

ALABAMA TAX TRIBUNAL

SIYA OM, INC.	§	
	§	
Taxpayer,	§	DOCKET NO. S. 20-405-JP
v.	§	
STATE OF ALABAMA	§	
DEPARTMENT OF REVENUE.	§	

OPINION AND FINAL ORDER

This appeal involves a final assessment of state sales tax for February 2016 through January 2019. The case came before the Tax Tribunal for a trial on January 11, 2023. Hilary Parks represented the Revenue Department. Julie Nelson, a Revenue Department auditor, appeared and testified. Neither the Taxpayer nor a representative for the Taxpayer appeared.

I. Facts

Ms. Nelson testified that the Taxpayer operated a convenience store in Livingston, Alabama, and that she had supervised the Revenue Department’s audit of the Taxpayer. According to Ms. Nelson, the Taxpayer had two cash registers; one of the registers had a computerized point-of-sale system, and the other register was not computerized. Ms. Nelson testified that the Taxpayer provided incomplete purchase records, incomplete bank statements, and point-of-sale records for 22 out of the 36-month audit period from one of the registers, but no records from the other register.

According to Ms. Nelson, because the auditor did not have enough information from which to conduct a direct audit, an indirect audit was conducted. Ms. Nelson testified that the Revenue Department requested records from the Taxpayer's wholesale vendors. Once the vendor records were received, the Revenue Department applied a 35% markup to the purchase amounts.

Ms. Nelson testified that, even considering the Taxpayer's own records from one of the two cash registers, the Taxpayer underreported by approximately \$15,000 per month, or approximately 28%. Specifically, she testified that the Taxpayer's average monthly reported sales were approximately \$25,000, but that the reports from just one of the cash registers showed an average of \$40,000 in monthly taxable sales. Ms. Nelson testified that, during the entire audit period, the Taxpayer purchased items for resale in the amount of \$1,217,883.23 but reported taxable sales in the amount of only \$921,048.61.

Ms. Nelson testified that the Revenue Department assessed the fraud penalty because the Taxpayer's own records showed that it underreported taxable sales, because the Taxpayer consistently underreported on a monthly basis, and because the Taxpayer provided no records to show the total amount of tax collected and remitted.

II. Discussion

A. Assessment of Tax

The evidence in this case indicated that the Taxpayer failed to provide complete and accurate sales records. 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 complete 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*.

Section 40-2A-7(b)(5)c.3, Ala. Code 1975, states the following: "On appeal ...

to the Alabama Tax Tribunal, the final assessment shall be prima facie correct, and the burden of proof shall be on the taxpayer to prove the assessment is incorrect.” Although the Taxpayer, in its Notice of Appeal, argued that the 35% markup was improper, the Taxpayer failed to appear at the trial to present evidence of another markup percentage. Because the Taxpayer has failed to prove that the 35% markup was incorrect, and the Tax Tribunal has concluded that the 35% estimate is reasonable, see E&Z, Inc., supra, it cannot be concluded that the Revenue Department erred in using the 35% markup. Therefore, the Taxpayer has failed to meet its burden of showing that the tax component of the final assessment is incorrect.

B. Assessment of the Fraud Penalty

In its Notice of Appeal, the Taxpayer did not challenge the assessment of the fraud penalty; however, that issue will be addressed briefly. 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 [persuasion] 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).

In this case, Ms. Nelson testified that the Revenue Department assessed the fraud penalty because the Taxpayer’s own records showed that it underreported its taxable sales, because the Taxpayer consistently underreported on a monthly basis, and because the Taxpayer provided no records to show the total amount of tax collected and remitted. Considering the totality of the evidence in this case, the Revenue Department has met its burden of proving fraud.

Conclusion

Based on the foregoing, the final assessment is affirmed. Judgment is entered against the Taxpayer and in favor of the Revenue Department in the amount of \$46,914.23 (consisting of tax in the amount of \$28,923.76, interest in the amount of \$3,528.51, and a fraud penalty in the amount of \$14,461.96), plus additional interest

that continues to accrue from the date of entry of the final assessment until the liability is paid in full. Any payments made by the Taxpayer are to be applied by the Revenue Department to the judgment amount, if not done so already.

It is so ordered.

This Final Order may be appealed to circuit court within 30 days, pursuant to Ala. Code 1975 § 40-2B-2(m).

Entered January 12, 2023.

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

jp:ac

cc: SIYA OM, Inc.
Hilary Y. Parks, Esq.