QLE, INC. Q-Vending 4456 Narrow Lane Road Montgomery, AL 36116-2954,	'	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	'	DOCKET NO. S. 99-544
v.	'	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	'	

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed sales tax against QLE, Inc. for April 1996 through March 1999. QLE, Inc. appealed to the Administrative Law Division pursuant to Code of Ala. 1975, '40-2A-7(b)(5)a. A hearing was conducted on April 20, 2000. Fred Walker (ATaxpayer@) attended the hearing. Assistant Counsel Wade Hope represented the Department.

ISSUES

The Taxpayer owns and operates QLE, Inc. The Taxpayer=s corporation sold laundry machines and also operated a vending machine business during the subject period. This case involves two issues:

(1) Did the Department properly include the Taxpayer=s laundry machine sales and his vending machine sales in a single audit; and,

(2) Did the Department properly compute the Taxpayer=s liability using the best information available.

FACTS

The Taxpayer began operating a laundry machine sales and service business in the late 1980s. He operated as a sole proprietorship before 1995, and had an Alabama sales

tax license in his name. The Taxpayer incorporated as QLE, Inc. in April 1995. The Department canceled the Taxpayer=s sales tax license, and issued a new license to QLE, Inc. at that time.

The Taxpayer started selling snacks and soft drinks through vending machines in December 1995. He started with one machine, but eventually operated six snack machines and ten soft drink machines. He closed his vending business in October 1999.

A Department sales tax examiner contacted the Taxpayer concerning his vending business. The examiner discovered at that time that the Taxpayer also operated a laundry machine sales business. Because the Taxpayer filed only one sales tax return a month using QLE, Inc.=s license, the examiner included the Taxpayer=s laundry machine and vending sales in one audit. The Taxpayer provided the examiner with receipt books concerning his laundry machine sales, and canceled checks concerning his snack and soft drink purchases. The checks were for 1998 and 1999 only.

The examiner used the receipt books to compute the Taxpayer=s laundry machine sales. If a receipt separately stated an amount for transportation or labor, the examiner did not include that amount in the taxable measure. If the receipt showed only a lump-sum amount, the lump-sum amount was included in the taxable measure.

The examiner used the canceled checks to compute the Taxpayer=s soft drink sales for 1998 and 1999. The examiner determined that the Taxpayer purchased drinks at wholesale for approximately $2.50 a dozen, or $.21 each. The Taxpayer claimed he sold the soft drinks for $.50 or $.60 each. Using those figures, the examiner determined that the Taxpayer marked up the drinks approximately 250 percent. She applied the markup to

total purchases, and then backed out sales tax to arrive at the Taxpayer=s taxable soft drink gross receipts in 1998 and 1999.

The Department also used the canceled checks to compute the Taxpayer=s snack sales in 1998 and 1999. The Department taxed the Taxpayer based on his cost of the snacks, without markup.[1]

Because the Taxpayer failed to provide checks for the pre-1998 audit period, the examiner projected the Taxpayer=s vending sales for 1998 and 1999 to the pre-1998

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[1]In 1973, the Alabama Legislature reduced the sales tax rate on snacks (but not beverages other than coffee or milk) sold through vending machines from 4 percent to 3 percent. See, Act, No. 1136. That Act, presently codified at Code of Ala. 1975, '40-23-2(5), levied the 3 percent tax on Athe cost of the food . . . sold through the machines, which cost . . . shall be the gross proceeds of sales of the business.@

Until 2000, the Department interpreted the above statute to mean that the vendor owed the 3 percent tax on his wholesale cost of the snacks. That is why the Department assessed the Taxpayer in this case on only his cost of the snacks.

However, the Department has changed its position, effective January 1, 2000, and now requires vendors to pay tax on the gross proceeds derived from the sale of the snacks. See Department Reg. 810-6-1-.183.02(2)(a).

months. However, because the Taxpayer claimed that his vending sales were less in the early part of the audit period, the examiner reduced the Taxpayer=s soft drink and snack sales for the pre-1998 period by 50 percent.

ANALYSIS

Issue (1) Single Audit

The Taxpayer complains that his two business activities should have been separately audited and assessed. However, the Taxpayer had only one sales tax number and filed only one monthly sales tax return during the audit period. The Taxpayer presumably reported both his machine sales and his vending sales on the one return. Consequently, the Department correctly included both activities in a single audit. Including both activities in a single audit did not prejudice the Taxpayer or increase his total liability.

Issue (2) Computation of the Taxpayer=s Liability

A taxpayer liable for sales tax is required to keep complete and accurate records from which the Department can accurately determine the taxpayer's correct liability. Code of Ala. 1975, '40-23-9; State v. Mack, 411 So.2d 799 (Ala.Civ.App. 1982). If a taxpayer fails to keep adequate records, the Department can use any reasonable method to compute the taxpayer's liability. Having failed to keep records, the taxpayer cannot then complain that the liability so computed is inexact. Jones v. CIR, 903 F.3d 1301 (10th Cir. 1990); Adamson v. Commissioner, 745 F.2d 54 (9th Cir. 1984); Denison v. CIR, 689 F.2d 777 (10th Cir. 1982); Webb v. CIR, 394 F.2d 366 (5th Cir. 1968).

Code of Ala. 1975, '40-2A-7(b)(1)a. also authorizes the Department to calculate a taxpayer's liability using the most accurate and complete information available. A final

assessment based on the best information is *prima facie* correct on appeal, and the burden is on the taxpayer to prove that the assessment is incorrect. Code of Ala. 1975, '40-2A-7(b)(5)c.

The Taxpayer admittedly failed to keep adequate records during the audit period. Consequently, he cannot now complain that the amount assessed is excessive. The Department examiner performed a good audit based on the only records provided by the Taxpayer. She correctly taxed the lump sum amounts included on the machine sales invoices if labor and transportation charges were not separately stated. See, Department Regs. 810-6-1-.84 and 810-6-1-.178. Her soft drink markup was reasonable under the circumstances. The examiner also gave the Taxpayer the benefit of the doubt when she reduced his pre-1998 vending sales by 50 percent. The audit is affirmed, with the following proviso.

The Taxpayer provided some additional laundry machine invoices after the audit was completed. Some of the invoices included separately stated labor and transportation charges. The Department reviewed the records, but did not adjust the audit. However, the Department examiner testified that if the records had been provided during the audit, she would have removed the separately stated labor and transportation charges from taxable gross receipts. The Department is directed to again review those records and delete from the taxable measure all separately stated labor and transportation charges.

The Department should notify the Administrative Law Division of the adjusted amount due. A Final Order will then be entered.

This Opinion and Preliminary Order is not an appealable Order. The Final Order,

when entered, may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, '40-2A-9(g).

Entered May 31, 2000.

BILL THOMPSON
Chief Administrative Law Judge