MAILFAST, INC. 3621 MESSER AIRPORT HIGHWAY BIRMINGHAM, AL 35222,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 06-1120
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed Mailfast, Inc. ("Taxpayer") for State sales tax for November 2002 through December 2005. 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 February 23, 2007. The Taxpayer's owner, Doyle Hain, represented the Taxpayer. Assistant Counsel Margaret McNeill represented the Department.

The Taxpayer operates a printing and mail preparation business in Birmingham, Alabama. It prints postcards, advertising fliers, etc. as directed by its customers. It also sometimes prepares the printed materials for mailing and delivers the materials to the post office. The mail preparation may include, but is not limited to, folding the printed items, placing the items in envelopes, addressing and sorting the envelopes, and delivering the envelopes to the post office.

The Taxpayer issues a customer a single invoice on which the printing charge and the mail preparation charge are separately stated. The printing charge includes an amount for the paper used, the printing-related labor costs, and all other costs related to the printing. The separately stated mail preparation charge includes the Taxpayer's charge for labor and materials used in preparing and mailing the printed items.

The Taxpayer collected and remitted sales tax on its printing charges during the period in issue. It failed, however, to charge sales tax on its separately stated mail preparation charges. The Department audited the Taxpayer and assessed it for sales tax on the full invoice amount, including the mail preparation charges. The Taxpayer appealed.

The Administrative Law Division previously addressed this issue in two cases. *Cook Publications, Inc. v. State of Alabama*, S. 94-160 (Admin. Law Div. 3/1/1995), and *State of Alabama v. Service Engraving Co., Inc.*, S. 84-198 (Admin. Law Div. 4/8/1985).

In *Service Engraving*, the Administrative Law Division held that the taxpayer's mail preparation charges were taxable because the mail preparation occurred before the sale was closed. The charges thus constituted taxable "gross proceeds," as defined at Code of Ala. 1975, §40-23-1(a)(6). The Administrative Law Division also held that it was not an unconstitutional denial of equal protection to tax the taxpayer's mail preparation charges, even though those charges would not be taxed if a different party printed the materials.

On appeal, the taxpayer in *Service Engraving* presented evidence in circuit court that the sale of the printed materials occurred after the printing was finished, but before the items were prepared for mailing. The circuit court subsequently ruled for the taxpayer, without issuing a substantive opinion stating why. The Department appealed.

The Court of Civil Appeals affirmed. See, *State of Alabama v. Service Engraving Co., Inc.*, 495 So.2d 695 (Ala. Civ. App. 1986). The Court first held that the mail preparation charges could not be taxed because it would be unfair to tax the taxpayer on the mailing charges because it also printed the materials, but not tax a competitor that only performed the mailing services. "Stated differently, if the contentions of the State were accepted, the taxpayer would be penalized seven percent (the combined State and local

sales tax rate) of its invoice for the preparation for mailing of any material which it also printed. We are not convinced that the legislature ever intended such an unequal treatment for identical services." *Service Engraving*, 495 So.2d at 697.

The Court also held that the mail preparation charges could not be taxed because evidence submitted for the first time in circuit court established that the sale of the printed materials was closed before the mail preparation occurred. "Since there was evidence before the trial court that title to the printed materials passed to its customers before any preparation for mailing service was performed, the evidence upheld the trial court's holding that no sales tax was due for the (post-sale) packaging and labeling of that printed matter." *Service Engraving*, 495 So.2d at 697.

The Administrative Law Division next addressed the issue in *Cook Publications* in 1995. The evidence in that case established that the sale of the printed materials was not closed until after the taxpayer performed the mail preparation services. The Administrative Law Division thus distinguished the case from *Service Engraving*, and held that the mailing charges constituted a part of taxable gross proceeds as defined at §40-23-1(a)(6).

