

JOSEPH OLAJUBUTU  
d/b/a JET PEP 64  
2310 S. BROAD AVENUE  
LANETT, AL 36863-3115,

Taxpayer,

v.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 10-343

### FINAL ORDER

The Revenue Department assessed Joseph Olajubutu (“Taxpayer”), d/b/a Jet Pep 64, for State sales tax for September 2006 through April 2009. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on August 12, 2010. The Taxpayer attended the hearing. Assistant Counsel Wade Hope represented the Department.

The Taxpayer owned and operated a convenience store near Lanett, Alabama during the period in issue. He took over the business from the prior owner in September 2004.

The Department audited the Taxpayer’s business and requested records from which his sales tax liability for the audit period could be computed/verified. The Taxpayer provided the Department examiner with cash register z-tapes, purchase invoices, daily sales reports, tax returns, and some bank records.

The examiner reviewed the z-tapes and determined that approximately one-half were missing. The examiner testified at the August 12 hearing that the business operated two shifts on a normal day – from 6:00 a.m. to 2:00 p.m. and from 2:00 p.m. to 10:00 p.m. He explained that the z-tapes provided by the Taxpayer included only one of the daily

shifts, with some few exceptions where tapes for both shifts were provided. The Taxpayer's sales as recorded in his sales journal closely reflected the sales totals shown on the partial z-tapes.

Z-tapes for at least part of each day were provided for the period July 2008 through April 2009. The examiner thus computed the Taxpayer's liability for that period using the available z-tapes. He then compared the tax due for that period to what the Taxpayer had paid on his returns for the period, which showed a 221 percent margin of error. The examiner applied that margin of error to compute the tax due for the prior period, September 2006 through June 2008, for which complete z-tapes were not provided.

The examiner testified that the tax due as computed above reflected a 66 percent mark-up. That mark-up amount approximated the standard 59 percent IRS mark-up for convenience stores used by the Department. The taxable gross receipts as computed by the examiner also approximated the gross receipts as reported by the Taxpayer on his 2006, 2007, and 2008 income tax returns.

The Taxpayer is from Nigeria. He explained that he had never operated a retail or any other type of business before he took over the convenience store in September 2004. He testified that he was unfamiliar with sales tax when he went into business, and that the prior owner took him to an accounting service, C & C Bookkeepers in Lanett, Alabama, for help. According to the Taxpayer, the accounting service told him to keep his cash register tapes together, and that they would pick them up once a month, prepare his monthly return, and then give him the return for filing.

The Taxpayer explained that he sometimes worked both shifts at the store, but that he usually worked the second shift and another individual worked the first shift. He claimed

that he always put the used z-tapes in a box at the store, and that he assumed that the individual that worked the other shift did the same.

The Taxpayer argued at the August 12 hearing that he did not understand sales tax, and that he only did what he was instructed to do by his accounting service.<sup>1</sup> He assumed that the individual that worked with him at the store also put the tapes in the box where they were kept, but he was not sure. He claimed that the store, which is now closed, lost money, and that he and his wife had to borrow money to keep it open.

If the Department determines that the amount of tax shown on a return is incorrect, it is authorized to compute the taxpayer's liability using the best information available. Code of Ala. 1975, §40-2A-7(b)(1)a. The Taxpayer's returns in this case were clearly incorrect because they were based on only approximately one-half of the store's cash register tapes. The Department examiner thus correctly computed the Taxpayer's liability by using the z-tapes for a period (July 2008 through April 2009) for which the store's true liability could be determined, and then projected the estimated liability for that period over the remaining audit period. The tax due as assessed is affirmed.

The remaining issue is whether the fraud penalty is applicable. The Administrative Law Division has affirmed the fraud penalty in numerous sales tax cases because the evidence clearly established that the taxpayers in those cases had knowingly and intentionally underreported their tax liability to the Department. See generally, *GHF, Inc. v.*

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<sup>1</sup> The Department examiner talked to the individual at the accounting service that prepared the Taxpayer's taxes. She confirmed that they would go by the Taxpayer's store every month, get the z-tapes maintained by the store, and use the tapes to prepare the store's sales tax return. She explained that she never questioned whether the Taxpayer gave her all of the z-tapes, and simply assumed that he had.

*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).

The Department assessed the fraud penalty in this case because the Taxpayer had substantially underreported his sales on his monthly sales tax returns. The Department audit report explained why the fraud penalty was applied.

The Taxpayer stated that he had no knowledge of what records were to be kept. The Taxpayer recorded in his sales ledger the z-tape figures from only one shift each day. These same sales ledgers were given to his bookkeeper and used to report and remit the tax. The Taxpayer had under reported his tax by more than 68%.

Department Ex. 1 at 3.

The fraud penalty applies in this case if the Taxpayer knowingly and intentionally underreported his sales tax liability on his monthly returns. As indicated, the Taxpayer maintained and provided to his bookkeeper z-tapes for only one of the two daily shifts at his store. It is obvious from a review of the tapes that approximately one-half are missing. If the Taxpayer had intentionally destroyed or discarded the missing z-tapes, he should have known that his actions would have been easily discovered when the Department reviewed the remaining tapes. That is, he made no attempt to hide the fact that the z-tapes were incomplete. If the Taxpayer had intended to underreport his sales, he simply could have not rung up some sales on his cash register instead of later destroying some of the tapes.<sup>2</sup>

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<sup>2</sup> If a taxpayer intentionally fails to ring up a substantial amount of sales in an attempt to evade tax, the Department can usually uncover the fraud by use of a purchase mark-up audit.

The Taxpayer also apparently reported his correct gross receipts on his income tax returns for the subject years because the store's gross sales per the Department audit approximated the amounts reported on those returns. There is no evidence explaining what records the Taxpayer's tax service used to compute his gross receipts for income tax purposes. But the fact that he correctly reported his gross receipts on his income tax returns but not on his sales tax returns, an easily discoverable discrepancy, further shows that he did not knowingly underreport for sales tax purposes.

Anyone guilty of fraud generally makes some attempt to cover up or hide their fraudulent activities. Consequently, in most sales tax fraud cases, the taxpayer fails to provide the Department with any sales records. In such cases, however, the fraud is easily discovered through the use of a purchase mark-up audit. 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); *Arnold v. State of Alabama*, S. 03-1098 (Admin. Law Div. 7/27/04); *Moseley's One Stop, Inc. v. State of Alabama*, S. 03-316 (Admin. Law Div. 7/28/03).

Fraud must be determined from the facts and circumstances of each particular case. In this case, the Taxpayer is from a foreign country and was unfamiliar with the sales tax. He also made no attempt to hide his actions, as evidenced by the fact that he reported his correct annual gross sales on his annual income tax returns. If the Taxpayer had knowingly intended to underreport his sales, it is reasonable to assume that he would report the same volume of sales for sales tax purposes as he did for income tax purposes. Under the unusual circumstances of this case, the fraud penalty is inapplicable, and instead the five percent negligence penalty at Code of Ala. 1975, §40-2A-11(c) should apply.

The final assessment, less the fraud penalty and plus the negligence penalty, is affirmed. Judgment is entered against the Taxpayer for State sales tax, the negligent penalty, and interest of \$31,091.25. Additional interest is also due from the date the final assessment was entered, March 3, 2010.

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

Entered January 28, 2011.

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BILL THOMPSON  
Chief Administrative Law Judge

bt:dr

cc: J. Wade Hope, Esq.  
Joseph Olajubutu  
Joe Cowen  
Mike Emfinger