

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

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v.

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DOCKET NO. S. 85-116

NEWS VEN, INC.
P.O. Box 11533
Chickasaw, AL 36611,

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Taxpayer.

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FINAL ORDER

This matter involves three preliminary assessments of State of Alabama, City of Prichard and City of Chickasaw sales tax entered by the Department against the Taxpayer, News Ven, Inc. The Taxpayer protested said preliminary assessments and requested that a hearing be set in Mobile, Alabama. A hearing was scheduled in Mobile for 10:00 a.m., May 24, 1985, with notice being sent to the Taxpayer by certified mail on April 9, 1985. At the time and location set for the hearing, the Taxpayer failed to appear. The Revenue Department was present and represented by assistant counsel Adolph Dean. The hearing proceeded and based on the testimony and exhibits taken therein, the following findings of fact and conclusions of law are hereby made and entered.

FINDINGS OF FACT

During the periods in issue, the Taxpayer was in the business of selling newspapers, both at wholesale and at retail, in the Mobile area. The Taxpayer purchased newspapers at wholesale from the Mobile Press Register and resold said papers by any one of the following four methods: Newsrack sales, store sales (for resale),

sales to newscarriers for resale, and direct sales using newscarriers as deliverers only.

The Revenue Department, through examiner Gordon Horsburgh, audited the Taxpayer and found that the Taxpayer had incomplete records of sales and receipts from which a complete audit could be done. Consequently, the examiner reconstructed the Taxpayer's sales tax liability based on information received from the Mobile Press Register and on information received from Mr. Don Withers, President of News Ven, Inc.

Concerning the newsrack sales made by the Taxpayer, the Department examiner was provided information by Mr. Withers as to the number of papers sold. The examiner then multiplied that number by the retail price (\$.15 per day except \$.50 on Sundays) to arrive at the number of gross sales made by the Taxpayer through newsracks.

Mr. Withers also provided information as to how many papers were sold to stores for resale. Those sales, being sales to licensed retail dealers for resale, were at wholesale and thus not included in the audit.

Concerning the sales to the independent newscarriers and the sales made using newscarriers as deliverers, the total number of papers distributed was provided by Mr. Withers. Mr. Withers also provided the price at which the papers were sold, in the first instance to the independent newscarriers, and in the second instance to the public through the controlled newscarriers.

The Mobile Press Register provided the Department examiner with the total number of papers sold to the Taxpayer during the audit period. The examiner testified that the information provided by Mr. Withers as to the total number of papers sold through newsracks and through or to newscarriers totalled only about five or six percent less than the total reported as sold to the Taxpayer by the Register, less the amount sold tax-free to stores for resale. Because of the approximate similarity in the two figures, the examiner accepted the Taxpayer's information as correct and based his findings thereon. The examiner also gave the Taxpayer a credit for bad debts concerning both the independent and the controlled newscarriers. The bad debt figures were based entirely on information provided by Mr. Withers.

CONCLUSIONS OF LAW

All taxpayers subject to sales tax in Alabama are required by Code of Alabama 1975, §40-23-9 to keep sufficient and accurate records as may be necessary to determine the proper amount of sales tax due. If the taxpayer fails to keep adequate records, the Department is not required to rely on the taxpayer's verbal assertions, and the taxpayer must suffer the consequences for failure to keep said records. State v. T. R. Miller Mill Company, 130 So.2d 185 (1961).

In the present case, the Taxpayer failed to keep adequate records. however, the Department performed its audit on information

provided by the Taxpayer's president, Mr. Don Withers. The audit figures used to compute the tax due on the three types of newspaper sales that were included as taxable by the Department were based entirely on information received from Mr. Withers. Thus, there can be no question that the figures used by the Department in conducting the audit are correct.

The only legal issue that the Taxpayer could raise involves the sales to the independent newscarriers for resale. Under normal circumstances, a sale for resale is a tax exempt wholesale sale.

However, as specifically set out in State v. The Advertiser Company, 337 So.2d 942, for a sale for resale to be tax exempt, it must be to a licensed retail merchant. In the present case, as in the above cited case, the independent newscarriers were not licensed retail merchants. Thus, the sales by the Taxpayer to the independent newscarriers were not wholesale, and consequently, were not tax exempt. Accordingly, the Department examiner acted properly in including said sales as part of the audit.

In summary, the preliminary assessments in issue are based on an audit which was performed based on information provided by the Taxpayer. Further, the Department was legally correct in including in the audit all of the sales in issue. Accordingly, it is hereby determined that the assessments in issue are correct and should be made final by the Department.

Done this 29th day of May, 1985.

BILL THOMPSON
Chief Administrative Law Judge