ALABAMA INTERNATIONAL DRAGWAY, INC. 937 Valley Forge Road Tuscaloosa, AL 35406-1606, Taxpayer, v. STATE OF ALABAMA DEPARTMENT OF REVENUE.	'	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION DOCKET NO. S. 00-331

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed State and City of Steele sales tax against Alabama International Dragway, Inc. for January 1997 through June 1999. Jack Collins (ATaxpayer@), the owner, appealed to the Administrative Law Division pursuant to Code of Ala. 1975, '40-2A-7(b)(5)a. A hearing was conducted on August 31, 2000. Luther Dickie Abel represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

ISSUES

This case involves two issues:

(1) Is the Taxpayer=s business located in the city limits of the City of Steele, Alabama? If so, the Taxpayer is liable for the 2 percent City of Steele sales tax levied on businesses located within the city limits during the period in issue. He had paid the 1 percent City of Steele police jurisdiction tax during the period; and,

(2) In computing his taxable admissions, should the Taxpayer be allowed to back out the combined 7 percent State, St. Clair County, and City of Steele sales tax? That issue turns on whether the Taxpayer displayed a sign specifying the amount of tax included in the admission charge.

FACTS

The Taxpayer operated a racetrack in St. Clair County, Alabama during the period in issue. He purchased the property on which the racetrack was located in 1991. It is undisputed that the property is within the City of Steele=s police jurisdiction. The Taxpayer claims the seller told him the property was outside the City of Steele city limits. The Taxpayer also claims that various City of Steele officials told him the property was outside the city limits. Consequently, when the racetrack opened, the Taxpayer reported and paid the .05 percent City of Steele police jurisdiction sales tax on his gross receipts at the racetrack.[1]

In October 1995, the City of Steele increased its sales tax in the city limits from 1 percent to 2 percent. The City=s police jurisdiction tax correspondingly increased from .05 percent to 1 percent. The Department in due course notified the Taxpayer and all other taxpayers in the City=s taxing jurisdiction of the increase.

The City of Steele discovered in mid-1995 that the property on which the Taxpayer=s facility was located had been annexed into the city limits by Act 81-415 in 1981. The City notified the Taxpayer of that fact in October 1995. The City also directed the Taxpayer to begin collecting the full 2 percent sales tax, beginning November 1, 1995.

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[1]The sales tax within the city limits of the City of Steele was 1 percent when the Taxpayer opened the racetrack. The police jurisdiction sales tax is limited to one-half of that amount. Code of Ala. 1975, '11-51-206.

The Taxpayer disagreed that his property was within the city limits of the City of Steele, and consequently paid the lower 1 percent police jurisdiction tax during the period in issue.

The Department audited the Taxpayer for State and City of Steele sales tax for January 1997 through June 1999.[2] The Department examiner concluded based on information received from the City that the Taxpayer=s property was inside the city limits. She consequently assessed the Taxpayer for the full 2 percent City of Steele tax.

The Department also assessed the Taxpayer on his total admission receipts, without allowing him to back out sales tax. The Taxpayer had subtracted the combined 7 percent City, St. Clair County, and State sales tax in computing his taxable admissions during the audit period. The Department examiner refused to back out the tax because she had no evidence that the Taxpayer had a sign posted at the racetrack specifying the amount of tax included in the admission, as required by Dept. Reg. 810-6-2-.86. The examiner testified that the Taxpayer told her he had a sign that stated only Atax included.@ The examiner visited the racetrack on a day it was closed, and did not observe a sign posted at the facility.

The Taxpayer testified that he had signs at the facility stating the amount of tax included in the admission charge. He explained that the signs were removed and stored when the racetrack was closed to protect them from the weather, but that they were posted

[2]The Department does not administer the 1 percent St. Clair County sales tax. Consequently, that tax is not in issue in this case.

when the racetrack was open. The Taxpayer offered two signs at the August 31 hearing. Those signs specify the amount of tax included in the admission charge.

The examiner also allowed the Taxpayer credit for sales tax he had erroneously paid on his gasoline sales.

ANALYSIS

Issue (1). Is the racetrack within the city limits of the City of Steele.

The Department assessed the Taxpayer for the full 2 percent City of Steele sales tax based on the City=s claim that the Taxpayer=s property was annexed into the City in 1981. The Taxpayer strongly denies that his property is in the city limits. However, neither party presented evidence proving that the property either is or is not within the city limits.

The Taxpayer argues that the State, as agent for the City, should be estopped from collecting the additional one percent City tax because (1) the Department failed to collect the tax before the period in issue, and (2) various City officials told him in 1991 that his property was outside the city limits.

