

DURGHAM AHMAD NASSAR  
3614 OLD SHELL RD.  
MOBILE, AL 36608-1307,

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. S. 05-263

v.

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

§

### **FINAL ORDER**

The Revenue Department assessed Durgham Ahmad Nassar (“Taxpayer”) for State and city/county sales tax for January 1999 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 December 23, 2008. Michael McNair represented the Taxpayer. Assistant Counsel Duncan Crow represented the Department. The Taxpayer failed to attend the hearing.

The Taxpayer operated five gas station/convenience stores in Alabama during all or parts of the years in issue. Three of the stores were in Mobile. The others were in Daphne and Prichard.

A Department examiner audited the stores for State and local sales tax for the subject years. He requested the Taxpayer’s sales tax z-tapes, purchase invoices, and all other sales tax-related records for each of the locations. The Taxpayer’s bookkeeper provided some piecemeal records. The examiner determined that the incomplete records were insufficient to accurately compute or verify the Taxpayer’s liability. He consequently computed the tax due using a purchase mark-up audit.

The examiner used the Taxpayer’s partial invoices to determine the Taxpayer’s primary vendors during the audit period. He then obtained the Taxpayer’s purchase

information from those vendors. The information established that the Taxpayer had purchased substantially more from his vendors in every month of the audit period than he had reported in total sales in those months. The examiner applied the standard IRS mark-up percentage of 124.865 percent to the Taxpayer's total purchases to determine his retail sales for the period. He then allowed a credit for the tax previously reported and paid by the Taxpayer to determine the additional tax due. The Department also applied the 50 percent fraud penalty because the Taxpayer had failed to maintain adequate records, and had consistently and substantially underreported his taxable retail sales during the three year audit period.

The Taxpayer argues that the Department's calculations are incorrect because (1) some of the locations were leased to and operated by others during the audit period; (2) he had substantial exempt food stamp and WIC sales at some of the locations; (3) the Daphne store was closed in March 2001 and did not operate for the rest of that year; (4) the Prichard store was closed for a month due to a murder at the location; and (5) there was also a fire at the Prichard location that destroyed a substantial amount of the store's inventory.

The Department does not dispute that individuals other than the Taxpayer may have operated some of the stores during the audit period. The Department correctly argues, however, that the Taxpayer is still liable for the unpaid sales tax because the stores all operated using the Taxpayer's sales tax license. The one exception involved the Pritchard location, which for a short period was operated under the Taxpayer's brother's account number. The Taxpayer conceded to the Department examiner, however, that he, and not his brother, was responsible for the sales tax at that location.

Food stamp and WIC sales are exempt from sales tax. But the burden was on the Taxpayer to provide records establishing the amount of the exempt sales. Code of Ala. 1975, §§40-2A-7(a)(1) and 40-23-9; *State v. Mack*, 411 So.2d 799 (Ala. Civ. App. 1982). He failed to do so.

Concerning the Daphne location, the examiner testified at the December 23 hearing that he did not assess the Taxpayer for the months after that location was closed in May 2001.

Finally, the examiner also excluded from the audit the one month during which the Prichard store was closed due to a murder at the location. The examiner did not allow any credit for merchandise that may have been burned or stolen at the location because there was no evidence supporting those claims.

A final assessment on appeal is *prima facie* correct, provided that there is some rational evidentiary basis for the assessment. The burden is also on a taxpayer to prove that the final assessment is incorrect. Code of Ala. 1975, §40-2A-7.

The final assessment in issue is based on a properly conducted purchase mark-up audit. Such audits are reasonable and commonly used when a taxpayer fails to maintain adequate records. See generally, *Alsedeh v. State of Alabama*, S. 03-549 (Admin. Law Div. 11/3/04); *Arnold v. State of Alabama*, S. 03-1098 (Admin. Law Div. 7/27/04); *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 has failed to prove that the examiner's audit and the resulting final assessments are incorrect. The final assessments are accordingly affirmed. Judgment is entered against the Taxpayer for State sales tax of \$194,454.46 and city/county sales tax of \$61,664.83. Additional interest is also due from the date the final assessments were entered, January 18, 2005.

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

Entered January 2, 2009.

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BILL THOMPSON  
Chief Administrative Law Judge

bt:dr

cc: Duncan R. Crow, Esq.  
Michael S. McNair, Esq.  
Joe Cowen  
Mike Emfinger