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| MCDANIEL WINDOW & DOOR COMPANY, INC.<br>300 E. Tennessee Street<br>Florence, AL 35630-5716,<br><br>Taxpayer,<br><br>v.<br><br>STATE OF ALABAMA DEPARTMENT OF REVENUE. | §<br>§<br>§<br>§<br>§<br>§<br>§ | STATE OF ALABAMA<br>DEPARTMENT OF REVENUE<br>ADMINISTRATIVE LAW DIVISION<br><br>DOCKET NO. S. 02-313 |

## FINAL ORDER

The Revenue Department assessed McDaniel Window & Door Company, Inc. ("Taxpayer") for State and City of Florence sales tax for June 1997 through June 2000. 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 August 1, 2002. Warren Matthews represented the Taxpayer. Assistant Counsel Margaret McNeill represented the Department.

## ISSUES

This case involves three issues:

(1) Should an unidentified 8 percent amount collected by the Taxpayer from its customers on furnish-and-install contracts be remitted to the Department as erroneously collected sales tax pursuant to Code of Ala. 1975, §40-23-26(d);

(2) Is assessment of the City of Florence sales tax by the Department authorized by City of Florence ordinance and Alabama law; and,

(3) Was the tax timely assessed?

## FACTS

The Taxpayer is a contractor/retailer located in Florence, Alabama. Before the audit period, the Taxpayer was engaged solely in contracting to furnish and install doors, windows, and other building materials for its customers.

As a contractor, the Taxpayer was not required to have a retail sales tax license pursuant to Code of Ala. 1975, §40-23-6, or to file monthly sales tax returns pursuant to Code of Ala. 1975, §40-23-7. Rather, it correctly paid sales tax to its suppliers when it purchased the materials necessary to complete the contracts. Code of Ala. 1975, §40-23-1(a)(10) ("retail sale" defined in part to include "sales of building materials to contractors . . . for resale or use in the form of real estate are retail sales in whatever quantity sold"); *State v. Algernon Blair Industrial Contractors, Inc.*, 362 So.2d 248 (Ala.Civ.App. 1978).

During the audit period, the Taxpayer also made over-the-counter retail sales. Consequently, as a "dual business," i.e. a contractor and a retailer, the Taxpayer should have obtained a sales tax license from the Department and purchased all materials tax-free using that license. Dept. Reg. 810-6-1-.56. The Taxpayer then should have filed monthly returns and remitted sales tax on (1) the gross proceeds derived from its retail sales, and (2) its wholesale cost of those materials withdrawn from inventory and consumed on the furnish-and-install contracts. Unfortunately, the Taxpayer failed to obtain a sales tax license and file returns, and instead continued to pay tax when it purchased materials from its suppliers.

The Department audited the Taxpayer for State and City of Florence sales tax for the subject period. The Department examiner divided the Taxpayer's transactions into four categories: (1) retail sales invoices on which no sales tax was added; (2) retail sales on which 8 percent was added; (3) furnish-and-install contracts on which 8 percent sales tax was added; and (4) furnish-and-install contracts on which an unidentified 8 percent amount was added.

The Department assessed the Taxpayer on the category (1) and (2) retail sales. The Taxpayer does not dispute and has paid the additional tax due on those sales.

The Department also assessed the Taxpayer for the 8 percent amounts included on the category (3) and (4) furnish-and-install contracts. The Department concedes that although the Taxpayer paid the sales tax due when it purchased the materials from its suppliers, the 8 percent amounts charged to the customers must still be remitted to the Department as over-collected sales tax pursuant to §40-23-26(d). As discussed below, that section requires that if any sum is collected from a consumer that purports to be sales tax, the amount must be paid to the Department. The Department entered preliminary assessments for the tax in issue on October 24, 2001.

