

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:)
)
 TERRY L. TUTTLE)
)
 Vehicle Rental Tax)
 Tax Years 2008-2010) OAH No. 11-0176-TAX

DECISION

I. INTRODUCTION

Terry L. Tuttle appealed an assessment of Vehicle Rental Tax relating to his motorhome rental business. He received a hearing on November 2, 2011, at which he had the opportunity to present evidence. He presented testimony from two witnesses: himself and his son, Troy Tuttle. The Department of Revenue presented a responsive case consisting of brief testimony from three individuals who had interacted with Terry Tuttle. The Department of Revenue made a downward revision of the assessment at the beginning of the hearing.

Because Mr. Tuttle has failed to carry his burden of proof of showing that it is in error, the amended assessment is upheld.

II. TAX ASSESSED

Terry L. Tuttle operated a recreational motorhome rental business in 2008, 2009, and 2010. He did not file Vehicle Rental Tax returns. His omission came to the attention of the Department of Revenue’s Criminal Investigation Unit.

Lacking detailed information about his rentals, the Department issued a “blue sky” assessment on December 22, 2010 that assumed he had rented both motorhomes registered in his name, 365 days per year, for the all eleven of the quarterly tax periods at issue.¹ This original assessment made a demand of \$9,036 in tax, \$2,134.80 as a penalty for failure to file, and \$451.80 as a negligence penalty, together with accrued interest which then totaled \$1,705.18.²

¹ Direct testimony of Jonathan Page, Tax Auditor III; R. 072.

² See R. 0045-0055.

As provided by AS 43.05.240, the Notice of Assessment gave Mr. Tuttle sixty days to request an informal conference to dispute the amount billed. Just prior to the expiration of that period, Mr. Tuttle requested an informal conference and contemporaneously filed late tax returns indicating a total tax owing of \$298.50.

The informal conference resulted in a decision upholding the original assessment.³ Mr. Tuttle timely appealed to the Office of Administrative Hearings. During the course of this appeal, informal information exchanges between the department and Mr. Tuttle have continued, and these have resulted in downward amendments of the assessment. The amount of the assessment currently stands at \$2,335.50 in tax, \$492.08 as a penalty for failure to file, and \$116.78 as a negligence penalty, together with accrued interest.⁴

III. FACTS

A. *Terry Tuttle*

Terry Tuttle is a middle-aged gentleman who appears healthy. He is intelligent and articulate.⁵ He reports that he has a hearing problem. Hearing impairment did not prevent him from operating a rental business that entailed conversing with customers in person and on the telephone. He does not use a hearing aid and did not bring one to the hearing.⁶ At the hearing, Mr. Tuttle was instructed to let the administrative law judge know if he had trouble understanding any of the proceedings. He appeared to understand, and he acknowledged the instruction on the record. At all points during the proceeding when he indicated he had not heard something adequately, the testimony or information was repeated until he indicated he understood.

B. *Operation of Rental Business*

Beginning in 2008, Terry Tuttle operated a motorhome rental business in Anchorage. He owned two Class C motorhomes, a 2003 tan and cream model and a 2000 purple and white model.⁷ The second one was the one he regarded as the primary one for

³ R. 002-009.

⁴ The final amendment was made on the oral record at the beginning of the hearing.

⁵ *See, e.g.*, R. 167-168.

⁶ Colloquy with Terry Tuttle prior to testimony.

⁷ Direct testimony of Terry Tuttle.

rentals.⁸ It has been stipulated that the tan and cream motorhome was not in Anchorage and was not rented at all in 2008, and the amended assessment does not assign any tax liability to rental of that vehicle in 2008.⁹

Both motorhomes were available in Anchorage and were rented on occasion in 2009 and 2010, with the purple and white vehicle remaining the primary rental.¹⁰ Mr. Tuttle was hesitant to rent the tan and cream motorhome, and would not rent it to people he was unsure of.¹¹

It was not practical to rent the motorhomes in winter weather.¹² Rentals were possible in at least May,¹³ June,¹⁴ July,¹⁵ August,¹⁶ and September.¹⁷

C. Knowledge of Tax Obligation

Shortly after Mr. Tuttle began operating his business, the Department of Revenue noted in a routine check that he had a business license for renting recreational vehicles and that it had no Vehicle Rental Tax quarterly returns from him.¹⁸ The Department sent him a certified letter explaining how the tax works and reminding him of the due dates for quarterly returns.¹⁹ The letter was received at his business address.²⁰

On June 24, 2009, a Department of Revenue investigator posing as a prospective customer made an inquiry to Mr. Tuttle about renting one of his motorhomes.²¹ Mr. Tuttle responded that he had “nothing open in June or July.”²² On August 3, 2009, the investigator made another inquiry.²³ Mr. Tuttle offered, in writing, “a very nice

⁸ *Id.*

⁹ Colloquy with parties prior to testimony.

