

CRIMSON 2 GO, LLC  
1718 5<sup>TH</sup> AVENUE  
TUSCALOOSA, AL 35401,

Taxpayer,

v.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA  
ALABAMA TAX TRIBUNAL

DOCKET NO. S. 16-118

### FINAL ORDER

The Revenue Department assessed Crimson 2 Go, LLC (“Taxpayer”) for State sales tax for June 2012 through May 2015. The Taxpayer appealed to the Tax Tribunal pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on May 12, 2016. Ambrey Auten represented the Taxpayer. Assistant Counsel Mary Martin Mitchell represented the Revenue Department.

The Taxpayer is located in Tuscaloosa, Alabama. It maintains and operates a website that its customers can visit to order food items from various area restaurants.<sup>1</sup> The restaurants provide the Taxpayer with the menu items to be shown on the website, and the prices for the various items. A customer visiting the website chooses the restaurant they want to order food from. They click on the particular menu items they want from the restaurant, and then “check out” when they finish ordering the items. The Taxpayer’s system thereafter prints a customer receipt which shows the Taxpayer’s name, the restaurant’s name, the prices for the items ordered, sales tax on the total food amount, a fixed delivery charge of \$2.99, and a tip, if applicable. The customer generally pays the amount due by credit card when they place their order through the Taxpayer.

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<sup>1</sup> Testimony at the hearing indicated that the Taxpayer and the various restaurants that are on the website have informal agreements or understandings concerning the respective duties and responsibilities of the Taxpayer and the restaurants.

The Taxpayer promptly forwards the customer's order to the designated restaurant. The Taxpayer has independent contractor delivery people that pick up the food from the restaurant and deliver it to the customer. If a customer did not pay when the food was ordered, they pay the delivery person in cash upon delivery.

If a customer is dissatisfied with the food or the delivery service, the customer must contact the Taxpayer for assistance. If the food was not cooked properly or was otherwise unsatisfactory, the Taxpayer contacts the restaurant and the restaurant is responsible for remedying the problem. The Taxpayer is responsible if the delivery person picked up the wrong food, was late delivering the food, etc.

The Taxpayer retains the delivery fees, and also a negotiated percentage of the food receipts. It remits the net food receipts and the sales tax it collected from the customers to the participating restaurants every Tuesday.

The Taxpayer also sold canned soft drinks to its customers during the audit period. It purchased the drinks at wholesale. It reported and paid sales tax on the drinks using its Alabama sales tax number.

The Department audited the Taxpayer for sales tax for the period in issue. It determined that the Taxpayer had purchased the food from the restaurants and then resold it to the customers at retail. It thus concluded that the Taxpayer was liable for sales tax on the food, and also on the delivery fees. It also assumed that the sales tax that the Taxpayer had collected on the food and paid over to the restaurants during the audit period had been reported and paid to the Department by the restaurants. It consequently allowed the Taxpayer a credit for that sales tax paid, and entered the final assessment in issue based only on the delivery fees.

This case again confirms that the seemingly simple sales tax is sometimes one of the most theoretically difficult taxes to correctly apply and administer.

To begin, the Department is correct that in Alabama, a retail seller's transportation or delivery charges constitute a part of taxable gross receipts if the delivery occurs incidental to and before the close of the sale, i.e., before title transfers upon physical delivery of the goods by the seller to the buyer. As stated by the Alabama Court of Civil Appeals in *East Brewton Materials v. State*, 233 So.2d 751 (Ala. Civ. App. 1970):

When it was provided in (Code of Ala. 1975, §40-23-1(a)(6)) that the value proceeding or accruing from the sale of tangible personal property should include "any other expenses whatsoever," we are of the opinion that the legislature intended thereby that sales tax be charged upon the total invoice price, including transportation charges incident to delivery of the material sold to a customer, when such transportation was provided by the seller, not by common carrier, and the sale was not completed or title transferred until delivery to the customer.

*East Brewton*, 233 So.2d at 756.<sup>2</sup>

In this case, if the restaurants had delivered the food to the customers, using either employees or independent contractors, the delivery charges would clearly have been a part of taxable gross proceeds. As discussed, however, the Taxpayer's independent delivery people delivered the food to the customers. That fact raises three possibilities. First, the Taxpayer purchased the food from the restaurants and resold the food to the customers, as argued by the Department. If so, the Department is correct that the Taxpayer would owe sales tax on the food and also on the delivery charges, less a credit for the sales tax paid by the restaurants to the Department on the food. Second, the Taxpayer acted as de

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<sup>2</sup> For other Alabama appellate court cases on point, see *Oxmoor Press v. State*, 500 So.2d 1098 (Ala. Civ. App. 1986), and *State v. Delta Air Lines, Inc.*, 356 So.2d 1205 (Ala. Civ. App. 1978).

facto agent for the restaurants when it forwarded the customers' orders to the restaurants and then picked up and delivered the food to the customers. In that case, the restaurants sold the food to the customers and would owe sales tax on both the food and the delivery charges. Third, the restaurants sold the food to the customers, and the Taxpayer provided an independent service when it delivered the food to the customers. In that case, the delivery charges would be nontaxable.

