

COMPASS MARKETING INC.  
P.O. BOX 3388  
GULF SHORES, AL 36547-3388,

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. S. 07-987

v.

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

§

### **OPINION AND PRELIMINARY ORDER**

The Revenue Department assessed Compass Marketing, Inc. (“Taxpayer”) for consumer use tax for February 2003 through February 2006. 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 9, 2008. Blake Madison represented the Taxpayer. Assistant Counsel Duncan Crow represented the Department.

The Taxpayer is located in Gulf Shores, Alabama. It publishes tourism guides and brochures for various entities, including the Alabama Bureau of Tourism and Travel (the “Bureau”), the Mobile Bay Convention and Visitors Bureau, and other public entities.

The Taxpayer contracted with the Bureau for the right to publish the official Alabama Vacation Guide during the audit period. The agreement required the Taxpayer to publish the Guide at its own expense. The Taxpayer profited by selling advertising space in the Guide.

The Taxpayer was required to “provide the graphic design, editing, copywriting, layout, composition, production and printing of the Guide at no cost to the Bureau,” and also to “coordinate all matters relevant to advertising, including sales, advertising, rates, proofs, mechanical and digital production, billing and collection.” Taxpayer Ex. 4, ¶ 4.B. and C. The Taxpayer was also required to provide and include a survey/reader service

card in each copy of the Guide.

The Taxpayer purchased a color proofing machine that produced color proofs used in producing the Guide. It also purchased computer software that its design department used to create color layouts and design advertisements for its customers for use in the Guide.

The Bureau had oversight and approval authority over the content, minimum length, and format of the publication. It also appointed one of its employees “as the coordinator and approval authority for all matters relevant to publishing the Guide, subject to final approval by the Director of Tourism.” Taxpayer Ex. 4, ¶ 2. The Taxpayer was also required to submit the initial design layout and the final proof to the Bureau for review and approval. Once the Bureau approved the final proof, the Taxpayer electronically transmitted the proof to an out-of-state printer for printing. The Taxpayer paid the printer, and directed the printer to ship the printed Guides directly to the Bureau.

The Taxpayer also purchased promotional folders and various other items on behalf of South Coast, U.S.A., a Louisiana non-profit corporation, during the subject period. The items were shipped to the Taxpayer in Alabama, and soon thereafter delivered by the Taxpayer to South Coast in Louisiana. The Taxpayer paid for the items and was subsequently reimbursed by South Coast.<sup>1</sup>

The Department audited the Taxpayer and assessed it for use tax at the general 4 percent rate on the tangible personal property that it used in producing the Guide, including

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<sup>1</sup> The Taxpayer’s witness at the June 10 hearing did not know why the Taxpayer had purchased the items for South Coast. He explained, however, that the Taxpayer’s president is on South Coast’s board of directors.

the color proofing machine, the computer software programs, and the survey/reader service cards. It also assessed the Taxpayer for use tax on the items it purchased for South Coast.

The Taxpayer disputes the final assessment because:

(1) It contends that the color proofing machine and the computer software it used to format, lay out, and produce the Guide were machines used in processing and/or manufacturing, and thus subject to the reduced 1 1/2 percent “machine” rate use tax levied at Code of Ala. 1975, §40-23-61(b);

(2) It argues that it was acting as an agent of the State when it produced and published the Guide, and consequently, that all related tangible property used in producing the Guide should be exempt from use tax;

(3) It asserts that the items it purchased for South Coast were not subject to Alabama use tax because they were not used or intended for use in Alabama, and were only temporarily stored in Alabama; and

(4) It renews its contention that the final assessment should be dismissed because the Department failed to timely file its Answer, as required by Code of Ala. 1975, §40-2A-9(c).

**Issue (1). The “machine” rate issue.**

Section 40-23-61(b) levies a reduced 1 1/2 percent use tax on machines used in processing, compounding, or manufacturing tangible personal property. The Department initially argued that the color proofing machine and the computer software in issue were not machines used in processing or manufacturing the Guides, and thus taxable at the general 4 percent rate. It now concedes in its post-hearing brief that the reduced machine rate

applies.

