

CAPITAL LLC
D/B/A CAPITAL WHOLESale AND
DISTRIBUTION
301 CAHABA VALLEY PKWY., N.
PELHAM, AL 35124-1135,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§

§

§

§

§

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 07-949

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed Capital LLC, d/b/a Capital Wholesale and Distribution (“Taxpayer”), for State sales tax for July 2003 through December 2005. 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 18, 2008. The Taxpayer’s owner, Shamin Kahn, attended the hearing. Assistant Counsel Wade Hope represented the Department.

The Taxpayer sold tobacco products, health and beauty products, novelties, and various other convenience store items during the period in issue. The Taxpayer’s owner testified at the January 18 hearing that he sold the items at wholesale to various gas stations and convenience stores, which then resold the items at retail. He argues that he is not liable for sales tax because his sales were nontaxable wholesale sales.

The Department audited the Taxpayer and requested its sales and other records for the period in issue. The Taxpayer failed to provide any sales records, but did provide some invoices for December 2005, and also a list of its suppliers.

The examiner contacted the suppliers to determine the Taxpayer’s total purchases during the audit period. He then computed a 27.61 percent mark-up by comparing what the

Taxpayer had purchased various items for (per the vendor information), to what it had sold the items for (per the Taxpayer's December 2005 invoices). He applied the mark-up to the Taxpayer's total purchases to arrive at an estimated sales amount.

The examiner reduced the estimated sales amount by three percent to allow for spoilage and theft. He also reviewed the December 2005 invoices provided by the Taxpayer, and if any of the customers had a sales tax license or were otherwise exempt, those sales were deleted from the audit. He then computed the Taxpayer's liability based on its net taxable sales as computed above. The examiner did not allow a credit for sales tax paid because the Taxpayer had not filed sales tax returns, and thus had not paid any sales tax during the months in issue.

The owner explained that he came to the United States in the mid-1990s with the intent of becoming an engineer. He decided in 2003 to go into business selling various items to gas stations, convenience stores, etc. He initially operated out of a small, garage-type building, and spent most of his time calling on customers and delivering his products. He explained that he had never operated a business before, and was not aware that he was required to keep detailed records of his purchases and sales. Consequently, he failed to maintain such records until December 2005, when he began keeping the information on a computer. He claims that he has maintained good sales and other records since that time.

All taxpayers subject to sales tax are required to keep adequate records separately showing taxable and nontaxable or wholesale sales. See, Code of Ala. 1975, §40-2A-7(a)(1), generally, and Code of Ala. 1975, §40-23-9, concerning sales tax. Section 40-23-9 further provides that any taxpayer "selling both at wholesale and retail shall keep his books

so as to show separately the gross proceeds of wholesale sales and the gross proceeds of retail sales. All sales shall be subject to tax in the absence of such separate records.” Alabama’s courts have also held that if a retailer fails to maintain adequate records distinguishing between taxable and nontaxable sales, the retailer must suffer the consequences and pay tax on the sales not properly recorded as exempt or at wholesale. *State v. Ludlum*, 384 So.2d 1089 (Ala. Civ. App.), cert. denied 384 So.2d 1094 (Ala. 1980).

The Department examiner in this case computed the Taxpayer’s sales using a purchase mark-up audit. Purchase mark-up audits are an accepted and reasonable method of computing a taxpayer’s sales tax liability in the absence of records. See generally, *Alsedeh v. State of Alabama*, S. 03-549 (Admin. Law Div. 11/3/04); *Arnold v. State of Alabama*, S. 03-1098 (Admin. Law Div. 7/27/04); and *Moseley’s One Stop, Inc. v. State of Alabama*, S. 03-316 (Admin. Law Div. 7/28/03). The examiner correctly deleted all of the Taxpayer’s sales that he could determine were to exempt customers. Without records or other evidence to the contrary, he treated all other sales as taxable.

The Taxpayer’s owner claims that almost all of his sales were tax-free to licensed retailers for resale. The few invoices provided by the owner for December 2005 identified a number of the Taxpayer’s customers. See, Dept. Ex. 3. However, as shown on Ex. 3, while some of the listed customers were licensed, the Department examiner found that many were not. The examiner correctly removed the sales to the licensed customers from the audit, but not the others.

The owner also contends that he works on a very small margin, and that the 27.61 percent mark-up used by the examiner is excessive. He claims that based on records he has maintained since the audit period, his mark-up is less than 10 percent.

I do not doubt that many of the Taxpayer's sales were non-taxable wholesale sales. Unfortunately for the Taxpayer, as discussed, Alabama law requires sellers to maintain adequate records identifying the taxable retail sales and the non-taxable wholesale sales. The Department cannot be required to accept a retailer's unsupported verbal assertion that his sales were at wholesale without records or some other evidence supporting that claim.

The Taxpayer's owner testified that he had asked some of his regular customers if they still had records concerning the months in issue, but that most replied that they did not maintain records going back that far. The Taxpayer's best hope, however, is to obtain vendor records from which the Department can verify that the Taxpayer's sales were at wholesale.

The Taxpayer is allowed until March 28, 2008 to obtain records or other information from its vendors from which the Department can reasonably compute or determine the Taxpayer's wholesale sales during the months in question. The records should be submitted to the Administrative Law Division by the above date. They will be forwarded to the Department for review and response. Appropriate action will then be taken.

This Opinion and Preliminary Order is not an appealable Order. The Final Order, when entered, may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered January 29, 2008.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: J. Wade Hope, Esq.
Joseph L. Freeman
Joe Cowen
Mike Emfinger