COOK PUBLICATIONS, INC. P. O. Box 10567 Birmingham, AL 35202,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	
vs.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	DOCKET NO. S. 94-160

FINAL ORDER

The Revenue Department assessed sales tax against Cook Publications, Inc. ("Taxpayer") for the period August 1990 through July 1993. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on August 24, 1994. William C. Hinds, Jr. represented the Taxpayer. Assistant counsel Claude Patton represented the Department.

The issue in this case is whether mail preparation charges relating to advertising fliers and other materials printed and sold by the Taxpayer in Alabama constitute gross proceeds subject to sales tax.

The facts are undisputed.

The Taxpayer prints the materials at its facility in Birmingham, Alabama and then sells the materials to customers both in and outside of Alabama. The Taxpayer also in some cases prepares the materials for mailing by preparing and affixing a label to the materials and packaging the materials for delivery to the U. S. Post Office. The Taxpayer also performs mail preparation services for materials printed and sold by others. The Department concedes that the mail preparation charges relating to the

materials not also printed and sold by the Taxpayer are not taxable. The only charges in dispute are the mail preparation charges relating to the materials printed and subsequently sold by the Taxpayer in Alabama.

Concerning the transactions in issue, the Taxpayer printed the materials and performed the mail preparation services under one roof at its facility in Birmingham. The materials were then delivered by the Taxpayer to the U. S. Post Office and mailed to the customer in Alabama. The Taxpayer issued an invoice to the customer on a Cook Publications invoice. The invoice included a separate line item for the mail preparation charges.[1]

The Taxpayer paid sales tax on only the printed materials sold during the period in question. The Department audited the Taxpayer, included the mail preparation charges as part of taxable gross proceeds, and based thereon entered the assessment in issue.

The Taxpayer cites State of Alabama v. Service Engraving Company, Inc., 495 So.2d 695 (Ala. Civ. App. 1986) in support of its case. That case involved almost identical facts as in this

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[1] The Taxpayer formed a separate corporation, Cook Mailing Services, Inc., in 1984 or 1985 at the suggestion of a Revenue Department auditor to insure that the preparation charges would not be taxable. However, that corporation is clearly a sham, and the Taxpayer's attorney does not argue that tax is not due because the preparation services were performed by a separate corporation. (R. 30-34). Clearly in substance, the Taxpayer and not Cook Mailing Services, Inc. performed the mail preparation services in issue.

case. The Court of Civil Appeals held that the mail preparation charges were not taxable for two reasons.

First, the Court recognized that mail preparation services performed by a company that did not also print and sell the materials would not be taxable. The Court then concluded that the identical preparation services performed by the taxpayer in conjunction with the sale of the printed materials also should not be taxed because to do so would give an unfair competitive advantage to businesses that performed mail preparation services only. The Court held as follows, at page 697:

> The State does not tax the packaging and labeling services of the taxpayer as to those materials which are printed by a third party, but the taxpayer is taxed for the packaging and labeling services which it performs upon materials which are printed by the taxpayer. In either instance, its mailing preparation services are the same. We agree with the taxpayer that, under those circumstances, Eagerton v. Dixie Color Corporation, 421 So.2d 1251 (Ala. 1982), is the case most nearly on point. To paraphrase Eagerton, we see no reason why the tax consequences of identical services should differ based entirely and solely upon who does the printing of the material. To hold otherwise would provide a 7% advantage, which is the total of all sales taxes, to a competitor who only provides such a mailing preparation service. Stated differently, if the contentions of the State were accepted, the taxpayer would be penalized 7% of its invoice for the preparation for mailing of any material which it also printed. We are not convinced that the legislature ever intended such an unequaled treatment for identical services.

Second, the Court also found that because the preparation services were performed after the sale of the printed materials was closed, those services were not incurred as part of the sale, and

thus did not constitute a part of gross proceeds subject to tax. [2]

I agree with the results in Service Engraving, but only because the mail preparation services in that case were performed after the sale of the materials was closed. Service or labor performed by the seller after a sale is completed is not taxable.

[2] Civil Appeals concluded that the sales were closed when the printing was completed and before the preparation services were performed based on the uncontroverted testimony of the taxpayer's comptroller in circuit court. See, Service Engraving, at page 697.

