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

ADMINISTRATIVE DECISION

IN THE MATTER OF [redacted]	**GROSS RECEIPTS TAX AND COMPENSATING USE TAX ASSESSMENT**
ACCT. NO.: [redacted]	**AUDIT NO.** [redacted]
	AUDIT PERIODS: JAN. 1, 2012 THROUGH MAY 31, 2018
DOCKET NOS.: 19-415 19-416	**SALES TAX** [redacted] [1] **USE TAX** [redacted] [2]

TODD EVANS, ADMINISTRATIVE LAW JUDGE

APPEARANCES

This case is before the Office of Hearings and Appeals upon written protest dated January 22, 2019, signed by [redacted] ("Owner") on behalf of [redacted], the Taxpayer. The Taxpayer protested assessments issued by the Department of Finance and Administration ("Department").

A hearing was held in this matter on May 15, 2019 at 10:00 a.m. in Little Rock, Arkansas. The Department was represented by Brad Young, Attorney at Law, Office of Revenue Legal Counsel. Also present for the Department was Elizabeth Isaac, Tax Auditor, and Judy Bowers, Audit Supervisor. The Taxpayer was represented by [redacted] ("Taxpayer's Representative"). Also present for the Taxpayer was the Owner and [redacted], Contractor.

[1] This amount represents [redacted]
[2] This amount represents [redacted]

ISSUE

Whether the Department's Assessments in this matter are correct under Arkansas law. Yes.

LEGAL AND FACTUAL CONTENTIONS OF THE PARTIES

Prehearing Filings

The Department provided the following factual information in its Answers to Information Request:

> [redacted] is a business that provides outdoor sprinkler installation and repair services and landscaping. On or about June 20, 2018, the Department conducted a sales and use tax audit. As part of the sales tax audit, the auditor reviewed the Taxpayer's invoices and other materials provided by the Taxpayer. The auditor determined that the Taxpayer had underreported taxable sales by at least 25%. Therefore, the auditor extended the audit period to January 1, 2012. Because the Taxpayer did not have records of sales that occurred prior to January 2015, the auditor projected the taxable sales for those tax years.
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> The auditor prepared schedules, portions of which the Department has attached to these answers. When preparing the schedules, the auditor split the Taxpayer's invoices into two categories. One category consisted of invoices that stated "sales tax included" on the face of each invoice. The auditor listed these invoices in Schedule A-2, attached as **Exhibit 1**. The second category consisted of all other invoices, which the auditor listed on Schedule A-3, attached as **Exhibit 2**.
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> **It is the "sales tax included" invoices (Schedule A-2/Ex. 1) that are the subject of this dispute.** The auditor listed approximately [redacted] transactions on which the Taxpayer provided its customers with invoices that stated that sales tax was included in the price the customer paid. A representative sample of these invoices is attached as **Exhibit 3.** The date of the earliest such invoice was January 2015, and the most recent was March 2018. With what appears to be only one exception, the Taxpayer did not report these sales or remit sales tax. Taxpayer's defense is that one of its subcontractors erroneously wrote "sales tax included" on the invoices, regardless of whether the invoices related to taxable service. Taxpayer states that because he believed that some or all of the services provided by the subcontractor were not taxable, the Taxpayer did not know that he needed to remit sales tax to the state for these invoices.

> For tax periods 2012-2014, which were the periods for which the Taxpayer did not have invoices, the auditor projected taxable sales by taking the total audited sales for the 41 months for which the Taxpayer did have records to calculate a monthly average of taxable sales for the missing years. The auditor then took the monthly average and multiplied it by 12 months to calculate a yearly average for those tax years. *See* Schedules X-1 through X-2. attached as **Exhibit 4**. Schedule A-1, attached as **Exhibit 5**, is a schedule of total additional taxable sales for the audit period.
>
> At the conclusion of the audit, the auditor prepared a Summary of Findings, a copy of which is attached as **Exhibit 6**. The Department issued a Notice of Proposed Assessment on November 26, 2018. A copy of the Notice or Proposed Assessment is attached as **Exhibit 7**. The taxpayer timely filed this protest. [Citations omitted.]

