GERALD BROWN, d/b/a BROWN TIRE AND AUTO CARE 35 BLAKE ROAD BLOUNTSVILLE, AL 35031-5743, Taxpayer, v. STATE OF ALABAMA DEPARTMENT OF REVENUE.	§ § § § § § §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION DOCKET NO. S. 12-114

FINAL ORDER

The Revenue Department assessed Gerald Brown ("Taxpayer"), d/b/a Brown Tire and Auto Care, for State sales tax for January 2003 through December 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 June 28, 2012. The Taxpayer's representative, Thomas Prickett, attended the hearing. Assistant Counsel Christy Edwards represented the Department.

The Taxpayer sold and installed automobile and truck tires during the period in issue. He did not have an Alabama sales tax account with the Department during the period, and consequently did not charge and collect sales tax from his retail customers. Rather, he paid sales tax when he purchased the tires from his vendors.

The Department audited the Taxpayer for sales tax for the period. The Taxpayer provided the Department examiner with his purchase records, sales tickets, bank records, income tax returns, and income statements. Most of the sales tickets showed a lump-sum amount charged to the customer, although a few stated a charge for the tires and a separately stated charge for the installation labor or other services provided to the customer.

The Department examiner determined the Taxpayer's total gross receipts from his income tax returns. She then deducted the labor and other service charges that were separately stated on some of the invoices. She computed the total tax due for the period on the remaining sales receipts. She then allowed a credit for the sales tax the Taxpayer had paid to his vendors, to arrive at the additional sales tax due.

The Taxpayer petitioned for a review of the Department's audit and resulting preliminary assessment. The Taxpayer's accountant submitted a worksheet at the review conference specifying how he believed the Taxpayer's liability should be computed. Specifically, the accountant determined the Taxpayer's total tire purchases using the Schedule Cs from the Taxpayer's income tax returns for the years in issue. He then backed out the four percent State sales tax to arrive at total purchases less sales tax. The accountant estimated that that the Taxpayer's mark-up on the tires was five percent. He then multiplied total purchases less sales tax by 1.05 percent to arrive at the Taxpayer's estimated taxable sales. He applied the four percent State sales tax rate to that amount to arrive at the sales tax due.

The Department assigned another examiner to review the accountant's computations. That examiner accepted the accountant's method of determining the Taxpayer's total tire purchases using the Schedule Cs. He also backed out the sales tax to arrive at the accountant's number for total purchases less sales tax.

The examiner did not, however, accept the accountant's estimated five percent mark-up. Rather, he computed the mark-up using the Taxpayer's own purchase information and sales receipts. Specifically, he determined the sales price the Taxpayer had charged for tires on 45 transactions from May 2004 through December 2006 using

sales tickets on which the Taxpayer had separately stated the charge for his tires and the charge for the labor or other services. He then determined what the Taxpayer had paid for the tires using the Taxpayer's purchase invoices. The difference between what the Taxpayer had paid for the tires and what he sold them for, excluding any labor or other services, showed an average tire mark-up of 25.85 percent. See, Department Ex. A.

The examiner applied the 25.85 percent mark-up to total tire purchases excluding sales tax to arrive at the Taxpayer's estimated taxable sales. He then applied the four percent tax rate to determine the tax due. A credit was allowed for the tax paid by the Taxpayer to his vendors to arrive at the estimated additional tax due of $6,971. (See, Department Ex. B for the examiner's complete computations.) The additional tax due as determined by the initial examiner had been $7,293.

Alabama law is clear that a retailer subject to sales tax must keep complete records separately showing both the taxable and nontaxable or exempt sales or other charges. Code of Ala. 1975, §40-2A-7(a)(1); *Carter Enterprise v. State of Alabama*, Docket S. 11-965 (Admin. Law Div. 6/25/2012); *Suburban, Inc. v. State of Alabama*, S. 05-538 (Admin. Law Div. 12/13/2007). And if a retailer makes retail sales and also performs non-taxable labor or other services for a customer, the retailer owes tax on only the retail sales price, but only if the charges for the taxable sale and the nontaxable labor or other services are separated stated on the customer's invoice or sales ticket. See Department Reg. 810-6-1-.81.

The Taxpayer's representative does not dispute the general method used by the Taxpayer's accountant and the second examiner to compute the estimated tax due. Rather, he contends that the 25.85 percent mark-up applied by the examiner must be too

high because the resulting tax due of $6,971 is only slightly lower than the original examiner's liability of $7,293. He explained that the initial examiner did not allow or deduct any of the non-separately stated labor in computing the Taxpayer's taxable sales. He thus argued that the second examiner's computations also could not have attributed a sufficient amount of the Taxpayer's total receipts to nontaxable labor because, as indicated, the second examiner found the Taxpayer's liability to be only $321 lower than the initial examiner.

The Taxpayer's representative did an excellent job in arguing the Taxpayer's case at the June 28 hearing. If the Taxpayer's lump-sum invoices included significant amounts for nontaxable labor and other services, as argued by the representative, then the Taxpayer's liability as determined by the second examiner should have been significantly less than the first examiner's findings.

Unfortunately for the Taxpayer, the second examiner's computations, including the 25.85 percent markup, are based entirely on the Taxpayer's own records. The representative also assumed that all of the lump-sum invoices included significant amounts for nontaxable labor or other services. Some or most may have, but the Taxpayer may also have sometimes only sold tires, without performing any services. Without accurate records, which the Taxpayer had the duty to keep, there is no way of knowing.

The second examiner used the method and numbers provided by the Taxpayer's accountant, and he computed the Taxpayer's tire markup using the Taxpayer's own records. I can find no errors in the examiner's calculations, and they are affirmed.

The final assessment is reduced to tax due of $6,971, plus applicable interest. Additional interest is also due from the date the final assessment was entered, December

6, 2011. The Department correctly did not assess the Taxpayer for penalties because he honestly misunderstood how he was required to report and pay sales tax during the audit period. Judgment is entered accordingly.

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

Entered July 10, 2012.

_____
BILL THOMPSON
Chief Administrative Law Judge

bt:dr
cc: Christy O. Edwards, Esq.
Thomas B. Prickett, II, Esq.
Joe Walls
Mike Emfinger