I disagree with the Department that the Taxpayer buys the food from the restaurants and resells it to the customers. The Taxpayer markets and facilitates the sale of the food and also delivers the food, but the restaurants, and not the Taxpayer, sell the food to the customers.

When a customer visits the Taxpayer's website, they select the restaurant that they want to buy the food from. They then select and order the food items from the restaurant's menu. The fact that the customer places the order with the restaurant via the Taxpayer's website is irrelevant. The restaurant is responsible for providing and preparing the food to the customer's satisfaction. If a restaurant fails to do so, the restaurant, and not the Taxpayer, is required to remedy the problem. If the Taxpayer is selling the food to the customer, as argued by the Department, the restaurant that provided the food would not be responsible for any subsequent problems concerning the food. Any improperly prepared food must also be returned to the restaurant, as the seller, not to the Taxpayer. The restaurant also sets the sales prices for the food, and ultimately receives the gross receipts from the sales, less a percentage of the receipts the Taxpayer retains in return for its

services provided, i.e., for marketing the restaurant's food on its website, delivering the food to the customer, and being an intermediary in handling customer complaints.<sup>3</sup>

The Department cites *Thompson Carriers, Inc. v. State of Alabama*, Docket S. 10-712 (Admin. Law Div. 7/12/2011) in support of its position. That case can, however, be factually distinguished. The taxpayer in *Thompson Carriers* primarily operated a hauling business. It also maintained an inventory of sand and other materials that it sold to its customers. The parties agreed that sales tax was not due when the taxpayer's trucks only hauled goods owned by a customer. They further agreed that the taxpayer owed sales tax when it sold the sand and the other items to customers from its inventory.

The dispute involved situations in which a customer directed the taxpayer to obtain and deliver items to a particular location. The taxpayer purchased the items from a third party supplier, and then delivered the items as directed to a specified location. It paid sales tax to the third party supplier, and then billed the customer for its cost of the items, which included the sales tax, and a hauling fee.

The Administrative Law Division held that under the specific facts of the case, the taxpayer "in this case purchased the materials in issue from the (third party suppliers) and then resold the materials at retail to its small customers. The Taxpayer is thus liable for sales tax on the lump-sum price (including the delivery fees) it charged its small customers for the materials." *Thompson Carriers* at 5.

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<sup>3</sup> Although there is no evidence in the record on this point, if I was ordering food from a restaurant via the Taxpayer's website, I would think I was buying the food from the restaurant, not the Taxpayer.

This case can be distinguished because in *Thompson Carriers*, there was no dispute that the taxpayer had purchased the materials from the third party suppliers. As discussed, however, the Taxpayer in this case did not purchase the food from the restaurants. Rather, the customers ordered the food from the restaurants, albeit through the Taxpayer's website, and the restaurants ultimately received the gross receipts from the food sales, less a negotiated marketing/service fee retained by the Taxpayer for facilitating the sales and deliveries.

The question remains whether the Taxpayer delivered the food as de facto agent for the restaurants, in which case the restaurants would be liable for sales tax on the delivery charges, or whether the Taxpayer's delivery fees were for a nontaxable service provided by the Taxpayer. That question need not be decided, however, because in either case, the Taxpayer is not liable for the sales tax in issue.<sup>4</sup>

The final assessment in issue is voided. Judgment is entered accordingly.

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

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<sup>4</sup> Department Reg. 810-6-1-.178, entitled "Transportation Charges," provides in paragraph (3) that "[w]here a seller contracts to sell and deliver tangible personal property to some designated place and makes arrangements for delivery of the property. . . , the transportation charges shall be considered" to be subject to sales tax. It could be argued that the Taxpayer's informal agreements with the restaurants constitute an "arrangement" by the restaurants/sellers for delivery of the food within the purview of the regulation. In that case, the restaurants would be liable for sales tax on the delivery charges, even though the fees were retained by the Taxpayer. The Taxpayer's representative indicated at the May 12 hearing that the Taxpayer was currently collecting sales tax on the delivery fees and remitting that tax to the restaurants with the sales tax collected on the food.

Entered July 7, 2016.

*Bill Thompson*

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BILL THOMPSON  
Chief Tax Tribunal Judge

bt:dr

cc: Mary Martin Mitchell, Esq.  
Ambrey M. Auten, Esq.