

JOHN R. RHODES § STATE OF ALABAMA  
Rural Route 1 Box 295 DEPARTMENT OF REVENUE  
Steele, Alabama 35987-9731, § ADMINISTRATIVE LAW DIVISION  
Taxpayer, § DOCKET NO. S. 95-377  
v. §  
STATE OF ALABAMA §  
DEPARTMENT OF REVENUE.

FINAL ORDER

The Revenue Department assessed State and City of Steele sales tax against John R. Rhodes ("Taxpayer") for the period October 1989 through July 1994. The Taxpayer appealed to the Administrative Law Division, and a hearing was conducted on January 10, 1996. Luther D. Abel represented the Taxpayer. Assistant Counsel Margaret McNeill represented the Department.

The issue in this case is whether the Department properly recomputed the Taxpayer's sales tax liability for the subject period using an indirect audit method.

The Department audited the Taxpayer's business, H and R Corner, a convenience store in St. Clair County, Alabama. The Taxpayer provided the Department examiner with purchase invoices for January 1993 through July 1994. However, he failed to provide any sales records for that period, or any records whatsoever for the prior period October 1989 through December 1992.

The examiner initially conducted a purchase mark-up audit using the above purchase invoices and applying a mark-up percentage as agreed by the Taxpayer. She then applied those estimated sales figures to the entire audit period.

After receiving the initial audit results, the Taxpayer hired CPA Luther Abel. Abel proposed to the examiner that the Taxpayer's liability should be recomputed using the ratio of the Taxpayer's taxable sales to gasoline sales for the period January 1993 through July 1994. The ratio for that period was approximately \$.50 in taxable sales to each \$1.00 in gasoline sales.

The examiner discussed Abel's proposal with her supervisor, who agreed that the alternative method was reasonable under the circumstances and should be accepted. The examiner thereafter obtained the Taxpayer's gasoline purchase records from his gasoline distributor for October 1989 through December 1992. She then applied the \$.50/\$1.00 taxable sales to gasoline sales ratio to that period. The final assessments in issue are based on that alternative audit method.

The Taxpayer now argues that while the \$.50/\$1.00 taxable sales to gasoline sales ratio properly reflects his liability for January 1993 through July 1994, it is excessive for the prior period October 1989 through December 1992. The Taxpayer contends that a racetrack opened across from his store in 1993, which caused his taxable sales to increase over his pre-1993 sales figures. The Taxpayer claims that his taxable sales ratio prior to 1993 is more accurately reflected by his sales in October through December 1994, a period during which the racetrack was not open. The Taxpayer computed those ratios to be taxable sales of \$.34, \$.36, and \$.31, respectively, for each \$1.00 in gasoline sales.

Conflicting evidence was offered as to when the racetrack actually opened. The examiner testified that it opened in March 1994, when the track obtained its retail sales tax license from the Department. The Taxpayer testified that the track was unofficially open sometime in 1993. The Taxpayer also explained that his wife operated the business by herself prior to their divorce in March 1993, and that she either failed to keep or destroyed any records for that period.

All taxpayers engaged in the business of making retail sales in Alabama are required to keep accurate records from which the Department can compute their correct sales tax liability. Code of Ala. 1975, §40-23-9 (relating specifically to sales tax) and Code of Ala. 1975, §40-2A-7(a) (relating to all taxes generally). See also, State v. Mack, 411 So.2d 799 (Ala.Civ.App. 1982).

The Taxpayer obtained a retail sales tax license in his name when the business opened in 1987 or 1988. He thereafter owned the business for the entire audit period, either jointly with his wife or by himself after he divorced in March 1993. The Taxpayer was thus personally liable to keep adequate sales records as required by the above statutes. He failed to do so.

Because the Taxpayer failed to keep adequate records, the Department was authorized to compute his liability using the best information available. Code of Ala. 1975, §40-2A-7(b)(1)a. The Taxpayer cannot now complain that the Department's estimates are

not exact or precise. Rather, the Department's calculations must be upheld if reasonable under the circumstances. Cracchiola v. Comm., 643 F.2d 1383 (9th Cir. 1981); Jones v. CIR, 903 F.2d 1301 (10th Cir. 1990). Having failed to keep adequate records, the Taxpayer must now pay the consequences. State v. Ludlum, 384 So.2d 1089 (Ala.Civ.App.), cert. denied 384 So.2d 1094 (1980).

The Department initially used a purchase mark-up audit, which is a common and generally accepted audit method. The Department later accepted the alternative taxable sales to gasoline sales ratio method suggested by the Taxpayer's CPA. That method, according to the Department examiner, substantially reduced the Taxpayer's liability for the subject period.

I agree that the Taxpayer may have had less taxable sales prior to 1993 than after. However, as stated above, because the Taxpayer failed to keep adequate records during that period, he cannot now complain that his estimated liability as computed by the Department is not correct. The Department's calculations are reasonable under the circumstances, especially considering that the Department used the Taxpayer's own alternative audit method, which resulted in less tax than the mark-up audit initially used by the Department. In any case, even if the Taxpayer did have less taxable sales prior to 1993, he also would have had correspondingly less gasoline sales, in which case the taxable sales to gasoline sales ratio would have been approximately the same as for the later period January 1993 through July 1994.

The final assessment as computed by the Department is

affirmed. Judgment is entered against the Taxpayer for State sales tax in the amount of \$44,117.96, and City of Steele sales tax in the amount of \$10,853.66, plus applicable interest.

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

Entered January 22, 1996.

BILL THOMPSON  
Chief Administrative Law Judge