

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

**ADMINISTRATIVE DECISION**

<b>IN THE MATTER OF</b> [REDACTED] [REDACTED] <b>ACCT. NO.:</b> [REDACTED]	<b>GROSS RECEIPTS (SALES) TAX &amp; COMPENSATING USE TAX AUDIT NO.:</b> [REDACTED] <b>AUDIT PERIOD: JUNE 2018 THROUGH MAY 2021</b>
<b>DOCKET NOS.: 23-122 (SALES) 23-123 (USE)</b>	[REDACTED] <sup>1</sup> [REDACTED] <sup>2</sup>

---

**TODD EVANS, ADMINISTRATIVE LAW JUDGE**

**APPEARANCES**

This case is before the Office of Hearings and Appeals upon written protest received August 22, 2022, signed by [REDACTED] (“Taxpayer’s Representative”) on behalf of [REDACTED], the Taxpayer. The Taxpayer protested the assessment of use tax issued by the Department of Finance and Administration (“Department”). The Department was represented by Olan Reeves, 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 by letter dated September 6, 2022. The Department’s Representative filed his Opening Brief on September 7, 2022. The Taxpayer filed a Response Brief on October 20, 2022. On November 3, 2022, the Department’s Representative filed a Reply

---

<sup>1</sup> This amount includes [REDACTED] (tax) and [REDACTED] (interest).

<sup>2</sup> This amount includes [REDACTED] (tax) and [REDACTED] (interest).



██████████, the total owed is ██████████.<sup>7</sup> Taxpayer disagrees with the proposed assessment and filed a protest on August 22, 2022 and states that:<sup>8</sup>

██████████ in the protest of their recent sales and use tax audit ██████████). Please find all ██████████ and the completed protest form. Additional documentation will be provided upon request. Could you please confirm receipt of the timely filed protest? Please let us know if you have any additional questions or comments.

On the protest form itself, Taxpayer has indicated a decision on documents plus they state:

*Additional supporting documentation gathered to support nontaxable transactions and credits not given for sales tax paid in error by ██████████ as use tax or tax paid to the vendor.*

During the audit, the records described above were examined. For Gross Receipts taxes, it was first determined and verified that ██████████ ██████████ would receive free complimentary meals ██████████. These transactions were deemed to be taxable and were also included in the audit on Schedule A.2. These are listed as additional taxable sales-comp meals. The auditor then verified that some local vendors were not charging the applicable sales taxes on items being used/consumed ██████████ but that they had valid sales tax permit, or exemption certificate and these were provided by the Taxpayer and the vendors as well. These would be classified as withdrawal from stock and listed on Schedule A.3. The totals for these 2 schedules were then added together on Schedule A.1.<sup>9</sup> After adjustments for both categories, these totals show total taxable sales for the ██████████

For compensating use taxes, the Taxpayer provided a detailed fixed asset listing, accounts payable records, credit card statements, accrual listing and any other supporting documents requested during the audit. During the audit, actual copies of invoices were used from June 1, 2018 to February 28, 2020. From March 1, 2020 to the end of the audit period, the information was contained in a computer accounting system. There are five taxable categories combined on Schedule B.1, Summary of Additional Taxable Purchases.<sup>10</sup>

<sup>7</sup> The Department's Representative cited Exhibit 4.  
<sup>8</sup> The Department's Representative cited Exhibit 5.  
<sup>9</sup> The Department's Representative cited Exhibit 6.  
<sup>10</sup> The Department's Representative cited Exhibit 7.

After reviewing credit card transactions and bank statements, the auditor determined that several out of state vendors were not charging the applicable sales taxes, nor did the taxpayer accrue the applicable taxes on items being consumed [REDACTED]. Schedule B.1 lists the compensating use additional taxable purchases for Arkansas state [REDACTED]

As to the Expenses, the auditor determined that several out of state vendors were not charging the applicable sales tax, nor did the taxpayer accrue the applicable tax on items being consumed by [REDACTED]. These adjustments are listed on Schedule B.2 as additional taxable purchases for Arkansas state, [REDACTED]. These amounts are reflected on Schedule B.1.

