ALABAMA TAX TRIBUNAL

AIRPORT MARINE, INC.,	§	
Taxpayer,	§	DOCKET NO. S. 19-149-JP
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND FINAL ORDER

The City of Calera, Alabama, imposes a sales tax on retail sales of tangible personal property. Transactions that occur outside of Calera's city limits but within its police jurisdiction are taxed at one-half the rate of transactions that occur within its city limits.

During the periods of February 2010 through January 2013, Calera's sales tax was administered by a private company. That company audited Airport Marine, Inc. (Taxpayer), for the periods noted. In April 2013, the company issued a cover letter and report to the Taxpayer that commended the Taxpayer on its compliance with Calera's tax laws and that found no material errors relating to the audit period. In fact, the report noted that the Taxpayer's business was located partly within Calera's city limits and partly within its police jurisdiction. Thus, the report stated that certain transactions were taxable at the general rate applicable within the city limits and that other transactions were taxable at the police-jurisdiction rate. The report also stated that the auditor had confirmed with someone in Calera's tax department that the Taxpayer was remitting sales tax correctly as to the general rate and the police-jurisdiction rate.

However, during the hearing of this appeal, the Taxpayer's president testified that, as the auditor was leaving the Taxpayer's business, the auditor told him that the Taxpayer

should not be collecting sales tax for the City of Calera because the Taxpayer was not located within Calera's city limits. The Taxpayer's president stated that he then checked with the county's license office and determined from a review of a map that the Taxpayer was not located within Calera's city limits. Therefore, the Taxpayer closed its Calera sales-tax account. (The Taxpayer did not call the auditor as a witness during the hearing.)

Effective April 1, 2017, Calera switched the administration of its sales tax from the private company to the Alabama Department of Revenue. In early 2018, the Revenue Department audited the Taxpayer for local sales tax for the periods of September 2013 through December 2017 and billed the Taxpayer for more than $311,000 pursuant to the audit. The Taxpayer disagreed with the audit, asserting that it was not required to collect and remit sales tax to Calera because it was not located within Calera's city limits. Nevertheless, the Revenue Department entered a preliminary assessment against the Taxpayer for local sales tax in the amount of $314,188.83. Then, in a letter to the Revenue Department, the Taxpayer referenced the alleged statement by the private auditor that the Taxpayer should not collect Calera's sales tax. The Taxpayer also expressed a lack of familiarity with the requirement to collect and remit tax on sales occurring within Calera's police jurisdiction.

Thus, the Taxpayer requested that the Revenue Department limit its billing to the periods after the Revenue Department began administering Calera's sales tax. The Revenue Department initially agreed. Therefore, on July 23, 2018, the Revenue Department wrote a letter stating that the Taxpayer's liability for only those periods totaled $46,900.88, consisting of tax and interest. The Taxpayer paid that amount.

About a month and a half later, however, the Revenue Department informed the Taxpayer by letter that it had obtained additional information concerning the previous audit performed by the private company. Specifically, the Revenue Department had spoken with City of Calera personnel and had reviewed the private auditor's full audit report. In its letter, the Revenue Department stated that, "upon further review, it is apparent that Airport Marine was in fact aware of its responsibilities regarding their local tax reporting requirements," despite the Taxpayer's claims to the contrary.

Therefore, the Revenue Department reinstated its original billing amounts for all periods under audit, but it waived all penalties. Subsequently, the Revenue Department entered a final assessment of local sales tax for the periods of September 2013 through March 2017 in the amount of $235,170.26, which the Taxpayer appealed to the Tax Tribunal. (The periods of April 2017 through December 2017 had been paid by the Taxpayer.)

Questions Presented

The Taxpayer raises the following questions:

1. Whether the Revenue Department has the authority to administer taxes on behalf of a municipality for periods prior to the Revenue Department's appointment by the municipality?

2. Whether the Revenue Department's actions constituted a second audit of the Taxpayer subject to certain notice requirements?

3. Whether the Revenue Department's decision to reinstate its original billing of the Taxpayer was subject to estoppel?

Law and Analysis

First, the Taxpayer argues that the Revenue Department had no authority to

assess the Taxpayer for periods prior to April 1, 2017, which was the effective date of Calera's appointment of the Revenue Department to administer Calera's taxes. In support, the Taxpayer cites Ala. Code §§ 11-51-180 and 11-51-185 and Ala. Const. of 1901, § 22.

Ala. Code § 11-51-180(a) directs the Revenue Department to collect municipal sales and use taxes upon request by that municipality. The local tax levy "shall parallel the corresponding state levy except for the rate of the tax and shall be subject to all ...statutes of limitation ... as are applicable to the state sales and use tax." Ala. Code § 11-51-185(a) requires the municipality to provide the Revenue Department with a copy of the municipality's enabling ordinance "at least 30 days prior to the first day of the month on which the" ordinance concerning the Revenue Department's administration takes effect. And § 22 of the Alabama Constitution of 1901 prohibits the legislature from passing an ex post facto law.