Within his Answers to Information Request, the Department's Representative asserted that, since the Taxpayer collected sales tax within the sales prices contained in its invoices, the tax must be remitted to the Department before a Taxpayer may assert that its services were nontaxable and the tax was incorrectly collected from its customers pursuant to the binding authority of *Cook v. Sears Roebuck & Co.*, 212 Ark. 308, 206 S.W.2d 20 (1947). Additionally, he argued that any portions of the assessment that were estimated due to insufficient Taxpayer records were reasonable, explaining that the Taxpayer bears the burden of refuting an estimated assessment under Ark. Code Ann. § 26-18-305(a)(1)(B) (Repl. 2012). He further noted that an estimated assessment may not be rebutted through the use of its employees' testimony, standing alone. *Leathers v. A & B Dirt Movers, Inc.*, 311 Ark. 320, 844 S.W.2d 314 (1992). Regarding any materials that could have been purchased exempt as sales for resale, he declared that, pursuant to Arkansas Gross Receipts Tax Rule GR-81.1, the Taxpayer was required to either make his refund claim with his vendors or

obtain assignments of the vendors' rights to obtain those refunds. He explained this requirement was mandatory even though refund claims with respect to those purchases is now barred by the applicable statute of limitations. He concluded his analysis averring that the failure to pay penalty was appropriate under Ark. Code Ann. § 26-18-208(2)(A) (Repl. 2012) and interest is warranted under Ark. Code Ann. § 26-18-508 (Repl. 2012).

Within her Answers to Information Request, the Taxpayer's Representative explained the Taxpayer paid sales tax to vendors on its material purchases even if those items were ultimately resold through the performance of taxable services and an independent contractor had improperly wrote "sales tax was included" on various invoices involving the performance of nontaxable services even though the Taxpayer did not believe its services were taxable. Additionally, she asserted that any estimated sales amounts based on later taxable sales that are not adjusted for sales tax paid on material purchases and include "sales tax paid" invoices for nontaxable services are unreasonable and must be adjusted.

Hearing Testimony

A. Auditor's Testimony

The Auditor testified that she performed the audit of this Taxpayer. She explained that the Taxpayer provides landscaping services and lawn sprinkler installation and repair. During the audit, she reviewed the Taxpayer's sales invoices, purchase invoices, bank statements, and a fixed asset list. [redacted] represented the Taxpayer during the audit process. Both individuals had a power of attorney on file with the Department.

She determined that the Taxpayer performed taxable sales and underreported its tax liability by more than twenty-five percent (25%). Consequently, the audit was extended to six (6) years and began January 1, 2012. The Taxpayer, however, only possessed records for periods beginning January 2015 through current. To calculate a tax amount for the earlier periods without records, she created an average of her audit sales for the periods with records and projected those sales back to the earlier periods.

The Auditor explained that Schedule A-2 (attached as Exhibit 1 to the Department's Answers) represented those invoices that stated tax was included within the sales price on the invoice. Some representative samples of those invoices are attached as Exhibit 3 to the Department's Answers. Those invoices provide a subtotal, state tax included, and the grand total matches the subtotal. From January 2015 through May 2018, several of this type of invoice were assessed. The Taxpayer did report sales tax on two invoices that stated sales tax was included but not on the remaining invoices.[3] The Auditor further testified that Taxpayer's representatives during the audit explained that the Contractor (not the owner) had wrote that tax was included on the invoices listed in Schedule A-2. The heading for each invoice listed the Taxpayer's name and address and provided the Owner's phone number. The Taxpayer's representatives never stated that the Contractor lacked authority to issue the relevant invoices or that invoices were not reviewed by the Taxpayer's employees. Invoices were retained by the Taxpayer as business records.

[3] She explained that, at some point, the Sales Tax Department contacted the Taxpayer in 2016. The Taxpayer was not under audit at that time. The Taxpayer was informed that it was a nonfiler, completed and filed the earlier monthly reports, and entered a payment plan to pay the resulting balance.

Because the invoices listed within Schedule A-2 stated that tax was included in the purchase price, she assessed the invoices within Schedule A-2 regardless of whether the invoice descriptions described otherwise nontaxable services. If a seller fails to remit taxes collected from customers, the Auditor explained that she does not address taxability of the underlying transaction because any tax proceeds must be remitted to the Department. Schedule A-3 provides a listing of taxable landscaping invoices containing separately stated tax amounts. During those transactions, the Taxpayer fully taxed those transactions without distinguishing between taxable and nontaxable services. The Taxpayer remitted tax on the transactions listed within Schedule A-3.

