

FOUNDATION FOR MORAL LAW, INC. §
ONE DEXTER AVENUE
MONTGOMERY, AL 36104, §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer, §

DOCKET NO. S. 10-860

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

FINAL ORDER

The Foundation for Moral Law, Inc. (“Foundation”) and McQuick Printing Company (“McQuick”) jointly petitioned the Revenue Department for a refund of sales tax for October 2004 through August 2008. The Department denied the refund. The Foundation appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(c)(5)a.¹ A hearing was conducted on February 15, 2011. Benjamin DuPre’ represented the Foundation. Assistant Counsel Wade Hope represented the Department.

The Foundation is a §501(c)(3) nonprofit organization located in Montgomery, Alabama. It specializes in First Amendment issues relating to freedom of religion. The Foundation periodically solicited donations during the period in issue by mass mailing letters and other documents to existing and prospective donors.

The Foundation verbally contracted for a Montgomery business, Graphics & Mailing Services, Inc. (“Graphics & Mailing”) to perform the various mailing services needed to complete the mass mailings. Those parties also agreed that because Graphics & Mailing could not print the number of copies needed for each mail out, another Montgomery business, McQuick, would actually print the needed copies.

¹ The Administrative Law Division incorrectly docketed the appeal in the name of McQuick. This Final Order correctly identifies the Foundation as the Taxpayer/Appellant in the case.

In a typical mass mailing during the subject period, the Foundation provided Graphics & Mailing with a mailing list and the document to be mailed out. Graphics & Mailing removed the duplicate addresses from the list and determined the number of copies needed. It then forwarded the document to McQuick for printing. McQuick prepared a proof of the document and submitted it to the Foundation for approval. McQuick also submitted a "Quotation" document to the Foundation requiring the Foundation to verify the number of copies to be printed and the cost. That document also stated that "No job will be initiated without a SIGNED QUOTE and quantity verification in WRITING."²

If the Foundation was satisfied with the proof, it approved and returned the proof, and presumably also the quote document, to McQuick in due course. McQuick then printed the required copies and envelopes and delivered them as directed to Graphics & Mailing. Graphics & Mailing "stuffed" and addressed the envelopes and delivered them to the U.S. Postal Service for delivery. According to the Foundation, approximately 90 percent of the envelopes were mailed to out-of-state addresses.

After delivering the printed materials to Graphics & Mailing, McQuick invoiced the Foundation for the materials. Before early 2007, McQuick did not charge the Foundation the 4 percent Alabama sales tax on the printed materials because it erroneously understood that the Foundation, as a §501(c)(3) entity, was exempt from Alabama sales tax.

The Department audited McQuick in early 2007 and notified McQuick that its sales to

² The Foundation's executive director testified at the February 15 hearing that he did not remember ever signing or reviewing a quote document from McQuick. The Department submitted examples of the quote document attached to a sample invoice from McQuick to the Foundation. See, Dept. Ex. 2.

the Foundation were not exempt. McQuick notified the Foundation of the back sales tax due. The Foundation remitted the amount due to McQuick, which remitted it to the Department. McQuick thereafter included sales tax on the invoices it issued to the Foundation for the printed materials, and the Foundation remitted the tax to McQuick when it paid the invoices.

Graphics & Mailing later suggested to the Foundation's executive director that the Foundation may not owe sales tax on the printed materials mailed to out-of-state recipients based on Department Reg. 810-6-1-.52. The Foundation and McQuick thereafter filed the joint refund petition in issue relating to the sales tax paid on the printed materials mailed outside of Alabama. The Department denied the petition, and this appeal followed.

As indicated, the Taxpayer relies on Reg. 810-6-1-.52 – “Direct Mail Advertising, Printer's Liability” – in support of its position.

