ALABAMA TAX TRIBUNAL

ISTORE, LLC & ITS SOLE MEMBER KIRTI PATEL D/B/A MILLERS,	§	
Taxpayer,	§	DOCKET NO. S. 21-1310-LP
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

This appeal involves a final assessment of state sales tax for the period August 1, 2017, through June 30, 2020.

The Taxpayer filed a response to the Tax Tribunal's Seventh Post-Hearing Preliminary Order. In its response, the Taxpayer advances several arguments against the Revenue Department's reduced final assessment provided in the Revenue Department's Response to the Tax Tribunal's Sixth Post-Hearing Preliminary Order. These arguments are insufficient to satisfy the Taxpayer's burden to prove the assessment is incorrect but do establish reasonable cause for waiver of the negligence penalty included in the assessment. Therefore, the negligence penalty is due to be waived, and the Revenue Department's final assessment, as reduced, is due to be affirmed.

On appeal to the Tax Tribunal, the final assessment of the Revenue Department is prima facie correct, and the burden of proving the assessment is incorrect falls on the taxpayer. Ala. Code § 40-2A-7(b)(5)c.3. Here, the Taxpayer argued initially in its Notice of Appeal that the Revenue Department used an

inaccurate purchase mark-up method when calculating the original final assessment, that the Revenue Department used duplicative figures in the final assessment, and that the negligence penalty assessed by the Revenue Department was improper. In its response to the Tax Tribunal's Seventh Post-Hearing Preliminary Order, the Taxpayer has refined these arguments to assert that the Revenue Department improperly included both Miller's and Lucky's Stop and Shop in its review of the Taxpayer, improperly employed a 35% markup in the review, improperly refused to consider the Taxpayer's records, and, finally, failed to return a flash drive containing the Taxpayer's tax returns.

The Tax Tribunal is inclined to agree with the Revenue Department that these arguments are insufficient to meet the Taxpayer's burden to establish the final assessment is incorrect. First, the entity subject to the Revenue Department's review here is Istore, LLC,[1] which owns and generates revenue through the convenience stores known as Miller's and Lucky's Stop and Shop. The Revenue Department's mailings and filings have clearly designated that the subject of the review has always been Istore, LLC, throughout both the preliminary and final assessments as well as in this appeal, rather than either of the individual convenience stores owned by Istore. The mere fact that the preliminary and final assessments included the assumed names of the convenience stores does not change the subject of the Revenue Department's review. The taxpayer identification number correspondent to the Revenue Department's review here is, and has always been, that of Istore rather than

[1] Kirti Patel is the sole member of Istore, LLC.

Miller's or Lucky's Stop and Shop. Therefore, the entity subject to the Revenue Department's review here is Istore, LLC, which owns and generates revenue through two convenience stores, respectively known as Miller's and Lucky's Stop and Shop. This ownership then requires the consideration of the revenue generated by each convenience store to accurately assess the tax liabilities of Istore.

In its Response to the Tax Tribunal's Seventh Post-Hearing Preliminary Order, the Taxpayer also cites cases with the docket numbers S. 20-1074-JP and S. 20-2084-LP as cases that have come before the Tax Tribunal in which "an LLC had two convenience stores it operated as dba's [and] ended up [sic] having two final assessments for sales taxes with an assessment against each store." This assertion is erroneous. The Tax Tribunal has no record of cases with docket numbers S. 20-1074-JP or S. 20-2084-LP. There is a case with docket number INC. 20-1074-JP, but that case involves a married couple's appeal of a final assessment of individual income tax rather than an LLC's appeal of a sales tax issue. There is no case with the docket number 20-2084-LP whatsoever. There is a case with the docket number S. 20-1084-LP; however, the taxpayer in that case was one LLC (S&B Cooperative, LLC), with a single member (Bhupendra Awasthi), that operated and did business as a convenience store (City Market Chevron). The LLC's sole member there (Bhupendra Awasthi) was also the sole member of another LLC (Awasthi Oil Company, LLC) that operated and did business as another, distinct convenience store (Zeigler Chevron), and filed its own, separate appeal with the assigned docket number S. 20-1070-JP. The taxpayer in case S. 20-1084-LP was S&B Cooperative, LLC, with its sole member

Bhupendra Awasthi d/b/a City Market Chevron. Awasthi Oil Company, LLC, despite sharing the same sole member, was a separate, distinct taxpayer and legal entity. The taxes in issue in S. 20-1070-JP and S. 20-1084-LP were the sales taxes attributed to the respective LLCs rather than the income of Bhupendra Awasthi, the sole member in each of the LLCs. Therefore, each LLC (and its respective convenience store) should have been subject to separate final assessments of sales tax, which contrasts from the situation at hand where just one LLC operates two convenience stores.

The Taxpayer's next argument, that the use of a 35% markup in the review was improper, is similarly ineffective. In its Answer, the Revenue Department stated that it used "the average markup at 35% for convenience stores and gasoline stations" only for the "convenient [sic] store purchases[.]" At the September 28, 2023, trial, Kirti Patel, sole member of the Taxpayer LLC, indicated the Taxpayer used a 35% markup for grocery and food items. The Taxpayer also agreed to a 26.9% markup percentage for alcohol sales, and indicated that it utilized a 35 to 40% markup percentage for sales of raw meat. The Tax Tribunal's initial Post-Hearing Preliminary Order acknowledged these percentages and allowed the Taxpayer the opportunity to provide markup percentages for hot food and cigarette purchases.

