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| ALABAMA LIQUIDATION & COLLECTION AGENCY, INC.<br>P.O. Box 70878<br>Tuscaloosa, AL 35407-0878,<br><br>Taxpayer,<br><br>v.<br><br>STATE OF ALABAMA<br>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. 03-345 |

**FINAL ORDER**

The Revenue Department assessed sales tax against Alabama Liquidation & Collection Agency, Inc. ("Taxpayer") for April 1999 through March 2002. 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 28, 2003. Attorney Joel Dorroh and CPA David Turnipseed represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

**ISSUES**

The Taxpayer auctions personal property on consignment. The property sold by the Taxpayer has usually been repossessed or is owned by businesses that are being liquidated. The Department audited and assessed the Taxpayer for sales tax for the period in issue. The Taxpayer has raised two issues on appeal:

(1) Is sales tax due on a separately stated "buyer's premium fee" that the Taxpayer added to the final bid price of the auctioned property; and,

(2) Should the Taxpayer be held liable for tax on sales it made tax-free to customers that had provided it with what the Taxpayer believed to be valid sales tax numbers, but which were in fact invalid or belonged to third parties that were not in the

business of selling the type of property purchased.

## FACTS

The Taxpayer has been in the auction business since the early 1990's. It generally auctions vehicles, boats, mobile homes, and other property that has been repossessed. It sells the property on consignment and receives a commission on each sale. It also charges a separately stated buyer's premium fee, which is added to the final bid price and paid by the customers. The Taxpayer charged sales tax on only the final bid price, and not also on the buyer's premium fee.

The Taxpayer required all customers that intended to purchase property tax-free to provide it with a sales tax number. However, it did not inquire whether the number belonged to the customer or to a third party, what type of business the customer was engaged in, or whether the customer intended to resell the property at retail.

A Department examiner audited the Taxpayer for the subject period and included the buyer's premium fees as part of the Taxpayer's taxable gross proceeds. The examiner also reviewed the tax-free sales made by the Taxpayer during the audit period. He discovered that many of the sales tax numbers provided by the Taxpayer's customers were incorrect, invalid, or belonged to someone other than the customer. For example, one customer purchased a mobile home using the tax number of a local restaurant.[1] He also found that in many cases the Taxpayer had failed to obtain drive-out certificates for vehicles it had sold tax-free pursuant to the motor vehicle drive-out exemption at Code of

[1] A restaurant is not in the business of reselling mobile homes at retail, and thus cannot buy mobile homes tax-free at wholesale.

Ala. 1975, §40-23-2(4). The examiner consequently included as taxable all tax-free sales made by the Taxpayer that were improperly documented or which the examiner could not otherwise verify had been for resale.

After making his initial audit adjustments, the examiner allowed the Taxpayer's CPA time to gather additional information, i.e. drive-out certificates, etc., concerning the tax-free sales. The examiner also contacted many of the Taxpayer's customers to verify that the sales had been for resale. The examiner's audit report reads in part as follows: - "The CPA requested substantial time to correspond with customers. . . . During this interim period, numerous customer calls were made to customers to verify usage/resale status and other possible improper usage of sales tax numbers. The Taxpayer and CPA were finally able to secure a considerable amount of additional information regarding wholesale/exempt status. All additional information was examined and substantial revisions were made to the audit schedules." The Department subsequently entered the final assessment in issue for the adjusted tax due, plus interest.

## ANALYSIS

**Issue (1). The Buyer's Premium Fee.**

The Taxpayer argues that it charges the buyer's premium fee to cover its labor costs, and that the fee should not be included in taxable gross proceeds.

"Gross proceeds of sale" is defined as "the value proceeding or accruing from the sale of tangible personal property, . . . without any deduction on account of the cost of the property sold, the cost of the materials used, labor or service costs, interest paid, any consumer excise taxes that may be included within the sales price of the property sold, or any other expenses whatsoever, . . . " Code of Ala. 1975, §40-23-1(a)(6). Dept. Reg. 810-

6-1-.84(2) further provides that sales tax is due on labor or service charges, whether included in the total price of a product or billed as a separate item, if the labor or service is incurred incidental to preparing the product for sale and is performed before the sale is closed.

The above statute and regulation clearly require that sales tax must be collected on the full amount received by a seller from a customer. A seller cannot deduct his labor or other costs incurred in selling a product, as the Taxpayer did in this case. This same issue was addressed in *Webster Enterprises v. State of Alabama*, S. 03-165 (Admin. Law Div. O.P.O. 6/12/03), which also involved a separate labor fee charged by an auctioneer:

> Generally, any charge for labor, transportation, or other services performed by a retailer in conjunction with and before the sale of tangible personal property constitutes taxable gross proceeds. *East Brewton Materials, Inc. v. State*, 233 So.2d 751 (Ala.Civ.App. 1970). In this case, the Taxpayer charged a five or ten percent fee to offset her labor costs incurred in packing, storing, and delivering merchandise for her customers. The sale of the merchandise was not closed until the merchandise was delivered to the customers. *State v. Delta Air Lines*, 356 So.2d 1205 (Ala.Civ.App. 1978). Consequently, the five or ten percent labor charges constituted gross proceeds subject to sales tax.

