ALABAMA TAX TRIBUNAL

AMY J. & DAVID S. FULMER,	§	
Taxpayer,	§	DOCKET NO. INC. 24-0659-RC
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE	§	

OPINION AND FINAL ORDER

This appeal involves the entry by the Alabama Department of Revenue of a final assessment of income tax for 2023. A hearing occurred on February 3, 2026. The Taxpayers were represented by Linda F. Mefford. The Department was represented by Margaret Johnson McNeill, Esq. No fact witness appeared or testified for either party.

FINDINGS OF FACT

Amy J. Fulmer and David S. Fulmer (the "Taxpayers") filed their 2023 joint Alabama income tax return. As filed, that return claimed a loss of $55,564.00 from a schedule C sole proprietorship. The Department examined the Taxpayers' return and disallowed the loss. This disallowance resulted in the denial of the refund requested on the Taxpayers' return and instead created a balance due. This balance due led to the Final Assessment of August 19, 2024, in the amount $11.29, consisting of tax of $11.00 and interest of $0.29. The Department did not impose penalties. The Taxpayers appealed the Final Assessment to this Tribunal. Their appeal is timely.

The question in this case is whether the Taxpayers' alleged business activity consists of a hobby, as the Department claimed when it disallowed the associated

losses, or whether the activity is a for-profit business as the Taxpayers claim, in which case some amount of business loss should have been allowed subject to substantiation requirements.

Because neither party produced fact witnesses, this opinion will rely heavily on the parties' filings prior to the hearing. Ordinarily, the statements of the representatives, being unsworn, would not be acceptable as evidence. However, especially in the case of Ms. Mefford, who in addition to representing the Taxpayers is also the bookkeeper for the activity and the mother of one of the Taxpayers, the Tribunal will consider some of her statements as they appear to be relevant. The Alabama Rules of Evidence do not apply to proceedings before the Alabama Tax Tribunal. Ala. Code (1975)[1], § 40-2B-2(k)(4).

The activity in question operates as "Alpha Mare Garlands & Gifts" (hereinafter, "Alpha Mare"). According to the Taxpayers, the activity operates in two main spheres. First, the Taxpayers acquire horses that are in need of rehabilitation. They then rehabilitate these horses, train them, and sell them to customers. Second, the Taxpayers produce floral displays, as one might use to drape a horse winning a race or a horse show. According to Ms. Mefford, the Taxpayers have been involved in this activity for 18 years.

Ms. Fulmer is first vice president of the Alabama Arabian Horse Association,

[1] Unless otherwise specified, all references to code sections in this order are to the Code of Alabama (1975), as amended to date.

and according to the association's website she has received its Volunteer of the Year Award on multiple occasions. She is employed full-time by the Montgomery Water Works & Sanitary Sewer Board. Mr. Fulmer is disabled and does not work outside the home other than his activities relating to Alpha Mare. The Taxpayers pay for living expenses using both Ms. Fulmer's salary and SSDI payments relating to Mr. Fulmer's disability.

Ms. Mefford states that, to her knowledge, Alpha Mare cares for 20 to 30 horses per year, and may be in possession of 10 to 20 horses at any one given time. The Taxpayers own 26 acres of property and rent a further 40 acres including a barn, where the horses are kept. She states that the activity has its own books and records kept separately from the Taxpayers' personal finances, and its own bank account. The receipts and expenditures of Alpha Mare are recorded using standard small-business accounting software, for which Ms. Mefford is responsible.

Ms. Mefford states that both Mr. and Ms. Fulmer spend between 30 and 40 hours per week participating in Alpha Mare activities. It is unexplained how Mr. Fulmer spends this much time active in Alpha Mare when he is disabled. Ms. Mefford states that Ms. Fulmer participates in Alpha Mare activities at night, on weekends, and on days off from her job. With no fact witnesses available, the Department's counsel was unable to inquire into these details through cross-examination.

