

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

ADMINISTRATIVE DECISION

IN THE MATTER OF [REDACTED]	GROSS RECEIPTS AND COMPENSATING USE TAX ASSESSMENTS
ACCT. NO.: [REDACTED]	
DOCKET NOS.: 20-743	(\$ [REDACTED] – Sales Tax) ¹
20-744	(\$ [REDACTED] – Use Tax) ²

RAY HOWARD, ADMINISTRATIVE LAW JUDGE

APPEARANCES

This case is before the Office of Hearings and Appeals upon a written protest dated February 21, 2020, and signed by [REDACTED], on behalf of [REDACTED], the Taxpayer. The Taxpayer protested the assessments of gross receipts tax (“sales tax”) and compensating use tax (“use tax”) resulting from an audit conducted by Crystal Gastineau (“Tax Auditor”), from the Central Audit District of the Office of Field Audit, for the Department of Finance and Administration (“Department”). The audit period was from June 1, 2013, through December 31, 2017 (Audit ID: [REDACTED]).

This case was submitted on written documents at the request of the Taxpayer. The Department was represented by Leslie D. Fryxell, Attorney at Law, Office of Revenue Legal Counsel (“Department’s Representative”). The

¹ The assessed amount includes tax ([REDACTED]) and interest (\$ [REDACTED]). This amount does not reflect any adjustments to the audit that the Department may have agreed to make.

² The assessed amount includes tax ([REDACTED]) and interest ([REDACTED]). This amount does not reflect any adjustments to the audit that the Department may have agreed to make.

Taxpayer was represented by [REDACTED] [REDACTED] (“Taxpayer’s Representative”). A Revised Briefing Schedule was mailed to the parties on May 15, 2020. The Department’s Opening Brief was filed on June 23, 2020. The Taxpayer’s Response Brief was filed on October 21, 2020. The Department’s Reply Brief was filed on November 5, 2020. The matter was submitted for a decision on March 10, 2021.

ISSUE

Whether the assessments issued by the Department against the Taxpayer should be sustained? Subject to the adjustments conceded by the Department, yes.

FINDINGS OF FACT/CONTENTIONS OF THE PARTIES

The Department’s Opening Brief summarized the facts and issues involved in this case and stated, in part:

[REDACTED] or “Taxpayer”) is a [REDACTED] doing business in Arkansas. [REDACTED] a [REDACTED], is primarily engaged in manufacturing and selling [REDACTED] in the United States [REDACTED]. Taxpayer is the holder of a Sales and Use Tax Permit issued on [REDACTED]. This plant was located in [REDACTED] and [REDACTED]. [REDACTED] is located at [REDACTED].

In March 2016, Crystal Gastineau, Tax Auditor for the Arkansas Department of Finance and Administration, initiated a sales and compensating use tax audit of the taxpayer’s books and records for the reporting period April 1, 2013 and ending March 31, 2016. Over the course of the audit, four (4) statute waivers were signed which extended the deadline for issuance of the Notice of Proposed Assessment to March 31, 2020. Copies of the signed waivers are attached collectively as **Exhibit 1**.

On August 31, 2016, an Audit Appointment Confirmation Letter

was sent to Taxpayer confirming a November 30, 2016, appointment for the audit of the [REDACTED] location. Taxpayer immediately notified the auditor that, [REDACTED]

[REDACTED] Taxpayer further advised the auditor that the records would be sent electronically so that the auditor would not need to [REDACTED] to obtain records. In November 2016, Taxpayer assigned new contacts to this audit and in January 2017, communication began between the auditor and Taxpayer's new contacts. In June of 2017, having learned that Taxpayer was [REDACTED] during this audit period, the auditor verified that all records would be accessible. In July 2017, Taxpayer advised that the audit start might be delayed until the first quarter of 2018, [REDACTED]

On or about January 29, 2018, the auditor contacted Taxpayer about starting the audit. Taxpayer replied that was the tentative plan, but their voluminous caseload along with various setbacks including [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] pointed to a mid-year start. In February 2018, it was agreed that the audit period would be changed from April 2013 to June 1, 2013, because the previous audit covered periods through May 31, 2013. Also at the Taxpayer's request, it was agreed that the audit period would be extended through December 2017. The subsequent statute waivers reflect the new audit period. On March 29, 2018, the Taxpayer requested more time to provide records so that older audits could be completed.

