

**STATE OF ARKANSAS
DEPARTMENT OF FINANCE & ADMINISTRATION
OFFICE OF HEARINGS & APPEALS
ADMINISTRATIVE DECISION**

IN THE MATTER OF [REDACTED]
[REDACTED]

**GROSS RECEIPTS TAX
ASSESSMENT
AUDIT NO.:** [REDACTED]
AUDIT PERIOD: [REDACTED]

ACCT. NO.: [REDACTED]

[REDACTED]

DOCKET NO.: 21-193

([REDACTED])¹

**TODD EVANS, ADMINISTRATIVE LAW JUDGE
APPEARANCES**

This case is before the Office of Hearings and Appeals upon a written protest received August 17, 2020, signed by [REDACTED], the Taxpayer. The Taxpayer protested an assessment issued by the Department of Finance and Administration (“Department”). The Department was represented by David Scott, Attorney at Law, Office of Revenue Legal Counsel (“Department’s Representative”).

At the request of the Taxpayer, this matter was taken under consideration of written documents. A briefing schedule was established for the parties on December 22, 2020. The Department’s Opening Brief was filed on December 28, 2020. The Taxpayer did not file a Response Brief but her protest was received into evidence. The record was closed and this matter was submitted for a decision on February 16, 2021.

ISSUE

Whether the Department’s assessments should be sustained? Yes.

FACTS AND CONTENTIONS OF THE PARTIES

¹ This amount represents [REDACTED] (tax), [REDACTED] (failure to file penalty), and [REDACTED] (interest).

Within his Opening Brief, the Department's Representative provided a summary of relevant facts, stating as follows in pertinent part²:

████████████████████ is owned by the Taxpayer. At the time of the estimated assessment, the Taxpayer was an unregistered taxpayer providing photography services in Arkansas. Taxpayer is located at ████████████████████. Taxpayer is primarily engaged in performing photography services in the ████████████████████.³ The Taxpayer did not respond to numerous attempts to contact her and did not submit the requested registration of sales information. As a result, a sales tax account was set up for assessment purposes and an estimated assessment was prepared related to the Taxpayer's activities within Arkansas.

A gross receipts ("sales") tax audit was conducted for the period December 1, 2013 through May 31, 2020 by Steve McCune, Tax Auditor for the Arkansas Department of Finance and Administration. Between December 6, 2019 and April 27, 2020, the auditor sent a series of four (4) letters advising the Taxpayer that it had come to the attention of the Department that Taxpayer was or had been conducting taxable business activities within the state of Arkansas.⁴ The letters informed the Taxpayer that she was not registered for sales tax purposes and not current with sales tax filing requirements. On April 27, 2020, the auditor issued a Summons for Records to Taxpayer, requesting Taxpayer to produce all books, records, a completed "Combined Business Tax Registration" form (AR-1R), and sales data from December 1, 2013 through March 31, 2020.⁵ Taxpayer did not respond to the auditor's letters or Summons.

Due to a lack of records, the auditor made an estimated assessment using an estimate calculator prepared by the auditor which included reported sales data from his prior assessments related to photography services. The previous assessments were made on the basis of sales information provided by those taxpayers previously assessed. The auditor used the sales information from the previously issued assessments to calculate a monthly average which was then applied to each filing period included in the Taxpayer's estimated assessment period.⁶ On the last page of the auditor's spreadsheet printout (**Exhibit 4**), under the column labeled, "Average" is the estimated unreported sales amount for the assessment, totaling for the audit period, ████████████████████. *Id.* Page 6 of the Summary of Findings (**Exhibit 5**) reflects "Estimated unreported sales of photography

² Except as noted, all exhibits support the statements for which they are cited.

³ The Department's Representative cited Exhibit 1. This exhibit includes prices and various examples of the Taxpayer's photography services. The address is listed as ████████████████████

⁴ The Department's Representative cited Exhibit 2.

⁵ The Department's Representative cited Exhibit 3.

⁶ The Department's Representative cited Exhibit 4.

services to consumer located within the State” in the amount of [REDACTED]. The same amount of unreported “Taxable Services” was found for [REDACTED]. See **Exhibit 5**.

The auditor determined that the taxpayer was liable for sales tax in the amount of [REDACTED] plus interest in the amount of [REDACTED], plus penalty in the amount of [REDACTED], for a total of [REDACTED].⁷ The Notice of Proposed Assessment resulting from the auditor’s findings was issued on June 19, 2020.⁸ On July 14, 2020, the Sales Tax Unit received a Combined Business Tax Registration Form, AR-1R, from the Taxpayer.⁹ Taxpayer filed a timely protest.¹⁰ The Department downloaded webpages from the NAICS Association and is including them as an Exhibit.¹¹ The Taxpayer contests the assessment on the following basis:

I take pictures for a hobby for the most part – few people have paid me & It was never more than [REDACTED]. I have written a list of “Client” & what they paid me, as I do not have any records of payments.¹²

Within his Answers to Information Request, the Department’s Representative noted that the provision of photography services is generally taxable, and, when a taxpayer fails to maintain adequate records, the Department is allowed to issue estimated assessments, placing the burden of refutation upon the taxpayer. While the Taxpayer alleged that she performed very little photography services for pay, he asserted that the Taxpayer has failed to provide any contemporaneous records to support her assertion and refute the estimated

⁷ The Department’s Representative cited Exhibit 5.