While the Taxpayer claims that it paid sales tax on its materials, the Auditor is not aware of the Taxpayer requesting a refund from its vendors for those tax payments. The Auditor instructed the Taxpayer during the audit to request refunds from its vendors on any materials that it believed should have been exempt. The Taxpayer has not presented an assignment from any of its vendors to pursue a refund on its vendors' behalf. She ultimately issued a Summary of Findings and a Notice of Proposed Assessment, provided as Department's Exhibits 6 and 7 to its Answers. The Auditor also assessed a deficiency or negligence penalty and interest against the Taxpayer. The Auditor does not know when the Taxpayer was actually issued a sales tax permit. In the absence of a sales tax permit, she acknowledged that the Taxpayer would not be entitled to purchase items for resale exempt from sales tax and could not claim a refund from its vendors for the earlier material purchases. The Auditor also acknowledged that services to lawn sprinkler systems are generally nontaxable.

B. Audit Supervisor's Testimony

The Audit Supervisor testified that she has performed roughly 600 hundred sales tax audits during her career. She was the supervisor of this audit and thoroughly reviewed the relevant paperwork prior to its issuance. She found this audit to be reasonable, proper, and consistent with the Department's existing audit principles. Addressing the invoices presented as Exhibits Q, R, and S (representing instances where the invoices stated tax was included but the Taxpayer calculated and remitted tax based on the full invoice price), the Audit Supervisor stated that the Taxpayer's calculation of the tax base, if accurately presented during the hearing, was in error because the taxes should have been backed out. If the Department can verify the Taxpayer overpaid tax due to this calculation error, she explained that an adjustment might be warranted with respect to those invoices.[4]

C. Owner's Testimony

The Owner testified that the Taxpayer provides irrigation service, installation, and repair; drainage installation and repair; landscape lighting; and landscaping. Roughly, [redacted] of the Taxpayer's business involves landscaping. The business began by servicing irrigation systems but its customers also desired landscaping services.

The first time that he was contacted by someone employed by the Department was roughly ten years ago. During that discussion, the Owner

[4] After this statement, the Taxpayer's Representative stated that she solely presented this information to show that the Taxpayer never gave any weight to a statement on the invoice that tax was included in the price, explaining that he always "grossed up" his tax calculations. She explained that the Taxpayer is not asserting that it incorrectly calculated or potentially overpaid its taxes on certain invoices. Consequently, this issue shall not be addressed within this decision.

described the Taxpayer's business and was told that he should register for sales tax. Shortly thereafter, the same unknown employee contacted the Owner and told him that, on review, the Taxpayer did not have to register with the Department. The Owner claimed to rely on that information until 2016. He was contacted again in 2016. In 2016, he was informed that he should have registered and paid sales tax during the prior years. He completed and filed the earlier returns without any assistance from the Department. He then entered into a repayment agreement to pay the resulting debt.[5] While completing those returns, the Owner reviewed his invoices to determine the taxable sales. The Owner calculated the tax liability based on the full consideration received from customers for the services that he deemed to be taxable without backing the tax out of those proceeds. He stated that no tax was originally collected from customers during the earlier transactions.

The Owner provided evidence that the Taxpayer recently registered for exempt purchases with several vendors: [redacted] (October 23, 2018), [redacted] (December 2016), [redacted] (September 20, 2016), [redacted] (September 11, 2016), [redacted] (November 10, 2016), [redacted] (October 10, 2018), and [redacted] (October 23, 2018).[6] Except for the last two vendors, he explained that the Taxpayer mostly purchases landscaping materials and sod

[5] This document was entered as Taxpayer's Hearing Exhibit E.
[6] See Taxpayer's Hearing Exhibits F through L. Many of these vendors also acknowledge that, prior to the Taxpayer's registration for exempt purchases, the Taxpayer had purchased items from them subject to Arkansas sales tax. These exhibits also include various copies of the Taxpayer's Sales and Use Tax Permit issued on August 1, 2016.

from the vendors. The Taxpayer primarily purchases sprinkler materials and drainage supplies from the last two vendors.

