

ALABAMA TAX TRIBUNAL

JORDANS PACKAGE STORE, LLC,	§	
Taxpayer,	§	DOCKET NO. S. 22-1000-JP
v.	§	
STATE OF ALABAMA	§	
DEPARTMENT OF REVENUE.		

OPINION AND FINAL ORDER

This appeal involves a final assessment of state sales tax for the periods September 2017 through August 2020. A trial was held on December 6, 2023. Sharon Delaney appeared and testified on behalf of the Taxpayer. Hilary Parks represented the Revenue Department, and Jasenn Hardin, the Revenue Department’s auditor, appeared and testified.

Facts

The Taxpayer operates a liquor store in Mobile, Alabama. Ms. Delaney and her son, Terry Dulaney, are listed as the board members of the Taxpayer.

At trial, Mr. Hardin testified that he conducted an audit of the Taxpayer and that the sales tax returns filed by the Taxpayer reported total taxable sales for the assessment periods (36 months) in the amount of \$99,182. However, the Taxpayer’s wholesale purchases from vendors for resale to the public during those same periods totaled \$684,564.96. Moreover, sales made during the assessment periods from store operations, as reported by the Taxpayer’s “Clover” point-of-sale system, which records each sale transaction, totaled \$762,330.24. And the Taxpayer’s 1099-K credit card

sales and bank account records also indicated that the Taxpayer made sales in excess of the amounts reported on the Taxpayer's returns. Therefore, the Revenue Department assessed the Taxpayer based on the taxable measure derived from the Taxpayer's own point-of-sale system. And the Revenue Department included interest and the fraud penalty in the assessment.

According to the Revenue Department, it assessed the fraud penalty against the Taxpayer because the Taxpayer's purchases from vendors for resale exceeded reported sales by \$585,382.96; the Taxpayer's retail sales as recorded by its own point-of-sale system (Clover) exceeded the retail sales reported by the Taxpayer on its sales tax returns by almost 770 percent; the Taxpayer understated sales in successive filing periods; the Taxpayer did not file income tax returns for 2019 or 2020; the Taxpayer failed to remit the sales tax collected at the store; and the Taxpayer failed to provide all documentation requested by the Revenue Department during the audit.

Ms. Delaney, on the other hand, testified that her store's account information had been stolen and that the thieves, operating in Georgia, were buying inventory using her store's account number. After Mr. Hardin testified that the actual sales of the Taxpayer were recorded by the Taxpayer's point-of-sale system, Ms. Delaney added that the thieves stole one of the store's point-of-sale devices, as well. She also accused Alabama law enforcement personnel of stalking her, secretly installing cameras in her store, and pulling a gun on her.

Discussion

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.” Here, the Revenue Department based its assessment on information obtained directly from the Taxpayer’s own point-of-sale system which recorded each of the Taxpayer’s sales. The Taxpayer made allegations of identity theft and theft of a point-of-sale device. But she offered no proof of those claims or the claims regarding law enforcement personnel. Therefore, the tax portion of the final assessment is upheld.

As stated, the Revenue Department assessed the fraud penalty because the Taxpayer’s purchases from vendors exceeded reported sales by \$585,382.96; the Taxpayer’s retail sales as recorded by its own point-of-sale system exceeded reported sales by almost 770 percent; the Taxpayer understated sales in successive filing periods; the Taxpayer did not file income tax returns for 2019 or 2020; the Taxpayer failed to remit the sales tax collected at the store; and the Taxpayer failed to provide all documentation requested by the Revenue Department during the audit.

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.OOR., 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).

Here, the reasons that the Revenue Department stated in support of its assessment of the penalty, as specified in this opinion, support the application of the fraud penalty. Thus, the fraud penalty is upheld.

The final assessment of sales tax is upheld. Judgment is entered against the Taxpayer and in favor of the Revenue Department in the amount of \$43,037.69, 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 December 19, 2023.

/s/ Jeff Patterson

Chief Judge

Alabama Tax Tribunal

jp:ac

cc: Sharon Dulaney
Hilary Y. Parks, Esq.