STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
v.	§	DOCKET NO. S. 89-110
THOMAS T. SUSI d/b/a The Cabaret and Classic 66 Route 3, Box 346 Enterprise, AL 36330, Taxpayer.	§ § §	

FINAL ORDER

The Revenue Department assessed State, Dale County and City of Daleville sales tax against Thomas T. Susi, d/b/a The Cabaret and Classic 66 (Taxpayer) for the period September 1, 1986 through March 31, 1988. The Taxpayer timely appealed and a hearing was conducted by the Administrative Law Division. Charles N. Reese, Esq. represented the Taxpayer. Assistant counsel Dan Schmaeling represented the Department. The following findings of fact and conclusions of law are based on the evidence and arguments submitted by the parties.

FINDINGS OF FACT

The Taxpayer operated two nightclubs in Dale County, Alabama during the subject period and made retail sales of liquor, beer, wine, snacks and soft drinks.

The Taxpayer failed to report and pay sales tax to the Department on his retail liquor, beer and wine sales. The Department audited the Taxpayer and assessed tax based on the gross receipts derived from those sales. In computing the assessments, the Department allowed a $2.38 per case beer tax deduction for beer

sold prior to October, 1987.

The Taxpayer does not dispute the amount of his sales as computed by the Department, but argues that (1) he should be allowed a credit for sales tax that he paid when he purchased liquor by the bottle from the ABC store, (2) he should be allowed to deduct the beer tax for the entire audit period, and (3) he should be allowed to deduct the liquor taxes that were included in the price of the liquor, citing Department of Revenue v. B and B Beverage, 534 So.2d 1114.

(1) The Sales Tax Credit - The Taxpayer purchased his liquor at wholesale by the case and by the bottle from an ABC outlet store during the subject period. The Taxpayer contends that sales tax was included in the single bottle sales price because the ABC store charged the same price on both retail and wholesale bottle sales during the audit period.. The ABC store also advertised during the audit period that the listed sales. price included "all applicable taxes", which the Taxpayer understood to include sales tax.

The evidence confirms that the ABC store charged the same price on both wholesale and retail single bottle sales during the audit period. A 10% discount was allowed on wholesale case purchases. However, the ABC store also distinguished between wholesale and retail sales and reported and paid tax to the Department on only the retail. sales. The ABC store didn't consider sales tax to be included in the wholesale single bottle

pi-ice, but rather treated the additional amount charged to the wholesale purchaser as profit to offset the increased costs associated with wholesale single, bottle sales. See Department Exhibit 1, memorandum from ABC Board Deputy Administrator dated June 29, 1982.

(2) The Beer Tax Deduction - As stated, the Department allowed a $2.38 per case beer tax deduction until October, 1987. The deduction was not allowed after that date based on Act No. 87-662, now codified at Code of Ala. 1975, §40-23-26(d). Act No. 87-662 became effective in October, 1987 and requires that any sales tax collected by a retailer, even if erroneously collected, must be remitted to the Department. Apparently, the Department examiner assumed that the Taxpayer had collected. sales tax on his beer sales during the audit period and therefore that no deduction should be allowed after the effective date of Act No. 87-662. The undisputed evidence is that the Taxpayer did not charge and collect sales tax on his beer or other alcohol sales during the audit period.

(3) The Liquor Tax Deduction - The Taxpayer claims that he should be allowed to deduct the liquor taxes from taxable gross proceeds based on the B & B Beverage case. The scope and applicability of B & B Beverage is discussed below.

CONCLUSIONS OF LAW

The Taxpayer was required to collect sales tax on his retail

beer, wine and liquor sales and then remit the tax to the Department. See, Code of Ala. 1975, §40-23-26; Matter of Fox, 609 F.2d 778. The Taxpayer is liable for the tax and cannot escape liability because he failed to collect the sales tax from his customers. A retailer is responsible for sales tax even if he fails to collect the tax from the consumer. See, last sentence of Code of Ala. 1975, 540-23-26(b).

The issues then are (1) should the Taxpayer be allowed a credit for sales tax paid to the ABC store; (2) should a beer tax deduction be allowed for the entire audit period; and (3) should the Taxpayer be allowed a liquor tax deduction.

On the first issue, the burden is on the Taxpayer to prove that he paid sales tax when he purchased liquor by the bottle from the ABC store. State v. Ludlam, 384 So.2d 1089. The Taxpayer cannot do so in this case.

A retailer is not required to collect sales tax on wholesale sales and the fact that the ABC Board charged the same price on both wholesale and retail bottle sales. is not conclusive that. sales tax was included in the wholesale price. Rather, the additional amount paid by the Taxpayer was treated as profit to offset the increased cost of wholesale single bottle sales. Whether or not wholesale single bottle sales were more costly to the ABC Board than retail single bottle sales is irrelevant. The important fact is that the ABC Board didn't collect and remit sales

tax to the Department bottle sales. The Department cannot be required to give a credit for taxes that were not collected from the purchaser and remitted to the Department. Also, the fact that the sales price included "all applicable taxes" does not help the Taxpayer's case. Sales tax is not "applicable" on wholesale sales and thus was not included in. the wholesale price paid by the Taxpayer.

Concerning the beer tax deduction, beer tax can normally be deducted. by a retailer from taxable gross receipts because the beer tax, like the sales tax, is on the ultimate consumer. See, Code of Ala. 1975, §28-3-184. Thus, to include the consumer beer tax in the measure of the consumer sales tax would constitute impermissible double taxation - a tax included in the measure of a second tax against the same taxpayer. However, if the retailer collects sales tax on the beer tax, then no deduction can be allowed based on Act 87-662, and the sales tax erroneously collected must be-remitted to the Department.

