LAISSEZ LES BONS TEMPS ROULER, INC. 2001 15TH AVENUE S. BIRMINGHAM, AL 35205-3811,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 07-552
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed Laissez Les Bons Temps Rouler, Inc. ("Taxpayer") for State sales tax for January 2003 through December 2005. 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 October 30, 2007. Robert Webb represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

ISSUES

The Taxpayer operates a bar/nightclub/restaurant in Birmingham, Alabama. It sells beer, wine, hard liquor, and soft drinks at the business. It also sometimes offers live entertainment, for which it generally charges an admission fee. This case involves two issues:

(1) Should the Taxpayer be allowed to back out sales tax from its lump-sum drink prices in computing its taxable gross receipts for the subject period; and

(2) How should the Taxpayer's taxable admission fees for the period be computed?

FACTS

The Department audited the Taxpayer for sales tax for January 2003 through

December 2005. The Department examiner requested the Taxpayer's cash register tapes ("z tapes"), its sales tax returns, and its tax accrual worksheets for the audit period. The Taxpayer provided its returns and worksheets for the entire period, and also its z tapes for February 2004 through December 2005. The Taxpayer was unable to produce the tapes for January 2003 through January 2004 because the current owner purchased the business in February 2004, and the prior owner could not locate the tapes for the prior months.

The examiner compared the z tapes for February 2004 though December 2005 with the Taxpayer's returns for those months and made some minor adjustments. He estimated the Taxpayer's January 2003 through January 2004 sales using the z tapes for the later months, and also made minor adjustments in those months. Those adjustments are not in dispute. As discussed below, however, the Taxpayer does object that the examiner taxed its entire drink receipts, without first backing out the sales tax it claims was included in the lump-sum drink prices.

The Taxpayer was not aware that sales tax was due on its admission receipts. It consequently failed to collect tax on the receipts or keep records showing the amount of the receipts. The Taxpayer's owner explained that the bands/entertainers usually collected and kept the door receipts as their compensation.

The Department examiner estimated the Taxpayer's admission receipts using information from a local entertainment publication, *The Black and White*. The examiner reviewed the Taxpayer's advertisements in a few issues of the publication to determine the average number of shows the Taxpayer had each month, and also the average admission charge. He projected those averages over the entire audit period. He then estimated that an average of 35 percent of the building's maximum legal capacity of 438 persons attended

each show. He multiplied the estimated paid attendance per show by the average admission to determine the receipts from each show. He then multiplied the estimated receipts per show by the estimated number of shows to determine the Taxpayer's total admission receipts for the audit period.

The Taxpayer objects to the audit on two grounds. As indicated, it claims that sales tax was included in its drink prices, and that the Department examiner failed to back the tax out when he computed its taxable gross receipts. It also contends that the examiner incorrectly determined its admission receipts.

ANALYSIS

Issue (1). Can the Taxpayer back out sales tax from its drink charges?

This issue was previously addressed in *Tuscaloosa Pubs, Inc. v. State of Alabama*, S. 03-425 (Admin. Law Div. 11/24/2003). The Administrative Law Division held in that case that the taxpayer could not back out sales tax from its lump-sum drink charges because it failed to post an on-premises sign indicating that tax was included in the price. The Final Order reads in part as follows:

> Alabama sales tax is levied on the gross proceeds derived from the sale of tangible personal property. Code of Ala. 1975, §40-23-2(1). "Gross proceeds of sale" is defined as the "value proceeding or accruing from the sale of tangible personal property." Code of Ala. 1975, §40-23-1(a)(6). All retailers subject to sales tax are required to add sales tax to the sale price and collect it from the purchaser. Further, it is illegal "to absorb . . . the amount (of sales tax) required to be added to the sales price and collected from the purchaser, . . ." Code of Ala. 1975, §40-23-26(b).
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> The taxable gross proceeds received by the Taxpayer were the full amounts paid by its customers. The Taxpayer argues that sales tax was included in the lump-sum amounts, and thus should be backed out in computing taxable gross proceeds. As indicated, however, it is illegal for the Taxpayer or any other retailer to absorb the sales tax in the sale price charged to a customer. The Department concedes that a retailer can charge a lump-sum price for a product which includes sales tax, and then back out the sales tax in

> computing taxable gross receipts. To do so, however, the retailer must have an on-premises sign or provide the customer with a receipt showing that sales tax was included in the lump-sum price. Otherwise, the retailer would be illegally absorbing the sales tax in the price.

