

ALABAMA TAX TRIBUNAL

EDITH P. HUBBERT D/B/A CATTLE
ON A FLAME,

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Taxpayer,

§

DOCKET NO. S. 21-198-JP

v.

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§

OPINION AND FINAL ORDER

This appeal involves final assessments of state and local sales tax for periods September 1, 2014, through February 28, 2019. The case came before the Tax Tribunal for trial on March 7, 2023. Andrew Gidiere represented the Revenue Department. Marlene Ward, a Revenue Department auditor, appeared and testified. Neither the Taxpayer nor the Taxpayer’s representative appeared.

I. Facts

The Taxpayer operates a restaurant in Gordo, Alabama. Ms. Ward testified that the Revenue Department had conducted an audit of the Taxpayer and that she had reviewed the confidential audit report.

According to Ms. Ward, the Taxpayer stated on audit that she had discarded all sales records. Therefore, a classified purchase markup audit was performed by the Revenue Department. Ms. Ward testified that a classified markup involves the Revenue Department’s auditor determining what a taxpayer paid for inventory and the price for which the taxpayer sold the corresponding items. Those figures are

compared to determine the taxpayer's markup percentage, and that percentage is applied to the taxpayer's purchase amounts to determine taxable sales.

Here the Taxpayer's inventory purchases were obtained by examining vendor records, and the sales prices of the Taxpayer's food items were obtained from the Taxpayer's menu. Ms. Ward testified that the Taxpayer's sales markup was 147%, which was less than the standard markup that the Revenue Department used at that time, *i.e.*, 203%. According to Ms. Ward, the Taxpayer had underreported her taxes by 87%.

Ms. Ward testified that the Revenue Department assessed the fraud penalty because of the following: the Taxpayer failed to keep adequate records; the Taxpayer had no documentation to reflect the numbers listed on her returns; the Taxpayer knowingly and deliberately omitted items on the returns; the Taxpayer's purchases were approximately \$370,900 more than her reported sales; and the Taxpayer had a consistent pattern of underreporting by 87%.

II. Discussion

A. Assessment of Tax

According to the evidence in this case, the Taxpayer failed to provide any sales records to the Revenue Department on audit. When a taxpayer fails to provide complete sales records, the Revenue Department may compute that taxpayer's tax liability "using the most accurate and complete information obtainable." Jai Shanidev Inc. d/b/a Country Corner, S. 16-449 (Ala. Tax Tribunal 04/27/17); Ala. Code 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).

“The purchase mark-up audit is a simple, oft-used Department method of determining a taxpayer’s sales tax liability when the taxpayer fails to keep accurate sales records. See generally, GHF, Inc. v. State of Alabama, S. 09-1221 (Admin. Law Div. 8/10/10); Thomas v. State of Alabama, S. 10-217 (Admin. Law Div. O.P.O. 5/18/10); Alsedeh v. State of Alabama, S. 03-549 (Admin. Law Div. 11/3/04).”

Jai Shanidev Inc. d/b/a Country Corner , supra.

Because the Taxpayer here failed to maintain and produce sales records for the audit period, the Revenue Department applied a markup percentage that had been calculated from records specific to the Taxpayer’s business. Section 40-2A-7(b)(5)c.3, Ala. Code 1975, states the following: “On appeal ... to the Alabama Tax Tribunal, the final assessment shall be prima facie correct, and the burden of proof shall be on the taxpayer to prove the assessment is incorrect.” In this case, the Taxpayer failed to appear at the trial to present evidence to contest the accuracy of the assessment. Therefore, the Taxpayer has failed to meet her burden of showing that the tax component of the final assessment is incorrect.

B. Assessment of the Fraud Penalty

In her Notice of Appeal, the Taxpayer challenged the assessment of the fraud penalty. The Tax Tribunal has previously explained:

“Ala. Code § 40-2A-11(d) levies a 50 percent fraud penalty for any

underpayment of tax due to fraud. The burden of [persuasion] in an assessment of a fraud penalty falls on the Department. Ala. Code § 40-2B-2(k)(7). For purposes of the penalty, 'fraud' is given the same meaning as ascribed in the federal fraud provision, 26 U.S.C. §6663. Consequently, federal authority should be followed in determining if the fraud penalty applies. Best v. State, Dept. of Revenue, 423 So. 2d 859 (Ala. Civ. App. 1982).

"The existence of fraud must be determined on a case-by-case basis from a review of the entire record. Parks v. Commissioner, 94 T.C. 654, 660 (1990). Because fraud is rarely admitted, 'the courts must generally rely on circumstantial evidence.' U.S. v. Walton, 909 F. 2d 915, 926 (6th Cir. 1990). Consequently, fraud may be established from 'any conduct, the likely effect of which would be to mislead or conceal.' Id. The mere under-reporting of gross receipts is itself insufficient to establish a finding of fraud, unless there is evidence of repeated understatements in successive periods when coupled with other circumstances showing an intent to conceal or misstate sales. Barrigan v. C.I.R., 69 F. 3d 543 (1995).

"A taxpayer's failure to keep adequate books and records, a taxpayer's failure to furnish auditors with records or access to records, the consistent underreporting of tax, and implausible or inconsistent explanations regarding the underreporting are strong indicia of fraud. See Solomon v. C.I.R., 732 F. 2d 1459 (1984); Wade v. C.I.R., 185 F. 3d 876 (1999).... Ignorance is not a defense to fraud where the taxpayer should have reasonably known that its taxes were being grossly underreported. Russo v. C.I.00R., T.C. Memo 1975-268; Temple v. C.I.R., 67 T.C. 143 (1976)."

"Any retailer should know with certainty that sales records must be maintained for audit purposes...."

E&Z, Inc., v. State of Alabama Department of Revenue, 19-989-LP (Ala. Tax Tribunal 1/12/22).

In this case, Ms. Ward testified that the Revenue Department assessed the fraud penalty because of the following: the Taxpayer failed to keep adequate records; the Taxpayer had no documentation to reflect the numbers listed on her returns; the Taxpayer knowingly and deliberately omitted items on the returns; the Taxpayer's

purchases were approximately \$370,900 more than her reported sales; and the Taxpayer had a consistent pattern of underreporting by 87%. Considering the totality of the evidence in this case, the Revenue Department has met its burden of proving fraud.

Conclusion

The final assessments of state and local sales tax are upheld. Judgment is entered against the Taxpayer and in favor of the Revenue Department in the amounts of \$39,919.64 in local sales tax and \$79,248.53 in state sales tax, plus additional interest that continues to accrue from the date of entry of the final assessments until the liabilities are paid in full.

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

Entered March 10, 2023.

/s/ Jeff Patterson

JEFF PATTERSON

Chief Judge

Alabama Tax Tribunal

jp:ac

cc: John Aaron, Esq.
Edith P Hubbert, d/b/a Cattle on a Flame
Andrew Gidiere