

MICHAEL D. MUDLER
D/B/A CYPRESS CREEK ANTIQUES
3801 FLORENCE BLVD.
FLORENCE, AL 35634-2898,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA
ALABAMA TAX TRIBUNAL

DOCKET NO. S. 16-1142

FINAL ORDER

The Revenue Department assessed Michael D. Mudler (“Taxpayer”), doing business as Cypress Creek Antiques, for State sales tax for February 2013 through January 2016. The Taxpayer appealed to the Tax Tribunal pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on January 16, 2017. The Taxpayer attended the hearing. Assistant Counsel Mary Martin Mitchell represented the Department.

The only issue in this appeal is whether the Taxpayer is liable for sales tax for items he sold at estate sales.

During the audit period, the Taxpayer operated an antique shop in Florence, Alabama, known as Cypress Creek Antiques (“Shop”). The Taxpayer sold antique, vintage, used and other secondhand items in the Shop. He also conducted estate sales away from the Shop where he sold the same type of goods. The Taxpayer correctly collected and remitted sales tax on the retail sales made at the Shop, but did not charge and collect sales tax on the items he sold at the estate sales.

The Department audited the Taxpayer and assessed him for sales tax on his sales at the estate sales. This appeal followed.

The Taxpayer asserts on appeal that he is not liable for sales tax on sales made at the estate sales because he was not actually selling the goods, but instead merely providing a service to his clients. Asserting that the sales were between his clients and the purchasers, he argues that the sales were not subject to sales tax because his clients were not engaged in the business of selling goods at retail. He also asserts that the sales at issue should not be considered taxable consignment sales pursuant to Code of Ala. 1975, §40-23-1(a)(6), because he did not take physical possession of the goods and sell them in the Shop – a requirement, he argues, for the sales to be treated as consignment sales includable in his gross proceeds of sale.

The Department asserts that the Taxpayer's estate sales are a part of his regular business of selling antique, vintage, used, and other secondhand items at retail. It argues that the sales were subject to the sales tax because the Taxpayer was in the business of selling the same type items in the Shop that he sold at the estate sales. The Department further contends that the sales are specifically included in the Taxpayer's gross proceeds of sales pursuant to §40-23-1(a)(6) because they are sales of property handled on consignment, citing *Ray v. State of Alabama*, Dkt. No. S. 03-271 (Admin. Law Div. July 22, 2003). I agree with the Department for the reasons set forth below.

Code of Ala. 1975, §40-23-2 levies a tax on every person engaged in the business of selling tangible personal property at retail within this state. Casual or isolated sales by a person not engaged in the business of selling the same type property in question are not subject to sales tax. *State of Alabama v. Bay Towing & Dredging Company, Inc.*, 85 So.2d

890 (Ala. 1955); Ala. Tax Reg. 810-6-1-.33. "Business" is defined for Alabama tax purposes at Code of Ala. 1975, §40-23-1(a)(11), as follows:

All activities engaged in, or caused to be engaged in, with the object of gain, profit, benefit, or advantage, either direct or indirect, and not excepting subactivities producing marketable commodities used or consumed in the main business activity, each of which subactivities shall be considered business engaged in, taxable in the class in which it falls.

Retail sales are defined as "all sales of tangible personal property except those defined . . . as wholesale sales." Code of Ala. 1975, §40-23-1(1). Relevant to this appeal, wholesale sales are defined as sales of tangible personal property by wholesalers to licensed retail merchants, dealers, or other wholesalers for resale. Code of Ala. 1975, §40-23-1(9). There is no provision in the sales tax law that requires a seller to be the owner of the goods sold at retail to be subject to sales tax on the retail sales of goods belonging to another. In fact, most goods sold by auctioneers are owned by people who are not in the business of selling the type of goods being sold at auction. These sales have been upheld by this court as taxable. See *Wright Transportation, Inc. v. State of Alabama*, Dkt. S. 14-806 (Admin. Law Div. July 9, 2015) (stating that "auctioneers are routinely hired to conduct estate sales, and must collect Alabama sales tax on those sales, even though the deceased owner had not been in the business of selling the estate sale items").

