

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

vs.

§

DOCKET NO. S. 87-183

THE PACKAGE STORE #1, INC. AND
THE PACKAGE STORE #2, INC.
2950 Springhill Avenue
Mobile, AL 36607,

§

§

Taxpayers.

§

FINAL ORDER

A hearing was conducted in this matter on January 8, 1993 in Mobile. Assistant counsel Duncan Crow appeared for the Department.

Dianne Sanford appeared for the Taxpayers. The relevant facts are as follows:

The Taxpayers operated retail liquor package stores in Mobile during 1986 and 1987. The Taxpayers initially reported and paid sales tax to the Department on total gross receipts, without deducting the consumer excise taxes that were included in the wholesale cost of the liquor.

The Taxpayers subsequently decided that the liquor excise taxes should be deducted from gross receipts in computing their sales tax liability. Accordingly, the Taxpayers filed six petitions for refund (3 each) concerning all or part of the period August 1986 through March 1987. The Department denied the refunds and the Taxpayers appealed to the Administrative Law Division on July 6, 1987.

The case was held in abeyance pending a decision in State v. B & B Beverage, 534 So.2d 1114 (1987). The Supreme Court subsequently ruled in B & B Beverage that a private package store could deduct the consumer excise taxes from gross receipt prior to reporting and paying sales tax.

After the B & B Beverage decision, the Department apparently audited the Taxpayers and after allowing a deduction for the consumer excise taxes determined that The Package Store #1 owed additional tax, penalty and interest of \$6,282.14 and that The Package Store #2 owed additional tax, penalty and interest of \$3,694.32. See, August 7, 1989 letter from Assessment Officer Joe Cowen. However, the Department attorney conceded at the hearing on January 8, 1993 that the Department had not issued formal notice and demand letters or entered preliminary assessments for the additional tax claimed. No further action was taken in the case until the hearing on January 8, 1993.

During the period in issue the Department was required to assess sales tax within three years from the due date of the tax.¹

The Department's position was that issuance of a formal notice and demand letter satisfied the three year statute for sales and use

¹See, Code of Ala. 1975, §§40-23-17 and 40-23-18, both repealed by the Uniform Revenue Procedures Act effective October 1, 1992. The statute of limitations for assessing tax is now a uniform three years from the due date of the return or the date the return is actually filed, whichever is later, or if no return is required, three years from the due date of the tax, with some few exceptions. See, Code of Ala. 1975, §40-2A-7(b)(2).

tax purposes. I disagree. Section 40-23-17 required the Department to notify a taxpayer of entry of a preliminary assessment, and §40-23-18(b) required that "any notice", i.e. a preliminary assessment notice, shall be given within three years. Under the above statutes, the Department was required to enter a preliminary assessment for sales or use tax within three years from the due date of the tax.

In either case, neither formal notice and demand letters nor preliminary assessments were entered by the Department against the Taxpayers in this case. Consequently, the tax period is now barred by the three statute of limitations and no additional tax can be assessed by the Department. Also, even if the statute was open, no evidence was submitted showing that the audit was properly conducted and that additional tax was in fact due.

Concerning the refund petitions, the burden is on a taxpayer to prove that a refund is due. The Taxpayers failed to do so in this case. While additional tax cannot be assessed because of the three year statute of limitations, obviously if additional tax is owed the Taxpayers cannot receive a refund of tax for the same period.

The above considered, the Department's denial of the refunds is upheld. No further action should be taken by the Department in this case.

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

Entered on January 26, 1993.

BILL THOMPSON
CHIEF ADMINISTRATIVE LAW JUDGE