D & J ENTERPRISES, INC. Route 5, Box 61 Auburn, Alabama 36830,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 91-127
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER ON REMAND

The Revenue Department assessed D & J Enterprises, Inc. ("Taxpayer") for State, Lee County, City of Auburn, City of Opelika, and City of Tuskegee use tax; and State, Macon County, Lee County, Montgomery County, City of Opelika, City of Auburn, and City of Tuskegee sales tax for all or parts of the period July 1987 through October 1989. The Taxpayer appealed to the Administrative Law Division on March 18, 1991. The Department filed an Answer in the case on August 6, 1993, and a hearing was conducted on September 28, 1993. The Taxpayer's original representative, W. Thomas King, was notified of the hearing by certified mail on August 19, 1993, but failed to appear. The hearing proceeded, and a Final Order was entered on October 4, 1993 upholding the final assessments. The Taxpayer timely appealed the Final Order to Montgomery County Circuit Court.

On March 16, 1994, the Circuit Court remanded the case back to the Administrative Law Division for another hearing. A hearing was scheduled for May 24, 1994, but was continued on several occasions at the request of one or both parties. A hearing was finally conducted on January 25, 1995. Christopher Simmons represented the

Taxpayer. Assistant Counsel Gwen Garner represented the Department.

The Taxpayer is located in Lee County, Alabama, outside of the corporate limits of the City of Auburn and the City of Opelika. The Taxpayer's primary business is site preparation and asphalt paving contracts. A Preliminary Order was entered after the January 25 hearing setting out the five issues in dispute, as follows:

> (1) The Taxpayer argues that the sale of sand, fill dirt, and top soil taxed by the Department should not have been taxed because they involved casual sales;
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> (2) The Taxpayer argues that certain materials used by the Taxpayer on its contracts were erroneously taxed at the point of use and not the point of withdrawal, citing City of Huntsville v. City of Madison, 628 So.2d 584;
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> (3) The Taxpayer argues that because of the unusual wording of the Lee County taxing ordinance, a transaction in Lee County can be subject to either Lee County tax or City of Opelika or Auburn tax, but not both;
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> (4) The Taxpayer next argues that interest should not be charged after the notice of appeal was filed because the Department unreasonably delayed in filing its position statement in the case.
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> (5) Finally, the Taxpayer contends that the penalties should be waived for reasonable cause.

Each of the five issues is addressed below:

(1) Casual sales.

The Taxpayer uses sand, soil, and fill dirt in conducting its site preparation and asphalt paving business. The Taxpayer sells any excess sand, fill dirt, or soil left over from a job. The Taxpayer sold sand approximately 30 times per year, and soil and

fill dirt approximately 15 times per year during the audit period. The Taxpayer claims that the sand, soil, and fill dirt sales were "casual", and thus not subject to sales tax. I disagree.

The Alabama sales tax is levied on every person engaged in the business of selling at retail. Code of Ala. 1975, §40-23-2(1). Casual or isolated sales by a taxpayer not engaged in the business of selling the property in question are not subject to sales tax. Dept. Reg. 810-6-1-.33.

"Business" is defined for sales tax purposes at Code of Ala. 1975, §40-23-1(a)(11), as follows:

> All activities engaged in, or caused to be engaged in, with the object of gain, profit, benefit or advantage, either direct or indirect, and not excepting subactivities producing marketable commodities used or consumed in the main business activity, each of which subactivities shall be considered business engaged in, taxable in the class in which it falls.

Applying the above definition, the Taxpayer is in the business of selling the excess sand, soil, and fill dirt in question. Admittedly, the Taxpayer is primarily engaged in site preparation and asphalt contracting. However, it sells the excess sand, soil, and fill dirt on a regular basis for a profit. Those sales are a sub-business, or "sub-activity", of the Taxpayer's primary business, and thus the proceeds derived therefrom are subject to sales tax.

(2) <u>The Lee County/Auburn and Opelika local tax issue</u>.

The Lee County sales and use taxes are levied only on the sale

or use of property in Lee County, but outside of the corporate limits of Auburn and Opelika. That is, transactions inside Auburn or Opelika are not subject to Lee County tax. See, Act No. 69-1254 and Act No. 88-400. The Taxpayer argues that if a sale occurs in Lee County but outside of Auburn or Opelika, Lee County sales tax is due, but then local city use tax cannot be assessed if the property is subsequently transported into and used, stored, or consumed in either Auburn or Opelika. I disagree. Neither the above cited Acts nor Code of Ala. 1975, §40-23-2.1 prohibit the assessment of a Lee County sales tax and a subsequent Auburn or Opelika city use tax on the same property. The Acts prohibit the assessment of a county tax on transactions in Auburn or Opelika, but not assessment of a city tax.

I agree with the Taxpayer, however, that if tangible personal property is sold in either Auburn or Opelika, and the property is subsequently used in Lee County outside of Auburn or Opelika, Lee County use tax cannot be assessed.

As a general rule, use tax is not due if the prior retail sale of the property is exempt from sales tax. State v. Hanna Steel Corp., 158 So.2d 906 (1963). As indicated, retail sales in either Auburn or Opelika are specifically exempted from Lee County sales tax in accordance with the above Acts. Consequently, because the sale of the property in Auburn or Opelika is exempt from Lee County sales tax, the Lee County use tax also cannot apply.

