

GEORGE DRYWALL, INC.	§	STATE OF ALABAMA
430 FOREST LAKES DRIVE		ALABAMA TAX TRIBUNAL
STERRETT, AL 35147-8166,	§	
		DOCKET NO. BIT. 11-450
Taxpayer,	§	
v.	§	
STATE OF ALABAMA	§	
DEPARTMENT OF REVENUE.		

**FINAL ORDER**

The Revenue Department assessed George Drywall, Inc. (“Taxpayer”) for 2005 through 2007 business income tax. The Taxpayer appealed to the Administrative Law Division, now the Alabama Tax Tribunal, pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on March 1, 2012.<sup>1</sup> Vicenta Bonet-Smith and Ryan Smith-Bonet represented the Taxpayer. Assistant Counsel David Avery represented the Department.

The issue in this case is whether the Department properly assessed the Taxpayer as a corporation for the 2005 tax year. The Taxpayer concedes that it was a corporation in 2006 and 2007, and that the assessed tax due for those years is correct.

The Taxpayer filed articles of incorporation in Alabama in April 2006. A tax preparer in Georgia filed a 2005 Alabama corporate income tax return for the Taxpayer in March 2007. The return reported gross receipts of \$2,172,327 and labor costs of \$2,057,410. The Department disallowed the labor costs in full, and also made a miscellaneous adjustment of \$2,683. It subsequently assessed the Taxpayer for the tax due.

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<sup>1</sup> Nine Preliminary Orders were entered in the case after the March 1, 2012 hearing directing the parties to submit documents and/or respond to arguments submitted by the opposing party. The last document, the Taxpayer’s Response to the Thirteenth Preliminary Order, was filed with the Tax Tribunal on November 19, 2014.

The Taxpayer's representative argues that the Taxpayer cannot be held liable for the 2005 tax in issue because it was not incorporated until April 2006. The representative claims that the Taxpayer's owner, Jorge Lopez, is uneducated and cannot speak or understand English. She argues that Lopez relied on an accountant in Georgia to prepare his taxes, and that for some unknown reason the accountant filed a 2005 Alabama corporate return for Lopez's sole proprietorship business. According to the representative, the "Accountant simply by mistake or inadvertence placed the word 'Inc.' and filed tax returns for the Taxpayer's sole proprietorship company." Taxpayer's Response to Tenth Preliminary Order at 2.

The representative also submitted documents supporting her claim that Lopez did not hold his business out as a corporation in 2005. Specifically, she submitted a certificate of liability insurance issued to Jorge Lopez d/b/a George Drywall in December 2005; another insurance policy also issued to Jorge Lopez d/b/a George Drywall in October 2005; numerous purchase invoices from 2005 showing Jorge Lopez or George Drywall as the purchaser; and checks issued by contractors in 2005 designating Jorge Lopez or George Drywall as the payee. Also included with the checks payable to Jorge Lopez or George Drywall were three checks payable to George Drywall, Inc., one dated August 26, 2005, and two dated December 2, 2005.

The Department argues that the tax due as assessed for 2005 should be affirmed because the Taxpayer filed a corporate return for 2005, and that Lopez should consequently be estopped from denying the corporation's existence in 2005.

A corporation by estoppel is established when the party by his own actions should be prevented from denying the existence of a corporation where the party has held himself

out as a corporation and the other party relied on such conduct and acted accordingly. See generally, *Harris v. Bessemer Bldg. & Improvement Co.*, 309 So.2d 115 (Ala. Civ. App. 1975).

The evidence establishes the Jorge Lopez conducted his drywall business as a sole proprietorship in 2005, either in his individual name or as George Drywall. He purchased insurance in 2005 in the name of Jorge Lopez d/b/a George Drywall, and various vendors issued purchase invoices to either Jorge Lopez or George Drywall as the purchaser. The vast majority of the checks issued by contractors for Lopez's drywall work were also payable to either Jorge Lopez or George Drywall, as payee. Finally, the bank account for the business at First Financial Bank in Bessemer, Alabama in 2005 was in the name "Jorge Lopez Drywall, d/b/a Jorge Drywall."

The above evidence confirms that Jorge Lopez held his business out to his vendors and to the public as a sole proprietorship in 2005, not a corporation. Consequently, there was no corporation established by estoppel. The fact that Lopez's tax preparer erroneously filed a 2005 corporate return for the business in 2007 does not retroactively convert the sole proprietorship into a corporation. If the Department had assessed Lopez individually for 2005 tax, I doubt that the Department would have voided that assessment against Lopez, individually, based on the argument that because a 2005 return was filed in the corporation's name in 2007, his sole proprietorship business must be treated as a corporation by estoppel in that year. The assessed amount for 2005 is accordingly deleted from the final assessment in issue.

The final assessment is reduced to the amounts due for 2006 and 2007, \$8,524.90 and \$12,238.00, respectively, plus statutory interest from May 23, 2011. Judgment is

entered accordingly.

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

Entered January 16, 2015.

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BILL THOMPSON  
Chief Tax Tribunal Judge

bt:dr

cc: David E. Avery, III, Esq.  
Vicenta Bonet-Smith, Esq.  
Ryan Smith-Bonet, Esq.