

ALABAMA TAX TRIBUNAL

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| BESSEMER EXXON, INC., | § | |
| Taxpayer, | § | DOCKET NO. S. 20-519-LP |
| v. | § | |
| STATE OF ALABAMA | § | |
| DEPARTMENT OF REVENUE. | | |

FINAL ORDER

This appeal involves a final assessment of State sales tax for April 1, 2016, through March 31, 2019. A hearing was held in this case on June 28, 2022. The Taxpayer was represented by Taylor S. Meadows, Esq. Assistant Counsel Hilary Y. Parks represented the Alabama Department of Revenue.

Facts

The Taxpayer operates a convenience store in Bessemer, Alabama. According to the Confidential Audit Report, which was entered into evidence as Revenue Department’s Exhibit A, the Revenue Department conducted an audit of the Taxpayer, and the Taxpayer provided no records to support the gross sales and deductions stated in its sales tax returns. Although the Revenue Department was able to obtain the Taxpayer’s bank statements, because of the lack of other information, those statements alone were insufficient for the Revenue Department to use to calculate taxable sales. Because of the lack of records provided, the Revenue Department used vendor records of the Taxpayer’s purchases for resale to determine the taxable sales by applying a 35% purchase markup to those purchases. According

to the Confidential Audit report, the taxpayer's purchases for resale amounted to almost \$822,000 more than the reported taxable sales. After the 35% purchase-markup was applied, it was determined that the taxable sales had been understated by over \$1,350,000.00. The Revenue Department assessed a fraud penalty because of the complete lack of sales records and gross underreporting.

Discussion

On appeal, the Taxpayer first argues that the percentage used by the Revenue Department -- 35% -- was inaccurate. The Taxpayer does not dispute that it failed to maintain adequate sales records from which the Revenue Department could determine the sales tax measure.

When a Taxpayer fails to provide complete sales records, the Revenue Department may compute the Taxpayer's tax liability "using the most accurate and complete information obtainable." Jai Shanidev Inc. d/b/a Country Corner, S. 16-449 (Ala. Tax Tribunal 04/27/17); Ala. Code 1975, § 40-2A-7(b)(1)a.

"The Department can also use any reasonable method to compute the liability, and the taxpayer, having failed in the duty to keep good records, cannot later complain that the records and/or method used by the Department is improper or does not reach a correct result. Jones v. CIR, 903 F. 3d 1301 (10th Cir. 1990); State v. Ludlum, 384 So. 2d 1089 (Ala. Civ. App.), cert. denied, 384 So. 2d 1094 (Ala. 1980) (A taxpayer must keep records showing the business transacted, and if the taxpayer fails to keep such records, the taxpayer must suffer the penalty for noncompliance).

"The purchase mark-up audit is a simple, oft-used Department method of determining a taxpayer's sales tax liability when the taxpayer fails to keep accurate sales records. See generally, GHF, Inc. v. State of Alabama, S. 09-1221 (Admin. Law Div. 8/10/10); Thomas v. State of Alabama, S. 10-217 (Admin. Law Div. O.P.O. 5/18/10); Alsedeh v. State of Alabama, S. 03-549 (Admin. Law Div. 11/3/04)."

Jai Shanidev Inc. d/b/a Country Corner, *supra*.

In the present case, because the Taxpayer failed to maintain and produce sales records for the audit period, the Revenue Department applied a purchase markup of 35%. As the Tax Tribunal has explained in previous cases, the 35% purchase markup is based on Internal Revenue Service information regarding percentage markups of gas stations and grocery stores. The percentages have been averaged to reach the 35% figure. *See, e.g., E&Z, Inc. v. State of Ala. Dep't of Rev.*, S. 19-989-LP (Ala. Tax Tribunal 1/12/2022). The Tribunal has previously held that that percentage is reasonable. *See, e.g., E&Z, Inc., supra*.

The Taxpayer argues in its brief that the Revenue Department should have used the percentage markup for Gasoline Stations with Convenience Stores. The Tax Tribunal has previously explained, though: “Many states tax gas and so the markup on gas is included in the gas station average. Alabama does not charge sales tax on gas, thus the IRS gas station markup is skewed downward for Alabama as the markup on gas is typically very low.” *E&Z, supra*. Therefore, the Tax Tribunal has concluded that the average of gas stations and grocery stores is reasonable.

