STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
v.	§	DOCKET NO. S. 93-305
W. GENTRY OF PELHAM, INC. d/b/a Gentry's Tropical Foliage 999 Yeager Parkway Pelham, Alabama 35501, Taxpayer.	§	

FINAL ORDER

The Revenue Department assessed State and Shelby county sales tax for the period July 1987 through May 1992, and also State lease tax for the period June 1989 through May 1992, against W. Gentry of Pelham, Inc. ("Taxpayer"). The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on November 29, 1993. Douglas L. McWhorter represented the Taxpayer. Assistant counsel J. Wade Hope represented the Department.

The issues in this case are as follows: (1) Did the Department properly compute the Taxpayer's sales tax liability for the subject period; and (2) Did the Taxpayer lease plants during the subject period so as to be liable for Alabama lease tax.

The Taxpayer is owned and operated by Wayne Gentry ("Gentry"). Gentry had operated as a sole proprietorship in the horticulture and landscaping business from 1974 until the business was incorporated in July 1987.

The Taxpayer primarily sold plants at wholesale during the first years of the audit period. Gentry testified that the business gradually got out of the wholesale business and into

exterior sales and maintenance of plants, and also the interior leasing and/or maintenance of plants. The Taxpayer had stopped making wholesale sales by the end of the audit period.

The Taxpayer's records were destroyed in a fire on November 18, 1990. Consequently, the Department recomputed the Taxpayer's sales and lease tax liability for the entire audit period using the Taxpayer's records for the base period December 1990 through May 1992.

The parties agree that the Taxpayer had gross receipts during the base period totaling $1,058,581.20, as indicated on the Taxpayer's federal income tax returns. The Department then determined from the Taxpayer's invoices that the Taxpayer had taxable sales of $149,489.77 during the base period. The Department included as taxable sales those invoices that included sales only, or sales and installation that were lumped together in a single lump-sum price. The Department did not include as taxable any separately stated maintenance or installation charges, or invoices that included maintenance or installation charges only.

The Department divided taxable sales of $149,489.77 by total gross receipts of $1,058,581.20 to determine taxable sales constituted 14.1% of the Taxpayer's gross receipts during the base period. The Department then applied the 14.1% taxable sales figure to total gross receipts for the period July 1987 through November 1990 to determine the Taxpayer's taxable sales for that period. The gross receipts figures for July 1987 - November 1990 were also

obtained from the Taxpayer's federal tax returns and are not disputed by either party.

The Department also assessed lease tax on the gross proceeds derived from transactions whereby the Taxpayer provided interior plants for use by various businesses and individuals. The Taxpayer retained title to and also maintained and serviced those plants provided to the customers.

The Taxpayer objects to the Department's audit for the following reasons:

(1) The Taxpayer first disputes the Department's taxable sales figure of $149,489.77 for the base period. Specifically, the Taxpayer argues that the invoices that included a single lump-sum price for both sales and maintenance should be prorated between taxable sales and non-taxable maintenance charges. As stated, the Department had taxed the total invoice amount if the maintenance fee was not separately stated or broken out on the invoice. The Taxpayer estimates that one-third of the lump-sum sales/maintenance invoices should be attributed to sales and two-thirds to maintenance. Based thereon, the Taxpayer argues that the taxable sales percentage during the base period should be 11.4%, not 14.1% as computed by the Department. I disagree with the Taxpayer for the reasons stated below.

Department Reg. 810-6-3-.43 provides that maintenance, planting or installation charges are not taxable if separately

stated on the invoice. Consequently, the Department properly omitted from the taxable gross proceeds any separately stated planting or site preparation charges.

However, the above regulation also provides that non-separately stated charges must be taxed. The Department thus properly included in taxable gross proceeds the entire invoice amount if the invoice failed to separately state the maintenance or installation charges. The burden is on a taxpayer to separately identify taxable and non-taxable charges, and if a taxpayer fails to do so, the entire amount must be taxed. State v. T. R. Miller Mill Company, 130 So.2d 185; State v. Ludlam, 384 So.2d 1089.

(2) The Taxpayer next argues that there should be some adjustment for the fact that the business made primarily tax-free wholesale sales during the early years of the audit period (1987 and 1988), but very few wholesale sales during the later base period. The Taxpayer testified that approximately 85-90% of its sales in 1987 and 1988 were wholesale, whereas the business had no wholesale sales at the end of the audit period.

Unfortunately, the Taxpayer was unable to provide any records or other evidence in support of his testimony. While I do not dispute the Taxpayer's testimony, the Department is not required to rely on the unsupported verbal assertions of a taxpayer. Sharwell v. C.I.R., 419 F.2d 1057; State v. Mack, 411 So.2d 799. Consequently, without documents supporting the Taxpayer's

testimony, no adjustment for additional tax-free wholesale sales can be allowed.

(3) Finally, the Taxpayer argues that lease tax is not due on its interior lease contracts because the contracts were for the regular maintenance and servicing of the plants, not for the lease of the plants. The Taxpayer's argument on this point is set out on page 4 of its brief as follows:

> Admittedly, the Taxpayer furnishes tangible personal property, in the form of plants, to its customers. The essence of the contracts between the Taxpayer and its customers, however, is the regular maintenance and servicing of those plants, performed by employees of the Taxpayer, for which a monthly service fee is charged. All of the decisions relating to this personal service, including when, where, and how much services are to be performed, are left to the sole determination oft he Taxpayer. The Taxpayer maintains no showroom for its foliage; nor does is regularly lease plants without maintenance contracts. The Taxpayer's customers are primarily interested in the beautification of their business establishments, not in the actual possession or control of the plants. The plants themselves are merely incidental to the real purpose of the Taxpayer's arrangements with its customers. Accordingly, any assessment of lease taxes by the Department is clearly erroneous.

I disagree that the essence of the lease transactions was the regular maintenance and servicing of the plants by the Taxpayer. Rather, the substance of the transactions was that the Taxpayer gave possession and use of the plants to the customers for a price. That constitutes a lease under Alabama law. See, Code of Ala. 1975, §40-12-220(5). The customers used the plants as decoration or decorative foliage, which required physical possession by the customers. The maintenance and servicing of the plants by the

Taxpayer was incidental to the physical possession and use of the plants by the customers, not vice versa as argued by the Taxpayer.

The above considered, the final assessments in issue are affirmed, and judgment is entered against the Taxpayer for State sales tax of $24,291.74, Shelby County sales tax of $1,556.52, and State lease tax of $7,558.74.

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

Entered on October 21, 1994.

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BILL THOMPSON
Chief Administrative Law Judge