STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
v.	§	DOCKET NO. S. 86-131
FRANDER & FRANDER, INC. 1600 280 Bypass Phenix City, AL 36867,	§	
Taxpayer.	§	

ORDER

This matter involves five preliminary assessments of State (October 1, 1982 - September 30, 1985), City of Phenix City (October 1, 1982 - September 30, 1985), Russell County (July 1, 1985 - September 30, 1985), City of Opelika (November 1, 1982- September 30, 1985), and Lee County (November 1,1982 - September 30, 1985) sales tax entered by the Revenue Department (Department) against Frander & Frander, Inc. (Taxpayer). A hearing was conducted by the Administrative Law Division in the matter on March 11, 1987. The Taxpayer was represented at said hearing by the Honorable J. Cliff Heard. Assistant counsel Adolph Dean was present and represented the Department. Based on the evidence submitted at the hearing, and in consideration of briefs filed by both parties, the following findings of fact and conclusions of law are hereby made and entered.

FINDINGS OF FACT

The Taxpayer is in the business of selling mobile home trailers at retail. The Department audited the Taxpayer for State, City of Phenix City, City of Opelika, Russell County and Lee County

sales tax for all or part of the period October 1, 1982 through September 30, 1985. As a result of said audit, additional liability was assessed based on the Department's determination that "set-up" charges relating to the delivery and installation of the trailers by the Taxpayer constituted a part of taxable gross proceeds.

The majority of sales made during the audit period included delivery and installation by the Taxpayer, for which a fixed charge was included of $800.00 for a single-wide and $1,600.00 for a double-wide. Upon the sale of a trailer, the Taxpayer would issue a service policy letter to the customer setting forth its obligations relating to delivery and installation. Such duties generally included some or all of the following: the securing of escort vehicles and a delivery truck, obtaining the necessary permits, water and sewage hookups, door and step placement, removal of tires and axles, painting, caulking and leveling, joining or fastening together of the double-wide units, tying down and anchoring all units, labor, and a general clean up of the area. Some materials such as wood, blocks, caulking and sealant were used by the Taxpayer in the installation process.

During the audit period, the Taxpayer kept a separate folder on each of its customers, with all relevant sales records included in the folder. Each folder also contained a notation as to the amount charged for delivery and setup. In addition, the Taxpayer

maintained a sales journal in which setup charges were separately set out, and also a disbursements journal showing the expense paid out by the Taxpayer relative to delivery and installation. However, the sales invoices provided to the customers did not separately set out the delivery and installation charges, and in advertising, the total price quoted was a lump sum, which included the standard setup fee.

The Department's initial (prehearing) position was that the setup charges were taxable because the Taxpayer had failed to keep adequate records from which setup charges could be properly broken out. However, at the administrative hearing the Department amended its position by arguing that the charges were taxable regardless of whether they were listed separately on the Taxpayer's records. That is, the charges constitute labor and services customarily performed incidental to the sale, and therefore constitute a part of taxable gross proceeds. The Department does concede that any materials, i.e., caulk, wood, etc., used and consumed by the Taxpayer in the installation process, and on which sales tax has already been paid, should not be included as part of taxable gross proceeds.

CONCLUSIONS OF LAW

The determinative issue is whether the delivery and installation fees charged by the Taxpayer constitute a part of gross proceeds within the provisions of Code of Alabama 1975, §40-

23-1(a)(6), which reads in pertinent part as follows:

> (6) GROSS PROCEEDS OF SALES. 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, . . .

The Department initially took the position that the transportation and installation charges were taxable because the Taxpayer had failed to separately set out the charges in its records. Specifically, the Department considered the charges taxable because the invoices provided to the customers did not include the installation charges as a separate item.

However, Code of Alabama 1975, §40-23-9, which requires the maintenance of adequate sales records, does not specify a particular method of record keeping, and the Court of Civil Appeals, in State v. Ludlum, 384 So.2d 1089, cert. denied 384 So.2d 1094, has stated that no particular form of record keeping is necessary as long as the taxpayer's method allows for an accurate computation of liability.

In the instant case, it is clear that the Taxpayer's records, on both the customer's file folder and specifically in the sales journal, adequately set out separately the installation fees levied by the Taxpayer. Sufficient records were thus available from which delivery and installation charges could be accurately determined.

Both parties cite Reg. 810-6-1-.81 in support of its position. Subsection (1) of that regulation provides in effect that the total amount received by a taxpayer is taxable if either the advertised price includes both property and installation of r the taxpayer's records do not separate the charges. The evidence in the instant case is that the standard price advertised by the Taxpayer was a set amount which included the delivery and installation charges. Subsection (2) merely reiterates that if the standard price quoted by the taxpayer does not include installation charges, then the taxpayer may make a separate charge which, when set out separately on its books, will not be subject to tax. Again, subsection (2) does not apply in that the present facts show that the Taxpayer's quoted price included the delivery and installation charges.

However, Reg. 810-6-1.81 is misleading insofar as it provides that the key factor in determining taxability is whether the installation charges are separately set out on the taxpayer's records. Rather, the deciding factors are (1) whether the transportation and installation services are performed by the taxpayer, and (2) whether they occur before or subsequent to the incidence of sale. That is, if the services are performed by the taxpayer as an incidental part of the sale, and most importantly, are completed prior to consummation of the sale, i.e., before transfer of title, then said charges constitute a part of taxable

gross proceeds. A separate charge for transportation and installation will not in itself remove the charges from taxation, see Reg. 810-6-1.84, and a separate recordation is necessary only if the services are not taxable, so as to allow the Department to easily differentiate between taxable and non-taxable proceeds.

