ALABAMA TAX TRIBUNAL

PERRIN AND SON, INC.,	§	
Taxpayer,	§	DOCKET NO. S. 24-0825-RC
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND FINAL ORDER

This case regards the Alabama Department of Revenue (the "Department") having issued a final assessment of sales tax, entered on October 30, 2024, in the amount $390,819.18 (the "Final Assessment") against Perrin and Son, Inc., an Alabama business corporation (the "Taxpayer"). For the reasons outlined below, the Department's Final Assessment is affirmed.

I. PROCEDURAL HISTORY

As stated above, the Department entered its Final Assessment on October 30, 2024, in the amount $390,819.18, consisting of Alabama sales tax of $329,635.32, and pre-final assessment interest of $61,183.86. The Department did not assess penalties of any variety.

The Taxpayer filed the instant appeal with the Alabama Tax Tribunal on November 12, 2024. The Department filed its Answer on February 11, 2025. The parties then engaged in informal discovery, at the conclusion of which the Taxpayer filed its "Petitioner's Motion for Summary Judgment, Memorandum of Law, and Proposed Order" on August 28, 2025. The Department responded on September 19, 2025, opposing the Taxpayer's summary judgment motion, to which the Taxpayer replied in turn on September 20.

After a number of preliminary orders, the Department supplemented its opposition to the Taxpayer's motion with further information and argument on October 17, 2025, which occasioned the Taxpayer to file its "Notice of Clarification" on that same date, and then its "Motion to Strike, or in the Alternative, to Disregard the Department's Late Supplemental Filing" on October 23.

That was the state of the case when the previous Chief Judge, the Hon. Jeff Patterson, resigned his position with the Tribunal. The undersigned Associate Judge was appointed to the Tribunal effective November 17, 2025, and the new Chief Judge, the Hon. Leslie Pitman, assigned this appeal to him immediately thereafter.

On December 9, 2025, the Tribunal denied the Taxpayer's Motion to Strike. On that same date, the Taxpayer supplemented its Motion for Summary Judgment. The Tribunal later held oral argument on the Taxpayer's Motion for Summary Judgment on January 28, 2026. Following post-hearing briefs, the Tribunal denied the Taxpayer's Motion for Summary Judgment on February 24, 2026, and set this matter for a hearing on the merits.

The parties entered a Joint Stipulation of Fact on May 6, 2026, along with pre-hearing briefs relating to the merits of the case. The hearing was held on May 13, 2026. Hilary Y. Parks, Esq., represented the Department, and Crystal Harrell, a Department employee (and the employee responsible for conducting the audit and drafting the ensuing Confidential Audit Report) testified. Robert Mayeri, Esq., represented the

Taxpayer, and Tommy Turpin, CPA, who had been and continues to be the Taxpayer's accountant and tax advisor, testified. The able attorneys made opening statements, examined their witness, cross-examined the other's witness, made legal arguments, and reserved making their closing statements until later, in writing.

The Tribunal entered a Post-Hearing Preliminary Order on May 19, 2026, directing the parties to provide certain additional information and documents that had not been produced at the hearing. The Taxpayer objected to this Post-Hearing Preliminary Order on the basis that the evidence thus produced would not be subject to cross-examination. The Tribunal denied the Taxpayer's motion on June 9, 2026, and the parties thereafter filed their written closing arguments on July 13, 2026.

Thus, the case is now ripe for decision.

II. FACTS

The Tribunal adopts the parties' May 6, 2026, Joint Stipulation of Fact, consisting of the following, in substance:

1. This appeal relates to an audit conducted by the Alabama Department of Revenue for April 2020 through March 2023 (the "Audit Period"). The parties attached a copy of the Confidential Audit Report (the "CAR") and its schedules and agreed to its authenticity.
2. The Taxpayer and the Department executed an "Agreement Extending Period of Limitation for Assessment or Refund" (a "Statute Waiver"), effective April 26, 2023. A copy of the Statute Waiver was attached and was agreed to be authentic.

3. The Statute Waiver was agreed to cover the Audit Period, and stated "[a]s provided in Code of Alabama 1975, the taxpayer and the Alabama Department of Revenue hereby consent and agree as follows: [t]he amount of **<u>State and Local Sales and Consumers' Use</u>** tax(es)/penalty/interest due from, or refund due to, the taxpayer under the provisions of the Code of Alabama 1975, for the period(s) indicated, may be assessed or claimed at any time on or before December 31, 2023." (emphasis in original).
4. The parties agreed that the Statute Wavier was not invalid because of the inadvertent failure by the Department to sign the document.
5. The Department entered its preliminary assessment on May 22, 2024 (the "Preliminary Assessment"), and its Final Assessment on October 30, 2024.

In addition to the above stipulated facts, considering the pleadings in this case and the testimony at the May 13, 2026, hearing, the Tribunal finds the following additional facts to be established as true.

6. The Taxpayer is in the business of selling masonry materials and supplies, lawn and garden supplies including sand and gravel, and it also sells fireworks seasonally. It is located at 5300 Highway 280, in Shelby County, Alabama.
7. At the commencement of the audit, the Department requested the following documents: sales invoices, sales journals, cash register tapes

("Z-tapes"), customer tax-exempt files, purchase invoices, depreciation schedules and asset files, federal and state income tax returns, IRS Forms 1099K, and bank statements.

