STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
v.	§	DOCKET NO. S. 90-141
MIKE GRAY d/b/a The Peach Park Highway 31 South P.O. Box 48 Clanton, AL 35045,	§	
Taxpayer.	§	

FINAL ORDER

The Department assessed State, Chilton County and City of Clanton sales tax against Mike Gray, d/b/a The Peach Park, (Taxpayer) for the period June, 1986 through July, 1989. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on May 5, 1992. James E. Bridges, III, represented the Taxpayer. Assistant counsel Wade Hope appeared for the Department.

FINDINGS OF FACT

The Taxpayer farms approximately 150 acres in Chilton County on which he grows peaches, nectarines and various other fruits and vegetables. The Taxpayer also owns approximately 35 acres in North Florida on which he is starting a peach orchard.

The Taxpayer's family has farmed in Chilton County for over three decades and for years sold its produce both locally and at various markets throughout the Southeast. The Taxpayer opened the Peach Park in 1986 as a more convenient and efficient way of marketing the produce.

The Peach Park is located just off I-65 in Chilton County and

sells peaches, nectarines, watermelons, corn, peas, squash and other fruits and vegetables in season, peanuts, jams, baskets, various products made from the Taxpayer's overripe produce (ice cream, fruit bars and yogurt), soft drinks, bird feeders and various other non-agricultural items. Most of the produce sold at the Peach Park is grown by the Taxpayer, although some fruits and vegetables are purchased from other sources.

The Taxpayer owns the Peach Park, but is not involved in the day-to-day operation of the business. Rather, the business is operated by the Taxpayer's brother, the brother's wife and a cousin. Various other related and unrelated individuals are also employed at the Peach Park. Some of the relatives that work at the Peach Park also occasionally help out on the Taxpayer's farm.

The Taxpayer failed to keep any record of how much produce he delivered to the Peach Park during the subject period. The Peach Park also failed to keep a sales journal, cash register tapes, or any other records of gross receipts or gross sales during the audit period.

The Peach Park reported and paid $131.00 in sales tax during the three year audit period. The sales tax returns were filled out by the Taxpayer's CPA based on sales figures provided by someone at the Peach Park, usually the Taxpayer's brother or sister-in-law.

The Department audited the Taxpayer using the Peach Park's bank records. Gross proceeds were computed based on total deposits less loans and transfers from other accounts. The Taxpayer concedes that

the audit was properly conducted (see Taxpayer's brief at p. 16) but contends that his produce should be exempt from sales tax pursuant to Code of Ala. 1975, §40-23-4(a)(5).

The Taxpayer offered an analysis compiled by his CPA estimating his produce sales at the Peach Park (see Taxpayer's Exhibit 7). The analysis is based on estimates provided by the Taxpayer and the county extension agent concerning acreage employed by the Taxpayer, estimated crop yield information, and produce prices at the Peach Park. The Taxpayer argues that the analysis accurately shows the amount of his exempt sales at the Peach Park.

CONCLUSIONS OF LAW

Section 40-23-4(a)(5) provides in pertinent part an exemption as follows:

> (5) The gross proceeds . . . of poultry and other products of the farm, dairy, grove or garden, when in the original state of production or condition of preparation for sale, when such sale or sales are made by the producer or members of his immediate family or for him by those employed by him to assist in the production thereof.

The Department argues that the exemption does not apply if the producer sells the crops as a merchant and not as a farmer, citing Curry v. Reeves, 195 So. 425; Sanitary Dairy v. State, 75 So.2d 611, and Department Reg. 810-6-3-.01. Specifically, the Department contends that the exemption does not apply in this case because the produce was sold in a "store" along with other non-farm items. I disagree.

The exemption isn't lost because the produce was sold in a

retail establishment along with other non-farm items. Rather, the issue turns on whether the Taxpayer is primarily a farmer or primarily a merchant. In Curry, supra, the exemption was denied because the seller was primarily a merchant and not a farmer. The growing of the chicks in that case was only incidental to the taxpayer's primary activity as a merchant.

The Taxpayer in this case is clearly a farmer and not a merchant. He spends most of his time on the farm and has little to do with operating the Peach Park. The growing of the produce is his primary activity. Thus, the Curry case does not apply and the sale of the Taxpayer's produce at the Peach Park would be exempt if the other requirements of the satisfied.