**Issue (2). Did the Taxpayer publish and produce the Guide as an agent of the State?**

The Taxpayer argues that “[a]s the Alabama Vacation Guide is produced on behalf of the State of Alabama and (Taxpayer) is merely acting as an agent of the State in purchasing the necessary components of that Alabama Vacation Guide, no use tax should be imposed as the State of Alabama is exempt from remitting consumer use tax under section 40-23-62(16) *Code of Alabama* (1975).” Taxpayer’s Brief at 7. I disagree.

The Taxpayer was not acting as the State’s agent, either implied or explicit, when it produced the Guide. The agreement between the parties did not designate the Taxpayer as the State’s agent, nor was the Taxpayer authorized to act for or on behalf of the State. Rather, the Taxpayer only contracted with the Bureau to independently produce, publish, and print the Guide for the Bureau. The fact that the Bureau retained the right to oversee production and control the content and format of the Guide did not create an agency relationship. The Taxpayer is thus liable for Alabama use tax on the property it used in producing and publishing the Guide. See, *State of Alabama v. King & Boozer*, 62 S. Ct. 43, 314 U.S. 1 (1941) (Contractor that contracted to perform work for federal government was not agent of the government, and thus liable for tax on property purchased and used to perform the government contract.).

**Issue (3). The property purchased for South Coast.**

The Taxpayer purchased various items of behalf of South Coast. The Department taxed the items because South Coast, although a §501(c) entity, was not exempt from

Alabama sales and use tax, and also because the items were initially delivered to the Taxpayer in Alabama.

Alabama use tax is due on tangible personal property purchased outside of Alabama and intended for first use in Alabama. See generally, *Boyd Brothers Transp., Inc. v. State Dep't of Revenue*, 976 So.2d 471 (Ala. Civ. App. 2007).<sup>2</sup> However, if property is only temporarily stored or kept in Alabama, and is subsequently removed and first used outside of Alabama for its intended purpose, Alabama use tax does not apply. See, Dept. Reg. 810-6-5-.23. “. . . property is not subject to the use tax if, at the time it is transported into the State, it is intended or contractually obligated for use outside of Alabama and is subsequently delivered and used outside of Alabama.” *Ala., Dept. of Rev. V. Wilbro Co., S.* 86-245 (Admin. Law Div. 10/14/1987).

In this case, the evidence is undisputed that the items purchased by the Taxpayer for South Coast were not intended for use in Alabama. Rather, they were intended for and first used in Louisiana. Consequently, because the items were only temporarily stored and not used in Alabama, the Alabama use tax does not apply.

**(4). Should the final assessment be dismissed because the Department failed to comply with §40-2A-9(c)?**

The Taxpayer again asserts that the Administrative Law Division is required to dismiss the final assessment because the Department failed to timely file its Answer, as required by §40-2A-9(c). The Taxpayer initially raised this issue in a Motion to Dismiss filed

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<sup>2</sup> The use tax also applies to property purchased in Alabama and first used in the State. Such property is, however, exempt from Alabama use tax if Alabama sales tax is paid when the property is purchased in Alabama. Code of Ala. 1975, §40-23-62(1).

on March 8, 2008. The Administrative Law Division denied the motion by Preliminary Order dated March 11, 2008. The Taxpayer filed a Motion to Reconsider on March 20, 2008. The Administrative Law Division denied that motion by Preliminary Order dated April 15, 2008.

The Taxpayer's position on this issue is again rejected for the reasons explained in the March 11, 2008 and April 15, 2008 Preliminary Orders.

The Department is directed to recompute the Taxpayer's liability as indicated above. A Final Order will then be entered for the adjusted amount due.

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 25, 2008.

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BILL THOMPSON  
Chief Administrative Law Judge

bt:dr

cc: Duncan R. Crow, Esq.  
Blake A. Madison, Esq.  
Joe Cowen  
Mike Emfinger