The Administrative Law Division nonetheless held in *Cook Publications* that the mailing charges could not be taxed based on the holding in *Service Engraving* that similar mail preparation services must be taxed alike. That is, the charge for mail preparation services by a printer that also prints (and sells) the materials cannot be taxed because those same services by a party that does not also print (and sell) the materials are not taxable. That same rationale applies in this case. Consequently, based on the holding in *Service Engraving*, the Taxpayer's separately stated mail preparation charges cannot be taxed. The final assessment in issue is voided.

I must add that while the *Service Engraving* decision is controlling, I respectfully disagree with the Court's rationale for the reasons previously stated in *Cook Publications.*

> While the *Service Engraving* decision is controlling and must be followed, I respectfully disagree with the Court's holding that all mail preparation services must be taxed alike. Rather, the taxability of services or labor, including mail preparation services, depends on whether it is performed by the seller (or seller's agent) prior to and as part of the sale of tangible personal property. If so, then the service or labor constitutes a part of taxable "gross proceeds" as defined at §40-23-1(a)(6). See generally, *East Brewton Materials, Inc. v. State*, 233 So.2d (Ala. 1970) (transportation service performed by seller prior to close of sale held to be taxable). However, as the Court correctly held in *Service Engraving*, if the service or labor is performed after the sale is closed, then the identical service or labor charges are not taxable. The same labor or services performed by a third party not engaged in selling also would not be taxable, but only because the services are not performed in conjunction with and as part of a sale.
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> If identical services must be taxed alike, then a wide variety of otherwise taxable services or labor performed by a seller as part of a sale also could not be taxed. For example, transportation or delivery services performed by a seller prior to the close of a sale are clearly taxable, see *East Brewton Materials, Inc. v. State*, supra. Obviously, the same transportation or delivery services could be performed tax-free by an independent third party (after the sale is closed). Consequently, if the *Service Engraving* rationale is applied, the delivery charges received by the seller also could not be taxed, even though the charges are clearly taxable.
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> The mail preparation charges in this case are taxable labor or service charges incurred prior to and in conjunction with the sale of the printed materials in Alabama. The charges are taxable, even though identical services performed by a third party non-seller would not be taxable.
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> Different tax consequences can apply to the same activity or transaction depending on the business a taxpayer chooses to engage in. If a business chooses to print and sell materials and also prepare the materials for delivery, tax is due on the materials plus the mail preparation services performed as part of the sale. If a business performs mail preparation services only, the business is not selling the materials, and thus no sales tax is due. (footnote omitted) As stated in *Dothan Progress v. State, Dept. of Revenue*, 507 So.2d 511 (Ala. Civ. App. 1986), reversed on other grounds, *Ex Parte Dothan Progress*, 507 So.2d 515 (Ala. 1987):
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> > We agree with the Department that there are bound to be inequalities in the effect of a tax on businesses which operate

> differently. 'Unavoidable inequalities which are due only to inequalities in business conditions and activities are not sufficient to render a tax statute invalid.' *State v. Hunt Oil Company*, 49 Ala. App. 445, 453, 273 So.2d 207, 213, (Ala. Civ. App. 1972), cert denied, 290 Ala. 371, 273 So.2d 214 (1973) (citing 84 C.J.S. Taxation §23 1954).
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> But for the specific holdings in *Service Engraving*, I would uphold the tax in issue in this case. However, *Service Engraving* clearly holds that mail preparation charges incurred in conjunction with the sale of printed materials cannot be taxed. Consequently, the final assessment in issue is dismissed.

Cook Publications at 4 – 6.

As indicated, but for the holding in *Service Engraving*, I would hold that the Taxpayer's mail preparation charges constituted taxable gross proceeds. But although I respectfully disagree with the Court's rationale in *Service Engraving*, it is controlling. The final assessment must be voided.

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

Entered April 26, 2007.

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BILL THOMPSON
Chief Administrative Law Judge

bt:dr
cc: Margaret Johnson McNeill, Esq.
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