AMERICAN CARPET SALES, INC. 1050 South Beltline Highway Mobile, AL 36609,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 97-208
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed sales tax against American Carpet Sales, Inc. ("Taxpayer") for February 1991 through March 1996. 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 October 28, 1998. Lewis Hickman represented the Taxpayer. Assistant Counsel Duncan Crow represented the Department.

The Taxpayer sold carpet at retail in Alabama from February 1991 through March 1996. The Taxpayer also contracted to furnish and install carpet for customers in Mississippi during that period. This case involves three issues:

(1) Should a nine percent "handling charge" collected by the Taxpayer from its customers be included in gross proceeds subject to sales tax;

(2) Should the Taxpayer be allowed a credit for Mississippi sales tax paid on the furnish and install contracts performed in that State; and

(3) Is a portion of the final assessment barred by the statute of limitations at Code of Ala. 1975, §40-2A-7(b)(2).

The Taxpayer sold carpet at its retail outlet in Mobile, Alabama during the subject period. The Taxpayer also contracted to furnish and install carpet for customers in Mississippi. Concerning the furnish

and install contracts, the Taxpayer withdrew carpet from inventory in Alabama and hired installers to install the carpet in Mississippi. The Taxpayer paid Mississippi sales tax on the contracts as demanded by the State of Mississippi.

The Taxpayer failed to charge sales tax on either the carpet sold at retail in Alabama or used on the furnish and install contracts in Mississippi. Rather, the Taxpayer billed its customers for a nine percent handling fee on each transaction. The Taxpayer reported and paid the combined nine percent State of Alabama, Mobile County, and City of Mobile sales tax on its retail sales in Alabama on the charge for the carpet, not including the handling fee. The Taxpayer failed to pay Alabama sales tax on the carpet used on the Mississippi furnish and install contracts because it paid Mississippi sales tax on those transactions.

The Taxpayer petitioned the Department for a sales tax refund on March 22, 1994 concerning the period February 1991 through February 1994. The Department audited the Taxpayer. The parties executed five agreements during the audit extending the statute of limitations for either assessing additional tax due or issuing a refund. The first agreement covered the period February 1991 through January 1994, and was executed on August 12, 1994. The last agreement extended the statute until December 1996.

The Department completed the audit in September 1996. The Department included in taxable gross proceeds (1) the nine percent handling fee on which the Taxpayer had not paid sales tax, and (2) the Taxpayer's wholesale cost of the carpet used on the Mississippi contracts. The Department entered a preliminary assessment for

the additional tax due on November 22, 1996. A final assessment was entered on March 13, 1997. The Taxpayer appealed.

ISSUE I - THE NINE PERCENT "HANDLING CHARGE"

Alabama sales tax is levied on the gross proceeds derived from retail sales. Code of Ala. 1975, §40-23-2(1). "Gross proceeds" includes the amount derived from the sale of tangible personal property"...without any deduction on account of the cost of the property sold, the cost of the materials used, labor or service cost..., or any other expenses whatsoever, ..." Code of Ala. 1975, §40-23-1(a)(6).

Charges for labor and services performed by a seller in conjunction with a sale are subject to sales tax, even if separately stated on the invoice. East Brewton Materials, Inc. v. State, Department of Revenue, 233 So.2d 751 (1970); Dept. Reg. 810-6-1-.84; See also, Color Craft, Inc. v. State of Alabama, S. 96-323 (Admin. Law Div. 02/12/97); Thigpen Photography v. State of Alabama, S. 95-127 (Admin. Law Div. Opinion and Preliminary Order 08/30/95); State of Alabama v. Mary B. Montgomery, S. 94-132 (Admin. Law Div. 12/29/94).

