RHYNO USA, INC. 177 Elvira Road Helena, AL 35080,	'	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	'	DOCKET NO. U. 00-675
v.	'	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	'	

FINAL ORDER

The Revenue Department assessed Rhyno USA, Inc. (ARhyno@) for use tax for November 1995 through March 1999. Rhyno appealed to the Administrative Law Division pursuant to Code of Ala. 1975, '40-2A-7(b)(5)a. A hearing was conducted on March 14, 2001. Fred Wood and Steve Pearson represented Rhyno. Assistant Counsel Wade Hope represented the Department.

ISSUES

The issue in this case is whether Rhyno is liable for Alabama use tax on large trucks, bulldozers, and other heavy equipment purchased outside of Alabama and held by Rhyno for resale in Alabama during the assessment period.

FACTS

Terry Habshey (AHabshey@) owns and operates Oxy Tires in Hoover, Alabama. Oxy Tires sells tires at retail worldwide.

While on a business trip to Russia in the mid-1990's, Habshey became interested in large trucks, bulldozers, and other large machinery being manufactured in Russia. He thought the machinery would be ideal for coal mining and related uses, and decided to attempt to sell the machinery in the U.S. market.

Habshey formed Habshey Equipment Company, Inc. in 1995 for the purpose of selling the machines to U.S. customers. The corporation later changed its name to Rhyno USA, Inc. The corporation initially tried to pre-sell the equipment through brochures. It soon became clear that potential customers wanted to see the equipment before buying it. Consequently, Rhyno purchased several of the machines from the foreign manufacturer in November 1995 and May, June, and July 1997.

Rhyno marketed the machines to coal mine operators and other heavy equipment users. It failed to sell any of the equipment, however, because potential buyers refused to buy the equipment without first seeing it demonstrated. Consequently, Habshey purchased a small tract of land in Alabama on which he intended to mine coal using the Russian-built equipment. Habshey testified that the only reason he purchased the land was to demonstrate the machines for potential customers. Unfortunately, while being demonstrated, the machines constantly broke down, parts were hard to obtain, and the machines were otherwise unfit for mining or other purposes. Rhyno failed to sell any of the machines, and subsequently abandoned the machines as junk.

Rhyno did not have an Alabama sales tax license when it purchased the machines from the Russian manufacturer. Habshey testified that Rhyno failed to initially obtain a sales tax license through an administrative oversight. The corporation obtained an Alabama sales tax license from the Department in November 1997.

The Department audited Rhyno and assessed the corporation for use tax on its cost of the machines. Rhyno appealed.

ANALYSIS

The Alabama use tax is on the storage, use, or other consumption in Alabama of tangible personal property previously purchased at retail. Code of Ala. 1975, '40-23-61(a). The use tax is complementary to the sales tax, and like the sales tax, does not apply to property purchased at wholesale. *State v. Tri State Pharmaceutical*, 371 So.2d 910, 913 (Ala.Civ.App. 1979). The first question is whether Rhyno purchased the machines in issue at wholesale. If so, the use tax does not apply.

AWholesale sale@ is defined for use tax purposes to include the Asale of tangible personal property by wholesalers to licensed retail merchants, jobbers, dealers, or other wholesalers for resale. . .@ Section 40-23-60(4)(a). That use tax definition is identical to the sales tax definition at Code of Ala. 1975, '40-23-1(a)(9)a.

In common parlance, a wholesale sale is understood to be a sale for resale. For sales and use tax purposes, however, the definition of Awholesale sale@ requires that the sale for resale must be to a licensed retail merchant. Sales to an unlicensed retail merchant, even if for resale, do not qualify as wholesale sales for sales and use tax purposes. *State v. Advertiser Co.*, 337 So.2d 942 (Ala.Civ.App. 1976).[1]

[1]The *Advertiser* case involved the sales tax definition of Awholesale sale@. As indicated, however, the definition of Awholesale sale@ is identical for sales and use tax purposes.

