H. DON MCKAY Twenty One Arcade, Inc. 867 Curry Station Road Millford, AL 36268-7082,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 03-269
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed State and local sales tax against H. Don McKay ("Taxpayer"), d/b/a Twenty One Arcade, Inc., for July through December 2001. The 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 6, 2003. The Taxpayer and his representative, William Crawford, attended the hearing. Assistant Counsel Wade Hope represented the Department.

The issue in this case is whether the Department correctly assessed the Taxpayer, individually, for the tax in question.

The Taxpayer owned an arcade business in Talladega, Alabama during the period in question at which coin operated game machines were offered to the public. The business failed to report and remit the "public amusement" gross receipts sales tax levied at Code of Ala. 1975, §40-23-2(2) on the receipts derived from the business. The Department assessed the Taxpayer, individually, for the tax due. The Taxpayer appealed.

The Taxpayer does not dispute the amount of tax assessed by the Department. Rather, he claims that he is not personally liable for the tax because his corporation,

Twenty One Arcade, Inc., actually operated the business.[1]

The Taxpayer incorporated Twenty One Arcade, Inc. on July 19, 2001 in Talladega County, Alabama. The Taxpayer was the sole owner of the corporation. The Articles of Incorporation indicate that the "purpose or purposes for which the corporation is organized are to operate a video arcade." The corporation, through the Taxpayer as president, submitted a combined sales, use, and withholding tax application to the Department on July 11, 2001. The application requested that the corporation be issued an income tax withholding account only. The Department processed the application and issued the corporation a withholding account in due course.

The Department audited the arcade and determined that the Taxpayer was personally operating the business because Twenty One Arcade, Inc. had only applied for a withholding tax license, and not also a sales tax license.

The Taxpayer testified at the August 6 hearing that the corporation did not apply for a sales tax license because the business was not selling tangible personal property, and thus he did not think the business's proceeds were subject to sales tax. He claims that the corporation was operating the business because the corporation leased the building in which the arcade was located and also the arcade machines used in the business. The corporation also had a separate checking account.

[1] The Taxpayer also argued that because his business was forced to close because it was deemed to be a "gambling establishment," it cannot also be taxed as a "place of amusement." Alabama's courts have held, however, that proceeds from gambling may still be subject to the gross receipts sales tax levied at §40-23-2(2). *State v. Crayton*, 344 So.2d 771 (Ala.Civ.App.), *cert. denied*, 344 So.2d 775 (Ala. 1977).

The evidence establishes that the Taxpayer's corporation, Twenty One Arcade, Inc., was operating the arcade business, and not the Taxpayer, individually. Consequently, the corporation was liable for and should have been assessed for the sales tax in issue, not the Taxpayer. The final assessment in issue against the Taxpayer is accordingly dismissed. I note, however, that the Taxpayer clearly controlled the corporation, and thus may be personally liable for the unpaid sales tax in issue pursuant to Alabama's 100 percent penalty statutes. Code of Ala. 1975, §§40-29-72 and 40-29-73.

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

Entered September 11, 2003.