

STATE OF ALABAMA
DEPARTMENT OF REVENUE

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DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

v.

RAYMOND R. EDWARDS
Route 2, Box 290A
Hamilton, Alabama 35570,

DOCKET NO. S. 90-318

Taxpayer.

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed State and Marion County sales tax against Raymond R. Edwards ("Taxpayer") for January 1987 through November 1989. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, § 40-2A-7(b)(5)a. Bill Atkinson represented the Taxpayer. Assistant Counsel Dan Schmaeling represented the Department.

The issue in this case is whether the Department properly computed the Taxpayer's sales tax liability for the period in question.

The Taxpayer initially operated as a house contractor and remodeler during the period in issue. He paid sales tax on the building materials he purchased and used in his business. On occasion, he also sold the scrap materials not used on a job.

The Taxpayer began building and selling roof trusses in addition to his contracting business. The truss business succeeded, and the Taxpayer eventually stopped his contracting work and devoted full time to building and selling trusses. The Taxpayer kept invoices of his taxable truss sales, and reported and paid sales tax on those sales.

The trusses were custom built for each customer. Two or three times, the

Taxpayer built a custom truss that the customer would not or did not buy. The Taxpayer scrapped those trusses and sold the lumber as surplus.

The Taxpayer deposited the income from his contracting and truss businesses into one bank account during the subject period.

The Department audited the Taxpayer using his bank records. The Taxpayer's bank deposits were matched to the truss invoices on which sales tax was paid. Those deposits were deleted from the audit. However, because the Taxpayer kept no other records, the Department treated the remaining bank deposits as taxable gross proceeds from the sale of salvage materials. Sales tax was assessed accordingly.

The Taxpayer also collected seven percent in State and local sales tax on his truss sales during the audit period, but remitted only six percent. The Department assessed the Taxpayer for the one percent overcollected tax. The Taxpayer concedes this issue.

The Taxpayer disputes the remaining assessment, and argues that the majority of his unidentified bank deposits came from his pay for contracting work. He concedes that a small portion came from the sale of scrap materials or cut-up trusses.

If a taxpayer fails to keep records, the Department can compute liability using the best information available. Code of Ala. 1975, ' 40-2A-7(b)(1)a. A final assessment based on the best available records will be affirmed, if reasonable, unless the taxpayer provides evidence to the contrary. See generally, Elegance Hair & Nail Design, Inc. v. State, S. 96-223 (Admin. Law Div. 7/17/96); GWW, Inc. v. State, S. 96-129 (Admin. Law Div. 6/25/96); Hillcrest Plaza Package Store v. State, S. 95-434 (11/26/96). However, the Department

must first establish that some tax is due.

The Taxpayer was primarily engaged in selling trusses, and paid sales tax on those sales. If the Taxpayer was also in the business of selling scrap materials, he would also be liable for sales tax on those sales.¹

However, the evidence is insufficient to establish that the Taxpayer's scrap sales reached the level of "doing business" for sales tax purposes. Rather, the sales were only occasional, and not made in the Taxpayer's regular course of business. See, State v. Bay Towing and Dredge Company, 90 So.2d 743 (1956); State v. U.S. Die Casting and Development Co., L. 91-208 (Admin. Law Div. 11/24/93). Consequently, those sales were not subject to sales tax. In any case, the Taxpayer already paid sales tax when he purchased the materials later sold as scrap.

That part of the assessment based on the one percent overcollected tax is affirmed. The remaining portion of the assessment is dismissed. The Department is directed to recompute the assessments accordingly. A Final Order will then be entered.

This Opinion and Preliminary Order is not an appealable Order. The Final Order, when entered, may be appealed to circuit court within 30 days pursuant to Code of Ala.

¹For example, in D & J Enterprises v. State, S. 91-127 (Admin. Law Div. 11/2/95), the taxpayer was primarily engaged in site preparation and asphalt contracting. The taxpayer also regularly sold excess sand, soil, and fill dirt not used on a contracting job. The evidence established that the taxpayer had regularly sold such items in the regular course of its business at least 45 times a year. The evidence confirmed that the taxpayer was in the business of selling the excess materials. The sales tax assessed on those sales was accordingly affirmed.

1975, ' 40-2A-9(g).

Entered April 17, 1997.

BILL THOMPSON
Chief Administrative Law Judge

cc: Dan E. Schmaeling, Esq.
William H. Atkinson, Esq.
Joe Cowen