

GADSDEN PRINTING COMPANY, INC.	§	STATE OF ALABAMA
116 Broad Street		DEPARTMENT OF REVENUE
Gadsden, Alabama 35901-3712,	§	ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 95-152
v.	§	
STATE OF ALABAMA	§	
DEPARTMENT OF REVENUE.		

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed Gadsden Printing Company, Inc. ("Taxpayer") for State sales tax for June 1991 through February 1994 and State use tax, City of Gadsden sales and use tax, and Etowah County sales and use tax for March 1991 through February 1994. The Taxpayer appealed to the Administrative Law Division, and a hearing was conducted on August 29, 1995. Kent Henslee represented the Taxpayer. David Wooldridge represented intervenor JNJ Associates, Inc. ("JNJ"). Assistant Counsel Margaret McNeill represented the Department.

The Taxpayer is in the printing business. The issue in this case is whether the Taxpayer is liable for sales tax on certain advertising flyers, circulars, etc. ("advertising mail-outs" or "mail-outs") printed by the Taxpayer and then sold to JNJ during the audit period. Numerous other issues on which tax was assessed have been settled by the parties.

JNJ is in the advertising business. Specifically, JNJ contracts to provide customers, usually car dealerships, with advertising mail-outs. The mail-outs are printed by the Taxpayer, delivered (sold) by the Taxpayer to JNJ, and then mailed by JNJ to the general public in a designated area around the customer's

location. The Taxpayer also provides advertising inserts to be included in newspapers. The Department concedes that those newspaper inserts are not taxable.

JNJ's customers usually provide JNJ with an idea for a mail-out. JNJ generally advises the customer as to the format and specific information that should be included in the mail-outs.

JNJ prepares a sample, sends it to the Taxpayer for printing, and then submits the printed sample to the customer. Once the customer approves, JNJ orders the necessary number of mail-outs from the Taxpayer.

The Taxpayer prints the mail-outs and then either delivers the materials to JNJ, or JNJ picks up the materials at the Taxpayer's facility. The Taxpayer bills JNJ on a 30-day due basis.

The Taxpayer did not charge sales tax on the materials sold to JNJ during the audit period.

After receiving the materials, JNJ prepares and then mails the mail-outs directly to the general public in the designated mailing area. JNJ did not have a sales tax license, and thus did not collect or remit sales tax to the Department during the subject period.

The Department argues that JNJ is an "advertising agency" pursuant to Department Reg. 810-6-1-.02. The Department contends that as an advertising agency, JNJ does not resell the mail-outs purchased from the Taxpayer, but rather uses the mail-outs in providing an advertising service, in which case the sale by the Taxpayer to JNJ is a taxable retail sale. Reg 810-6-1-.02 reads as

follows:

Advertising agencies perform a service in formulating ideas and programs for advertising purposes. All materials purchased by an advertising agency including, but not limited to, brochures, drawing supplies, photographic supplies, and office supplies are consumed by the agency in performing the service and are subject to the tax at the time of purchase. The subsequent transfers of brochures and other materials to the agencies' clients are not classed as retail sales subject to the tax. Amended to conform to the decision of the Alabama Court of Civil Appeals in the case State of Alabama v. Douglas M. Harrison, d/b/a/ Douglas M. Harrison Advertising.

As stated in the regulation itself, Reg. 810-6-1-.02 was amended to specifically conform to State v. Harrison, 386 So.2d 416 (Ala.Civ.App. 1980). In Harrison, an advertising agency advised and consulted with its clients as to their public relations and advertising needs. The services provided by the agency included filming motion pictures, taking photographs, making tapes for television and radio, and preparing catalogs and brochures to be used by the customers in displaying merchandise. The advertising agency billed its customers for its time, advice, and expertise in addition to the tangible brochures and catalogs. The Court of Civil Appeals found that the advertising agency was primarily selling its services, i.e., time, talent, and advice. The tangible brochures and catalogs were transferred only incidental to the service, and thus were not subject to sales tax. The Court stated as follows, at page 461:

The appellee (Harrison) does much more than merely sell a client catalogs and brochures. The appellee must create the product that he eventually presents to his client. The final product created by appellee is the result of the appellee's talent and skill. Therefore, we

hold that the appellee was not engaged in selling tangible personal property under the sales tax act.

The Taxpayer counters that JNJ is not an advertising agency pursuant to Harrison because JNJ does not provide full advertising services to its customers as did the agency in Harrison. Rather, the Taxpayer argues that JNJ is merely reselling the printed mail-outs, in which case the sale by the Taxpayer to JNJ was a tax-free wholesale sale. The Taxpayer also cites Reg. 810-6-1-.52 ("Direct Mail Advertising, Printer's Liability") and Reg. 810-6-1-.130 ("Printers") in support of its case.