¹⁰ Cross-exam of Terry Tuttle; direct testimony of Dreyer. Troy Tuttle’s testimony that the tan and cream motorhome was parked at his residence “pretty much” the whole time in 2009, during the portion of the year when he was home, does not establish that this vehicle was never rented during that year.

¹¹ *Id.*

¹² *E.g.*, direct testimony of Terry Tuttle on rebuttal.

¹³ *E.g.*, R. 130, 132, 162.

¹⁴ *E.g.*, R. 122, 169.

¹⁵ *E.g.*, R. 114, 169.

¹⁶ *E.g.*, R. 106, 165.

¹⁷ *E.g.*, R. 100, 102, 171.

¹⁸ Direct Testimony of Page.

¹⁹ R. 057-058.

²⁰ R. 056.

²¹ Direct testimony of James Kurth; R. 169.

²² R. 169.

²³ R. 170.

motorhome” for rental in mid-September, at the rate of “\$150 per day with free mileage and tax.”²⁴

From his receipt of the certified letter, and from his specific offer to rent to the investigator free of “tax,” I infer that Mr. Tuttle knew of the requirement to pay Vehicle Rental Tax. Notwithstanding this knowledge, Mr. Tuttle made a conscious election not to preserve records of his rentals.

D. Recordkeeping

Mr. Tuttle’s main record of rental reservations was an appointment book he kept by his work bench in his garage, where he noted the names and dates of bookings.²⁵ He threw it away after each season.²⁶

Mr. Tuttle arranged “a lot” of rentals by exchanging e-mails with customers.²⁷ He manually deleted the e-mails from his e-mail account after the rentals were completed.²⁸

Mr. Tuttle had renters sign rental contracts.²⁹ He threw away the contracts about a month after the rentals were completed.³⁰

On June 4, 2008, Mr. Tuttle opened a bank account for his business, “Tuttle RVs.”³¹ He never used it for business transactions.³² Instead, to the extent that he used a bank account for business transactions, he commingled business funds with personal funds in his personal checking account.³³ He also conducted some of his business in cash, taking checks from renters to the renter’s bank to cash them.³⁴ Some renter deposits were handled by holding a check from the renter, then returning it uncashed at the end of the rental.³⁵

Mr. Tuttle does have one set of calendars for 2008-2010. These were calendars he kept by his upstairs computer, which Mr. Tuttle would use if he happened to be up

²⁴ R. 171.

²⁵ Cross-exam of Terry Tuttle; rebuttal testimony of Terry Tuttle.

²⁶ Rebuttal testimony of Terry Tuttle.

²⁷ Cross-exam of Terry Tuttle.

²⁸ *Id.*

²⁹ *Id.*; R. 165.

³⁰ Cross-exam of Terry Tuttle.

³¹ R. 085.

³² R. 085-091; direct testimony of Barbara Dreyer.

³³ Direct testimony of Barbara Dreyer.

³⁴ Cross-exam of Terry Tuttle on rebuttal.

³⁵ *Id.*

there.³⁶ However, he spent the majority of his time in the garage, and that is where the master appointment books were kept (which he threw away). It is from the upstairs calendars that his accountant apparently prepared the late tax returns filed in 2011.³⁷ Not all of his rentals were marked on these calendars.³⁸

Mr. Tuttle charged varying amounts for rentals depending what the market would bear or how he sized up a particular renter.³⁹ The rate per day could be as high as \$200.⁴⁰ There is no documentation to show what rate would apply at any particular time.⁴¹

E. Untruthful Response to Audit

After receiving the department's initial assessment for unpaid taxes and penalties, Mr. Tuttle contacted the auditor responsible for his case. He told the auditor that he did not rent vehicles. He told the auditor that he had held a business license only for the purpose of getting a discount on RV parts.⁴² These statements were untrue.

IV. ANALYSIS

A. Burden of Proof

In an appeal of a tax matter to this office, “[t]he taxpayer bears the burden of proof on questions of fact.”⁴³ Therefore, the factual underpinnings of the assessment will stand unless Mr. Tuttle shows, by a preponderance of the evidence, that they are in error. As noted in a prior case, “[t]his means that [the taxpayer] needs to put evidence in the record, or point to evidence already in the record, showing that he does not owe the tax assessed.”⁴⁴

³⁶ Cross-exam of Terry Tuttle.

