CHARLIE J. FARACE SAVE A STOP FOOD MART 3000 - 12TH AVENUE NORTH BIRMINGHAM, AL 35234-3220,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 05-451
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed Charlie J. Farace ("Taxpayer"), d/b/a Save A Stop Food Mart, for State sales tax for March 2001 through February 2004. 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 July 6, 2005. The Taxpayer and his accountant, H.J. Habshey, attended the hearing. Assistant Counsel Keith Maddox represented the Department.

The issue in this case is whether the Department correctly determined the Taxpayer's sales tax liability for the subject period using an indirect purchase mark-up audit.

The Taxpayer operates a gasoline station/food mart in downtown Birmingham, Alabama. The Department audited the Taxpayer for sales tax for the period in issue and requested records from which his sales tax liability for the period could be verified. The Taxpayer provided a few invoices, but failed to provide any cash register tapes or other sales records. The Department examiner determined that the records provided were insufficient to determine the Taxpayer's liability. Consequently, he computed the Taxpayer's liability using an indirect purchase mark-up audit.

The examiner obtained purchase information from the Taxpayer's vendors. He allowed the Taxpayer a credit of $41,551 for tax-exempt food stamp sales. He did not allow $12,887 in exempt WIC sales claimed by the Taxpayer because the Taxpayer failed to submit proof concerning the sales. The examiner applied the standard 35 percent IRS mark-up to the Taxpayer's net purchases to determine the total tax due. He then allowed a credit for tax previously paid to arrive at the additional tax due.[1]

The Department's use of a purchase mark-up audit is an accepted method of computing a taxpayer's liability in the absence of adequate records. See generally, *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 does not contest the examiner's use of a purchase mark-up audit. He contends, however, that the examiner should have applied a 23 percent mark-up instead of the standard 35 percent used by the IRS. The Taxpayer asserts that his income tax returns for the subject years verified a 23 percent mark-up. He also argues that if the examiner had compared the shelf prices at his store with his wholesale cost of the products, the 23 percent mark-up would have again been verified.

[1] The examiner assumed that the Taxpayer's beginning and ending inventories were the same because the Taxpayer provided no records showing otherwise.

The IRS mark-up chart is regularly used by the Department, and provides a reasonable estimate of the average mark-up for different types of businesses. If the Taxpayer had maintained adequate records, as required by Alabama law, the Department would not have been required to estimate his percentage mark-up. And where a taxpayer fails to maintain records, as in this case, the taxpayer must not only present credible evidence showing that the Department's estimates are incorrect, he must also present evidence establishing his correct liability. *Hintz v. C.I.R.*, 712 F.2d 281 (1983); *Doyal v. C.I.R.*, 616 F.2d 1191 (1980). The Taxpayer failed to do so in this case. The Taxpayer's income tax returns cannot be relied on because there are no records supporting the returns. The Taxpayer's claim that he had a 23 percent average mark-up during the audit period is otherwise unsupported by any evidence. The examiner's use of the 35 percent IRS mark-up is affirmed.

The Taxpayer also claimed at the July 6 hearing that he should be allowed credit for exempt WIC sales he made during the audit period. As indicated, the examiner did not allow a credit for WIC sales because the Taxpayer failed to present credible evidence establishing the amount of the exempt sales. However, the Taxpayer's representative subsequently submitted a letter from the Alabama Department of Public Health verifying that the Taxpayer made WIC sales of $12,751.16 during the audit period. The audit should be adjusted accordingly.

Finally, the Taxpayer contends that his ending inventory for the subject period as reflected on his income tax returns was $9,662 more than his beginning inventory for the period. He asserts that his taxable sales should be reduced accordingly. The Department examiner refused to make an adjustment for the ending inventory because

the inventory amounts reported by the Taxpayer on his income tax returns were not supported by any records.

The Taxpayer's representative completed the Taxpayer's sales tax returns during the audit period based solely on the sales amounts verbally provided to him by the Taxpayer. He saw no records verifying the amounts. Likewise, the representative completed the Taxpayer's income tax returns based solely on statements by the Taxpayer. The Taxpayer testified that he conducted an annual inventory at his store. However, no records or other evidence documenting the inventory amounts were submitted in support of the Taxpayer's testimony. The Department is not required to rely solely on the verbal assertions of a taxpayer. *State v. Mack*, 411 So.2d 799 (Ala. Civ. App. 1982). The examiner's refusal to make an adjustment for ending inventory is affirmed.

The Department is directed to adjust the audit by allowing the Taxpayer $12,751.16 in exempt WIC sales. A Final Order will then be entered for the adjusted amount due.

This Opinion and Preliminary Order is not an appealable 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 August 22, 2005.

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BILL THOMPSON
Chief Administrative Law Judge