

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

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DOCKET NO. S. 87-242

PATRICK'S, INC.
701 Davidson Avenue
Muscle Shoals, AL 35662,

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Taxpayer.

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FINAL ORDER

The Revenue Department assessed State, Colbert County and City of Muscle Shoals sales tax against Patrick's, Inc. (Taxpayer) for the period June 24, 1982 through February 28, 1985. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on February 5, 1991. Conrad Pitts, Esq. and Peter Paine, Esq. appeared for the Taxpayer. Assistant counsel Dan Schmaeling represented the Department. This Final order is based on the evidence and arguments presented by the parties.

FINDINGS OF FACT

The Taxpayer operated a nightclub/bar in Muscle Shoals, Alabama during the period June, 1982 through February, 1985. The Department audited the Taxpayer for sales tax and discovered from partial records provided by the Taxpayer's bookkeeper that the Taxpayer's bank deposits exceeded the gross sales reported on the Taxpayer's sales tax returns. The bookkeeper subsequently admitted to the Department examiner that the Taxpayer's sales tax returns were not based on the actual sales by the Taxpayer, but rather on a much lower sales figure provided to her by the Taxpayer's owner,

Pat Patton. The bookkeeper also stated that the Taxpayer maintained two sales journals, one showing the correct sales for the business and the other showing a greatly reduced sales figure.

The examiner immediately suspended the civil audit and reported the case to the Department's Special Investigations Unit (SIU) for possible criminal action against Patton.

Patton initially refused to cooperate with the Department's SIU investigator, but finally admitted that he routinely supplied the bookkeeper with an arbitrary gross sales figure and instructed her to report that figure on the Taxpayer's sales tax returns. Patton also acknowledged that he kept two sets of records for the business.

The SIU investigator contacted the bookkeeper who again verified that the Taxpayer's sales tax returns were based on a false sales figure provided to her by Patton. The bookkeeper also stated that Patton had instructed her to burn the sales records and tell the Department examiner that the records had been destroyed in a fire in September, 1984. The bookkeeper had refused and instead turned both journals over to the Department examiner.

The SIU investigator audited the Taxpayer for the period December, 1983 through January, 1985 using the Taxpayer's correct sales journal. The audit showed that the Taxpayer had failed to report over \$593,000.00 in taxable receipts for the period, which resulted in a deficiency of \$37,642.33.

The SIU investigator included the above facts in a case report

which was submitted to the Colbert County District Attorney in September, 1985. The report recommended that Patton should be charged with willfully attempting to evade tax pursuant to Code of Ala. 1975, §40-29-110. The District Attorney eventually charged Patton with willful failure to pay tax under Code of Ala. 1975, §40-29-112. Patton initially pled not guilty to the charge, but changed his plea to guilty in December, 1986 and agreed to pay restitution of \$37,642.33 and also a \$5,000.00 fine.

The Department examiner eventually resumed the civil audit using the Taxpayer's correct sales journal. The audit revealed that the Taxpayer had underreported taxable receipts for the period June, 1982 through February, 1985 by \$1,146,926.00. The assessments in issue are based on the above audit, with allowance for the \$37,642.33 paid by Patton as restitution in the criminal case. A notice and demand for the additional tax due was issued by the Department on January 11, 1987.

CONCLUSIONS OF LAW

The issues in dispute are (1) whether the Department can assess additional tax against the Taxpayer over and above the \$37,642.32 paid by Patton as restitution in the criminal action, and (2) is the Department barred by the three year statute of limitations from assessing additional tax for the years 1982 and 1983.

On the first issue, the Taxpayer argues that the Department is

barred from assessing additional tax by the doctrine of res judicata. However, res judicata doesn't apply because the criminal action was against Patton individually civil assessments are against Patrick's, Inc. Also, the restitution paid by Patton covered the period December, 1983 through January, 1 1985, while the civil assessments are for the expanded period June, 1982 through February, 1985. The Department allowed the Taxpayer full credit for the restitution paid by Patton and cannot and should not be prevented from assessing additional tax due as computed from the Taxpayer's own records.

The statute of limitations issue turns on whether the Taxpayer filed false or fraudulent returns with the Department in 1982 and 1983. The Department must normally issue a notice and demand for additional sales tax within three years. However, additional sales tax can be assessed at any time if the taxpayer files fraudulent returns. See, Code of Ala. 1975, §40-23-18.

The Department must prove fraud by clear and convincing evidence. Biggs v. C.I.R., 440 F.2d 1; Bradford v. C.I.R., 796 F.2d 303. A fraud conviction in a criminal action conclusively establishes fraud in a subsequent civil action against the same party by the doctrine of collateral estoppel. Gray v. C.I.R., 708 F.2d 243. Also, fraud can be established by circumstantial evidence where the facts show an intent to evade tax. Bradford v. C.I.R., supra.

The Taxpayer correctly argues that the guilty plea by Patton in the criminal action does not establish fraud by the Taxpayer because Patton was not charged with and did not plead guilty to fraud. Nonetheless, the Department has adequately proved fraud by clear and convincing evidence.

The Taxpayer admittedly filed false sales tax returns based on false sales figures provided by Patton. As a result, the Taxpayer willfully failed to report over \$1,100,000.00 in taxable gross proceeds during the audit period. The Taxpayer also maintained a false set of sales records and Patton instructed the Taxpayer's bookkeeper to destroy the records and then tell the examiner that the records had been accidentally destroyed in a fire. The above facts clearly show that the Taxpayer knowingly filed false and fraudulent returns with the Department with the intent to evade tax. Accordingly, the Department properly assessed additional tax due for the years 1982 and 1983.

The above considered, the preliminary assessments in issue are correct and should be made final, with applicable interest.

Entered on April 16, 1991.

BILL THOMPSON
Chief Administrative Law Judge