

ROBERT EARL LEE D/B/A LEE'S
LOUNGE
605 Clay Street
Marion, AL 36756-2411,

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

DOCKET NO. S. 98-179

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

FINAL ORDER

The Revenue Department assessed State and Perry County sales tax against Robert Earl Lee (ATaxpayer@), d/b/a Lee's Lounge, for March 1994 through March 1997. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, § 40-2A-7(b)(5)a. A hearing was conducted on January 20, 1999 at the Perry County Courthouse in Marion, Alabama. Robert Turner represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

The issue in this case is whether the Department correctly computed the tax in question using the best information available.

The Taxpayer operated a night club in Perry County, Alabama during the period in issue. The club had a disco which held 200 to 300 people, and a lounge which held 75 to 100 people. The club sold beer, and also liquor by the half-pint and by the shot. The club charged an admission fee on weekends.

The club was open on Wednesday, Friday, Saturday, and Sunday nights. Ladies received free drinks and there was no admission fee on Wednesdays. Both

the lounge and disco were open on Fridays and Saturdays. The Friday admission fee was usually \$3 a person. Saturday was the club's busiest night, and generally featured a disc jockey. The Saturday admission fee was \$3 to \$5, depending on the popularity of the entertainment. Only the lounge was open on Sunday nights. The Sunday admission fee was \$3.

The club's monthly sales tax returns during the period in issue reported rounded amounts of tax due, i.e. \$1300, \$1400, etc., which is unusual. The Department compared the retail liquor sales reported by the club on its sales tax returns with the liquor purchase records maintained by the ABC Board. Those records showed that the club purchased more liquor in each month than it reported in retail liquor sales in each month. Based on the above, the Department audited the club.

The Department requested records from which the club's sales tax returns could be verified. The Taxpayer provided a few scattered purchase invoices, but no sales records. Because the Taxpayer failed to provide sufficient records, the Department examiner conducted an indirect audit using (1) beer purchase information from the Perry County Courthouse and from the Taxpayer's beer vendors, (2) liquor purchase information from the ABC Board, and (3) door receipt information provided by the Taxpayer and The City of Marion Police Department.

The examiner used the above information to compute the Taxpayer's sales

tax liability, as follows:

The Taxpayer normally sold a beer for \$1.50, and sometimes \$2.00. The examiner computed the club's monthly beer sales by multiplying the lower \$1.50 sales price by the number of beers purchased at wholesale by the club in each month.

Concerning the liquor sales, the examiner determined that 6 percent of the club's liquor sales were by the shot from 750 milliliter bottles. A 750 milliliter bottle contains 17 shots at 1.2 ounces each. The club charged \$3.00 and sometimes \$4.00 for a drink by the shot. The examiner multiplied the minimum \$3 per shot price by 17 shots to determine that the club received \$51 for each 750 milliliter bottle. The examiner computed total monthly shot sales by multiplying \$51 by the number of bottles the club purchased monthly from the ABC Board.

The examiner determined the club's half-pint sales by multiplying the minimum \$7.00 per half-pint charged by the club by the number of half-pints the club purchased monthly from the ABC Board.

Concerning the door receipts, the Taxpayer told the examiner that the club averaged 100 to 150 customers on both Friday and Saturday. The examiner confirmed those numbers with the Marion Police Department. The Taxpayer also told the examiner that the club was filled to capacity (300 people) on holidays such as Valentine's Day, Labor Day, Spring Break, Fourth of July, Thanksgiving, and Christmas. The Taxpayer estimated that 25 to 30 customers paid admission on Sunday. Based on the above information, the examiner estimated that 270 people per week, or 1,080 people per month, paid the admission charge at the club. That total was multiplied by the minimum \$3 per person charge to arrive at total monthly admission charges.

The examiner added the monthly liquor sales, beer sales, and door receipts to arrive at the taxable measure. She then applied the 4 percent State rate and the applicable Perry County rate. After allowing a credit for sales tax reported and paid, the Department assessed the Taxpayer for the additional sales tax due, plus applicable penalty and interest.

The Taxpayer objects generally that the audit overstates his liability. He claims that the door receipts are over-estimated, that the club sometimes closed on weekends due to fire or bad weather, that some drinks were sold at reduced prices, and that inventory was lost due to theft, breakage, and employee consumption.

It is common knowledge that retail businesses are required to keep records from which their sales tax liability can be accurately computed. Code of Ala. 1975, ' ' 40-23-9 and 40-2A-7(a)(1). The Taxpayer had previously operated a retail business and was aware of his responsibilities concerning sales tax. Unfortunately, he failed to keep any sales records for the club. The club had two cash registers, but tape was not used in either one.

If a taxpayer fails to keep records, the Department is authorized to compute the taxpayer's liability using the best information available. Code of Ala. 1975, ' 40-2A-7(b)(1)a. Having failed to keep records, the taxpayer cannot complain that the Department's calculations are incorrect. Jones v. C.I.R., 903 F.2d 1301 (1990);

Adamson v. Commissioner, 745 F.2d 54 (1984).¹

An assessment based on the best information available is *prima facie* correct. The burden is then on the taxpayer to prove that the assessment is incorrect. Code of Ala. 1975, ' 40-2A-7(b)(5)c. Unsupported verbal assertions are not sufficient to overcome the *prima facie* correctness of a final assessment. State v. Ludlam, 384 So.2d 1089 (Ala.Civ.App.) cert. denied, 384 So.2d 1094 (1980).

The Taxpayer may have lost some of his beer and liquor inventory due to theft, breakage, employee consumption, etc. The Department examiner acknowledged that if the Taxpayer had provided estimates for breakage, theft, etc., she may have considered them. But the examiner did give the Taxpayer the benefit of the doubt by using the minimum \$3 admission fee to compute door

¹The cited cases involved federal tax. However, the same principle applies to Alabama taxes. See generally, Watkins v. State of Alabama, Docket S. 97-111 (Admin. Law Div. 1/9/98); Gibson v. State of Alabama, Docket P. 95-210 (Admin. Law Div. 1/26/96); Red Brahma Club, Inc. v. State of Alabama, Docket S. 92-171 (Admin. Law Div. 4/7/96).

receipts, and the lower \$1.50 price for beer, even though the club sometimes charged \$5 for admission and \$2 for beer. Under the circumstances, the Taxpayer should not be allowed an additional credit for breakage, theft, or otherwise.

Admission fees to public places of amusements are subject to the gross receipts sales tax levied at Code of Ala. 1975, ' 40-23-2(2). The club was subject to the gross receipts tax, and it was incumbent on the Taxpayer to keep a record of the club's admission receipts. He failed to do so. The examiner may have overestimated door receipts, but she also may have underestimated. The examiner's reasonable estimate of admission charges is affirmed.

The Taxpayer's claim that the audit is excessive is supported only by his self-serving testimony. As indicated, that alone is insufficient to overcome the *prima facie* correct assessment. The Taxpayer has only himself to blame for failing in his known duty to keep good records. The Department examiner performed a good audit, which is reasonable under the circumstances.

The final assessments are affirmed. Judgment is entered against the Taxpayer for State sales tax, penalty, and interest of \$25,923.99, and Marion County sales tax, penalty, and interest of \$6,007.67. Additional interest is also due from the date the final assessments were entered, January 28, 1998.

Entered June 28, 1999.

BILL THOMPSON
Chief Administrative Law Judge

BT:ks

cc: J. Wade Hope, Esq.
Robert Turner, Esq.
James Browder