STATE OF ALABAMA,	§	STATE OF ALABAMA
V.	§	DEPARTMENT OF REVENUE
ON THE WAY PACKAGE STORE, a Partnership composed of LOUIS E. WOOD, JR., WILLIAM J. WOOD and JAMES H. WOOD; and LOUIS E. WOOD, JR., Individually, WILLIAM J. WOOD, Individually, and JAMES H. WOOD, Individually 2408 Carson Road, Suite C Birmingham, AL 35215, Taxpayer.	§	ADMINISTRATIVE LAW DIVISION
	§	DOCKET NO. S.85-106
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ORDER

This case involves a preliminary assessment of sales tax entered by the Department against the Taxpayer on December 14, 1984 concerning the period January 1, 1983 through September 30, 1984. A hearing was conducted by the Administrative Law Division on may 14, 1985. The parties were represented at said hearing by attorneys Bruce Burttram and Mark Griffin, for the Taxpayer and the Revenue Department, respectfully. Based on the evidence submitted at the hearing, and in consideration of the arguments and authorities presented by both parties, the following findings of fact and conclusions of law are hereby made and entered.

FINDINGS OF FACT

The facts are not in dispute. The Taxpayer operates a package store in Birmingham at which liquor and other items are sold at retail. Only the liquor sales are presently relevant. The Department audited the Taxpayer's records and determined that in calculating its taxable gross proceeds, the Taxpayer had improperly

deducted a three percent City of Birmingham tax and a five percent Jefferson County tax. Both of said local taxes are privilege license taxes measured by a percentage of gross receipts derived from the sale of liquor, and are levied against a retailer for the privilege of selling liquor.

The testimony of Mr. Louis Wood, a partner in the business, indicates the following pricing structure employed by the Taxpayer during the period in question. To begin, the wholesale cost of the liquor was determined. A varying percentage of the wholesale cost was then added to cover profit, operating expenses and other overhead, including a set annual liquor license fee paid to the City of Birmingham. The Taxpayer then added a total of eight percent to compensate for the three percent city tax and the five percent county tax. The total of the above constituted the retail price charged by the Taxpayer for its product.

When the Taxpayer sold the liquor to its customers, sales tax was collected on the entire retail price, including the eight percent figure included In the retail price as compensation for the local taxes. However, in calculating the amount to be remitted to the Department, the Taxpayer deducted the eight percent in local taxes from the measure of gross proceeds subject to the sales tax. That is, the Taxpayer charged sales tax to its customers based on a price which included the eight percent local taxes, but remitted to the State sales tax calculated on its gross proceeds less the eight percent local taxes.

CONCLUSIONS OF LAW

This case presents two questions. First, do the local taxes in issue come within the purview of the exclusion provision set out at Code of Alabama 1975, §40-23-3. Second, if it is found that the taxes should be excluded under said provision, should the Taxpayer be allowed to retain the excess tax money that it erroneously collected as a result of improperly including the local taxes in the measure of the sales tax during the audit period.

Code of Alabama 1975, §40-23-3 reads as follows:

> Municipal privilege license taxes which are levied and collected by the application of a flat percentage rate of gross sales, or gross receipts from sales, and which are passed on directly by the licensee-seller to the purchaser-consumer shall be excluded from the gross sales, or gross receipts, as the case may be, in the computation of the sales tax levied by this state, under the provisions of this division.

There is no dispute that the county and city taxes in issue are privilege license taxes, and that they are measured by a flat percentage rate of gross receipts of sale. The only issue is whether the taxes are "passed on directly" by the Taxpayer to the retail customer.

The Department argues that to come within the exclusion provision, the tax must be a "consumer" tax. That is, the taxing statute must specify that the taxes are levied directly on the consumer, with the seller liable only to collect and remit the tax

to the State. In other words, the Department would interpret the clause in question to include the following underlined words: "Taxes..... passed on directly by the levying statute". Of course, the classic consumer tax is the State sales tax, which is levied at §40-23-2 and imposes a "privilege or license tax against the person on account of the business activities" of various persons, firms, corporations and other entities. At §40-23-26, it is provided that the sales tax is a direct tax on the consumer that must be collected by the seller.

On the other hand, the Taxpayer argues that the tax need only be passed on in fact to the consumer as part of the retail price. The Taxpayer argues that §40-23-3 does not require by its wording that the local tax be passed on by statute, and that such an interpretation is too restrictive and against the plain language of the statute. The Taxpayer also contends that to include the local taxes in the measure of the sales tax would constitute unwarranted double taxation.

The crux of the case concerns the Legislature's intention in including the word "directly" in the phrase "passed on directly", as used in the exclusion statute. In a real sense, the economic burden of all taxes levied relative to a retail business is passed on to the purchaser/consumer, either separately as an addition to the retail price, as in the case of the sales tax, or as a part of the retail price, as in the present case when the tax is on the

seller. The question is which of said taxes did the Legislature intend to exclude from the measure of the sales tax through the enactment of §40-23-3.

If the Legislature had intended to exclude all municipal percentage taxes, the use of the words "passed on" in the statute would have been sufficient. The exclusion would have then included all taxes, whether levied directly on the seller or the buyer. However, the Legislature also included the word "directly" in the statute. In that the Legislature cannot be presumed to have included a word for no reason, Robinson v. State, 361 So.2d 1113; Wright v. Cutler-Hammer, Inc. 358 So.2d 444, the use of the word "directly" must be taken to have some substantive purpose. The only logical purpose for including the word "directly" in the statute would be to differentiate between those consumer taxes passed on directly by statute to the purchaser, and collected as additions to the purchase price, and those that are shifted to the consumer by the seller indirectly as part of the retail price. Thus, by including "directly" in the statute, it is clear that the Legislature intended to exclude only taxes levied directly on the buyer. Accordingly, for the §40-23-3 exclusion to apply, the local tax must be passed on directly by statute to the consumer. Such is not the case with the two taxes in issue, which are levied on the seller.

It should also be noted that §40-23-3 applies only to

municipal privilege license taxes. A municipal corporation or municipality constitutes either a city or town, and not a county. See generally the statutory provisions relative to municipal corporations at Code of Alabama 1975, Title 11, Chapters 40 - 60. Thus, even if the Jefferson County tax in issue did otherwise come within the scope of §40-23-3, that section would not be applicable because said tax is not a municipal tax as required by the exclusion provision.

The Taxpayer also argues that the inclusion of the local taxes as part of the measure of the sales tax is unwarranted double taxation. However, the case law In Alabama is clear that two taxes levied on the same or related transactions or activities, but not on the same taxpayer, does not constitute double taxation. Pure Oil Company v. State, 12 So.2d 861; Merchants Cigar and Candy Company v. City of Birmingham, 18 So.2d 137; Starlite Lanes, Inc. v. State, 214 So.2d 324. In the present case, the local privilege taxes are levied on the seller, and constitute a part of the seller's overhead, while the sales tax is on the buyer. Thus, the Taxpayer is not being subjected to impermissible double taxation.

Having determined that the tax in issue is due and must be paid over to the State, the second issue in the case, concerning whether an erroneously collected tax should be paid over to the State, is moot. However, it should be noted that the case of Ross Jewelers v. State, 72 So.2d 402, is controlling on that point and

holds that as between the seller and the State, any tax erroneously collected and retained by the seller from the buyer must be remitted to the State.

Accordingly, the above findings and conclusions considered, the Revenue Department is hereby directed to make the assessment in issue final.

Done this 30th day of July, 1985.

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BILL THOMPSON
Chief Administrative Law Judge