EDWIN WATTS GOLF SHOP, INC. P.O. Box 1806 Ft. Walton Beach, FL 32549-1806,	'	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	'	DOCKET NO. U. 98-525
v.	'	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	'	

FINAL ORDER

The Revenue Department assessed use tax against Edwin Watts Golf Shop, Inc. (ATaxpayer@) for January 1993 through June 1997. 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 February 16, 1999. Harry W. Gates represented the Taxpayer. Assistant Counsel Margaret McNeill represented the Department.

The issue in this case is whether the Taxpayer is liable for Alabama use tax on golf carts purchased from out-of-state vendors and used by the Taxpayer in Alabama. Two sub-issues are involved:

(1) Were the carts subject to Alabama sales tax, and thus exempt from use tax;

(2) Were the carts purchased by the Taxpayer at wholesale pursuant to Code of Ala. 1975, ''40-23-1(a)(9)j. (sales tax) and 40-23-60(4)i. (use tax). If so, neither sales tax nor use tax is due.

The Taxpayer owns and operates a public golf course in Mobile, Alabama. The Taxpayer purchased golf carts from out-of-state vendors during the subject

period. The vendors delivered the carts to the Taxpayer=s facility in Alabama. The Taxpayer failed

to pay sales or use tax on the carts. The Taxpayer subsequently rented the carts to golfers at its facility.

The Taxpayer reported the cart rental receipts on its monthly Alabama sales tax returns, and paid the four percent gross receipts tax levied at Code of Ala. 1975, '40-23-2(2). That tax is on the gross receipts derived from places of public amusement. The Department audited the Taxpayer and assessed the use tax in issue on the purchase price of the carts pursuant to Code of Ala. 1975, '40-23-61.

The Department argues that the Taxpayer is liable for the four percent use tax on the use of the carts in Alabama, and also the four percent public amusement gross receipts tax on the receipts derived from the rental of the carts. The Taxpayer contends that applying both taxes constitutes impermissible double taxation. The Department counters that applying both taxes is not impermissible double taxation because the legal incidence of the taxes are on different parties. Neither party is correct.

ISSUE 1 - DOES SALES TAX OR USE TAX APPLY?

A sale closed in Alabama is subject to Alabama sales tax. Code of Ala. 1975, '40-23-1(a)(5). Before 1997, the use of property subject to Alabama sales tax was exempt from Alabama use tax pursuant to Code of Ala. 1975, '40-23-62(1). See generally, Bluegrass Bit Co., Inc. v. State of Alabama, Docket U. 96-294 (Admin. Law Div. Opinion & Preliminary Order 1/16/97).

In response to Bluegrass Bit, the Alabama Legislature passed Act 97-301. That

Act amended '40-23-62(1) to provide that property sold in Alabama is exempt from use

tax only if Alabama sales tax was paid on the sale of the property. Act 97-301 was effective for all open tax years.

In this case, the sale of the carts was closed in Alabama when the vendors delivered the carts to the Taxpayer=s facility in Mobile. Section 40-23-1(a)(5); Bluegrass Bit, U. 96-294 at p. 6. Consequently, before Act 97-301, the carts were subject to Alabama sales tax and thus exempt from use tax. After Act 97-301, however, the carts were no longer exempt from use tax because the Taxpayer failed to pay Alabama sales tax on the carts. Consequently, applying Act 97-301 retrospectively, Alabama use tax would apply to the Taxpayer=s use of the carts in Alabama.

This issue is complicated, however, because the retrospective aspect of Act 97-301 was ruled unconstitutional by the Montgomery County Circuit Court in Valhalla Cemetery Co. v. G. Sage Lyons, CV. 97-940-GR. If Act 97-301 is not applied retrospectively, all carts purchased in Alabama before the passage of Act 97-301 (May 7, 1997) would still be exempt from use tax. Valhalla Cemetery is presently on appeal in the Alabama Court of Civil Appeals. Consequently, whether Alabama sales tax or use tax applied to the purchase or use of the carts in Alabama is still undecided.

If the Taxpayer purchased the carts at wholesale, however, the issue of whether sales tax or use tax applied would be irrelevant because neither tax would be due. State v. Tri-State Pharmaceutical, 371 So.2d 910, writ denied, 371 So.2d 914

(1979); Holloway v. State, 79 So.2d 40 (1955).

ISSUE II - DID THE TAXPAYER PURCHASE THE CARTS AT WHOLESALE?