The Owner provided a copy of his standard rates and fees for months up to March 2017[7] and for months after March 2017.[8] Referencing two invoices involving the startup of two different sprinkler systems (one stating tax was included in the price and the other not including taxes), he noted that fees billed to those customers matched the standard rate for that service and had the same grand total even though one invoice stated tax was included.[9] Referencing the invoice provided as Taxpayer's Exhibit Q, he explained that invoice contained several handwritten alterations that he made when calculating the tax liability for the monthly report that he filed, including scratching out the note that tax was included in the price. He increased that invoiced amount to add the taxes that should have been billed on the transaction, even though the additional tax amount had not been paid to him by the customer.

Referencing the invoices attached as Taxpayer's Hearing Exhibits R and S, he testified that he separates taxable and nontaxable charges and calculates the additional tax on top of the service charges when explaining those invoices' handwritten alterations. Exhibits Q, R, and S represent invoices that were not properly completed at the job site and were corrected by him prior to filing the respective monthly reports. He did not bill the customer for the additional tax and simply "ate" that cost. These invoices occurred after the audit was initiated.

[7] See Taxpayer's Hearing Exhibit N.
[8] See Taxpayer's Hearing Exhibit M.
[9] See Taxpayer's Hearing Exhibits O and P.

He was aware that some invoices contained the "tax included" notations but interpreted that to mean the Taxpayer paid tax on its materials.

On cross examination, the Owner acknowledged that landscaping services were taxable but felt it was wrong to hold him accountable for the earlier incorrect advice from the Department. While invoices did state that tax was included, he asserted that tax was not actually included but acknowledged that a customer would not be aware that sales tax was not actually included based on the invoices. He believes all invoices containing the "tax included" notations were prepared by the Contractor. The Contractor had the authority to issue invoices on the Taxpayer's behalf. The customers were not notified that the Contractor was not an actual employee of the Taxpayer. The Taxpayer has since stopped writing "tax included" on its invoices and now lists the actual tax amount on each invoice. The Owner does not think that any tax was remitted on the "tax included" invoices. Additionally, the Taxpayer has not refunded its customers for any tax amounts regarding those invoices because no tax was collected on the invoiced amounts. The Taxpayer has not requested a sales tax refund from its vendors for material purchases nor attained an assignment of rights from any vendor.

D. Contractor's Testimony

The Contractor testified that he performed landscaping services and sprinkler installation and repair for the Taxpayer. As a part of that activity, he invoiced the Taxpayer's customers when the services were rendered.[10] He referenced Invoice No. [redacted] and noted the invoice stated tax was included on an

[10] At this point in the administrative hearing, the Taxpayer's Representative entered three invoices containing amounts billed for certain services (Taxpayer's Hearing Exhibits A, B, and C). The Contractor explained that he prepared these invoices. Those invoices state that tax is included on the tax line of each invoice.

invoice billing zero dollars ($0) for a spring startup.[11] He never discussed with the Owner whether an invoice should state if tax was included on the invoice and did not know whether his services were taxable or not. He wrote tax was included because he was trained by a prior employee of the Taxpayer to include that statement. The inclusion of that statement became a habit. He never told a customer whether a particular transaction was taxable or not. He acknowledged that the invoice informed customers that the invoiced price included tax and the customer would not know that statement was incorrect.

E. Assertions of Department's Representative

The Department's Representative asserted that, with respect to any prior instructions by employees of the Department, it is uncertain who the Owner spoke with and what was said. Since this information was first discussed during the administrative hearing, he is unable to research this assertion. Additionally, if the Taxpayer wanted a binding opinion, he noted that the Taxpayer could have requested a Legal Opinion under Arkansas Gross Receipts Tax Rule GR-75. He further declared that the tax included invoices explicitly state that tax was included within their proceeds and that was the only information communicated to customers, implicating *Sears Roebuck* and requiring remittance of the tax proceeds before taxability can be addressed. Additionally, he averred that the Taxpayer bears the burden of refuting the estimated portion of the assessment and failed to demonstrate the audit methodology for that portion of the assessment was unreasonable. Regarding any claim of credit for tax paid purchases, the Department's Representative argued that the Taxpayer must

[11] Taxpayer's Hearing Exhibit D.

comply with the statutory requirements for the refund claim, particularly either requesting a refund from vendors or obtaining an assignment of those vendor's rights to a refund.