However, the produce also must be sold by "the producer or members of his immediate family or for him by those employed by him to assist in the production thereof". The Taxpayer's produce was sold by his brother and sister-in-law, but also by various "distant" cousins and other unrelated employees. Clearly the produce was not sold by "the producer or members of his immediate family" as required by the statute. Also, while some of the related Peach Park employees may have occasionally helped on the Taxpayer's farm, some did not and none were employed by the Taxpayer primarily to assist in growing the produce. They were employed to work at the Peach Park. Consequently, even though the Taxpayer is a farmer within the purview of the statute, the exemption does not apply because the produce was not sold by him or members of his

immediate family or by individuals hired by him to grow the produce. See generally, Sanitary Dairy v. State, supra, at p. 613.

The Taxpayer also claims an exemption under the newly enacted Act 92-343. That Act amended Code of Ala. 1975, §40-23-4 to exempt the following:

> (44) The gross receipts derived from the sale or sales of fruit or other agricultural products by the person or corporation that planted, cultivated and harvested such fruit or agricultural product.

The exemption is retroactive to January 1, 1984 and the Taxpayer's produce sales in issue appear to be exempted by the Act. However, no exemption can be allowed because no records were kept showing how much of the Taxpayer's produce was sold at the Peach Park.

All taxpayers are required by Code of Ala. 1975, §40-23-9 to keep suitable records of gross sales "and such other books or accounts as may be necessary to determine the amount of tax for which he is liable. . . ." The need for proper records is obvious. The State must have complete and accurate records from which a retailer's correct liability can be computed. Rough estimates are not sufficient. Also, a taxpayer must keep specific records distinguishing taxable and nontaxable sales, and in the absence of such records the taxpayer must pay tax on all sales. State v. T. R. Miller Mill Company, 130 So.2d 185 (1961); State v. Ludlam, 384 So.2d 1089 (1980).

In this case, the Taxpayer failed to keep any records showing how much produce he delivered to the Peach Park. More importantly, the Peach Park failed to keep any records showing how much of the Taxpayer's produce was sold, or showing gross sales or gross receipts whatsoever.

The Taxpayer argues that no particular form of record keeping is required and sufficient. I disagree. The analysis is a rough estimate based assertions and on average crop yields and production estimates. The Department is not required to rely on a taxpayer's verbal assertions in lieu of goods records. State v. Mack, 411 So.2d 799. In any case the analysis shows only how much produce may have been grown by the Taxpayer, and not how much was sold at the Peach Park. Only 80-90% of the Taxpayer's crops were offered for sale at the Peach Park. There is no way of knowing how much was actually sold or how much it was sold for. Also, some of the Taxpayer's overripe produce was processed and sold as ice cream, fruit bars and other non-exempt products (the exemption applies only to produce in its original state).

In State v. Ludlam, supra, the Court of Civil Appeals upheld the circuit court's finding that calculations by the taxpayer's accountant were sufficient to prove exempt sales. While I respectfully disagree with the majority opinion in Ludlam, at least in Ludlam and the two cases cited as support, State v. Levey, 29 So. 2d 129, and State v. Mims, 30 So.2d 673, the taxpayers had some

direct records from which sales could be determined.[1] Not so in this case. The analysis relied on by the Taxpayer is based entirely on estimates and averages that are unsupported by any sales record. Also, the Court's holding in Ludlam was dictated at least in part by the presumption of correctness afforded the trial judge's findings. There is no such presumption in this case.

Judge Wright's dissent in Ludlam is the better view. A taxpayer cannot be allowed an exemption from sales tax unless he maintains accurate and complete records from which the amount of the exempt sales can be established with reasonable certainty.

In summary, the Department properly conducted the audit using the best information available. The Taxpayer's produce was not exempt under §40-23-4(a)(5), and even if Act 92-343 applies, the Taxpayer failed to keep any records showing the amount of his exempt sales. In the absence of such records, the entire gross receipts must be taxed. The Department is directed to make the assessments in issue final, plus applicable interest.

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[1]1 In Ludlam, the accountant computed exempt sales using invoices, billings, and a "test period" in which adequate records were kept. See Ludlam, at p. 1092.

Entered on July 8, 1992.

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BILL THOMPSON
Chief Administrative Law Judge