KAMBIZ ADELI ARTHURS CONFERENCE CENTER/ AUDIO VISUAL EXPRESS 144 BUSINESS CENTER DRIVE BIRMINGHAM, AL 35244,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 05-1103
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed Kambiz Adeli ("Taxpayer"), d/b/a Arthur's Conference Center/Audio Visual Express, for State sales tax for September 2001 through June 2004 and State rental tax for September 2001 through July 2004. A hearing was conducted on January 26, 2006. The Taxpayer and his CPA, Stephen Schniper, attended the hearing. Assistant Counsel Mark Griffin represented the Department.

The Taxpayer rents conference rooms and other meeting facilities in Birmingham, Alabama. He operates that business as Arthur's Conference Center. He also sells food, beverages, etc. to the conference/meeting participants.

The Taxpayer also rents audio and video equipment. That business is operated as Audio Visual Express.

A Department examiner was assigned to audit the Taxpayer, doing business through Audio Visual Express, Inc. The Department's records indicated, however, that the above entity did not have an Alabama sales or rental tax account with the Department. The examiner consequently contacted the Taxpayer's CPA and requested

the Taxpayer's records back to when the Taxpayer started in business in the early 1990's.

The examiner and the CPA met in August 2004. The CPA notified the examiner at that time that both businesses were being operated with sales and rental tax accounts in the Taxpayer's name, individually.[1] The CPA also provided the examiner with the Taxpayer's records for the prior three years.

The Department audit report does not indicate that the Taxpayer's records were poor or incomplete. However, the examiner stated in a post-hearing letter that the records were in a "horrible state." See, February 28, 2006 letter from Examiner Klancy Crowell at 2. The examiner also stated that the Taxpayer's CPA was hostile and refused to allow her to ask questions concerning the Taxpayer's businesses or his records. Consequently, she determined the Taxpayer's sales and rental tax liabilities as best she could from the Taxpayer's records.

The Taxpayer's CPA claims that the examiner was hostile toward him, not vice versa. He asserts that the examiner never attempted to discuss the Taxpayer's records with him, and never explained the finished audit report. He also disputes that the Taxpayer's records were not well-maintained.

The parties also disagree concerning an informal conference the Taxpayer and his CPA had with a Department assessment officer in Montgomery. The CPA claims that the assessment officer was concerned about how the examiner had conducted the audit, and that the officer saw reasonable cause to return the file to the field for a re-audit.

---

[1] The Taxpayer had previously operated his business through a corporation, Audio Visual Express, Inc. He stopped using the corporation in the mid-1990's.

The assessment officer submitted an affidavit in which he contends that he told the CPA at the conference that he did not see anything in the audit that needed to be changed, but that as a courtesy he would send the file back for verification. The assessment officer was later informed by the examiner and her supervisor that no changes were justified. Final assessments were accordingly entered for the amounts due.

The Taxpayer's CPA asserts that the Department has conspired "in supporting a very bad audit, handled in an unprofessional and vengeful manner. No one within the Department can seem to get their facts straight, . . ." See, May 17, 2006 letter from CPA Stephen Schniper at 4. I was, of course, not present during the meetings between the examiner and the Taxpayer's CPA, or at the conference with the assessment officer. Consequently, I have no first hand knowledge as to which side's rendition of the facts is correct. I can state, however, that in my 23 years as the Department's Chief Administrative Law Judge, I have never known Department personnel, either individually or collectively, to improperly or unfairly conspire against a taxpayer. Audits do become contentious, however, and conflicts in personalities do occur.

The Taxpayer's CPA also makes various substantive objections to the Department's audit.

As indicated, the Taxpayer sells food, drinks, etc. to the lessees that rent his conference and meeting rooms. The Department audit indicates that the Taxpayer was in the catering business. The Taxpayer disputes that characterization, and claims that it only buys pre-prepared food that it resells to its customers. In any case, the Taxpayer concedes that he owes sales tax on his food sales. He disputes, however, that he owes

tax on an 18 percent "service charge" he adds to the food charge. He contends that the 18 percent is not for preparing or serving the food, but is a nontaxable gratuity distributed to the cleaning crew.

Alabama sales tax is levied on the gross proceeds derived from the sale of tangible personal property. Code of Ala. 1975, §40-23-2(1). "Gross proceeds" is defined as "[t]he 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 cost, . . ." Code of Ala. 1975, §40-23-1(a)(6).

In *State v. International Trade Club, Inc.*, 351 So.2d 895 (Ala. Civ. App. 1977), the Court of Civil Appeals addressed the issue of whether a 15 percent service charge added to each meal ticket in lieu of a tip was subject to sales tax. The taxpayer used the service charge to (1) pay the minimum wage to its busboys, (2) pay part of the salaries guaranteed to its bartenders, and (3) give its waiters and waitresses a bonus above their $4 per hour pay.

