BIGBEE STEEL BUILDINGS, INC. P.O. BOX 2314 MUSCLE SHOALS, AL 35662-2314,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 05-118
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed Bigbee Steel Buildings, Inc. ("Taxpayer") for State and local sales tax for March 2001 through February 2004. 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 March 21, 2005. Conrad Pitts and Carol Eckl represented the Taxpayer. Assistant Counsel David Avery represented the Department.

ISSUE

The Taxpayer sells building components at retail in Alabama. The issue is whether the Taxpayer is liable for sales tax on the lump-sum contract amounts it charged its customers during the subject period, as argued by the Department; or should the Taxpayer be allowed to back out sales tax from the lump-sum amounts before computing the tax due, as argued by the Taxpayer.

FACTS

The Taxpayer is located in Muscle Shoals, Alabama. It buys raw steel and other materials at wholesale and uses the materials to fabricate building components to specification. It then sells the components at retail to customers in Alabama and throughout the Southeastern United States.

The Taxpayer entered into lump-sum contracts with its customers during the subject period. In computing the lump-sum price, the Taxpayer determined on a worksheet the amount of State and local sales tax that would be owed on the components. It then included the tax in the lump-sum price. However, the amount of sales tax was not shown on the face of the contracts. Rather, the contracts stated only "price includes" sales tax.

In computing its taxable gross receipts, the Taxpayer backed out the sales tax from the lump-sum amounts, and then reported and paid tax on the net amounts. For example, if the contract sales price was $10,000, and the applicable State and local tax rate was 10 percent, the Taxpayer multiplied $10,000 by 1.10 to arrive at sales tax of $909.09. The Taxpayer subtracted the tax from the $10,000 contract price to arrive at taxable gross receipts of $9,090.91. It then reported and paid the combined State and local tax of $909.09 on the sale.

The Department audited the Taxpayer and determined that by charging a lump-sum price and not stating the amount of sales tax on the face of the contract, the Taxpayer was improperly absorbing or failing to add sales tax to the sales price, as required by Code of Ala. 1975, §40-23-26. The Department consequently assessed the Taxpayer on its sales in Alabama based on the full contract amounts, i.e., $10,000 in the above example.

ANALYSIS

Section 40-23-26(a) provides that all retailers "shall add to the sales price and collect from the purchaser" the sales tax levied in Article 1 of Chapter 23, Title 40, Code

of Alabama 1975. Section 40-23-26(b) further provides that it is unlawful not to add sales tax to the sales price or to absorb the sales tax due in the sales price.

The purpose of §40-23-26 is to insure that a retailer collects and remits the full amount of sales tax due to the Department. If a retailer sells goods advertised for $10, the retailer must add the 4 percent State sales tax to the sales price and collect $10.40 (plus any local tax) from the purchaser. It is clear in the above example that sales tax has been added to the stated sales price of $10. The issue is more difficult, however, if the retail sales price is not fixed or predetermined. That situation generally occurs, as in this case, when goods are special ordered.

If a retailer quotes a customer a price for a special ordered item, sales tax must be added to the sales price. The issue is whether the retailer can charge a lump-sum price and claim that sales tax is included in the amount; or must the retailer separately state on a contract, receipt, invoice, etc., the amount of sales tax that was added to the sales price.

The issue often arises concerning admissions to places of public amusement, which are subject to the gross receipts sales tax levied at §40-23-2(2). Department Reg. 810-6-1-.125 reads in pertinent part as follows:

> (2) Sales tax shall be collected as a separate item from the consumer at the amusement rate of tax based on the price of admission to the place of amusement. Where the tax is not stated and collected separately, the total amount of the admission price shall be used as a measure of the tax. A deduction for the sales tax included in the price of admission will be allowed in computing the tax due whenever the business has permanently displayed a sign showing the admission price and the amount or amounts of tax due within the view of persons paying the admission, or where the tickets used in connection with the transactions have plainly printed on the face the admission price and, as a separate item, the amount of sales tax due.

The Administrative Law Division has addressed the issue in several cases. In *State of Alabama v. Huntsville Baseball Club, Inc. and Birmingham Baseball Club, Inc.*, S. 92-208 and S. 92-170 (Admin. Law Div. 2/23/94), the taxpayers had a sign at their ball fields indicating that the lump-sum admission price "includes tax." The Administrative Law Division held that sales tax was due on the lump-sum price because the tax was not separately stated on the signs, as required by the regulation.[1] Likewise, in *Mobile Alabama Bowl, Inc. v. State of Alabama*, S. 02-132 (Admin. Law Div. 6/20/02), the Administrative Law Division held that tickets to football games that included the statement "9% sales tax is included in the ticket price" did not satisfy Reg. 810-6-1-.125 because, as in *Huntsville Baseball*, the amount of the tax itself was not stated on the ticket, as required by the regulation.

On the other hand, in *Alabama International Dragway, Inc. v. State of Alabama*, S. 00-331 (Admin. Law Div. 11/28/00), the taxpayer was allowed to back out the tax from its lump-sum admission charge because the taxpayer had a sign at the gate specifying the amount of sales tax that was included in the admission price.

Finally, in *Tuscaloosa Pubs, Inc. v. State of Alabama*, S. 03-425 (Admin. Law Div. 11/24/03), the taxpayer failed to post a sign stating that the lump-sum price it charged for beer, wine, and liquor drinks included sales tax. The Department assessed the taxpayer on the lump-sum amounts. The Administrative Law Division affirmed.