³⁷ The calendars are at R. 069-071. The tax returns at 073-084 appear to correspond to the number of days marked on the calendars, multiplied by \$150.

³⁸ Direct testimony of Dreyer; *see also, e.g.*, R. 167-168 (showing some rental days not on calendar); R. 100, 132, 162 (examples of damage deposits return at conclusion of rentals that do not appear on calendar); R. 169 (fully booked during late June & July 2009, even though calendar shows 25 unbooked days).

³⁹ Cross-exam of Terry Tuttle.

⁴⁰ R. 165 (extra day rate of \$200).

⁴¹ Cross-exam of Terry Tuttle.

⁴² Direct testimony of Page.

⁴³ AS 43.05.455(c).

⁴⁴ *In re McMullin*, OAH No. 07-0213-TAX (Office of Admin. Hearings 2008), at 2.

B. Tax

Since 2004, Alaska has levied a three percent excise tax on the total fees and costs charged in any rental of a recreational vehicle lasting 90 days or less.⁴⁵

The department's amended assessment assumed that Mr. Tuttle rented his motorhomes at an average rate of \$150 per day. This was a conservative assumption, since the rate was sometimes higher than that. Between the two vehicles, the assessment assumed 519 rental days over the course of the 2008, 2009, and 2010 seasons.⁴⁶ This was intended to account for the rental of one motorhome during the summer of 2008 and two motorhomes during the two succeeding summers.⁴⁷

As noted above, the vehicles were available for rental in at least May, June, July, August, and September. This five-month span consists of 153 days each year. The total number of rental days available was therefore 765, as shown below:

| <u>Year</u> | <u>Number of vehicles for rent</u> | <u>Rental Days available</u> |
|-------------|------------------------------------|------------------------------|
| 2008 | 1 | 153 |
| 2009 | 2 | 306 |
| 2010 | 2 | 306 |
| Total | | 765 |

Accordingly, the department's assumption of 519 rental days corresponded to a supposition that these vehicles were rented about two-thirds of the time during the months they were available for rental. This is not the exact reasoning the department followed,⁴⁸ but it is the factual scenario the amended assessment fits.

Alaska Statute 43.99.010 provides:

A person subject to a tax shall keep in permanent form at the person's principal place of business or occupation within the state correct accounts in a manner that will readily disclose, upon examination, the amount of tax due the state.

Mr. Tuttle consciously and systematically destroyed the records from which his tax

⁴⁵ AS 43.52.030, 040.

⁴⁶ The exact number of rental days has been back-calculated: $(2335.50 \div .03) \div 150$.

⁴⁷ Oral amendment at outset of hearing.

⁴⁸ The department's rough methodology was to assume the vehicles were rented 100% of the time between Memorial Day and Labor Day, and 0% of the time outside those dates. However, it is clear that Mr. Tuttle offered to rent—and actually did rent on occasion—outside of the Memorial Day to Labor Day window.

liability could be ascertained. When recordkeeping is mandatory, “the failure to keep or produce records for tax purposes will permit a negative inference against the taxpayer, that if the records had been produced they would have reflected unfavorably upon him.”⁴⁹ That inference is made here: I infer that had Mr. Tuttle not destroyed his rental records, they would have shown substantially more rentals than he now admits.

Moreover, to the extent that Mr. Tuttle presented evidence to challenge the assessment, his evidence was unworthy of being relied upon. The returns that Mr. Tuttle finally filed in 2011, given under penalty of perjury, claimed that he had rented just one motorhome and that the rentals had occurred only on the days marked on the incomplete upstairs calendars. There was extensive evidence that these calendars omitted many rental periods.⁵⁰ Further, there was uncontroverted and credible evidence that Mr. Tuttle gave a deceptive response to the Department of Revenue when first contacted about his unpaid tax.⁵¹ This history caused Mr. Tuttle’s testimony to lack credibility.

Mr. Tuttle had the burden to prove that the department’s assessment was wrong. Because of the negative inference drawn from his destruction of records, and because the evidence he presented at the hearing was not credible, he failed to carry his burden. Accordingly, the assessment will stand.

C. Failure-to-Pay Penalty

Under AS 43.05.220(a), when a taxpayer fails to file a required return, five percent is added to the tax owing for each 30-day period or fraction thereof during which the required return and the tax remains unpaid. This civil penalty is capped at 25 percent.