F. Assertions of Taxpayer's Representative

The Taxpayer's Representative asserted that the *Sears Roebuck* case is distinguishable because the Taxpayer never collected sales tax from its customers on the relevant transactions and did not possess a sales tax permit. She further argued that, prior to issuance of the permit, the Taxpayer was not operating as an agent on behalf of the State. Additionally, since taxes were not actually included in the purchase price, she reasoned that the customers were not harmed in any way. Since the vendors cannot provide a refund of taxes preceding the Taxpayer's permit registration, she averred that credit for taxes associated with those purchases should be allowed by the Department. The Taxpayer's Representative confirmed that the Taxpayer was not protesting the use tax assessment or the assessment of any invoices with a tax amount listed on the invoice.

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).

Further, it is the duty of every taxpayer to make a return of any tax due under any state tax law and to preserve suitable records to determine the amount due. Ark. Code Ann. § 26-18-506(a) (Repl. 2012). The taxpayer's records may be examined by the Department at any reasonable time, and, when the Taxpayer fails to maintain or provide adequate records, the Department may make an

estimated assessment based on the information that is available. Ark. Code Ann. § 26-18-506(b) and (d) (Repl. 2012). The burden is on a taxpayer to refute an estimated assessment and self-serving testimony, standing alone, is insufficient to refute an estimated assessment. Ark. Code Ann. § 26-18-506(d); *cf. Leathers v. A. & B. Dirt Mover, Inc.*, 311 Ark. 320, 844 S.W.2d 314 (1992). Specifically, the Arkansas Supreme Court stated as follows when analyzing an estimated assessment:

> In short, we find Mr. Nabholz's testimony insufficient, standing alone, to meet the taxpayer's statutory burden in refuting the reasonableness of the assessment. To hold otherwise would be to permit a taxpayer to maintain scant records and after an unsatisfactory tax audit, avoid taxation by merely verbalizing his transactions unsupported by appropriate documentation made at the time of the transactions or by testimony from other parties to the transactions.
> *Id*. at 330, 844 S.W.2d at 319.

Tax Assessment

A. Application of *Sears-Roebuck*

Arkansas Gross Receipts (sales) Tax generally applies to all sales of tangible personal property and certain specifically enumerated services within the State of Arkansas. Ark. Code Ann. § 26-52-301 (Supp. 2017). "Lawn care and landscaping services" are specifically enumerated taxable services. *Id.* at (3)(D)(i)(f). Landscaping is defined as "the installation, preservation, or enhancement of ground covering by planting trees, bushes and shrubbery, grass, flowers, and other types of decorative plants . . .." *Id.* at (3)(D)(ii)(a). Landscaping services are interpreted by the Department in its promulgated rule to mean as follows:

> "Landscaping" means the installation, preservation or enhancement of ground covering by planting trees, bushes, shrubbery, grass, flowers and

> other types of decorative plants. "Landscaping" does not include site preparation, cutting and filling, leveling, tree trimming or tree removal, or clearing a site of bushes and trees. "Landscaping" does include sodding, seeding and planting, as well as installing items such as landscape timbers, edging, planters, or similar items. Landscaping performed on highway easements and right-of-ways is taxable. Landscaping is taxable whether it is done for decorative purposes or non-decorative purposes such as erosion or sediment control.

Arkansas Gross Receipts Tax Rules GR-9.2(C)(1).

Additionally, the installation, repair, and replacement of sprinkler systems is nontaxable. Ark. Code Ann. § 26-52-301(B)(3)(viii)(a)(18) (Supp. 2017).

