

SUBURBAN, INC.
6220 HIGHWAY 90 WEST
THEODORE, AL 36582,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. S. 05-538

v.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§

**OPINION AND PRELIMINARY ORDER ON TAXPAYER'S
APPLICATION FOR REHEARING**

This appeal involves final assessments for State sales and use tax for September 2001 through August 2004 entered against the above Taxpayer. 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 June 19, 2007. Assistant Counsel Duncan Crow represented the Department. The Taxpayer's representative was notified of the hearing, but failed to appear. A Final Order was entered on August 22, 2007 that affirmed the final assessments, as adjusted.

The Taxpayer timely applied for a rehearing. A second hearing was conducted on October 10, 2007. Assistant Counsel Duncan Crow again represented the Department. Bob Galloway represented the Taxpayer.

The Taxpayer is located in Theodore, Alabama, and sells new and used mobile homes at retail. On its invoices, the Taxpayer generally lists the sales price for the mobile home, plus a charge for delivery and set up, and a charge for any "improvements" provided by the Taxpayer to the customer. The improvements may include a driveway, sidewalk, septic tank and related perk tests, electrical hook-up, appraisal, and financing and closing costs, among others.

The Department audited the Taxpayer for the period in issue and determined that the Taxpayer owed sales tax on the entire invoice amount, which, as indicated, included delivery and set-up charges and any improvements. The Taxpayer concedes that the delivery and set-up charges are taxable. It disagrees, however, concerning the charges for the improvements.

The issue of whether intangible services and improvements provided by a mobile home dealer to a customer in conjunction with the sale of a mobile home was recently addressed by the Administrative Law Division in *Port City Mobile Homes, Inc. v. State of Alabama*, S. 05-767 (Admin. Law Div. 11/20/2007). The Final Order in that case reads in part as follows:

The Alabama sales tax is measured by the gross proceeds derived from the retail 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 materials used, labor or service costs, interest paid or any other expenses whatsoever." Code of Ala. 1975, §40-23-1(a)(6).

In *State of Alabama v. Frander & Frander, Inc.*, S. 86-131 (Admin Law Div. 5/18/1987), the issue was whether a mobile home retailer in Alabama was liable for sales tax on its charges for delivering and setting-up the mobile homes. The delivery and set-up charges were not separately stated on the sales invoices, but the retailer maintained other records that itemized those charges.

In deciding the case, the Administrative Law Division analyzed three Alabama cases on point: *Alabama Precast Products, Inc. v. State*, 332 So.2d 160 (Ala. Civ. App. 1976); *East Brewton Materials, Inc. v. State*, 233 So.2d 751 (Ala. Civ. App. 1970); and *State v. Natco Corp.*, 90 So.2d 385 (Ala. 1956). The Administrative Law Division summarized the above cases as follows:

As stated, the rule of general applicability that can be taken from the above cases and regulations is that transportation, delivery and installation charges made in conjunction with a

sale are taxable if the services are performed as a part of and prior to completion of the sale. If the services are rendered subsequent to the sale, the charges are not a part of taxable gross proceeds.

Under Alabama law, a sale occurs with the passing of title (§7-2-106), and unless otherwise provided, title passes upon completion of physical delivery by the seller (§7-22-401(2)). *State v. Delta Airlines, Inc.*, 356 So.2d 1205 (1977); *American Cast Iron Pipe Co. v. Boswell*, 350 So.2d 438 (1977).

Concerning the sales in issue, the Taxpayer was obligated to deliver and install the trailers. Clearly, such delivery was an integral part of the sale, and title did not pass until the Taxpayer had completed his contractual performance with respect to the goods. Consequently, the charges relating to delivery and installation constituted a part of taxable gross proceeds.

Frander at 7.

In this case, the Taxpayer included the delivery and set-up or installation charges as a part of its lump-sum charge for the mobile homes. It correctly collected sales tax on that lump-sum amount in accordance with the rationale of *Frander & Frander* and the cases cited therein. The dispute is whether the separately stated lump-sum charge for the services and improvements was also subject to sales tax as gross proceeds derived from the sale of the mobile homes.

As discussed, a mobile home dealer's charges for delivery and set-up of a mobile home are subject to sales tax, whether separately stated on the invoice or not, because those services are an integral and necessary part of the sale, and are performed before transfer of title, i.e., before the sale is closed. (footnote omitted)

The services and improvements in issue were separate from the sale of a mobile home and the related delivery and set-up charges, and thus were not subject to sales tax. Rather, they were either an intangible service not involving the sale of tangible property, or, if tangible property was involved, i.e., decks, fencing, septic tanks, driveways, etc., the property was either exempt from sales tax or an improvement to realty. If the latter, sales tax was due when the tangible materials used to complete the improvement were purchased. "Sales of building materials to contractors, builders, or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold." Code of Ala. 1975, §40-23-1(a)(10).