The Taxpayer contends that the 8 percent amount included on the furnish-and-install contracts was not sales tax, but rather a service charge or contractor mark-up added to offset overhead expenses. It claims that an employee mistakenly identified as sales tax the 8 percent amounts included on the category (3) contracts. It nonetheless has paid the tax due on those contracts because the 8 percent amount was clearly identified as "sales tax."

The Taxpayer argues, however, that §40-23-26(d) does not apply to the unidentified 8 percent amounts on the category (4) invoices because the amounts did not "purport" to be sales tax, as required by the specific language of the statute. It also contends that the 8 percent amounts were not "collected from a consumer," again as required by the statute.

## ANALYSIS

**Issue (1). Does §40-23-26(d) apply?**

Section 40-23-26(d) was enacted by the Alabama Legislature in 1987, Acts 1987, No. 87-662. The intent of the Legislature as stated in the preamble to the Act was "to provide that any over collection of sales tax by a retailer from the customer is paid over to the state and not retained by the retailer as a windfall . . . ." *Dandy's Discount Packaging Store, Inc., et al. v. Sizemore*, 597 So.2d 1370,

1372 (Ala.Civ.App. 1992). The Act codified prior Alabama case law on the subject, as established in *Ross Jewelers, Inc. v. State*, 72 So.2d 402, 408 (Ala. 1953) ("As between Ross Jewelers and the State, such excess collections (of sales tax) should belong to the State.").

The Taxpayer correctly paid the amount of State sales tax owed on the furnish-and-install contracts when it purchased the materials from its suppliers, although as discussed, it should have purchased the materials tax-free and then reported and remitted the tax when (and where) the materials were withdrawn from inventory for use on the contracts.[1] Consequently, the Taxpayer must remit to the Department the unidentified 8 percent amounts included on the category (4) invoices only if the amounts constituted erroneously collected sales tax within the scope of §40-23-26(d).

Tax levy statutes must be strictly construed against the government. *State v. Calumet and Hecla, Inc.*, 206 So.2d 354 (Ala. 1968). Section 40-23-26(d) is in the nature of a tax levy statute because it requires an amount to be paid to the State. Consequently, the statute must be strictly construed against the Department.

The plain language of §40-23-26(d) provides that an amount must be paid to the Department only if it "purports" to be a sales tax. The unidentified 8 percent amounts in issue did not purport to be sales tax. The Department may

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[1]While it is irrelevant for State purposes that the Taxpayer incorrectly paid tax when it purchased the materials instead of when the materials were withdrawn from inventory, it may be relevant for local tax purposes. For example, if the Taxpayer purchased materials outside of Florence, it paid the applicable local tax to the jurisdiction in which the supplier's business was located. However, the Taxpayer technically should have remitted tax to the City of Florence when the materials were withdrawn from the Taxpayer's inventory in Florence. *City of Huntsville v. City of Madison*, 628 So.2d 584 (Ala. 1993). It is not clear from the evidence how the Department examiner handled those transactions.

assume or speculate that the amount was sales tax because the combined State and local sales tax in Florence was 8 percent. But the amount was not identified as sales tax, nor is there evidence that the Taxpayer's customers were informed or understood that the amount was sales tax. Strictly construing the statute against the Department, §40-23-26(d) does not apply unless the amount collected is identified as sales tax. Consequently, the unidentified 8 percent amounts in issue did not constitute erroneously collected sales tax within the scope of §40-23-26(d).[2]

Because the assessments in issue are based entirely on the category (4) amounts, the assessments are voided.

The above holding is dispositive of this case. However, Issues (2) and (3) will be briefly addressed in case the Issue (1) holding is reversed on appeal.