A true "handling fee" charged by a retailer in conjunction with a retail sale must be included in gross proceeds subject to sales tax. However, the nine percent charged by the Taxpayer on its retail sales in Alabama was not a true handling fee. Substance over form must govern in tax matters. Boswell v. Paramount Television Sales, Inc., 282 So.2d 892 (1973). In substance, the Taxpayer treated the nine percent charge as sales tax, and reported and paid the combined nine percent State, Mobile County, and City of Mobile sales tax on the retail sales at its Mobile store. Consequently, the Taxpayer should not be required

to include the nine percent charge in taxable gross proceeds during the period in issue.[1]

All taxpayers are required to add sales tax to the sale price of property sold at retail in Alabama. Code of Ala. 1975, §40-23-26. Consequently, billing a customer for a handling fee in lieu of sales tax is technically incorrect. The Taxpayer is thus on notice that sales tax delineated as such must be charged on all future retail sales of carpet in Alabama. Any handling charges added by the Taxpayer on future retail sales must be included in taxable gross proceeds.

The nine percent handling charge is irrelevant concerning the Mississippi contracts because, as discussed below, Alabama sales tax is due on those transactions measured by the Taxpayer's wholesale cost of the carpet. What or how the Taxpayer billed the Mississippi customer is irrelevant.

ISSUE II - CREDIT FOR SALES TAX PAID TO MISSISSIPPI

The Taxpayer concedes that the withdrawal of carpet in Alabama for use on the Mississippi contracts

[1]This holding applies only to the specific facts of this case. If a retailer charges a customer a handling or some other charge in lieu of sales tax, but does not remit the amount collected to the appropriate taxing jurisdictions, the retailer would owe sales tax on the full retail sales price, including the handling or other charge. Tax would be owed on the entire charge because the retailer did not in substance treat the charge as sales tax, and remit the tax to the appropriate taxing jurisdictions, as the Taxpayer did in this case.

was a taxable retail sale in Alabama. Code of Ala. 1975, §40-23-1(a)(10). The taxable measure was the Taxpayer's wholesale cost of the carpet. Home Tile and Equipment Co. v. State, 362 So.2d 236 (Ala.Civ.App.), cert denied, 362 So.2d 239 (Ala. 1978). The Taxpayer argues, however, that it should be allowed a credit for the sales tax paid to Mississippi. Unfortunately, I must disagree.

A taxpayer is allowed a credit against Alabama use tax for sales or use tax paid to another state on the same property. Code of Ala. 1975, §40-23-65. The credit does not apply in this case because the Taxpayer owes Alabama sales tax on the carpet used on the Mississippi contracts, not use tax. Section 40-23-65 does not allow a credit against Alabama sales tax. The credit also cannot be allowed because Mississippi does not reciprocate and allow a credit for tax paid to Alabama, as required by §40-23-65.[2]

The Multi-State Tax Compact, Code of Ala. 1975, §40-27-1, Article V, paragraph 1, provides that any purchaser liable for use tax shall be allowed a credit for sales or use tax paid on the same property to another state. That section also does not apply because the Taxpayer is not a purchaser in this instance, and, as stated, the Taxpayer is liable for Alabama sales tax, not use tax.

ISSUE III - THE STATUTE OF LIMITATIONS

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[2]Home Tile and Equipment also involved a situation in which a Mobile carpet company owed Mississippi tax on furnish and install contracts in that State, and also Alabama sales tax on the withdrawal of the carpet in Alabama. The Court of Civil Appeals recognized that both taxes were due.

The parties entered into the first waiver on August 12, 1994. Alabama law requires that a waiver must be executed "prior to the expiration of the period for entering a preliminary assessment". Code of Ala. 1975, §40-2A-7(b)(2)i. The Department has three years from the due date of a return to assess tax. Consequently, the Department is barred from assessing June 1991 and prior months because the three year statute had expired for those months when the first waiver was executed on August 12, 1994. Any tax assessed for those months should be deleted from the final assessment. The Taxpayer had, however, timely applied for a refund for those months. The Taxpayer thus should be allowed credit if a refund is due for those months.

The Department is directed to recompute the Taxpayer's liability as indicated above. 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 April 9, 1998.

BILL THOMPSON
Chief Administrative Law Judge

BT:ks

cc: Duncan R. Crow, Esq.
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James Browder