This case can be distinguished factually from Service Engraving on the above point. The mail preparation in this case was performed prior to the close of the sale of the printed materials. There was no testimony or other evidence indicating that title passed before the mail preparation services were performed, as in Service Engraving. Rather, the sale of the printed materials in this case was closed when the Post Office (seller's agent) completed delivery to the customer. See, Code of Ala. 1975, §40-23-1(a)(5).[3] The mail preparation charges thus constituted a part of taxable gross proceeds.

However, Service Engraving is directly on point as to the Court's holding that similar services must be taxed alike. Service Engraving clearly holds that mail preparation services performed by a seller in conjunction with the sale of printed materials cannot

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[3] Section 40-23-1(a)(5), as amended by Act No. 86-536, makes the Postal Service the agent of the seller for purposes of transfer of title. Consequently, under that statute the sale of the printed materials was not closed until delivery by the Postal Service, even if the parties had otherwise agreed, as in Service Engraving, that title would pass before the mail preparation was performed.

be taxed because similar services performed by a non-seller are not taxable. Consequently, based on the specific holding in Service Engraving, the assessment in issue must be dismissed.

While the Service Engraving decision is controlling and must be followed, I respectfully disagree with the Court's holding that all mail preparation services must be taxed alike. Rather, the taxability of services or labor, including mail preparation services, depends on whether it is performed by the seller (or seller's agent) prior to and as part of the sale of tangible personal property. If so, then the service or labor constitutes a part of taxable "gross proceeds" as defined at §40-23-1(a)(6). See generally, East Brewton Materials, Inc. v. State, 233 So.2d (Ala. 1970) (transportation service performed by seller prior to close of sale held to be taxable). However, as the Court correctly held in Service Engraving, if the service or labor is performed after the sale is closed, then the identical service or labor charges are not taxable. The same labor or services performed by a third party not engaged in selling also would not be taxable, but only because the services are not performed in conjunction with and as part of a sale.

If identical services must be taxed alike, then a wide variety of otherwise taxable services or labor performed by a seller as part of a sale also could not be taxed. For example, transportation or delivery services performed by a seller prior to

the close of a sale are clearly taxable, see East Brewton Materials, Inc. v. State, supra. Obviously, the same transportation or delivery services could be performed tax-free by an independent third party. Consequently, if the Service Engraving rationale is applied, the delivery charges received by the seller also could not be taxed, even though the charges are clearly taxable.

The mail preparation charges in this case are taxable labor or service charges incurred prior to and in conjunction with the sale of the printed materials in Alabama. The charges are taxable, even though identical services performed by a third party non-seller would not be taxable.

Different tax consequences can apply to the same activity or transaction depending on the business a taxpayer chooses to engage in. If a business chooses to print and sell materials and also prepare the materials for delivery, tax is due on the materials plus the mail preparation services performed as part of the sale. If a business performs mail preparation services only, the business is not selling the materials, and thus no sales tax is due.[4] As stated in Dothan Progress v. State, Dept. of Revenue, 507 So.2d 511 (Ala. Civ. App. 1986), reversed on other grounds, Ex

[4] A business providing services only would pay sales tax, but only on the purchase of the materials (labels, packaging, etc.) used in providing the service.

Parte Dothan Progress, 507 So.2d 515 (Ala. 1987):

> We agree with the Department that there are bound to be inequities in the affect of a tax on businesses which operate differently. "Unavoidable inequities which are due only to inequities in business conditions and activities are not sufficient to render a tax statute invalid". State v. Hunt Oil Company, 49 Ala. App. 445, 453, 273 So.2d 207, 213, (Ala. Civ. App. 1972), cert denied, 290 Ala. 371, 273 So.2d 214 (1973) (citing 84 C.J.S. Taxation §23 1954)).

But for the specific holdings in Service Engraving, I would uphold the tax in issue in this case. However, Service Engraving clearly holds that mail preparation charges incurred in conjunction with the sale of printed materials cannot be taxed. Consequently, the final assessment in issue is dismissed.

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

Entered on March 1, 1995.

BILL THOMPSON
Chief Administrative Law Judge