**Issue (2). The validity of the City of Florence assessment.**

The City of Florence was authorized by Code of Ala. 1975, §11-51-200 to levy a sales tax. It did so by City ordinance in October 1971. Section 2 of the ordinance provides as follows:

> Provisions of State Sales Tax Statutes Applicable to this Ordinance and Taxes Herein Levied. The taxes levied by Section 1 of this ordinance shall be subject to all definitions, exceptions, exemptions,

[2]The Taxpayer also argues that §40-23-26(d) does not apply because the amounts were not "collected from a consumer," as required by the statute. I disagree. Technically, the Taxpayer, not its customers, was the consumer of the materials used on the furnish-and-install contracts. *Algernon Blair*, *supra*. However, the clear intent of §40-23-26(d) is to require a taxpayer to remit to the Department any amount erroneously collected as sales tax from a customer. In the context of §40-23-26(d), "consumer" should be construed as customer. The Legislature even used the phrase "from the customer" in the preamble to Act 87-662. The Taxpayer apparently concedes the point because it has paid the 8 percent collected as sales tax on the category (3) furnish-and-install contracts, even though the Taxpayer was technically the consumer of the materials used on those contracts.

> proceedings, requirements, rules, regulations, provision, penalties, fines, punishments, and deductions that are applicable to the taxes levied by the State sales tax statutes, . . . including all provisions of the State sales tax statutes for enforcement and collection of taxes.

In December 1971, the City of Florence Board of Commissioners passed a resolution requesting the Revenue Department to collect its sales tax pursuant to Act 203, 1st Ex. Sess. 1965, which is presently codified at Code of Ala. 1975, §11-51-180. That statute requires the Department to collect a municipal sales or use tax upon request by the municipality.

Florence's authority to levy the local sales tax in issue, and the Department's authority to collect the tax for the City, are clearly established by the above ordinance and statute. The Taxpayer argues, however, that while the Department may be authorized to collect the tax, it is not authorized to assess the tax. "The City of Florence sales and use tax ordinance does not provide the requisite assessment authority the Department needs to support the City Assessment." Taxpayer's Reply Brief at 3. I disagree.

The assessment of a tax is an often necessary part in the collection of the tax. Consequently, the Department's broad authority to "collect" the City of Florence sales tax includes the authority to assess the tax. The Department's authority to collect a municipal sales tax pursuant to §11-51-180 empowers the Department to fully administer the municipal tax using all of its legal powers and authority available for administration of the State sales tax.

The Taxpayer also argues that the Florence sales tax ordinance does not incorporate the provisions of §40-23-26(d). Again, I disagree. Section 2 of the ordinance adopts all "provisions" of the State sales tax law, which clearly includes

§40-23-26(d). The State over-collection statute thus also applies to over-collected municipal sales tax.

**Issue (3). Was the tax timely assessed?**

The Department issued preliminary assessments for the State and City of Florence sales tax on October 24, 2001. The Taxpayer argues that the general three year statute at Code of Ala. 1975, §40-2A-7(b)(2) applies, and consequently that a portion of the assessment period is out of statute. The Taxpayer contends that §40-2A-7(b)(2)a., which allows the Department to assess tax at any time "if no return is filed as required," also does not apply because as a contractor, it was not required to file sales tax returns during the subject period. I disagree.

Before the audit period, the Taxpayer operated solely as a contractor, and thus was not required to have a sales tax license and file returns with the Department. But during the audit period, the Taxpayer also made over-the-counter retail sales. Consequently, as discussed, it was required to be licensed and file monthly sales tax returns with the Department. Code of Ala. 1975, §40-23-7(b). It failed to do so. Because the Taxpayer failed to file returns during the subject months as required by Alabama law, the unlimited statute of limitations at §40-2A-7(b)(2)a. applies.[3] The preliminary assessments were thus timely entered.

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[3]It is problematical whether a person or entity not otherwise required to file sales tax returns, i.e. a business operating solely as a contractor, would be required to file returns as a result of collecting an amount purporting to be a sales tax. Section 40-23-26(d) requires only that "such sum . . . shall be paid" to the Department. It does not require the filing of a return with the payment. That issue need not be addressed, however, because as a retailer making over-the-counter sales during the subject period, the Taxpayer was required by law to file monthly returns.

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

Entered September 25, 2002.