

THE GINNY OF ANNISTON, INC.
1500 HILLYER ROBINSON INDUS.
ANNISTON, AL 36207-6207,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA
ALABAMA TAX TRIBUNAL

DOCKET NO. S. 15-820

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed The Ginny of Anniston, Inc. (“Taxpayer”) for State sales tax for September 2007 through June 2013. The Taxpayer appealed to the Tax Tribunal pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on August 4, 2016. Attorney Jason Odom and CPA Mike Askew represented the Taxpayer. Assistant Counsel Mary Martin Mitchell represented the Revenue Department.

The Taxpayer operates a bar in Anniston, Alabama at which it sells liquor drinks, beer, wine, and some food items. Two Revenue Department examiners audited the Taxpayer for sales tax for July 2010 through June 2013, and requested the Taxpayer’s sales records, purchase invoices, bank statements, and other relevant records. The Taxpayer provided the examiners with some purchase records and bank statements, but no or only scattered sales records. It also provided binders that contained completed private club membership applications.

The examiners determined that the Taxpayer’s sales records were insufficient. One examiner consequently computed the Taxpayer’s taxable sales using the deposits shown in the Taxpayer’s bank records, less the sales tax. The other examiner computed the tax due using the purchase mark-up method. That is, she used purchase records she obtained from both the Taxpayer and some of the Taxpayer’s vendors to determine the

Taxpayer's total purchases during the subject period. She applied the standard IRS mark-up to arrive at the Taxpayer's estimated retail sales. She then computed the four percent sales tax due on those sales.

The additional tax due pursuant to the purchase mark-up method was greater than the tax due using the bank deposits method. The examiners decided to use the deposits method to be "a little bit more fair to the taxpayer . . . going with their deposits." (T. 52).¹

The owner testified that she bought the business from her brother in 2005, and that she just continued reporting her sales and paying the sales tax due the same as her brother had done. That is, she kept track of the whiskey, beer, wine, and food she purchased every month. She then calculated how much she would sell the products for at retail. She subsequently notified her CPA tax preparer of the amount of her taxable monthly sales. The tax preparer reported the sales and the total tax due in each month.

The Taxpayer's representative does not dispute that the Taxpayer failed to keep adequate sales records. He argues, however, that many of the bank deposits came from nontaxable sources. Specifically, the Taxpayer's owner testified that her health insurance policy with Blue Cross/Blue Shield was paid out of the business account, and that several family members were covered by the policy. She explained that the family members on the policy were required to pay their share of the lump-sum monthly premium, and that those payments were deposited into the account. The owner also claims that she cashed checks for customers that were later deposited; that some of the deposits were from nontaxable

¹ The additional tax due using the deposits method resulted in more than a twenty five percent underreporting. The examiners thus extended the audit period back to September 2007 pursuant to the six year assessment statute of limitations at Code of Ala. 1975, §40-2A-7(b)(2)b.

door receipts and membership fees; and that from time to time she also deposited her own money into the account to pay the building lease and various other expenses.

The Department examiners requested records verifying that some of the bank deposits were from nontaxable sources. The owner explained that she did not keep such records, i.e., the amounts of checks cashed, her personal deposits, etc., because she did not know she had to do so. And what records the owner maintained were mostly destroyed in a fire at the business location in February 2016.

All retailers subject to Alabama sales tax are statutorily required to keep complete and accurate sales, purchase, and other records from which their correct sales tax liability can be computed. Code of Ala. 1975, §§40-2A-7(a)(1) and 40-23-9. A retailer's duty to keep sales records is straightforward and simple. The retailer must record all sales on a cash register z-tape and/or on customer invoices or receipts, which may then be compiled onto a monthly sales journal. It is commonly understood that such records must be maintained to allow the Department to verify that the correct amount of sales tax has been reported and paid. See, generally *Johnson v. State of Alabama*, Docket S. 15-444 (T.T. 7/20/2015); *Adams v. State of Alabama*, Docket S. 14-339 (Admin. Law Div. 7/9/2014).

The individuals that testified for the Taxpayer at the August 4 hearing appear to be sincere and honest people that simply did not understand that they were required to keep accurate cash register z-tapes and/or other complete records showing the exact amount of their monthly retail sales and other taxable receipts.² But ignorance of the duty to keep

² Door or gate receipts for a specific entertainment event are subject to the public amusement gross receipts sales tax at Code of Ala. 1975, §40-23-2(2). Membership fees for membership in a private club are not taxable. See generally, *Department of Revenue v. Craft Development Corp.*, Docket S. 91-142 (Admin. Law Div. 10/22/91). ("The monthly

complete and accurate records does not relieve a taxpayer from the consequences for failing to do so.

The Taxpayer in this case admittedly failed to provide complete sales records. In such cases, the Department is authorized to compute a taxpayer's correct liability using the most accurate and complete information obtainable. Code of Ala. 1975, §40-2A-7(b)(1)a. The Department can also use any reasonable method to compute the liability, and the taxpayer, having failed in the duty to keep good records, cannot later complain that the records and/or method used by the Department is improper or does not reach a correct result. *Jones v. CIR*, 903 F.3d 1301 (10th Cir. 1990); *State v. Ludlum*, 384 So.2d 1089 (Ala. Civ. App.), cert. denied, 384 So.2d 1094 (Ala. 1980) ("A taxpayer must keep records showing the business transacted, and if the taxpayer fails to keep such records, the taxpayer must suffer the penalty for noncompliance").

Adams v. State of Alabama, Docket S. 14-339 (Admin. Law Div. 7/9/2014)

The Taxpayer's representative presented four exhibits after the August 4 hearing. Exhibit 1 is a group invoice issued by Blue Cross to the Taxpayer for March 18 to April 15, 2016. The invoice shows an insurance premium payment of \$2,866.50 for the preceding period, and a current amount due for the above period of \$2,995.36.

Exhibit 3 is a sampling of the Taxpayer's completed membership forms from 2002 through 2012 showing the members' names, the amount paid, and other relevant information. Exhibit 4 is a photograph of numerous membership notebooks that, according to the Taxpayer, were offered to but not reviewed by the examiners. The notebooks were smoke damaged, but not destroyed, in the February 2016 fire. The Taxpayer's representative offers to provide the notebooks to the Department for review at a mutually agreeable time and place.

memberships are not taxable because they are separate and distinct from the public golf facility and are not derived from a public activity.") *Craft Farms* at 4.

A single monthly invoice for a period after the audit period is not sufficient to substantiate the amount of the Taxpayer's health insurance premiums during the audit period. The Taxpayer is allowed until December 23, 2016 to obtain records or other evidence from Blue Cross showing the amount of health insurance premiums the Taxpayer paid for all or at least a part of the period in issue. The Taxpayer should also compute and then notify the Tribunal of the total annual membership dues paid during the period as reflected in the membership notebooks.

The above documents/information should be submitted to the Tribunal on or before the above date, and will be forwarded to the Department for review and response. If requested by the Department, the Tribunal will also direct the Taxpayer to provide the membership notebooks to the Department for review at the Department's Gadsden Taxpayer Service Center, or at another mutually convenient location.

This Opinion and Preliminary Order is not an appealable Order. The Final Order, when entered, may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2B-2(m).

Entered November 2, 2016.

BILL THOMPSON
Chief Tax Tribunal Judge

bt:dr

cc: Margaret Johnson McNeill, Esq.
Jason C. Odom, Esq.