

**STATE OF ARKANSAS
DEPARTMENT OF FINANCE AND ADMINISTRATION
OFFICE OF HEARINGS & APPEALS**

ADMINISTRATIVE DECISION

IN THE MATTER OF [REDACTED] ACCT. NO.: [REDACTED]	GROSS RECEIPTS TAX ASSESSMENT AUDIT ID: [REDACTED]
DOCKET NO.: 19-359	PERIOD: 09/01/12-04/30/17 (\$ [REDACTED])¹

RAY HOWARD, ADMINISTRATIVE LAW JUDGE

APPEARANCES

This case is before the Office of Hearings and Appeals upon a written protest dated December 20, 2018, signed by [REDACTED] (“Taxpayer’s Representative”),² on behalf of [REDACTED], doing business as [REDACTED], the Taxpayer.³ The Taxpayer protested an assessment of Gross Receipts (sales) Tax resulting from an audit conducted by Jerry Harrison, Tax Auditor – Northeast Audit District, on behalf of the Department of Finance and Administration (“Department”).

This case was submitted on written documents included with the protest at the request of the Taxpayer’s Representative. A Briefing Schedule was mailed to the parties on April 11, 2019. The Department was represented by Brad Young, Attorney at Law, Office of Revenue Legal Counsel. The Taxpayer’s

¹ The reflected amount included tax (\$ [REDACTED]) and interest (\$ [REDACTED]).

² The case file contains a properly executed Power of Attorney for the years of 2012 – 2017.

³ The Power of Attorney identified the Taxpayer as “[REDACTED].”

Representative filed the Opening Brief on May 9, 2019. The Department's Response Brief was filed on June 12, 2019. The Taxpayer's Reply Brief was filed on July 1, 2019. This case was submitted for decision on July 3, 2019.

ISSUE

Whether the Department's assessment against the Taxpayer should be sustained? Yes.

FINDINGS OF FACT/CONTENTIONS OF THE PARTIES

The Taxpayer's Opening Brief set forth the basis for the Taxpayer's disagreement with the assessment and stated, as follows:

The Arkansas Department of Finance and Administration, Office of Field Audit conducted an audit of [REDACTED] (see attached audit notification letter). Taxpayer came to [REDACTED] after notification was received and signed a Power of Attorney for representation for [REDACTED] for tax years 2017 & 2018. This time period for the POA was selected because this is the time frame that [REDACTED] had been formed and in existence.

The audit progressed and the auditor extended the audit period back to a six (6) year period because sales were under-reported by 25%. Taxpayer did not know that his labor was taxable, and was under the impression that as long as he paid tax on his materials, and did not mark those parts up that his labor was exempt. **There is not a dispute that taxable transactions occurred and there is not a dispute on the amounts assessed.**

Our disagreement with the assessment is that the wrong taxpayer was assessed. During this time, the taxpayer was doing business as [REDACTED] a sole proprietorship.

I have attached the statute waiver and extension showing the wrong taxpayer was listed. As a matter of fact, the attorney assigned to the hearing had to request a power of attorney to incorporate the back-tax years that were included in the audit.

I have attached the following documents to show that the wrong taxpayer was assessed.

1. Schedule C (sole proprietorship) tax returns from 2012 — 2016
2. Bank Statements (selected months) from 2012 — 2016 showing the business name as [REDACTED].
3. Statue Waiver and Extension showing wrong taxpayer listed.
4. Summary of Findings indicating [REDACTED]
5. IRS filing showing the date and name and FEIN of [REDACTED] formation
6. Audit notification letter showing [REDACTED] [Emphasis added, P. 1-2.]

The Department's Response Brief addressed the Taxpayer's contentions and stated, in part:

In the Taxpayer's Opening Brief, the Taxpayer stipulates that there is not a dispute that taxable transactions occurred, and there is not a dispute on the amounts assessed. Taxpayer's sole point of protest is that "the wrong Taxpayer was assessed." Specifically, Taxpayer contends that during the audit period, "the Taxpayer was doing business as [REDACTED] a sole proprietorship."

The Department's audit properly resulted in two assessments: (1) one for the sole proprietorship, representing audit period September 1, 2012 through [REDACTED]; and (2) one for [REDACTED] representing audit period [REDACTED] through December 31, 2017. Taxpayer has protested only the assessment against the sole proprietorship.

