

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

ADMINISTRATIVE DECISION

IN THE MATTER OF

ACCT. NO.: [REDACTED]

DOCKET NO.: 21-224

**GROSS RECEIPTS
TAX ASSESSMENT**

AUDIT ID: [REDACTED]

(\$ [REDACTED])¹

RAY HOWARD, ADMINISTRATIVE LAW JUDGE

APPEARANCES

This case is before the Office of Hearings and Appeals upon a written protest submitted on September 2, 2020, by [REDACTED], the Taxpayer. The Taxpayer protested the assessment of Gross Receipts Tax (“sales tax”) resulting from an audit conducted by Brittany Howerton, DFA Service Representative – Northwest Audit District of the Office of Field Audit, for the Department of Finance and Administration (“Department”). The audit period was from February 1, 2020, through February 29, 2020.

This case was submitted for consideration of written documents in the record. The Department was represented by David Scott, Attorney at Law, Office of Revenue Legal Counsel. The Taxpayer represented himself. A Briefing Schedule was mailed to the parties on January 15, 2021. The Department’s Opening Brief was filed on January 19, 2021. The Taxpayer did not file a

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

Response Brief but the Taxpayer's protest letter and an attachment were received into evidence. The matter was submitted for a decision on April 1, 2021.

ISSUE

Whether the assessment issued by the Department against the Taxpayer should be sustained? Yes.

FINDINGS OF FACT/CONTENTIONS OF THE PARTIES

The Department issued a proposed assessment against the Taxpayer on August 17, 2020. The Department's Opening Brief summarized the facts and issues involved in this case (including the basis for the Taxpayer's disagreement with the assessment as reflected in the typewritten statement on the Taxpayer's protest letter) and stated, in part:

The Department has a subscription with [REDACTED] that provides a listing of all changes of aircraft registration with the Federal Aviation Administration (FAA). A [REDACTED] (the "[REDACTED]") with [REDACTED] registered to [REDACTED] ("Taxpayer") appeared on the March 2020 [REDACTED] report. That report reflected that registration was pending. On April 13, 2020, the auditor consulted the FAA Registry and found that the registration was pending for new owner/applicant [REDACTED] of [REDACTED]. Taxpayer sold a [REDACTED] on [or about] [REDACTED] and did not collect and remit the gross receipts ("sales") tax.

The Department sent Taxpayer a series of letters requesting sales information and proof of payment of tax. In its request letters, the Department stated that if it did not receive the requested information it would make an estimated assessment based upon the best available information. On May 21, 2020, Taxpayer called auditor Brittany Howerton and stated that there was no Bill of Sale or paperwork for the sale. Taxpayer further stated that he would try to come up with something. Ultimately, the Taxpayer did not provide the requested information and the Department made an estimated assessment of tax, penalty, and interest based upon the best available information which was the Aircraft Bluebook Information for a [REDACTED]. The Department's policy is to take the Average Retail value and add the Average Overhaul value to

calculate the value upon which to make the assessment (Avg Retail [REDACTED] + Avg Overhaul [REDACTED]).

On August 14, 2020, the Department issued a Summary of Findings which was mailed to the Taxpayer. On August 17, 2020, the Department issued a Notice of Proposed Assessment which was mailed to the Taxpayer. On September 2, 2020, Taxpayer protested the assessment.

In accordance with Ark. Code Ann. § 26-18-403 (Repl. 2020), a liability has been determined by the Secretary of the Department of Finance and Administration ("Department") against Taxpayer in the amount of \$ [REDACTED] for sales tax, penalty, and interest.

...

Interest on delinquent sales tax is ten percent (10%) per annum from the date such sales tax was due to be remitted until date of payment. See Ark. Code Ann. § 26-18-508(1) (Repl. 2020). A penalty was assessed as a result of the Taxpayer's failure to file a tax return. See Ark. Code Ann. § 26-18-208(1) (Repl. 2020). "Return" means any tax or information return, report, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of any state tax law which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement to a tax or information return, report, declaration of estimated tax, or claim for refund, including supporting schedules, attachments, or list which are supplemental to, or part of, the return so filed. See Ark. Code Ann. § 26-18-104(12)(A) (Repl. 2020).