Ms. Mefford states that Alpha Mare sells its goods and services to the public and advertises its products and services through flyers distributed at horse shows, and on

the internet. She states that the Taxpayers attend the horse shows to develop business for Alpha Mare and not to show their own horses or horses they are training for other owners. A Facebook page exists for "Alpha Mare, Inc.,"[2] which the Tribunal assumes is for the Taxpayers' activity. Alpha Mare is also credited with garlands pictured at the website of the Alabama Arabian Horse Association and is recognized as a sponsor of the association as well.

Ms. Mefford states that the activity has not shown a profit in any of the 18 years it has been in operation, though it might have done in a few of those years if not for mileage expense. When asked if the Taxpayers had any plan to change their operations to increase the chances of financial success, Ms. Mefford stated that they intended to focus more on gifts and garlands and less on horses. But, she admitted, if the Taxpayers were unsuccessful in the present appeal, they were likely to cease operations.

ANALYSIS

Hobby loss cases come before this Tribunal, and came before its predecessor, the Administrative Law Division of the Alabama Department of Revenue, with some frequency. A search of decisions relating to this topic reveals 34 published decisions. Of these, the great majority (23) involved agriculture of some sort, and in particular

[2] Although the Facebook page refers to "Alpha Mare, Inc.," the electronic records of the Alabama Secretary of State's office do not contain any entry for a corporation or other business entity by that name. The Taxpayers in this appeal have consistently referred to Alpha Mare as an unincorporated sole proprietorship, which would accord with the lack of business entity records from the Secretary of State.

activities involving horses made up 8 of these. Decisions rendered in these cases have sometimes favored the taxpayer and sometimes favored the Department, depending on the particular facts.

In Blankenship v. State of Alabama, Ala. Dep't of Rev., Admin. L. Div., dkt. no. INC. 06-1215 (Oct. 16, 2007), the Division explained the criteria to be applied in deciding the issue:

> The general test for whether a taxpayer is engaged in a "trade or business," and thus entitled to deduct all ordinary and necessary business expenses, is "whether the taxpayer's primary purpose and intention in engaging in the activity is to make a profit." State of Alabama v. Dawson, 504 So.2d 312, 313 (Ala. Civ. App. 1987), *quoting* Zell v. Commissioner of Revenue, 763 F.2d 1139, 1142 (10th Cir. 1985). To be deductible, the activity must be engaged in "with a good faith expectation of making a profit." Zell, 763 F.2d at 1142. As stated by the U.S. Supreme Court – "We accept the fact that to be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity and that the taxpayer's primary purpose for engaging in the activity must be for income or profit. A sporadic activity, a hobby, or an amusement diversion does not qualify." Commissioner v. Groetzinger, 107 S. Ct. 980, 987 (1987). But a taxpayer's expectation of a profit need not be reasonable. Rather, the taxpayer must only have a good faith expectation of realizing an eventual profit. Allen v. Commissioner, 72 T.C. 28, 33 (1979). Whether the taxpayer had an intent to make a profit must be determined on a case-by-case basis from all the circumstances. Patterson v. U.S., 459 F.2d 487 (1972).
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> Treas. Reg. §1.183-2 specifies nine factors that should be considered in determining if an activity was entered into for profit.
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> Factor (1). The manner in which the taxpayer conducted the activity.
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> Factor (2). The expertise of the taxpayer in carrying on the activity.

The Tribunal will assume the "Inc." on the Facebook page is in error.

> Factor (3). The time and effort exerted by the taxpayer in conducting the activity.
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> Factor (4). The expectation that the assets used in the activity will appreciate.
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> Factor (5). The taxpayer's success in similar or related activities.
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> Factors (6) and (7). The taxpayer's history of profits and losses, and the amounts of any occasional profits.
>
> Factor (8). The taxpayer's financial status.
>
> Factor (9). The activity was for the taxpayer's personal pleasure and recreation.

Blankenship, at 3-4.

"As with most disputed 'hobby loss' cases, some of the above factors favor the Taxpayer, and some the Department. No one factor is determinative." McWaters v. Department of Revenue, Ala. Dep't of Rev., Admin. L. Div., dkt. no. INC. 13-1193, at 5 (Sept. 24, 2014). We shall now examine each of the nine factors in turn.