Subsequently, the Taxpayer provided substantiating documentation that led the Revenue Department to apply reduced markup percentages for hot food purchases, alcohol purchases at Miller's, and tobacco and cigarette purchases, which

resulted in a reduced final assessment amount of $69,024.55.[2] Therefore, despite the Taxpayer's agreement to markup percentages at the September 28, 2023, trial, the Taxpayer was given the opportunity to provide documentation substantiating its use of lower markup percentages than those utilized in the Revenue Department's original final assessment, and the Revenue Department then used that documentation to reach a reduced final assessment amount. Even with this opportunity, the Taxpayer was unable to establish that all purchases were subject to a markup percentage below 35%, and, therefore, failed to satisfy its burden to establish that the use of a 35% markup for any category of purchases in the final assessment would be incorrect.

The Taxpayer's argument that the Revenue Department improperly refused to consider the Taxpayer's records also lacks merit. The Taxpayer never provided its Form 1099-K statements. The z-tapes the Taxpayer provided were incomplete and did not contain sufficient information to determine taxable sales; specifically, the z-tapes did not provide a breakdown on locations. Similarly, the Taxpayer provided incomplete purchase invoices and bank statements that were insufficient to verify all money order sales. The Revenue Department could not distinguish taxable events from their nontaxable counterparts using the records provided by the Taxpayer. These incomplete records required the Revenue Department to contact third-party vendors and to utilize these vendors' records to complete the assessment. In other

[2] This reduced final assessment amount was proffered in the Revenue Department's Response to the Fifth Post-Hearing Preliminary Order and reflected in the Tax Tribunal's Amended Fifth Post-Hearing Preliminary Order, before being ultimately supplanted by the reduced final assessment proffered by the Revenue Department's Response to the Sixth Post-Hearing Preliminary Order discussed *infra*.

words, the Revenue Department could not use the Taxpayer's records and had to perform an indirect audit because the Taxpayer's records were incomplete and lacked sufficient information to allow the Revenue Department to determine the exact amount of tax due.

Over the course of the appeal, this deficiency was never remedied. Thus, the Taxpayer never satisfied its burden to establish the Revenue Department's use of third-party records and an indirect audit to complete the final assessment was incorrect. Further, the Taxpayer argues in its response to the Seventh Post-Hearing Preliminary Order that the Revenue Department ignored the inclusion of an inventory of $103,638.00 provided by the Taxpayer's purchasers. However, this argument is incorrect as the Revenue Department included the inventory of $103,638,00 in its Response to the Sixth Post-Hearing Preliminary Order to reach a reduced final assessment of $63,023.68.

The evidence in this case displays that the Taxpayer failed to provide the Revenue Department with complete and accurate sales records for its convenience store purchases. When a Taxpayer fails to provide complete sales records, the Revenue Department may compute the Taxpayer's tax liability "using the most accurate and complete information obtainable." *Jai Shanidev Inc. d/b/a Country Corner*, S. 16-449, at 4 (Ala. Tax Trib. Apr. 27, 2017); Ala. Code § 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).
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> 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).

Id.

In the present case, because the Taxpayer failed to maintain and produce complete and accurate sales records for all convenience store purchases during the audit period, the Revenue Department applied a purchase markup of 35%. As the Tax Tribunal has explained in previous cases, the 35% purchase 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 Revenue*, 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.*

In sum, the Taxpayer has failed to establish that the Revenue Department's final assessment, as reduced, is incorrect as required by Ala. Code § 40-2A-7(b)(5)c.3. However, the Taxpayer has established reasonable cause that warrants waiver of the negligence penalty included in the Revenue Department's final assessment. As the Taxpayer argued, the Revenue Department's tax auditor admitted at the September 28, 2023, trial that she had been provided a flash drive containing the Taxpayer's tax returns, but she no longer knew the location of the flash drive. The Revenue

Department contended in its Response to the Sixth Post-Hearing Preliminary Order that the flash drive was included in the box of records returned to the Taxpayer. However, the Taxpayer's Response to the Seventh Post-Hearing Preliminary Order makes clear that the flash drive was not in the box of records.

It is "unlawful for any person to print, publish, or divulge" any part of a taxpayer's return without the written consent of the taxpayer. *See* Ala. Code § 40-2A-10(a). As employees of the state of Alabama, the representatives of the Revenue Department are bound to abide by the Alabama Ethics Law. *See* Ala. Code §§ 36-25-1 to -30. The Revenue Department's Employee Handbook delineates these requirements and includes a provision that all Revenue Department employees must sign an "Employee's Disclosure of Information Statement" and acknowledge receipt of the Department's "Confidentiality Policy". The Employee Handbook also includes a provision that "[e]mployees shall be held responsible for the loss, disappearance, or theft of official documents when attributable to negligence or carelessness."

The exact circumstances that led to the disappearance of the flash drive containing the Taxpayer's tax returns are unclear. However, it is clear that the flash drive was successfully transferred to the Revenue Department, that the last known location of the flash drive was with the Revenue Department, and that the flash drive was never returned to the Taxpayer. This clarity is more than sufficient reasonable cause to warrant waiver of the penalty included in the Revenue Department's final assessment.

Therefore, the penalty is waived for reasonable cause, and the Revenue

Department's final assessment of state sales tax for the period August 1, 2017, through June 30, 2020, as reduced, is affirmed for the balance of $60,239.44, consisting of $54,791.81 of outstanding tax and interest of $5,447.63, plus additional interest that continues to accrue from the date of the 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 § 40-2B-2(m)

Entered September 24, 2024.

/s/ Leslie H. Pitman
LESLIE H. PITMAN
Associate Tax Tribunal Judge

lhp:thb

cc: John Kroutter
Istore, LLC & its Sole Member, Kirti Patel d/b/a/ Millers
Margaret Johnson McNeill, Esq.