On May 30, 2018, at Taxpayer's request, a conference call was held to discuss how this audit could be expedited; specifically, Taxpayer proposed the possibility of using prior audit projections to complete this audit. Included on the call were three (3) representatives of the Taxpayer along with the auditor and her supervisor. The parties agreed that Taxpayer would begin sending information around June 11, 2018. Nothing was received on that date and on June 12, 2018, the auditor asked for a progress report. On June 13, 2018, Taxpayer advised there were issues with the data and they were still in the process of running the numbers and analyzing data. The auditor followed up with the Taxpayer on July 3, 2018. Taxpayer replied that, due to deadlines, they were still compiling data and hoped to provide findings in the next week. The auditor asked for an update on July 25, 2018. The Taxpayer replied on July 31, 2018, that they would have to determine when the analysis could be done. On September 6, 2018, the auditor asked whether any information had been gathered. On December 5, 2018, having received no records, the auditor advised Taxpayer that if records were not

received by December 31, 2018, then a summons for the records would have to be issued. On December 28, 2018, the auditor received a zip file containing downloads of raw data of the sales and purchases on [REDACTED].

As previously referenced, the Taxpayer [REDACTED] during the audit period. The downloads included raw data on [REDACTED] [REDACTED] included purchase reports and sales reports for tax years 2013 and 2014. The [REDACTED] included purchase and sales reports for tax years 2013 through 2017. The auditor asked for confirmation that these downloads contained all the purchase and sales transactions for the audit period. Taxpayer explained that the purchase downloads were “for the accounts that [the previous auditor] found exceptions with last examination.” Taxpayer confirmed the sales downloads included all sales.

With the data provided on December 28, 2018, and in an effort to “expedite the normal audit timeline,” Taxpayer made a “proposal” to “apply an error rate . . . derived from the last audit” to determine taxability of purchases and sales. Using the previous audit as a base, Taxpayer calculated an “average tax rate” which, it proposed, would be applied to the present audit to determine a “total proposed tax” for the use tax audit. For the sales audit, Taxpayer proposed that the auditor “objectively” choose transactions from among the [REDACTED] Taxpayer acquired since the previous audit. Taxpayer would then provide supporting documentation to verify the tax status of those transactions. The proposed tax payment for sales would be calculated after the auditor selected transactions and reviewed Taxpayer’s documents.

Communications between the Taxpayer and the auditor continued during the period between December 28, 2018, when the raw data was first provided and December 20, 2019, the date the audit closed. The data was coded to Taxpayer’s standards. As a result, the auditor was unable to understand most of the data, and asked Taxpayer to explain the reports. Taxpayer answered some of the auditor’s questions, but was delayed in answering others, thereby impeding the ability of the auditor to analyze the raw data. In February 2019, Taxpayer advised that the [REDACTED] was erroneous, should be disregarded, and a corrected report was sent.

In April 2019, Taxpayer provided the tax codes requested by the auditor in March. On April 25, 2019, the auditor advised Taxpayer she tried to analyze the purchase downloads, but still needed help understanding the data. She sent a list of questions to Taxpayer

and advised that not enough information had been provided to come to an agreement on how to audit the data. In June 2019, Taxpayer advised that due to “deadlines for multiple audits with older audit periods,” Taxpayer had not reviewed the auditor’s issues and inquiries, but would do so “as soon as possible.”

