

THOMPSON CARRIERS, INC.
1700 OLD COLUMBUS ROAD
OPELIKA, AL 36804,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 10-712

FINAL ORDER

The Revenue Department assessed Thompson Carriers, Inc. ("Taxpayer") for State sales tax for February 2001 through August 2007. 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 March 15, 2011. Paul Turner represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

The Taxpayer operated a truck hauling business based in Opelika, Alabama during the period in issue. It generally hauled rock, stone, sand, storm debris, etc., in dump trucks for its customers. It occasionally purchased the materials that it hauled from third party quarries, or obtained the materials from other vendors or from its own quarry. It also maintained an inventory of sand that it sold to customers. The Taxpayer did not have an Alabama sales tax number during the period in issue. It consequently did not file sales tax returns or collect and remit sales tax to the Department during the period.

A Department examiner audited the Taxpayer for sales tax and determined that the Taxpayer was making taxable retail sales. The examiner determined that the Taxpayer was providing a non-taxable service when it hauled materials owned by a customer or provided hourly rate hauling services for a customer. The examiner also concluded, and the Taxpayer agrees, that the Taxpayer owes sales tax on materials hauled by the

Taxpayer to its customers that were either obtained by the Taxpayer from its own quarry or were previously purchased by the Taxpayer from a third party vendor, i.e., sand, etc.

The dispute involves those transactions where a customer ordered materials from the Taxpayer, the Taxpayer purchased and picked up the materials at a third party quarry, and then delivered the materials to a site determined by the customer.

For safety and other reasons, the quarries that the Taxpayer did business with during the audit period only allowed established haulers such as the Taxpayer to pick up materials at the quarries. The quarries also sold materials only to established haulers or large construction companies that had a charge account with the quarries.

The Taxpayer's owner testified at the March 15 hearing that in many instances during the audit period, a large construction company with an account with a rock quarry directed the Taxpayer to pick up materials at the quarry and deliver them to a designated location. In those cases, the quarry charged the construction company's account for the materials. The Taxpayer picked up and delivered the materials as directed, and then separately invoiced the company for its hauling services. The Department concedes that the Taxpayer's charges from those hauling services were not subject to sales tax.

The owner explained further that in some instances, an individual or small business ("small customer") that did not have access to or an account with a quarry directed the Taxpayer to deliver materials to a designated location. The Taxpayer subsequently purchased the needed materials from a quarry and delivered them to the customer. The quarry billed the Taxpayer's account for the materials, plus sales tax, which the Taxpayer paid. The Taxpayer in turn invoiced the customer for a lump-sum amount, which included the Taxpayer's cost of the materials, including sales tax, and a hauling fee.

The Taxpayer argues that it is not in the business of selling materials at retail. It claims that when a small customer directed it to obtain and haul materials to a location designated by the customer, it was acting as the customer's agent when it purchased the required materials from the quarry. Finally, it contends that taxing it on its hauling charges when it picked up and delivered materials for its small customers, and not assessing the hauling charges when it picked up and delivered materials for its large customers, results in inconsistent taxation of substantially identical transactions.

The Department contends that the Taxpayer purchased the materials from the quarries and then resold them to the small customers. The Department thus asserts that the Taxpayer sold the materials to its customers at retail, and is thus liable for sales tax on the entire gross proceeds charged to the small customers, including the delivery or hauling charges included in the Taxpayer's lump-sum charge. The Department also allowed the Taxpayer a credit for the sales tax it paid on the materials to the quarries.

The Taxpayer is primarily in the hauling business, but it is also in the business of selling materials at retail. The Taxpayer is clearly making retail sales when it sells materials obtained from its own quarry. It also maintains an inventory of sand, and perhaps other materials, that it obtains from third party vendors and then resells at retail to its customers.

Concerning the disputed transactions where the Taxpayer purchased the materials at a quarry and then delivered them to its small customers, the decision in *Pearce Trucking, Inc. v. State of Alabama*, Docket S. 08-317 (Admin. Law Div. 9/29/2008) is directly on point. The Final Order in *Pearce Trucking* reads in pertinent part as follows:

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.

Pearce Trucking at 2 – 3.

The Administrative Law Division held that when Pearce Trucking purchased the materials from a third party vendor and then delivered them to the customer, it was reselling the materials to the customer at retail.

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., 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.

Pearce Trucking at 5 – 6.

The facts in *Pearce Trucking* are in substance identical to the facts in this case. The Taxpayer in this case purchased the materials in issue from the quarries and then resold the materials at retail to its small customers. The Taxpayer is thus liable for sales tax on the lump-sum price it charged its small customers for the materials. See also, Dept. Reg. 810-6-1-.150.05 (“The 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 expenses of loading, dumping, or hauling or any other expense whatsoever.”)

There is also no evidence the Taxpayer purchased the materials from the quarries

as agent for its small customers. In some instances a small customer would first attempt to directly purchase the needed materials from a quarry. In those cases, the quarry directed the customer to contact the Taxpayer (or another hauling company). But the above facts do not establish an agency relationship between the Taxpayer and the small customers. Rather, the evidence shows that the Taxpayer purchased the materials from the quarries in its own name, and paid for the materials with its own money.

The transactions involving the Taxpayer's large customers and those involving its small customers also are not substantively identical transactions, as argued by the Taxpayer. The Taxpayer's large customers directly purchased the materials from the quarry, and the Taxpayer only provided hauling services. Concerning the small customers, as discussed, the Taxpayer purchased the materials from the quarries and then resold the materials to the customers. The form of the transactions, and thus the tax consequences, are different.

I sympathize with the Taxpayer because it is primarily involved in hauling materials for its customers, although it does sell at retail materials obtained from its own quarry or from other vendors, presumably at a profit. The Taxpayer's owner also believed in good faith that she was only performing non-taxable hauling services when she obtained and delivered the quarry materials to her small customers. But the Taxpayer is bound by the tax consequences of the transactions in issue, which included the retail sale of materials to the small customers. I have attempted to find a legal reason why the Taxpayer would not be liable for the tax in issue. Unfortunately, I am unable to do so.

The tax and interest assessed by the Department is affirmed. The penalty in issue is

waived for reasonable cause under the circumstances. Judgment is entered against the Taxpayer for tax and interest of \$214,563.34. Additional interest is also due from the date the final assessment was entered, July 23, 2010.

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

Entered July 12, 2011.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: Glenmore P. Powers, II, Esq.
Paul T. Turner, Jr., Esq.
Dan Bass
Mike Emfinger