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| STATE OF ALABAMA DEPARTMENT OF REVENUE, | § | STATE OF ALABAMA DEPARTMENT OF REVENUE |
| | § | ADMINISTRATIVE LAW DIVISION |
| v. | § | DOCKET NO. S. 85-162 |
| ORBITER FAMILY ARCADES, A Partnership Composed of Marion W. Smith, Charles W. Smith and Bradley W. Smith; and Marion W. Smith, Individually, Charles W. Smith, Individually, and Bradley S. Smith, Individually P.O. Box 541 Athens, AL 35611, | § | |
| TRIPLE S ENTERPRISES/ORBITER FAMILY ARCADES, A Partnership Composed of Marion W. Smith, Charles W. Smith and Bradley Smith; and Marion W. Smith, Individually, Charles W. Smith, Individually, and Bradley S. Smith, Individually P.O. Box 541 Athens, AL 35611, | § | |
| Taxpayers. | § | |

ORDER

This matter involves a total of six disputed preliminary assessments; three use tax assessments for the period July 1, 1982 through December 31, 1982 against Triple S Enterprises/Orbiter Family Arcades, a partnership, et al. and three sales tax assessments for the period July 1, 1982 through June 30, 1984 against Orbiter Family Arcades, a partnership, et al. A hearing was conducted by the Administrative Law Division on January 8, 1986. Mr. Marion W. Smith was present and represented the Taxpayers. The Revenue Department was represented by assistant counsel Adolph Dean. Based on the evidence taken at said hearing,

the following findings of fact and conclusions of law are hereby made and entered.

## FINDINGS OF FACT

The relevant facts are undisputed: The Taxpayer, Triple S Enterprises, purchased twenty-eight (28) coin-operated arcade video machines from Rowe International, Inc. of Nashville, Tennessee during the period July 1, 1982 through December 31, 1982. Said machines were purchased in Tennessee and thereafter transported to the Taxpayer's business location in Athens, Alabama, where they were placed In operation by the Taxpayer. In purchasing the machines, the Taxpayer used its Alabama sales tax license. Thus, no Tennessee sales tax was paid. The Revenue Department audited the Taxpayer and obtained copies of the sales orders and invoices from Rowe International relative to said machines. Based an those records, the Revenue Department computed the Taxpayer's use tax liability and thereafter entered the three use tax preliminary assessments in issue.

During the period July 1, 1982 through June 30, 1984, the Taxpayer, Orbiter Family Arcades, operated an arcade business in Athens, Alabama in which the twenty-eight machines referred to above, and other coin-operated video machines, were used. Pursuant to audit, the Department found that the gross proceeds derived from said arcade machines had not been reported by the Taxpayer. Sales tax returns were filed by the Taxpayer for the period in question indicating no tax due. The Taxpayer, which discontinued business

on June 30, 1984, argues that it had not been informed that sales tax was due on the gross proceeds derived from its video business.

The Taxpayer's records were insufficient to allow the Department to properly calculate the gross proceeds derived by the Taxpayer from its video business during the period in issue. However, the Department did obtain certain bank deposit and cash disbursement records of both Triple S Enterprises and Orbiter Family Arcades from the Taxpayers' accountant. Said records were used by the accountant to compute the Taxpayers' partnership returns for the relevant periods. Based on the bank deposit and cash disbursement records, the Department determined the gross proceeds derived from the Taxpayers' arcade business, and based thereon entered the sales tax assessments in Issue.

CONCLUSIONS OF LAW

Under the Alabama use tax, Code of Alabama 1975, §40-23-60, et seq., the taxable event is the use, storage or consumption in Alabama of property purchased at retail outside of the State. Paramount-Richards Theatres v. State, 39 So.2d 380; State v. Smith, 55 So.2d 130. A retail sale for purposes of the use tax is defined at Code of Alabama 1975, §40-23-60(5) as "all sales of tangible personal property except those defined above as wholesale". A wholesale sale for use tax purposes is defined by Code of Alabama 1975, §40-23-60(4) as follows:

> WHOLESALE SALE OR SALE AT WHOLESALE.
> Anyone of the following:
> a. a sale of tangible personal property by wholesaler to licensed retail merchants, jobbers, dealers or other wholesalers for resale and does not include a sale by wholesalers to users or consumers, not for resale.
> (Emphasis added)

In the present case, the Taxpayer purchased the video machines in Tennessee by using its Alabama sales tax license number. Thus, no Tennessee sales tax was charged. However, the machines were not purchased at wholesale for purposes of the Alabama use tax In that they were not purchased by the Taxpayer for resale. The last phrase of §40-23-60(4) set out above is clear that a sale by a wholesaler to a user, not for resale, it not a wholesale sale, and consequently, under §40-23-60(5), Is a retail sale for use tax purposes. Thus, the purchases of the video machines by the Taxpayer, not for resale, were retail transactions and accordingly, use tax is due on the subsequent use of said machines in Alabama.

Concerning the sales tax assessments, the Taxpayers' argument is that it was not aware that the video gross proceeds were subject to tax. However, Code of Alabama 1975, §40-23-2(2) clearly provides that the tax is levied on places of amusement or entertainment, and "amusement devices".

In addition, Code of Alabama 11475, §40-23-9 requires all taxpayers to keep proper and adequate records as may be necessary to determine the proper amount of tax due. If a taxpayer fails to keep sufficient records, then the tax due shall be assessed using

the best information obtainable, and the taxpayer cannot object as to the manner in which such liability is calculated. In the present case, the Taxpayer failed to keep proper records from which its total gross proceeds from the video business could be determined. As a consequence, the Department used the only available records, the Taxpayers' bank statements and cash disbursement records, to determine the tax due. The Taxpayer cannot now object to the accuracy of those calculations. State v. T. R. Miller Mill Co., 130 So.2d 185; State v. Levey, 29 So.2d 129.

Based on the above, it is hereby determined that the assessments in issue are correct and due to be made final by the Department as entered, with interest computed as required by law.

Done this the 13th day of January, 1986.

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BILL THOMPSON
Chief Administrative Law Judge