

ANTHONY L. & PAMELA D. WHALEY §
6412 THISTLE LANE NW
HUNTSVILLE, AL 35810-1457, §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayers, §

DOCKET NO. INC. 12-614

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

FINAL ORDER

The Revenue Department assessed Anthony L. and Pamela D. Whaley (“Taxpayers”) for 2008 and 2009 Alabama income tax. The Taxpayers appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on October 11, 2012. Anthony Whaley (individually “Taxpayer”) attended the hearing. Assistant Counsel Margaret McNeill represented the Department.

The Taxpayers filed joint 2008 and 2009 Alabama income tax returns on which they claimed business-related travel deductions of \$40,098 and \$77,680, respectively. The Taxpayer testified at the October 11 hearing that he incurred the mileage expenses in connection with his work as an independent financial services provider for Primerica, a corporation located in Duluth, Georgia. The Taxpayer earned \$246 and \$396 from that activity in 2008 and 2009, respectively.

The Department audited the Taxpayers’ 2008 and 2009 Alabama returns and requested records substantiating the business-related travel deductions. The Taxpayer provided the Department with six page computer printouts for both 2008 and 2009. The 2008 printout showed that the Taxpayer took 129 business trips in the year and traveled a total of 74,443 miles. It showed a date for each trip, the destination, i.e., Warrenton, Missouri, St. Louis, Missouri, Columbus, Georgia, Jacksonville, Florida, etc., the reason for

the trip, i.e., "PFS Training Roundtrip," and the miles traveled. The 2009 printout showed 150 business trips in the year and 141,235 total miles traveled. Sixty of the trips were to St. Louis, Missouri, and 72 were to Jacksonville, Florida. Again, the reason given for all to the trips was "PFS Training Roundtrip."

The Department disallowed the mileage expenses because it determined that the Taxpayer's activities were not for profit. In deciding if a taxpayer's activities are "for profit," the Department generally applies the nine factors set out in Treas. Reg. §1.183-2. See generally, *McMurtrey v. State of Alabama*, Docket Inc. 11-857 (Admin. Law Div. 6/5/2012).

The Department examiner that audited the Taxpayers analyzed the nine factors as they related to the Taxpayer's activities, as follows:

(1) The manner in which the taxpayer carries on the activity.

The taxpayer reports very minimal gross receipts and only one substantial expense for extensive travel to various cities for continuous training for the years in question. The taxpayer maintains the minimal requirements for the mileage log and no other verifying documentation to establish his presence in these areas. The taxpayer has not provided a business plan nor a financial and economic forecast. After sustaining years of losses, the taxpayer has not made adjustments to his business operations and practices in an effort to improve the profitability of the company.

(2) The expertise of the taxpayer or his advisor.

The mileage logs presented by the taxpayer report travel for training of approximately half a month each month. The taxpayer stated he has been in insurance sales since 1993 and received his security license in 2003. The reimbursement letter from Primerica Financial Services states Mr. Whaley has been affiliated with their company since 1986. However, the returns on our systems (2003 - 2011) report a loss on the Schedule C business for each tax year.

(3) The time and effort expended by the taxpayer in carrying on the activity.

Per the mileage logs submitted, the taxpayer travels for training to various cities at a frequency of approximately 12 -16 days each month. The majority of the trips are reported as round-trip mileage between 800 and 1100 miles at 70 mph. Using the taxpayer's calculation, the trip to Jacksonville, FL of 1108 miles would take 16 hours without stops. The Chamber of Commerce of Huntsville provides a Mileage and Drive Time to Major Cities estimate which reports the trip would take 9 hours and 25 minutes, one way. This time does not include stops for fuel, food, traffic delays, etc. Round trip time, without the aforementioned delays, would be 18 hours and 50 minutes. Very little time would be allotted to the training referred to on the mileage log, since a majority of each day is spent traveling to and from the destinations. Additionally, the taxpayer also maintained a part-time job while operating his business and traveling so frequently.

(4) Expectation that assets used in the activity may appreciate in value.

The taxpayer does not hold any assets in this business.

(5) The success of the taxpayer in carrying on other similar activities.

The taxpayer has no other known previous activities.

(6) The Taxpayer's history of income or losses with respect to the activity.

For the years audited, the taxpayer reported losses of (\$39,852.00) and (\$77,284.00), respectively. The taxpayer also reported Schedule C business losses relating to this activity of (\$15,994.00), (\$18,732.00), (\$28,034.00), (\$27,082.00), and (\$19,158.00) for years 2003, 2004, 2005, 2006, and 2007.

(7) The amount of occasional profits earned, if any.

The business has not earned a profit since its inception. The taxpayer cannot reasonably expect to make a profit with mileage of that magnitude when Primerica Financial Services states on their own website they "paid a total of \$503,115,928 in compensation to the sales force at an average of \$5,296 per licensed representative."

(8) The financial status of the Taxpayer.

