

STYRON SAND & CLAY, INC.	§	STATE OF ALABAMA
P.O. BOX 1318		DEPARTMENT OF REVENUE
FOLEY, AL 36536-1318,	§	ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 05-1136
v.	§	
STATE OF ALABAMA	§	
DEPARTMENT OF REVENUE.		

**OPINION AND PRELIMINARY ORDER**

Styron Sand & Clay, Inc. (“Taxpayer”) petitioned the Department for refunds of State and Baldwin County sales tax for May 2001 through April 2004. The Department denied the refunds. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(c)(5)a. A hearing was conducted on February 14, 2006. Stephen Johnson represented the Taxpayer. Assistant Counsel Duncan Crow represented the Department.

The Taxpayer is located in Baldwin County, Alabama and sells sand, dirt, and gravel at retail. It also sometimes spreads the materials for its customers.

The Department audited the Taxpayer for sales tax for August 1997 through July 2000. The Department examiner informed the Taxpayer’s owner after the audit that if he sold and also spread the materials, he should keep detailed records indicating that the materials had been spread. As discussed below, if the Taxpayer furnishes and also spreads or installs the materials, it would owe sales tax on only its cost of the materials used.

The Department examiner audited the Taxpayer again for the period in issue – May 2001 through April 2004. Unfortunately, the Taxpayer again failed to indicate on its records during that period if the materials provided had also been spread. Consequently, the

examiner treated all of the transactions as taxable retail sales. She also assessed a 5 percent negligence penalty.

The Taxpayer paid the State and Baldwin County tax, penalty, and interest due, and applied for refunds. As indicated, the Department denied the refunds. The Taxpayer appealed.

The retail sale of sand, gravel, etc. is subject to State and local sales tax. See, Dept. Reg. 810-6-1-.150.05(1). However, if the provider of sand, gravel, etc. is also required to spread or otherwise incorporate the materials in such a way that they become a part of real property, the provider is acting as a contractor, and is not selling the materials at retail. In that case, the provider/contractor is required to pay sales tax when it purchases the materials to be spread. See, Reg. 810-6-1-.150.05(2); Code of Ala. 1975, §40-23-1(a)(10).

If the provider both sells the materials at retail and also sometimes contracts to furnish and spread the materials, the provider is operating a dual business, and should purchase all materials at wholesale. The provider should later report and pay the applicable sales tax on the retail sales price if it sells the materials at retail, or on its wholesale cost if it withdraws and uses the materials on a furnish-and-install contract. See, Reg. 810-6-1-.150.05(3) and Reg. 810-6-1-.56.

The Taxpayer in this case argues that it had numerous open-ended contracts during the subject period that required it to both provide and spread the materials as requested by its customers. The Taxpayer's owner explained at the February 14 hearing that as a practical matter he could not separately state the amounts he charged for the materials and for his spreading services because he charged some customers more than others.

Consequently, if he separately stated the amounts on an invoice, the customers he charged more would find out and be upset.

I understand the owner's concern. However, Alabama law required the Taxpayer to maintain accurate records from which its correct sales tax liability could be determined. Code of Ala. 1975, §§40-2A-7(a)(1) and 40-23-9. The Taxpayer was thus required to keep records showing that it both provided and also spread the materials for some of its customers. Unfortunately, the Taxpayer failed to do so. Consequently, the Department examiner had no choice but to treat the transactions as taxable sales, and tax them accordingly. See, *State v. T.R. Miller Mill Co.*, 130 So.2d 185 (Ala. 1961) ("Where there are no proper entries on the records to show the business done, the taxpayer must suffer the penalty of noncompliance and pay on the sales not so accurately recorded as exempt." *T.R. Miller Mill Co.* 130 So.2d at 190, citing *State v. Levey*, 29 So.2d 129 (Ala. 1946)).

As indicated, if a taxpayer fails to keep good records, the Department must assume that a transaction is taxable and assess the taxpayer accordingly. However, the mission of the Department is to collect tax only if it is legally due. Consequently, if a taxpayer can later establish by competent evidence that the tax is not due, i.e., that the transaction was exempt or otherwise not taxable, the taxpayer may be relieved of liability.

The Taxpayer offered numerous customer affidavits into evidence at the February 14 hearing which stated that the Taxpayer both provided and spread the materials for the customers. Those affidavits cannot be relied on, however, because the affiants were not available to be cross-examined by the Department (or the Administrative Law Division). They are thus inadmissible under the applicable rules of evidence. Code of Ala. 1975, §40-2A-9(j).

The Taxpayer's representative should notify the Administrative Law Division by April 14, 2006 if the case should be reset to allow the Taxpayer's customers to testify under oath and identify the specific jobs on which the Taxpayer both provided and also spread the materials. A hearing will then be scheduled in due course. If the representative fails to contact the Administrative Law Division by the above date, the Department's denial of the refunds will be affirmed.

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 27, 2006.

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BILL THOMPSON  
Chief Administrative Law Judge