KELLY'S FOOD CONCEPTS OF ALABAMA, LLP 141 FELIX ROAD SELMA, AL 36701-6492,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 10-1131
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER ON TAXPAYER'S APPLICATION FOR REHEARING

This appeal involves final assessments of State and local sales tax entered against the above Taxpayer for August 2005 through July 2008. A Final Order affirming the final assessments was entered on January 5, 2012. The Taxpayer timely applied for a rehearing. A hearing was conducted on March 15, 2012. Jim Sizemore represented the Taxpayer. Assistant Counsel Keith Maddox represented the Department.

The Taxpayer is in the restaurant supply business, and sold paper napkins, plastic utensils, straws, and other items to various fast food restaurants during the period in issue. The restaurants subsequently offered or provided the items free-of-charge to their customers with the customers' food orders.

The issue in the case is whether the Taxpayer sold the items to its restaurant customers at retail, as argued by the Department, or at wholesale for resale, as contended by the Taxpayer. That issue turns on whether the restaurant customers resold the items to their customers at retail. The January 5, 2012 Final Order held that the restaurants were not reselling the items at retail to their customers, and consequently that the Taxpayer's sales to the restaurants were taxable retail sales, because there was no evidence that the restaurants had factored their cost of the items into the prices they charged their customers

for the food, citing *Alabama Department of Revenue v. Logan's Roadhouse, Inc.*, 85 So.3d 403, 2011 WL 1820107 (Ala. Civ. App. May 31, 2011.

Logan's operates restaurants in Alabama at which it sells menu items for a specific price. It also offers peanuts to its customers without extra charge. The Court of Civil Appeals held in *Logan's Roadhouse* that Logan's was reselling the peanuts at retail to its customers, and consequently, that it had properly purchased the peanuts at wholesale. The critical fact relied on by the Court was that Logan's presented evidence, i.e., a "menu mix" document, showing that it factored its cost of the peanuts into the prices it charged for its menu items.

> [The menu mix] graphically shows that the cost of peanuts is included in the cost of a meal. The evidence shows that [the taxpayer] allocates $.09 to each meal for peanuts.

Logan's Roadhouse, 85 So.3d 403 at 406.

> To treat the taxpayer, a restaurant operator, as liable for use tax based upon its purchase of peanuts in bulk . . ., would disregard the evidence presented at trial indicating that the taxpayer charges its customers for the peanuts.

Logan's Roadhouse, 85 So.3d 403 at 407.

> The trial court's determination in this case that the taxpayer included the cost of peanuts . . . in the prices of the meals sold in its restaurants is supported by substantial evidence, and its legal conclusion that the peanuts were sold at retail to those customers is, therefore, not in error.

Logan's Roadhouse, 85 So.3d 403 at 407.

I respectfully disagree with the holding in *Logan's Roadhouse* for the reasons explained in the January 5, 2012 Final Order, note 1. But *Logan's Roadhouse* is currently the law in the land, and must control.

Unlike in *Logan's Roadhouse*, there is no evidence in this case that the Taxpayer's restaurant customers factored their cost of the items in issue into their food prices. Consequently, as stated in the January 5, 2012 Final Order at 5, "there is no evidence that the restaurants resold the napkins, plastic utensils, etc. 'for a price,' as required for a sale to occur. See, Code of Ala. 1975, §7-2-106, which defines 'sale' as 'the passing of title from the seller to the buyer for a price.'"[1]

The Taxpayer's Brief on Rehearing at 4, contends that the January 5, 2012 Final Order goes beyond *Logan's Roadhouse* because it "establishes a requirement in addition to the requirement of a subsequent resale of the property. . . ."

> The decision in this case establishes a requirement in addition to the requirement of a subsequent resale of the property in order for a bulk sale to qualify as a wholesale sale. The *Logan's Roadhouse* case, however, established that "all that is required for purposes of classifying a bulk sale to a retailer . . . as a nontaxable 'wholesale sale' is that a subsequent 'resale' of tangible personal property occur. . . ." *Alabama Dep't of Revenue v. Logan's Roadhouse, Inc.*, ___ So.3d ___, 2011 WL 1820107 at *3. Despite the statement of "all that is required" from the appellate court, this Court's decision establishes another requirement, one not stated in the statute or by the appellate court. A transfer of title from retailer to consumer is required, not a calculation of the incremental cost of tableware and cutlery included in the retailer consumer's cost.

