

STATE OF ALABAMA,	§	STATE OF ALABAMA	
		DEPARTMENT OF REVENUE	
v.	§	ADMINISTRATIVE LAW DIVISION	
B & B BEVERAGE, INC.	§		
P. O. Box 6			
Acmar, AL 35004,	§		DOCKET NO.
S.85-191			
Taxpayer.	§		

ORDER

This matter involves two disputed preliminary assessments of State and City of Moody sales tax entered against B & B Beverage, Inc. (Taxpayer) concerning the period July 1, 1982 through June 30, 1985. The parties were represented at the hearing before the Administrative Law Division by attorney Jim Hill, for the Taxpayer, and assistant counsel Eddie Crumbley, for the Department. Based on the evidence submitted at the hearing, and in consideration of the arguments and authorities presented by the parties, the following findings of fact and conclusions of law are hereby made and entered.

FINDINGS OF FACT

The Taxpayer, a Class II Lounge Retail Liquor Licensee, operates a package store and sells liquor, beer, wine and other miscellaneous items at retail. The liquor is sold for off-premises consumption only.

As is all liquor legally purchased in Alabama, the source of the Taxpayer's liquor is an Alcoholic Beverage Control Board (ABC Board) outlet store. Because the Taxpayer purchases for resale, no sales tax is charged by the ABC outlets. However, the price of the liquor includes the 48% liquor excise taxes levied at Code of Alabama 1975,

§§28-3-200 through 205. Those taxes are by statute passed on to and levied against the party that purchases the liquor from the ABC Board.

The issue in dispute is whether the Taxpayer can deduct the 48% liquor taxes from gross proceeds in computing its sales tax liability. The Taxpayer argues that it is in a similar position and should be taxed in a similar manner as an ABC Board outlet. When an ABC outlet makes a retail sale, the liquor taxes are subtracted from gross proceeds prior to computation of the sales tax. The Taxpayer contends that to not allow it to also subtract the liquor taxes from its taxable gross proceeds is a violation of the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution. The Taxpayer also argues that it is unreasonable for the Department to allow a deduction for the beer (Code of Alabama 1975, §28-3-184) and wine (Code of Alabama 1975, §28-7-16) excise taxes, but not for the liquor taxes. The beer and wine excise taxes are levied against the ultimate consumer.

The Revenue Department's position is that the liquor taxes are levied on the party that buys from the ABC Board, and that if that purchaser resells the product, as in the present case, the liquor taxes are a part of the cost of the liquor and are not deductible from taxable gross proceeds. That is, a tax is deductible from the measure of the sales tax only if it is levied against the retail purchaser. If the tax is against the seller, then it is a part of

the seller's cost of doing business and is not deductible.

CONCLUSIONS OF LAW

Code of Alabama 1975, §40-23-1(6) defines "gross proceeds of sale" in pertinent part to include:

The value proceeding or accruing from the sale of tangible personal property . . . without any deduction on account of the cost of the property sold, the cost of the materials used, labor or service costs, interest paid or any other expenses whatsoever (emphasis added)

As stated, the Department's position is that any tax levied against the retail seller is a part of the cost of the property sold and thus includable in taxable gross proceeds. The fact that the economic burden for the tax may be indirectly passed to the consumer is of no consequence. However, in recognition of the principle that double taxation is to be avoided where possible, Starlite Lanes, Inc. v. State, 214 So.2d 324; Al Means, Inc. v. City of Montgomery, 104 So.2d 816, the Department's position allows a deduction from taxable gross proceeds subject to sales tax where the tax is levied against the retail purchaser. In that case, both the sales tax and the second tax are levied against the same party. Thus, a deduction is allowed so as to avoid a tax on a tax.

The Taxpayer argues that it is unreasonable to distinguish between the beer and wine excise taxes and the liquor excise taxes.

