STATE OF ALABAMA, DEPARTMENT OF REVENUE, vs. NEW JOY YOUNG RESTAURANT, INC. 5 Shades Crescent Road Birmingham, AL 35209, Taxpayer.	§ § § § § § §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION DOCKET NO. S. 91-246

FINAL ORDER

The Revenue Department assessed sales tax against the New Joy Young Restaurant, Inc. (Taxpayer) fax the period January, 1984 through May, 1986. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted an April 21, 1992. J. Mark White appeared for the Taxpayer. Assistant counsel Claude Patton represented the Department.

FINDINGS OF FACT

The Taxpayer has operated a Chinese restaurant in Birmingham since 1919. During the period. in issue, the Taxpayer's monthly sales tax returns were prepared by an accounting firm based on sales figures verbally provided by the Taxpayer's principal owner., Mr. Wing Su Joe. The Taxpayer failed to maintain any cash register tapes or other sales records during the subject period.

The Department audited the Taxpayer in mid-1986 for sales tax for the period May, 1983 through May, 1986. The audit was conducted using the Taxpayer's bank deposit records and showed that the Taxpayer had underreported sales tax by approximately 40% ($1,000.00 in tax, $25,000.00 in sales) per month during the audit

period. The gross sales figures determined by the audit ($864,473.00 in 1984 and $799,843.00 in 1985) were approximately the same as the gross sales figures reported on the Taxpayer's income tax returns during the subject period ($868,493.00 for fiscal year ending March., 1984 and $848,442.00 for the fiscal year ending March, 1985).

The audit was completed in July, 1986 and turned over to the Department's Special Investigations Unit for possible criminal action. However, the audit was split and the period prior to January 1, 1984 was immediately assessed because the criminal tax evasion statutes were not effective prior to 1984. The Department subsequently agreed to waive all penalties and the Taxpayer paid the May through December 1983 assessment in full.

The Special Investigations Unit and the Jefferson County Grand Jury both subpoenaed the Taxpayer's bank records in, September, 1986. However, the criminal investigation was subsequently dropped after Mr. Joe died in mid-1987. The Department took no further action in the matter until 1991.

The Department entered a preliminary assessment against the Taxpayer on March 15, 1991. That assessment was voided because the Department had failed to issue a notice and demand letter prior to the assessment. A notice and demand letter was subsequently issued on July 15, 1991, and the preliminary assessment in issue was entered on July 31, 1991. The preliminary assessment includes a 25% fraud penalty.

CONCLUSIONS OF LAW

The issues in dispute are (1) did the Taxpayer file fraudulent sales tax returns during the audit period., and (2) if so, should the Department have assessed tax within three years. from when the fraud was first discovered in mid-1986.

Generally, sales tax must be assessed within 3 years from the due date. See, Code of Ala. 1975, §40-23-1,8(b). The Department failed to do so in this case. Consequently, the assessment is barred by the three year statute of limitations unless the Department can prove that the Taxpayer filed false or fraudulent returns with the intent to- evade tax. See again, Code of Ala. 1975, §40-23-18(b).

The Department must prove fraud by clear and convincing evidence. Bradford v. C.I.R., 796 F.2d 303 (1986). However, direct evidence of fraud is not required and the Department can prove fraud by cumulative circumstantial evidence showing an intent to evade. Bradford v. C.I.R., supra; Douge v. C.I.R., 899 F.2d 164 (1990). Relevant factors indicating fraud are (1) a consistent underreporting of tax; (2) inadequate records; (3) implausible or unbelievable explanation of behavior, and (4) failure to cooperate. Korecky v. C.I.R., 781 F.2d 1566 (1986); Douge v. C.I.R., supra. Three of the above four factors indicate fraud in this case.

The Taxpayer failed to keep sales tax records during the subject period, which while not conclusive of fraud is evidence of

fraud. See, Korecky v. C.I.R., supra. The Department audit using the Taxpayer's bank records showed that the Taxpayer consistently underreported sales by approximately $25,000.00 per month during the audit period. No plausible explanation was offered, and "a consistent and substantial understatement of income (sales) is by itself strong evidence of fraud". See, Korecky v. C.I.R., supra, citing Merritt v. Commissioner, 301 F.2d 484. The audit is also supported by the fact that the audit gross receipts figures are approximately the same as the gross sales figures reported on the Taxpayer's income tax returns.

The Taxpayer's attorney argues that the Taxpayer conducted business the "Chinese way" and cannot be held to the normal standard of compliance. However, the Taxpayer has successfully operated a restaurant in Birmingham since 1919 and certainly knew or should have known to keep adequate records for sales tax purposes. A similar "ignorance" argument was rejected in Korecky v. C.I.R., supra, at page 1569, as follows:

> In defense of the accusation of fraud, Korecky contends that he was inexperienced. in financial matters and that he relied on the expertise of his bookkeeper. . . . However, he did have the practical experience gained from operating his own business for over a decade. As such, he cannot be excused. from keeping accurate records of sales receipts., which is a rather straightforward bookkeeping task. See, Webb v. Commissioner, 394 F.2d 366, 379-80 . . . . Nor may Korecky use reliance on his bookkeeper to excuse his conduct. Reliance on a book-keeper or accountant is no defense to fraud if the taxpayer failed to provide the accountant "with all of the data necessary for maintaining complete and accurate records." Merritt v. commissioner, 301 F.2d at 487. Since Korecky failed to furnish complete data on his

sales receipts, he cannot claim that his bookkeeper was at fault.

The Taxpayer at all times cooperated with the Department. Nonetheless, the fact that the Taxpayer consistently and substantially underreported liability and failed to keep records is sufficient evidence of fraud. The fraud penalty was properly added by the Department.

The Taxpayer next argues that the Department should have assessed tax within three years from when the evidence indicating fraud was discovered in 1986. I disagree. Code of Ala. 1975, §40-23-18(b) provides that in the case of fraud, tax can be assessed "at any time". The plain language of the statute must be followed. Quick v. Utotem of Ala., 365 So.2d 1245. The Legislature could have easily worded the statute to provide that. "in the case of a fraudulent return, tax can be assessed at any time within three years from when the fraud is discovered". It did not do so.

The Taxpayer argues that it would be unfair to allow the Department an indefinite period to assess tax. I agree to a point, and the Department perhaps should have acted earlier in this case. However, there are valid reasons for an extended statute in fraud cases, see, Badaracco v. C.I.R., 104 S.Ct. 756, and the fact that the Department waited before assessing the tax does not alter the fact that the Taxpayer owes the tax
in question. In any case, the Legislature must decide what is fair, not the courts or an administrative agency. As stated in

Hintz v. C.I.R., 712 F.2d 281 (1983), at page 284;

> It is up to Congress alone to be lavish or mizerly in remedying perceived inequities in the tax structure. Lewyet Corp. v. Commissioner, 349 U.S. 237, 240, 75 S.Ct. 736, 739, 99 L.Ed. 1029. The responsibility of the judiciary is merely to effectuate the will of Congress. We can only take the code as we find it and give it an internal symmetry and consistency as its words permit. United States v. Olympic Radio and Television, 349 U.S. 232, 236, 75 S.Ct. 133, 736, 99 L.Ed. 1024. Rarely will there exist a principal extra--statutory ground consistent with the intent of Congress that will permit a court to go beyond the expressed bounds of a statute. See., eg., Home Mut. Ins. Co. v. Commissioner, 639 F.2d 333, 340.

The above considered, the assessment in issue was timely entered by the Department and should be made final, plus applicable interest.

Entered an July 8, 1992.

_____
BILL THOMPSON
Chief Administrative Law Judge