I agree that "all that is required" for a sale of tangible personal property to be at wholesale is for the purchaser to subsequently resell the property at retail. But *Logan's Roadhouse* requires that for a subsequent resale to occur, there must be evidence that the

[1] Section 7-2-106 is in the Uniform Commercial Code, but Alabama's appellate courts have often cited provisions in the UCC's "Sales" chapter, Code of Ala. 1975, §7-2-101, et seq., in deciding issues involving sales tax. See, *Oxmoor Press, Inc. v. State of Alabama*, 500 So.2d 1098, 1101 (Ala. Civ. App. 1986); *State v. Delta Air Lines, Inc.*, 356 So.2d 1205, 1207 (Ala. Civ. App. 1978). The Taxpayer also cites §7-2-106 as controlling authority in its Post-Hearing Brief at 4.

"reseller," i.e., Logan's restaurants in *Logan's Roadhouse* and the Taxpayer's restaurant customers in this case, factored the cost of the items being transferred into the retail prices they charge their customers. Only then is there a subsequent retail sale of the item.

A simple transfer of title is not sufficient to establish a retail sale, as suggested by the Taxpayer. A true gift of tangible personal property from one person to another involves a transfer of title, but clearly is not a retail sale. Rather, for a retail sale to occur, the transfer of title must be "for a price." Section 7-2-106. The Court in *Logan's Roadhouse* found that Logan's was selling the peanuts for a price because Logan's factored the cost of the peanuts into its menu prices. There is no corresponding evidence in this case establishing that the Taxpayer's customers factored their cost of the paper napkins, plastic utensils, etc. into their food prices. Consequently, I cannot find that the Taxpayer sold the items tax-free at wholesale for subsequent retail sale.

The Taxpayer argues that its restaurant customers will not provide the information needed to prove that they factored their cost of the disputed items into their food costs because the information is proprietary and confidential. I understand the Taxpayer's dilemma, but I respectfully submit that the problem only illustrates the flaw in the *Logan's Roadhouse* rationale. That is, whether a transfer of tangible personal property also involves a retail sale of the property should not turn on whether the cost of the property is factored into the price charged by the transferor for other property being sold at retail. As discussed in the January 5, 2012 Final Order at note 1, Logan's surely factors its cost of the soap, tissue, and other bathroom supplies (and all other costs, plus a profit) into its food prices, but it clearly is not selling those items to its customers.

Alabama law burdens a seller with knowing the general nature of a customer's business, and thus knowing if its sales to the customer are wholesale sales for resale. For example, an automobile dealership should not sell a car to a restaurant customer sales tax free simply because the restaurant has a sales tax license. See generally, *Merriweather v. State*, 42 So.2d 465 (Ala. 1949); Department Reg. 810-6-1-.184.

In this case, the Taxpayer should have known that its restaurant customers would use and consume, and not resell, the kitchen cleaning supplies, paper towels, etc., that it sold to the customers, and thus should have collected sales tax from the restaurants on those retail sales. The Taxpayer now concedes that point. But concerning the plastic utensils, napkins, and the other disputed items in issue, reasonable people can, and do, disagree as to whether fast food restaurants give the items to their customers as an amenity or a courtesy, or sell them to the customers with the food.

I believe the better reasoned view is that restaurants give away the items as an amenity or courtesy. As stated in *Celestial Food of Massapequa Corp. v. New York State Tax Comm.*, 473 N.E.2d 737 (1984) – "Whereas a cup of coffee cannot be purchased without a container, the same cannot be said of napkins, stirrers and utensils, which are more akin to items of overhead, enhancing the comfort of restaurant patrons consuming the food." *Celestial Food*, 473 N.E.2d 737, 738; *Kelly's Food Concepts v. State of Alabama*, Docket S. 10-1131 (Admin. Law Div. 1/5/2012) at 3, 4. But given the unsettled nature of the issue, and the fact that Alabama's courts have never addressed the issue, a reasonable solution would be for a court with equitable authority to hold that a restaurant purchases the disputed items in issue at retail, not for resale, but that the "new" rule of law should be applied prospectively only. The Administrative Law Division does not have such authority,

but such action by the appellate courts is not unprecedented – "We agree that the law with regard to the withdrawal provision is unclear, and we now attempt to clarify the purpose of the 1986 amendment. Because of the confusion of the law in this area, we do so, however, without penalizing the taxpayer in this instance. Therefore, the interpretation of the law in this case is prospective only, and the taxpayer in this case is entitled to its refund from the Department of Revenue." *Ex parte Sizemore*, 605 So.2d 1221, 1227 (1992).

The Taxpayer's application for rehearing is denied. The January 5, 2012 Final Order is affirmed.

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

Entered June 14, 2012.

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BILL THOMPSON
Chief Administrative Law Judge

bt:dr
cc: Keith Maddox, Esq.
James M. Sizemore, Jr., Esq.
Joe Walls
Mike Emfinger