8. The Taxpayer provided sales invoices, purchase records, and bank statements. The Department retrieved tax returns and Forms 1099K from its own database. The Taxpayer did not provide exemption certificates or sales tax licenses for any customers.

9. The Department's examiner reviewed the sales invoices, and discovered that, with the exception of one customer, none of the invoices listed sales tax as a separate line item. Upon inquiry, the Taxpayer stated that the sales tax was included in the price of the goods sold, and the measure of taxable sales reported was calculated by totaling the taxable sales for the month and then dividing that total by 1.05 (5% being the sales tax rate at the Taxpayer's location).

10. The Taxpayer informed the Department that many of the customers to which it had made tax-exempt sales were themselves landscaping or construction companies. The Department therefore concluded that those customers were considered to be the end-user of the goods. None of the customers reviewed had sales tax accounts or exemption certificates that the Department could locate in its records.

11. The Department reviewed the Taxpayer's federal income tax returns, and noted that the gross receipts on those returns for the period April 2020

through December 2022 exceeded reported taxable sales by $6,869,202.04.

12. The Department reviewed the IRS Forms 1099K, which are reported by credit and debit card processing companies to the Taxpayer and to the federal and state taxing authorities. For the period April 2020 through December 2022, the proceeds paid by the card processing companies to the Taxpayer exceeded its reported taxable sales by $1,758,785.47.

13. The Department reviewed the Taxpayer's bank statements for the period April 2020 through March 2023. After adjusting the deposits for verified sales tax collected, the total deposits into the Taxpayer's checking account exceeded its reported taxable sales by $7,993,984.23.

14. Because of the above-identified discrepancies, the Department determined that the reported taxable sales figures supplied by the Taxpayer were not reliable, and therefore it decided to conduct an indirect audit.

15. The Department concluded that the best and most reliable information it had was the bank statements. Consequently, the Department used the amount of bank deposits (less sales taxes actually paid) as its estimate of the Taxpayer's taxable sales for each month of the Audit Period.

16. The Department also noted that the Taxpayer's business license was issued in the category of construction companies and contractors, and that therefore some (but not all) of its vendors had charged it sales tax

despite the Taxpayer's intent to resell the goods, as the Taxpayer is not actually in the construction or contracting business itself. The Department identified as many of these taxed purchases as it could and removed those invoices from the total of taxable sales (thus reducing the eventual balance due).

17. The Taxpayers responded to the Department's findings by noting that it had been audited by the Department in 2014 for the period March 2011 through February 2014, and at that time the Department did not argue that the Taxpayer's method of invoicing and calculating taxable sales was incorrect. Therefore, the Taxpayer had been under the impression that it was in compliance with Alabama sales tax laws and regulations.

18. In response to the Taxpayer's contentions above, the Department determined that it would be appropriate to relieve the Taxpayer from penalties. The ensuing Final Assessment contained no penalties.

III. STATUTE OF LIMITATIONS ARGUMENTS

The Taxpayer at various times in this appeal has presented three arguments relating to the statute of limitations:

A. That the Preliminary Assessment (and thus the Final Assessment resulting from it) is void in its entirety, because it was entered after the Statute Waiver expired on December 31, 2023.

B. If the Preliminary Assessment is not void in its entirety, then the periods that were more than three years in the past were invalidly assessed, because the Statute Waiver had expired before the Preliminary Assessment date.

C. That the 6-year statute of limitations for omissions from the taxable base of over 25% was improperly invoked by the Department both because the Statute Waiver had expired by the time of the Preliminary Assessment, and, separately, because the Department failed to prove that such an omission occurred in the first instance.

Before turning to these arguments, the Tribunal notes that "[w]hen an Alabama statute is modeled after a federal statute, federal authority should be followed in interpreting the Alabama statute." Island Interiors, Inc., v. State of Alabama Department of Revenue, Ala. Dep't of Rev., Admin. L. Div., dkt. no. S. 2001-316 (Aug. 23, 2001), *citing* Best v. State Dept. of Revenue, 417 So. 2d 197 (Ala. Civ. App. 1981).

In content and structure, ALA. CODE (1975), § 40-2A-7(b)(2)[1], containing the three-year statute of limitations, is modeled on IRC § 6501(a). Similarly, § 40-2A-7(b)(2)i (providing for Statute Waivers) is modeled on IRC § 6501(c)(4)(A). Finally, § 40-2A-7(b)(2)b (providing for the six-year statute of limitations in cases of sufficiently large omissions) is modeled on IRC § 6501(e)(1)(A). Thus, both Alabama law and federal law relating to IRC § 6501 can be used as precedent in addressing the Taxpayer's arguments.

With respect to the first and second arguments, above, the Tribunal ruled on these issues when the Taxpayer presented them in its Motion for Summary Judgment.

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[1] Unless otherwise indicated, all section numbers in this Opinion and Final Order are to the CODE OF ALABAMA (1975), as amended to date.

The Tribunal sees no reason for its opinion to have changed in this respect since then.

Although Statute Waivers share some characteristics with contractual agreements, they are not contracts. “A consent to extend the statute of limitations under section 6501 ‘is essentially a voluntary, unilateral waiver of a defense by the taxpayer,’ not a contract.” Feldman v. Commissioner, 20 F.3d 1128, 1132 (11th Cir. 1994), *quoting* Stange v. United States, 282 U.S. 270, 276 (1931).

