

ALABAMA ROCK, LLC, AND ITS
MEMBERS, JERRY D. MILLS,
LAURA A. MILLS
3761 HIGHWAY 80 W
PHENIX CITY, AL 36870-6468,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§ STATE OF ALABAMA
DEPARTMENT OF REVENUE
§ ADMINISTRATIVE LAW DIVISION

§ DOCKET NO. S. 09-255

FINAL ORDER

The Revenue Department assessed Alabama Rock, LLC (“Taxpayer”), and its members, Jerry D. Mills and Laura A. Mills, for State sales tax for January 2005 through January 2008. 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 11, 2009. Jerry Mills represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

The Taxpayer is located in Phenix City, Alabama. It sells sand, gravel, and similar products at retail in Alabama and Georgia.

The Department audited the Taxpayer for sales tax for the period in issue. The Taxpayer’s invoices showed that the products sold by the Taxpayer were sometimes delivered to the customer by Bi-City Hauling. The Taxpayer charged the customers a delivery charge, but failed to collect sales tax on those charges. The Department consequently assessed it for sales tax on the delivery charges. This appeal followed.

The Taxpayer is a limited liability company, with Jerry Mills and his wife, Laura Mills, as the two members. Jerry Mills explained at the June 11 hearing that Bi-City Hauling is a partnership with two partners, Laura Mills and Robert Nelson. Mills testified, however, that

he actually runs the business. The company's website also refers to the business as Jerry Mills, d/b/a Bi-City Hauling. Mills also explained that he owns JNL Trucking, which has seven trucks that are leased to and used by Bi-City Hauling.

Mills testified that when the Taxpayer received an order from a customer, Bi-City Hauling would generally deliver the goods to the customer. As discussed, the Taxpayer would then charge the customer a delivery fee. Mills conceded at the June 11 hearing, however, that the Taxpayer was not billed by and never paid Bi-City Hauling for delivery during the period in issue. He testified as follows:

The Court: And you charge \$50 to the customer for delivery. Does Alabama Rock pay Bi-City Hauling \$50?

A. Well, that is one of the issues that they had with it. We had just formed that company and we wasn't, you know, I – I had all the money –

The Court: That company being what?

A. Bi-City Hauling. We had formed that company and we was not sitting there and paying Bi-City at the time for all of the deliveries. And I had put all the money up to start Bi-City from Alabama Rock and it's just – there wasn't a – now we do have but at that point in time we wasn't sitting there paying – wasn't billing Alabama Rock like we should have.

The Court: Alabama Rock would just make the deliveries and not receive anything?

A. That's correct.

The Court: I mean Bi-City Hauling?

A. That's correct. Technically it was all my money at the time, you know. We just started it. The partner wasn't – he was legally made a partner but he didn't put any money in and we were trying to get off the ground. And we just wasn't billing Alabama Rock.

Mills explained that he did not collect sales tax on the delivery charges because he understood that delivery by a common carrier was not taxable. He also stated that he “didn’t know that any delivery was supposed to be taxable. I thought it was a service and service wasn’t taxable.” T. at 25.

Before 1986, if goods sold by a retailer were delivered by common carrier, the sale was closed when the retailer delivered the goods to the common carrier. Consequently, the transportation occurred after the sale was closed, and the transportation charges were not subject to sales tax. *East Brewton Materials, Inc. v. State of Alabama*, 223 So.2d 751 (Ala. Civ. App. 1970).

In 1986, the Alabama Legislature amended the sales tax definition of “sale” at Code of Ala. 1975, §40-23-1(a)(5). That section, as amended, now provides that a common carrier is deemed to be the agent of the seller. Consequently, under current law, if goods are delivered by common carrier, the sale is not closed until the common carrier finishes delivery of the goods to the customer. The delivery charges are thus a part of the sale, and are subject to sales tax.¹

Section 40-23-1(a)(5) further provides, however, that transportation charges paid to a common carrier are not a part of the taxable selling price if billed as a separate item to and paid by the purchaser.

In this case, Bi-City Hauling was clearly acting as agent for the Taxpayer when it delivered the goods to the Taxpayer’s customers. Consequently, the delivery fees charged

¹ See also, Code of Ala. 1975, §40-23-60(10), which specifies that all services, “including transportation,” that are a part of the sale shall be included in the taxable sales price for use tax purposes.

by the Taxpayer constituted a part of the taxable gross proceeds derived from the Taxpayer's sales.

The exception in §40-23-1(a)(5) also does not apply because while the Taxpayer billed the transportation charges to its customers as a separate item, the Taxpayer did not pay Bi-City Hauling for hauling the goods. That is, even assuming for the sake of argument that Bi-City Hauling was acting as a common carrier when it delivered for the Taxpayer, the Taxpayer did not pay Bi-City for the deliveries, i.e., there was no payment to a common carrier.

The tax and interest as assessed by the Department is affirmed. The penalty is waived for reasonable cause under the circumstances. Code of Ala. 1975, §40-2A-11(h). Judgment is entered against the Taxpayer for \$4,866.36. Additional interest is also due from the date the final assessment was entered, January 23, 2009.

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

Entered September 11, 2009.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: J. Wade Hope, Esq.
Jerry Mills
Joe Cowen
Mike Emfinger