On July 11, 2019, the auditor advised that lack of progress on the audit was leading to a “situation.” Because the downloads from the Taxpayer were labeled using headings unique to the Taxpayer, the auditor could not understand the data. The list of questions related to purchases was resent along with a request for clarification for the headings on the sales list. The auditor identified issues preventing progress on the audit. First, figuring out how to match what was reported to what should have been reported was difficult because only a partial list (the transactions questioned during the previous audit) of sales and purchases had been provided. Second, the auditor could not determine what taxes were charged or whether a line item was a taxable event. Exemption certificates were requested. Taxpayer stated they have [REDACTED] and for that reason, the proposal was presented. The auditor stated that, at the direction of her supervisor and manager, a summons for records would be issued if records and information were not received by July 17, 2019. Taxpayer replied that they were working to progress as “efficiently and quickly as possible” and would provide “updates and answers” on or before the July 17th deadline. Taxpayer cited a full audit inventory; a [REDACTED] and working to reduce their audit caseload as reasons for the delays. On July 15, 2019, Taxpayer sent the tax code descriptions and answered some questions. Using that information, the auditor provided an [REDACTED] download analysis to the Taxpayer. Taxpayer stated that, based on “a brief cursory review,” the expense analysis “looked good,” but it would be reviewed “in detail.” On July 19, 2019, the auditor again requested exemption certificates and an explanation for the line item descriptions on the downloads that were exempt. Although exemption certificates were not provided, Taxpayer explained how to find the exempted sales and requested a list of customers for whom exemption certificates were being requested. The auditor said she would compile a list of exempted customers and again requested the descriptions of the exempted line items. The auditor explained the issue was a lack of information to determine whether a transaction should be exempt. The list of customers with exempt sales and a request for copies of exemption certificates was emailed to Taxpayer on July 23, 2019. Another request for line item descriptions for exempted sales was made on July 25, 2019. Taxpayer’s response was to direct her to a previous email. The auditor asked whether Taxpayer could run

another report to add descriptions to the exempt sales line items. Taxpayer replied that there was not; the format was the same as previously used; it works; and “the objective is met in determining taxed sales from exempt ones.” Taxpayer stated they were continuing to pull exemption certificates and document support and reviewing the purchase reports.

On September 4, 2019, the auditor requested a status report on the Taxpayer’s review of the [REDACTED] and the [REDACTED] [REDACTED] and an update regarding the exemption certificates. Taxpayer confirmed they were still working on both and said they would be in touch after making “a reasonable amount of headway.”

On December 4, 2019, the auditor requested the locations for the jurisdiction codes on the [REDACTED] and sent the underreported taxable sales list for the [REDACTED] to Taxpayer. With the list, the auditor explained that, due to the absence of documentation supporting exemptions or certificates validating exempt sales, any audited exempted sales transactions were denied. On December 5, 2019, Taxpayer replied that communication had continued throughout the audit process and consideration should be given to their caseload. Taxpayer requested additional time to manually pull the documentation they may have to support exemptions for the remaining customers. The auditor explained that after failed attempts to establish deadlines and the passing of another eighteen (18) months since Taxpayer’s “proposal” to expedite the audit, the audit would have to be completed based on the information provided. Taxpayer requested until the end of December 2019, to provide documents related to non-taxable transaction types and exempt customers. The auditor said she would review any documents provided, but that she was working to complete the audit. Taxpayer began sending screenshots of invoices which the auditor reviewed and again told Taxpayer that she was continuing to complete the audit.

The suggested “proposal” using figures from the previous audit was never formalized. Without the requested documents and information, the auditor was never able to gain a comprehensive understanding of the raw data in the December 28, 2018, downloads. Due to the lack of documents and information, the data could not be analyzed and a degree of confidence in the Taxpayer’s record keeping was never developed. These factors contributed to an inability to rely on the numbers in the Taxpayer’s proposal. Therefore, all sales and purchase transactions for [REDACTED] [REDACTED] [REDACTED] were reviewed based on the information available to the auditor as of December 20, 2019, the audit close

date.