Credit Card transactions and bank statements were provided for review by the Taxpayer. The auditor determined that several out of state vendors were not charging applicable sales tax, nor did the taxpayer accrue the applicable tax on items being consumed by the Taxpayer. These adjustments are listed on Schedule B.3 as additional taxable purchases - credit cards. These amounts are reflected on Schedule B.1.

Taxpayer provided a detail listing of assets for the audit period and documentation was provided for the majority of the items listed but not all. The items without documentation were placed on the list as taxable. All of these adjustments are reflected on Schedule B.4. These amounts are reflected on Schedule B.1.

Because the Taxpayer changed accounting systems in March 2020, there was a glitch which resulted in the system not properly allocating the state, [REDACTED] taxes that were being reported on the accrual listings. These errors are found on Schedule B.5 - Accounting Errors. These amounts are reflected on Schedule B.1.

During the audit, the auditor noticed that the Taxpayer was accruing tax each month on invoices from vendors that were providing non-taxable services. These items were adjusted as credits and are listed on Schedule B.6 as Over Accruals. These amounts are credited on Schedule B.1.

In summary, the Taxpayer was assessed for additional Gross Receipts tax due to complimentary meals and withdrawal from stock not being taxes properly. During the audit review, it was determined that [REDACTED] were receiving 100% complimentary meals while [REDACTED]. It was also determined that local vendors were not charging tax on taxable items due to valid permits/exemption certificates being on file. The Taxpayer was assessed for compensating use taxes for additional taxable purchases. This adjustment consisted of reporting errors, over accruals

and out of state vendors not charging the applicable taxes on a variety of expenses that occurred during the audit period.

Within his Answers to Information Request, the Department's Representative initially stated that consideration of any new issues that were not previously raised should be barred as an untimely protest under Ark. Code Ann. § 26-18-404 (Repl. 2020). The Department's Representative further asserted that the Taxpayer failed to supply all requested documents during the audit and may not provide the missing records now. He additionally noted that the Taxpayer is a direct pay permit holder.

## **2. Response Brief**

For her Response Brief, the Taxpayer's Representative alleged that certain vendors with assessed transactions either had locations in Arkansas or had nexus with Arkansas. She concluded that those assessed transactions did not represent out of state transactions for tax purposes. Consequently, she argued that the sellers were responsible for collection and remittance of applicable taxes under Ark. Code Ann. § 26-52-517(a) (Repl. 2020) and Arkansas Gross Receipts Tax Rule GR-79. To establish that the vendors had physical locations within Arkansas or otherwise had nexus, the Taxpayer's cited to links to the Arkansas Secretary of State's website<sup>11</sup> or, for some, simply recommended review of the vendor's

---

<sup>11</sup> Unless otherwise noted these links established that the vendors are not domestic corporations and provided third party registered agent addresses for service of process. It should be noted that the links for [REDACTED]

[REDACTED] actually linked to different companies.

[REDACTED] registrations listed the companies as domestic corporations but also stated their charters had been forfeited or revoked at some point in the past, creating uncertainty whether they were the same companies as the ones with transactions assessed by the Department. The links for [REDACTED] were just expired name

addresses from unknown, unlinked sources. The Taxpayer's Representative failed to provide any documentation or other evidence to support the alleged vendor addresses and simply provided a statement to "See Vendor Address – In State Vendor."<sup>12</sup>

### **3. Reply Brief**

Within his Reply Brief, the Department's Representative asserted that the disputed transactions were assessed for Arkansas use tax, not sales tax. Specifically, he noted that each assessed transaction involved tangible personal property that was shipped into Arkansas for use by the Taxpayer. Consequently, he reasoned that Arkansas Gross Receipts Tax Rule GR-79 was not applicable to the matter at hand and the Department was proper in directly assessing the Taxpayer instead of the vendors. He noted that the Taxpayer and any vendor with sufficient nexus to Arkansas were jointly liable for the applicable use taxes under Ark. Code Ann. § 26-53-123(a) (Repl. 2020). To the extent that any of the issues raised within the Taxpayer's Response Brief were not related to the issues discussed in the protest, the Department's Representative averred that such issues should not be considered as any new issues would represent untimely protests barred under Ark. Code Ann. § 26-18-404 (Repl. 2020) and Arkansas Gross Receipts Tax Rule GR-81.2(A). Finally, he deemed it inappropriate to consider any evidence not provided during the audit for the auditor's review.