> The Department concedes that a retailer can charge a lump-sum price for a product which includes sales tax, and then back out the sales tax in computing taxable gross receipts. To do so, however, the retailer must

[1] The regulation in issue in the case was Reg. 810-6-2-.86, not Reg. 810-6-1-.125. However, the sign requirement in Reg. 810-6-2-.86 was the same as in Reg. 810-6-1-.125. Reg. 810-6-2-.86 has since been repealed and merged into Reg. 810-6-1-.125.

> have an on-premises sign or provide the customer with a receipt showing that sales tax was included in the lump-sum price. Otherwise, the retailer would be illegally absorbing the sales tax in the price.
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> The Department cites Dept. Reg. 810-6-1-.125 in support of its position. That regulation provides that if a taxpayer operates a place of amusement that is subject to the gross receipts sales tax levied at Code of Ala. 1975, §40-23-2(2), the sales tax on the price of admission must be stated as a separate item, either on a sign at the business or on the admission tickets used by the business. Otherwise, the gross receipts tax would be on the full admission amount. The requirement that tax must be separately stated on a sign or a ticket is based on §40-23-26(b), which, as discussed, prohibits absorbing sales tax in the lump-sum price.
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> The Taxpayer argues that Reg. 810-6-1-.125 applies only to admissions to places of amusement. The Taxpayer is technically correct. However, the statute itself, §40-23-26(b), prohibits the Taxpayer from charging a lump-sum amount without identifying a part of the amount as sales tax. By failing to have a sign or customer receipt showing that tax was included in the sale price, the Taxpayer was illegally absorbing sales tax in the price. In such cases, sales tax is due on the full lump-sum sales price.

Tuscaloosa Pubs at 3.

None of the above cases directly address the issue in this case. That is, did the Taxpayer violate §40-23-26 when it failed to separately state the amount of sales tax due on the face of its contracts.

Department Reg. 810-6-4-.20 requires that a retailer must add sales tax "to the sales price and to collect same from the customers." The Taxpayer argues that Reg. 810-6-4-20 currently does not require that the amount of sales tax due must be separately stated, as does Reg. 810-6-1-.125 concerning admissions to places of amusement. It contends that it substantively complied with Reg. 810-6-4-.20 because it computed the sales tax due on the components and included the tax in the lump-sum price charged to its customers. It also claims that it notified its customers that sales tax was being charged by stating on the contracts that "price includes" sales tax.

I agree that Reg. 810-6-4-.20, as it currently reads, does not require that sales tax must be separately stated on the invoice, receipt, contract, etc., given to a customer. It only requires, as does §40-23-26, that the seller must add sales tax to the sales price. In this case, the Taxpayer separately computed and added sales tax to the amounts it charged its customers for the components. It also notified the customers that the "price includes" sales tax. Consequently, sales tax was not illegally absorbed in the lump-sum price, and the Taxpayer thus correctly backed out the sales tax in computing its taxable gross receipts subject to sales tax. The final assessments are voided.[2]

The Department is in the process of amending Reg. 810-6-4-.20 to include the following:

> (3) Whenever practical, each retailer shall add the sales tax as a separate line item to the selling price. The initial invoice, bill, charge ticket, sales slip, or receipt shall separately state the amount of the tax being charged. If not separately stated, it will be presumed that sales tax was not charged to the customer or collected. In such cases, the measure will be the gross receipts.
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> (a) In those instances where it is practically impossible to furnish a customer with an invoice, bill, charge ticket, sales slip, or receipt, the retailer shall conspicuously post a sign indicating that the charge for the item being purchased includes the price of the item and the total percentage of sales tax being collected. The sign shall be of sufficient size to allow a person of normal vision to read it from a distance of 20 feet and shall be posted in plain view.

[2] The Administrative Law Division ruled against the taxpayer in *Tuscaloosa Pubs* because there was no sign at the business stating that the price included tax, and there was no evidence that the taxpayer had, in fact, included tax in computing the drink prices. This case can be distinguished from *Tuscaloosa Pubs* because, as discussed, (1) the Taxpayer's contracts indicated that the price included sales tax, and (2) there was evidence that the Taxpayer added sales tax to the price of the components in determining the contract price.

(b) Each retailer who makes tax-included sales in which tax is an unspecified part of the customer charge shall post a sign pursuant to paragraph (a) using the following example:

Charge for items purchased includes price of item and 8% sales tax.

Reg. 810-6-4-.20, as amended, will require that whenever practical, the seller must separately state the amount of sales tax on the invoice, billing, receipt, etc., provided to the customer. The amended regulation, which is effective June 8, 2005, is reasonable, and thus must be followed. See generally, *Ex parte White*, 477 So.2d 422 (Ala. 1985), on remand, 477 So.2d 425. Consequently, after June 8, 2005, all taxpayers subject to sales tax must comply with Reg. 810-6-4-.20 by separately stating the amount of sales tax charged to a customer; or, if it is impractical to do so, post a sign stating that the charge includes the sales price plus the applicable percentage of sales tax.[3] Otherwise, tax will be due on the full price charged to the customer.

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

Entered June 1, 2005.

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BILL THOMPSON
Chief Administrative Law Judge

[3] I assume that Reg. 810-6-4-.20, as amended, also applies to admissions to places of public amusement, and thus supersedes the Reg. 810-6-1-.125 requirement that the amount of sales tax, not just the applicable percentage rate, must be stated on a posted sign or ticket. Whether it is "practical" to specify the amount of sales tax on an invoice, bill, sales slip, etc., must be decided on a case by case basis. It would be practical for the Taxpayer in this case to separately state the State and local sales tax due on each contract. The Taxpayer's representative indicated at the March 21 hearing that the Taxpayer began doing so after the Department audit.