Citing a Florida case, *Green v. Surf Club*, 136 So.2d 354, cert. denied 193 So.2d 694 (Fla. 1962), the Court held that the taxability of the service charge depended on whether the taxpayer benefited from the charge. "The determinative question is each instance should be whether or not the (taxpayer) receives a benefit from the involuntary charge. If he does, he should be taxed. If he does not, no tax should be levied." *International Trade Club*, 351 So.2d at 897, citing *Green v. Surf Club*, 136 So.2d at 356.

Applying the above test, the Court held that the service charges used to pay the busboys and bartenders were taxable because the taxpayer benefited from the charges. That is, but for the taxpayer using the service charges to pay the busboys and

bartenders, the taxpayer would have otherwise been required to pay those individuals their minimum wages and guaranteed salaries, respectively. The Court held, however, that the amounts that went to the waiters and waitresses were in the nature of a gratuity or tip, and thus not taxable, because the taxpayer would not have been required to pay the amounts in the absence of the service charge.

In this case, the 18 percent service charge went to pay the cleaning crew. Presumably, the cleaning crew members are either employees of the Taxpayer or independent contractors hired by the Taxpayer to do the cleaning. In either case, the Taxpayer would have been required to pay the cleaning crew. The Taxpayer thus clearly benefited from the service charges because he used the money to pay for a service that he would have otherwise been required to pay for. The charge is thus taxable.

Concerning lease tax, the Taxpayer included a charge for delivery fees and a 9 percent damage waiver fee on the invoices to his customers. The Taxpayer claims that the delivery fees should not be taxed because the delivery occurred after the rental took place. He also claims that the damage waiver was nontaxable insurance. I disagree.

For lease tax purposes, “gross receipts” is defined substantially the same as the sales tax definition of the term at §40-23-1(a)(6). See, Code of Ala. 1975, §40-12-220(4). The term thus includes all proceeds from the leasing of tangible personal property, without deduction for labor or service costs or any other expenses incurred by the lessor.

The Taxpayer claims that the delivery charges are not taxable because the delivery occurred after the taxable lease transactions, citing an Administrative Law

Division case, *State v. Odis Ray Harper*, S. 91-170 (Admin. Law Div. 7/23/92). I agree that charges for delivery after a sale or lease of tangible personal property has occurred are not includable in taxable gross proceeds. A lease transaction is not closed, however, until the lessor transfers possession and use of the leased item to the lessee. See, Code of Ala. 1975, §40-12-220(5). The Taxpayer's delivery of the leased items to its customers occurred before the Taxpayer gave possession and use of the items to the customers. Consequently, the delivery charges were correctly included in the Taxpayer's taxable gross receipts.

Likewise, the damage waivers were also a part of taxable gross receipts. This issue was addressed in a 1982 Montgomery County Circuit Court case, *Southeastern Car & Truck Rental, Inc. v. State of Alabama*, Civ. Action No. CV. 81-1229-P. One of the issues in that case was whether a collision damage waiver charged by a car rental company was subject to lease tax. The Circuit Court held that it was. I agree with the following analysis by the Court:

> It is the contention of the State in this case that the receipts derived on account of charges for the one way service fee, the collision damage waiver and the personal accident insurance constitutes "gross proceeds" derived by the taxpayer from the lease or rental of its automobiles as that term is defined in §40-12-220(4), *Code of Alabama* 1975. The Court agrees with the State's contention. The taxpayer's customers enter into and sign a single lease agreement in order to lease an automobile from the taxpayer. The customer pays a single charge to the taxpayer for the lease of the automobile. The fact that the taxpayer allocates the monies paid to it by its customers to cover certain of its costs of doing business does not render the monies allocated non-taxable under the Alabama Lease Tax Law. Those charges are all incidental to the leasing by the customer of an automobile from the taxpayer. All of the receipts derived are pursuant to and the consequence of the lease agreement.
>
> As stated by the wording of §40-12-220(4), the definition of "gross proceeds" contained therein is very broad and was obviously framed in such broad terms so as to prevent taxpayers from designating or

> allocating various costs under separate labels so as to render the receipts derived therefore non-taxable as not being receipts derived from the leasing of tangible personal property.

The Taxpayer further contends that the Department erroneously taxed copies, and also included some exempt sales in the audit. However, while the examiner did include a "Copies" column in her audit work papers, those amounts were not included in the taxable measure column, and thus were not taxed by the Department. The Department also included some exempt entities in the audit, but only for rental tax purposes because the rental tax is on the lessor, not the lessee. It is thus irrelevant that some of the lessor's rental customers may have been exempt entities.

The final assessments are affirmed. Judgment is entered against the Taxpayer for State sales tax of $574.51 and State rental tax of $3,151.36. Additional interest is also due from the date the final assessments were entered, September 6, 2005.

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

Entered August 1, 2006.

_____
BILL THOMPSON
Chief Administrative Law Judge