In *Cook v. Sears-Roebuck & Co.*, 212 Ark. 308, 206 S.W.2d 20 (1947), the Arkansas Supreme Court addressed the issue of whether a vendor may retain proceeds that it believed were improperly collected. Sears operated mail order desks whose sales were ultimately approved and shipped from out of state. Sears originally collected and remitted tax on the mail order sales but, in January 1945, Sears continued to collect the tax from its mail order customers but did not remit the tax to the Department. In July 1945, the Department assessed Sears for the taxes collected but not remitted on its mail order sales. On appeal, Sears argued that Arkansas Sales Tax did not apply to the mail order transactions because the sales were completed out of state, and, consequently, it should not be required to remit the proceeds to the Department. *Id.* at 320, 206 S.W.2d at 26. When discussing the ownership of the tax proceeds, the Arkansas Supreme Court noted: "Either, it belongs to the State, or it belongs to the persons who paid the taxes to Sears. At all events, it is not Sears' money." *Id.* at 312, 206 S.W.2d at 22. The Arkansas Supreme Court ultimately concluded "that Sears' status under our Tax Act is that of a tax collector, and that the rule against unjust enrichment is a bar to Sears' effort to recover (or retain) the tax which Sears collected from its

customers under this Tax Act." *Id.* at 319-320, 206 S.W.2d at 26. The Arkansas Supreme further concluded that it was not a valid defense to the assessment for Sears to argue that the taxes it collected and retained should not have been collected. *Id.* at 320, 206 S.W.2d at 26. Under the *Sears Roebuck* case, it is evident that, if the Taxpayer collected sales tax from its customers, those proceeds must be remitted to the Department even if the Taxpayer believes the tax was collected on nontaxable transactions.

Here, the relevant invoices completed by the Contractor indicated to customers that sales tax was included in the prices that they paid. The Owner has asserted that he personally did not believe his services were taxable and, thus, that notation was included in error. The Owner, however, was not present during the relevant transactions and did not provide any information to the Taxpayer's customers to inform them that they were not actually paying sales tax. When the customers paid his company for its services, the customers were told and reasonably would have believed sales tax was collected as a component part of their payment. This conclusion is supported by the contemporaneous invoices completed for each of the transactions relevant to this issue. The Taxpayer cannot collect those proceeds from its customers (indicating that tax is included in the amounts) and now independently recharacterize those proceeds as solely representing sales proceeds. Based on the record, a portion of the billed amount for these transactions must represent included sales tax. Under *Sears Roebuck*, the sales tax included within the price for these transactions must be remitted to the Department and cannot be retained by the Taxpayer.

Any remaining arguments that this outcome is unfair or creates injustice for the Taxpayer or its customers must be rejected. The Arkansas Supreme Court has explained that the Arkansas General Assembly is sole arbiter of policy decisions within Arkansas and it would be inappropriate for a court to refuse to enforce the law based on a policy disagreement. *Snowden v. JRE Investments, Inc.*, 2010 Ark. 276, 370 S.W.3d 215.

The arguments raised by the Taxpayer with respect to this issue are not persuasive.

B. Credit for Tax Paid Purchases

Initially, it is not proven by a preponderance of the evidence that the relevant transactions involved situations where the Taxpayer "contracts or undertakes to construct, manage or supervise the construction, erection or substantial modification of any building or other improvement or structure affixed to real estate." Consequently, the Taxpayer would not qualify as a contractor under Arkansas Gross Receipts Tax Rule GR-3(D) and Ark. Code Ann. § 26-52-307 (Supp. 2017). An individual or entity that performs taxable landscaping services must remit Arkansas sales tax on the entire proceeds received from their sales and may generally purchase their associated materials provided to their customers exempt as sales for resale. Arkansas Gross Receipts Tax Rule GR-9.2(A) and (B).

Here, while the Taxpayer likely bought landscaping material that remained with its customers, the Taxpayer failed to purchase those items exempt from sales tax from its vendors. Under Arkansas Gross Receipts Tax Rule GR-81.1(C)(1)(a) and Ark. Code Ann. § 26-18-507(d) (Repl. 2012), to obtain a refund,

the Taxpayer must either request a refund from its vendors for those purchases or obtain an assignment of the vendors' rights to a refund in addition to other applicable requirements for a refund claim. While any refund claim for these purchases may now be outside the Statute of Limitations for Refund Claims under Ark. Code Ann. § 26-18-306(i) (Supp. 2017), strict compliance with the statutory refund procedure is required before the Department can process a refund claim since the voluntary payment rule prevents payment of the taxes in the absence of that compliance. *Baker Refrigeration Systems v. Weiss*, 360 Ark. 388, 201 S.W.3d 900 (2005) (explaining that absent a waiver of sovereign immunity, the voluntary payment rule applies and a refund claim cannot be pursued) and *Dept. of Finance and Admin v. Staton*, 325 Ark. 341, 942 S.W.2d 804 (1996) (requiring strict compliance with the refund statute before immunity is waived). This Office may not allow a refund or credit that is not authorized by Arkansas law.

