STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE
	§	ADMINISTRATIVE LAW DIVISION
vs.		
	§	
THOMAS B. PINKSTON, JR. General Delivery Mt. Meigs, AL 36057,	§	DOCKET NO. S. 94-294
	§	
Taxpayer.		

FINAL ORDER

The Revenue Department assessed sales tax against Thomas B. Pinkston, Jr. ("Taxpayer") for the period October 1989 through October 1993. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on September 28, 1994. Jim Scott represented the Taxpayer. Assistant counsel Margaret McNeill represented the Department.

The Taxpayer owns a front-end loader and loaded gravel sold to customers at two gravel pits in east Montgomery County during the period in issue. The Taxpayer did not own the gravel. The issue in this case is whether the loading charges paid by the customers to the Taxpayer for loading the gravel should be included in gross proceeds subject to sales tax.

The Taxpayer first got involved in the gravel business when he agreed to load gravel and otherwise oversee the operation of a pit owned by his friend, Scott Gilder. Scott Gilder had previously sold his gravel tax-free primarily to Montgomery County and the State, and thus had never reported and paid sales tax on his gravel sales. However, when the Taxpayer got involved, the pit was selling primarily to private contractors. The Taxpayer asked Gilder about paying sales tax, and Gilder asked the Taxpayer to "help him

on it". (R. 23). The Taxpayer agreed to help, and subsequently applied for and received a State sales tax license in February 1988. The license was issued in the Taxpayer's name as owner of "Pinkston's Pit". The application listed the Taxpayer's primary business as selling clay and gravel at retail.

The Taxpayer later moved to a pit owned by John Dean Gilder, Scott's uncle. The Taxpayer operated at both pits in substantially the same manner. That is, the Taxpayer and the Gilders agreed that the Taxpayer would load the gravel onto the customers' trucks with his front-end loader, record the amount of gravel sold to each customer, and issue an invoice to the customers at the end of each month. The invoices were issued in the Taxpayer's name and had the Taxpayer's logo and the name "Pinkston's" at the top.

The invoices included a charge for the gravel and also a loading charge. The loading charge was sometimes separately stated on the invoice, sometimes not. In either case, the Taxpayer charged the customer sales tax on only the gravel charge. As soon as the customer paid the Taxpayer, the Taxpayer remitted the gravel charge to Gilder and kept the loading fee for himself. The Taxpayer then reported and paid sales tax to the Department on the gravel charges only. The Taxpayer had been advised by his accountant that sales tax was not due on his loading charges.

The Department audited the Taxpayer and entered the final assessment in issue based on the previously untaxed loading charges. The Taxpayer timely appealed to the Administrative Law Division.

Alabama sales tax is levied on the gross proceeds derived from the sale of tangible personal property. "Gross proceeds" is defined at Code of Ala. 1975, §40-23-1(a)(6) as

"the value proceeding or accruing from the sale of tangible personal property . . . without any deduction on account of . . . labor or service cost . . . or any other expenses whatsoever, . . .". That is, any labor or service, including transportation or delivery, which is performed by the seller or the seller's agent prior to completion of the sale must be included in taxable gross proceeds. East Brewton Materials v. Dept. of Revenue, 233 So.2d 751, at 756; see also, Admin. Law Docket Nos. S. 84-172, S. 84-198, S. 86-131, and generally 2 ALR 4th 1124 (1985).

For sales tax purposes, a sale is closed when title is transferred "by the seller or the seller's agent to the purchaser . . .". Code of Ala. 1975, §40-23-1(a)(5). Title is transferred upon completion of delivery to the purchaser. Code of Ala. 1975, §§7-2-106 and 7-2-401, and State v. Delta Air Lines, Inc., 356 So.2d 1205.

Applying the above principles to this case, the sale of gravel was closed after the gravel was loaded onto the customer's trucks by the Taxpayer. Consequently, the loading charges incurred prior to and in conjunction with the sale of the gravel constituted a taxable service and must be included in gross proceeds subject to sales tax.

The Taxpayer argues that his loading services were separate and apart from the sale of the gravel by the Gilders, and thus should not be taxed. I disagree. Rather, the Taxpayer acted as agent for or in partnership with the Gilders in selling the gravel and

loading the gravel onto the customer's trucks.[1]

The Taxpayer and both Gilders agreed that the Taxpayer would oversee the operation of the pits, load the gravel, keep up with how much each customer purchased, and bill the customer at the end of each month. The Taxpayer then remitted to the Gilders the gravel charges and kept the loading charges for himself. The Taxpayer, as a licensed retailer, also agreed that he would report and pay sales tax to the Department on the gravel sales. The Taxpayer's sales tax license application shows the Taxpayer as owner of the pit and his business as selling clay and gravel at retail. Unfortunately, the Taxpayer collected and remitted sales tax to the Department on the gravel charges only. Clearly under Alabama law, tax is also due on the loading fees received for delivering the gravel

[1] I disagree with the Department's contention that the Taxpayer was selling the gravel on consignment. Rather, a better description is that the Taxpayer sold the gravel as agent for or in partnership with the Gilders. An agency relationship can exist without a formal written agreement between the parties. See generally, Principal and Agent in Alabama Digest, Vol. 16. The same is true for a partnership. See generally, Waters v. Union Bank, 370 So.2d 957; Adderhold v. Adderhold, 426 So.2d 457.

to the customers.

The Taxpayer argues that the non-taxability of the loading charges is supported by the language of Department Reg. 810-6-1-.175. I disagree.

Reg. 810-6-1-.175(1) clearly and correctly provides that the sale of top soil, gravel, etc., is taxable, without deduction for labor or services incurred in producing and delivering the materials to the customer.

The next to the last sentence of subparagraph (1) is cited by the Taxpayer and reads as follows:

> Suppliers may not, for tax purposes, claim to furnish these materials (gravel) free where charges are made for services such as hauling, loading and handling.

The above sentence only clarifies that a supplier (seller) cannot avoid tax on the sale of gravel by claiming that he is giving the gravel away and charging only for the non-taxable delivery or hauling charges. That part of the regulation is not relevant to this case.

The Taxpayer also cites subparagraph (2) of the regulation, which reads as follows:

> This rule applies only where the materials are furnished, and does not apply where a charge for hauling is made by a person who contracts to haul materials which he does not furnish.

That section clarifies that hauling or delivery fees are not taxable when performed by a third-party hauler. For example, if a purchaser hires a third-party hauler to pick up the gravel, the amount charged by the third-party hauler clearly is not taxable.

In this case, the Taxpayer is not an unrelated third-party hauler. Rather, as discussed above, the Taxpayer sold and loaded the gravel as agent for or in partnership with the Gilders. The Taxpayer's loading charges constituted labor or service charges

incurred in conjunction with and as part of the sale of the gravel, and thus are taxable.

I sympathize with the Taxpayer in that he paid what he believed to be the correct tax based on the advice of his accountant. According to the Taxpayer, but for him obtaining a sales tax license and remitting tax on the gravel, no sales tax at all would have been paid on the gravel sales. That may be correct. However, having obtained a sales tax license and assumed the responsibility of paying tax on the gravel sales at the pits, the Taxpayer was then also obligated to pay on the correct amount, including the taxable loading charges. It is between the Taxpayer and the Gilders to determine if the Gilders should bear some responsibility for the additional tax due on the loading fees.

The above considered, the final assessment in issue is affirmed, and judgment is entered against the Taxpayer for State sales tax in the amount of $40,386.44. This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on January 30, 1995.

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BILL THOMPSON
Chief Administrative Law Judge