

SIDNEY JERNIGAN
662 Aberfoil Road
Union Springs, AL 36089,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 03-601

FINAL ORDER

The Revenue Department assessed Sidney Jernigan (“Taxpayer”), d/b/a Jernigan Citgo, for sales tax for October 1999 through September 2002. 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 May 17, 2004. Adero Jernigan represented the Taxpayer. Assistant Counsel Wade Hope 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 a purchase mark-up audit.

The Taxpayer operated a gas station/convenience store in Union Springs, Alabama during the period in issue. The Taxpayer primarily sold soft drinks, beer, tobacco products, snacks, and other miscellaneous food items in the store.

A Department examiner reviewed the Taxpayer’s sales tax returns for June 2001 through June 2002. He discovered that the Taxpayer was subtracting a significant amount of “exempt sales” from his gross sales in each month. The percentage of claimed exempt sales ranged from 87.25 percent of total sales in July 2001 to 138.90 percent in April 2002. The examiner subsequently audited the Taxpayer for the period in issue.

The examiner requested the Taxpayer’s cash register tapes, purchase invoices, sales journals, and other relevant records concerning the audit period. The Taxpayer

provided the examiner with several notebooks that contained only daily sales totals. He also provided a few purchase invoices, but failed to provide any cash register tapes, sales invoices, or other sales records. The examiner determined that the Taxpayer's records were insufficient to do a direct audit. He consequently computed the Taxpayer's liability using a purchase mark-up audit.

In a purchase mark-up audit, a retailer's total purchases are computed using purchase invoices provided by the retailer and/or purchase information obtained from the retailer's vendors. In this case, the Department examiner used the few purchase invoices provided by the Taxpayer, and also purchase information obtained from the Taxpayer's vendors, which included Sam's Club in Montgomery, All State Beverage, Horn Beverage, Pepsi Cola Bottling, Golden Flake, Lance, Tom's, and CVS Pharmacy in Union Springs.

The Taxpayer had paid sales tax on some of the purchases. The examiner deleted those tax-paid purchases from the audit. He also determined that the Taxpayer had withdrawn some of the purchased goods from inventory for personal use. He listed those items in a separate schedule. He applied the standard 25 percent IRS mark-up applicable to gas station/convenience stores to the remaining purchases to determine the Taxpayer's total sales receipts. He then added back the Taxpayer's wholesale cost of those items withdrawn for personal use to arrive at total taxable receipts.¹

¹ Property purchased at wholesale and subsequently withdrawn for personal use is taxable at the purchaser's wholesale cost. Code of Ala. 1975, §40-23-1(a)(10). In other words, the examiner did not apply the 25 percent mark-up to the personal items, which obviously benefited the Taxpayer.

The examiner multiplied the taxable receipts by the applicable 4 percent tax rate to determine the Taxpayer's total liability for the subject period. He then allowed the Taxpayer a credit for sales tax previously paid, which resulted in the additional tax due as assessed by the Department.

The Taxpayer's representative objected generally concerning the audit at the May 17 hearing. She primarily argued that some of the items the Department examiner treated as personal in nature had in fact been resold. As discussed, however, in footnote 1, *supra*, the Taxpayer benefited from the examiner's characterization of the items as personal because the 25 percent mark-up was not applied to those items.

The Taxpayer testified that he put his gas receipts in his pocket during the day, and all beer, tobacco, and other store-related receipts in a cash register in the store.² He then totaled and recorded the amount as his total daily sales in his sales journal. He also testified that he treated his beer and cigarette sales as exempt. "Q. So the exempt sales that you reported on your monthly sales tax reports was basically the beer and cigarette sales? A. That's correct." T. at 60. However, beer and cigarettes are not exempt from sales tax. The Taxpayer also did not explain how he determined what part of his commingled cash receipts was from beer and cigarette sales.

All taxpayers subject to sales tax are required to keep complete and accurate records from which the Department can accurately determine their correct sales tax liability.

Code of Ala. 1975, §§40-2A-7(a)(1) and 40-23-9; *State v. Mack*, 411 So.2d 799

² The Taxpayer never used a cash register tape to record his sales or the amount of money he put into the cash register.

(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. The taxpayer cannot later complain that the liability so computed by the Department is inexact. *Jones v. C.I.R.*, 903 F.3d 1301 (10th Cir. 1990).

The purchase mark-up audit used by the Department examiner in this case is an accepted method of computing a taxpayer's liability in the absence of adequate records. See generally, *Moseley's One Stop, Inc. v. State of Alabama*, S. 03-316 (Admin. Law Div. 7/28/03); *Pelican Pub & Raw Bar, LLC v. State of Alabama*, S. 00-286 (Admin. Law Div. 12/15/00); *Joey C. Moore v. State of Alabama*, S. 99-126 (Admin. Law Div. 8/19/99); *Robert Earl Lee v. State of Alabama*, S. 98-179 (Admin. Law Div. 6/28/99); *Red Brahma Club, Inc. v. State of Alabama*, S. 92-171 (Admin. Law Div. 4/7/95); and *Wrangler Lounge v. State of Alabama*, S. 85-171 (Admin. Law Div. 7/16/86). The Taxpayer failed to keep any sales records, and has failed to establish that the examiner's computations are incorrect or unreasonable. The *prima facie* correct final assessment is affirmed.

Judgment is entered against the Taxpayer for State sales tax, penalty, and interest of \$19,139.49. Additional interest is also due from the date of entry of the final assessment, August 5, 2003.

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

Entered July 13, 2004.

BILL THOMPSON
Chief Administrative Law Judge