HILLCREST PLAZA PACKAGE STORE 6165 Airport Boulevard Mobile, Alabama 36608-3159,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 95-434
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed sales tax against Hillcrest Plaza Package Store, a partnership, and its partners Thomas D. Lunceford and Jennifer C. Lunceford, for the period April 1991 through April 1994. Thomas D. Lunceford ("Taxpayer") appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on August 30, 1996 in Mobile, Alabama. The Taxpayer represented himself at the hearing. Assistant Counsel Duncan Crow represented the Department.

The issue in this case is whether the Department properly computed the Taxpayer's sales tax liability for the subject period using an indirect purchase mark-up audit.

The Taxpayer owned and operated two retail liquor stores in Mobile County during and before the period in question.

The Department audited and assessed additional tax against the Taxpayer for the period May 1982 through March 1991. From April 1988 through the end of that audit period, the Taxpayer had reported gross sales on his sales tax returns and then claimed a corresponding deduction, which resulted in zero tax due.

The Taxpayer appealed to the Administrative Law Division and

explained that he was filing zero returns because he had already paid sales tax when he purchased his liquor from the ABC Board. The Taxpayer's argument was rejected by the Administrative Law Division in March 1993. See, State v. Hillcrest Plaza Package Store, S. 92-169 (Admin. Law Div. 4/2/93). The Taxpayer thereafter started reporting and paying some sales tax to the Department.

The Department audited the Taxpayer again for the period in issue, April 1991 through April 1994. The Department requested the Taxpayer's sales records. The Taxpayer responded that his records had been completely destroyed in a fire at one of his stores in July 1993. The Department consequently conducted the audit using vendor purchase records and applying a mark-up or "multiplier" provided by the Taxpayer.

A different mark-up was used for the various items sold by the Taxpayer, i.e. snacks, beer, liquor, etc. The exact mark-ups were not submitted into evidence, although the examiner's report (Dept. Exhibit 2) indicated an average mark-up of 15.68 percent, and that "it appeared extremely low for a package store mark-up percentage." (Dept. Exhibit 2, at p. 3). The Department allowed a credit for the tax previously paid by the Taxpayer, and then assessed the additional tax due, plus penalty and interest.

The Taxpayer disputes the audit on two primary grounds.

First, he argues that he should be allowed to deduct from taxable receipts the State excise tax included in the retail price of his products. Specifically, the Taxpayer claims that in

accordance with State, Dept. of Revenue v. B & B Beverage, Inc., 534 So.2d 1114 (Ala.Civ.App. 1987), he did not charge his customers sales tax on the excise tax portion of his retail sales price, and consequently, that his taxable gross receipts should be reduced by that amount. For example, if the Taxpayer sold a bottle of whiskey for $10, he claims that he deducted the 56 percent liquor excise tax and then collected sales tax on only the remaining $4.40.

The Court of Civil Appeals did hold in B & B Beverage that private retail liquor stores are not required to collect sales tax on the excise tax included the cost of the liquor. Unfortunately for the Taxpayer, although he testified that he first backed out the excise tax from the taxable measure before charging sales tax, he failed to produce any records verifying his testimony. The Department is not required to rely on a taxpayer's verbal assertions in lieu of records. State v. Mack, 411 So.2d 799 (Ala. 1982). If the Taxpayer had collected sales tax on the excise tax, then the tax, although erroneously collected, must be remitted to the Department. Code of Ala. 1975, §40-23-26(d).

The burden is on a taxpayer to keep adequate records. Code of Ala. 1975, §40-2A-7(a)(1) and Code of Ala. 1975, §40-23-9. In the absence of adequate records establishing that a transaction is exempt "the taxpayer must suffer the penalty of noncompliance and pay on the sales not so accurately recorded as exempt." State v. T. R. Miller Mill Co. 130 So.2d 185, 190 (1961); see also, State v.

Ludlum, 384 So.2d 1089 (Ala.Civ.App.), cert. denied 384 So.2d 1094 (Ala. 1980). Consequently, because the Taxpayer failed to provide records showing that he did not collect sales tax on the excise tax, no credit against his taxable gross proceeds can be allowed.

The Taxpayer next argues that he should be allowed a credit for the inventory destroyed in the July 1993 fire. But again, the Taxpayer failed to provide any records from the police, the fire department, his insurance company, or otherwise concerning the fire, and, importantly, the extent of his alleged losses in the fire. The Department examiner repeatedly requested those records, as did this Administrative Law Judge at the August 30, 1996 hearing. The Taxpayer failed to respond.

The Department examiners in this case conducted a fair and complete purchase mark-up audit based on the best information available. Code of Ala. 1975, §40-2A-7(b)(1)a. The Taxpayer cannot complain about the mark-up or "multiplier" used by the Department because the examiners accepted the Taxpayer's own numbers. My experience concerning purchase/mark-up audit cases indicates that the 15.68% average mark-up used by the Department was very low, and thus beneficial to the Taxpayer.

The Taxpayer escaped liability in the prior appeal for most of the period 1982 through April 1988 because the Department failed to timely assess the tax due. But concerning the remainder of the

tax, the Final Order stated that "at the least the Taxpayer owes the tax, penalties, and interest due for those periods set out in the Final Order." (Emphasis in original). The same is true in this case.

The final assessment is affirmed. Judgment is entered against Thomas D. Lunceford and Jennifer C. Lunceford for sales tax for the period April 1991 through April 1994 of $88,945.55, 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 November 26, 1996.

BILL THOMPSON
Chief Administrative Law Judge