

JOEY C. MOORE
d/b/a The Frosty
RR 1, Box 35
Jasper, AL 35501-9705,

' STATE OF ALABAMA
' DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

' DOCKET NO. S. 99-126

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

FINAL ORDER

The Revenue Department assessed sales tax against Joey C. Moore, d/b/a The Frosty (ATaxpayer®), for January 1995 through April 1998. 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 July 16, 1999 in Birmingham, Alabama. CPA Joe Evers represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

The issue in this case is whether the Department correctly computed the Taxpayer's sales tax liability using the best information available.

The Taxpayer operates a restaurant just outside of Jasper, Alabama. During the period in issue, an accountant computed the Taxpayer's gross receipts for sales tax purposes by multiplying his monthly purchases by 150 percent.

The Department audited the Taxpayer and requested records from which his correct liability could be computed. The Taxpayer provided the Department with purchase invoices and bank records. He failed, however, to provide any sales

records. The examiner consequently conducted a purchase/mark-up audit using the available records.

The examiner computed the Taxpayer's purchases by using his purchase invoices. The examiner next determined that the Taxpayer's purchases represented 36 percent of his total sales. The 36 percent figure came from a chart compiled by the IRS and routinely used by the Department when conducting purchase/mark-up audits. The examiner divided the 36 percent into the Taxpayer's purchases to arrive at the taxable measure. The four percent state rate was applied to determine the Taxpayer's total liability. The Department allowed a credit for tax already paid, and assessed the Taxpayer for the additional tax due.

The Taxpayer's representative, his current CPA, argues that the mark-up applied by the Department is excessive. He claims that he represents several other small restaurants in the Birmingham area, and that none of those restaurants realize the mark-up the Department used to compute the Taxpayer's liability. In support of his claim, the CPA offered a chart he obtained from the IRS which shows a slightly smaller mark-up percentage than the IRS chart used by the Department.

All retail businesses are required to keep adequate sales records from which their sales tax liability can be accurately computed. Code of Ala. 1975, '40-2A-7(a)(1); and specifically Code of Ala. 1975, '40-23-9 relating to sales tax. The requirement that sales records must be maintained for sales tax purposes is common knowledge among retail businesses. Nonetheless, the Taxpayer in this case admittedly failed to keep any sales records. In such cases, the Department is authorized to compute a taxpayer's liability using the best information available.

Code of Ala. 1975, ' 40-2A-7(b)(1)a. If the Department's computations using the best information available are reasonable, the taxpayer cannot complain that the liability so computed is inexact. William T. Gipson v. State of Alabama, P. 95-210 (Admin. Law Div. 01/26/96), citing Jones v. C.I.R., 903 F.2d 1301 (10th Cir. 1990); Denison v. C.I.R., 689 F.2d 777 (10th Cir. 1982); and Webb v. C.I.R., 394 F.2d 366 (5th Cir. 1968).

In this case, there is no evidence that the chart offered by the Taxpayer's CPA is more accurate than the chart used by the Department. The mark-up percent used by the Department is reasonable under the circumstances, and must be affirmed. I note that although the Taxpayer failed to keep sales records as required by Alabama law and regulation, the Department did not assess the Taxpayer for the five percent negligence penalty levied at Code of Ala. 1975, ' 40-2A-11(c).

The final assessment is affirmed. Judgment is entered against the Taxpayer for \$9,726.23, plus applicable additional interest from December 22, 1998.

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

Entered August 19, 1999.

BILL THOMPSON
Chief Administrative Law Judge

BT: ks

cc: J. Wade Hope, Esq.
Joe L. Evers, CPA
James Browder