With respect to any such periods as would ordinarily have lapsed under the standard, three-year statute of limitations found at ALA. CODE (1975), § 40-2A-7(b)(2) (the “Three-Year Statute”), what the Taxpayer did by executing the Statute Waiver was to unilaterally waive the right it otherwise would have had to object based on that statute, at least at any time before December 31, 2023. However, for such periods as remained open on the Preliminary Assessment date, the Taxpayer had no such rights to object, and therefore nothing to waive. For at least the months that remained within the Three-Year Statute at the time the Preliminary Assessment was entered (in this case, the months of May, 2021, through May, 2023), the execution of the Statute Waiver was irrelevant as the Taxpayer had yet to accrue any rights it could have waived.

The opposite finding would have the perverse result of encouraging taxpayers generally to agree to short Statute Waivers with the intent of artificially shortening the statute of limitations period with respect to at least some tax periods at issue. Naturally, this incentive could then result in the Department being less willing to grant Statute Waivers to begin with, frustrating the purpose of the entire Statute

Waiver scheme. Therefore, I find that regardless of the Taxpayer's arguments regarding the 6-year statute for sufficiently large omissions, the ordinary, 3-Year Statute had yet to lapse for the months May, 2021, through and including May, 2023.

The Taxpayer is correct to argue that the ordinary, 3-Year Statute had in fact expired (on December 31, 2023) before the Department entered its Preliminary Assessment on May 22, 2024. Therefore, if the Department's Preliminary Assessment with respect to the first 13 months (April, 2020, through April, 2021) is to be effective, it must have its effect under some statutory provision other than the Three-Year Statute.

The Department argues that its Final Assessment applies to April, 2020 through April, 2021, not through the Three-Year Statute, but rather through § 40-2A-7(b)(2)b (the "6-Year Statute"), which reads as follows: "[a] preliminary assessment may be entered within six years from the due date of the return or six years from the date the return is filed with the department, whichever is later, if the taxpayer omits from the taxable base an amount properly includable therein which is in excess of 25 percent of the amount of the taxable base stated in the return."[2] If the 6-Year Statute applies, then all the months contained in the Preliminary Assessment would be open, as all of them were within the 6 years before May 22, 2024.

The Taxpayer objects in two ways: first, the Taxpayer has at times throughout this appeal argued that the same logic it applied to the Three-Year Statute should also

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[2] For ease of reference, the triggering event of the 6-Year Statute will be referred to in this Opinion and Final Order as a "Substantial Omission." The Tribunal in previous orders referred to this triggering event as a "substantial understatement," which in addition to being imprecise risks confusion with the triggering event of the penalty found at IRC § 6662. All such references should be understood to

be applied to the Six-Year Statute; that is, that the Statute Waiver it signed necessarily invalidates any assessment after December 31, 2023, regardless of what provision (i.e., 3-year or 6-year) the Department uses to reach those periods.

This argument fails respecting the 6-Year Statute for the same reason it failed for the unelapsed months subject to the 3-Year Statute as described above. Namely, if the 6-Year Statute does apply, the Taxpayer would yet to have accrued any right to object, and thus it had no right that it could have waived. In addition, I repeat my analysis and conclusion from the Tribunal's previous order denying the Taxpayer's Motion for Summary Judgment, below.

> In my opinion, the [3-Year Statute] and the [6-Year Statute] are separate and distinct limitations, and a Statute Waiver executed to extend the one does not necessarily operate to extend (or, as in this case, shorten) the other. The three-year statute applies to all taxpayers and to all taxes administered by the Department under the Alabama Taxpayers' Bill of Rights and Uniform Revenue Procedures Act (§§ 40-2A-1 through 40-2A-18). The six-year statute, however, operates differently. It does not apply to all taxpayers, and whether it applies to any given taxpayer is driven by that taxpayer's behavior in creating a [Substantial Omission]. While the Tribunal cannot locate an Alabama or a federal case exactly on point (regarding the interplay of expired Statute Waivers with the 6-year statute), a review of other federal guidance indicates that this is the correct view.
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> The federal regulation interpreting IRC § 6501's treatment of omissions from one's return (omissions that could trigger the 6-year statute of IRC § 6501(e)(1)(A)) is Treas. Reg. § 301.6501(e)-1. Of note in that regulation, it explicitly states that "the provisions of this section do not limit the application of section 6501(c)." Treas. Reg. § 301.6501(e)-1(d). Section 6501(c) contains exceptions from the general three-year statute of limitations found at IRC § 6501(a), including (notably) IRC § 6501(c)(4)(A), allowing for Statute Waivers. However, IRC § 6501(c) contains many exceptions other than Statute Waivers. For example, IRC § 6501(c)(3) provides that an assessment may be made at any time when a taxpayer fails to file a return. The regulation, then, stipulates that the

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be related to the triggering event of § 40-2A-7(b)(2)b.

six-year statute applicable to [Substantial Omissions] does not supplant the unlimited statute of limitations applicable to non-filed returns. Nor, for example, does the six-year statute supplant the unlimited statute of limitations applicable to false or fraudulent returns (IRC § 6501(c)(1)), returns filed in a manner to defeat or evade tax (IRC § 6501(c)(2)), or assessments upon terminating private foundations (IRC § 6501(c)(6)).