Reg. 810-6-1-.52 was first promulgated in 1978 as Rule P18-033. At the time, Code of Ala. 1975, §40-23-1(a)(5) broadly defined “sale or sales” for sales tax purposes as “every closed transaction constituting a sale.” That statute did not, however, specify when a “transaction,” i.e., a sale, was closed. Rather, the Alabama statutes that controlled when a sale was closed for sales tax purposes were found in the Uniform Commercial Code, Title 7, Code 1975; and specifically, Code of Ala. 1975, §§7-2-106 and 7-2-401(2). Section 7-2-106 provided that a sale occurred with the passing of title from the seller to the buyer. Section 7-2-401(2) specified that title passed, unless otherwise agreed, when the seller completed his performance with respect to physical delivery of the goods. See generally, *State v. Delta Air Lines, Inc.*, 356 So.2d 1205 (Ala. Civ. App. 1978).

Paragraph 2 of Rule P18-033, as promulgated in 1978, provided as follows:

Printer is located in Alabama and his customer is located in Alabama. The mailing list contains names of people living in Alabama and people living out of state. The printer places all of the printed matter in the U. S. Post Office within this state. Since the placing of this printed matter in the United States mail is tantamount to delivery to the customer, Alabama sales tax would be due on the total sales even though some of these were addressed to people living out of state.

The above rule complied with 1978 Alabama law because, as discussed, Alabama law provided at the time that a sale was closed when and where the seller completed his performance with respect to physical delivery of the goods. Sales of printed materials by Alabama printers that also mailed the materials were thus closed when the printers delivered the materials to the U.S. Post Office in Alabama, and Alabama sales tax was due at that point, even if some of the materials were mailed outside of the State.

In 1986, the Alabama Legislature amended the §40-23-1(a)(5) definition of “sale or sales” by Act 86-532, effective April 30, 1986. The amendment retained the language in the first sentence that a sale included “every closed transaction constituting a sale.” It also added the following pertinent language:

Provided, however, a transaction shall not be closed or a sale completed until the time and place when and where title is transferred by the seller or seller’s agent to the purchaser or purchaser’s agent, and for the purpose of determining transfer of title, a common carrier or the U.S. Postal Service shall be deemed to be the agent of the seller regardless of any F.O.B. point and regardless of who selects the method by which freight, postage, or other transportation charge is paid.

By making the Postal Service the agent of the seller, the 1986 amendment thus changed the point of sale concerning materials printed and mailed by an Alabama printer from where the printer delivered the materials to the Post Office in Alabama (pre-amendment), to where the Post Office, as the printer’s agent, delivered the materials to the addressee (post-amendment). Consequently, if the addressee was located outside of

Alabama, the sale was closed outside of Alabama and Alabama sales tax would not be due.

The Department amended P18-033 (then Reg. 810-6-1-.52) in 1987 to conform to the 1986 amendment to §40-23-1(a)(5). The amended regulation provided in pertinent part:

(2) Effective April 30, 1986, Alabama sales or use tax is due as follows on sales of printed matter by printers who are required as part of the sales agreement to mail the printed matter to people whose names appear on a list furnished to the printer by the customer.

(b) The printer is located within Alabama. The mailing list contains names of people located within Alabama and people located outside Alabama. Sales tax is due on the printed matter addressed to people within Alabama. Sales tax is not due on the printed matter addressed to people outside Alabama since these sales qualify for exemption as sales in interstate commerce.

The above correctly applies the 1986 amendment to §40-23-1(a)(5). That is, if the printer mails the printed materials to an addressee in Alabama, the sale is closed in Alabama and Alabama sales tax is due; but if the addressee is out-of-state, the sale is closed when the Postal Service, as the printer's agent, delivers the materials outside of Alabama, and Alabama sales tax is not due.³ The regulation has in substance remained unchanged since 1987.