Tuscaloosa Pubs at 2 – 3.

The Department contends that the Taxpayer in this case cannot back out sales tax from its drink prices because the examiner that conducted the audit did not see a sign at the Taxpayer's business. Unfortunately, the examiner is no longer employed by the Department and did not testify at the October 30 hearing. The examiner's audit report also did not mention the issue. The examiner's supervisor testified, however, that the examiner told her that he did not see a sign at the business.

The Taxpayer's prior and current owners testified that the business has always maintained signs at both the upstairs and downstairs bars that indicate that sales tax is included in the drink prices. The Taxpayer introduced photographs of those on-premises signs at the October 30 hearing. The current owner explained that he offered to give the Department examiner a tour of the facility, but that the examiner declined and instead toured the business by himself. The owner claims that the examiner only talked with a janitor at the business, and did not inquire about the existence or location of any signs indicating that sales tax was included in the drink prices.

This issue turns on a question of fact – did the Taxpayer have signs at the facility during the audit period. As discussed, the examiner's supervisor testified that the examiner told her that he did not see a sign at the business. The supervisor did not, however, have first-hand knowledge of that fact. The examiner's audit report also did not address the issue, and there is otherwise no evidence concerning if or where the examiner attempted to locate the signs at the business.

On the other hand, the Taxpayer's former and current owners testified that the business has always maintained signs both upstairs and downstairs showing that sales tax is included in the drink prices. The Taxpayer also submitted photographs supporting that testimony. Given that evidence, and the lack of admissible evidence to the contrary, I must find that the Taxpayer maintained signs at the business indicating that tax was included in the drink prices. Consequently, the applicable sales tax should be backed out in computing the Taxpayer's taxable gross proceeds.

Issue (2). The door receipts.

The Taxpayer's door or admission receipts are subject to the "public amusement" gross receipts tax levied at Code of Ala. 1975, §40-23-2(2). The Taxpayer admittedly failed to pay tax on or keep records concerning its door receipts during the audit period because it was unaware that the receipts were taxable. In such cases, the Department is authorized to compute a taxpayer's liability using the best information obtainable. Code of Ala. 1975, §40-2A-7(b)(1)a.

As discussed, the Department examiner estimated the Taxpayer's door receipts using information from a local entertainment publication. He determined the average number of shows per month and the average admission ($8.62) based on the Taxpayer's advertisements in several issues of the publication. He then estimated that the average attendance per show was 35 percent of the maximum building capacity of 438, or 153 paid admissions per show. He used the above amounts to estimate the Taxpayer's total door receipts.

The Taxpayer's owner concedes that the examiner's average door receipt estimate

of $8.62 per person is accurate. He contends, however, that the examiner overestimated the total number of events during the audit period because the examiner only reviewed a few issues of the entertainment publication. The owner consequently reviewed all of the issues during the audit period to arrive at a more accurate number of events.

The Taxpayer primarily disputes the examiner's estimate of 153 paid admissions per show. The owner calculated what he claims is a more accurate estimate of attendance per show as follows: He first determined the average daily drink receipts by totaling the z tapes at both the upstairs and downstairs bars. He determined the number of credit card customers by computing the average number of credit card transactions in a day. He then divided the number of credit transactions into the total amount charged on the cards to arrive at the average tab per credit card transaction.

He determined the number of his cash customers by subtracting the credit card receipts from total receipts, which left his cash receipts. He then divided the average credit card tab into the total cash receipts, which resulted in the number of his cash customers. Assuming that all customers paid a cover, he then multiplied the total number of credit card and cash customers by the average door admissions of $8.62 to arrive at the average door receipts per event. That average amount was multiplied by the number of shows to determine the total door receipts. Using the above method, the owner determined that the Taxpayer's monthly door receipts averaged $10,929. The Department examiner had estimated the monthly receipts to be $17,150.

