

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

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DOCKET NO. S. 87-104

HOWARD H. STRICKLAND, JR.
1300 Water Street
Selma, AL 36701,

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Taxpayer.

§

FINAL ORDER

The Revenue Department assessed State and City of Selma sales tax against Howard H. Strickland, Jr. (Taxpayer) for the years 1982 and 1983. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on April 30, 1991. John W. Kelly, III, Esq. represented the Taxpayer. Assistant counsel Dan Schmaeling, Esq. appeared for the Department. This Final Order is based on the evidence and arguments presented by both parties.

FINDINGS OF FACT

The Taxpayer operated three businesses during 1982 through 1984, the Warehouse Package Store and Club and Major Grumbles in Selma and the Historic Warehouse Package Store in Greenville. The Greenville store opened in July 1984.

The Department audited the Taxpayer for sales tax and determined that the Taxpayer's records were insufficient to properly complete the audit. Consequently, the Department conducted a cash flow audit using the Taxpayer's partial records as supplemented by vendor records. Bank deposits (less loans) were added to cash expenditures to arrive at taxable gross proceeds. No estimates were

involved. The assessments in issue are based on the audit and the Department also added a 25% fraud penalty.

The Taxpayer's primary argument is that he should be allowed a 48% deduction on his bottled whiskey sales based on State, Department of Revenue v. B & B Beverage, 534 So.2d 1114 (1987). That case holds that package stores can deduct from their gross proceeds subject to sales tax the 48% whiskey excise tax charged by the ABC Board. The Taxpayer contends that the Department has his records from which his bottled whiskey sales, and thus the amount of the 48% deduction, can be determined for the subject years.

The Department concedes that the Taxpayer should be allowed a deduction for the whiskey excise tax, but points out that the Taxpayer has not provided sufficient records from which his bottled whiskey sales can be computed. The Department acknowledges that the Special Investigations Division was given some of the Taxpayer's records in late 1985 but that those records were returned to the Taxpayer in January 1986.

The Department added the fraud penalty because the Taxpayer substantially underreported his gross receipts during the subject years and also pled guilty to criminal tax fraud concerning the year 1984. The Taxpayer was not charged with criminal fraud concerning 1982, or 1983 because the criminal fraud statute under which the Taxpayer was charged became effective January 1, 1984. The Department contends that the guilty plea concerning 1984

conclusively establishes fraud for the prior years 1982 and 1983.

CONCLUSIONS OF LAW

All taxpayers are required to keep adequate records necessary to allow the Department to determine the correct amount of tax due. Code of Ala. 1975, §40-23-9, see also, State v. T. R. Miller Mill Co., 130 So.2d 185; State v. Mack, 411 So.2d 799.

In this case, the Taxpayer failed to keep proper records and the Department was required to determine the Taxpayer's liability using an indirect cash flow audit. The audit was properly conducted using the Taxpayer's partial records as supplemented by records from the Taxpayer's vendors. The Taxpayer has failed to present any records disputing the Department's audit and has failed to establish how much deduction should be allowed for the 48% whiskey tax. In such cases, the Department's computations must be upheld. State v. T. R. Miller Mill Co., supra.

Concerning the fraud issue, the Department contends that the Taxpayer's guilty plea to criminal fraud concerning 1984 also proves that the Taxpayer is guilty of fraud in 1982 and 1983.

The Department is correct that a guilty plea to criminal fraud charges conclusively establishes civil fraud. Gray v. C.I.R., 708 F.2d 243. However, a criminal fraud conviction establishes civil fraud only relating to the period involved in the criminal action. Proof of fraud in one year does not establish that fraud was also committed in an earlier or later

year. Consequently, the Taxpayer's 1984 guilty plea to criminal fraud is not conclusive relating to 1982 and 1983. Further, the Department has failed to provide evidence of fraud other than an underreporting of gross proceeds. That alone is insufficient to establish fraud by the necessary clear and convincing evidence and therefore the fraud penalties should be voided.

The above considered, the fraud penalties should be removed and the assessments as adjusted should be made final, with applicable interest.

Entered on July 3, 1991.

BILL THOMPSON
Chief Administrative Law Judge