The Tribunal also notes the U.S. Tax Court's opinion in Crawford v. Commissioner, 97 T.C. 302 (1991). In that case, the taxpayer elected to use the special five-year statute of limitations in determining a so-called "hobby loss" case, pursuant to IRC §§ 183(e)(1) and 183(e)(4). In particular, for the 1983 year, the taxpayer had filed the appropriate election with his return. By virtue of that election, the statute of limitations applying to the taxpayer's 1983 return did not expire (or would not have expired) until April 15, 1989, five years after the due date of his 1983 return (instead of the usual three). However, in January of 1989, the taxpayer and the IRS executed Form 872, the federal form used to create a Statute Waiver. That Statute Waiver specified that the IRS had until December 31, 1989, to enter its assessment. In fact, the IRS entered its assessment against the taxpayer in October of 1989, after the expiration of the special five-year statute of IRC § 183(e), but before the end of the term specified in the Statute Waiver. The taxpayer objected, arguing that the Statute Waiver he had signed was ineffective. He posited that IRC § 183 does not contain any provision allowing for voluntary extensions of the lengthened statute of limitations. Further, IRC § 6501(c), containing the exceptions to the usual three-year rule of IRC § 6501(a), makes no reference to the special rule of IRC § 183. Thus, he argued, the statute of limitations for assessing his 1983 return had elapsed on April 15, 1989, and the October assessment entered by the IRS was void.

The Tax Court disagreed, stating:

> It is true that no provision of section 183 provides for extension of the section 183(e)(4) period of limitations. It is also true that section 183(e)(4) modifies the period of limitations on assessment that would apply in the absence of an election under section 183(e)(1). In relevant part, section 183(e)(4) provides: "the STATUTORY PERIOD for the assessment of any deficiency attributable to * * * [a section 183] activity shall not expire before * * *." (Emphasis added.) The "statutory period" referred to is the period that otherwise would apply. As quoted above, the legislative history of section 183(e)(4) states that it is the "normal 3-year limitations period" that is being extended. That period

> is found in section 6501(a). Thus, a sensible construction of section 183(e)(4) is that it modifies section 6501(a) with regard to a section 183 activity for which an election under section 183(e)(1) has been made. As a result, that modification must be taken into account, as if written into section 6501(a), when applying section 6501(a) in connection with a section 183 activity for which the election has been made. An agreement under section 6501(c)(4) would, by the same reasoning, be effective to extend the period of limitations provided for in section 6501(a), notwithstanding that it was entered into after the normal 3- year period provided for in that section had run, so long as it was entered into before the section 6501(a) period, as extended by section 183(e)(4), had run.

Crawford, *supra*, at 307. The holding of the Crawford case indicates that different statute of limitation provisions within the Internal Revenue Code can operate simultaneously and modify one another, but each must be judged on its own specific terms and triggering events. Thus, a Statute Waiver intending to extend the three-year limitation of IRC § 6501(a) by voluntary consent of the taxpayer does not by its own terms necessarily extend (or shorten) the six-year limitation of IRC § 6501(e)(1)(A), triggered not through consent but rather through the behavior of the taxpayer.

The case cited by the Department, Full-Circle Staffing, LLC v. Commissioner, T.C. Memo 2018-66 (May 17, 2018), is suggestive. Faced with a taxpayer partnership attempting to make a statute of limitations argument similar to the Taxpayer's, the U.S. Tax Court stated "[t]he periods of limitations for the [partners'] partnership items cannot expire before their applicable statute of limitations dates under section 6501." Full-Circle Staffing, *supra*, at *40.

Strengthening this argument further is the different purposes of the two rules. Allowing taxpayers and the taxing authority to voluntarily extend the three-year statute facilitates cooperative resolutions of audits by not forcing the taxing authorities into making premature assessments when the facts are as yet uncertain. *See* United States v. Herman, 186 F. Supp. 98, 100-101 (E.D.N.Y. 1960). Conversely, the six-year statute exists not to facilitate resolutions but rather to deter overly-aggressive tax reporting positions and ensure sufficient time for enforcement in cases of serious compliance failures.

This is certainly the interpretation of the IRS. In a Field Service Advisory dated June 11, 1993 (1993 WL 1469666), the IRS's Assistant

> Chief Counsel advised the District Counsel about a case in which the IRS had inadvertently failed to assess a taxpayer within three years. The District Counsel desired to proceed against the taxpayer in any event under the six-year statute because the IRS believed the taxpayer had committed a [Substantial Omission], and the specific question was whether the IRS was required to issue the taxpayer another notice of deficiency, given that the taxpayer already had a notice of deficiency from the prior audit. The Assistant Chief Counsel wrote "[o]nce a notice of deficiency is issued, section 6501(a) and 6213(a) apply, and any assessment should be made within the time frames dictated by those code sections. If the Service does not comply with the mandate of the statutes, it must find <u>another legal theory upon which to base an assessment</u>. One possible solution, as your office concluded, is the issuance of a second statutory notice based on the six year statute of limitations provided in section 6501(e)." (emphasis added). While not binding precedent, this FSA clearly indicates the IRS's belief that the two statutes of limitations are separate theories upon which an assessment might be based, and that an impairment of the first would not necessarily work an impediment of the second.
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> Thus, in the present case, I find that while the three-year statute of limitations at § 40-2A-7(b)(2) had been extended by the Statute Waiver and then expired, the Statute Waiver had no effect upon the six-year statute of limitations of § 40-2A-7(b)(2)b. Thus, the Taxpayer is incorrect when it argues that the preliminary assessment was void *ab initio* because it was untimely, if the six-year statute applies. Presuming the Taxpayer is unable to carry its burden of proving the Department was incorrect when it alleged that a [Substantial Omission] invoked the six-year statute, the Statute Waiver would be irrelevant and the statute of limitations would still be open.