In this case, Rhyno purchased the machines intending to resell them at a profit. Unfortunately, Rhyno failed to obtain a sales tax license before purchasing the machines. Consequently, the purchases were not at wholesale, and thus, by statute, were at retail. (ARetail sale@ defined as A[a]ll sales of tangible personal property except those above defined as wholesale sales.@ See, Code of Ala. 1975, ''40-23-1(a)(10) (sales tax) and 40-23-60(5) (use tax)).

The next question is whether the equipment was stored, used, or otherwise consumed by Rhyno in Alabama within the scope of the Alabama use tax statute, '40-23-61(a). In answering that question, the applicable rule of statutory construction is that the scope of a levying statute must be strictly construed against the Department and for the taxpayer. *Alabama Farm Bureau Mutual Consolidated Insurance Co. v. City of Hartselle*, 460 So.2d 1219 (1984).

AStorage@ is defined for use tax purposes as A[a]ny keeping or retention in this state for any purpose except sale in the regular course of business. . .@ Code of Ala. 1975, '40-23-60(7). Although unlicensed when the machines were purchased, it is undisputed that Rhyno held the machines for sale in the regular course of business. Consequently, Rhyno did not store the machines in Alabama for purposes of the use tax.

AConsumption@ is not defined in the use tax law. By any definition of the term, however, Rhyno did not consume the machines in issue.

AUse@ is defined for use tax purposes as the Aexercise of any right or power over tangible personal property incident to the ownership of that property, . . . except that it shall not include the sale of that property in the regular course of business.@ Code of Ala. 1975, '40-23-

60(8). The clear intent of the above definition is that use tax should not apply to property being held for sale in the regular course of business. Rhyno thus also was not using the machines within the scope of the use tax.

Rhyno actually operated the machines in Alabama, but only as demonstrators for the purpose of selling them at retail. The Alabama Supreme Court has held that the use of in-stock automobiles as demonstrators by an automobile retailer was not a taxable use for purposes of the sales tax Awithdrawal for use@ provision, Code of Ala. 1975, '40-23-1(a)(10). *Drennen Motor Co. v. State*, 185 So.2d 405 (Ala. 1966). Likewise, the withdrawal and use of the machines by Rhyno for the sole purpose of demonstrating them for prospective customers was not a taxable use for use tax purposes. The machines were still being held for sale in the regular course of business.

This holding is not inconsistent with the *Advertiser* case. In *Advertiser*, there was a taxable retail sale of the newspapers.[2] The issue was which party, the *Advertiser* or its news carriers, was responsible for paying over the tax to the Department. The Court noted that although the news carriers sold the papers to the ultimate consumers, they were not licensed to collect and remit the tax to the Department. The Court thus held that the burden fell on the

[2]Technically, the *Advertiser* case involved a municipal business license tax. However, the tax paralleled the State sales tax, and adopted by reference all definitions, provisions, etc. applicable to the State sales tax.

last licensed seller, the *Advertiser*, to remit the tax.[3]

In this case, however, there was no taxable use of the property in Alabama. Consequently, there is no use tax due that is required to be paid to the Department.

The practical result of this ruling is that neither sales tax nor use tax will be paid on the machines. But that regularly occurs when a retailer purchases goods, but fails to sell the goods at retail. Rhyno obtained a sales tax license in November 1997, shortly after it purchased the last of the machines in issue. Presumably, if Rhyno had sold any of the machines, which it wholeheartedly attempted to do, it would have remitted the applicable sales tax to the Department.

The final assessment in issue is dismissed.

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

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[3]Retail sales by an unlicensed seller in Alabama are still subject to Alabama sales tax. Code of Ala. 1975, '40-23-2(1). The *Advertiser* case only holds that in such cases, the Department may also collect the tax from the licensed retailer that sold the property in Alabama to the unlicensed vendor.

Entered August 8, 2001.