The Taxpayer in this case did not charge sales tax on his beer sales during the audit period. Consequently, Act 87-662 does not come into play and a beer tax deduction should be allowed for the entire audit period.

A brief history will help in understanding the liquor tax deduction. The Department allows the ABC Board to deduct the liquor taxes in reporting sales tax on its retail sales because in

that case the two taxes are levied against the same taxpayer - the liquor taxes are against the customer as the purchaser from the ABC Board, see Code of. Ala. 1975, §§28-3-201 through 205, and the sales tax is also levied against the customer as the ultimate consumer, see Code of Ala. 1975, §40-23-26. The liquor taxes can thus be deducted to avoid impermissible double taxation. The liquor taxes are not otherwise deductible from taxable gross receipts for sales tax purposes except as required to avoid double taxation - a tax on a tax against the same taxpayer.

Prior to 1987, private package stores were not allowed to deduct the liquor taxes in computing their sales tax liability because in that case the liquor taxes and the sales tax are on different parties - the liquor taxes are on the package store as the purchaser from the ABC store, but the sales tax is passed on to the package store's customer as the final consumer. Consequently, there is no double taxation and the liquor taxes constitute a non-deductible cost of goods sold by the package store.

However, in 1987 the Court of Civil Appeals ruled in B & B Beverage that ABC stores and private package stores are similarity situated - they both sell bottled whiskey at retail and therefore must be taxed alike. As a consequence, private package stores are now allowed on equal protection grounds to deduct the liquor taxes from taxable gross proceeds in computing and paying their sales tax (unless the package store collects sales tax on the liquor taxes,

in which case sales tax would be due under Act 87-662, see Dandy's Discount Package Store, Inc., et al. v. Sizemore, ____ So.2d ___ __decided by Court of Civil Appeals January 24, 1992).

B & B Beverage doesn't apply in this case because the Taxpayer is not a package store, doesn't sell bottled liquor at retail, and is not otherwise similarity situated with an ABC store or a private package store. Consequently, equal protection doesn't allow the Taxpayer to deduct the liquor taxes in computing his taxable. gross proceeds.

Nor can the Taxpayer argue that the liquor taxes should be deducted to avoid double taxation. Double taxation is not per se illegal or unconstitutional but is to be avoided only if it results in an unreasonable pyramiding of taxes. Starlite Lanes, Inc. v. State, 214 So.2d 324. Impermissible double taxation does not result if the two taxes are levied on different taxpayers. As stated in Starlite Lanes, Inc., supra, at p. 327:

> It should also be noted that the burden. of the "gross receipts" tax does not fall-upon the appellant, as this tax is required by law to be added to the total gross receipts and passed on to the customers of appellant. Thus, the burden of the sales tax falls upon the appellant when he buys the shoes and the "gross receipts" tax upon the appellant's customers when they rent the shoes. Although there is double taxation in the sense that two taxes have been paid on the same item, the two taxes do not fall upon the same person. We do not feel that this is objectionable in the present case.

In this case the liquor taxes were levied against the Taxpayer and the sales tax was levied against the Taxpayer's final consumers. Consequently, the two taxes were on different taxpayers and there was no impermissible double taxation.

Judge Ingram in his B & B Beverage opinion concluded that requiring a package store to include liquor tax in the measure

constituted double taxation. The decision reads in pertinent part as follows, at p. 1116:

> The Department has determined that when a package store purchases its inventory from the state stores at wholesale and pays the liquor tax, such payment constitutes a privilege tax and consequently is a business expense. This means that the package store cannot pass the liquor tax on to its retail consumer as a tax. Most importantly it means the package store, the taxpayer, is twice taxed for the amount of the sales tax it must pay on the liquor tax. This is double taxation. A tax on tax.

However, as in Starlite Lanes, while there was double taxation in a sense because the liquor taxes and the sales tax were levied on the same item, impermissible double taxation didn't occur because the two taxes were levied-against different taxpayers. Also, contrary to the above B and B Beverage quote, a package store (or the Taxpayer in this case or any other retailer) is not "twice taxed for the amount of the sales tax it must pay on the liquor tax". To the contrary, the sales tax is not levied against the retailer, but rather "is laid against the customers of the retailer and not the retailer, the only duty or 'obligation of the retailer in the present. case being to collect the tax from its customers and remit such collections to the State". Sizemore v. Krupp Oil Co., Inc., ____ So.2d ____, decided by Court of Civil Appeals, January 24, 1992, citing Ross Jewelers v. State, 72 So.2d 402.

Judge Bradley ruled in his concurring B and B Beverage opinion that the liquor taxes are consumer taxes. respectfully disagree, as

did Judge Holmes in dissent. A consumer tax is a tax that is passed on by statute to the ultimate consumer, i.e., the sales, beer and wine taxes are consumer taxes. The liquor taxes are not passed on to the consumer, but rather are specifically levied by §§28-3-201 through 205 against the purchaser from the ABC Board. The liquor taxes thus are a non-deductible cost to the retailer, the same as any license, income and other tax levied against and paid by the retailer.

For the above reasons, the Taxpayer should not be allowed to deduct liquor taxes from taxable-gross receipts on an equal protection, double taxation or any other grounds. In addition, even if the liquor taxes could be deducted, the deduction would only be allowed for the tax paid on that percentage of the liquor that was resold each month. There would be no accurate or verifiable method by which that amount could be computed.

The above considered, the Department is directed to review the Taxpayer's records and allow a beer tax deduction for the entire audit period and to thereafter make the assessments final. as adjusted, with applicable interest.

Entered on February 5, 1992.

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BILL THOMPSON
Chief Administrative Law Judge