---

registrations with no addresses. Links for [REDACTED] are listed as domestic corporations on the Secretary of State's website.

<sup>12</sup> Within her filing, the Taxpayer's Representative encouraged this Office to contact her if the submitted proof was deemed insufficient to prove her case. This Office, however, is unable to provide advice, suggestions, or assistance to either party and must base its decision on the record and arguments that are submitted by the parties for this proceeding.

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 LAW**

### **Burdens 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).

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Here, the sole protest issue raised by the Taxpayer (as clarified by the Response Brief) is that certain assessed transactions were performed by companies that are either registered within Arkansas as foreign companies in Arkansas (indicating nexus with Arkansas) or may have a location somewhere within Arkansas.<sup>13</sup> In either case, she reasoned that Arkansas sales tax applied to these transactions, placing the burden of collection and remittance of tax upon the sellers, not the Taxpayer, in the absence of an exemption claim. In the absence of the applicable schedules for verification, it is presumed that the discussed transactions must have been assessed upon the use tax schedules since the Taxpayer's Representative contended that these transactions were improperly assessed as out of state purchases. Additionally, the Department's Representative stated within his Reply Brief that the relevant transactions were assessed for use tax. As a result of this conclusion, the analysis below shall be limited to the correctness of the assessment of use tax.<sup>14</sup>

If subject to Arkansas sales tax, the Taxpayer's Representative correctly asserts that the vendor is liable for the proper collection and remittance of

---

<sup>13</sup> As noted in the rendition of the factual contentions, the actual documentation submitted by the Taxpayer does not firmly establish these assertions for all of the relevant entities. These statements, however, shall be considered to be true for purposes of this decision as, even if proven by the submitted evidence, the assessment would still be correct.

<sup>14</sup> The assessment of Arkansas sales tax shall be sustained as those adjustments do not appear to be in dispute between the parties.



applicable sales taxes in the absence of an exemption claim for the Taxpayer. Addressing when Arkansas sales tax applies a purchase, the Arkansas Supreme Court provided the following relevant guidance:

So here, appellee's Shreveport store operated only in Shreveport. It did not make any contracts or actual deliveries in Arkansas. On the contrary, just as in the Dilworth case, the branch or store is in Louisiana, the sales were made in Louisiana, and the deliveries were consummated either in Louisiana or in interstate commerce with no interruption from Louisiana until delivery to the consignees essential to complete the interstate journey.

...

The citizenship of the seller is not controlling in determining whether a sale is taxable. It is the situs of the sale that controls. If the sale as here is consummated in Louisiana by a citizen of Arkansas to an Arkansas citizen, it is not taxable in Arkansas under our sales tax law, whereas, it might be taxable here, if we had a use tax law<sup>15</sup>. See *Mann v. McCarroll, Com'r of Rev.*, 198 Ark. 628, 130 S.W.2d 721, where Mann and others had bought merchandise, machinery, etc., in other states and the right to collect a sales tax thereon was denied under Act 154 of 1937. Also Sec. 2(c) of Act 386 of 1941.

*State ex rel. Comm'r of Revenues v. Hollis & Co.*, 209 Ark. 455, 458-459, 190 S.W.2d 986, 987 (1945).

The fundamental flaw in the Taxpayer's Representative's analysis, is that it is wholly irrelevant for application of Arkansas sales tax versus Arkansas use tax whether a vendor is or is not registered with the Arkansas Secretary of State's Office or may have a location somewhere within Arkansas. Arkansas Gross Receipts Tax Rule GR-5 and binding case law instructs that the application of Arkansas sales tax turns on whether the situs of the sale is located within Arkansas.