It is undisputed that the Taxpayer was in the business of selling tangible personal property at retail in this state during the period at issue, and was thus subject to Alabama's sales tax laws. Specifically, the Taxpayer regularly sold antique, vintage, used, and other secondhand items to others "with the object of gain, profit, benefit, or advantage. . . ." §40-23-2. It is also undisputed that Alabama's sales tax is levied upon a percentage "of the gross proceeds of sales" of the Taxpayer's business. §40-23-2(1). The issue, therefore, is

whether the gross proceeds the Taxpayer received from the estate sales he conducted should have been included in his taxable measure.

Alabama's legislature has answered that question by defining "gross proceeds of sales" as "the value proceeding or accruing from the proceeds from the sale of tangible personal property ... *including the proceeds from the sale of any property handled on consignment....*" §40-23-1(6) (emphasis added); *see also* Ala. Admin. Code 810-6-1-.38 (stating that "sellers of property held on consignment are required to include the gross proceeds of sales of such property in sales tax returns filed under the Sales Tax Law"). The Taxpayer argues that the goods sold at the estate sales cannot be considered as handled by him on consignment because he did not take physical possession of the goods and sell them at the Shop. I disagree.

Black's Law Dictionary, 5th Ed., defines "consignment" as the "entrusting of goods to another to sell for the consignor." That is exactly what happened in the estate sales at issue. It is undisputed that the Taxpayer did not just bring his clients and the purchasers together to bargain for the sale of the goods. Instead, the Taxpayer completely facilitated the sales transactions at issue. The goods in the transactions at issue were turned over to the Taxpayer to inventory, clean, organize, display, and sell. The Taxpayer advertised the sale; provided the staff necessary to conduct the sales and assist the buyers; and invoiced the purchasers, deposited the proceeds into his bank account, withheld a commission and remitted the net proceeds to his clients. Additionally, the Taxpayer testified that he facilitated returns and refunded the sales proceeds to the purchaser if appropriate.

The Taxpayer's argument that the goods at issue were not handled on consignment because he did not take physical possession of the goods at the Shop is misplaced. The facts are clear that the goods in the transactions at issue were given over to the Taxpayer's possession to inventory, clean, organize, value, tag, and sell. The fact that the Taxpayer's possession occurred at a location other than the Shop is irrelevant. Further, the Revenue Department's Administrative Law Division (the "ALD"), the Tribunal's predecessor, has held that the agent's physical possession of the goods is not a factor in determining whether goods are handled on consignment. *Ray*, Dkt. No. S. 03-271, page 2.

In *Ray*, the taxpayer was an auctioneer that sold goods on behalf of his customers through a bidding process at his warehouse or at other locations. The taxpayer argued that he did not handle the property on consignment, and thus could not be considered a consignee of the goods, because he did not take physical possession of the goods. The ALD disagreed and held that whether the consignee takes physical possession of the goods is irrelevant in determining whether sales were made on consignment for purposes of §40-23-1(a)(6). The ALD found that the auctioneer sold the goods on consignment where he facilitated the sale of goods for the owner and "receive[d] payment for the property sold, issue[d] a bill of sale or invoice for the property, and [paid] the owner the net proceeds from the auction."

The facts in *Ray* are similar to the facts of this case. The Taxpayer, like the taxpayer in *Ray*, facilitated the sale of the goods, invoiced the purchasers and accepted payment into his bank account, withheld a commission and remitted the net proceeds to

his customers. It is also undisputed that the Taxpayer sold some goods at the estate sales through a bidding process.

There is no evidence to indicate that the sales transactions at issue were wholesale sales or exempt sales. Consequently, the gross proceeds from the sales of estate property handled by the Taxpayer were properly included by the Department in the Taxpayer's taxable measure.

The final assessment, less the negligence penalty, is affirmed. Judgment is entered against the Taxpayer for tax and interest in the amount of \$8,461.63. Additional interest is due from the date the final assessment was entered, September 29, 2016.

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

Entered August 1, 2017.

CHRISTY O. EDWARDS
Associate Tax Tribunal Judge

cc: Mary Martin Mitchell, Esq.
Michael D. Mudler