The Taxpayer's second line of attack against the 6-Year Statute is that the Department failed to show that the prerequisite for its application, a Substantial Omission, occurred. If no Substantial Omission occurred, then the 6-Year Statute would not apply regardless of the length of time between the return filing and the Preliminary Assessment. If this is correct, then the Taxpayer would be correct that the first 13 months assessed (April, 2020, through April, 2021) should have been excluded from the Preliminary Assessment as they were both beyond the 3-Year Statute (even the extended 3-Year Statute under the Statute Waiver), and not subject to the 6-Year Statute.

Thus, we now turn to the question of exactly what is a "Substantial Omission." The term Substantial Omission is used as a shorthand in this Opinion and Final Order only, as those exact words are not found in the Internal Revenue Code nor the concomitant provisions of the Alabama Code. Rather, both laws seek to impose a longer, 6-year statute of limitations when a return meets certain characteristics. In the case of Alabama, such a period applies when "the taxpayer omits from the taxable base an amount properly includable therein which is in excess of 25 percent of the amount of the taxable base stated in the return." § 40-2A-7(b)(2)b. Because the Department collects many types of taxes in addition to income tax, the Alabama statute differs from its Internal Revenue Code counterpart by referring to the "taxable base" rather than "gross income," as in IRC § 6501(e)(1)(A). The "taxable base" is "the gross income, gross proceeds from sales, gross receipts, net worth, or other amounts on which the tax paid with the return is computed." § 40-2A-7(b)(2)b.1.

The sales tax levy statute imposes sales tax upon "every person, firm, or corporation, … engaged or continuing within this state, in the business of selling at retail any tangible personal property whatsoever, … an amount equal to four percent of the <u>gross proceeds of sales</u> of the business except where a different amount is expressly provided herein." § 40-23-2(1) (emphasis added).

It is here that the Taxpayer attacks, arguing that the figures used as the "taxable base" by the Department are not the "gross proceeds from sales," as required by the statute. The Taxpayer argues as follows: "Mr. Turpin testified that the Department's calculations were based upon the tax deficiency determined during the audit rather than the taxable base reported on [the Taxpayer's] monthly sales tax returns. The taxpayer's actual gross receipts and reported taxable base were available to the Department throughout the audit. Nevertheless, the Department's audit report contains no calculation demonstrating that the alleged omitted taxable base exceeded twenty-five percent of the taxable base reported on any individual monthly return. Instead, the Department relied upon assessed tax deficiencies. Whatever label is assigned to those reconstructed figures, they are not the metric prescribed by [the 6-Year Statute]. The Legislature required one denominator. The Department used another. Because the Department bears the burden of establishing the applicability of the extraordinary six-year statute of limitations, its failure to apply the statutory metric is fatal to that claim."

In the Confidential Audit Report, in the section labeled "Basis for Assessment," the Department's auditor states "[a]dditional tax is due because there were errors in the reporting of total taxable sales. The error resulted in an understatement of taxable sales on the sales tax reports filed with the Department of Revenue." This, the Taxpayer argues, is the source of the Department's fatal flaw; that it used "total taxable sales" as the measure rather than "gross proceeds from sales." The Tribunal understands this argument to be that because the Department used "total taxable sales" rather than "gross proceeds from sales," the Department may not use the 6-Year Statute regardless of the amounts involved because it is measuring the wrong thing.

Firstly, the Taxpayer is in error when it describes which party bears the burden of proof on this issue. Were this a federal case under IRC § 6501(e), the Taxpayer would have been correct. Section 6501(e) is silent about which party must prove that an omission of income exceeds 25% of the reported taxable income. Thus, the question is answered by case law developed over time. The federal rule is that the IRS bears the burden of proving that a Substantial Omission has occurred. *See, e.g.*, Philipp Bros. Chemicals, Inc. v. Commissioner, 52 T.C. 240, 254 (1969) ("The burden of proof as to the existence of the 25-percent omission is upon the Commissioner."); Sacco v. Commissioner, T.C. Memo 1988-532 (1988) ("[R]espondent has the burden of pleading and proving the existence of an exception to the general period of limitations."); Benson v. Commissioner, T.C. Memo 2004-272 (2004) ("Respondent bears the burden…").

Alabama law, however, is not silent on this topic. Where the Internal Revenue Code leaves this question to be answered by courts, Alabama law explicitly provides "[o[n appeal to the circuit court or 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." § 40-2A-7(b)(5)c.3. The Tribunal is not anxious to discover areas of disharmony between Alabama and federal tax law; but where, as here, Alabama law clearly and specifically requires a certain outcome, that outcome must prevail even in the presence of a different federal rule, and even in cases where the Alabama statute has otherwise been modeled on the corresponding Internal Revenue Code provision. Therefore, the Taxpayer has the burden of proving that the Department was incorrect in finding a Substantial Omission.