Factor 1 (the manner in which the taxpayer conducted the activity) favors the Taxpayers. They keep separate books and records for Alpha Mare, apart from their own personal books and records. Alpha Mare has its own separate bank account, and its books and records are kept in a business-like and professional manner using bookkeeping software.

Factor 2 (the expertise of the taxpayer in carrying on the activity) also favors the Taxpayers. Clearly, the Taxpayers, and Ms. Fulmer in particular, have had extensive experience in training and showing Arabian horses.

Factor 3 (the time and effort exerted by the taxpayer in conducting the activity) favors the Taxpayers. Regardless of whether their activity for Alpha Mare effectively constitutes a second full-time job, it is nevertheless clear that the Taxpayers must and do spend a great deal of time tending to the horses and producing the goods they sell. This is not a passing fancy or a small diversion; the Taxpayers invest a great deal of their time in Alpha Mare.

Factor 4 (the expectation that the assets used in the activity will appreciate) is irrelevant and favors neither party. Other than the horses themselves, the small amount of personal property used by the Taxpayers in this activity is unlikely to appreciate at all. Any appreciation in the value of the acreage they own and use would be unconnected to this activity, and any appreciation in the value of the acreage and the barn they rent would accrue to the owner of those assets.

Factor 5 (the taxpayer's success in similar or related activities) is likewise irrelevant. Neither party has alleged that the Taxpayers have ever engaged in any similar or related activities in which they might or might not have demonstrated success. Although Ms. Mefford indicated that the Taxpayers had engaged in a similar activity prior to Mr. Fulmer's injury, no details were provided regarding that activity, or its record of success or failure. As indicated above, the Taxpayers themselves did not make themselves available to testify.

Factors 6 and 7 (the taxpayer's history of profits and losses, and the amounts of any occasional profits) weigh heavily in favor of the Department. Again, Ms. Mefford

stated that the Taxpayers have not ever, not even once, turned a profit engaging in this activity over 18 years. Her statement that some years would have been profitable if not for mileage expense is unavailing. Mileage expense substitutes for actual expenses a business incurs in fuel, maintenance, and repairs of and for automobiles. Unlike depreciation, which represents a diminution in value but without a current cash outlay, mileage represents a current expense that must be paid when incurred. A business that would generate income except for depreciation expense may nevertheless create positive cash flow and be or become a going concern; a business that would generate income except for mileage expense is just losing money. The facts in the case at bar demonstrate only that the activity has come close to being profitable in some years, but even in those years did not manage to produce a profit. Ms. Mefford mentioned that the Covid-19 pandemic had a substantial negative effect on the Taxpayers' business and on the equine industry, generally. I have no doubt that this is accurate; but, without any profits to speak of before or after the events of 2020, it would seem that while the pandemic may have increased the activity's losses from what they otherwise would have been, there nevertheless would have been losses. Again, testimony from the Taxpayers themselves may have been helpful in delving into this question; as it is, the Tribunal must proceed only upon the record before it.

It is true that the intent to produce a profit must be subjectively sincere but need not be objectively reasonable. Taxpayers are allowed to take long shots and bear risks that others may find unreasonable. However, after a certain point, an uninterrupted

history of losses begs the question of how sincere a given taxpayer's belief in eventual profits must be or remain. It is especially telling that, should they not prevail in this appeal, the Taxpayers plan to cease operations altogether. This suggests that the tax savings generated by their losses have been an important factor in continuing the activity, and that it is not worth the time and effort they unquestionably devote to it if the tax effect of their losses are not to be given effect.

Factor 8 (the taxpayer's financial status) is a mixed result. It partially weighs in favor of the Taxpayers. Where, as here, taxpayers do not have high incomes or substantial assets from which to finance losses due to hobbies, it is reasonable to presume that the taxpayers would not engage in those activities without some expectation or at least hope that it will produce a profit. On the other hand, it partially weighs in favor of the Department, in that the Taxpayers (clearly) do not depend on the activity for their main source of income and support.