...

DISCUSSION

In his protest, Taxpayer stated:

Sir or mrs, [sic] I would like to protest the amount of tax I am being charged. I have included a copy of the bill of sale. I can be reached at [REDACTED]. Or this email address.

Taxpayer is not denying that he owes the tax, penalty, and interest, but instead is protesting the amount of the tax assessed.

Assessment of tax, penalty, and interest should be sustained

The ■■■ is tangible personal property subject to the sales tax. The Taxpayer should have applied for, and obtained, a sales tax permit before he sold the ■■■. At the time of the sale, Taxpayer should have collected the appropriate amount of sales tax and remitted it along with the sales tax report he was required to file with the Department. Taxpayer failed to collect and remit the sales tax. Further, Taxpayer failed to file the required sales tax report(s).

Failure to keep proper records & Estimated assessment

Because the Taxpayer did not keep suitable records of the sale, the Department made an estimated assessment based upon the best available information. The Aircraft Bluebook is a national trade publication generally accepted by aircraft dealers as accurately reflecting current aircraft market value and is used by the Department as a source of aircraft fair market value in cases where suitable records are not available. The bill of sale that the Taxpayer sent with his protest was not made contemporaneously with the sale of the ■■■ and when judged against the value of the Aircraft Bluebook does not appear to reflect the fair market value. The Taxpayer stated to the auditor on a phone call that there was no bill of sale or paperwork for the sale, but that he would try to come up with something. Further, the bill of sale appears to be an effort to use a document that was not created at the time of the transaction in an effort to avoid an unsatisfactory tax audit and should be afforded little to no evidentiary weight.

Taxpayer has not met his burden of proof of refuting the assessment

The Taxpayer has not met his burden of proof of refuting the estimated assessment with credible evidence to establish that the audit results are unreasonable. Arkansas Code Ann. § 26-18-506 (Repl. 2020); *See also Jones v. Ragland*, 293 Ark. 320, 737 S.W.2d 641 (1987); *Leathers v. A. & B. Dirt Movers, Inc.*, 311 Ark. 320, 844 S.W.2d 314 (1992); *Weiss v. Best Enterprises, Inc.*, 323 Ark. 712, 917 S.W.2d 543 (1996).

CONCLUSION

The Taxpayer has not met his burden of proof of refuting the estimated assessment with credible evidence to establish that the audit results are unreasonable. The Department as met the burden of proof in this case by establishing evidence that has the most convincing force and is of superior evidentiary weight. The

evidence is sufficient to incline a fair and impartial mind to the Department's view of the case rather than to the Taxpayer's position. The Department has met its burden to sufficiently demonstrate that the assessment of tax, penalty, and interest was proper. For the reasons set forth above, it is respectfully requested that the assessment herein be sustained in full. [Footnotes omitted, P. 1 – 6].

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.

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).

Sales 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.² Ark. Code Ann. § 26-52-103(35)(A) (Repl. 2020) defines “tangible personal property” to mean “personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses.” The ■■■ sold by the Taxpayer was tangible personal property.³ The liability for collecting and reporting sales tax is upon the seller of the tangible personal property or taxable services unless the purchaser claims an exemption. See Arkansas Gross Receipts Tax Rule GR-79(C). In the instant case, no evidence has been introduced to support a finding that the purchaser of the ■■■ claimed any sales tax exemption.

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”⁴ and to “employ proper and reasonable audit methods.”⁵

² See Ark. Code Ann. § 26-52-101 et seq. (Repl. 2020).

³ Sellers of airplanes are explicitly responsible for obtaining a sales tax permit and collecting and remitting sales tax to the Department for airplane sales. See Ark. Code Ann. § 26-52-505 (Repl. 2020).