As explained above, the auditor reviewed the downloads of raw data for sales and use tax from [REDACTED]. The data was coded to Taxpayer's standards making it very difficult to understand. For Sales Tax, additional information for coding and line item descriptions was requested. No exemption certificates or line item descriptions for the [REDACTED] were provided. Taxpayer did [REDACTED] the list was adjusted to reflect those findings. All other line items were listed as taxable and the underreported tax amounts were figured. See Schedule A-4 (sales for [REDACTED]) attached as **Exhibit 2**. No exemption certificates, line item descriptions, or location codes for the [REDACTED] were provided. Therefore, each line item was assessed as taxable to the [REDACTED] and underreported amounts were figured. See Schedule A-5 (sales for [REDACTED]) attached as **Exhibit 3**. These findings were carried to Schedule A-2, attached as **Exhibit 4**, for underreported amounts per county and Schedule A-3, attached as **Exhibit 5**, for underreported amounts per city. The state monthly underreported sales tax is on Schedule A-1 attached as **Exhibit 6**.

For Use Tax, the auditor assessed the taxable purchases based on purchase order descriptions for each line item because no invoices were provided. The auditor determined that tax was not paid, but should have been paid, on a variety of purchases from out of state vendors. Invoices for underreported local taxes were capped at [REDACTED]. The combined findings per month are reported on Schedule B-1 for State, [REDACTED]. Schedule B-2 is the listing for [REDACTED]. Schedule B-3 is the Use Tax listing for [REDACTED]. All Use Tax Schedules are collectively attached as **Exhibit 7**.

The auditor determined that the taxpayer had taxable sales totaling [REDACTED] and taxable purchases totaling [REDACTED]. A Notice of Proposed Assessment dated December 23, 2019, in the total sum of [REDACTED] was issued. The assessment included tax of [REDACTED] and interest of [REDACTED]. No penalty was assessed. A copy of the Notice of Proposed Assessment is attached as **Exhibit 8**.

On January 7, 2020, the auditor received approximately four hundred (400) additional invoices from the Taxpayer. A review of these invoices resulted in adjustments to taxable sales. These adjustments are reflected in the Revised Sales Tax Schedules dated January 10, 2020, which are collectively attached as **Exhibit 9**. A

new Summary of Findings was issued on January 10, 2020, reflecting gross receipts (sales) tax due of [REDACTED], plus interest of [REDACTED], for a total of [REDACTED]; additionally, compensating use tax of [REDACTED], plus interest of [REDACTED], was due for a total of [REDACTED]. Together, the total assessment was [REDACTED] for both gross receipts (sales) and use tax. See, Summary of Findings attached as **Exhibit 10**.

The Taxpayer timely protested the assessment. See Protest attached as **Exhibit 11**. Taxpayer's protest states:

All supporting documentation from [REDACTED] had not been reviewed by the auditor. A thorough and complete review of the Taxpayer's documents nor contentions had not been considered. The State of AR abruptly decided to conclude the audit without considering outstanding documentation. The auditor failed to consider exemption certificates accepted in previous examination, which were still valid.

With the Protest, Taxpayer provided a thumb drive containing hundreds of documents that had been requested during the audit including, but not limited to, exemption certificates; sales invoices; and credit memos. The auditor reviewed all documents provided. Then, on May 14, 2020, Taxpayer submitted additional documentation. After reviewing all documentation provided by the Taxpayer through May 14, 2020, the auditor agreed that some adjustments to the taxable sales should be mad and the sales schedules were adjusted. See Schedules attached as **Exhibit 12**.

...

The Department has established by a preponderance of the evidence that the Taxpayer is subject to gross receipts tax. The Taxpayer sells tangible personal property subject to Arkansas sales tax, and is responsible for collecting and remitting sales tax.

The Department has established by a preponderance of the evidence that the assessment of compensating use tax was proper because Taxpayer made purchases of tangible personal property from out-of-state vendors for use, storage, consumption, or distribution in Arkansas. No invoices were provided; taxable purchases were assessed based on purchase order descriptions. Taxpayer was properly assessed use tax.

...