AWholesale sale@ is defined for both sales tax and use tax purposes to include the sale of property to a person engaged in the business of leasing tangible personal property, if the property is intended to be leased and the lease is subject to the Alabama lease tax. Code of Ala. 1975, '40-23-1(a)(9)j., relating to sales tax, and Code of Ala. 1975, '40-23-60(4)i. relating to use tax. The Taxpayer purchased the carts in issue for the purpose of leasing them at its Mobile facility. The Taxpayer is engaged in the business of leasing carts, and the leases are clearly subject to the Alabama lease tax levied at Code of Ala. 1975, '40-12-222. Consequently, the purchase of the carts was a non-taxable wholesale sale, in which case use tax does not apply. Lepeska Leasing Corp. v. State, Dept. of Revenue, 395 So.2d 82 (1981). The use tax final assessment in issue is dismissed.

The above holding disposes of this appeal. For the benefit of the parties, however, I will discuss what taxes are applicable. As indicated, the rental of the carts is clearly subject to the lease tax levied at '40-12-222. The carts are motor vehicles, and thus taxable at the one and one-half percent automotive rate. Section 40-12-222.

The harder question is whether the gross receipts derived from the cart rentals are also subject to the four percent gross receipts tax levied at '40-23-2(2). In my opinion, that tax also applies.

The gross receipts tax levied at '40-23-2(2) is on the gross receipts derived

from public places of amusement. Golf courses are specifically included in the scope of the tax. State, Dept. of Revenue v. Teague, 441 So.2d 914 (Ala.Civ.App.1983). Consequently, gross receipts derived from the rental of golf carts must be included in the measure of the tax. It is irrelevant that the golf carts were purchased at wholesale. The gross receipts tax is due even if sales and use tax was not paid on the tangible property, i.e. the carts, from which the receipts were derived.

Applying both the lease tax and the gross receipts sales tax also does not result in impermissible double taxation because the taxes are on different parties. The lease tax is on the Taxpayer, as lessor. The gross receipts sales tax is on the Taxpayer=s customers. This is illustrated by the holdings in Starlite Lanes, Inc. v. State, 214 So.2d 324 (1968), and State v. Barnes, 233 So.2d 83 (1970).

In Starlite Lanes, a bowling alley purchased bowling shoes which it rented to its customers. The operator paid sales tax on the shoes when they were purchased.[1]

The Department assessed the operator the four percent gross receipts sales tax on the receipts from the shoe rentals. The Alabama Supreme Court affirmed

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[1]During the period involved in Starlite Lanes (1962-1964), Alabama did not have a lease tax. Consequently, items purchased for rental were subject to sales tax or use tax at the time of purchase. As discussed, under current law, the purchase of property that is intended to be rented constitutes a non-taxable wholesale sale. The change in the law, however, does not affect the applicability of the Court=s rationale in Starlite Lanes to this case.

that the four percent gross receipts tax was owed in addition to the sales tax the operator paid when he purchased the shoes. The Court rejected the claim that applying both taxes constituted impermissible double taxation.

> "It should also be noted that the burden of the 'gross receipts' tax does not fall upon the appellant, as this tax is required by law to be added to the total gross receipts and passed on to the customers of appellant. Thus, the burden of the sales tax falls upon the appellant when he buys the shoes and the 'gross receipts' tax upon the appellant's customers when they rent the shoes. Although there is double taxation in the sense that two taxes have been paid on the same item, the two taxes do not fall upon the same person. We do not feel that this is objectionable in the present case."

Starlite Lanes, 214 So.2d at 327.

Barnes Music was decided two years after Starlite Lanes. In Barnes Music, the taxpayer sold records at retail and also operated coin-operated record players. The taxpayer purchased records at wholesale for subsequent sale at retail, and also for use in the coin-operated machines.

The taxpayer withdrew records from inventory and used the records in the coin-operated machines. The taxpayer later removed the records and sold them at retail at a discounted price. The Court of Civil Appeals held that (1) the withdrawal of the records from inventory for use in the coin-operated machines constituted a taxable retail sale under the sales tax "withdrawal provision". Code of Ala. 1975, '40-23-1(a)(10); (2) the gross receipts from the coin-operated machines were subject to the gross receipts amusement tax at '40-23-2(2); and (3)

the sale of the used records also constituted a taxable retail sale. The Court cited Starlite Lanes as authority for finding that double and even triple taxation was permissible under the circumstances because each tax fell on different parties.

In this case, the lease tax is on the Taxpayer, as lessor. The gross receipts tax is on the Taxpayer=s customers. Consequently, there would be no impermissible double taxation. The Taxpayer thus correctly reported and paid the four percent gross receipts tax on the cart rental receipts.

My understanding is that so-called Aprivate@ golf courses pay the one and one-half percent lease tax on cart rentals. They are not subject to the gross receipts tax because they are not open to the public. See, Dept. Reg. 810-6-1-.125.01.

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

Entered April 23, 1999.

BILL THOMPSON
Chief Administrative Law Judge

BT:ks

cc: Margaret Johnson McNeill, Esq.
Harry W. Gates
James Browder