

THE DOCKING STATION, LLC
3688 AIRPORT BLVD., SUITE A
MOBILE, AL 36608-1616,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. S. 07-124

v.

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§

FINAL ORDER

The Revenue Department assessed The Docking Station, LLC (“Taxpayer”) for State sales tax for January 2003 through December 2005, and State use tax for September 2002 through February 2006. 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 March 7, 2007. The Taxpayer’s owner, Derek Thomas, attended the hearing. Assistant Counsel Duncan Crow represented the Department.

The Taxpayer operated a business in Mobile, Alabama during the periods in issue at which it provided customers with internet access for a fee. It also sold computer software and hardware, and offered its customers graphic design services, computer repair services, web site design, and various other computer-related services.

A Department examiner audited the Taxpayer and discovered that the Taxpayer’s records did not show whether the Taxpayer’s customers had used the internet for gaming purposes or for other purposes. The examiner thus determined that all of the Taxpayer’s internet access fees were subject to the gross receipts “sales” tax levied on public places of amusement at Code of Ala. 1975, §40-23-2(2). The examiner did not tax those gross receipts which he could identify as being for graphic design, web site design, or for any other non-taxable service.

The Taxpayer's owner testified that before he opened his business, he inquired with and was informed by the State, Mobile County, and the City of Mobile that his internet access fees were not taxable. He claims that he accordingly recorded all of the internet fees as derived from non-taxable services.

The Department contends that while the City and County may have informed the Taxpayer that internet access fees were not taxable, the Taxpayer never inquired with the Department concerning whether those fees were taxable. The Department's position is that the access fees paid by customers that used the internet for gaming purposes were subject to the gross receipts tax, but that those fees paid to use the internet for non-gaming purposes were not taxable. The Department contends, however, that because the Taxpayer failed to keep records distinguishing between the gaming-related and non-gaming related receipts, all of the receipts must be taxed.

The 4 percent tax levied at §40-23-2(2) is on the gross receipts derived from places of amusement or entertainment that are open to the public. The types of public entertainment listed in §40-23-2(2), i.e., pool rooms, vaudevilles, moving picture shows, etc., reflect the types of entertainment that predominated when the statute was enacted in 1939. See, Act 18, Acts of Alabama 1939. In today's modern world, however, the most popular and used amusement or entertainment device is the computer. Consequently, an "internet café" that is open to the public and provides its customers with internet access for a fee is clearly a place of public amusement or entertainment within the purview of §40-23-2(2).

The Department's stated position is that internet access fees are taxable only if the customer uses the computer for internet gaming. However, all access fees paid to use the

internet would be taxable gross proceeds derived from a public place of amusement, regardless of how the user used the time on-line.

In any case, even if the gross proceeds from the Taxpayer's customers that accessed and used the internet for non-gaming purposes were not taxable, the Department correctly assessed the Taxpayer on its total internet access receipts because the Taxpayer failed to keep records distinguishing between the taxable (game-related) and non-taxable (non-gaming related) receipts. See, *State v. Ludlum*, 384 So.2d 1089 (Ala. Civ. App.), cert. denied, 384 So.2d 1094 (Ala. 1980); *State v. T.R. Miller Mill Co.*, 130 So.2d 185 (Ala. 1961) (If a taxpayer fails to keep records distinguishing taxable and non-taxable receipts or transactions, the taxpayer must suffer the consequences and pay tax on those receipts or transaction not properly recorded as exempt.).

The Department also assessed the Taxpayer for use tax on the computers and other tangible items that the Taxpayer had purchased tax-free outside of Alabama. The Taxpayer did not dispute that it had purchased the items tax-free. Consequently, the use tax final assessment is also due to be affirmed.

The final assessments are affirmed. Judgment is entered against the Taxpayer for State sales tax and interest of \$10,787.54, and State use tax and interest of \$2,137.67. Additional interest is also due from the date the final assessments were entered, December 12, 2006.

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

Entered May 1, 2007.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: Duncan R. Crow, Esq.
Derek Thomas
Joe Cowen
Myra Houser