This is a burden the Taxpayer fails to carry in this appeal. Firstly, the Taxpayer is incorrect when it argues “the Department’s audit report contains no calculation demonstrating that the alleged omitted taxable base exceeds twenty-five percent of the taxable base reported on any individual monthly return. Instead, the Department relied upon assessed tax deficiencies.”

The Taxpayer’s statement that the Department based its decision to apply the 6-Year Statute based on alleged tax due rather than omissions from the taxable base is contradicted by the Confidential Audit Report itself, in which the Department’s auditor states “[a] waiver is not required for this examination because the taxpayer has omitted <u>more than 25% from the taxable base</u> for the majority of the audit period, except one month.” (emphasis added).

An attachment to the Confidential Audit Report, entitled “Billing Details – Sales Tax” shows for each month during the audit period the following on a spreadsheet: the period; the taxable amount; the tax; credits & adjustments; the tax due; interest; penalty; and then the total. Another attachment, entitled “Credits and Adjustments Detail – Sales Tax” demonstrates how the “Tax Due” from the previous spreadsheet for each month was calculated, arriving at the “Tax before Penalty & Int[erest],” which in each case is identical to the “Tax Due” column on the first exhibit.

A further argument advanced by the Taxpayer is that, instead of using “gross receipts from sales” as its measure, the Department used taxable sales. Indeed, the spreadsheet attached to the Confidential Audit Report has a column for “Taxable Amount,” which the Tribunal interprets to be the amount of taxable sales made by the

Taxpayer.

The Tribunal believes that the "Credit for Taxes Paid" column on the second spreadsheet indicates the amount of sales tax that the Taxpayer actually remitted to the Department for each month in the Audit Period. Taking, for example, the month of March, 2022, that figure is $1,852.88. The Department has alleged that the proper amount of tax for that same period was $20,016.78. Because Alabama state sales tax is a fixed 4%, the figures producing these results are easy to understand. With respect to the $20,016.78 the Department believes to be correct, one need not even pull out one's calculator; the number is explicitly listed on the first attachment as $500,419.41. It is true that the spreadsheet in the first attachment does not list the amount of sales required to produce the figure of sales tax actually remitted, but a quick resort to middle school algebra indicates that $1,852.88 divided by .04 equals $46,322.00. Thus, the amount the Department alleges to be omitted from the sales tax return is the difference between those two, or $454,097.41. One does not need a degree in mathematics to see that $454,097.41 is, in fact, greater than 25% of $46,322.00. With different numbers, this same process repeats itself in each of the other months of the audit period. The only month that even comes close is December of 2022, when the Taxpayer remitted $9,415.47 on a Department-adjusted amount due of $12.907.46, a difference of $3,491.99, which is 37.09% of $9,415.47. The other months all reflect understatements of greater magnitude, and some months the tax figures are grossly understated.

The Taxpayer's argument is factually incorrect if the Confidential Audit Report is to be believed. The Department's auditor stated in that report "[t]he gross receipts per the income tax returns were compared to the total sales (taxed and non-taxed sales) per the sales invoices. The gross receipts [on the income tax returns] significantly exceeded the total sales (taxed and non-taxed) per the sales invoices by more than $6,869,202.04 (for April 2020 – December 2022)." Although the auditor named the figure she used for comparison "total sales (taxed and non-taxed sales)," and not "gross receipts from sales," it is difficult to see how these two differ in substance. If one takes account of all the taxed sales and all the non-taxed sales, one has taken account of the gross receipts from all sales.

Secondly, with respect to the month-by-month figures on the spreadsheet that do show "Taxable Amount" and not "gross receipts from sales," it is self-evident that what the Department did was to take the gross receipts from sales and then reduce that figure by the amount of tax-exempt sales it could identify, multiplying this reduced figure by the 4% tax rate. What the Taxpayer seems to be arguing is that this was in error, and that the Department ought to have figured the 4% tax on the entire amount of gross receipts from sales, and then given credit for 4% of the tax-exempt sales it could identify. A solid understanding of ninth-grade algebra again demonstrates that these are two methods of arriving at the exact same figure. To invalidate all or part of the assessment because the Department chose to show its calculations using the former method and not the latter would be to elevate form high above substance, and the Tribunal declines the Taxpayer's invitation to do so. The Confidential Audit Report left the Taxpayer in no doubt (or should have left it in no doubt) of the claims the

Department was making and the basis and reasoning behind those claims; the Department's assessment will not be voided because part of the report failed to use the exact phraseology of the statute. The substance of what the statute requires was there for the Taxpayer to see, regardless of failure to utter the magic words the Taxpayer insists must have been written.

For all the reasons described above, none of the months included in the Audit Period fall outside the relevant statute of limitations, and the Taxpayer's arguments and objections to the contrary are overruled.

IV. MERITS OF THE CASE

Having disposed of the Taxpayer's procedural objections, we now turn to the substance of the Taxpayer's arguments regarding the correctness of the Final Assessment. As stated above, and as the Taxpayer correctly noted in its closing argument, "[t]he Department's assessment entered these proceedings accompanied by a presumption of correctness. Ala. Code § 40-2A-7(b)(5)c." It is therefore the Taxpayer's duty to show through preponderance of the evidence that the Department's Final Assessment is incorrect.