By letter dated January 5, 2018, the Department notified the Taxpayer that his business had been selected for audit. [Footnote 1 provided, "See Audit Notification Letter dated January 5, 2018, attached as **Exhibit 1**."] The Taxpayer, through its representative, provided invoices and other business records of sales. The Department has attached a representative sample of the Taxpayer's invoices to this response as **Exhibit 2**. As evidenced by the attached invoices, during the September 1, 2012 through [REDACTED] audit period, the Taxpayer was operating as "[REDACTED]," even though he did not incorporate the LLC until [REDACTED]. [Footnote 2 stated, "See Arkansas Secretary of State corporation search result, attached as **Exhibit 3**, . . ."]. Although the Taxpayer also provided invoices for the audit period that included only the Taxpayer's name ([REDACTED]), the Department does not have a record of invoices for the audit period that include the name "[REDACTED]." [Footnote 3 provided,

“See Email dated January 10, 2019 from DFA Auditor Jerry Harrison, attached as **Exhibit 4** (“I do not recall any invoices having the [REDACTED] name on it even though that was the name on the Schedule C information.”). Prior to the audit, the Taxpayer was a non-filer for sales tax purposes for both the sole proprietorship and the LLC. *Id.*”]

Prior to the Taxpayers [REDACTED] incorporation of the LLC, the Taxpayer also maintained a Facebook page.[Footnote omitted] It appears that on or about November 13, 2015, the Taxpayer created a Facebook profile for “[REDACTED].” The Facebook profile includes a profile picture of the same “[REDACTED]” logo that appears on the invoices that the Taxpayer provided to the Department. In subsequent posts on the “[REDACTED]” Facebook page, the Taxpayer posted photos and descriptions of repairs performed by his company. Each of these posts pre-dates the Taxpayer’s incorporation of the LLC.

On or about October 18, 2018, the Department provided the Taxpayer with a Summary of Findings for the sole proprietorship, addressed to “[REDACTED],” that the Taxpayer’s representative signed on the Taxpayer’s behalf.[Footnote omitted]

On or about October 22, 2018, the Department issued a Notice of Proposed Assessment for the sole proprietorship, addressed to “[REDACTED]”[Footnote 6 stated, “See Notice of Proposed Assessment (Sole Proprietorship) dated October 22, 2018, attached as **Exhibit 7.**”] The Department issued a separate Notice of Proposed Assessment to “[REDACTED]”[Footnote 7 stated, ““See Notice of Proposed Assessment (LLC) dated October 22, 2018, attached as **Exhibit 8.**”]

“[A] ‘proprietorship’ is not a legal entity, but merely a name under which the owner, who is the real party in interest, does business.”[Footnote omitted] In this case, “[REDACTED]” was a name under which the Taxpayer did business as a sole proprietor. The Taxpayer does not allege that the Department improperly assessed the LLC for the tax debts of his sole proprietorship. Nor can the Taxpayer meet his burden to prove that the Department improperly assessed the sole proprietorship for the debts of another entity. The Department’s evidence conclusively establishes that during the time in which Taxpayer was operating as a sole proprietorship, he operated under the name “[REDACTED]” which is the name listed

on the assessment. Thus, there is no merit to the Taxpayer's contention that the Department assessed the "wrong taxpayer." [P. 1-2].

The Taxpayer's Final Brief focused on the single determinative issue in this case and stated:

The taxpayer is not disputing the fact that taxable transactions did occur, and as was stated [REDACTED] was under the mistaken impression that labor was not taxable and as long as tax was paid on the parts that he was following the law.

The facts boil down to that the wrong taxpayer was assessed, and I find it telling that that the Mr. Young states

"[A] proprietorship is not a legal entity but merely a name under which the owner does business"

According to the Internal Revenue Service Schedule C the proprietorship is doing business as [REDACTED]. In this case the federal document supports our claim the wrong taxpayer was assessed and Mr. Young's argument further cements that claim. [P. 1].

CONCLUSIONS OF LAW

Standard of Proof

Ark. Code Ann. § 26-18-313(c) (Supp. 2017) provides, in pertinent part, as follows:

The burden of proof applied to matters of fact and evidence, whether placed on the taxpayer or the state in controversies regarding the application of a state tax law shall be by preponderance of the evidence.

A preponderance of the evidence means the greater weight of the evidence.

Chandler v. Baker, 16 Ark. App. 253, 700 S.W.2d 378 (1985). In Edmisten v. Bull Shoals Landing, 2014 Ark. 89, at 12-13, 432 S.W.3d 25, 33, the Arkansas Supreme Court explained:

A preponderance of the evidence is “not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

The Department bears the burden of proving that the tax law applies to an item or service sought to be taxed, and a taxpayer bears the burden of proving entitlement to a tax exemption, deduction, or credit. Ark. Code Ann. § 26-18-313(d) (Supp. 2017). Statutes imposing a tax or providing a tax exemption, deduction, or credit must be reasonably and strictly construed in limitation of their application, giving the words their plain and ordinary meaning. Ark. Code Ann. § 26-18-313(a), (b), and (e) (Supp. 2017). If a well-founded doubt exists with respect to the application of a statute imposing a tax or providing a tax exemption, deduction, or credit, the doubt must be resolved against the application of the tax, exemption, deduction, or credit. Ark. Code Ann. § 26-18-313(f)(2) (Supp. 2017).