In a situation in which a taxpayer fails to submit sufficient

documents or records, the Taxpayer fails to establish by a preponderance of the evidence the accuracy of its tax returns. In the absence of evidence to the contrary, the Department's assessments should be sustained. The Department assessed gross receipts tax and compensating use tax based upon the best information and documentation available. The burden of refuting the assessment is on the Taxpayer.

In its Protest, the Taxpayer states that not all supporting documentation had been reviewed by the auditor. This statement is false. The auditor did review all supporting documentation provided by Taxpayer. Taxpayer also states that the audit was "abruptly" concluded. As demonstrated by the summary of communications spanning from March 15, 2016, through January 7, 2020, above, it simply cannot be said that this audit ended "abruptly." The auditor asked for, but did not receive exemption certificates until February 21, 2020, when Taxpayer protested the assessment. As reflected by the facts above, the Taxpayer failed to produce all requested records. The Tax Auditor's gross receipts tax assessment and compensating use tax assessment should be sustained and affirmed in its entirety subject to the adjustments made through May 14, 2020, and any additional adjustments that may be made by the Department following a review of all documents received from the Taxpayer through September 7, 2020, which the Department has agreed to accept.

Interest was properly assessed upon the tax deficiencies for the use of the State's tax dollars. *See* Ark. Code Ann. § 26-18-508 (Supp. 2019).

CONCLUSION

The Department has established by a preponderance of the evidence that the Taxpayer is subject to gross receipts (sales) tax and compensating use tax. Taxpayer's assessment of Arkansas sales tax for Taxpayer's sales to its customers is proper. Taxpayer's assessment of compensating use tax for its out-of-state purchases for use inside the state was proper. The Taxpayer has not presented evidence to refute the assessment. The assessment of interest against the Taxpayer is proper because the tax was due, but not paid, thereby depriving the State of the use of such funds during those periods. Ark. Code Ann. § 26-18-508 (Supp. 2019). For the reasons set forth above, the Department respectfully requests that the assessment be sustained in full. [P. 1 – 8].

The Taxpayer's Response Brief addressed the facts and issues raised by the Department and stated, as follows:

Taxpayer does not challenge the Department's litany of the events other than mentioning that an apparent misunderstanding between Taxpayer and the auditor existed as to the extent of the sales invoices requested. Notwithstanding the misunderstanding, the Department's recitation does not capture Taxpayer's good faith efforts to gather and provide the records to the auditor during challenging times - that is, Taxpayer was acquired by [REDACTED] during the audit period, was still undergoing [REDACTED] when the audit began, encountered delays due [REDACTED] required by COVID-19, and [REDACTED]. Moreover, Taxpayer had to pull data from [REDACTED] due to the [REDACTED] that occurred during the audit period. Frequently, the records from the [REDACTED] had to be pulled manually.

Taxpayer was able to provide records and the Department has agreed to reductions. See Exhibits 9, 10, and 12 to the Office of Revenue Legal Counsel's letter brief. Exhibit 12 is the Department's schedules as of June 3, 2020. The revised total taxable amount assessment is \$ [REDACTED], which is a reduction of \$ [REDACTED].

As noted by the Office of Revenue Legal Counsel in its letter brief, the Department agreed to accept additional documents up to September 5, 2020. Taxpayer provided additional records in early part of July 2020. On July 29, 2020, the Department provided a proposed schedule and a proposed summary of findings, both dated July 27, 2020, which are attached hereto as Appendix B and Appendix C, respectively. The proposed total taxable amount assessment is [REDACTED], and the proposed tax assessment is [REDACTED] plus interest. Taxpayer appreciates the patience, professionalism and willingness of the Department's staff to review and consider additional documents that Taxpayer produced after the notice of the proposed assessment.

In this Response Brief, Taxpayer sets out two remaining contested issues and offers its evidence in support thereof.

