

JUAN CARLOS MELTON
D/B/A JENNIE'S PLACE
RR 1, BOX 123B
SPROTT, AL 36779-9145,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 05-281

FINAL ORDER

The Revenue Department assessed Juan Carlos Melton ("Taxpayer"), d/b/a Jennie's Place, for State sales tax for July 1999 through May 2004. 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 April 20, 2005. The Taxpayer was notified of the hearing by certified mail, but failed to appear. Assistant Counsel Mark Griffin represented the Department.

The Taxpayer operates a grocery store in Sprott, Alabama. The Department previously audited the Taxpayer for April 1994 through December 1995. It computed the Taxpayer's liability for that period using a purchase mark-up audit because the Taxpayer failed to maintain sales records. The Department assessed the Taxpayer for the tax due, which has still not been paid. The Taxpayer also has an unpaid liability for September 1996 through October 1997.

The Department's Collection Services Division filed an injunction action against the Taxpayer for failing to pay the taxes due. However, the Department dismissed the case because the Taxpayer informed the Department that he had closed his business on October 31, 1997. The Department also closed the Taxpayer's sales tax account at that time.

A Department examiner discovered in 2001 that the Taxpayer's grocery store was open for business. The examiner and her supervisor visited the store in June 2001. The Taxpayer admitted at that time that he was operating the store without a sales tax license. He also indicated that he had not maintained any sales records.

The examiner obtained purchase invoices from the Taxpayer's vendors. The records indicated that the Taxpayer had reopened his store in July 1999. The examiner used the vendor records to conduct a purchase mark-up audit for July 1999 through May 2004. The Department also added a 50 percent fraud penalty because the Taxpayer failed to maintain sales records, file sales tax returns, or to even obtain a sales tax license. The Department subsequently assessed the Taxpayer for the sales tax due, plus the fraud penalty and interest. The Taxpayer appealed.

All taxpayers subject to sales tax are required to keep complete and accurate records from which the Department can accurately determine the taxpayer's correct liability. Code of Ala. 1975, §§40-2A-7(a)(1) and 40-23-9; *State v. Mack*, 411 So.2d 799 (Ala.Civ.App. 1982). If a taxpayer fails to keep adequate records, the Department can use any reasonable method to compute the taxpayer's liability. The taxpayer cannot later complain that the liability so computed by the Department is inexact. *Jones v. C.I.R.*, 903 F.3d 1301 (10th Cir. 1990).

The Department's use of a purchase mark-up audit is an accepted method of computing a taxpayer's liability in the absence of adequate records. See generally, *Arnold v. State of Alabama*, S. 03-1098 (Admin. Law Div. 7/27/04); *Moseley's One Stop, Inc. v. State of Alabama*, S. 03-316 (Admin. Law Div. 7/28/03); *Pelican Pub & Raw Bar, LLC v. State of Alabama*, S. 00-286 (Admin. Law Div. 12/15/00); *Joey C. Moore v. State of*

Alabama, S. 99-126 (Admin. Law Div. 8/19/99); *Robert Earl Lee v. State of Alabama*, S. 98-179 (Admin. Law Div. 6/28/99); *Red Brahma Club, Inc. v. State of Alabama*, S. 92-171 (Admin. Law Div. 4/7/95); and *Wrangler Lounge v. State of Alabama*, S. 85-171 (Admin. Law Div. 7/16/86). The Taxpayer failed to maintain sales records during the subject period. He also failed to present any evidence showing that the Department's mark-up audit is incorrect. The tax due as computed pursuant to the audit is affirmed.

The Department also assessed the Taxpayer for the 50 percent fraud penalty. The issue of fraud was previously addressed by the Administrative Law Division in *Arnold v. State of Alabama*, S. 03-1098 (Admin. Law Div. 7/27/04).

Code of Ala. 1975, §40-2A-11(d) levies a 50 percent penalty for any underpayment due to fraud. "Fraud" is given the same meaning as ascribed in the federal fraud provision, 26 U.S.C. §6663. Consequently, federal authority and case law should be followed in determining if the fraud penalty applies. *State Dept. of Revenue v. Acker*, 636 So.2d 470 (Ala.Civ.App. 1994).

The Department is required to prove fraud by clear and convincing evidence. *Bradford v. C.I.R.*, 796 F.2d 303 (1986). "The burden is upon the commissioner to prove affirmatively by clear and convincing evidence actual and intentional wrongdoing on the part of the (taxpayer) with a specific intent to evade the tax." *Lee v. U.S.*, 466 F.2d 11, 14 (1972), citing *Eagle v. Commissioner of Internal Revenue*, 242 F.2d 635, 637 (5th Cir. 1957). The existence of fraud must be determined on a case by case basis, and from a review of the entire record. *Parks v. Commissioner*, 94 T.C. 654, 660 (1990). However, 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), citing *Traficant v. Commissioner*, 884 F.2d 258, 263 (6th Cir. 1989). Consequently, fraud may be established from "any conduct, the likely effect of which would be to mislead or conceal." *Walton*, 909 F.2d at 926, quoting *Spies v. United States*, 63 S.Ct. 364, 368 (1943). The failure to keep adequate records and the consistent underreporting of tax is strong evidence of fraud. *Wade v. C.I.R.*, 185 F.3d 876 (1999) ("There is no dispute (taxpayer) kept inadequate books and records, further suggesting fraud.").

Arnold at 7 – 8.

The Taxpayer was previously audited by the Department and was informed that he was required to maintain sales records. He failed, however, to maintain any records during the audit period. He also operated his grocery store without a sales tax license for over five years. Without a license, he of course also failed to file returns in those years. The Taxpayer's failure to keep any sales records, to file sales tax returns, or to even obtain a sales tax license clearly indicates that he knowingly and intentionally attempted to evade paying his sales taxes during the subject period. The Taxpayer charged his customers sales tax, but then kept it for his own use. The Department's finding of fraud is affirmed.

The final assessment is affirmed. Judgment is entered against the Taxpayer for State sales tax, penalty, and interest of \$18,251.64. Additional interest is also due from the date of entry of the final assessment, December 10, 2004.

This Final Order may be appealed to circuit court within 30 days from the date of this Order pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered April 26, 2005.

BILL THOMPSON
Chief Administrative Law Judge