

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.

SECOND PRELIMINARY ORDER
ON APPLICATION FOR REHEARING

A Final Order was entered in this case on August 15, 1996. Southeastern Cellular, Inc. ("Taxpayer") timely applied for a rehearing pursuant to Code of Ala. 1975, §40-2A-9(f).

First, the Taxpayer reargues its position that the telephones were sold at retail for zero, and thus were not taxable under the withdrawal provision, as amended by Act 95-608. Again, I disagree. The telephones were given away as gifts. They were not sold at retail. Consequently, Act 95-608 is not applicable. The Final Order is affirmed on this point.

The Taxpayer also argues that it should be allowed a credit for the free telephones returned by its customers. The Taxpayer claims that approximately 1,150 telephones were returned during the audit period for various unspecified reasons. This issue was previously raised by the Taxpayer, but was not addressed in the Final Order.

The Taxpayer argues that a credit for the returned telephones should be allowed pursuant to Code of Ala. 1975, §40-23-1(a)(6). That section reads in part as follows: "'Gross

proceeds of sale' shall not include the sale price of property returned by customers when the full sales price thereof is refunded either in cash or by credit." The rationale for the above provision is that if a sale item is returned and the entire purchase price is refunded to the customer, the sale is in substance cancelled and there should be no tax liability. The retailer is put in the same position as before the sale, except the item might be slightly used. The provision applies whether the item is returned immediately, or days or weeks later, as long as the entire purchase price is refunded.

A retail sale occurs under the withdrawal provision when the item is used or consumed by the wholesale purchaser. In the normal withdrawal transaction, a credit cannot be allowed if the property is later returned to inventory. For example, in State v. Barnes, 233 So.2d 83 (Ala.Civ.App. 1970), phonograph records purchased tax-free for resale were instead withdrawn from inventory by the wholesale purchaser and used in jukeboxes. The Court held that the withdrawal was taxable, even though the records were later returned to inventory and sold at retail.¹ The taxpayer benefitted from the taxable use of the records in the jukeboxes, and that benefit was not nullified when the

¹Sales tax was also due when the records were later sold at retail. See generally, Starlite Lanes, Inc. v. State, 214 So.2d 324 (1968); Dothan Jet Center, Inc. v. State, S. 95-172 (Admin. Law Div. 9/20/95). The two taxes did not constitute impermissible double taxation because the first tax was against the retailer under the withdrawal provision, while the second was levied against a different taxpayer, the retail customer.

records were returned to inventory.

However, this case presents a unique situation. The Taxpayer used the telephones to obtain a commission from the carrier, BellSouth Mobility. If a telephone was returned, and the Taxpayer was required to return or forfeit the entire commission received from BellSouth, the Taxpayer would be in the same position as before the transaction, except the telephone might be slightly used. That situation is analogous with the typical over-the-counter sale where the item is returned for a full refund, in which case no tax is due under §40-23-1(a)(6). Consequently, a credit should be allowed for any returned telephones if the Taxpayer was required to return its full commission to BellSouth, and the Taxpayer otherwise did not benefit from the transaction.

I emphasize that this holding applies only to the specific fact situation in this case. It does not apply to property withdrawn from inventory and given away as free samples or for advertising purposes that might be returned or recovered by the wholesale purchaser, or to any other fact situation I can think of.

The Taxpayer is allowed until November 29, 1996 to document the telephones returned by customers during the audit period for which the full BellSouth commission was returned. Those telephones will be deleted from the audit, and the Taxpayer's liability will be recomputed accordingly. A Final Order on

Application for Rehearing will then be entered. The Taxpayer's attorney should contact the Administrative Law Division if he has any questions concerning the documentation necessary.

This Second Preliminary Order on Application for Rehearing 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 November 1, 1996.

BILL THOMPSON
Chief Administrative Law Judge