1. Sales scheduled in the audit were not Taxpayer's sales.

The Department generated an audit to verify Taxpayer's sales/use tax compliance to the state of Arkansas. The term "taxpayer" means "any person liable to remit a tax under [Chapter

substantially the same services that Taxpayer agreed to provide [REDACTED] that Taxpayer [REDACTED]. See Appendix I.

Appendix J - [REDACTED] is the sales report that identifies [REDACTED] that are included in Taxpayer's audit. The sales report reflects the data that are in the auditor's worksheet, including the Document Numbers. Taxpayer has included all available invoices in the folder titled Appendix J - Invoices and has selected the following two invoices to illustrate what they show:

- Appendix K - [REDACTED]
- Appendix L - [REDACTED]

The sales report was generated from Taxpayer's [REDACTED] using various fields such as the profit center names (Column Z) and the profit center codes (column AD). [REDACTED]

Based on the evidence presented, Taxpayer contends that all [REDACTED] should be deleted from Taxpayer's audit.

2. Taxpayer's sales scheduled in the audit erroneously include intra-company sales.

Arkansas sales tax is imposed the gross proceeds or gross receipts derived from all sales of tangible personal property or taxable services to **any person** the state. ARK. CODE ANN. §26-52-301. The term " person" includes any individual, partnership, limited liability company, limited liability partnership, corporation, estate, trust, fiduciary, or any other legal entity. ARK. CODE ANN. §26-52-101(24) and GR-3(J). It means sales tax is imposed when a taxable item is sold by one person to another person. The auditor's adjustments include sales from [REDACTED] of Taxpayer to another [REDACTED] Taxpayer; therefore, Taxpayer is being assessed tax on intra-company sales. A charge that Taxpayer recognized in its system as sales between divisions within the same company (Taxpayer) should be removed from Taxpayer's audit.

Taxpayer is providing a spreadsheet as Appendix M that identifies the intracompany charges. Available invoices are provided in a folder titled Appendix M-Invoice. The invoices show the seller to be [REDACTED] and the purchaser to be [REDACTED]. Because no taxable sales were made, the invoices should be deleted from Taxpayer's audit. [P. 1 – 4].

The Department's Reply Brief requested that the assessments against the Taxpayer be sustained subject to the adjustments made by the Department and stated, as follows:

ISSUES

The analysis and arguments set forth in the Department's Opening Brief, submitted June 22, 2020, are adopted and incorporated by reference in this Reply Brief. The Taxpayer's Response Brief received on October 21, 2020, asserts that there are two remaining contested issues and offers an additional 246 pages of documents in support thereof.

DISCUSSION

The Audit opened in March 2016 and closed in December 2019. During the course of the audit, numerous requests for records from the Taxpayer were made. However, Taxpayer provided no documentation until December 2018. The audit closed in December 2019 and a Proposed Assessment was issued based on records received from the Taxpayer through December 12, 2019. See **Exhibit 8**. In January 2020, Taxpayer sent the Auditor approximately four hundred additional invoices. The Auditor reviewed the invoices, made appropriate adjustments, and issued a Summary of Findings reducing the tax liability. See **Exhibit 10**. With its protest received February 26, 2020, (**Exhibit 11**) Taxpayer submitted a thumb drive containing hundreds of documents that had been requested during the audit. The Auditor reviewed these invoices and documents and made adjustments to the taxable sales. See **Exhibit 12**. Subsequently, by agreement of the parties, Taxpayer was given until September 7, 2020, to submit additional documents for review by the Auditor. That no documents would be accepted after September 7, 2020, was expressly stated and understood by the parties. On July 9, 2020, the Department received approximately 2,296 documents from Taxpayer. No additional documents were received by the September 7, 2020 deadline. All documents provided through September 7, 2020 have

been reviewed by the Auditor and appropriate adjustments to sales schedules made.

The Taxpayer has now submitted 246 pages of documents and spreadsheets in support of its assertion that there are two remaining issues. However, these documents were not provided to the Auditor during the course of the audit nor by the extended deadline. These records were provided approximately 9 months after the audit was closed. Therefore, these records are not sufficient to refute the assessment.

