PEARCE TRUCKING, INC. 5860 OLD MONTGOMERY HWY. TUSCALOOSA, AL 35407-0093,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 08-317
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed Pearce Trucking, Inc. ("Taxpayer") for State sales tax for January 1998 through April 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 12, 2008. Jim Sizemore represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

The Taxpayer conducted a short haul trucking business in Alabama during the period in issue. It primarily hauled pea gravel, dirt, sand, and other construction materials for its customers. As discussed below, it also sometimes provided the materials that it delivered to its customers. The issue is whether the Taxpayer was selling those materials at retail, and thus liable for sales tax on the gross proceeds derived from the sales.

The Taxpayer's business included two types of transactions during the subject period. The first type involved customers that had purchased materials directly from third party vendors. Those customers directed the Taxpayer to pick up the materials from the vendor and deliver them to a specified location. The Taxpayer picked up and delivered the materials as directed, and then charged the customer a delivery fee. The Department agrees that the above delivery services did not involve a sale by the Taxpayer, and thus were not subject to Alabama sales tax.

The second type of transaction involved customers that directed the Taxpayer to both provide the materials and also deliver them to a specified location. In those situations, the Taxpayer purchased the required materials from a third party vendor. It paid the vendor for the materials, including sales tax. It then delivered the materials to the designated location.

The Taxpayer billed its customers a lump-sum amount on the above furnish and deliver transactions. As discussed below, the Taxpayer also charged some of its customers sales tax on the lump-sum amounts. The Taxpayer was not a licensed retailer during the period in issue, and thus failed to remit the sales tax to the Department.

The Department audited the Taxpayer and determined that when the Taxpayer provided the materials that it delivered to its customers, it was reselling the materials at retail. It thus assessed the Taxpayer for sales tax on the lump-sum amounts it had charged its customers.

The Department excluded from the audit those materials, i.e., pollution control items, etc., used for an exempt purpose. It also allowed the Taxpayer a credit for the sales tax it had paid on the materials to the vendors. For example, if the Taxpayer purchased materials from a vendor for $100, plus $4 State tax, and then charged its customer $200 for the materials, including delivery, the Department assessed the Taxpayer for $8 ($200 x 4 percent) in State sales tax. It then allowed a $4 credit for the State sales tax the Taxpayer had paid to the vendor, for additional tax due of $4.

The Department audit also showed that the Taxpayer had charged its customers sales tax on 191 transactions during the audit period, and had collected approximately

$8,500 in State sales tax on those transactions. The Taxpayer retained that amount as additional profit. The Taxpayer concedes that it is liable for that amount pursuant to Code of Ala. 1975, §40-23-26(d), which requires that any amount purportedly collected as sales tax from a consumer must be remitted to the Department.

As indicated, the Department claims that when the Taxpayer contracted to both furnish and deliver materials to a customer, it was reselling the materials at retail, and thus liable for sales tax on the lump-sum amounts paid by the customers.

The Taxpayer argues that it did not sell the materials at retail. Rather, it contends that it is a contractor, and that under the sales tax "contractor" provision at Code of Ala. 1975, §40-23-1(a)(10), it correctly paid sales tax when it purchased the materials from its vendors. The contractor provision reads as follows – "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." The Taxpayer contends that the contractor provision applies because (1) it is a contractor, (2) the materials involved are building materials, and (3) the materials were attached to and became a part of realty. *State, Dept. of Revenue v. Montgomery Woodworks, Inc.*, 389 So.2d 510, 511 (Ala. Civ. App. 1989); see also, *Dept. of Revenue v. James A. Head & Co., Inc.*, 306 So.2d 5 (Ala. Civ. App. 1974). I disagree.

The Taxpayer correctly identifies a contractor as a "person who undertakes to supply labor and materials for specific improvements under a contract with an owner or principal." Taxpayer's Reply Brief at 3, quoting *Head*, 306 So.2d at 8. But the Taxpayer did not use or apply the materials to make specific improvements to real estate. Rather, it only delivered the materials to a jobsite or other location as specified by a customer. It did not spread or

otherwise use, handle, or apply the materials after the materials were delivered to the job site. Consequently, the Taxpayer was not a contractor within the purview of the "contractor" provision.

Likewise, while the materials in issue, i.e., sand, gravel, stone, etc., were building materials, see Reg. 810-6-1-.27(2), the Taxpayer did not apply or attach the materials so that they became part of the realty. The Taxpayer asserts that it "made improvements, additions, alterations or repairs to real property in such a way that the building materials became identified with the realty." Taxpayer's Reply Brief at 3. The evidence establishes otherwise.

