



taxable sales by 58%. Mr. Thompson testified that he did not consider the Taxpayer's EBT sales in the audit because those transactions are not taxable. Mr. Thompson also testified that he conducted a shelf test and, based on that shelf test, he concluded that the 35% markup was an accurate markup for the Taxpayer's store.

Mr. Sow testified that he believes that the auditor failed to give the Taxpayer credit for nontaxable Electronic Banking Transactions ("EBTs"). He stated that the difference between the amount of sales he reported and the Revenue Department's calculation of taxable sales is close to the amount of EBTs the Taxpayer received.

Mr. Sow also testified that his store had a lower profit margin than the Revenue Department assumed because the store is in a low-income area. According to Mr. Sow, his overall profit percentage is approximately 12-15%. He testified that two-thirds of his sales are beer and tobacco, which have an average markup of 10%. He further testified that one-third of his sales are food. According to Mr. Sow, 80% of the food he sells is purchased with food stamps.

Mr. Sow stated that he has only one cash register and that every sale is recorded by a scanner connected to that register. He testified that he ran monthly reports from the cash register when he was in the United States. However, he stated that he had traveled to West Africa for months at a time to care for his ill mother. During those times, no monthly reports were run unless his wife came to the store and ran a report. He admitted that there were some months for which there were no sales records available. Additionally, he admitted that he did not provide the Revenue Department with bank statements or income tax returns.

Mr. Sow testified that the store has had issues with theft and that the cashiers are sometimes involved in that theft. However, he testified that he had no way to document the theft.

Mr. Sow also stated that he obtained money to purchase more store inventory than he sold by selling one of three homes that he owned. He testified that he did not realize profits from the business. According to Mr. Sow, when he returned from a stay in West Africa, he tended to overspend to rebuild his inventory.

#### Discussion

On appeal, the Taxpayer argues that the purchase mark-up percentage of 35% was too high. It is undisputed that the Taxpayer in this case failed to provide complete sales records. In such a situation, the Revenue Department may compute the Taxpayer's liability "using the most accurate and complete information reasonably obtainable." *Jai Shanidev Inc. d/b/a Country Corner*, S. 16-449 (Ala. Tax Tribunal 04/27/17); Ala. Code 1975, § 40-2A-7(b)(1)a.

The Department can also use any reasonable method to compute the liability, and the taxpayer, having failed in the duty to keep good records, cannot later complain that the records and/or method used by the Department is improper or does not reach a correct result. *Jones v. CIR*, 903 F. 3d 1301 (10th Cir. 1990); *State v. Ludlum*, 384 So. 2d 1089 (Ala. Civ. App.), cert. denied, 384 So. 2d 1094 (Ala. 1980) (A taxpayer must keep records showing the business transacted, and if the taxpayer fails to keep such records, the taxpayer must suffer the penalty for noncompliance).

The purchase mark-up audit is a simple, oft-used Department method of determining a taxpayer's sales tax liability when the taxpayer fails to keep accurate sales records. *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).

*Jai Shanidev Inc. d/b/a Country Corner*, *supra*.

Because the Taxpayer in this appeal failed to maintain and produce sales records for the audit period, the Revenue Department applied a purchase markup of 35%. As the Tax Tribunal has explained in previous cases, the 35% markup is based on Internal Revenue Service information regarding percentage markups of gas stations and grocery stores. The percentages have been averaged to reach the 35% figure. *See, e.g., E&Z, Inc. v. State of Ala. Dep't of Rev.*, S. 19-989-LP (Ala. Tax Tribunal 1/12/2022). The Tribunal has previously held that that percentage is reasonable. *See, e.g., E&Z, Inc., supra*. “The tax due as computed by the audit is by its nature an estimate, but the examiner of necessity estimated the Taxpayer's liability because the Taxpayer failed to maintain adequate records.” *Id.*

Here, the Taxpayer argues that its markup is less than 35%. The Taxpayer also argues that its checkbook records indicate that its purchases were lower than the Revenue Department's calculations. However, as noted by the Revenue Department, the Taxpayer did not produce its bank records for the Revenue Department to review, nor did the Taxpayer have complete sales records to show its true markup percentage. In accordance with the Tax Tribunal's previous decisions, *see, e.g., Jai Shanidev, supra*, the Revenue Department's method of calculating taxable sales in this case was reasonable. Moreover, the auditor stated that the shelf audit confirmed the accuracy of the markup percentage used by the Revenue

Department.

Therefore, the final assessment entered by the Revenue Department is upheld. Judgment is entered against the Taxpayer and in favor of the Revenue Department in the amount of \$17,385.50 (consisting of tax in the amount of \$15,560.82, interest to the date of the final assessment in the amount of \$1,013.11, and a negligence penalty in the amount of \$811.57), plus additional interest that continues to accrue from the date of entry of the final assessment until the liability is paid in full.

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

Entered August 3, 2023.

*/s/ Jeff Patterson* \_\_\_\_\_

JEFF PATTERSON

Chief Judge

Alabama Tax Tribunal

jp:ac

cc: Abdoulaye Sow  
Hilary Y. Parks, Esq.