Here, the presented evidence from the Department is that the Auditor, upon review of the presented invoices and other evidence from the Taxpayer,

---

<sup>15</sup> Please note that a use tax was later adopted by the State of Arkansas through Act 487 of the 1949 Arkansas General Assembly.

discovered that the assessed use tax transactions occurred outside of Arkansas and were then shipped into Arkansas. This contention has not been countered or even rejected by the Taxpayer. Instead, the Taxpayer has contended that these entities were registered within Arkansas or may have a business location somewhere within the State. No arguments or evidence have been provided to show that the Department incorrectly concluded that the situs for the associated transactions were not located within Arkansas.

If the transactions were properly sourced by the Department outside the state, the Department properly applied Arkansas use tax to these transactions and Ark. Code Ann. § 26-52-517 (Repl. 2020) is not applicable to the matter at hand. Arkansas Compensating (Use) generally applies to the privilege of storing, using, distributing, or consuming tangible personal property and taxable services within the State of Arkansas that were purchased outside this state.<sup>16</sup> Ark. Code Ann. § 26-53-106(a) (Supp. 2021). A purchaser is generally liable for Arkansas Use Tax unless a seller pays the tax on the purchaser's behalf. Ark. Code. Ann. § 26-53-123 (Repl. 2020). Tangible personal property means personal property that may "be seen, weighed, measured, felt, or touched or is in any other manner perceptible to the senses." Ark. Code Ann. §§ 26-52-103(35)(A) (Supp. 2021) and 26-53-102(24)(A) (Repl. 2020).

Arkansas Gross Receipts Tax Rule GR-5 also provides the following relevant guidance regarding the proper application of Arkansas sales and use taxes to intrastate and interstate sales:

---

<sup>16</sup> The parties appear to be in agreement that the purchases at issue are generally taxable and merely dispute who is responsible for the associated taxes.

B. INTRASTATE (ARKANSAS) SALE.

1. When tangible personal property is sold to a consumer and the seller of the property is engaged in an established business, or sells in an established manner, within Arkansas, and delivery is made within Arkansas transferring either title or possession of the property, the sale is intrastate and subject to the gross receipts tax irrespective of the fact that the seller may not have in stock certain goods, wares, and merchandise for immediate delivery, which requires the seller to order the goods for direct shipment at or from a source outside Arkansas.

...

C. INTERSTATE SALES.

1. Delivery from Arkansas. When tangible personal property is sold by a seller that is engaged in an established business, or sells in an established manner within Arkansas, and the contract of sale or order requires the seller to deliver the property by common carrier, contract carrier, U.S. Postal Service, or in the seller's own conveyance to a point outside Arkansas for consumption or use, the transaction is interstate and not subject to Arkansas gross receipts tax.

2. Delivery into Arkansas. If tangible personal property is purchased for use or consumption in Arkansas from a seller in another state and delivery is made in Arkansas, **then such sale is subject to Arkansas compensating use tax.** The out-of-state seller may be required to collect Arkansas tax. **If the out-of-state seller does not collect Arkansas tax, it becomes the responsibility of the Arkansas customer to remit compensating use tax directly to the Department.** The Arkansas customer will be given credit for tax legally paid on the item in another state pursuant to Ark. Code Ann. §§ 26-5-101, 26-53-131. See Ark. Code Ann. § 26-53-101 et seq. and UT-12.

...

E. SERVICES.

1. Services Performed in Arkansas. When taxable services are performed in Arkansas and the customer takes receipt of the service in Arkansas, the transaction is subject to Arkansas gross receipts tax. However, if taxable services are performed in Arkansas, but the customer takes receipt of the service outside of Arkansas, then no Arkansas gross receipts tax is due.

Example: XYZ is a business located in West Memphis, Arkansas that repairs automobile motors. After repairing the motor, XYZ ships the motor by common carrier to Nashville, Tennessee. Since the customer took receipt of the service in Nashville, Tennessee, XYZ will not collect Arkansas tax.

