

STATE OF ALABAMA,  
DEPARTMENT OF REVENUE,

§

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

§

vs.

CAPITOL PAWN SHOP, et al.  
1120 Adams Avenue  
Montgomery, AL 36104,

§

DOCKET NO. S. 92-187

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Taxpayers.

§

FINAL ORDER

The Revenue Department assessed State and Montgomery County sales tax against Capitol Pawn Shop, Inc. for the period November 1983 through June 1984; Capitol Pawn Shop, a partnership composed of Luther Z. Finklestein and George A. Phillips, for the period July 1984 through August 1986; and Capital Pawn Shop, Inc. for the period September 1986 through April 1987. The above entities are hereinafter referred to jointly as "Taxpayer". The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on November 10, 1992. Lewis B. Hickman, Jr. appeared for the Taxpayer. Assistant counsel Dan Schmaeling represented the Department. The relevant facts are set out below.

The Taxpayer operated a pawn shop in downtown Montgomery during the period in issue.

The Montgomery Police Department raided the Taxpayer's place of business in April, 1987 and seized certain records belonging to the Taxpayer. The records included a daily accounting of retail sales, pawn-ins, pawn-outs, loans and other information for the months November, 1983 through April, 1987.

Suspecting tax fraud, the Montgomery Police turned the records over to the Department for review. Using the records, the

Department computed the Taxpayer's sales tax liability as follows:

The Department took monthly retail sales as reflected on the records, backed out sales tax presumably included as part of the gross sales, computed the Taxpayer's liability, allowed a credit for tax previously paid, and then assessed the balance as additional tax due. The audit showed that the Taxpayer had consistently underreported and underpaid sales tax to the Department by anywhere from 300% to 33% in each month of the audit period.

The Department did not review the sales records kept by the Taxpayer's accountant, and instead relied entirely on the records obtained in the police raid. The Taxpayer's attorney acknowledges that the records confiscated by the police were prepared by the Taxpayer's employees, but argues that they were used only as an estimate of expected sales. Luther Finklestein, one of the principals of the Taxpayer, appeared at the hearing but refused to testify concerning the records or any other matter.

This case turns on whether the records used by the Department are a second set of books kept by the Taxpayer, as argued by the Department, or only a projection of expected sales, as argued by the Taxpayer.

After carefully reviewing the records, I must conclude that the records are not estimates or projections, but rather are a second set of books showing actual sales by the Taxpayer during the audit period. The records show retail sales, pawn-ins, pawn-outs, loan defaults and other entries broken down to the penny for each

day of each month. An estimate of expected sales would not include such detailed entries. The records also include specific notations such as the monthly loan default rate or that a burglary occurred on June 23, 1984. The January 1986 record notes that \$2,000.00 was placed in a safety deposit box on January 6th and that \$1,000.00 was deposited on January 10th. The February 1986 record shows another \$3,000.00 safety deposit box deposit on February 10th, and so forth. Obviously the entries are not before the fact estimates.

Also, actual sales as shown on the records consistently exceeded reported sales by anywhere from 300% to 33% per month during the entire audit period. A good faith estimate would have sometimes underestimated as well as overestimated expected sales.

The records are clearly a contemporaneously maintained accounting of the Taxpayer's sales and other business activities during the subject period. Accordingly, the Department properly disregarded the Taxpayer's returns, and the sales records kept by the Taxpayer's accountant on which the returns were based, and instead used the records provided by the police to compute the Taxpayer's liability.

The Department's audit is based on reasonable evidence and is prima facie correct. The burden then shifts to the Taxpayer to present credible evidence showing that the Department's calculations are incorrect. Bradford v. C.I.R., 796 F.2d 303.

I attach no presumption to Mr. Finklestein's refusal to

testify.<sup>1</sup> However, his refusal to testify does not lessen or shift the Taxpayer's burden of presenting evidence to overcome the Department's prima facie correct audit. The Taxpayer has failed to present any evidence showing that the records relied on by the Department are other than what they appear to be, a second set of books secretly maintained by the Taxpayer. Accordingly, the Department audit is upheld.

The Taxpayer is normally required to assess sales tax within three years. However, tax may be assessed at any time if a taxpayer has filed fraudulent returns. Code of Ala. 1975, §40-23-18. The fact that the Taxpayer kept a secret second set of records and consistently underreported taxable sales by anywhere from 300% to 33% during the audit period is clear evidence of fraud. Accordingly, the Department properly added the 25% fraud penalty levied at Code of Ala. 1975, §40-23-16 and assessed tax for the entire period in issue.

The assessments are upheld and judgment is hereby entered for the Department and against the Taxpayer for Montgomery County sales tax for the period November 1, 1983 through June 30, 1984 in the amount of \$392.46, State sales tax for the same period in the amount of \$1,569.85; Montgomery County sales tax for the period July, 1984 through August, 1986 in the amount of \$2,242.71, State sales tax for the same period in the amount of \$8,971.36;

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<sup>1</sup> An individual may refuse to testify in a civil hearing. However, such refusal may be considered against the party by the trier of fact. Cokely v. Cokely, 469 So.2d 635; Anonymous v. Anonymous, 353 So.2d 510.

Montgomery County sales tax for the period September, 1986 through April, 1987 in the amount of \$1,538.56, and State sales tax for the same period in the amount of \$6,154.05. Additional interest is due on the assessments from February 19, 1992.

This Final Order may be appeal to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on December 15, 1992.

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BILL THOMPSON  
Chief Administrative Law Judge