Tax Assessment

Subject to the applicability of an exemption, deduction, or a credit, sales tax is imposed on sales of tangible personal property or taxable services made by in-state vendors/sellers to in-state purchasers.⁴ As a general rule, sales tax applies to the entire gross receipts from sales of tangible personal property and certain specifically enumerated services within the State of Arkansas. See Ark. Code Ann. § 26-52-301 et seq. (Repl. 2014 & Supp. 2017).

⁴ See Ark. Code Ann. § 26-52-101 et seq. (Repl. 2014 & Supp. 2017).

With respect to a taxable service, the entire gross receipts derived from the performance of the taxable service is subject to tax (including the transfer of title or possession of any materials or supplies used or consumed in performing the taxable service and without deduction for "labor or service cost"). See Ark. Code Ann. § 26-52-103(13)(A) (Supp. 2017).

In the instant case, there is no dispute that the Taxpayer was performing various taxable services during the audit period.⁵ The evidence also established that prior to [REDACTED], [REDACTED] was conducting business as a sole proprietorship using at least two (2) trade names, [REDACTED] and [REDACTED].⁶ As illustrated by the persuasive authority of Rainsberger v. Klein, 1999 CJ A.A.R. 6582, 5 P.3d 351 (1999), [REDACTED] was not a separate entity but merely an alter ego of the sole proprietor, [REDACTED]. The majority opinion in Rainsberger v. Klein, *supra*, stated that:

Courts in other jurisdictions have held that an individual sued only under his or her trade name has nevertheless received sufficient notice to support the court's acquisition of personal jurisdiction. *See, e.g., Hughes v. Cox*, 601 So.2d 465 (Ala. 1992). In that case, the court concluded that: "[o]ne doing business in a trade name has fair notice that a complaint alleging a cause of action arising out of his business may lead to personal liability." *Hughes v. Cox, supra*, 601 So.2d at 471.

Id. at 353 -354.

The liability for collecting and reporting sales tax on the sale of a taxable service is upon the seller of the service unless the purchaser claims an

⁵ The audit period prior to the formation of a Limited Liability Company. See Department Exhibits 3, 6, 7, and 8.

⁶ See Attachments to Taxpayer's Opening Brief and Department Exhibits 2 and 5.

exemption.⁷ See Arkansas Gross Receipts Tax Rule GR-79(C). While it is unfortunate that (prior to the Department's audit) the Taxpayer was unaware the services being performed were taxable, including the associated labor charges, the Department correctly assessed sales taxes against the Taxpayer.⁸

Interest was properly assessed upon the tax deficiency for the use of the State's tax dollars. See Ark. Code Ann. § 26-18-508 (Repl. 2012). No penalty was assessed against the Taxpayer.

DECISION AND ORDER

The proposed assessment is sustained. The file is to be returned to the appropriate section of the Department for further proceedings in accordance with this Administrative Decision and applicable law. Pursuant to Ark. Code Ann. § 26-18-405 (Supp. 2017), unless the Taxpayer requests in writing within twenty (20) days of the mailing of this decision that the Commissioner of Revenues revise the decision of the Administrative Law Judge, this Administrative Decision shall be effective and become the action of the agency. The revision request may be mailed to the Assistant Commissioner of Revenues, P.O. Box 1272, Rm. 2440, Little Rock, Arkansas 72203. A revision request may also be faxed to the Assistant Commissioner of Revenues at (501) 683-1161 or emailed to revision@dfa.arkansas.gov. The Commissioner of Revenues, within twenty (20) days of the mailing of this Administrative Decision, may revise the decision regardless of whether the Taxpayer has requested a revision.

⁷ The Taxpayer was not collecting sales tax during the audit period so there was no evidence introduced to establish that any of the Taxpayer's customers claimed an exemption.

⁸ The amount of the assessment was not disputed.

Ark. Code Ann. § 26-18-406 (Supp. 2017) provides for the judicial appeal of a final decision of an Administrative Law Judge or the Commissioner of Revenues on a final assessment or refund claim denial; however, the constitutionality of that code section is uncertain.⁹

OFFICE OF HEARINGS & APPEALS



RAY HOWARD
ADMINISTRATIVE LAW JUDGE

DATED: July 23, 2019

⁹ See Board of Trustees of Univ. of Arkansas v. Andrews, 2018 Ark. 12.