

SOUTHEASTERN CELLULAR, INC. §
911 South Quintard Avenue
Anniston, Alabama 36201-6680, §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer, §

DOCKET NO. S. 96-185

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

FINAL ORDER

The Revenue Department assessed State, Talladega County, Etowah County, and city sales tax against Southeastern Cellular, Inc. ("Taxpayer") for the period June 1992 through May 1995. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on June 11, 1996. Will Sellers represented the Taxpayer. Assistant Counsel Margaret McNeill represented the Department.

This case involves the sales tax "withdrawal" provision at Code of Ala. 1975, §40-23-1(a)(10), as amended by Act 95-608. The specific issue is whether sales tax is due under the "withdrawal" provision on the wholesale cost of cellular telephones provided by the Taxpayer free of charge to its customers in return for the customer buying cellular service from the Taxpayer.

The facts are undisputed.

The Taxpayer sells cellular telephones and related equipment at retail. The Taxpayer also is an authorized agent and sells cellular telephone service on behalf of BellSouth Mobility ("BellSouth"). BellSouth pays the Taxpayer a commission for selling its services. To encourage customers to buy BellSouth service, the Taxpayer sometimes gives customers a cellular

telephone at no charge if the customer agrees to buy BellSouth service through the Taxpayer.

The Department audited the Taxpayer and assessed sales tax on the Taxpayer's wholesale cost of the telephones provided free of charge. The Taxpayer appealed to the Administrative Law Division.

The "withdrawal" provision is included in §40-23-1(a)(10) and defines "Retail Sale" to include the withdrawal from inventory of property previously purchased at wholesale for personal use or consumption. See generally, Ex parte Sizemore, 605 So.2d 1221 (Ala. 1992).

The Taxpayer concedes that the telephones would have been taxable under the "withdrawal" provision prior to the passage of Act 95-608 in July 1995. The Taxpayer argues, however, that the telephones are specifically excluded from the "withdrawal" provision by Act 95-608.

Act 95-608 was enacted as a direct result of the decision in Cellular Pro Corporation v. State, Admin. Law Docket No. 94-303, Opinion and Preliminary Order entered January 30, 1995. The facts in Cellular Pro were the same as in this case, except the telephones in Cellular Pro were sold for a nominal price (\$.99), whereas the telephones in this case were provided at no charge.

The Department argued in Cellular Pro that sales tax was due on the commissions received by Cellular Pro from the service provider, Alltel. The Administrative Law Division rejected that argument, and instead ruled that Cellular Pro was liable for sales tax on its wholesale cost of the telephones under the "withdrawal" provision:

However, while the commissions paid by Alltel to the Taxpayer are not taxable, the Taxpayer is liable for sales tax on the wholesale cost of the promotional phones sold for \$.99 under the sales tax "withdrawal" provision found at Code of Ala. 1975, §40-23-1(a)(10). That section defines "retail sale" in part to include the withdrawal, use or consumption of tangible personal property previously purchased at wholesale for the personal and private use of the wholesale purchaser/withdrawer. Ex parte Sizemore, 605 So.2d 1221.

The Taxpayer in this case purchased the promotional phones at wholesale. In my opinion, selling the phones for \$.99 for promotional purposes constituted in substance a personal use or consumption of the phones by the Taxpayer. The sale of the phones for \$.99 was tied to and contingent on the customer agreeing to buy Alltel service, in which case the Taxpayer would receive a commission. The Taxpayer clearly "used" the promotional phones to acquire the commissions, and thus owes sales tax on its wholesale cost of the phones.

If the Taxpayer had given the promotional phones away free-of-charge in return for the customer buying Alltel service, then clearly the "withdrawal" provision would apply and tax would be due on the Taxpayer's wholesale cost. Certainly the Taxpayer should not be allowed to charge a nominal \$.99 and thereby escape tax on the difference between \$.99 and the wholesale cost of the phone. The "withdrawal" provision applies even though the phones were technically resold for \$.99. Substance over form must govern, and in substance the \$.99 phones were used by the Taxpayer to obtain the Alltel commissions.

In summary, the general rule to be applied is that if a retailer sells tangible personal property at below cost (or free), and the reduced selling price is linked to an obligation by the customer to purchase or subscribe to some form of service for which the retailer receives compensation, then the retailer owes sales tax on its wholesale cost of the property. The above is a practical rule and clearly in accord with the intent of the "withdrawal" provision.

In response to the Cellular Pro decision, the Legislature enacted Act 95-608, effective July 31, 1995, for all open tax years. Act 95-608 amended Code of Ala. 1975, §§40-23-1(a)(6) and (a)(10) by adding the following language:

(6) GROSS PROCEEDS OF SALES. . . . In the case of the retail sale of equipment, accessories, fixtures, and other similar tangible personal property used in connection with the sale of commercial mobile services as defined herein, or in connection with satellite television services, at a price below cost, "gross proceeds of sale" shall only include the stated sales price thereof and shall not include any sales commission or rebate received by the seller as a result of the sale. As used herein, the term "commercial mobile services" shall have the same meaning as that term has in 47 U.S.C. §§153(n) and 332(d), as in effect from time to time.

. . . .

(10) SALE AT RETAIL or RETAIL SALE. . . . In the case of the sale of equipment, accessories, fixtures, and other similar tangible personal property used in connection with the sale of commercial mobile services as defined in subdivision (6) above, or in connection with satellite television services, at a price below cost, the term "sale at retail" and "retail sale" shall include those sales, and those sales shall not be taxable as a withdrawal, use, or consumption of such tangible personal property.

Act 95-608 excluded from the "withdrawal" provision only telephones and related equipment sold at retail at below cost. The Taxpayer argues that the telephones in issue come within the scope of Act 95-608 because they were sold at retail for \$0.00. I disagree. The Taxpayer did not sell the telephones at retail. Rather, it gave the telephones as gifts to its customers. A gift has different tax consequences and cannot be equated with a sale for tax purposes.

The Taxpayer points out that in Cellular Pro, telephones sold

at below cost were equated with telephones provided for free. See last paragraph of Cellular Pro quote, at page 3 infra. That comparison was appropriate at the time because before Act 95-608, the "withdrawal" provision applied in both cases.

However, while Act 95-608 clearly removed telephones sold at below cost from the "withdrawal" provision, it did not address telephones that are given away. The intent of the Legislature can only be gleaned from the plain and unambiguous language of the statute. Heater v. Tri-State Motor Transit Co., 644 So.2d 25 (Ala.Civ.App. 1994); Kimberly-Clark v. Eagerton, 445 So.2d 566 (Ala.Civ.App. 1983). Consequently, telephones and related equipment given away in return for a customer buying cellular phone service are still taxable under the "withdrawal" provision.

I agree with the Taxpayer that there is little difference between telephones sold for \$.99 and telephones given away. But again, the specific language of §40-23-1(a)(10), as amended by Act 95-608, plainly excludes from the "withdrawal" provision only telephones sold at retail at below cost. Consequently, for the reasons stated in Cellular Pro, the telephones given away by the Taxpayer in this case are taxable under the "withdrawal" provision.

The final assessments are affirmed. Judgment is entered against the Taxpayer for State sales tax of \$52,552.13, Talladega County sales tax of \$2,415.54, Etowah County sales tax of \$1,473.07, and local cities sales tax of \$6,838.60.

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

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Entered August 15, 1996.

BILL THOMPSON
Chief Administrative Law Judge