As a general rule, the Department cannot be estopped from assessing and collecting a tax that is legally due. *Community Action Agency of Huntsville, Madison County, Inc. v. State*, 406 So.2d 890 (Ala. 1981); *Boswell v. Abex Corp.*, 317 So.2d 317 (Ala. 1975). The Alabama Supreme Court has, however, held that the State can be estopped under certain limited circumstances. *Ex parte Four Seasons, Ltd.*, 450 So.2d 110 (Ala. 1984). The Taxpayer argues that *Ex parte Four Seasons* applies in this case. I disagree.

In *Ex parte Four Seasons*, a county tax assessor misinformed a taxpayer concerning how much time the taxpayer had to appeal a decision of the Lauderdale County Board of Equalization. The Supreme Court held that the State should be estopped from dismissing the taxpayer=s appeal on jurisdictional grounds.

> The doctrine of estoppel has not been applied against the state acting in its governmental capacity in the assessment and collection of taxes. *Community Action Agency of Huntsville, Madison County, Inc. v State*, 406 So.2d 890 (Ala. 1981); *State v. Maddox Tractor & Equipment Co.*, 26 Ala. 136, 69 So.2d 426 (1953). However, the petitioners in this case are not seeking to estop the state from assessing or collecting the tax owed. Rather, they are attempting to preserve their right to a hearing in a state court, where the untimeliness of the filing of their appeal was caused by misinformation furnished by the state=s office and relied upon by the petitioners to their detriment.

Ex parte Four Seasons, 450 So.2d at 112.

The rationale of *Ex parte Four Seasons* does not apply in this case. The Department can only be estopped from denying a taxpayer an appeal or hearing where the taxpayer=s procedural or jurisdiction defect was caused by Department misinformation. See, *State of Alabama v. S.D. Warren Co.*, F. 94-226 (Admin. Law Div. Order Denying Department=s Motion to Dismiss 7/18/94). *Ex parte Four Seasons* does not estop the Department from assessing a tax that is legally owed, as in this case.

The Taxpayer could have hired an attorney before he purchased the property to determine whether the property was in the city limits of the City of Steele. He elected not to. In any case, the City of Steele notified the Taxpayer in 1995, before the period in issue, that his business was in the city limits and subject to the full 2 percent sales tax. The Taxpayer was thus under a known duty to collect and remit the full 2 percent tax.

The burden was on the Taxpayer to prove that the *prima facie* final assessment is

incorrect, i.e. that his property is outside the city limits of the City of Steele. Code of Ala. 1975, '40-2A-7(b)(5)c. He failed to do so. Consequently, the additional 1 percent City of Steele tax on his gross receipts is affirmed. [3]

Issue (2). Can the Taxpayer back out the tax from his admissions gross receipts?

Code of Ala. 1975, '40-23-26(b) provides in relevant part that Ait shall likewise be unlawful . . . to absorb or advertise directly or indirectly the absorption or refund of the amount required to be added to the sales price and collected from the purchaser. . .@ Consequently, a taxpayer cannot charge a lump-sum admission price and absorb the tax in the price. The tax can, however, be backed out of the admission charge, but only if the amount of the tax is separately stated on a ticket or a sign at the entrance or gate of the facility. Dept. Reg. 810-6-2-.86 reads as follows:

> (1) The sales tax due on an admission fee must be collected as a separate item. Where the tax is not stated and collected separately the total amount of the admission price will be used as the measure of the tax to be paid to the State. Where the tax is stated and collected separately, only the amount of the admission price (not including tax) will be used as the measure of the tax.
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> (2) This rule will have been complied with where a sign showing the admission price and amount or amounts of tax due thereon is permanently displayed within view of persons paying such admissions or where the tickets used in connection with such transactions have plainly printed on the face thereof the admission price and, as a separate item, the amount of

[3]The Taxpayer claims the City does not provide any services to his facility. But that is irrelevant to the issue in dispute. The Taxpayer must address the lack of services with the City governing body.

sales tax due thereon.

The Department examiner correctly included the total gross receipts in the taxable measure because she had no evidence that the Taxpayer displayed a sign showing the amount of tax included in the admission. Such a sign is required to substantially comply with Dept. Reg. 810-6-2-.86. See, *State of Alabama v. Huntsville Baseball Club, Inc. & Birmingham Baseball Club, Inc.*, S. 92-208 & S. 92-170 (Admin. Law Div. 2/23/94). However, the Taxpayer presented signs at the August 31 hearing which separately stated the amount of tax included in the admission charge. The Taxpayer testified that he displays such signs at his facility when the racetrack is open to the public. Based on that uncontroverted evidence, the Department should recompute the Taxpayer=s liabilities by removing the sales tax from his gross receipts.

The Department should recompute the Taxpayer=s liabilities as indicated above. An appropriate Final Order will then be entered.

This Opinion and Preliminary Order is not a Final 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 November 28, 2000.