The Taxpayer states as follows:

> The Department's audit attributes a taxable measure of \$13,484,709 for the thirty-six month audit period. Taxpayer's Exhibit P-3, prepared by Tommy Turpin, CPA, establishes total gross receipts of approximately \$12,010,000 for the same period. (Tr. 94:17-20).
>
> These figures cannot both be correct. Taxable sales constitute only a portion of total gross receipts and cannot exceed the total revenue generated by the business. Yet the Department's assessment attributes taxable sales approximately \$1.47 million greater than Perrin's total gross receipts for the period.

> When asked to explain this discrepancy, the Department's auditor testified: "*I don't know. I can only testify to my numbers. I can't testify to his numbers.*" (Tr. 68-:8-9).
>
> No reconciliation was provided, and no other evidence explained the difference. This internal inconsistency raises a substantial question about the reliability of the assessment.
>
> The simple fact remains that the record demonstrates that there was a $1.47 million discrepancy in which the Department's claimed taxable sales exceeded the taxpayer's proven gross receipts during the thirty-six month audit period. This is an impossibility—both numbers cannot be correct. At a minimum, the Department's auditor should have identified and addressed the fundamental inconsistency. Not only did she fail to do so, but this omission strikes at the heart of the audit process and the very framework upon which the assessment is built. Without any explanation or reconciliation, the assessment lacks basic reliability and cannot be sustained.

With respect, this argument is unpersuasive because it begs the question, assuming as fact that which is to be proven. In particular, this argument treats as established fact that the Taxpayer's gross receipts for the Audit Period were (approximately) $12,010,000.00. Yet, the Taxpayer's self-reported gross receipts were deemed unreliable by the Department due to their marked differences from: (A) the gross receipts as shown on its income tax returns; (B) the gross receipts as shown on its IRS Forms 1099-K; and, (C) the total amount of bank deposits during the Audit Period.

The Taxpayer demands that the Department provide a "reconciliation" of the differences between its figure and the Taxpayer's own. Firstly, the explanation of the difference, on a monthly basis, is shown in the Confidential Audit Report and its attachments. There is one explanation for these differences, which the Department provided: namely, that the total bank deposits in each month exceeded (and sometimes markedly exceeded) the Taxpayer's reported gross receipts from sales. Secondly, the type of detailed reconciliation the Taxpayer appears to desire, while a routine and even mandated step in an audit of a business for financial accounting purposes, subject to the requirements of generally accepted accounting principles ("GAAP"), is not required in a governmental tax audit. The United States Supreme Court noted:

> The primary goal of financial accounting is to provide useful information to management, shareholders, creditors, and others properly interested; the major responsibility of the accountant is to protect these parties from being misled. The primary goal of the income tax system, in contrast, is the equitable collection of revenue; the major responsibility of the Internal Revenue Service is to protect the public fisc. Consistently with its goals and responsibilities, financial accounting has as its foundation the principle of conservatism, with its corollary that "possible errors in measurement [should] be in the direction of understatement rather than overstatement of net income and net assets." In view of the Treasury's markedly different goals and responsibilities understatement of income is not destined to be its guiding light. Given this diversity, even contrariety, of objectives, any presumptive equivalency between tax and financial accounting would be unacceptable.

<u>Thor Power Tool Co. v. Commissioner</u>, 439 U.S. 522, 542-43 (1979). Alabama's tax audit procedures are governed by the Alabama Taxpayers' Bill of Rights and Uniform Procedures Act, § 40-2A-7. Under those provisions, the Department may "examine and audit the records, books, or other relevant information maintained by any taxpayer or other person for the purpose of computing and determining the correct amount of value or correct amount of any tax, license, or fee administered by the department…." § 40-2A-7(a)(2). The statute's focus on determining the "correct amount of any tax," rather than compliance with financial reporting standards, reflects the same fundamental separation between tax accounting and GAAP that governs at the federal level. There is no provision in Alabama's tax audit framework incorporating or requiring adherence to GAAP standards, and no Alabama court has held otherwise.

If any reconciliation is needed in this case, it could usefully have been provided by the Taxpayer, explaining how it managed to deposit $7,993,984.23 more in its checking account than it had taxable sales during the Audit Period. The Taxpayer maintains that most of this difference consists of tax-exempt sales. Yet, the Department removed from its measure of gross deposits all sales it could identify that were provably tax-exempt (and also removed sales tax collected). The Taxpayer had ample opportunity, both during the audit and during this appeal, to provide other and further evidence that additional sales were or should have been tax-exempt, by providing copies of the sales tax licenses of wholesale customers or exemption certificates of exempt customers. The Taxpayer failed to produce this evidence. "[T]he seller is liable for sales or use tax on any sales for which the seller fails to collect the appropriate sales or use tax due. It is the seller's duty under the Sales and Use Tax Laws to know the general and customary business of the customer and to collect the amount of tax due." *Ala. Admin. Code*, r. 810-6-1-.184(1).

