ALABAMA TAX TRIBUNAL

ABDUL ALMOJADID D/B/A A-1 FOOD MART,	§	
	§	
Taxpayer,	§	DOCKET NO. S. 21-1002-JP
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND FINAL ORDER

This appeal involves a final assessment of state sales tax for periods February 2017 through January 2020. A trial was held on May 10, 2023. Blake Madison represented the Taxpayer, and Abdul Almojadid appeared and testified. Hilary Parks represented the Revenue Department, and Marlene Ward, a Revenue Department auditor, appeared and testified.

Facts

Ms. Ward testified that she was not the original auditor in this matter, but that she assisted the original auditor with the audit and inspected five of the Taxpayer's six stores. She also reviewed and agreed with the original auditor's report. The Taxpayer operates five convenience stores and one package store. The convenience stores sell typical items such as soft drinks, snacks, beer, wine, tobacco, and gasoline, whereas the package store sells liquor and tobacco. The audit report states that the Taxpayer reports sales tax for all six stores under one sales tax number.

Ms. Ward stated that the Taxpayer did not provide any sales records, income

tax records, or bank statements to the Revenue Department during the audit. Therefore, the Revenue Department subpoenaed the Taxpayer's bank records and subpoenaed purchase invoices from the Taxpayer. However, because some inventory was purchased with cash, the Revenue Department concluded that not all sales proceeds had been deposited into the Taxpayer's bank account. Thus, bank deposits would not be reliable in determining the Taxpayer's taxable sales.

Requests also were made to the Taxpayer's wholesale vendors for the Taxpayer's purchase information for the audit period, but a few smaller vendors did not respond. Additionally, the Revenue Department's confidential audit report indicated that "[t]here were some vendors from which the taxpayer seemed to have made consistent monthly purchases from but for which some purchase information was missing." Where purchase records appeared incomplete, the Revenue Department estimated purchase numbers from those vendors based on the records the Taxpayer provided. According to Ms. Ward, the Taxpayer's total wholesale purchases from vendors during the audit period totaled more than $7 million, of which only $49,000 were estimated. For that same period, though, the Taxpayer reported taxable sales of only $4.9 million. Therefore, for the audit period, the Taxpayer's total wholesale purchases exceeded total reported taxable retail sales by $2,116,238.75.

Ms. Ward testified that, based on Internal Revenue Service statistical data, the Revenue Department applied a 35% markup to the Taxpayer's purchases from vendors to determine the Taxpayer's taxable sales for the audit period. Such an

approach was necessary because the Taxpayer did not provide records to the Revenue Department that would have shown his actual sales. A 35% markup also was applied to the liquor purchases because, according to Ms. Ward, that was the markup used by liquor stores in the same area as the Taxpayer's liquor store. After the markup was applied, the Revenue Department calculated that the Taxpayer had underreported his taxable sales by $4.5 million, or 48%. Ms. Ward stated that, to conduct a classified markup, she would have needed complete vendor records, which she did not have. She further stated that spoilage is accounted for in the 35% markup, but that an adjustment could be made for theft if a Taxpayer provided sufficient evidence of theft.

Ms. Ward testified that the fraud penalty was assessed for the following reasons: (1) the Taxpayer had been audited prior to the audit of the tax periods at issue in this case, and the Taxpayer had been informed of the filing and record-keeping requirements during that previous audit; (2) the Taxpayer did not provide any sales records or monthly recap sheets to show the amount of taxable sales reported on the tax returns; (3) the Taxpayer underreported his taxable sales by 48%; (4) the Taxpayer omitted 69.5% of his taxable sales from the taxable base; and (5) the Taxpayer's purchases from vendors for resale exceeded the taxable sales reported by the Taxpayer on his returns by $2.1 million.

Mr. Almojadid testified that, to determine his sales tax measure, he marked up his total purchases from vendors by 22%, the amount that he deemed to be the stores' average markup. He testified that his cash registers did not produce z-tapes,

and that he could not rely on his employees to keep sales records. According to Mr. Almojadid, he has purchased a point-of-sale system. He admitted that he had no sales records for the audit period, but he stated that he provided some purchase invoices and some 1099 forms to the auditor.

The Taxpayer contended that the markup used by the Revenue Department is too high. He also stated that he recently reviewed a list of vendors that was produced pursuant to the Wholesale to Retail Accountability Program ("WRAP") and noticed two vendors on that list from whom he does not purchase merchandise. However, he did not check the vendor list for the audit period in issue to see if there were any vendors whom he did not recognize.

