

HEALTHSOUTH CORPORATION
HEALTHSOUTH COMPANY STORE
P.O. BOX 380546
BIRMINGHAM, AL 35238-0546,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

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Taxpayer,

§

DOCKET NO. S. 06-243

v.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed HealthSouth Corporation (“Taxpayer”) for State use tax for October 1999 through September 2002. 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 July 11, 2006. Michael Martin represented the Taxpayer. Assistant Counsel Margaret McNeill represented the Department.

The Department audited the Taxpayer and determined that the Taxpayer owed additional Alabama use tax. The Taxpayer raised various objections to the Department’s audit. The Department responded to the Taxpayer’s objections by either requesting additional information concerning an objection, or explaining why it did not agree with the objection. The Department thereafter made some adjustments based on additional information provided by the Taxpayer. It then entered the final assessment in issue.

The items in issue in this case are identified in the Department’s June 13, 2005 response to the Taxpayer’s objections, Department Ex. B. Those disputed adjustments were addressed at the July 11 hearing, and are discussed below.

- (1) Stratum 1, Line 96, Item 9271.

This disputed invoice is for “201 print clippings.” The Department examiner taxed

the items because he understood the items were tangible property. The Taxpayer contends that the invoice involved nontaxable information.

I cannot determine from the invoice whether the items purchased were tangible property or nontaxable intangible services. The final assessment is *prima facie* correct, and the burden was on the Taxpayer to establish that the items were nontaxable. Code of Ala. 1975, §40-2A-7(b)(5)c. It failed to do so. Consequently, this invoice was correctly included as taxable.

(2) Stratum 2, Line 6, Item 366.

This item involves approximately 5,500 magazines purchased by the Taxpayer. The magazines were shipped to the Taxpayer's headquarters in Birmingham, and, according to the Taxpayer's representative, some were distributed in Alabama and some were shipped to the Taxpayer's inpatient hospitals outside of Alabama. The Department examiner did not allow the temporary storage exemption provided in Reg. 810-6-5-.23 because he saw no evidence as to when and where the magazines were shipped out-of-state, if at all.

Again, the burden was on the Taxpayer to maintain records showing that some of the magazines were shipped out of Alabama. Without such records, or other evidence establishing the number of magazines that were shipped out of Alabama, the magazines must be taxed in full.

(3) Stratum 2, Line 23, Item 127.

This involves an invoice from CLA Architecture, Inc. The Department taxed the invoice because the invoice did not identify what was being purchased. The Taxpayer's representative claims that the Taxpayer was purchasing nontaxable architectural services.

He indicated at the July 11 hearing that he could contact the vendor and determine exactly what the invoice was for. As explained below, the representative will be allowed time to do so.

(4) Stratum 3, Line 52, Item 23.

This is one of several invoices from Ingenix Publishing Group. The Department taxed the invoices because there was no indication that the items sold – “workers comp fee sch plus – ren” – were not tangible property, and thus taxable.

The Taxpayer’s representative conceded that he was not sure what the invoices involved, but that the company’s website indicated that it was an information services provider. However, without some evidence that the invoices were for nontaxable services, the Department correctly included the invoices as *prima facie* taxable.

(5) Stratum 3, Line 64, Item 92.

These invoices were for “PeopleSoft Upgrade Training” from PeopleSoft USA, Inc. The “training units” purchased by the Taxpayer were primarily for software training. The Department concedes that if the units were used for training, the cost was nontaxable. However, the contracts also provided that if the items or credits were not redeemed for training, they may be used to obtain tangible items. Because there was no evidence indicating which units were redeemed for training versus tangible property, the Department taxed the entire amounts. Again, without some evidence showing the separate amounts spent for nontaxable training and taxable property, the examiner correctly taxed the entire amount. *State v. Ludlum*, 384 So.2d 1089 (Ala. Civ. App.), cert. denied, 384 So.2d 1094 (Ala. 1980).

(6) Stratum 3, Line 74, Item 248.

It is not disputed that this invoice involved the taxable sale of tangible property. The Department also initially taxed a separately stated freight charge, which it later deleted from the taxable measure. The Taxpayer also claims that it should be allowed a credit for a \$3,000 charge for training on the invoice on which it had erroneously accrued and paid tax. The Department apparently agrees.

(7) Stratum 3, Line 91, Item 1.

This invoice involves a software package the Department deemed to be canned software, and thus taxable. The Taxpayer contends that the software was nontaxable custom software because it was developed exclusively for the Taxpayer.

The Alabama Supreme Court has held that “canned” or generic computer software constitutes tangible property subject to sales, use, or lease tax. *Wal-Mart Stores v. City of Mobile*, 690 So.2d 290 (Ala. 1996). However, the Department still considers the gross proceeds from custom or special-designed software to be nontaxable as a charge for professional services. See, Dept. Reg. 810-6-.1-.37.

The Taxpayer’s representative testified that he understood that the software was developed exclusively for the Taxpayer. The Department examiner explained that the software was taken off the shelf, i.e., was canned, but that “they took it and made adjustments for it.” (T. 23) By adjusting the software to fit the Taxpayer’s needs, the software became custom software, and thus was not taxable per Reg. 810-6-.1-.37.

(8) \$100,000 + Stratum, Line 9, Item 58.

This is another canned versus custom software issue. The item is not taxable for

the reasons explained above, see (7).

(9) \$100,000 + Stratum, Line 18, Item 34.

This involves an invoice for approximately \$160,000 from M.J. Harrison, a large construction company. The Department taxed the invoice because there was no indication the invoice was not for taxable property versus a nontaxable construction service. The Taxpayer claims that the invoice was for building improvements to real property, and thus not taxable. The Taxpayer's representative indicated at the July 11 hearing that he would contact the vendor and verify what the invoice was for. Without evidence that the invoice was nontaxable, it must be included as taxable.

(10) \$100,000 + Stratum, Line 21, Items 19 and 20; Line 23, Item 21.

These invoices involve purchases from PeopleSoft. The Department does not dispute that the Taxpayer paid sales tax to PeopleSoft. The problem is that the Department has no evidence that PeopleSoft remitted the tax to the State. PeopleSoft is located in another State, and does not have an Alabama sales tax account. The Taxpayer's representative indicated at the July 11 hearing that he would contact PeopleSoft and find out if they remitted the tax to Alabama. Otherwise, the invoices must be included as taxable.

(11) \$100,000 + Stratum, Line 24, Item 14.

This item involves a purchase of nontaxable information services the Department did not assess. The Taxpayer claims that it may have improperly accrued tax, and if so, it should be allowed a credit. I agree. However, there is no evidence that the Taxpayer did, in fact, accrue and pay tax on the amount. Without such proof, no credit can be allowed.

(12) \$100,000 + Stratum, Line 26, Item 6.

This invoice involves tangible property that was shipped to Georgia. The Department taxed the amount because it was suspected that the property may have subsequently been shipped into and used at the Taxpayer's headquarters in Alabama. There is no evidence, however, that the property was used anywhere other than in Georgia. This item should be excluded from the audit.

The taxability of many of the disputed items discussed above turns on whether the Taxpayer can provide records or other sufficient evidence showing that the items were not taxable. The Taxpayer is allowed until September 29, 2006 to provide additional evidence concerning the items. The evidence should be submitted to the Administrative Law Division, and will be forwarded to the Department for review and response. An appropriate Order will then be entered.

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 August 10, 2006.

BILL THOMPSON
Chief Administrative Law Judge