Reg. 810-6-1.78, titles "Transportation Charges", provides in substance that where a seller contracts to sell and delivery property to some designated place, the transportation services, which would include delivery and installation, are rendered to the seller and tax is due on the entire amount received from the purchaser. That regulation reaffirms that the determining factor is whether the services are performed prior to and as a part of the sale (taxable), or subsequent to the sale (non-taxable). Further paragraph (3) provides that the seller cannot make a separate charge for transportation and deduct the same from taxable gross proceeds.

Reg. 810-6-1-.78 was shaped in its present form by three appellate court decisions, State v. Natco Corporation, 90 So.2d 385 (1956); East Brewton Materials, Inc. v. State, Department of Revenue, 233 So.2d 751 (1970); and Alabama Precast Products, Inc. v. State, Department of Revenue, 332 So.2d 160 (1976).

In Natco, the issue concerned the taxability of transportation charges relating to delivery of clay products to an Alabama purchaser. Delivery was f.o.b. origin. The Supreme Court

determined that title passed to the purchaser at the point of origin and, consequently, that any subsequent transportation charges were rendered to the buyer and were not taxable as part of the sales price. That is, transportation charges should be taxed only if they accrue prior to completion of the sale.

It should be noted that Natco was decided prior to the adoption of the Uniform Commercial Code (UCC) in Alabama. However, as discussed below, if a similar fact situation arose today, the same conclusion would be reached under the applicable provisions of the UCC, Code of Alabama 1975, §7-2-101, et seq.

In East Brewton Materials, the taxpayer sold sand, gravel and plant mix asphalt. The sales in issue involved deliveries by the taxpayer either in its own trucks or in trucks leased for that purpose. The taxpayer's records listed separately the charges for materials and delivery.

The Court of Appeals found that the delivery charges were taxable, holding that title tot he goods did not pass until after delivery of the materials by the taxpayer. The taxpayer argued that Natco was controlling. However, the Court distinguished the two cases by pointing out that Natco involved delivery by a common carrier f.o.b. origin with title passing prior to delivery, whereas East Brewton Materials involved delivery in trucks either owned or leased by the taxpayer, with title passing after delivery. The Court held as follows:

> . . ., we are of the opinion that the legislature intended thereby that sales tax be charged upon the total invoice price, including transportation charges incident to delivery of the material sold to a customer, when such transportation was provided by the seller, not by common carrier, and the sale was not completed or title transferred until delivery to the customer. (emphasis added)

In Alabama Precast, the taxpayer sold concrete blocks which were delivered to the buyer by a third party carrier. No evidence was presented as to whether the sales were f.o.b. origin or f.o.b. destination. The materials and transportation charges were listed as separate line items on a single invoice.

The Court found that the delivery charges were not taxable. In so holding, the Court relied on Department Reg. T18-011 (810-6-1-.78), which, the Court found, excluded freight charges from tax where delivery was by a third party. That portion of the regulation relied on by the Court read as follows:

> The rule discussed in this paragraph (including transportation charges as taxable gross proceeds) does not apply to cases in which a third party or any independent carrier, common, contract or private, is employed to transport or delivery the goods for hire.

As a result of the above decision, Reg. 810-6-1-.178 was amended so as to exclude that section quoted above.

As stated, the rule of general applicability that can be taken from the above cases and regulations is that transportation, delivery and installation charges made in conjunction with a sale are taxable if the services are performed as a part of and prior to completion of the sale. If the services are rendered subsequent to

the sale, the charges are not a part of taxable gross proceeds.

Under Alabama law, a sale occurs with the passing of title (§7-2-106), and unless otherwise provided, title passes upon completion of physical delivery by the seller (§7-22-401(2)). State v. Delta Airlines, Inc., 356 So.2d 1205 (1977); American Cast Iron Pipe Co. v. Boswell, 350 So.2d 438 (1977).

Concerning the sales in issue, the Taxpayer was obligated to delivery and install the trailers. Clearly, such delivery was an integral part of the sale and title did not pass until the Taxpayer had completed his contractual performance with respect to the goods. Consequently, the charges relating to delivery and installation constituted a part of taxable gross proceeds. To repeat the Court's holding in East Brewton Materials, Inc., at page 756:

> When it was provided in Section 786(2) (§40-23-1(a)(6)) that the value proceeding or accruing from the sale of tangible personal property should include "any other expenses whatsoever," we are of the opinion that the legislature intended thereby that sales tax be charged upon the total invoice price, including transportation charges incident to delivery of the material sold to a customer, when such transportation was provided by the seller, not by common carrier, and the sale was not completed or title transferred until delivery to the customer.

Having determined that the delivery and set-up charges are taxable, the Taxpayer should now be allowed to verify that sales tax has previously been paid on various materials consumed in the installation process, in which case the cost of such materials

should be deleted from taxable gross proceeds. The Taxpayer is hereby directed to provide such records to the Department's representative, Adolph Dean, within thirty days of this date. If an agreement cannot be reached as to those records, a subsequent hearing will be set. If an agreement is reached, then the materials should be deleted from gross proceeds and the preliminary assessments, as adjusted, should be made final.

Done this 18th day of May, 1987.

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BILL THOMPSON
Chief Administrative Law Judge