The Department has met its burden of proof in this case by establishing by a preponderance of the evidence that the tax law applies. The Taxpayer sells tangible personal property subject to Arkansas sales tax and is responsible for collecting and remitting the sales tax. The Taxpayer has made purchases that are subject to use tax and is responsible for reporting and remitting use tax. The Department correctly assessed sales and use tax against the Taxpayer based on the Taxpayer's sales and purchases.

The Taxpayer does not deny in its response brief that ordinarily taxable sales were made. Instead, the Taxpayer argues that it does not owe tax in relation to some sales because another entity was responsible for those sales and it also argues that it does not owe tax in relation to other sales because those were non-taxable intracompany sales. In support of these arguments, the Taxpayer submitted a 3 ½ page response brief and more than 246 pages of documents and spreadsheets and asks that the Department audit the proffered records to prove the Taxpayer's case. The Taxpayer has not proven that the specific sales at issue in its response brief were even included within the assessment. As the Department's examination of the taxpayer's records concluded in 2019, the Department does not have the ability to now verify the accuracy and authenticity of any of the records that have been provided by the taxpayer during the administrative hearing process.

Conducting an audit of records under Ark. Code Ann. § 26-18-305 (Repl. 2020) to assist a Taxpayer in meeting its burden of proof at an administrative hearing is outside the scope of the administrative relief afforded to taxpayers under Ark. Code Ann. §§ 26-18-404 and 26-18-405 (Repl. 2020). Hearing officers have the authority to review evidence and make written findings concerning the applicability of a proposed assessment or refund claim denial, but do not have the authority to audit a taxpayer's records. Ark. Code Ann. § 26-18-405(a)(1) (Repl. 2020). Auditors employed by the Secretary have completed the one (1) audit of the Taxpayer's records authorized by law and have not been instructed that an

additional audit is necessary. As an attorney appointed by the Secretary under § 26-17-202 (Repl. 2020), counsel for the Department has the authority and duty to maintain and defend the interests of the Revenue Division of the Arkansas Department of Finance and Administration but does not have the authority to audit a taxpayer's records. Further, counsel for the Department is ethically prohibited by the Arkansas Rules of Professional Conduct from assisting the Taxpayer in proving its case.

Though the Taxpayer has provided many excuses for not providing records during the audit that completed in 2019, the Taxpayer failed in its duties to keep and preserve records and to provide such records during the course of an audit under Ark. Code Ann. § 26-18-305 (Repl. 2020). All evidence produced prior to deadlines established in this matter has been reviewed. The Taxpayer has failed to refute the assessment of tax in relation to the sales at issue in the Taxpayer's response brief.

The Department has established by a preponderance of the evidence that the Taxpayer is subject to gross receipts tax for the tangible personal property sold by the Taxpayer and use tax for the taxable purchases made by the Taxpayer. The Taxpayer was required to maintain suitable records necessary to determine the amount of tax due but failed to submit them to the Auditor. The Auditor made an assessment based upon the records provided by Taxpayer by the date agreed upon by the parties. The assessment of gross receipts tax and use tax against the Taxpayer is proper.

The assessment of interest against the Taxpayer is proper because the tax was due but not paid, thereby depriving the State of the use of such funds. Ark. Code Ann. § 26-18-508 (Repl. 2020). For the reasons set forth above, the Department respectfully requests that the assessment against the Taxpayer be sustained in full, subject to the adjustments noted in the Department's Opening Brief and the adjustments made through September 7, 2020.

CONCLUSIONS OF LAW

Standard of Proof

Ark. Code Ann. § 26-18-313(c) (Repl. 2020) 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) (Repl. 2020).

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) (Repl. 2020).

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) (Repl. 2020).