There are, of course, many reasons why a business might deposit funds into its bank account other than taxable sales. Among these are loan proceeds, investments of capital from owners of the business, insurance payouts, refunds of prior purchases, lawsuit or settlement proceeds, customer deposits, sales or leases of intangible personal property, sales or leases of real property, occasional sales of capital equipment, and others in addition. The Taxpayer had ample opportunity to provide proof that any given deposit or series of deposits was due to such a cause or one like it. The Taxpayer failed to do so.

The Taxpayer insists that its evidence was more reliable than the Department's evidence. The Taxpayer states:

> [The Taxpayer's CPA] testified regarding the preparation of [the Taxpayer's] sales tax returns, the compilation of its gross receipts from bank deposits and accounting records, and the methodology used in the Taxpayer's Exhibit P-3. His testimony was consistent and addressed the Tribunal's questions directly. … By contrast, the Department's auditor was unable to explain how the Department's taxable measure exceeded the taxpayer's total gross receipts by approximately $1.47 million. This is not merely a difference of professional opinion. One witness provided a documented explanation of the taxpayer's figures; the other candidly acknowledged that she could not explain the nature of the difference between the two sets of numbers. Under these circumstances, the taxpayer's evidence is more reliable and persuasive."

This argument suffers from the same flaw as the one above in that it begs the question of whether the Taxpayer's gross receipts figure was itself reliable. The Taxpayer's preparer did testify as to how his firm received information from the Taxpayer and used that information to calculate the Taxpayer's sales tax due and prepare the corresponding returns. That does not mean, however, that the information the Taxpayer provided to the preparer was itself reliable. The large discrepancies between the Taxpayer's figures and the income tax return, the 1099-Ks, and the bank statements have not been sufficiently explained. In that case, the Department was reasonable in determining that the Taxpayer's figures were unreliable; they were not transformed into reliable figures by having been recorded and reported by a CPA.

As noted above, Alabama law requires all taxpayers to "keep and maintain an accurate and complete set of records, books, and other information sufficient to allow the department to determine the correct amount of value or correct amount of any tax…." § 40-2A-7(a). In addition, those taxpayers selling tangible personal property at retail are required to "keep and preserve suitable records of the gross sales, gross proceeds of sales, and gross receipts or gross receipts of sales of such business and such other books or accounts as may be necessary to determine the amount of tax for which he is liable…. It shall be the duty of every person to keep and preserve all invoices of goods, wares, and merchandise purchased, for resale or otherwise…. Any person selling both at wholesale and retail shall keep his books so as to show separately the gross proceeds of wholesale sales and the gross proceeds of retail sales. All sales shall be subject to tax in the absence of such separate records." § 40-23-9.

The Taxpayer in this case provided some of the records the Department had requested, but not all of them. The records that it did provide were incomplete or confusing in that they did not indicate which customers were allegedly tax-exempt and failed to list sales tax as a separate line item. This Tribunal has held in the past: "[t]he Revenue Department could not distinguish taxable events from their nontaxable counterparts using the records provided by the Taxpayer. These incomplete records required the Revenue Department to contact third-party vendors and to utilize these vendors' records to complete the assessment. <u>In other words, the Revenue Department could not use the Taxpayer's records and had to perform an indirect audit because the Taxpayer's records were incomplete and lacked sufficient information to allow the Revenue Department to determine the exact amount of tax due</u>. … Over the course of the appeal, this deficiency was never remedied. <u>Thus, the Taxpayer never satisfied its burden to establish the Revenue Department's use of third-party records and an indirect audit to complete the final assessment was incorrect</u>." <u>IStore, LLC & its Sole</u>

Member Kirti Patel, d/b/a Millers v. Alabama Dep't of Rev., Ala. Tax Trib., dkt. no. S. 21-1310-LP (Sept. 24, 2024), at *3 (emphasis added). Similarly, in this case, the incomplete information provided by the Taxpayer, that the Department determined was unreliable, led to the Department's decision to conduct an indirect audit, based on the most accurate and complete information reasonably obtainable; in this case, the Taxpayer's bank statements. The Taxpayer has not proven that the Department's assessment, taken directly from independent third-party data produced by the Taxpayer's bank, is less reliable than its own evidence.

In fact, the Department went beyond what it was strictly required to do in reducing the Taxpayer's taxable sales for purchases it made when erroneously paying sales tax to its vendors. Not only did this give the Taxpayer credit for amounts that are likely to have exceeded the sales tax it paid (presuming the Taxpayer sold the inventory for more than its wholesale purchase price), it also dispensed with the requirement that the Taxpayer separately petition for refunds of erroneously paid sales tax. The Department would have been within its rights to leave those sales in the taxable column and demand that the Taxpayer petition for refunds of erroneously paid tax, presuming that the statute of limitations applying to refund requests had not yet expired. Instead, the Department gave the Taxpayer the benefit of the doubt and allowed these reductions in gross sales (and thus reductions in the eventual tax due) without the necessity of a separate petition process. The Tribunal does not rule that this process was either proper or improper but merely notes that such actions by the Department demonstrate its good faith effort to give the Taxpayer all the credit to which it was due.

V. CONCLUSION

For the reasons noted above, the Final Assessment of October 30, 2024, in the amount $390,819.18, is hereby AFFIRMED, plus additional interest that shall have accrued and shall continue to accrue through the date of payment.

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

It is so ordered.

Entered August 13, 2026.

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

cc: Robert Mayeri, Esq.
Hilary Y. Parks, Esq.