

FRONTIER AMUSEMENTS, INC. §
103 W. RIDGE ROAD
JASPER, AL 35504

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. S. 10-947

v.

§

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

§

FOURTH PRELIMINARY ORDER SETTING HEARING

This appeal involves a final assessment of rental tax for 3/1/2008 through 8/31/2009 entered against the above Taxpayer. A hearing was scheduled for March 17, 2011. The parties agreed, however, that a conference should be conducted in lieu of a formal evidentiary hearing. Lance Webster and Ashley Neese represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

The Department audited the Taxpayer for lease tax and determined from information obtained from the Walker County business license office that the Taxpayer had leased electronic bingo machines to a gaming establishment in Walker County from March 2008 through August 2009. The Taxpayer had failed to file Alabama lease tax returns with the Department for that or any other period.

The Department requested copies of lease agreements and all other relevant records from the Taxpayer. The Taxpayer failed to provide the records, and the Department consequently used the Taxpayer's 2008 income tax return to compute the Taxpayer's average monthly lease receipts in 2008. It then projected the average 2008 monthly receipts through August 2009, and assessed the Taxpayer accordingly. The Taxpayer appealed.

The Taxpayer initially argued that its 2008 income tax return the Department used to estimate its liability was incorrect. It now concedes that the tax due as assessed for 2008 is correct. It contends, however, that it did not operate in 2009, and consequently, that tax was incorrectly assessed for that year.

The Department agreed at the March 17 conference that it would shorten the assessment period if the Taxpayer provided records showing that the Taxpayer had ceased operating before August 2009.

The Taxpayer subsequently provided bank records for 2009 from its account at the First National Bank of Jasper. The Department responded by letter dated October 5, 2011 that the bank records were insufficient.

The information submitted is not sufficient to prove Taxpayer's claim that they did not operate in 2009. Because the Taxpayer had related companies and other bank accounts, these other accounts could have been used to combine business activities. Furthermore, it is not uncommon in these cases to operate with cash and not use a bank account. The Taxpayer never provided the requested lease contracts, bank records, general ledger, etc. for any of the operating period. The Taxpayer should not be rewarded for not providing records. Taxpayer was also reluctant to provide records for the true business operations because of other ongoing bingo cases. The owners are the same for both Blackwater Charity Bingo and the Taxpayer. Blackwater Charity Bingo continued to operate until October 2009. They reorganized in August 2009 in order to temporarily remain open during the ongoing bingo case with Judge Vance. At that time they created another separate entity (Blackwater Entertainment LLC) to sub-lease the electronic bingo machines. The Department initially accounted for the reorganization and set up a liability for the new created entity from the time they were organized (August 2009) through October 2009. If there was an additional entity involved other than Taxpayer or Blackwater Entertainment LLC or if the audit periods were incorrectly assigned for the entities the owners should know and should be able to provide the Department with that information. Again, the owners are the same for both the Blackwater Charity Bingo, the lessee who rented the machines, and the Taxpayer, the lessor of the bingo machines. Both have repeatedly refused to provide the Department with the requested information. Therefore, the Department used the best information

available to complete the examination. The Taxpayer was given five months to provide the requested records, and then allowed additional time to the March 17, 2011 conference. The Taxpayer simply provided seven pages of bank statements, which is not sufficient to adjust the initial assessment. Therefore, the final assessment is due to be affirmed.

The Taxpayer has responded that the bank records should be sufficient to prove that it did not operate in 2009, and that it cannot and should not be required to prove a negative.

A final assessment is presumed to be *prima facie* correct on appeal, and the burden is on the taxpayer to prove that a final assessment is incorrect. Code of Ala. 1975, §40-2A-7(b)(5)c. The final assessment must, however, be “based on some evidentiary minimum foundation. Where the government’s assessment has no factual basis, the usual presumption of correctness does not apply. *United States v. Janis*, 96 S.Ct. 3021 (1976); *Weimerskirch v. CIR*, 596 F.2d 358 (1979); *Leonard Jackson v. C.I.R.*, 73 T.C. 394 (1979); *Denison v. CIR*, 689 F.2d 771 (1982); *Yoon v. CIR*, 135 F.3d 1007 (5th Cir. 1998).” *Dial Bank v. State of Alabama*, Docket Inc. 95-289 (Admin. Law Div. O.P.O. 8/10/1998) at 19, 20.

As indicated, the Department assessed the Taxpayer for the period March 2008 through August 2009 based on information obtained from the Walker County business license office. Exactly what information the Department relied on is not in evidence, but if such evidence in fact shows that the Taxpayer was operating through August 2009, then the burden shifts to the Taxpayer to present evidence showing that the final assessment is incorrect, i.e., that it did not operate and lease machines in Alabama in 2009. I agree with the Department that the bank records submitted by the Taxpayer are alone not sufficient.

The Taxpayer apparently leased the machines to Blackwater Charity Bingo, which,

according to the Department, is also owned by the Taxpayer's owners. The Department claims that Blackwater Charity Bingo continued operating until October 2009, although apparently it operated as a different entity, Blackwater Entertainment LLC, from August until October 2009. If Blackwater continued operating into 2009, it presumably continued leasing bingo machines from either the Taxpayer or another entity in 2009. If Blackwater rented machines from another entity in 2009, it should have records identifying the lessor other than the Taxpayer from which it leased the machines. Because Blackwater Charity Bingo is owned by the same individuals that own the Taxpayer, those individuals should have proof supporting their claim that the Taxpayer did not lease the machines to Blackwater in 2009. At the least, those individuals could testify under oath concerning the Taxpayer's business activities, or lack thereof, in 2008 and 2009.

To allow the Taxpayer to present testimony and/or other evidence showing that it did not lease the machines in Alabama in 2009, a hearing is scheduled for January 5, 2012 at **1:00 p.m., January 5, 2012 at the Department's Jefferson/Shelby Taxpayer Service Center, 2020 Valleydale Road, Suite 208, Hoover, Alabama.** The Department should also present any evidence at the hearing supporting its claim that the Taxpayer operated until August 2009.

Entered November 30, 2011.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

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Joe Walls

Mike Emfinger