Factor 9 (the activity was for the taxpayer's personal pleasure and recreation) weighs heavily in favor of the Department. The Taxpayers, and Ms. Fulmer in particular, clearly derive great enjoyment from being around horses and participating in the recreational opportunities that horses provide. In addition to her activities with Alpha Mare, she spends further time volunteering for and serving as an officer for the Alabama Arabian Horse Association. It is certainly desirable that any person derives enjoyment and satisfaction from her work; activities do not have to be miserable or drudgery to be deductible. But in this case, personal pleasure has been so great that

the Taxpayers have continued in this activity year after year without ever making a profit. It is likely they would have ceased another activity that they did not enjoy as much long ago in similar circumstances.

In federal and Alabama cases reviewed by the Tribunal, where substantial and continuing losses exist under factors 6 and 7, and the personal enjoyment created by the activity under factor 9 is great, the clear majority of cases conclude that the activity is a hobby and not a for-profit business.

Final assessments entered by the Department are presumed to be *prima facie* correct, and it is the Taxpayers' burden to show that a final assessment is incorrect, as provided by § 40-2A-7(b)(5)c.3. "The oft-cited rule is that deductions are matters of legislative grace. *See*, *e.g.*, Surtees v. VFJ Ventures, Inc., 8 So. 3d 950, 970 (Ala. Civ. App. 2008), *aff'd* Ex parte VFJ Ventures, Inc., 8 So. 3d 983 (Ala. 2008). Thus, the burden of proving the right to a deduction rests with the taxpayer." Vukovich v. Alabama Dep't of Rev., Ala. Tax Trib., dkt. no. INC. 17-663-JP, at *2 (May 21, 2020).

Given the analysis above, it would have been difficult for the Taxpayers to carry their burden of proving their subjective intent to make a profit, despite never having done so over almost two decades. However difficult, though, the task is utterly impossible without their own testimony. Especially in cases where this Tribunal or any court must make determinations about someone's subjective intent or belief, in-person testimony is vital. During in-person testimony, not only the witness's words but also their demeanor can be observed and weighed in the balance, and testimony can be

challenged or clarified by cross-examination. Without that, the Taxpayers in this case cannot carry the burden of disproving the Department's final assessment.

I also express my wish that the Department had produced a fact witness as well. During the hearing, it was apparent that the Department's attorney had arranged for a Department witness to be available, and that the witness had unexpectedly failed to appear. Ms. Mefford had several questions regarding her belief that the Taxpayers had been repeatedly audited, and the reasons why this might be. It is understandable that the Department's attorney could not answer these questions, not being familiar with the history of the Taxpayers before being assigned this present appeal. A fact witness could have at least shed light on what the Taxpayer's representative asserted was an unfair process in repeatedly examining these Taxpayers. Ms. Mefford cited (by content if not by specific reference) § 40-2A-13(b) and its requirement that "no more than one examination of a taxpayers' books and records by each respective taxing entity relating to each type of tax shall be made every three taxable years…." Department violations of the Alabama Taxpayers' Bill of Rights and Uniform Revenue Procedures Act are not grounds to set aside an otherwise valid final assessment, but such violations are a reason why the Tribunal might order the vacating of imposed penalties. § 40-2A-4(c). In this case, the Department imposed no penalties, and so even if Ms. Mefford's complaint has merit, there is no remedy the Tribunal can provide. Nevertheless, the Taxpayers may have appreciated an explanation if one was available.

I find that Alpha Mare is a hobby and not a for-profit business, and that

therefore losses generated by it may be used to offset only such income as the activity may produce and not other income. Consequently, I find that the Departments Final Assessment was correct, and it is hereby upheld. Judgment is rendered for the Department and against the Taxpayers in the amount $11.29, plus such interest as shall have accrued since the date of its entry.

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

Entered March 5, 2026.

/s/ *Ralph M. Clements, III*
RALPH M. CLEMENTS, III
Associate Judge
Alabama Tax Tribunal

cc: Amy J. & David S. Fulmer
Linda F. Mefford
Margaret Johnson McNeill, Esq.