

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. 89-250

LILLIE L. BISHOP
d/b/a Dreamland Cafe
Route 4, Box 644
Tuscaloosa, AL 35405,

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Taxpayer.

FINAL ORDER

The Revenue Department assessed sales tax against Lillie L. Bishop, d/b/a Dreamland Cafe (Taxpayer), for the period January 1, 1983 through December 31, 1986. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on April 17, 1991. Attorney Jon M. Turner, Jr., Esq. and CPA Carl P. Jamison, Esq. appeared for the Taxpayer. Assistant counsel Dan Schmaeling, Esq. represented the Department. This Final order is based on the evidence and arguments presented by both parties.

FINDINGS OF FACT

The Taxpayer operated a cafe and sold ribs, beer, soft drinks and snack foods during the period in issue. The Taxpayer reported and paid sales tax to the Department as follows: Each month the Taxpayer or an employee of the business would take some of the Taxpayer's purchase invoices in a paper sack to the Department's Taxpayer Service Center in Tuscaloosa. A Department employee would total the invoices, add a 25% markup, and thereby compute the Taxpayer's gross proceeds. The Taxpayer would then pay the tax due as computed by the Department.

The Taxpayer was subsequently indicted on 15 counts of income and sales tax fraud or evasion involving the years 1983-1986. The Taxpayer initially pled not guilty to the charges, but due to poor health and other considerations changed her plea to guilty on seven counts, including willfully filing false sales tax returns for 1985 and 1986.

The Department also audited the Taxpayer for sales tax for the years 1983 through 1986. The Taxpayer admittedly failed to maintain proper sales records for the subject period. Consequently, the Department conducted the audit based on records obtained from the Taxpayer's vendors. The Department determined from those records that the Taxpayer had underreported purchases by 54.87% in 1983, 71.83% in 1984, 75.10% in 1985 and 79.27% in 1986, for an average of 70.51% over the four year period. The Department assessed additional tax based on the vendor's records and also added a 25% fraud penalty.

The primary issues in dispute are (1) the method by which the Department computed the Taxpayer's rib sales, and (2) the fraud penalty.

The Department reconstructed the Taxpayer's rib sales as follows: The Taxpayer purchased ribs in 30 pound boxes. Each box contained individual slabs weighing up to 3.5 pounds each. The Department divided 30 by 3.5 and determined that each box contained approximately 8.5 saleable slabs. The Department then multiplied the total number of slabs by the price charged by the Taxpayer to

determine the gross proceeds derived from the rib sales.

The Department subsequently reduced the slabs per box to 7.5, as initially argued by the Taxpayer (see Department's Ex. 2, letter from Jamison dated October 26, 1989), and also allowed 5% for spoilage and theft. The Taxpayer now contends that each box contained less than 7.5 saleable slabs and also that at least 15% should be allowed for spoilage and theft.

Concerning the fraud issue, the Taxpayer argues that the guilty plea in the criminal action does not constitute prima facie evidence of fraud. Rather, the Taxpayer contends that the fraud penalty should be deleted because the Department has failed to prove that the Taxpayer intentionally underreported her sales tax during the period in question.

CONCLUSIONS OF LAW

All taxpayers are required to keep sales records sufficient to allow the Department to accurately compute the taxpayer's sales tax liability. See, Code of Ala. 1975, §40-23-9. In this case, the Taxpayer admittedly failed to keep proper records and attacks the Department's computations based on oral testimony and estimates. However, the Department is not obligated to rely on verbal assertions where a taxpayer has failed to keep accurate records. State v. T. R. Miller Mill Co., 130 So.2d 185. In such cases the Department is authorized to compute the taxpayer's liability using the best information available. See, Mallette

Bros. Const. Co. Inc. v. U.S., 695 F.2d 145, and Webb v. CIR, 394 F.2d 366.

The Department's method for computing the Taxpayer's rib sales is reasonable under the circumstances and must be upheld. The Department initially argued that each box contained 8.5 slabs, but subsequently accepted the Taxpayer's 7.5 figure and also conceded a 5% spoilage and theft allowance. The Department's estimates are reasonable and should not be altered based on unsupported estimates and conjecture.

Concerning the fraud issue, the Taxpayer is correct that while her guilty plea to criminal tax evasion can be considered in a subsequent civil suit as evidence of fraud, it does not conclusively establish fraud. See, Cups Coal v. Tenn. River Pulp Co., 519 So.2d 932. The taxpayer's guilty plea in Gray v. CIR, 708 F.2d 243, conclusively established fraud only because the taxpayer admitted fraud in open court. In this case, the Taxpayer has denied fraud throughout the proceedings and pled guilty in the criminal case only because of extenuating circumstances.

Nevertheless, fraud can be established by circumstantial evidence. Bradford v. CIR, 796 F.2d 303. A consistent underreporting of tax and the maintenance of poor or inadequate records may constitute fraud. Biggs v. CIR, 440 F.2d 1.

In this case, the Taxpayer admittedly failed to keep records and also consistently underreported her purchases to the Department by over 70% during the subject period. The Taxpayer certainly knew

or should have know that she was not providing all of her purchase invoices to the Department. That evidence in conjunction with the Taxpayer's guilty plea in the criminal case is sufficient to establish by clear and convincing evidence that the Taxpayer willfully and knowingly underreported her sales tax during the subject period. Accordingly, the fraud penalty was properly applied by the Department and should be upheld.

The above considered, the assessments in issue should be made final as entered, with applicable interest.

Entered on June 17, 1991.

BILL THOMPSON
Chief Administrative Law Judge