Assessments

Subject to the applicability of an exemption, a deduction, or a credit, use tax is imposed on sales of tangible personal property or taxable services made by

out-of-state vendors/sellers to in-state purchasers for storage, use, or consumption in this state,³ and sales tax is imposed on sales of tangible personal property or taxable services made by in-state vendors/sellers to in-state purchasers.⁴ The Department has statutory authority to “[a]udit and properly determine and compute the state tax payable by any taxpayer subject to taxation under any state law”⁵ and to “employ proper and reasonable audit methods.”⁶ Ark. Code Ann. § 26-18-506(a) (Repl. 2020) requires the Taxpayer to maintain suitable records and states:

(a) It is the duty of every taxpayer required to make a return of any tax due under any state tax law to keep and preserve suitable records as are necessary to determine the amount of tax due or to prove the accuracy of any return.

Tax deductions and credits, like tax exemptions, exist as a matter of legislative grace. See Cook, Commissioner of Revenue v. Walters Dry Good Company, 212 Ark. 485, 206 S.W.2d 742 (1947); and Kansas City Southern Ry. Co. v. Pledger, 301 Ark. 564, 785 S.W.2d 462 (1990). A taxpayer claiming a deduction or credit bears the burden of proving that it is entitled to the deduction or credit by bringing herself or himself clearly within the terms and conditions imposed by the statute that contains the deduction or credit. See Weiss v. American Honda Finance Corp., 360 Ark. 208, 200 S.W.3d 381 (2004).

This case really involves an audit dispute more so than a legal controversy. The Taxpayer’s Representative filed an additional brief on November 12, 2020, and the Department’s Representative responded, via email, and stated:

³ See Ark. Code Ann. § 26-53-101 et seq. (Repl. 2020).

⁴ See Ark. Code Ann. § 26-52-101 et seq. (Repl. 2020).

⁵ See Ark. Code Ann. § 26-18-301(a)(2) (Repl. 2020).

⁶ See Ark. Code Ann. § 26-18-305(a)(2)(A) (Repl. 2020).

All Briefs allowed under your Briefing Schedule were submitted November 5, 2020. The Department respectfully objects to inclusion of the "Taxpayer's Reply Brief" and asks that said Brief and Appendices not be considered, and that this matter be considered closed and submitted for decision on November 6, 2020, the date on which the Department's Reply Brief was due.

Similar cases in the past have focused on the authority vested in the Office of Hearings and Appeals. In a Revision Decision issued in May of 2019, the Commissioner of Revenues delineated the authority of the Office of Hearings and Appeals and held that:

The duties of a hearing officer appointed by the Department are limited to reviewing written protests and making written findings as to the applicability of a proposed assessment or denial of a claim for refund. Accordingly, it is outside the scope of the duties of the hearing officer to provide taxpayers with guidance concerning the existence of programs to request a waiver of interest or penalties.

The Office of Hearings and Appeals does not have the authority to order or direct a re-audit of a matter submitted for consideration. Given the parameter of duties outlined above, it would be outside the scope of the duties of a hearing officer to determine the weight or relevance of documents not reviewed during an audit. Consequently, in light of the position taken by the Department, the assessments are sustained at this stage of the administrative review.

Interest

Interest was properly assessed on the tax deficiency for the use of the State's tax dollars. See Ark. Code Ann. § 26-18-508 (Repl. 2020). No penalty was assessed against the Taxpayer.

DECISION AND ORDER

Subject to the adjustments conceded by the Department, the proposed assessments are sustained. The file is to be returned to the appropriate section of

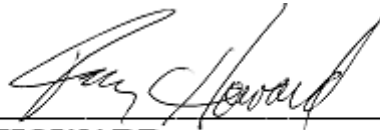
the Department for further proceedings in accordance with this Administrative Decision and applicable law.

Pursuant to Ark. Code Ann. § 26-18-405 (Repl. 2020), 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 (Repl. 2020) 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.⁷

OFFICE OF HEARINGS & APPEALS



RAY HOWARD
ADMINISTRATIVE LAW JUDGE

DATED: March 12, 2021

⁷ See Board of Trustees of Univ. of Arkansas v. Andrews, 2018 Ark. 12.