⁸ The Department’s Representative cited Exhibit 6.

⁹ The Department’s Representative cited Exhibit 7.

¹⁰ The Department’s Representative cited Exhibit 8.

¹¹ The Department’s Representative wrote: “NAICS Association website: <https://www.naics.com/naics-code-description/?code=541921> last visited December 21, 2020 at 2:21 p.m.”

¹² Included with the protest, the Taxpayer also stated: “I started [REDACTED] around August or September 2015. I only made the [REDACTED] to build my portfolio, but of course it drew in clients, many had told me I should start advertising and actually charging customers for my services, so [REDACTED], but never charged anyone the prices that I had posted. I’ve mostly only photographed family and friends, so most was done free of charge. Below are my clients, the services received, dates and amount paid by the clients:” The Taxpayer listed twenty-three (23) individuals for services from 2012 through February 2020, and stated that all but five (5) involved free services.

assessment. He further averred that the assessment of interest is appropriate under Ark. Code Ann. § 26-18-508 (Repl. 2020).

After a general discussion of the burdens of proof in tax proceedings and a discussion of the applicable law, the parties' argument shall be addressed with a legal analysis and associated conclusions.

CONCLUSIONS OF FACT AND 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).

Legal Analysis

Initially, the Taxpayer has conceded that she performed taxable photography services for paying customers but challenged the total estimated sales calculated by the Department.

All sales of tangible personal property and certain specifically enumerated services within the State of Arkansas are generally taxable. Ark. Code Ann. § 26-52-301 (Repl. 2020). Sales of photography services of all kinds are included within taxable services. Ark. Code Ann. § 26-52-301(4) (Repl. 2020). Consequently, the Taxpayer's sales are generally taxable unless an applicable credit, deduction, or exemption is proven by the Taxpayer. The Taxpayer is generally liable for the collection and remittance of sales tax upon its sales of tangible personal property and taxable services. Ark. Code Ann. § 26-52-508 (Repl. 2020).

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. 2020). A taxpayer's records may be examined by the Department at any reasonable time, and, when a taxpayer fails to maintain 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. 2020). 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) (Repl. 2020); *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.

The Taxpayer has acknowledged that she lacks business records, warranting an estimated assessment.

While the Taxpayer has provided a handwritten customer list and associated payments with her protest, I am unable to verify the accuracy of that listing without any supporting documentation or records. Additionally, the Arkansas Supreme Court has explained that testimony (standing alone) is insufficient to rebut an estimated assessment. This principle would apply even if that testimony was written down.

In the absence of sufficient records, the Department utilized sales from prior audits of the Taxpayer's photography peers. I am unable to find that approach to be unreasonable based on the presented record. Consequently, the

estimated assessment has not been rebutted by the Taxpayer and must be upheld under Ark. Code Ann. § 26-18-506(d) (Repl. 2020).

Ark. Code Ann. § 26-18-208(1) (Repl. 2020) provides as follows:

In the case of a taxpayer's failure to file any return required by any state tax law on or before the date prescribed determined with regard to any extension of time for filing the return, unless it is shown that the failure is due to reasonable cause and not to willful neglect, there shall be added to the amount required to be shown as tax on the return five percent (5%) of the amount of the tax if the failure is 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

Under the above analysis, the Taxpayer was required to timely file Arkansas sales tax returns to report her taxable sales but failed to do so.¹³ Additionally, lack of knowledge of publicly available statutes and rules cannot be recognized as a defense to their application. 29 Am. Jur. 2d Evidence 290; see also *Edward v. US*, 334 F.2d 360 (1964) and *Jellico Coal Min. Co. v. Commonwealth*, 96 Ky. 373, 29 S.W. 26 (Ky. App. 1895). The assessment of the Failure to File Penalty is sustained.

Interest must be assessed upon tax deficiencies for the use of the State's tax dollars. See Ark. Code Ann. § 26-18-508 (Repl. 2020). Consequently, the assessment of interest on the tax balance 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. §

¹³ It should be noted that the Taxpayer has admitted to performing taxable photography services for pay within her protest.

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.¹⁴

OFFICE OF HEARINGS & APPEALS



TODD EVANS
ADMINISTRATIVE LAW JUDGE

DATED: March 5, 2021

¹⁴ See *Board of Trustees of Univ. of Arkansas v. Andrews*, 2018 Ark. 12.