2. Services Performed Outside of Arkansas. **If a taxable service is purchased for use or consumption in Arkansas from a seller in another state,** then such sale is subject to Arkansas compensating use tax. The out-of-state seller may be required to collect Arkansas tax. **If the out-of-state seller does not collect Arkansas tax, then the Arkansas customer is responsible for reporting and remitting**

**Arkansas compensating use tax.** The Arkansas customer will be given credit **for tax legally** paid for the service in another state pursuant to Ark. Code Ann. §§ 26-5-101 and 26-53-131. See Ark. Code Ann. § 26-53-101 et seq. and UT-12.

Example: XYZ ships office equipment out of state for repairs. Following the repair, the office equipment is returned to XYZ in Arkansas. Office equipment repairs are subject to tax in Arkansas. Tax is due on the parts, labor, and delivery charged based on where the repaired item is delivered within Arkansas. [Emphasis supplied.]

As noted above, the protested transactions are not subject to Arkansas Sales Tax based on the presented evidence and arguments. Consequently, these transactions would generally subject to Arkansas compensating use tax in absence of an applicable tax credit, deduction, or exemption.

Ark. Code Ann. § 26-53-123 (Repl. 2020) provides the following guidance regarding the liability for payment of Arkansas use tax:

(a) **Every person storing, using, distributing, or consuming** in this state tangible personal property, specified digital products, a digital code, or taxable services purchased from a vendor **shall be liable for the tax** imposed by this subchapter, and the liability shall not be extinguished until the tax has been paid to this state.

(b) However, **a receipt from a vendor** authorized by the Secretary of the Department of Finance and Administration under such rules as he or she may prescribe to collect the tax imposed given to the purchaser in accordance with the provisions of §§ 26-53-121 and 26-53-122 **shall be sufficient to relieve the purchaser from further liability for the tax to which the receipt may refer.** [Emphasis Supplied.]

*See also* Arkansas Gross Receipts Tax Rule GR-5(C)(2) and (E)(2). The governing statute and rule clearly state that a purchaser is ultimately liable for payment of any applicable use taxes on out of state purchases and may only be relieved of that liability if a vendor collects and pays Arkansas use tax upon the purchaser's behalf.

Here, the parties appear to be in agreement that the sellers did not collect and remit Arkansas use tax on behalf of Taxpayer for the relevant purchases. Consequently, the Department correctly assessed Arkansas use tax upon these transactions against the Taxpayer, and the Taxpayer is not relieved of applicable taxes on the transactions simply because the vendors were registered with the Arkansas Secretary of State or may have had a business location somewhere within the state if the Department properly found the situs of the sales to be outside of the state. Arkansas use tax was properly assessed upon these transactions.<sup>17</sup>

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). That code section provides the following statement, in pertinent part:

Interest **shall be collected on tax deficiencies** and paid on overpayments as follows:

- (1) A tax levied under any state tax law which is not paid when due is delinquent. Interest at the rate of ten percent (10%) per annum shall be collected on the total tax deficiency from the date the return for the tax was due to be filed until the date of payment;
- (2) Interest on a tax deficiency shall be assessed at the same time as the tax deficiency. The tax deficiency together with the interest shall be paid upon notice and demand by the Secretary of the Department of Finance and Administration; . . . [Emphasis supplied.]

The use of the term “shall” indicates that this Office lacks authority to waive or set aside an assessment of interest upon a sustained tax deficiency. Further, this Office does not possess the settlement authority authorized under Ark. Code Ann.

---

<sup>17</sup> Since this conclusion resolves this matter, the remaining bases raised by the Department for upholding the assessment shall not be addressed as they or rendered moot.

§ 26-18-705 (Supp. 2021). Consequently, the assessment of interest on the tax balance is sustained.

### **DECISION AND ORDER**

The 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](mailto: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.<sup>18</sup>

DATED: November 7, 2022

OFFICE OF HEARINGS & APPEALS



TODD EVANS  
ADMINISTRATIVE LAW JUDGE

---

<sup>18</sup> See *Board of Trustees of Univ. of Arkansas v. Andrews*, 2018 Ark. 12.