The Taxpayer only delivered the materials to the location indicated by a customer. It dumped or offloaded the materials at the location, but did not thereafter spread, handle, or use the materials on the job site. The Taxpayer's owner testified as follows at the June 12 hearing:

> Q. Mr. Pearce, do you have spreading equipment at your business?
>
> A. No, sir.
>
> Q. So if you take a truckload of sand and you dump it at a customer's specified location, you don't have spreading equipment to even do any spreading, do you?
>
> A. No, sir
>
> Q. And what you really do, Mr. Pearce, is just go to wherever the customer tells you he wants the materials and you deposit the materials at that particular place. And once you deliver those materials, you're finished with them, aren't you?
> A. Yes, sir.

T. at 99 – 100.

Department Reg. 810-6-1-.150.05, which is entitled "Sand, Gravel, and other Building Materials, Sales of.," is directly on point. Paragraph (1) of the regulation specifies that a "seller is making taxable sales of such building materials as sand, gravel, earth, crushed stone, and asphalt which are merely dumped or deposited by him on a job site or in a storage area. In this case the measure of the tax is the total amount received by the supplier without any deduction for the expense of loading, dumping, or hauling or any other expense whatsoever." The above applies in this case because, contrary to the Taxpayer's claim, it only dumped or deposited the materials at the job site. It did not resell or use the materials in the form of real estate, as required for the §40-23-1(a)(10) contractor provision to apply.[1]

Alabama sales tax is levied on every person, corporation, etc., that is in the business of selling tangible personal property at retail. Code of Ala. 1975, §40-23-2(1). The Taxpayer in this case is in the hauling business, but it also sold at retail those materials that it furnished and delivered to its customers. Department Reg. 810-6-1-.150 defines a "sale" as "[e]ach transaction whereby property is transferred from one owner to another. . . ." The Taxpayer became the owner of the materials in issue when it purchased the materials from the third party vendors. It subsequently transferred ownership , i.e.,

[1] Paragraph (2) of the regulation provides that if the "materials are spread and placed by the purchaser under a contract to furnish and to apply the materials in such a way that they become a part of real property," the contractor provision applies and there is no sale by the contractor to the landowner. Paragraph (2) does not apply in this case because, as discussed, the Taxpayer did not apply the materials so that they became a part of the realty.

sold, the property to its customers. The Taxpayer was thus in the business of selling the materials at retail.

The Department also correctly computed the tax due based on the lump-sum amounts paid by the customers. A sale is not closed until title to the goods is transferred. Code of Ala. 1975, §40-23-1(a)(5). Title is transferred when the seller, the Taxpayer in this case, completes delivery to the purchaser. *Oxmoor Press, Inc. v. State*, 500 So.2d 1098 (Ala. Civ. App. 1986). The taxable measure is the gross receipts or proceeds accruing from the sale, without deduction for any labor or service costs incurred by the seller, including the cost of delivery before the sale is closed. Code of Ala. 1975, §40-23-1(a)(6). "Where the seller delivers tangible personal property in his own equipment. . ., the transportation charges shall be considered a part of the selling price subject to sales or use tax. Said transportation charges are taxable even if billed separately." Reg. 810-6-1-.178(1). The following statement from *State of Alabama v. Pinkston*, S. 94-294 (Admin. Law Div. 1/30/1995) is directly on point:

> Alabama sales tax is levied on the gross proceeds derived from the sale of tangible personal property. "Gross proceeds" is defined at Code of Ala. 1975, §40-23-1(a)(6) as "the value proceeding or accruing from the sale of tangible personal property . . . without any deduction on account of . . . labor or service cost . . . or any other expenses whatsoever, . . .". That is, any labor or service, including transportation or delivery, which is performed by the seller or the seller's agent prior to completion of the sale must be included in taxable gross proceeds. *East Brewton Materials v. Dept. of Revenue*, 233 So.2d 751, at 756; see also, Admin. Law Docket Nos. S. 84-172, S. 84-198, S. 86-131, and generally 2 ALR 4th 1124 (1985).

Pinkston at 2 – 3.

The Taxpayer also argues that the penalties assessed by the Department should be waived for cause. Code of Ala. 1975, §40-2A-11(h) provides that a penalty may be waived

for reasonable cause, which includes, but is not limited to, those instances in which a taxpayer has acted in good faith. The burden is on the taxpayer to establish or prove reasonable cause.

The Taxpayer contends that the failure to file and negligence penalties assessed by the Department should be waived because it believed in good faith that it was not making retail sales, and thus was not required to file sales tax returns. But that claim is belied by the fact that the Taxpayer actually collected sales tax from its customers on 191 furnish and deliver transactions during the audit period. And instead of remitting the approximately $8,500 in State sales tax it had collected to the Department, the Taxpayer kept the money and treated it as additional income. Under the circumstances, the Taxpayer has failed to establish reasonable cause to waive the penalties.

The modified final assessment is affirmed. Judgment is entered against the Taxpayer for $39,333.80. Additional interest is also due from March 18, 2008.

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

Entered September 29, 2008.

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BILL THOMPSON
Chief Administrative Law Judge

bt:dr
cc: J. Wade Hope, Esq.
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