

STATE OF ALABAMA, § STATE OF ALABAMA  
v. § DEPARTMENT OF REVENUE  
BEAU D. GREER § ADMINISTRATIVE LAW DIVISION  
d/b/a Capital Stockyards of  
Alabama and The General Store §  
P. O. Box 4007 § DOCKET NO. S.85-129  
Montgomery, AL 36101, §  
Taxpayer. §

ORDER

This matter involves three disputed preliminary assessments entered by the Revenue Department against the Taxpayer for State of Alabama, Montgomery County and City of Montgomery sales tax covering the period June 1, 1978 through December 31, 1984. A hearing was conducted by the Administrative Law Division on August 1, 1985, at which the parties were represented by attorneys Keith B. Norman and J. Wade Hope, for the Taxpayer and the Revenue Department, respectively. Based on the evidence and arguments presented at said hearing, and the authorities subsequently submitted by both parties, the following findings of fact and conclusions of law are hereby made and entered.

FINDINGS OF FACT

This case presents the issue of whether the Taxpayer is liable for sales tax on the sale of saddles, bridles, spurs, etc. , commonly referred to as "tack", made during auctions conducted at the Taxpayer's stockyard during the assessment period. The facts of the case are largely undisputed.

During the period in question, the Taxpayer owned and operated

a stockyard in Montgomery County. Once or twice a month, the stockyard held a livestock auction at which horses, ponies and mules were sold. The livestock auctions were conducted as follows: The owner would transport the animal to the stockyard and register the animal for auction. A stockyard employee would give the owner a receipt and then take possession of the animal. During the auction, the animal would usually be displayed in the arena by an employee of the stockyard, although sometimes by the owner. Upon acceptance by the auctioneer of the, highest bid, a ringside sales clerk would record the sale and transmit the amount of the sale to the stockyard office. The purchaser would then go to the office and upon payment would receive a statement of purchase from the stockyard. Finally, the seller would be paid by check issued on the account of the stockyard.

The tack items in question were sold in conjunction with the livestock sales. As a matter of policy, the Taxpayer allowed tack to be sold only by individuals that were also selling an animal at the auction. The tack items were usually sold or offered for sale in conjunction with or at the same time as the sale of the owner's animal. Generally, the owner would present or show the item to the crowd, although sometimes presentation would be made by a stockyard employee. The auctioneer would recognize the tack item and ask for bids from the crowd. If the owner accepted the highest bid, the transaction would thereafter be handled in the same manner as the livestock sales. That is, the sales clerk would record the sale,

the buyer would pay the stockyard and get a statement of sale, and the seller would be paid by check issued on the stockyard account. The stockyard charged a ten percent commission on all tack sales. No sales tax was collected by the Taxpayer on the tack sales.

The tack items were never in the possession and care of the stockyard, except if offered to the public by a stockyard employee during the sale. Further, the owner always had the option of rejecting the highest bid. The owner was at all times responsible for the item, and upon completion of the sale, the buyer would take possession directly from the seller. Practically speaking, the stockyard had no control over if and when tack would be presented for sale.

The Revenue Department audited the Taxpayer for the period in issue and determined that the Taxpayer was liable for sales tax on the tack sales described above. The Department's position is that the sales were consignment sales within the purview of Department Regulations 810-6-1-.05 and 810-6-1-.38.

The Taxpayer argues that the stockyard did not sell the tack on consignment, but was merely providing a service by allowing the tack owners to sale their goods during the auction. The Taxpayer's argument is based in part on the difference between the method by which livestock was auctioned, which the Taxpayer concedes is a consignment sale, and the method by which the tack was sold. The Taxpayer puts great emphasis on the fact that the stockyard never had possession or responsibility for the tack items.

CONCLUSIONS OF LAW

There is no dispute that a consignee is liable for sales tax on the auction of all property held on consignment, if said property is otherwise subject to sales tax. See Department Regulations 810-6-1-.38 and 810-6-1-.05. In the present case, there is no question that the livestock auctioned by the Taxpayer was sold on consignment. However, no sales tax is due because livestock sales are exempt under Code of Alabama 1975 , §40-23-4(5). The dispute is whether the tack in question was held and sold on consignment by the stockyard.

The Revenue Code, Title 40, Code of Alabama 1975, gives no definition of "consignment" or "consignment sales". However, the Uniform Commercial Code, at Code of Alabama 1975, §7-2-326(3) does provide the following definition:

Where goods are delivered to a person for sale and such person maintains a place of business in which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return.

In Bischoff v. Thomasson, 400 So.2d 359, the Alabama Supreme Court, per Justice Adams, discussed in detail the nature and elements of consignment. The Court noted that "consignment is a special kind of agency involving the delivery of goods to one, . . . for the purpose of finding a buyer". The elements of consignment were outlined by the Court as follows: (1) delivery of possession to the consignee, (2) engaging in the business of selling such

types of items by the consignee and (3) failure of the consignor to give public notice of his retained interest in the goods.

Again, as stated above, there is no question that the livestock was held and sold on consignment. Element (1), delivery of possession to the consignee, was clearly fulfilled when the stockyard took formal possession and thereafter sold the animals as agent for the owners. However, the same cannot be said about the tack sales. The distinguishing feature is that the stockyard never took formal possession of the tack. That is, the crucial element of delivery of possession to the consignee (stockyard) never occurred. The owner retained possession of the tack item, made the final determination of whether to accept the highest bid, and then delivered the item over directly to the purchaser. The sole function of the stockyard employees involved was only to physically assist the owner in his attempt to make the sale. That is, the owner was the seller of the tack, and not the stockyard.

Based on the particular facts of the case, as set out above, it must be found that the Taxpayer was not selling the tack on consignment within the purview of §7-2-326(3). Rather, the tack items were sold by the owner directly to the purchaser, with only related services being performed by the stockyard employees. Accordingly, the sales not being sales on consignment by the Taxpayer, the Taxpayer is not liable for sales tax on said sales.

The above determination is made notwithstanding the provisions

of Regulation 810-6-1-.05 concerning consignment sales by an auctioneer. Paragraph (1) of the regulation provides that an auctioneer is liable for sales tax on the sale of property held by him on consignment. The holding of this decree is not contrary to that statement. However, paragraph (2) sets out the criteria for a consignment sale. Insofar as that section does not make delivery to the auctioneer an element of consignment, as required by §7-2-326(3), then the regulation is contrary to the controlling statute and should not be followed. It is axiomatic that if a regulation is not in accordance with a controlling statute, the regulation must be ignored in favor of the law. Boswell v. Bonham, 297 So.2d 379; East Brewton Materials, Inc. v. State, Dept. of Revenue, 233 So.2d 751.

Based on the above findings and conclusions, the Revenue Department is hereby directed to make the assessments in issue final in the amount of zero.

Done this 24th day of September, 1985.

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BILL THOMPSON  
Chief Administrative Law Judge