The returns filed for the years in question are joint returns. The taxpayer earned wages of \$2,142.00 and \$12,425.00 for years 2008 and 2009. The taxpayer's spouse earned wages of \$58,970.00 and \$85,283.00 for years

2008 and 2009. The taxpayer's spouse also received 1099 distributions of \$11,567.00 and \$16,277.00 for years 2008 and 2009. Together, the taxpayers earn more than enough income to support their household and this income is being offset with by the non-monetary losses from the taxpayer's activity of insurance sales. These losses create a taxable benefit for the taxpayers by reducing their tax liability. The financial status of the taxpayers has enabled the taxpayer to sustain a history of losses in this activity.

(9) Elements of personal pleasure or recreation.

Taxpayer travels to various distant cities from his place of residence for this activity, including Atlanta, GA, Birmingham, AL, Chattanooga, TN, Columbus, GA, Jacksonville, FL, Nashville, TN, St. Louis, MO, and Warrent, MO at a frequency of approximately 12 -16 days each and every month. Some areas where the taxpayer travels on a regular basis are places of or near previous residences.

The Department's audit report, Department Ex. 1, also shows that the Taxpayer reported income from his financial services activities of \$410, \$556, \$327, \$176, \$624, \$246, and \$396 in the years 2003 through 2009, respectively. Against that meager income, the Taxpayer claimed business-related travel expenses of \$14,834, \$16,417, \$26,096, \$27,258, \$19,782, \$40,098, and \$77,680, respectively, in those years.

Given the miniscule income derived from the activity when compared to the expense claimed, in addition to the above nine factor analysis by the examiner, which I agree with, I must conclude that the Taxpayer's so-called "financial services" activity was not for profit. The travel expenses claimed by the Taxpayers were thus correctly disallowed.

Even if the activity was for profit, the travel expenses would still be disallowed because they were not properly verified.

Pursuant to Code of Ala. 1975, §40-18-15(a)(20), Alabama has adopted the strict recordkeeping requirements in 26 U.S.C. §274. That section requires contemporaneous

records showing the miles traveled, the specific destination and time of travel, and importantly, the business purpose for the travel.

The Taxpayer's records show a date and the city traveled to, but they do not show the exact location the Taxpayer allegedly traveled to, and importantly, they do not show who the Taxpayer met with on each trip. Rather, the stated business purpose for all 279 trips over the two year period was "PFS Training." The Taxpayer claims he is in the financial services business, which presumably would include selling life insurance, giving investment advice, etc. The Taxpayer has not proved how the 279 trips for "training" would constitute an ordinary and necessary business expense for a financial services provider.

The Taxpayer's records also show that he drove the exact number of miles when he traveled to the same city during the two years in issue. For example, he claims he traveled exactly 1,108 miles on his 72 round trips to Jacksonville, Florida in 2009. If he had "trained" different individuals, certainly he would have done so at different locations in the city. The records also show that the Taxpayer made all of the roundtrips in a single day. If the Taxpayer traveled at an average speed of 60 miles per hour, including stops for fuel, gas, bathroom breaks, etc., it would have taken the Taxpayer over 18 hours to travel from his home in Huntsville to Jacksonville, Florida and back. That obviously would have left little if any time for him to conduct "training" while at the location. I agree with the Department's audit report, which states in part:

Per the mileage logs submitted, the taxpayer travels for training to various cities at a frequency of approximately 12 – 16 days each month. The majority of the trips are reported as round-trip mileage between 800 and 1100 miles at 70 mph. Using the taxpayer's calculation, the trip to Jacksonville, FL of 1108 miles would take 16 hours without stops. The Chamber of Commerce of Huntsville provides a Mileage and Drive Time to

Major Cities estimate which reports the trip would take 9 hours and 25 minutes, one way. This time does not include stops for fuel, food, traffic delays, etc. Round trip time, without the aforementioned delays, would be 18 hours and 50 minutes. Very little time would be allotted to the training referred to on the mileage log, since a majority of each day is spent traveling to and from the destinations. Additionally, the taxpayer also maintained a part-time job while operating his business and traveling so frequently.

In summary, there is no evidence, other than the Taxpayer's unsupported testimony, that the 279 "training" trips the Taxpayer took in the subject years were ordinary and necessary business trips, and thus deductible. The Taxpayer's records are also insufficient because they do not show the address he visited in the various destinations or the individual or individuals that he allegedly "trained" at the locations. Nor did he explain how he could travel great distances in a given day and still have time to conduct training at the locations.

The business-related travel expenses were correctly disallowed. The final assessments are affirmed. Judgment is entered against the Taxpayers for 2008 and 2009 tax, penalties, and interest of \$2,277.36 and \$3,264.95, respectively. Additional interest is also due from the date the final assessments were entered, May 2, 2012.

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

Entered February 6, 2013.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: Margaret Johnson McNeill, Esq.
Anthony L. Whaley
Brenda Lausane