In accordance with the Tax Tribunal’s previous decisions, *see, e.g., Jai Shanidev, supra*, I conclude that the Revenue Department’s method of calculating taxable sales in this case was reasonable. Therefore, the tax components of the final assessments entered by the Revenue Department are upheld.

The Taxpayer next argues that the Revenue Department erred in assessing the fraud penalty. The Tax Tribunal has previously explained:

“Ala. Code § 40-2A-11(d) levies a 50 percent fraud penalty for any underpayment of tax due to fraud. The burden of proof in an assessment of a fraud penalty falls on the Department. Ala. Code § 40-2B-2(k)(7). For purposes of the penalty, ‘fraud’ is given the same meaning as ascribed in the federal fraud provision, 26 U.S.C. §6663. Consequently, federal authority should be followed in determining if the fraud penalty applies. Best v. State, Dept. of Revenue, 423 So. 2d 859 (Ala. Civ. App. 1982).

“The existence of fraud must be determined on a case-by-case basis from a review of the entire record. Parks v. Commissioner, 94 T.C. 654, 660 (1990). Because fraud is rarely admitted, ‘the courts must generally rely on circumstantial evidence.’ U.S. v. Walton, 909 F. 2d 915, 926 (6th Cir. 1990). Consequently, fraud may be established from ‘any conduct, the likely effect of which would be to mislead or conceal.’ Id. The mere under-reporting of gross receipts is itself insufficient to establish a finding of fraud, unless there is evidence of repeated understatements in successive periods when coupled with other circumstances showing an intent to conceal or misstate sales. Barrigan v. C.I.R., 69 F. 3d 543 (1995).

“A taxpayer’s failure to keep adequate books and records, a taxpayer’s failure to furnish auditors with records or access to records, the consistent underreporting of tax, and implausible or inconsistent explanations regarding the underreporting are strong indicia of fraud. See Solomon v. C.I.R., 732 F. 2d 1459 (1984); Wade v. C.I.R., 185 F. 3d 876 (1999)... Ignorance is not a defense to fraud where the taxpayer should have reasonably known that its taxes were being grossly underreported. Russo v. C.I.00R., T.C. Memo 1975-268; Temple v. C.I.R., 67 T.C. 143 (1976).”

“Any retailer should know with certainty that sales records must be maintained for audit purposes....”

E&Z, Inc., v. State of Alabama Department of Revenue, 19-989-LP (Ala. Tax Tribunal 1/12/22).

The Taxpayer cites Carter Enterprise, a Partnership, and its Partners Norris Carter, Rayfus Cart, and Grace Cobb v. State of Ala. Dep’t of Rev., Docket No. S. 11-965 (Ala. Admin. Law Div. June 25, 2012) in support of its argument. In that case,

the Administrative Law Judge concluded that the Revenue Department had failed to prove fraud. I note, however, that, in Carter Enterprises, the Taxpayer presented some sales records and had “made no overt attempt to hide” his underreporting. In the present case, however, the Taxpayer failed to keep any sales records which “[a]ny retailer should know ... must be maintained for audit purposes....” E&Z, Inc., supra. Moreover, the Taxpayer’s purchases for resale, even before the markup was applied, were greater than the Taxpayer’s reported sales. The Taxpayer provided no explanation for the gross underreporting. Considering the evidence in this case, I conclude that the Revenue Department met its burden of proof to support its assessment of the fraud penalty, and thus the assessment of the fraud penalty is upheld.

The final assessment of sales tax is affirmed in the amount of \$87,780.09 (consisting of tax in the amount of \$54,016.36, interest in the amount of \$6,755.47, and a fraud penalty in the amount of \$27,009.26). Additional interest continues to accrue from the date of the entry of the final assessment until the liability is paid in full.

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

Entered December 7, 2022.

/s/ Leslie H. Pitman
LESLIE H. PITMAN
Associate Judge
Alabama Tax Tribunal

lhp:ac

cc: Taylor S. Meadows, Esq.
Hilary Y. Parks, Esq.