JNJ's representative conceded at the administrative hearing that it was reselling the mail-outs at retail, and thus is liable for Alabama sales tax on all otherwise taxable sales in Alabama during the subject period. Most of the mail-outs were mailed by JNJ to recipients outside of Alabama, in which case Alabama sales tax would not be due. JNJ still does not have an Alabama sales tax license, although JNJ's representative claims that all sales tax owed by JNJ after the audit period has been paid by the Taxpayer.

I agree with the Taxpayer that JNJ is not an "advertising agency" within the context of Harrison.

JNJ is in the advertising business in the sense that it sells advertising materials to its customers. JNJ also sometimes helps the customer with the format and content of the advertising mail-outs. But JNJ clearly is not a full service advertising agency as was the agency in Harrison. The advertising agency in Harrison was

not primarily engaged in selling brochures and catalogs. Rather, it primarily provided a creative service for which it charged for its time, talent, and advice. The transfer of the tangible brochures and catalogs was only incidental to that service. On the other hand, JNJ is primarily engaged in selling the tangible mail-outs. The "services" provided by JNJ, if any, are only incidental to the sale of those printed materials. The sales by the Taxpayer to JNJ were thus for resale.¹

In summary, Harrison should be strictly construed to apply only to professional advertising agencies that primarily provide a creative service. It does not apply to a business such as JNJ that is primarily selling tangible personal property at retail. Whether a business is primarily providing a service or primarily selling at retail must be decided on the specific facts of each case.

However, while normally a sale for resale is a tax-free transaction, the sales by the Taxpayer to JNJ cannot be considered "wholesale sales" for tax purposes because JNJ was not a licensed reseller during the subject period. State v. Advertiser Company, 337 So.2d 442 (1976).

The issue in Advertiser was whether newspapers sold by the Advertiser Company to its unlicensed newscarriers was a tax-free

¹I do not necessarily agree with the Taxpayer that Regs. 810-6-1-.52 and 810-6-1-.130 are applicable. The Taxpayer is not a printer concerning the subject materials. But an analysis of the above regulations is not necessary because, as stated, I agree with the Taxpayer that JNJ is buying the materials in issue for resale.

wholesale sale. The Supreme Court held that even though the sales were for resale, they were not at wholesale for tax purposes because the newscarriers were not licensed.

The sales tax applies to retail sales. It is a tax paid by the ultimate consumer, and collected and returned to the State by the retailer. The word "license" is used throughout the tax statute to indicate a status conferred on a retailer by virtue of his remittance of collected sales tax in compliance with the law. A "licensed" merchant is one who remits the tax due on his sales; an "unlicensed merchant" is one who does not.

The scope of the sales tax statute does not extend to wholesale sales. However, the statutory definition of "wholesale" covers a more restricted category of sales than the word denotes in common parlance. Whereas the ordinary meaning of wholesale includes all sales made to retailers who will resell the item, the sales tax meaning of wholesale contained in the statute is limited to those sales made to *licensed* retail merchants for purposes of resale. The implication is clear: the legislature intends to collect its tax. If a wholesaler sells to a retailer who resells the goods but does not remit the tax due, then the retail sales tax becomes an obligation of the wholesaler. We see nothing infirm in the legislature establishing such a provision to prevent the possible avoidance of tax liability.

Advertiser, at page 945.

JNJ admittedly was not a licensed reseller and thus failed to collect and remit tax on its taxable sales in Alabama during the subject period. Consequently, the sales by the Taxpayer to JNJ, although for resale, cannot be treated as wholesale sales, and thus must be treated as taxable retail sales. See, Code of Ala. 1975, §40-23-1(a)(10) ("retail sale" defined as "all sales of tangible personal property except those above defined as wholesale sales).

It is irrelevant that JNJ resold most of the mail-outs outside of

Alabama. The taxable transaction was the retail sale by the Taxpayer to JNJ in Alabama. The sales tax assessed by the Department on those sales is accordingly upheld.

The Department is directed to recompute the Taxpayer's liability pursuant to the above holding. The Taxpayer's adjusted liability should be submitted to the Administrative Law Division, and a Final Order will be entered accordingly.

This Opinion and Preliminary Order is not an appealable order. The Final Order, when entered, may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered December 14, 1995.

BILL THOMPSON
Chief Administrative Law Judge