In addition, Alabama's courts have ruled that use tax can be assessed only if the subject property is purchased at retail outside of the taxing jurisdiction. Paramount-Richards Theatres v. State, 55 So.2d 812 (1951). Consequently, Lee County use tax also cannot apply to property sold in Auburn or Opelika because the retail sale was in the same taxing jurisdiction, Lee County.

(3) Tax situs of asphalt plant mix.

The Revenue Department assessed sales tax on the asphalt plant mix used by the Taxpayer in the jurisdiction where the plant mix was used. The Taxpayer claims that the tax should have been assessed at the place of withdrawal, the Taxpayer's facility in Lee County, citing City of Huntsville v. City of Madison, 628 So.2d 548 (1993).

City of Huntsville v. City of Madison involved the "withdrawal" provision and correctly holds that tax is due when and where the property is withdrawn from inventory. Code of Ala. 1975, §40-23-1(a)(10). However, Code of Ala. 1975, §40-23-1(b) applies in this case, not the "withdrawal" provision. Section 40-23-1(b) reads as follows:

> The use within this state of tangible personal property by the manufacturer thereof, as building materials in the performance of a construction contract, shall, for the purposes of this division, be considered as a retail sale thereof by such manufacturer, who shall also be construed as the ultimate consumer of such materials or property, and who shall be required to report such transaction and pay the sales tax thereon, based upon the reasonable and

> fair market price thereof at the time and place where same are used or consumed by him or it. Where the contractor is the manufacturer or compounder of ready-mix concrete or asphalt plant mix used in the performance of a contract, whether the ready-mix concrete or asphalt plant mix is manufactured or compounded at the job site or at a fixed or permanent plant location, the tax applies only to the cost of the ingredients that become a component part of the ready-mix concrete or the asphalt plant mix. The provisions of this subsection shall not apply to any tangible personal property which is specifically exempted from the tax levied in this division.

The Taxpayer is a compounder of asphalt plant mix used in the performance of a contract, and thus is covered by §40-23-1(b). Under §40-23-1(b), tax is not due when the materials are withdrawn, but rather "at the time and place where same are used or consumed". Consequently, the Department properly assessed the asphalt plant mix in the county and/or city where the contract was performed. The taxable measure for the plant mix was “the cost of the ingredients”.

In addition, even if Lee County tax should have been assessed, as argued by the Taxpayer, the Taxpayer is incorrect that "the Department is now barred from assessing the correct (Lee County) taxes". (Taxpayer's brief at page 8). To the contrary, final assessments of Lee County sales and use tax are on appeal in this case. The Administrative Law Division, in deciding an appeal, is authorized to "increase or decrease the assessment to reflect the correct tax due". Code of Ala. 1975, §40-2A-7(b)(5)d. Thus, even if the Taxpayer was correct on this issue, the Lee County

assessments could be increased to reflect the correct tax due.

(4) The Department's delay in hearing the case.

The Taxpayer argues that because the Department delayed in filing its Answer for two and one-half years after the appeal was filed, the Taxpayer should not be charged statutory interest during that period. I disagree.

The Taxpayer appealed to the Administrative Law Division in March 1991. The Legal Division was notified of the appeal, and was directed to file a position statement. Department procedures require that a position statement, now known as an Answer, must be filed before a hearing can be scheduled.

The Department unfortunately failed to file an Answer until August 1993. However, because the Taxpayer's appeal was filed prior to passage of the Uniform Revenue Procedures Act ("URPA"), effective October 1992, the Department was under no statutory time limit to file a position statement.[1] Consequently, while the Department should have filed an Answer sooner, the Department's delay in filing an Answer did not violate any statute or Department regulation. It should also be noted that the Taxpayer never inquired concerning the case during the two and one-half year pendency of the appeal.

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[1]Code of Ala. 1975, §40-2A-9(c), enacted as part of URPA, now requires that the Legal Division must file an Answer within 30 days, with allowance for an additional 60 days if necessary. That provision was included to insure that an appeal would be promptly heard.

Code of Ala. 1975, §40-1-44 requires that interest shall be charged on any unpaid taxes. The Taxpayer could have paid the tax in dispute and would have received a refund, plus interest, if any part or all of the tax was not due. The Taxpayer elected not to do so, and consequently is liable for interest on the unpaid tax.

(5) Penalty.

The Taxpayer also argues that the penalties assessed by the Department should be waived. However, the Taxpayer's stated reason for not paying the tax is, in effect, that it did not understand its liability. Unfortunately for the Taxpayer, ignorance or confusion concerning the law or a tax liability does not constitute reasonable cause to waive a penalty.

The above considered, the assessments in issue are affirmed, and judgment is entered against the Taxpayer for State sales tax in the amount of $22,986.99, Lee County sales tax in the amount of $1,864.78, Lee County Regulation M sales tax in the amount of $4,285.49, Macon County sales tax in the amount of $67.02, Montgomery County sales tax in the amount of $51.85, Tallapoosa County sales tax in the amount of $142.56, City of Auburn sales tax in the amount of $10,900.11, City of Opelika sales tax in the amount of $1,154.31, City of Tuskegee sales tax in the amount of $67.53, State use tax in the amount of $12,588.86, Lee County use tax in the amount of $6,453.82, City of Auburn use tax in the amount of $12,946.12, City of Opelika use tax in the amount of

$2,215.77, and City of Tuskegee use tax in the amount of $419.90, plus applicable interest.

This Final Order on Remand may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered November 2, 1995.

BILL THOMPSON
Chief Administrative Law Judge