

TOBACCO SHACK OF ALABAMA, INC. VII § STATE OF ALABAMA  
33200 U.S. HIGHWAY 43 N. DEPARTMENT OF REVENUE  
THOMASVILLE, AL 36784-1613, § ADMINISTRATIVE LAW DIVISION

Taxpayer, § DOCKET NO. S. 04-997

v. §

STATE OF ALABAMA §  
DEPARTMENT OF REVENUE.

### **OPINION AND PRELIMINARY ORDER**

The Revenue Department assessed Tobacco Shack of Alabama, Inc. VII (“Taxpayer”) for State sales tax for September 2000 through August 2003. 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 February 15, 2005. Charles Doize, Jr. represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

The Tobacco Shack of Alabama, Inc. operates ten tobacco outlets in Alabama and numerous others in Mississippi and Louisiana. The Taxpayer is the Tobacco Shack of Alabama, Inc. outlet in Thomasville, Alabama.

The Department audited the Taxpayer for State sales tax beginning in September 2003. The Department examiner requested the Taxpayer’s records, including its cash register z-tapes, daily reports, records of its exempt or wholesale sales, etc. The Taxpayer informed the examiner that it did not keep its z-tapes during the subject period. It did provide its daily reports and a receipt copy of its wholesale sales for the corresponding day.

The examiner questioned the records showing wholesale sales because he had previously visited the Taxpayer’s business concerning another taxpayer and was told that the store did not maintain any wholesale sales information. The records also

“looked as though they were written with the same ink pen, the same handwriting and there were several receipt copies with the same receipt number.” See, Dept. Ex. 1 at 2. In an attempt to determine the Taxpayer’s wholesale sales, the examiner mailed the Taxpayer’s wholesale customers a letter asking them to certify how much tobacco products they had purchased from the Taxpayer at wholesale during the audit period. The examiner allowed the wholesale sales verified by the customers that responded to his letter.

The Taxpayer’s representative in this case is the accountant for all of the Tobacco Shack stores. He maintains the corporation’s financial information and computes and files the monthly sales tax returns for the stores. He explained that all of the Tobacco Shack outlets in Alabama record their sales on cash register z-tapes. The store managers complete daily sales reports from the z-tapes, which includes a listing of the total receipts, the exempt or wholesale sales, expenses, and other information. The managers forward the daily reports to the representative at the end of each month. The representative then uses the reports to prepare each store’s monthly sales tax return.

One of the managers of the Taxpayer’s business in Thomasville testified that he followed the procedures stated above. Unfortunately, the z-tapes were discarded after they were used to fill out the daily reports. The Taxpayer also failed to keep wholesale sales receipts showing the customer’s name, sales tax number, and the type of product sold. A witness for the Taxpayer testified that the wholesale sales information provided to the Department examiner were estimates compiled after the fact in a good faith effort to show the Taxpayer’s wholesale sales during the audit period.

All taxpayers subject to sales tax are required to keep adequate records showing taxable and nontaxable or wholesale sales. Code of Ala. 1975, §40-2A-7(a)(1) (generally), and Code of Ala. 1975, §40-23-9 (concerning sales tax). Section 40-23-9 further provides that any taxpayer “selling both at wholesale and retail shall keep his books so as to show separately the gross proceeds of wholesale sales and the gross proceeds of retail sales. All sales shall be subject to tax in the absence of such separate records.” Alabama’s courts have also held that if a retailer fails to maintain adequate records distinguishing between taxable and nontaxable sales, the retailer must suffer the consequences and pay tax on the sales not properly recorded as exempt or at wholesale. *State v. Ludlum*, 384 So.2d 1089 (Ala. Civ. App.), *cert. denied* 384 So.2d 1094 (Ala. 1980).

In this case, the Taxpayer’s representative maintained an efficient and easy to verify system for computing and reporting the sales tax liabilities of the various Tobacco Shack stores in Alabama. The general accuracy of the system is confirmed by the fact that of the eight other Tobacco Shack stores audited by the Department, five owed no additional tax and the other three had only minor adjustments that totaled less than \$3,500. Unfortunately, through a misunderstanding, the store in Thomasville failed to keep its z-tapes or other source documents from which its wholesale sales could be verified.

The Department, acknowledging that the Taxpayer made some wholesale sales during the audit period, attempted to determine the amount of the Taxpayer’s wholesale sales by contacting the Taxpayer’s wholesale customers. As indicated, the examiner allowed the wholesale sales confirmed by the customers that responded to his inquiry.

The Taxpayer's representative explained that a number of the customers failed to respond only because they were hesitant to get involved in an on-going Department audit. The representative subsequently contacted most of the customers that had failed to respond and obtained 20 signed statements verifying the wholesale purchases the customers had made with the Taxpayer during the last three years. The Taxpayer submitted the statements to the Administrative Law Division with its notice of appeal.

The other Tobacco Shack outlets in Alabama maintained good records and properly recorded their taxable and nontaxable sales. The Tobacco Shack accountant's records also distinguish between taxable and wholesale sales for all of the stores, including the one in Thomasville. The Taxpayer presented believable testimony at the February 15 hearing explaining why the managers failed to maintain sufficient records at the Thomasville store. It also presented evidence that the percentage of wholesale sales reported during the audit period was consistent with the percentage of wholesale sales for the ten months following the audit period during which the Taxpayer maintained meticulous records of its wholesale sales.

Under the circumstances, the Taxpayer should be allowed credit for the wholesale sales reflected in the customer statements submitted with its notice of appeal. Provided, the Department should contact the customers and verify (1) that they were in business during the entire audit period, and (2) that the amount of wholesale purchases attested to is correct.

The Department should notify the Administrative Law Division after its investigation is completed. It should also notify the Administrative Law Division of the

Taxpayer's adjusted liability after allowing all verified wholesale sales. An appropriate 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 from the date of this Order pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered April 13, 2005.

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BILL THOMPSON  
Chief Administrative Law Judge