

ROBERT L. WHITE
d/b/a Executive Lounge
Route 2 Box 53
Coatopa, Alabama 35470,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 95-146

FINAL ORDER

The Revenue Department assessed State, Sumter County, and City of York sales tax against Robert L. White, d/b/a Executive Lounge ("Taxpayer"), for the period February 1991 through February 1994.

The Taxpayer appealed to the Administrative Law Division, and a hearing was conducted on July 26, 1995. The Taxpayer represented himself at the hearing. Assistant Counsel Gwen Garner represented the Department.

The Department audited the Taxpayer and entered the final assessments in issue based on the best information available. The issue is whether the final assessments were properly computed by the Department.

The Taxpayer operates a lounge in the City of York, Sumter County, Alabama. The Taxpayer sells beer and liquor at the lounge, and also on occasion charges a \$3.00 per person admission charge.

The Taxpayer timely filed his State and local sales tax returns and paid the tax due as reported on those returns through 1992. According to the Taxpayer, a Revenue Department examiner would come to his business monthly and fill out his returns. The

examiner completed the returns based on information provided by the Taxpayer.

The Department examiner was re-assigned and thus stopped helping the Taxpayer in early 1993. The Taxpayer thereafter failed to timely file his returns for most of 1993 and 1994.

During 1994, the Department started an audit of the Taxpayer's business for the three year period February 1991 through February 1994. The Taxpayer failed to provide the Department auditor with adequate records from which the business' liability could be accurately computed. Consequently, the auditor computed the Taxpayer's liability using the best information available.

Specifically, the auditor computed the Taxpayer's liquor sales by obtaining his liquor purchases from the ABC Board, and then applying a 400% mark-up. The 400% mark-up was based on the price charged by the Taxpayer for a single drink, multiplied by the estimated number of drinks that the Taxpayer could pour per bottle.

The Taxpayer's beer sales were based on vendor records from the beer distributors in the area. The auditor also estimated that the Taxpayer had purchased 14 cases of beer per month from a local grocery store, C & D Grocery. That information was provided by the store owner.

Finally, the Taxpayer's door receipts were estimated based on the examiner's interview with someone at the local police station. The auditor estimated that approximately 15 to 20 people paid the

\$3.00 admission on Thursday night, 50 paid on Friday night, and 100 paid on Saturday night, for a total of 650 per month.

Prior to completion of the audit, the Department's Collection Services Division separately attempted to obtain the Taxpayer's delinquent returns for 1993 and 1994. In late 1994, the Taxpayer provided Bruce Davis of the Collection Services Division with information concerning his liability for the delinquent months. Davis completed the Taxpayer's delinquent returns based on that information. The Taxpayer signed the returns and paid the tax due as indicated on the returns. The Department accepted the returns because the Taxpayer would not have been able to renew his liquor license if the returns had not been filed.

The Department subsequently completed its audit, which included the period covered by the delinquent returns, and notified the Taxpayer of the audit results. The Taxpayer objected, and a formal conference was conducted by the Department on December 19, 1994. The matter could not be settled, and the final assessments in issue were entered on March 10, 1995. The Taxpayer subsequently appealed to the Administrative Law Division.

The Taxpayer first argues that the Department over-estimated his liquor and beer sales and also his monthly admission charges.

Specifically, the Taxpayer claims that he could not have purchased 14 cases of beer from C & D Grocery, that the 400% liquor mark-up was excessive, and also that the Department's estimate of 650 paid

admissions per month is excessive and should be reduced to 250 per month. Unfortunately, the Taxpayer failed to keep adequate records from which his correct beer and liquor sales and his admission charges could be accurately computed.

All taxpayers are required to keep complete and accurate records from which their tax liability can be properly computed.

Code of Ala. 1975, §40-2A-7(a)(1). If a taxpayer fails to keep adequate records, the Department is authorized to compute the taxpayer's liability using the most accurate and best information available. Code of Ala. 1975, §40-2A-7(b)(1)a.; see also, Bradford v. C.I.R., 796 F.2d 303 (9th Cir. 1986); Denison v. C.I.R., 689 F.2d 771 (8th Cir. 1982); Mallette Brothers Construction Co., Inc. v. U.S., 695 F.2d 145 (5th Cir. 1993). As stated in Bradford, supra, at page 306, citing Webb v. C.I.R., 394 F.2d 366, 373 (5th Cir. 1968):

"[T]he absence of adequate tax records does not give the Commissioner carte blanche for imposing Draconian absolutes [However,] such absence does weaken any critique of the Commissioner's methodology.

Arithmetic precision was originally and exclusively in [the taxpayer's] hands, and he had a statutory duty to provide it [H]aving defaulted in his duty, he cannot frustrate the Commissioner's reasonable attempts by compelling investigation and recomputation under every means of income determination. Nor should he be overly chagrined at the Tax Court's reluctance to credit every word of his negative wails."

The Taxpayer in this case did provide the auditor with a daily sales summary. However, the auditor properly rejected the

amount because the business' liquor purchases alone were more than the total sales reflected in the summary. The examiner thus properly computed the Taxpayer's taxable beer and liquor sales using the best available information, vendor purchase records, and then applying a reasonable mark-up.

Concerning the estimated admission fees, the Department again is not required to rely on the verbal assertions of the Taxpayer. State v. Mack, 411 So.2d 799 (Ala.Civ.App. 1982). The Taxpayer failed to provide any tangible evidence showing that the Department's estimate of 650 paid admissions per month is incorrect or unreasonably excessive. In the absence of evidence to the contrary, the Department's prima facie correct computations must be affirmed.

The Taxpayer also complains that he should not be assessed additional tax for those delinquent months in 1993 and 1994 for which the Department prepared his returns and accepted payment of the tax as reported on those returns. However, the Collections Division prepared and accepted the Taxpayer's delinquent returns for 1993 and 1994 only to clear the delinquencies and thus allow the Taxpayer to renew his ABC Board liquor license. The accuracy of the returns was not conceded by the Department at that time. The Department thus properly included those periods in the audit.

The above considered, the final assessments in issue are affirmed, and judgment is entered against the Taxpayer for State

sales tax in the amount of \$6,847.96, Sumter County sales tax in the amount of \$1,696.86, and City of York sales tax in the amount of \$3,413.93.

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

Entered August 2, 1995.

BILL THOMPSON
Chief Administrative Law Judge