

KROGER COMPANY
1014 Vine Street
Cincinnati, OH 45202-1100,

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

DOCKET NO. S. 00-440

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

FINAL ORDER

The Revenue Department assessed sales tax against Kroger Company (ATaxpayer®) for September 1994 through November 1997. 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 January 24, 2001. Paul Schulte represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

ISSUE

The issue in this case is whether the Department correctly assessed the Taxpayer based on the best information available. Specifically, did the Department correctly compute the amount of sales tax the Taxpayer failed to collect on taxable retail sales at its stores in Alabama during the subject period.

FACTS

The Taxpayer operates approximately ten retail grocery stores in Alabama. The Department routinely audits the Taxpayer to insure it is correctly reporting and remitting sales tax to the Department. The Department examiner that audited the Taxpayer for the subject period had audited the Taxpayer on two prior occasions.

The examiner concentrated on two areas in conducting the subject audit. First, he reviewed the Taxpayer's records to determine if the Taxpayer had properly reported exempt sales during the period. Second, he determined if the Taxpayer had properly reported and remitted both the over-collected and under-collected sales tax at its various stores during the audit period.¹ Over-collected tax is tax the Taxpayer erroneously collected on nontaxable sales. Under-collected tax is tax due on taxable sales that was not collected.

Concerning the exempt sales, the examiner determined that some sales treated by the Taxpayer as exempt should have been taxed. The Department assessed those transactions accordingly. The Taxpayer does not contest that part of the audit, and has paid the additional tax due.

The examiner determined how much tax was over collected and under collected by the Taxpayer at its various stores using internal documents prepared monthly by the Taxpayer. The Taxpayer had used the internal documents to verify the accuracy of its monthly reports. The documents listed each store that operated in Alabama during the reporting period. They also showed a **Atotal tax accrued@** amount and a **Astore collected@** amount for each store. If the tax collected was more than the tax accrued, an over collection amount was listed. If the tax collected was less than the tax accrued, an under collection amount was listed.

¹The Taxpayer reports and pays its Alabama sales tax in four week increments, instead of the usual monthly reporting period. For ease of reference, the Taxpayer's four week reporting periods will be referred to as monthly reports.

The Taxpayer reported and remitted all sales tax collected during a reporting period, which included all amounts over collected during the period. It did not, however, report and remit the amounts under collected during the period.

The Department examiner determined that the Taxpayer should have also reported all under-collected tax. The examiner accordingly assessed the Taxpayer for the tax under collected at each individual store, as reflected on the internal documents.² For example, on Taxpayer Exhibit 7, the examiner assessed the Taxpayer for the tax under collected at the Opelika and Lanett locations.

The Taxpayer argues that the Department's calculations are faulty because the internal documents on which the examiner relied are flawed. The Taxpayer claims the tax accrued figure on the documents is a test figure that is inaccurate because of logic errors in its computer system during the audit period. Consequently, the Taxpayer contends that the internal documents do not accurately reflect under collections during the audit period. The Taxpayer maintains that the examiner should have instead reviewed the Taxpayer's computer program to insure that all items taxable in Alabama were programmed into the computer as taxable. The Taxpayer argues that if its computer scanning system was correctly programmed,

²The examiner had used the same internal documents to assess the Taxpayer for under-collected tax in his two prior audits of the Taxpayer. The Taxpayer paid those audits without dispute. The Taxpayer is correct, however, that the fact that the prior audits were not contested does not prove that the current audit is correct.

then the correct tax was collected from the customers at the check-out counters, and subsequently remitted to the Department.

ANALYSIS

The parties agree that given the Taxpayer's large volume of sales, it would be impractical if not impossible for the Department to audit the Taxpayer's cash register tapes. Consequently, the parties agree that an alternative audit method must be used. The issue is whether the alternative method used by the Department was appropriate.

If a Department audit is reasonable under the circumstances, it will be affirmed. *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); *Red Brahma Club, Inc. v. State of Alabama*, S. 92-171 (Admin. Law Div. 4/7/95). The Taxpayer does not contest the Department's adjustments concerning the exempt sales. The tax over collected by the Taxpayer also is not disputed because the Taxpayer remitted all tax collected, including those amounts erroneously collected, as required by Code of Ala. 1975, ' 40-23-26(d). See generally, *Sizemore v. Krupp Oil Company*, 597 So.2d 211 (Ala.Civ.App. 1992). The dispute concerns the under-collected tax.

This is an unusual case. The Department examiner computed the under-collected tax using the Taxpayer's internal documents. The Taxpayer now contends that the internal documents are incorrect. The Taxpayer failed to present evidence, however, explaining what logic errors caused the tax accrued amounts on the documents to be incorrect. As between the Department audit based on the Taxpayer's records, and the Taxpayer's unsupported claim that its records are wrong, the Department audit must control. *State v.*

Ludlum, 384 So.2d 1089 (Ala.Civ.App. 1980). The State is not required to rely on verbal assertions of a taxpayer in determining correctness of the tax return . . . @ *Ludlum* at 1091, quoting *State v. T.R. Miller Mill Co.*, 130 So.2d 185, 190 (1961). A Department audit will be affirmed if based on the best information available, and the taxpayer fails to present evidence that the audit is incorrect.

The Taxpayer's representative argues that the examiner should have reviewed its computer scanning system to insure that those items taxable in Alabama were properly programmed as taxable in the system. The Taxpayer claims that other states use that audit procedure. I am not convinced, however, that such a review would accurately indicate whether the Taxpayer collected and remitted the correct tax to the Department. Human error may occur. Scanning machine malfunctions or misreads are also possible. In any case, even if the examiner had used the method suggested by the Taxpayer, there is no evidence the Taxpayer's liability would have been less than assessed by the Department.

The Department audit using the Taxpayer's records was reasonable under the circumstances. The Taxpayer correctly remitted all tax collected, but also owes the tax under collected at its various stores during the audit period, as reflected on its own records.

The final assessment in issue is *prima facie* correct, and the burden was on the Taxpayer to prove that the assessment was incorrect. Code of Ala. 1975, ' 40-2A-7(b)(5)c. The Taxpayer has failed to carry that burden. The final assessment is affirmed. Judgment is entered against the Taxpayer for tax and interest of \$31,580.59. Additional interest is also due from the date of entry of the final assessment, August 21, 2000.

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

Entered April 11, 2001.