And Mr. Almojadid testified that his stores are located in high crime areas where considerable theft occurs. However, Ms. Ward stated that the Taxpayer did not produce any records to document theft. The Taxpayer also acknowledged on cross-examination that he had been warned previously by the Revenue Department to keep sales records. And, in questioning by the Tax Tribunal, the Taxpayer had no explanation for the difference between the total amount of purchases from vendors during the audit period ($7 million) and the amount of sales reported by the Taxpayer on his sales tax returns for the same period ($4.9 million).

Discussion

On appeal, the Taxpayer challenges the Revenue Department's determination of the sales tax measure as well as the assessment of the fraud penalty.

The Taxable Measure

It is undisputed that the Taxpayer in this case failed to provide *any* sales records to the Revenue Department. In such a situation, the Revenue Department may compute the Taxpayer's liability "based on the most accurate and complete information reasonably obtainable…" Ala. Code 1975, § 40-2A-7(b)(1)a; *Jai Shanidev Inc. d/b/a Country Corner*, S. 16-449 (Ala. Tax Tribunal 04/27/17).

> "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).
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> "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.

Because the Taxpayer in this appeal failed to maintain or produce any sales records and because the auditor could not determine the taxable measure with reference to the Taxpayer's bank records, the auditor used an indirect audit method. Using a mostly-complete set of vendor-purchase records, she first determined the amount of wholesale purchases made by the Taxpayer during the audit period, with only a minor portion of those purchases being estimated. According to Ms. Ward, those purchases for resale totaled more than $7 million.

She then applied a markup of 35% to those purchases to estimate the Taxpayer's retail sales.

As the Tax Tribunal has explained in previous cases, the 35% 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 tax due as computed by the audit is by its nature an estimate, but the examiner of necessity estimated the Taxpayer's liability because the Taxpayer failed to maintain adequate records." *Id*.

Here, the Taxpayer argues that the Revenue Department should not have estimated some of the vendor purchases and that the Revenue Department should have performed a classified markup audit (using actual shelf prices) instead of applying a 35% markup to all purchases. Both arguments are unavailing, however, because of the specific facts of this case. First, Ms. Ward testified that there were some smaller vendors which the Revenue Department was not able to contact that did not provide sales information to the Department. And some estimates were for periods prior to the Revenue Department receiving information from vendors pursuant to the information exchange program (WRAP). She also noted that the amount of vendor purchases that was estimated was only $49,000 out of $7 million.

Second, concerning the Taxpayer's argument that a classified markup audit should have been performed, Ms. Ward stated that the information received by the

Revenue Department from vendors contains only a monthly total of all items purchased and does not contain purchase amounts for each item. Thus, to perform a classified markup audit, a taxpayer would have to provide an auditor with complete invoices for every item purchased over a specific period of time so that the Revenue Department could record individual sale prices and calculate an actual markup. Here, though, the Taxpayer provided no such information. The Taxpayer also argues that there should be an adjustment for theft and spoilage, but the Taxpayer produced no evidence to support that claim.

Considering the totality of the evidence, the Taxpayer has not overcome the final assessment's presumption of correctness with respect to the tax calculation. *See* Ala. Code § 40-2A-7(b)(5)c.3. Therefore, the tax component of the final assessment entered by the Revenue Department is upheld.[1]

The Fraud Penalty

The Revenue Department also included a fraud penalty in the final assessment. The agency asserts the following in support of the penalty: (1) the Taxpayer had been audited prior to the audit of the tax periods at issue in this case and had been informed of the filing and record-keeping requirements during the previous audit; (2) the Taxpayer did not provide any sales records or monthly recap sheets to document the amount of taxable sales reported on the tax returns; (3) the Taxpayer underreported his taxable sales by 48%; (4) the Taxpayer omitted 69.5% of taxable

[1] The Taxpayer also argues that, if the tax liability is reduced on appeal, some of the periods will be barred by the statute of limitations. Because the tax component of the final assessment is upheld, the Taxpayer's argument on this point is moot.

sales from the taxable base; and (5) the Taxpayer's purchases of inventory for resale exceeded the Taxpayer's reported sales by $2.1 million.

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).
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> 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. *Barriganv. C.I.R.*, 69 F. 3d 543 (1995).
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> 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).
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> 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).

Here, based on the evidence presented, the Revenue Department met its burden of proving fraud. Thus, the fraud penalty is upheld.

Conclusion

The final assessment of sales tax is upheld. Judgment is entered in favor of the Revenue Department and against the Taxpayer in the amount of $198,791.39, plus additional interest that continues to accrue from the date of entry of the final assessment until the liability is paid in full.

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

Entered November 21, 2023.

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

jp:ac
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