

COMPASS MARKETING INC.  
P.O. BOX 3388  
GULF SHORES, AL 36547-3388,

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. S. 07-987

v.

§

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

§

**PRELIMINARY ORDER DENYING TAXPAYER'S  
MOTION TO DISMISS**

This appeal involves a final assessment of consumer use tax for February 2003 through February 2006 entered against the above Taxpayer. The Taxpayer has moved to have the final assessment dismissed because the Department's Answer was insufficient. The motion is denied.

The Taxpayer timely appealed on November 30, 2007. The Administrative Law Division notified the Department's Legal Division by letter dated December 6, 2007 that the Taxpayer had appealed, and that it should file an Answer in the case. It is not known when the Legal Division received the letter. The Legal Division requested an extension to file its Answer on January 9, 2008. An Order granting the Legal Division 60 additional days to file the Answer was entered on January 10, 2008.

On March 4, 2008, the Legal Division filed a "Pro Forma Answer to Notice of Appeal." The Answer indicated that the attorney handling the case had not yet received the Tax Division file on the Taxpayer, and thus could not determine the issues involved or the Department's position on those issues. The Answer further indicated that an Amended Answer would be filed after the attorney had received the Taxpayer's file. The Legal Division has to date not filed an Amended Answer.

The Taxpayer argues that the Department's Pro Form Answer is insufficient because it failed to "state the facts and issues in dispute and the department's position relating thereto," as required by Code of Ala. 1975, §40-2A-9(c). I agree that the Pro Forma Answer does not contain the information specified at §40-2A-9(c). That does not, however, constitute sufficient grounds to grant the Taxpayer relief under the circumstances.

The Administrative Law Division may dismiss an appeal or grant relief to either party if the opposing party fails to comply with a statute or regulation concerning appeals to the Administrative Law Division. See, Code of Ala. 1975, §40-2A-9(b) and Reg. 810-14-1.24(3). The decision to do so, however, is discretionary with the Division. "The Administrative Law Judge shall have discretion to dismiss the appeal, grant all of or part of the relief sought by the taxpayer, or take any other action appropriate under the circumstances." Reg. 810-14-1-.24(3).

In *JSC Brewton, Inc. v. State of Alabama, Corp.* 07-554 (Admin. Law Div. Order Denying Taxpayer's Motion to Dismiss 12/3/2007), the issue was whether the Administrative Law Division was required to grant the taxpayer relief because the Department had failed to file its Answer within 90 days. The Administrative Law Division found that the Answer had been timely filed. It also held that even if the Answer had been untimely, the Administrative Law Division was not required to grant the taxpayer relief, but rather had the discretion to do so.

The Administrative Law Division has also held that the 90 day Answer period is mandatory. On reconsideration, however, Reg. 810-14-1-.24 gives the Administrative Law Division discretion to grant a taxpayer the requested relief. Granting relief is thus discretionary, not mandatory. If there is reasonable cause or a plausible explanation why the Department did not timely file its Answer, then the Administrative Law Division, in its discretion,

may not grant a taxpayer relief. If, however, there is no reasonable cause why the Department failed to comply with §40-2A-9(c), relief will be granted.

*JSC Brewton* at 3.

Likewise, the Administrative Law Division is not required to grant the Taxpayer relief in this case because the Department's Answer did not include all of the information specified in §40-2A-9(c). The Legal Division explained in its Pro Forma Answer that it could not provide the above information because the Tax Division has yet to provide the Taxpayer's file to the Legal Division. That constitutes reasonable cause under the circumstances not to grant the Taxpayer relief.

The Department is directed to file an Amended Answer by March 25, 2008. The Amended Answer should include the information required by §40-2A-9(c).<sup>1</sup> The case will then be set for hearing, or other appropriate action will be taken.

Entered March 11, 2008.

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BILL THOMPSON  
Chief Administrative Law Judge

bt:dr

cc: Duncan R. Crow, Esq. (w/enc.)  
Blake A. Madison, Esq.  
Joe Cowen  
Mike Emfinger

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<sup>1</sup> The Administrative Law Division is authorized to require additional information from the Department after it files its Answer. Section 40-2A-9(c).