

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. S. 91-170

ODIS RAY HARPER
d/b/a The Home Center
Highway 78 South
Hamilton, AL 35570,

§

§

Taxpayer.

§

FINAL ORDER

The Revenue Department assessed State of Alabama, Marion County and City of Hamilton sales tax against Odis, Ray Harper, d/b/a The Home Center (Taxpayer) for the period January 1, 1986 through August 31, 1988. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on November 14, 1991. Jack B. Hinton, Jr. represented the Taxpayer. Assistant counsel Beth Acker appeared for the Department.

FINDINGS OF FACT

The Taxpayer operates a mobile home dealership in the City of Hamilton in Marion County, Alabama and sold numerous mobile homes at retail during the period in issue.

The Department audited the Taxpayer for sales tax using the Taxpayer's sales invoices, sales journals and sales tax worksheets.

In all cases the sales invoice showed a uniform 3% sales tax charged to the customer. However, the Taxpayer reported and paid tax only to the jurisdiction or jurisdictions within which the sale occurred. That is, no tax was paid if the sale occurred outside of Alabama, only the 1 1/2% State tax was paid if the sale was in

Alabama but outside of Marion County, charges were separated on its internal pricing records and should be allowed as a credit against gross receipts.

The Department responds that set-up and delivery charges can be excluded from taxable gross proceeds only if separately billed on both the customer invoice and on the Taxpayer's books as required by Department Reg. 810-6-1-.81. The Department also contends that even if the set-up and delivery charges were not taxable, the Taxpayer nevertheless collected tax on those charges which must now be remitted as over-collected tax pursuant to §40-23-26(d).

Finally, the Taxpayer claims that a credit should be allowed for sales tax paid to Mississippi. The Department claims that a credit should be allowed if the sale occurred in Mississippi and Mississippi tax was paid, but that no credit can be allowed because the Taxpayer failed to present proof of those facts to the Department.

CONCLUSIONS OF LAW

(1) The Overcollected Tax Issue.

Code of Ala. 1975, §40-23-26(d) provides that any amount "collected from a customer that purports to be collected because of this section (the sales tax law), whether or not the amount is actually provided for hereunder, . . . shall be paid to the department of revenue. . . ." That is, any amount purportedly

collected as a sales tax by a retailer must be remitted to the Department.

The Taxpayer's invoices show that a uniform 3% sales tax was collected on each sale. The 3% was purportedly collected as a sales tax and therefore must be paid to the State as required by §40-23-26(d).

The Taxpayer argues that the invoices are wrong and that only the tax actually due was collected. However, the invoices showing 3% collected as sales tax is sufficient to bring §40-23-26(d) into play.

(2) Set-up and Delivery Charges.

Taxable gross proceeds includes the entire amount received by the seller, "without any deduction on account of the cost of the property sold, the cost of the materials used, labor or service costs, interest paid or any other expenses whatsoever," See, §40-23-1(a)(6).

Whether delivery and installation charges should be subject to sales tax has been a recurring issue before the Department. Delivery and installation charges should be taxed, or not taxed as set out below.

If delivery and installation occurs prior to completion of the sale¹, then the costs of those services are incidental to the sale

¹A sale occurs generally with passage of title, see §7-2-106, which unless otherwise agreed occurs when delivery is completed to the purchaser, see §7-2-401. See also, the

and constitute taxable gross proceeds. If the charges are taxable, then a seller cannot avoid tax by separating those costs on the invoice. The above is in accordance with the guidelines set out in East Brewton Materials, Inc. v. State, 233 So.2d 751.

On the other hand, if delivery and installation occurs after the sale is completed, then the charges are not taxable. However, if the charges are not taxable, the seller must keep adequate records distinguishing taxable and nontaxable receipts - that is, the nontaxable set-up and delivery charges must be separately stated on the customer invoice or other billing - and if not, the entire amount, including the otherwise nontaxable charges, must be taxed. State v. T. R. Miller Mill Company, 130 So.2d 185; State v. Ludlam, 384 So.2d 1089.

The various Department regulations on point (Regs. 810-6-1-.81, 810-6-1-.178, and others if applicable) insofar as they are inconsistent with the above, are incorrect and should not be followed.

In this case the question of whether the Taxpayer kept adequate "other records" showing the delivery and set-up charges is not relevant. The delivery and installation of the trailers by the

definition of "sale" at §40-23-1(a)(5), which reiterates that a sale is complete upon passage of title. That section also specifies that a common carrier or the Postal Service are agents of the seller, but that transportation charges billed as a separate item and paid by the purchaser shall not be included in the selling price for tax purposes.

Taxpayer occurred prior to thus constituted taxable "labor and service cost" incurred incidental to the sale.² The Taxpayer cannot deduct the cost of delivery and installation in this case.

(3) Credits for Mississippi Tax.

To be allowed a credit for Mississippi tax previously paid, the Taxpayer must provide adequate proof that Mississippi tax was in fact paid. The Taxpayer has failed to do so in this case and therefore no credit can be allowed.

The above considered, the assessments in issue are correct and should be made final, plus applicable interest.

Entered on July 23, 1992.

BILL THOMPSON
Chief Administrative Law Judge

²The Taxpayer also failed to keep a sufficient record of the nontaxable charges because delivery and set-up charges were not separated on the customer invoices.