As indicated, a final assessment based on the Department's calculations is *prima facie* correct, and the burden is on the taxpayer to prove that it is incorrect. Code of Ala. 1975, §40-2A-7(b)(5)c. The usual presumption of correctness does not apply, however, if

the Department's calculations are not based on some minimum evidentiary foundation. *Jones v. C.I.R.*, 903 F.2d 1301 (10th Cir. 1990); *Muncaster v. State of Alabama*, S. 98-273 (Admin. Law Div. 6/16/2000).

In this case, the Department examiner estimated that the Taxpayer's average attendance was 35 percent of the building's maximum capacity. But there is no evidence that the estimate was based on any documents, statements, or other evidence. It consequently must be assumed that the examiner arbitrarily selected the 35 percent amount. That unsupported estimate cannot be presumed to be correct.

On the other hand, the owner's computations are based on actual numbers. The owner claims that his calculations actually overestimate the number of customers that paid a cover charge because he used the drink receipts from both the upstairs and downstairs bars, although a cover charge was only paid by the upstairs customers. The owner also did not consider the fact that some customers paid a reduced or no cover charge because the cover charge was reduced and then dropped altogether as the night progressed. The entertainers also gave the Taxpayer a guest list of individuals that were allowed in free-of-charge.

The Department claims that the owner's estimates may be too low because more than one person may have used the same credit card tab. Also, some people attending a show may not have purchased anything from the bar, and thus would not be accounted for in the owner's computations.

This case is somewhat analogous to *State v. Ludlum*, 384 So.2d 1089 (Ala. Civ. App. 1980). The taxpayer in *Ludlum* was a nurseryman that sold products at retail and also performed services for his customers. The taxpayer failed to keep records during the

period in issue distinguishing between its taxable sales and nontaxable services.

The Department argued that because the taxpayer failed to keep records, all of its receipts must be presumed to be from taxable sales. The taxpayer disagreed, and presented evidence from a subsequent "test period" in which adequate records were kept which established that 80 percent of the taxpayer's receipts were from nontaxable services. The trial court agreed with the taxpayer. The Court of Civil Appeals affirmed, finding that the taxpayer's estimates were based on reasonable and competent evidence. See also, *State v. Mack, d/b/a Mack Amusement*, 411 So.2d 799 (Ala. Civ. App. 1982) (Department examiner's finding in a sales tax audit that the taxpayer had only reported one-half of his taxable gross proceeds was rejected because it "was mere conjecture on the part of the Department with no real evidence to support such a conclusion." *Mack*, 411 So.2d at 803.).

In this case, the examiner's estimate of the number of paying customers per event was, like the Department's estimate in *Mack*, based on conjecture and unsupported by any evidence. Conversely, the owner arrived at his estimate by taking actual bar sales at the business and then estimating the number of customers based on those sales. He then assumed that all of those customers paid a cover charge on the nights entertainment was offered.

I agree with the Department that it is not unusual for more than one person to be included on a bar tab that is paid with a single credit card. But that is more than offset by the fact that the owner considered the bar receipts from both the downstairs and upstairs bars, even though only upstairs customers paid a cover. Also, some customers that purchased drinks were charged a reduced or no cover if they came late, or if they were on the entertainer's guest list.

It is undisputed that the Taxpayer's door receipts for the subject period must be estimated. As between the examiner's estimate and the owner's estimate, the owner's estimate is based on some evidence, is reasonable under the circumstances, and must be accepted as the most accurate.

The Department is directed to recompute the Taxpayer's liability by (1) backing the applicable sales tax out of the Taxpayer's gross drinks receipts, and (2) using the owner's estimate that the Taxpayer's door receipts averaged $10,929 a month during the audit period. 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 March 10, 2008.

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BILL THOMPSON
Chief Administrative Law Judge

bt:dr
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