⁴ See Ark. Code Ann. § 26-18-301(a)(2) (Repl. 2020).

⁵ See Ark. Code Ann. § 26-18-305(a)(2)(A) (Repl. 2020).

Ark. Code Ann. § 26-18-506 (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.

...

(d) When a taxpayer fails to preserve and maintain the records required by any state tax law, the director may, in his or her discretion, make **an estimated assessment** based upon information available to him or her as to the amount of tax due by the taxpayer. **The burden of proof of refuting this estimated assessment is upon the taxpayer.** [Emphasis added].

With respect to the sale of an aircraft, in the absence of suitable records, Arkansas Gross Receipts Tax Rule GR-14(D) sets forth methods of determining sales tax liability, as follows:

D. RECORDS. The seller shall retain records reflecting the total gross receipts or gross proceeds and description of each aircraft sold along with the value and description of each aircraft taken in trade. If the seller's records are inadequate or incomplete, the Commissioner may utilize any of the following for purposes of determining sales tax liability:

1. Affidavit signed by the seller and purchaser attesting to the sales price or trade-in value of the aircraft;
2. Aircraft valuation schedules prepared by the Assessment Coordination Division of the Arkansas Public Service Commission;
3. Any national trade publication generally accepted by aircraft dealers as accurately reflecting current aircraft market value; or
4. The higher of two appraisals prepared by other aircraft dealers.

The Department utilized the valuation method in Arkansas Gross Receipts Tax Rule GR-14(D)(3) to calculate the estimated assessment issued against the Taxpayer. In the absence of suitable records, the Taxpayer has the burden of

refuting the Department's estimated assessment. See Jones v. Ragland, 293 Ark. 320, 737 S.W.2d 641 (1987); Leathers v. A. & B. Dirt Movers, Inc., 311 Ark. 320, 844 S.W.2d 314 (1992); Weiss v. Best Enterprises, Inc., 323 Ark. 712, 917 S.W.2d 543 (1996). The law requires that sufficient credible evidence be offered by the Taxpayer to establish that the audit results are unreasonable. In Leathers v. A & B Dirt Movers, Inc., 311 Ark. 320, 844 S.W.2d 314 (1992), the Arkansas Supreme Court discussed the absence of appropriate documentation in the context of an estimated assessment, and stated:

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.

Department Exhibit 7 is an Aircraft Bill of Sale relating to the [REDACTED] which reflects a date stamp of "[REDACTED]" and consideration in the amount of [REDACTED]." The Taxpayer submitted an undated Aircraft Bill of Sale with his protest letter⁶ and it reflected consideration for the purchase of the [REDACTED] in the amount of "\$[REDACTED]." With respect to the Bill of Sale submitted with the Taxpayer's protest letter, the Department contended that it: (1) was not made contemporaneously with the sale of the [REDACTED] (2) when judged against the value of the Aircraft Bluebook does not appear to reflect the fair market value of the [REDACTED]; (3) appears to be an effort to use a document that was not created at the time of

⁶ The protest letter was dated August 30, 2020.

the transaction in an effort to avoid an unsatisfactory tax audit; and (4) should be afforded little to no evidentiary weight. The Department's contention regarding the evidentiary weight to be afforded to the Bill of Sale submitted with the Taxpayer's protest letter is well-founded. Consequently, the Taxpayer failed to establish that the audit methodology or calculations used by the Department were unreasonable. The Taxpayer failed to present sufficient evidence to meet the burden of refuting the estimated assessment of sales tax. See Jones v. Ragland, supra; Leathers v. A. & B. Dirt Movers, Inc., supra; Weiss v. Best Enterprises, Inc., supra. The evidence presented supports a finding that the Department correctly assessed sales tax against the Taxpayer.

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. 2020). A penalty was also properly assessed for failure to file a sales tax return under Ark. Code Ann. § 26-18-208(1) (Repl. 2020).

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 (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: April 5, 2021

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