.

The Department audited the Taxpayer beginning in approximately November 1990. The Taxpayer provided records piece-meal to the Department auditor over the next six months. Those records included a partial cash receipts and disbursements journal for November 1987 through March 1989, monthly bank statements and cancelled checks,

some invoices and cash register tapes, and monthly schedules of gross receipts for September 1989 through March 1990. The auditor also independently obtained vendor records from the ABC Board and various beer distributors. The Taxpayer failed to provide any records concerning door receipts.

The auditor reviewed the above records and determined that the records were incomplete and insufficient to directly compute the Taxpayer's liability. Consequently, the auditor conducted an indirect audit, as follows: Total beverage sales were computed based on total bank deposits minus returned checks plus cash payouts. Total door receipts were estimated by the auditor because the Taxpayer had no records concerning door receipts. The club had a capacity of approximately 175 people during most of the audit period, although it was enlarged toward the end of the audit period. The auditor reviewed newspaper advertisements, conducted oral interviews, inspected the club premises, and observed the activity on the premises during the club's business hours. Based thereon, the auditor estimated that 200 people paid a cover charge on Friday nights and 300 people paid a cover charge on Saturday nights. The auditor then multiplied the attendance figures by the \$2.00 per person cover charge to arrive at estimated door receipts.

The estimated door receipts were added to the estimated beverage sales. Sales tax was then backed out to arrive at the taxable measure. The applicable tax rates were applied to the taxable measure to arrive at the total State and county tax due. A credit was then allowed for tax previously paid to arrive at the additional tax due.

Odessa Cain was the club's sole director and shareholder during the audit period.

However, Horace Weeks financed and actually controlled the business. As stated, accountant Richard Goff represented the Taxpayer at the August 24, 1994 hearing. Goff concedes that the club's records were not complete or accurate. (R. 39). However, he disputes the Department's audit on the following grounds:

(1) Goff claims that money withdrawn from the Taxpayer's bank account and subsequently paid out in cash was included twice in the audit - once as a bank deposit and again as a cash payout;

(2) Goff claims that the door receipts should not be taxed because the band collected and kept all of the receipts. Goff submitted into evidence a letter from the Department dated November 18, 1991 which states in part, "that if a band employee collects the cover charge and the club does not collect or disburse any part of the funds the liability for the cover charge would be on the band and not the club". (Taxpayer's Exhibit 2). Goff argues in the alternative that if the club is liable for tax on the door receipts, the amount estimated by the auditor is excessive. The Taxpayer estimated that during the audit period, no more than 125 people paid a cover charge on any given night;

(3) Goff also contends that some of the money withdrawn from the bank account to operate the business on a daily basis was re-deposited at the end of the day, and thus included twice in the audit;

(4) The Taxpayer's journal describes some deposits as "loans from shareholders". Goff claims that those non-taxable loans should be excluded from the audit.

All taxpayers liable for sales tax are required to keep complete and accurate records from which the Department can accurately determine the taxpayer's correct liability. Code of Ala. 1975, §40-23-9; State v. Mack, 411 So.2d 799 (Ala.Civ.App. 1982). If a taxpayer fails to keep adequate records, the Department can use any reasonable method to compute the taxpayer's liability. The taxpayer cannot then complain that the liability so computed is inexact. Jones v. CIR, 903 F.3d 1301 (10th Cir. 1990); Denison v. CIR, 689 F.2d 777 (10th Cir. 1982); Webb v. CIR, 394 F.2d 366 (5th Cir. 1968); Adamson v. Commissioner, 745 F.2d 54 (9th Cir. 1984). The above cases are income tax cases. However, the general principles enunciated in those cases are equally applicable to State sales and use tax and other State taxes administered by the Department. See, Code of Ala. 1975, §40-2A-7(b)(1)a, which authorizes the Department to calculate a taxpayer's liability on the most accurate and complete information available. Also, a final assessment on appeal is presumed prima facie correct, and the burden is on the taxpayer to prove the assessment incorrect. Code of Ala. 1975, §40-2A-7(b)(5)c. It is common knowledge that any business or individual subject to sales tax must keep adequate, contemporaneous records showing the amount of sales and/or gross receipts subject to sales tax. In this case, the Taxpayer clearly, if not intentionally, failed to keep complete journals, purchase invoices, cash register tapes, records of door receipts or any other adequate records from which its sales tax liability could be properly computed. Consequently, the Department auditor computed the Taxpayer's liability using the best information available. The auditor did a thorough and complete job, as illustrated by her 31 page audit report. (Department's Exhibit 2). The audit was reasonable and must be affirmed. The Taxpayer cannot now attack the audit based on unsupported speculation

and assumptions. See above cases.

I agree that money may have been withdrawn from the Taxpayer's bank account and subsequently paid out in cash and thus included twice in the audit. However, without adequate records, there is no way of knowing. The same applies to the cash withdrawn to operate the business that may have been redeposited. The Taxpayer failed to keep adequate records, and now must pay the consequences. State v. Ludlam, 384 So.2d 1089 (Ala.Civ.App.), cert. denied, 384 So.2d 1094 (Ala. 1980).

There is also no way of knowing if the amounts designated as "loans from shareholders" were actually non-taxable loans instead of taxable receipts from the business. Odessa Cain was the only shareholder, and there is no evidence confirming or showing that she ever loaned the business any money. Goff claims that Weeks borrowed over sixty thousand dollars from a bank during the audit period. But Weeks was not a stockholder, and there are no records substantiating that he loaned the club money.

Concerning the door receipts, Code of Ala. 1975, §40-23-2(2) levies a sales tax on the gross receipts derived from public places of amusement. The Taxpayer's door receipts are clearly taxable under that section. The Taxpayer is not relieved of liability because the bands may have collected and kept the receipts. The Taxpayer as the licensed operator of the business is ultimately liable for sales tax on the business' gross receipts. The amount of the door receipts was also reasonably estimated and should be upheld. The Department is not required to rely on the Taxpayer's unsubstantiated verbal assertions that the Department's estimates are incorrect. State v. Mack, supra.

The Taxpayer claims that it did not report and pay sales tax on the door receipts

based on advice from the Department. However, the erroneous letter referred to by the Taxpayer was issued in November 1991, after the period in question. In any case, the Department cannot be estopped from properly collecting tax due because of erroneous information provided by a Department employee. Boswell v. Abex Corp., 317 So.2d 317 (Ala. 1975).

The Taxpayer obviously had a large volume of unaccounted for cash transactions during the audit period, which is confirmed by the fact that no salary checks were ever issued to the club's employees. A reasonable conclusion is that taxable receipts from the business were diverted directly to those individuals, and perhaps others, without ever being deposited in the bank. See page 8 of auditor's report, Department's Exhibit 2.

The above considered, the assessments in issue are affirmed, and judgment is entered against the Red Brahma Club, Inc. for State sales tax in the amount of \$21,207.68, and Covington County sales tax in the amount of \$10,833.42, plus applicable interest from the date of entry of the assessments, December 5, 1991.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered April 7, 1995.

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BILL THOMPSON  
Chief Administrative Law Judge