DIVERSIFIED SALES, INC. P.O. Box 560 Trussville, AL 35173-0560,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 02-458
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed "combined local tax" against Diversified Sales, Inc. ("Taxpayer") for January 1997 through December 1999. 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 8, 2002. Blake Madison represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

The Taxpayer, d/b/a Don's Carpet One, sells carpet and other flooring materials over-the-counter at retail outlets in the Cities of Hoover and Vestavia, Alabama. It also contracts to furnish and install flooring materials in various other municipalities in Alabama. This case involves the Taxpayer's municipal sales and/or use tax liability, if any, on the flooring materials used on the furnish and install contracts.

ISSUES

(1) Did the Department erroneously assess the Taxpayer for municipal sales tax, not municipal use tax;

(2) Was municipal use tax due in the municipalities where the flooring materials were installed;

(3) Did the Taxpayer have sufficient nexus to be subject to the municipalities' taxing jurisdiction; and,

(4) If any tax is owed, should part of the accrued interest be abated due to undue delay by the Department in assessing the Taxpayer?

FACTS

In a typical furnish and install contract, a customer visits one of the Taxpayer's outlets and orders flooring materials for installation. If the Taxpayer's salesperson does not know the size of the area to be covered, the salesperson or another Taxpayer employee goes to the job site and measures the area involved.

The completed order is forwarded to the Taxpayer's installation manager at the Taxpayer's warehouse in unincorporated Jefferson County. The manager has the necessary flooring materials withdrawn from inventory and delivered to an independent contractor for installation. After the independent contractor installs the flooring, the Taxpayer's salesperson contacts the customer to insure that the installation was satisfactory. If not, the Taxpayer directs the original installer to return and fix the problem. If they fail to do so, the Taxpayer hires another installer to do the job.

The Taxpayer correctly paid State and Jefferson County sales tax during the period in issue on its cost of the materials used on the furnish and install contracts.[1] The Taxpayer was not liable for municipal sales tax on the materials because the taxable sales tax event, the withdrawal of the materials from inventory, occurred at its warehouse in unincorporated Jefferson County. The Taxpayer also failed to report and pay municipal use tax to the various municipalities in which the flooring was installed. It did, however, erroneously charge some of the customers municipal sales tax on the materials. It failed to

[1]The Taxpayer had previously purchased the materials tax-free at wholesale.

report and remit those amounts to the Department.

The Department audited the Taxpayer and determined that the Taxpayer owed municipal use tax to the various municipalities in which the flooring was installed. The Department examiner also determined that the Taxpayer was liable for the municipal sales tax it had erroneously collected on the materials used on the furnish and install contracts.

The Department examiner completed her audit of the Taxpayer in early June 2000. The Department entered a preliminary assessment for the tax due shortly thereafter. The Taxpayer filed a petition for review, and the Taxpayer's representatives and the Department held a conference in October 2000. The Taxpayer's representatives agreed at the conference to submit additional information to the Department. The Department consequently held the file in abeyance pending receipt of that information. The representatives failed, however, to submit the information. The Department also failed to timely follow-up on the matter.

The Taxpayer's attorney inquired with the Department in April 2002 concerning the matter. The Department promptly completed its review and entered the final assessment in issue on May 28, 2002 for "combined local tax." A recap sheet attached to the final assessment listed the municipalities for which the tax was being collected, and the amount due each municipality. The recap sheet also identified the type of tax as "sales tax."

Issue (1). Should the final assessment be dismissed because the Department erroneously assessed municipal sales tax and not municipal use tax?

On its face, the final assessment in issue identifies the type of tax as "combined local tax." However, the attached recap sheet identifies the type of tax as "sales tax." The

Department has not disputed that the attached recap sheet is part of the final assessment.[2]

The Taxpayer argues that the final assessment must be dismissed because it is for municipal sales tax, not municipal use tax. The Taxpayer is partly correct.

Department Reg. 810-14-1-.15 governs the entry of final assessments by the Department. That regulation requires that, among other information, a final assessment must include the "character or type of tax/value of the liability assessed." See, Reg. 810-14-1-.15(3)(c).

In *Knight v. State of Alabama*, Inc. 99-431 (Admin. Law Div. 5/23/00), the Administrative Law Division held that a final assessment entered for a wrong tax period must be voided.

> Due process requires that a final assessment must include the name of the taxpayer or taxpayers, the type of tax assessed, the tax period or periods involved, and the amount owed. See also, Department Reg. 810-14-1-.15. The amount of an assessment can be increased or decreased on appeal to reflect the correct tax due. Code of Ala. 1975, §40-2A-7(b)(5)d.1. Other than the amount, however, the other substantive components of a final assessment cannot be "corrected" on appeal. Specifically, the listing of a wrong tax period on an assessment is grounds for dismissal of the assessment. *Stallard v. U.S.*, 12 F.3d 489 (1994) ("And accurately ascertaining the correct tax period is more than a mere 'technicality.'") Consequently, the final assessment of 1996 income tax cannot be substantively changed to a final assessment of 1995 tax.

Knight at 2.

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[2]The recap sheet must be considered as a part of the final assessment because only on the recap sheet are the municipalities identified for which the tax was assessed.

The type of tax assessed by the Department is not a mere technicality. Rather, it is as substantively important as the tax period involved. Further, a Department regulation must be followed unless it is unreasonable or contrary to the statute to which it relates. *Adair v. Alabama Real Estate Comm'n*, 303 So.2d 119, 122 (Ala.Civ.App. 1974). The requirement that a final assessment must correctly identify the type of tax being assessed is not unreasonable. The requirement also is not contrary to any statute. "Men must turn square corners when they deal with the government; it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens." *Title Ins. Co. of Minn. v. SBE*, 4 Ca. 4th 715, 732 (Calif. S.Ct. 1992). Consequently, the municipal sales tax final assessment in issue must be voided to the extent it consists of use tax on the materials used on the furnish and install contracts.

As discussed, the final assessment includes some municipal sales tax erroneously collected by the Taxpayer from its customers, but not remitted. See audit report, Dept. Ex. 1, at p. 2.

Code of Ala. 1975, §40-23-26(d) requires that if a retailer erroneously collects sales tax from a customer, the retailer must remit the amount to the Department. Consequently, the sales tax final assessment is affirmed to the extent it represents municipal sales tax erroneously collected by the Taxpayer. The Department is directed to notify the Administrative Law Division of the amount of the erroneously collected municipal sales tax. The matter will then be submitted to the Department's Taxpayer Advocate for a determination as to whether any accrued interest should be abated pursuant to Code of Ala. 1975, §40-2A-4(b)(1)c. A Final Order will then be entered.

The above holding is dispositive of the final assessment in issue. Consequently,

issues (2) and (3) need not be addressed.[3]

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 March 13, 2003.

BILL THOMPSON
Chief Administrative Law Judge

[3]Nexus is not an issue concerning the erroneously collected municipal sales tax because it was not due in the first place.