

JAMES W. OSBORN  
d/b/a Keith's 280 Package Store  
Highway 280  
Childersburg, Alabama 35044,

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. S. 94-415

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v.

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

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### FINAL ORDER

The Revenue Department assessed James W. Osborn, d/b/a Keith's 280 Package Store ("Keith's Package Store" or "business"), for State and Talladega County sales tax for the period January 1991 through August 1993. James W. Osborn ("Taxpayer") appealed to the Administrative Law Division and a hearing was conducted on February 21, 1995. Jack Noe and Harold Grierson represented the Taxpayer. Assistant counsel Wade Hope represented the Department.

The Department audited Keith's Package Store and assessed the Taxpayer in this case based on information obtained during the audit. The Taxpayer does not dispute the amount of the assessments. Rather, the Taxpayer claims that he is not liable for the tax in issue because he did not own or operate the business during the assessment period.

The only issue thus is whether the Taxpayer owned and operated the subject business during the audit period.

The Taxpayer and his two sons started Keith's 280 Package Store in August 1989. Ishmil D. Daoud ("Daoud"), an employee at another package store owned by the Taxpayer, approached the Taxpayer in mid-1990 about buying the business. The Taxpayer subsequently sold the business to Daoud in September 1990 for \$26,000 cash

and the assumption by Daoud of a \$14,000 loan at a local bank. The Department does not dispute that the Taxpayer sold the business to Daoud in September 1990. Daoud subsequently paid off the bank loan in full in September 1992.

Daoud applied for and obtained a State sales tax license in September 1990. He filed sales tax returns and paid the tax due using his account number in October, November and December 1990. However, sometime in December 1990 or January 1991, Daoud notified the Department's Sales and Use Tax Division that he had sold the business back to the Taxpayer. Based on that information, the Department cancelled Daoud's sales tax number and reactivated the Taxpayer's sales tax number for the business. Daoud subsequently filed returns during the subject period using the Taxpayer's sales tax number. Daoud signed the returns either as "manager", or in some cases using his name only.

The Taxpayer renewed the business' retail liquor license with the ABC Board under his name in June 1991. The Taxpayer explained that he agreed to renew the license in his name because Daoud was not a United States citizen and could not get a license himself. The Taxpayer agreed to renew the license with the understanding that Daoud would become a United States citizen and thereafter obtain the license in his own name. The license was again renewed in the Taxpayer's name for the year 1992/1993. However, that license application was signed by Daoud, and the Taxpayer denies that he authorized Daoud to sign the application.

Department examiner Howard Neal ("Neal") audited the business beginning in June 1993. Neal visited the business location and talked to Daoud, who said he was only an

employee and that the business was owned by the Taxpayer. Daoud also directed Neal to see CPA Mort Moody ("Moody") concerning the business' taxes.

Moody was employed by Daoud, not the Taxpayer, and prepared returns for the business based on information provided by Daoud. Moody believed that the Taxpayer actually owned the business because Daoud told him so. Consequently, when Neal met with Moody, Moody confirmed Daoud's earlier statement that the Taxpayer owned the business. Moody had also prepared 941 and W-2 forms for the business indicating that Daoud was an employee only.

Neal asked Moody to obtain a power of attorney from the Taxpayer so Moody could turn over information for the audit. Moody apparently faxed a power of attorney form to the Taxpayer covering the years 1990 - 1993. The Taxpayer signed the power of attorney form and returned it to Moody because he had operated the business in 1990 and thought he was being audited for that year.

Neal reviewed the records provided by Moody and determined that the records were insufficient to do the audit. Consequently, Neal conducted the audit using records obtained from the business' vendors.

After Neal reached an approximate liability, he met with the Taxpayer at Moody's office on July 30, 1993. Neal testified that the Taxpayer was "shocked" at the amount of the liability. Daoud appeared at Moody's office later that same day. He appeared upset and asked Neal if he could pay the liability. Neal told Daoud that it was not his liability to pay because Daoud was only an employee at the business.

Daoud closed the business sometime in August 1993 and submitted an

unemployment claim with the State on August 29, 1993. Daoud subsequently filed a voluntary bankruptcy petition in United States Bankruptcy Court on September 1, 1993.

The owner of the store building contacted the Taxpayer in September 1993 and asked him to remove some beer and liquor that Daoud had left in the building. The Taxpayer subsequently destroyed the beer and stored the liquor at one of his other business locations. The Taxpayer as lessee was also required to pay the \$500 monthly rent for the final three months of 1993. Daoud had made all prior lease payments since he took over the business in September 1990.

The Department determined that the Taxpayer had owned and operated the business and thus is liable for the tax in issue based on the following facts: First, Examiner Neal was initially told by Daoud that the business was owned by the Taxpayer. That information was confirmed by Moody. Neal also saw 941 and W-2 forms prepared by Moody indicating that Daoud was an employee only. Second, the returns for the subject period, although signed by Daoud, were filed under the Taxpayer's active sales tax number. Third, the ABC liquor license for the business was renewed in the Taxpayer's name for the years 1991/1992 and 1992/1993. Fourth, the Taxpayer was legally liable as lessee for the monthly rental payments on the store building. Finally, the Taxpayer entered the business premises after the business was closed and removed the remaining beer and liquor from the building.

Examiner Neal did a good job in this case. Given the facts available during the audit, it was reasonable for him to conclude that the Taxpayer was the owner of the business and thus liable for the tax in issue. However, in light of the additional testimony

and exhibits submitted at the administrative hearing, it is clear that the Taxpayer did not own or operate the business during the audit period.

It is undisputed that the Taxpayer sold the business to Daoud in September 1990. Daoud claims that he sold the business back to the Taxpayer in late 1990 or early 1991. There is no evidence supporting that claim. The only reason CPA Moody believed that the Taxpayer owned the business was because Daoud told him so. As a result, Moody erroneously treated Daoud as an employee and prepared 941 and W-2 forms accordingly.

The Taxpayer adequately explained that he agreed to renew the store's retail liquor license only because Daoud was not a citizen and could not get a license. The Taxpayer was also unaware that Daoud was filing returns using his sales tax number. While the Taxpayer was technically liable for the lease payments, Daoud actually made the \$500 monthly payments during the audit period. Daoud also continued making payments on the assumed \$14,000 bank loan and finally paid off the loan in September 1992, which shows that he had not sold the business back to the Taxpayer.

Based on the above evidence, it is clear that the Taxpayer did not own or operate the business and otherwise had no financial interest in the business after September 1990. Consequently, the Taxpayer was not engaged in the business of selling tangible personal property at retail at the Keith's Package Store location, and thus is not liable for the sales tax in issue. The final assessments in issue are accordingly dismissed.

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

Entered April 5, 1995.

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BILL THOMPSON  
Chief Administrative Law Judge