Reg. 810-6-1-.52 does not apply in this case because by its language it only applies

³ Paragraph (2)(b) of the regulation states that if the printed matter is addressed to people outside of Alabama, no Alabama sales tax is due "since those sales qualify for exemption as sales in interstate commerce." That statement is technically incorrect. Such sales are not exempt from Alabama sales tax. Rather, because the sales are closed outside of Alabama, they are not subject to Alabama sales tax to begin with. The result is, however, the same. No Alabama tax is due.

when a printer is contractually required to both print and also mail the printed materials pursuant to a mailing list provided by the printer's customer. In this case, the printer/seller, McQuick, was not required to and did not also mail the printed materials for its customer, the Foundation. Rather, that service was provided by a separate entity, Graphics & Mailing. The sales of the printed documents were closed in Alabama when the seller, McQuick, delivered the materials as directed to Graphics & Mailing in Alabama. Alabama sales tax was thus due on those closed sales in Alabama, and it is irrelevant that some of the materials were subsequently mailed outside of the State.

The Foundation argues that it "had a 'sales agreement' with only Graphics & Mailing, not McQuick, . . ." It thus asserts that McQuick was "an effective subcontractor for Graphics & Mailing." Foundation's Brief at 3. I disagree.

Substance must govern in tax matters. *Brundidge Milling Co. v. State*, 228 So.2d 475 (1969). In substance, McQuick was selling the printed materials to the Foundation, not Graphics & Mailing. This is confirmed by the fact that McQuick submitted a proof of the document to be copied to the Foundation for approval; the Foundation approved the proof and verified or accepted the quantity to be printed and the price to be charged by McQuick; and importantly, McQuick billed the Foundation and the Foundation paid McQuick for the materials.

As discussed, §40-23-1(a)(5) generally provides that a sale is closed when and where the seller completes delivery of the goods being sold. As indicated, the sales of the printed materials by McQuick to the Foundation were closed in Alabama when McQuick delivered the printed materials as directed to Graphics & Mailing in Alabama. It is not required that for a sale to be closed, the seller must deliver the goods directly to the buyer.

Rather, a sale is closed when the seller completes its performance with respect to delivery as agreed to or directed by the buyer.⁴ The Foundation was thus liable for Alabama sales tax on the materials delivered by McQuick to the designated recipient, Graphics & Mailing, in Alabama.

The Foundation apparently does not dispute that it purchased the printed materials from McQuick because it concedes that it owed the sales tax on the materials mailed to Alabama addresses. Rather, it argues that taxing the materials mailed to the out-of-state addresses would violate the Commerce Clause of the U.S. Constitution, Art. I, §8, cl. 3. I again disagree.

Taxing the printed materials that were ultimately delivered outside of Alabama did not constitute an unconstitutional tax on interstate commerce. The Alabama sales tax attached when the seller, McQuick, delivered the materials in Alabama. The discrete taxable event occurred in Alabama, and it is irrelevant that Graphics & Mailing subsequently mailed some of the materials to locations outside of Alabama. *Ex parte Fleming Foods, Inc.*, 648 So.2d 577 (Ala. 1994); *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 115 S. Ct. 1331 (1995).

When examining the taxation of a sale of goods, however, the sale is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale . . . Thus, taxation of sales has been consistently approved without any division of the tax base among different States and has been found properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future. Therefore, an internally consistent, conventional sales tax has long been held to be externally consistent as well (and thus not afoul of the Commerce Clause).

⁴ This is confirmed by the transactions addressed in Reg. 810-6-1-.52. The printer is the seller in those transactions, and the printer's customer is the buyer, even though the seller delivers the materials via the mail directly to the third party addressees, not the customer.

Jefferson Lines, 115 S. Ct. at 1333.

Even if it was determined that McQuick was selling the materials to Graphics & Mailing, which was not the case, McQuick would still owe Alabama sales tax on the sales because, as indicated, the sales were closed when McQuick delivered the materials to Graphics & Mailing in Alabama. McQuick, as the retailer required to remit the tax to the Department, thus properly paid the sales tax due on those sales, and no refund is due. If McQuick incorrectly collected the tax from the Foundation, which again was not the case, the Foundation's dispute would be with McQuick and/or Graphics & Mailing, not with the Department.

The Department's denial of the joint petition for refund in issue is affirmed.

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

Entered June 15, 2011.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

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