The full amount received by the Taxpayer, including the premium fee, was subject to sales tax. *East Brewton Materials, Inc. v. State*, 233 So.2d 751 (Ala.Civ.App. 1970); *Mary B. Montgomery v. State of Alabama*, S. 94-132 (Admin. Law Div. 12/29/94). The Department thus properly included the premium fees as part of the Taxpayer's taxable gross proceeds.

**Issue (2). The Tax-Free Sales.**

The sale of tangible personal property to a licensed retailer for resale constitutes a nontaxable wholesale sale. Code of Ala. 1975, §40-23-1(a)(9); *State v. Advertiser*

*Company*, 337 So.2d 942 (Ala.Civ.App. 1976). To be tax-free, however, the wholesale purchaser must provide the seller with a valid sales tax number. The burden is on the seller to know the general nature of the wholesale purchaser's business, and that the purchaser is in the business of reselling the type of property being purchased. Dept. Reg. 810-6-1-.184; see also, *Webster Enterprises*, *supra.*

The Taxpayer's owner testified at the October 28 hearing that when a customer provided him with a sales tax number, he assumed the number was valid, and consequently allowed the customer to purchase items tax-free. He conceded that he did not inquire as to the customer's business, or whether the customer intended to resell the goods at retail. He claimed, however, that he should not be held liable if a customer gave him an invalid or wrong number, or otherwise did not purchase an item for resale. The owner's testimony was forthright and believable. Unfortunately, he failed to fully understand his duty as a retailer under Alabama's sales tax law.

A retailer cannot blindly accept a sales tax number from a customer. Rather, as stated in Reg. 810-6-1-.184, a retailer is under a duty to know the general nature of his customer's business. If it is not readily apparent that a customer using a sales tax number intends to resell the goods being purchased, the retailer must inquire concerning the type of business engaged in by the customer. The burden must be on the retailer to police the proper use of tax numbers. Otherwise, the improper use of such numbers to buy items tax-free would be rampant.

If, however, the retailer exercises due care and reasonably believes that the customer intends to resell the goods, then the retailer can sell the goods tax-free. In that case, the retailer is relieved of liability, even if it is later discovered that the customer

improperly purchased the item tax-free, again assuming that the retailer used due diligence in determining that the customer was in the business of and intended to resell the goods at retail.

I do not believe the Taxpayer's owner intentionally sold items tax-free that he knew would not be resold. He conceded, however, that he never asked customers that purchased goods tax-free what business they were in or whether they intended to resell the goods they were purchasing. Consequently, the Taxpayer improperly sold some goods tax-free that were clearly taxable, the sale of the mobile home to the restaurant, for example. If the Taxpayer had questioned the purchaser in that instance, it would have discovered that the sale was not for resale. The Department examiner worked with the Taxpayer's CPA in an effort to establish whether the sales in issue were made for resale. A number of the sales initially taxed by the examiner were subsequently deleted from the audit. However, the remaining sales that cannot be shown to have been for resale were properly included as taxable. [2]

The Taxpayer's owner claimed at the October 28 hearing that he has attempted on four occasions to contact the customers that purchased tax-free that are still in the

[2] It is also suggested that to avoid this problem in the future, the Taxpayer should require all customers that purchase items tax-free to sign a statement verifying that the number being used is theirs or that they are authorized to use the number as agent for the number holder, and also that they intend to resell the goods at retail. Attached to this Final Order is a form recommended by the Multistate Tax Commission, and informally adopted by the Revenue Department, which will document that a seller is entitled to purchase goods tax-free. Having such a signed statement would not relieve a retailer of liability if the retailer otherwise should have known that the customer was not purchasing for resale. As stated in footnote 2 on the form, in Alabama, "each retailer shall be responsible for determining the validity of a purchaser's claim for exemption." But in cases of doubt, the certificates would certainly help the retailer's position.

Department audit. Because the tax-free status of those sales has been disallowed, the customers are technically liable to the Taxpayer for the sales tax due. Whether the Taxpayer can collect the tax from the customers depends on whether it can locate the customers, and how aggressively it pursues the matter.[3]

The final assessment is affirmed. Judgment is entered against the Taxpayer for $25,933.88. Additional interest is also due from the date of entry of the final assessment, April 16, 2003.

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

Entered December 11, 2003.

[3] If instead of paying the Taxpayer the tax due, a customer provides the Taxpayer with proof that the goods had been purchased for resale, the Taxpayer can, of course, apply to the Department for a refund of the sales tax it paid on the property as a result of this Final Order.