However, the authorities cited by the Taxpayer do not support its position. Although Calera was required to provide a 30-day notice before the Revenue Department's administrative obligations began, the city's levy nevertheless was subject to the statute of limitations. Thus, once the Revenue Department began administering Calera's sales tax, the Revenue Department was authorized to assess the Taxpayer pursuant to the time limits set forth in Ala. Code § 40-2A-7(b). This is seen clearly in Ala. Code § 11-51-182, in which the legislature stated that the Revenue Department "shall have all the authority and duties under this division as it has in connection with the collection of the state sales and use taxes ..." Obviously, some of the periods assessed by the Revenue Department occurred

prior to the date that the Revenue Department's authorization took effect. *See, e.g.*, Ala. Code § 40-2A-7(b)(2), which authorizes the Revenue Department to enter a preliminary assessment "within three years from the due date of the return, or three years from the date the return is filed with the department, whichever is later …"

Also, our state constitution's prohibition of ex post facto laws does not aid the Taxpayer. Black's Law Dictionary, 5th Ed., defines "ex post facto law" as "[a] law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed." Here, Calera's appointment of the Revenue Department to administer its taxes did not change the legal consequences of the Taxpayer failing to collect and remit Calera's sales tax. It merely changed the entity that handled the assessment and collection of that tax. Thus, the Revenue Department was authorized to assess the Taxpayer for periods that occurred prior to April 2017.

Second, the Taxpayer seems to argue that the Revenue Department's reinstatement of the full amount of the assessment to include all periods under audit constituted a second audit of the Taxpayer. Thus, the Taxpayer claims that the Revenue Department's failure to notify the Taxpayer in writing of a second audit violated Ala. Code §§ 40-2A-7(b)(2)(j) and 40-2A-13(b) and Ala. Admin. Code r. 810-14-1-.12. However, the Taxpayer contradicts its factual assertion of a second audit on page 9 of its initial brief, as follows: "From discussions and testimony, the Taxpayer now knows that there was no new information nor did the Department of Revenue conduct a second audit, it is convinced that this attempt to nullify the good faith agreement that was entered into by it and the Department is purely based on political pressure from the City of Calera who never questioned or notified the

Taxpayer that it was supposed to be collecting taxes for the police jurisdiction area as it had in the past." Nevertheless, the Revenue Department's reinstatement of the full amount of the final assessment did not involve a second audit of the Taxpayer's books and records. The Revenue Department simply reverted to its original audit figures once it learned that the Taxpayer had been aware of its responsibilities concerning Calera's sales tax.

Third, the Taxpayer claims that the doctrines of collateral estoppel and accord and satisfaction prevent the Revenue Department from assessing the Taxpayer for periods prior to April 2017. The Taxpayer relies upon the Revenue Department's letter of July 23, 2018, in which the Revenue Department stated: "After a review of the contentions presented, and the additional information provided, the Department has agreed to make adjustments to the audit period to only include those periods in which the Department was administering local taxes for the City of Calera. In addition, the Department agrees to waive the penalties imposed as a result of the liabilities found due."

Concerning collateral estoppel, the Taxpayer seems to assert that the Revenue Department's agreement by letter to limit its billing constituted an adjudication of the Taxpayer's liability. *See Amoco Production Co. v. White*, 453 So.2d 358, 360 (Ala. 1984) (stating that one requirement for the operation of collateral estoppel is that the issue actually was litigated in a prior action).

Here, though, there was no prior action in which the Taxpayer's liability had been litigated. This appeal by the Taxpayer of the final assessment is the first such litigation. Therefore, collateral estoppel does not apply.

Concerning accord and satisfaction, the Taxpayer references commercial law and

contract law, citing the 1923 and 1940 Codes of Alabama, both of which have been superseded. However, the Taxpayer did not cite any tax case in which accord and satisfaction had been applied. Nor did the Taxpayer address the well-settled case-law principle that the Revenue Department cannot be estopped from assessing and collecting the correct amount of tax due, even if the Revenue Department gave incorrect tax information to a taxpayer. *See State v. Maddox Tractor & Equipment Co.*, 69 So.2d 426, 429 (Ala. 1953) (stating that, "[i]n the assessment and collection of taxes the State is acting in its governmental capacity and it cannot be estopped with reference to these matters"). *Cf. Magee v. The Home Depot USA, Inc.*, 95 So.3d 781 (Ala. Civ. App. 2011) (recognizing that the Revenue Department can be estopped from arguing that a taxpayer's appeal is untimely if the Revenue Department gave the Taxpayer incorrect information as to the appeal deadline and the Taxpayer relied on that information).

Also, during the trial, the Revenue Department's sales-tax hearings officer testified that the initial decision to limit the billing to the periods of April 2017 forward was based on the Taxpayer's representations that it was not required to collect Calera's sales tax and that it had never heard of Calera's police-jurisdiction tax ordinance. At the time of that initial decision, however, Revenue Department personnel had not seen the audit report of the private auditor, which stated that the Taxpayer had been correctly collecting and remitting Calera's sales tax at both the general rate within the city limits and the police-jurisdiction rate. Later, after reviewing the audit report and additional information, the Revenue Department notified the Taxpayer that it was reinstating the original billing. "[U]pon further review, it is apparent that Airport Marine was in fact aware of its responsibilities regarding

their local tax reporting requirements."

Even if the doctrine of accord and satisfaction could be applied in a tax case, suffice it to say that the Taxpayer has not proven that the doctrine applies here.

Conclusion

The final assessment is upheld in full. Judgment is entered against the Taxpayer and in favor of the Revenue Department in the amount of $235,170.26, plus additional interest.

It is so ordered.

This Opinion and Final Order may be appealed to the appropriate circuit court within 30 days, pursuant to Ala. Code § 40-2B-2(m).

Entered June 17, 2021.

/s/ *Jeff Patterson*
JEFF PATTERSON
Chief Judge
Alabama Tax Tribunal

cc: James C. White, Sr., CPA
David E. Avery, III, Esq.