

CITY WHOLESALE, INC §  
d/b/a CITY WHOLESALE GROCERY §  
COMPANY, INC §  
300 INDUSTRIAL DRIVE §  
BIRMINGHAM, AL 35219-0208, §

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

Taxpayer, §

DOCKET NO. MISC. 12-708

v. §

STATE OF ALABAMA §  
DEPARTMENT OF REVENUE.

### **THIRD PRELIMINARY ORDER**

This appeal involves a final assessment of tobacco tax for May 2008 through June 2011 entered against the above Taxpayer. A hearing was conducted on March 12, 2013. Matthew Goforth, Bruce Gordon, and Sam McCord represented the Taxpayer. Assistant Counsel Christy Edwards represented the Department.

The Taxpayer submitted additional information to the Department at the March 12 hearing. Specifically, the Taxpayer provided a spreadsheet containing the suggested retail price of every product sold to every customer during the period in issue.

The Department subsequently notified the Administrative Law Division that it “has considered that information and agreed to use the customer-by-customer suggested retail price during the audit period as the taxable measure, as the Taxpayer argues should have been done.” Department’s Response To Information Supplied By The Taxpayer At The March 12, 2013 Hearing at 1. The Department’s response also explained how the Department used the information to recompute the Taxpayer’s liability.

Using the information provided by the taxpayer at the hearing, the Department calculated a weighted average retail price per stick per product per month. The Department then used the average retail price per stick to determine the retail price per carton or applicable unit, subtracting all applicable taxes passed along to the retailer, to determine the tax due for

each and every product sold by the Taxpayer in each month of the audit period. The revised audit schedule for the taxpayer's sales of filtered cigars is attached as Exhibit A. The Department's use of the customer-by-customer suggested retail price as the taxable measure yields a reduced adjustment to purchase of filtered cigars in the amount of \$31,527.60. The Department's adjustment results in additional tax liability for purchases of filtered cigars in the amount of \$118,674.60 (reduced from \$150,202.20).

The Department also requested additional time to allow it to determine the correct tax, penalties, and interest due because it had to determine how to apply a prior payment by the Taxpayer. The request was granted, and the Department subsequently notified the Administrative Law Division that the adjusted amount due is \$82,895.90, which consists of \$70,147.72 in tax, \$322.87 in interest, and a late payment penalty of \$12,425.31.

After the Department filed its response in which it agreed to use the information provided by the Taxpayer to recompute the amount due, the Taxpayer filed a Taxpayer's Opposition And Objection To Response Filed By Department ("Taxpayer's Opposition"). In that submission, the Taxpayer attacked the Department's initial audit as arbitrary, capricious, and otherwise flawed. It also contended that the Department should not be allowed to use another method to recompute the amount due. The Taxpayer's Opposition asserts in part as follows:

15. The Department and its auditors should not be allowed to haphazardly conduct improper audits at the peril of the state's taxpayers, and then be given the chance to clean up their haphazard, flawed, and improper audits *after* the appeal of the Final Assessment has taken place and the flaws have been exposed. To allow such would turn the taxpayer appeal right into nothing more than unmitigated freedom for the Department to ignore its statutory audit procedures and the time limitations for assessing taxes, and to take do-overs as needed every time an appealing taxpayer exposes an improper Final Assessment that should otherwise be set aside.

16. The Taxpayer objects to any attempt by the Department to, after the Appeal Hearing, change the methodology the Department uses in

determining the amount of tax due. The Department relied on that methodology for the audit, the Preliminary Assessment, the Final Assessment and the Appeal Hearing, and the parties conducted and completed the Appeal Hearing based on that methodology.

17. The Taxpayer is due to prevail in its appeal from the Final Assessment, based on the Department's flawed audit procedures and methodologies as incorporated into the Preliminary and Final Assessments. Use by the Department of any new methodologies not made a part of the Final Assessment originally entered against the Taxpayer, appealed by the Taxpayer, and asserted at the Appeal Hearing, is a violation of the Taxpayer's federal and state constitutional due process rights, as well as the Alabama statutes that provide the Taxpayer the right to appeal.

The Department audit that resulted in the final assessment in issue may or may not be flawed and inaccurate. In any case, the end goal in an appeal before the Administrative Law Division is to determine the correct amount owed by a taxpayer, if anything.

In this case, the Department has accepted the information proffered by the Taxpayer and has used that information to recompute the Taxpayer's liability. The Taxpayer cannot now argue that the Department should not be allowed to do so. A final assessment should not be voided solely because the Department may have used incorrect information or an improper method in calculating the final assessment. Rather, the Department should be allowed, if not required, the recomputed tax due, if any, using the best and most accurate information available, which the Department has agreed to do in this case.

If the Taxpayer disputes the latest method used by the Department to recalculate the amount due, it should explain why the Department's method is flawed. As requested by the Taxpayer, it may also submit "computerized versions (of) its actual sales and retail price records and its calculations of the amount of tax due thereon, . . . ." Taxpayer's

Opposition at 9. The above should be submitted to the Administrative Law Division by July 19, 2013. It will then be submitted to the Department for review and response. Appropriate action will then be taken.

Entered June 19, 2013.

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BILL THOMPSON  
Chief Administrative Law Judge

bt:dr

cc: Christy O. Edwards, Esq.  
Bruce L. Gordon, Esq.  
Matthew I. Goforth, Esq.  
Janet Stathopoulos  
Randy Winkler