The Taxpayer's Representative noted that, for some portion of the audit period, the Taxpayer did not possess a sales tax permit and could not have requested a refund from its vendors for purchases preceding the issuance that permit. This statement appears to be a concession that the Taxpayer did not qualify for the sale for resale exemption prior to the issuance of a sales tax permit. Ark. Code Ann. § 26-52-401(12) (Supp. 2017) does require that a taxpayer to obtain a sales tax permit to qualify for sale for resale exemption. It is of no effect that the Taxpayer could not have requested a refund from its vendors for certain purchases during a portion of the audit period as the Taxpayer did not qualify for the requested exemption during that time. That exemption cannot

now be granted by this Office. As stated above, the Arkansas General Assembly is the sole arbiter of policy decision. This Office cannot grant an exemption when the Taxpayer fails to meet the statutory requirements put in place by the legislature.

The arguments raised by the Taxpayer with respect to this issue are not persuasive.

C. Reasonableness of Assessment of Periods Lacking Records

The Taxpayer has argued that the tax amount estimated for periods lacking records must be adjusted to account for invoices (improperly notated as tax included) and taxes paid on material purchases. Based on the above analysis, however, no adjustment is warranted with respect to those issues. The Taxpayer has not demonstrated that, utilizing sales within recent periods (without adjusting for tax paid invoices and denying a credit for taxes paid to vendors on materials) to calculate past sales was an unreasonable approach in the absence of the actual records. Consequently, the Taxpayer's arguments with respect to this issue are not persuasive.

D. Estoppel

The Owner indicated that an unknown employee (roughly ten years ago) told him that his services were nontaxable. To the extent that this testimony might implicate an estoppel claim. It is entirely uncertain who that individual was, precisely what information was communicated to that person, and what actual instructions were given by that individual. Additionally, landscaping services have been explicitly listed as taxable services since adoption of Act 5 of

1992 Arkansas General Assembly (2nd Ex. Sess.). The Taxpayer has not proven the elements necessary to establish an estoppel claim. *Cf Duchac v. City of Hot Springs*, 67 Ark. App. 98, 992 S.W.2d 174 (1999).

Interest

Interest must be assessed upon tax deficiencies for the use of the State's tax dollars. See Ark. Code Ann. § 26-18-508 (Repl. 2012). Consequently, the assessment of interest on the tax balance is sustained.

Negligence Penalty

Ark. Code Ann. § 26-18-208(2)(A) (Repl. 2014) provides as follows:

> In case of a failure to pay the amount shown as tax on any return required to be filed under any state tax law, except an individual income tax return, on or before the date prescribed for payment of the tax, unless it is shown that the failure to pay is due to reasonable cause and not to willful neglect, there shall be added to the amount shown as tax on the return five percent (5%) of the amount of the tax if the failure is for not more than one (1) month, with an additional five percent (5%) for each additional month or fraction of a month during which the failure continues, not to exceed thirty-five percent (35%) in the aggregate.

The record provides that this penalty was assessed with respect to the sales taxes that were collected from customers but not remitted to the Department based on the above analysis. As stated above, a Taxpayer may not collect state taxes on behalf of the Department and fail to remit those taxes to the state. Though the Taxpayer was unaware of its error, this principle has been well established since the issuance of the *Sears Roebuck* case in 1947. Lack of knowledge of a publicly stated legal requirement cannot be recognized as a defense to its enforcement as all individuals are presumed to know the law. *Barlow v. US*, 32 U.S. 404, 411 (1833); *see also State v. Simmons*, 1 Ark. 265, 266

(1839). Consequently, the assessment of the negligence penalty with respect to the sales tax assessment is sustained.

DECISION AND ORDER

The assessment is sustained in full. 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.

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.[12]

OFFICE OF HEARINGS & APPEALS

TODD EVANS
ADMINISTRATIVE LAW JUDGE

DATED: June 28, 2019

[12] *See Board of Trustees of Univ. of Arkansas v. Andrews*, 2018 Ark. 12.