However, there is a clear and discernible difference between the two levies. Like the sales tax, the beer and wine taxes are in all instances levied against the ultimate consumer. Thus, so as to

avoid a tax on a tax, the beer and wine taxes are deductible from gross proceeds in computing the sales tax. On the other hand, the liquor taxes are levied on the party buying from the ABC Board, which may or may not be the ultimate consumer. If the ABC outlet sale is at retail, then the retail purchaser is liable for both the liquor taxes and the sales tax, in which case the sales tax measure would not include the liquor taxes. However, if the ABC outlet sale is for resale, the wholesale purchaser is liable for the liquor taxes only, whereas the sales tax would be against the subsequent retail purchaser. In that case, the liability for the liquor taxes and the sales tax would be on different parties, there would be no tax on a tax, and consequently, the liquor taxes would not be deductible from gross proceeds in computing the sales tax.

In summary, the beer and wine taxes are deductible from sales tax in all cases because they are levied against the ultimate consumer. However, the liquor taxes are levied against the ultimate consumer, and thus deductible from gross proceeds, only if the ABC outlet sale is at retail. If the ABC sale is at wholesale, as in the present case, then the taxes are a cost of doing business, as are all other taxes (income, license, etc.) levied on the reseller, and are not deductible from gross proceeds. The liquor taxes may as a business practice be passed by the wholesale purchaser to its customers, but such is not required by statute and does not allow the retailer to deduct the taxes from gross proceeds. See

generally, Pure Oil Company v. State, 12 So.2d 861; Merchants Cigar and Candy Company v. City of Birmingham, 18 So.2d 137; Lash's Products v. U.S., 278 U.S. 175, 49 S.Ct. 100.

In Merchant's Cigar and Candy Co. v. City of Birmingham, supra, the issue was whether a stamp tax levied against a tobacco wholesaler should be included in the measure of the wholesaler's gross receipts license tax. The wholesaler as a matter of practice passed the burden of the stamp tax to its customers, setting the tax out as a separate item on its invoices. The Alabama Supreme Court held in effect that the stamp tax, because it was levied on the wholesaler, was not deductible from the wholesaler's gross receipts, as follows:

It does not provide that the invoice shall include separate items for the stamp tax, or charge it as such to the purchaser. But that procedure was adopted, and the tax was collected by the wholesaler from his purchaser along with the balance of the invoice. The collection of it as a tax from the purchaser was appellant's own system not required by the State Revenue Department, nor by law or ordinance and has no effect on the instant question.

Pure Oil Co. v. State, 244 Ala. 258, 12 So.2d 861, 148 A.L.R. 260. The tax is levied on the seller as any other tax against him. He could absorb the amount of it without increasing the sale price. There is no law which directs him to pass it on as a tax to his purchaser. But "the price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. Therefore it is part of the price." Lash's Products v. United State, 278 U.S. 175, 49 S.Ct. 100, 73 L.Ed 251. (emphasis added)

The Taxpayer's constitutional equal protection argument is that package stores are in the same class as ABC outlets and should thus be subjected to the same treatment. However, the two are not

similarly situated. The ABC outlets are instruments of the State and are designated by statute, Code of Ala. 1975, §28-3-1, et seq., as the only primary source of liquor in the state. Ott v. Moody, 216 So.2d 177; State v. Murphy, 186 So. 487. On the other hand, package stores are private commercial ventures in the business of reselling liquor that must be first purchased from an ABC outlet.

Thus, although both do make retail liquor sales, they operate under different statutory authority and are inherently different. While the two may be subject to different tax burdens, it is due to a difference in circumstances, and does not constitute unconstitutional discrimination.

The Taxpayer's attempt to group all retail liquor dealers within one class is overbroad. As stated, the ABC outlets are unique in their creation, character and operation. The class which is due equal treatment consists of all package stores. The 48% liquor taxes are levied against all ABC outlet purchasers, without exception. If a package store wishes to resell the liquor, it must bear the cost of the liquor taxes along with other overhead costs.

There is no unconstitutional discrimination in the scheme of taxation administered by the Department in that all package stores are taxed alike.

The above considered, the Revenue Department Sales and Use Tax Division is hereby directed to make final the preliminary assessments in issue as entered, with appropriate interest as

required by law.

Done this the 28th day of July, 1986.

BILL THOMPSON
Chief Administrative Law Judge