

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

vs.

MARVIN DURBIN
d/b/a Durbin Farms
P. O. Box 1139
Clanton, AL 35045,

Taxpayer.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 92-339

FINAL ORDER

The Revenue Department assessed State, Chilton County and City of Clanton sales tax against Marvin Durbin, d/b/a Durbin Farms (Taxpayer), for the period May 1988 through August 1990. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on March 4, 1993. William D. Latham represented the Taxpayer. Assistant counsel Wade Hope appeared for the Department.

The Taxpayer owns a farm and also a produce market/yogurt shop in Clanton, Alabama. The produce market sells produce grown on the Taxpayer's farm and also produce obtained from other sources.

The home grown produce sold by the market was exempt from sales tax pursuant to Code of Ala. 1975, §40-23-4(44). The issue in dispute is whether the Taxpayer kept sufficient records distinguishing the exempt produce sales from the taxable produce sales.

The Taxpayer grows peaches, plums, nectarines, blueberries and other produce items on his farm. Some of the farm produce is sold at wholesale to other parties, but most is delivered to and sold at

the Taxpayer's produce market. For bookkeeping purposes, the market buys the produce from the farm for the same pre-set wholesale price paid by the farm's other wholesale customers.

The market also buys produce for sale from other sources if the farm doesn't grow the item or if the farm is unable to provide the item in sufficient quantity. The produce obtained from other sources is marked up and sold at the market the same as the home grown produce.

The Department agrees that the Taxpayer kept good purchase and sales records during the period in issue showing the source of the produce, the quantity, the purchase price and the sales price. See, transcript at pages 28-30, 34, 98. However, the Taxpayer failed to keep sales records separating the home grown produce from the outside source produce.

The Department had earlier informed the Taxpayer that all of his produce sales were exempt from sales tax. Consequently, the Taxpayer did not have a sales tax license and did not pay any sales tax prior to 1988. See, transcript at page 69. The Taxpayer obtained a sales tax license when he opened the yogurt shop in May 1988 and started paying sales tax on the yogurt shop sales at that time.

The Taxpayer's accountant informed him in 1989 or 1990 that the Department was beginning to tax all sales of non-home grown produce. In an effort to comply with the law, the Taxpayer called

Revenue Commissioner Jim Sizemore to find out what he should be doing. See, transcript at page 94.

The Department subsequently audited the Taxpayer and assessed all of the Taxpayer's home grown and other source produce sales from May 1988 through August 1990. No tax was assessed prior to May 1988 because the Department had led the Taxpayer to believe that no tax was due and the Department didn't think it would be fair to assess tax prior to May 1988. See, transcript at page 69.

The Taxpayer, apparently believing that his home grown produce was not exempt, paid the audit in full in October 1990.

The Legislature broadened the home grown produce exemption by Act 92-343 in 1992, retroactive to January 1984. The Taxpayer concluded that his home grown produce was retroactively exempted under Act 92-343, and consequently filed the petitions for refund in issue.

The refunds are for the tax paid on the Taxpayer's home grown produce and were computed as follows: The Taxpayer first determined from his purchase records what percentage of his total purchases was of home grown produce. The percentage of home grown produce was then applied to total sales to determine what percentage of total sales represented exempt home grown produce.

That percentage was applied to total gross proceeds from the market to arrive at the amount of exempt sales.

The Department denied the refunds because the Taxpayer's sales records failed to distinguish between exempt home grown produce and taxable produce from other sources.

All taxpayers are required to keep suitable records as necessary to allow the Department to determine their correct sales tax liability. See, Code of Ala. 1975, §§40-23-9 and 40-2A-7(a)(1). However, while the Department is not required to rely on verbal assertions in lieu of records, no particular form of records is required. State v. Mack, 411 So.2d 799; State v. Mims, 30 So.2d 673. A taxpayer's records, although inartfully kept, are sufficient if the taxpayer's liability can be determined with reasonable certainty. State v. Levey, 29 So.2d 129; State v. Mims, supra; State v. Ludlum, 384 So.2d 1089.

In both Levey and Mims, the taxpayers maintained some sales records which were found to be sufficient. The taxpayer in Ludlum failed to keep direct sales records but the courts accepted the indirect calculations of an accountant to show that approximately 80% of the taxpayer's sales were exempt. I respectfully disagree with the majority in Ludlam and think that Judge Wright's dissent is the better reasoned view. However, the rule to be applied is whether the Department can determine with reasonable certainty from a taxpayer's records what part of the taxpayer's sales are exempt and what part are taxable. Records declaring a specific sale or sales to be exempt, while preferable, are not necessary.

In my opinion, the Taxpayer's records are sufficient. The exempt home grown produce sales can be calculated with reasonable certainty by using the Taxpayer's sales and purchase records and without using estimates or unsubstantiated projections.

A retailer's duty to keep accurate records is straightforward. If a retailer knowingly fails to keep any records, then clearly he should be held accountable. The Taxpayer in this case kept good records of all purchases and sales but saw no need to separately record the home grown produce sales because the Department had informed him that all produce was exempt. Thus, the Taxpayer had no reason to keep the specific records that the Department now claims he should have kept for the sales to be exempt.

This case can be distinguished from Docket No. S. 90-141. In that case, the taxpayer, another produce market, failed to keep any purchase or sales records whatsoever. In this case, the Taxpayer kept complete purchase and sales records from which his exempt sales can be computed using simple math. Although not exact, the exempt sales can be reasonably calculated from the Taxpayer's records. That method should be accepted under the circumstances.

The Department does not dispute the dollar amount of the refunds. Accordingly, the refunds as filed by the Taxpayer should be granted.

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

Entered on September 28, 1993.

BILL THOMPSON
Chief Administrative Law Judge