Tangible property was involved when the Taxpayer, through independent contractors, provided a septic tank, a driveway or sidewalks, a deck or fence, sod or landscaping, etc. However, those activities constituted improvements to realty separate from the sale of the mobile homes. As indicated, sales tax was due on the materials when the subcontractors that performed the work purchased the materials. Section 40-23-1(a)(10). The septic tanks were also otherwise exempt from sales tax, as was the sod if sold by the person that produced it. See, Reg. 810-6-3-.75 and Code of Ala. 1975, §40-23-4(a)(16), respectively.

The intangible services included the loan closing expenses, surveys, appraisals, inspections, title insurance, soil tests, home buyer warranties, termite bonds, utility deposits and connections, appliance installation services, lot clearing and stump removal, etc. The Taxpayer's charge for those services, while included on the mobile home sales invoices, were not derived from the sale of the mobile homes or any other tangible property, and thus were not taxable.

The Department concedes that some of the items included in the lump-sum services and improvements charge were not subject to sales tax. The Department contends, however, that the entire lump-sum must be taxed because the Taxpayer did not identify on its invoices the separate charges for the taxable and non-taxable services and improvements.

All taxpayers are required to keep records from which the Department can determine their correct liability. Code of Ala. 1975, §40-2A-4(a)(1). If a taxpayer has taxable and non-taxable sales, but fails to keep records identifying the non-taxable sales, "[t]he taxpayer must suffer the penalty and pay on the sales not so accurately recorded as exempt." *State v. Ludlum*, 384 So.2d 1089, 1091 (Ala. Civ. App. 1980), quoting *State v. T.R. Miller Mill. Co.*, 130 So.2d 185, 190 (Ala. 1960).

The above rule of law does not apply in this case because, as discussed, none of the lump-sum charges for the services and improvements were derived from the taxable sale of tangible property, and thus were not subject to sales tax. Consequently, because none of the lump-sum charges were taxable, the Taxpayer was not required to itemize the various services and improvements on its sales invoices. (footnote omitted)

In any case, the Taxpayer, through its CPA, maintained internal records identifying the separate charges for the various services and improvements. Consequently, even if some of the services or improvements were taxable, the Taxpayer maintained adequate records from which the taxable and non-taxable items could be identified. (footnote omitted)

In summary, a mobile home dealer owes sales tax on the charge for the mobile home, plus any related delivery and set-up charges. The dealer is not liable for tax on financing-related or other intangible services, or for improvements or additions to a customer's real property, even if those charges are included on the sales invoice for the mobile home. (footnote omitted)

Port City at 3 – 7.

The above analysis in *Port City* applies in this case. The proceeds from the sale of mobile homes and all delivery and set-up charges are taxable. The proceeds from intangible services and improvements are not.

In *Port City*, the taxable proceeds from the sale of the mobile homes and delivery and set-up were included in a lump-sum amount separate from the lump-sum amount for the nontaxable improvements. The taxpayer in that case was thus not required to itemize the nontaxable improvements.

In this case, however, it is unclear if the Taxpayer's taxable and nontaxable proceeds were separately identified on the Taxpayer's invoices or other records. The Department's sales tax supervisor in Mobile explained that "[e]ach invoice was different. And sometimes there was no invoice; there were just notes we went on with numbers on the page." T. at 7, 8. She further testified that sometimes the invoice was for a lump-sum, and that the Department had to use a bill-of-sale or other records to distinguish between the taxable sales price versus the nontaxable improvements.

The Department is to be commended for working with the Taxpayer to resolve this matter. The Taxpayer's representative indicated at the October 10 hearing that most of the issues had been resolved, except the above discussed issue concerning the taxability of the improvements. If the Taxpayer has records from which the taxable sales price for the

mobile home and delivery and set-up can be distinguished for the nontaxable charge for the improvements, then only the charge for the home and delivery and set-up should be taxed.

If, however, the taxable and nontaxable charges are not separately stated and cannot otherwise be determined, the Taxpayer must be held liable for sales tax on the entire amount. *State v. Ludlum*, 384 So.2d 1089 (Ala. Civ. App.), cert. denied, 384 So.2d 1094 (Ala. 1980); *State v. Levey*, 29 So.2d 129 (1946).

The Department should recompute the Taxpayer's liabilities in accordance with this Order. A Final Order will then be entered for the reduced amount due.

This Opinion and Preliminary Order on Taxpayer's Application for Rehearing 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 December 13, 2007.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

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