

ALABAMA TAX TRIBUNAL

DAVID W. PROSCH,	§	
doing business as GYROGYM,	§	
	§	
Taxpayer,	§	DOCKET NO. COUNTY 17-106-CE
	§	
v.	§	
	§	
BALDWIN COUNTY	§	
SALES & USE TAX DEPARTMENT.	§	

FINAL ORDER

The Baldwin County Sales and Use Tax Department (“Department”) assessed David W. Prosch, doing business as Gyrogym, (“Taxpayer”) for sales tax for the periods of January 31, 2014 through December 31, 2016. The Taxpayer appealed to the Tax Tribunal pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a and §40-2B-2(g)(2). A hearing was conducted on May 3, 2018. Attorney David Conner represented the Department. The Taxpayer was notified of the hearing by letter to his authorized representative, Attorney Charles Hubbard, Jr., but failed to attend.

The Taxpayer owns and operates a universal fitness device known as a Gyrogym. The Gyrogym is a human-sized, therapeutic exercise apparatus that is designed to stretch the body by manipulating the machine to move in various directions. Because the Gyrogym is capable of moving at thrilling speeds, can rotate 360 degrees, and change directions quickly, the machine is also used for entertainment purposes.

The undisputed evidence indicates that the Taxpayer operated the Gyrogym at festivals and events in Baldwin County and along the Alabama Gulf Coast throughout the audit period. The Taxpayer charged event-goers a fee on a per-ride basis, and

occasionally operated the machine at events on a flat-fee basis. The Taxpayer also occasionally sold Gyrogyms at retail. It is undisputed that the Taxpayer failed to collect sales tax on the fees he charged for use of the Gyrogym or the gross proceeds of sales of the machines during the audit period.

The Department audited the Taxpayer to determine compliance with Baldwin County sales tax laws. As customary in sales and use tax audits, the Department requested that the Taxpayer provide it with all records necessary to determine the Taxpayer's tax liability. The Taxpayer refused to provide records of any kind. Consequently, the Department performed the audit using the best available information it could reasonably obtain. Specifically, the Department based its audit on an analysis of the gross proceeds from operation of amusement devices by four similar businesses in Baldwin County. The businesses were comparable to the Taxpayer's business in size and scope. Fortunately for the Taxpayer, the Department did not include the Taxpayer's sales of the machines in the audit, despite that the Taxpayer should have collected sales tax on those sales.

Specifically, the Department calculated the average monthly gross proceeds from the four similar businesses after removing the three highest and three lowest months. This monthly average sales figure was applied to each month in the audit period to determine the Taxpayer's total gross sales. The local sales tax rate was applied to gross sales to determine the Taxpayer's total sales tax liability for the audit period. The Taxpayer failed to pay the tax due and applicable interest, and the Department entered its final assessment on July 31, 2017, consisting of tax due in the amount of \$2,331.65,

interest in the amount of \$432.42, and penalties for failure to file returns and pay tax totaling \$2,149.80.

The Taxpayer timely appealed to the Tax Tribunal, asserting that the gross proceeds from his operation of the Gyrogym at festivals and events were not taxable and that the Department's audit calculations were not correct. The Department timely filed its Answer, arguing that the Taxpayer provides a place of amusement and that its gross proceeds are subject to tax pursuant to Code of Ala. 1975, §40-23-2(2). The Department also asserted that its audit methodology and resulting calculations should be upheld because they are based on the best information reasonably obtainable given the Taxpayer's failure to produce records that it is legally required to keep.

Among other situations, Alabama's sales tax is levied upon "every person, firm, or corporation engaged or continuing within this state in the business of conducting or operating places of amusement or entertainment, . . ., amusement devices, . . ., skating rinks, race tracks, golf courses, or any other place at which any exhibition, display, amusement, or entertainment is offered to the public. . . ." Ala. Code 1975, § 40-23-2(2). The so-called "amusement tax" is levied as a percentage of the business's "gross receipts." *Id.* Baldwin County's sales tax levy at issue here is identical to the State sales tax levy at §40-23-2. See Code of Ala. 1975, §45-2-244.101. Baldwin County has subjected their levy to the State's definition of relevant terms and phrases. *Id.*

The undisputed evidence clearly indicates that the Gyrogym operated by the Taxpayer fits within the category of "amusement devices." At the least, the place at which the machine was operated constituted "any other place at which any exhibition,

display, amusement, or entertainment [was] offered to the public.” As stated, the measure of the tax is “gross receipts,” which is defined by statute as “. . . *all* receipts actual and accrued. . . .” Ala. Code § 40-23-1(a)(8) (emphasis added). Further, Alabama Department of Revenue regulation 810-6-1-.125(1) states that “[t]he *total receipts* accruing from the operation of places of amusement or entertainment are subject to the sales tax.” Ala. Admin. Code 810-6-1-.125(1) (emphasis added). Therefore, the Taxpayer’s gross receipts from the operation of the Gyrogym, including receipts received on a flat-fee basis, are subject to the local sales tax.

All taxpayers liable for sales tax are required to keep complete records from which the Department can accurately determine their correct liability. Code of Ala. 1975, §§40-2A-7(a)(1) and 40-23-9; *State v. Mack*, 411 So.2d 799 (Ala. Civ. App. 1982). If a taxpayer fails to keep accurate records, the Department can use the best information available to compute the taxpayer’s liability. If the Department’s computations using the best information available are reasonable, the taxpayer cannot then complain that the liability so computed is inexact. *Jones v. CIR*, 903 F.2d 1301 (10th Cir. 1990); See also, *William T. Gibson v. State of Alabama*, P. 95-210 (Admin. Law Div. 1/26/96); and *State of Alabama v. Red Brahma Club, Inc.*, S. 92-171 (Admin. Law Div. 4/7/95).

In this case, the Taxpayer failed to produce a single record regarding its business and the gross proceeds resulting from his operation of and sales of Gyrogyms. Consequently, it is well-established that the Department can use the best information reasonably obtainable to determine the Taxpayer’s tax liability. A final assessment

based on that information is *prima facie* correct, and the burden is on the Taxpayer to prove the assessment was incorrect. Code of Ala. 1975, §40-2A-7(b)(5)c.

As indicated, the Taxpayer failed to appear at the May 3 hearing and failed to provide any business records to the Tax Tribunal from which its liability can be determined. The Taxpayer has offered no evidence to indicate that the information used to calculate the tax in the *prima facie* correct final assessment was not the best information reasonably available to the Department. Consequently, the Taxpayer has not met his burden of proving that the final assessment is incorrect.

The final assessment is affirmed. Judgment is entered against the Taxpayer for tax, penalties, and interest of \$4,913.87. Additional interest is also due from the date the final assessment was entered, July 31, 2017.

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

Entered August 7, 2018.

/s/ C. O. Edwards

CHRISTY O. EDWARDS

Associate Tax Tribunal Judge

cc: David J. Conner, Esq.
Heather Gwynn
Charles W. Hubbard, Jr.