Mr. Tuttle was required to file quarterly tax returns, due one month after the conclusion of any quarter in which he had rentals.⁵² Mr. Tuttle filed no timely quarterly returns. On December 22, 2010, the department filed returns for him as it is authorized to do under AS 43.05.050. Mr. Tuttle subsequently filed his own returns on February 15, 2011.

For all quarters other than the quarter ending September 30, 2010, both sets of returns were more than four months late and the five-percent-per-month penalty accrued

⁴⁹ *Lakeland Const. Co. v. Department of Revenue*, 379 N.E.2d 859, 861 (Ill. App. 1978).

⁵⁰ *See supra* note 38.

⁵¹ *See supra* Part III-E.

⁵² 15 AAC 52.010(a)(2), (d).

to its maximum of 25 percent. The department's amended assessment reflects this maximum penalty. For the quarter ending September 30, 2010, the return was due October 31, 2010. The department's assessment applies a ten percent penalty for failure to file this final return, in effect giving Mr. Tuttle the benefit of the return the department filed on his behalf by terminating the escalation of the penalty percentage. The total penalty calculated for all of the quarters combined is \$492.08.

Mr. Tuttle does not challenge this calculation. At informal conference, he appears to have argued that the penalty ought not to be applied because he was unaware of his obligation to file tax returns.⁵³ Although Mr. Tuttle did not renew this argument at the formal hearing, it will receive a brief response here.

A failure to timely file penalty can be abated only if the omission was "due to a reasonable cause and not to wilful neglect."⁵⁴ Even if it were true that Mr. Tuttle was ignorant of the tax obligation, ignorance would not qualify as "reasonable cause" as that phrase has been interpreted by regulations and prior decisions.⁵⁵ In any event, Mr. Tuttle, as has been found above, was aware of the Vehicle Rental Tax and chose to ignore it. Accordingly, his failure to file was due to "wilful neglect," and he is not eligible for abatement of the penalty.

D. Penalty for Negligence or Intentional Disregard

In addition to the five-percent-per-month penalty discussed above, the department may assess a further penalty of five percent of the tax deficiency if the deficiency "is due to negligence or intentional disregard."⁵⁶ The amended assessment includes a negligence penalty of \$116.78, representing five percent of the unpaid tax balance. Because Mr. Tuttle knew of the tax and decided not to collect or pay it, he engaged in "intentional disregard" and this additional penalty is appropriate.

V. CONCLUSION

No basis has been demonstrated to disturb the amended assessment placed on the record at the beginning of the hearing, and accordingly that assessment is affirmed. The amount of the affirmed assessment is:

⁵³ See R. 007.

⁵⁴ AS 43.05.220(a).

⁵⁵ See, e.g., *In re Doubleday*, OAH No. 08-0239-TAX (Office of Admin. Hearings 2008), at 5.

⁵⁶ AS 43.05.220(b); 15 AAC 05.220.

| | |
|---|------------|
| Vehicle Rental Tax (AS 43.52.030) | \$2,335.50 |
| Penalty for Failure to File (AS 43.05.220(a)) | \$492.08 |
| Penalty for Negligence/Intentional Disregard (AS 43.05.220(b)) | \$116.78 |

The matter is remanded to the Department of Revenue to calculate accrued interest on these revised amounts under AS 43.05.225(1). Jurisdiction is not retained.

DATED this 14th day of November, 2011.

Signed

 Christopher Kennedy
 Administrative Law Judge

NOTICE

This is the decision of the Administrative Law Judge under AS 43.05.465(a). Unless reconsideration is ordered, this decision will become the final administrative decision 60 days from the date of service of this decision.

A party may request reconsideration in accordance with AS 43.05.465(b) within 30 days of the date of service of this decision.

When the decision becomes final, the decision and the record in this appeal become public records unless the Administrative Law Judge has issued a protective order requiring that specified parts of the record be kept confidential. A party may file a motion for a protective order, showing good cause why specific information in the record should remain confidential, within 30 days of the date of service of this decision.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 43.05.480 within 30 days after the date on which this decision becomes final.

Certificate of Service: The undersigned certifies that on the 14th day of November, 2011, a true and correct copy of this document was mailed to the following: Terry L. Tuttle; Michael Barber, AAG. A courtesy copy was provided to Hollie A. Kovach, Revenue Appeals Supervisor.

By: Signed

 Kimberly DeMoss

[This document has been modified to conform to the technical standards for publication.]