STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
v.	§	DOCKET NO. U. 86-245
WILBRO COMPANY, INC. P. O. Box 6708 Dothan, AL 36302,	§	
Taxpayer.	§	

ORDER ON APPLICATION FOR REHEARING

The Department's application for rehearing filed in this matter is hereby denied for the following reasons:

In Paragraph 1 of the application, the Department erroneously asserts that "[i]t was not necessary to make a further allocation of catalogs going from DMI in Alabama to locations outside of Alabama because there were no catalogs going out of Alabama." To the contrary, the evidence is clear that both catalogs and flyers were delivered to DMI in Alabama and that a percentage of both were subsequently delivered out of state.

The Department further asserts in Paragraph 1 that the catalog percentages should not be applied to the flyers. However, Taxpayer's Exhibit 1, as complimented by the testimony of Mr. Robert Greenlee, controller for Taxpayer, sets out the percentage of both catalogs and flyers that were shipped by DMI from Alabama to out-of-state locations.

In Paragraph 2, the Department defends Reg. 810-6-50.23, which provides in part that the temporary storage exception will apply only if the subject property is segregated and marked for out-of-

state use "at the time of its coming to rest in Alabama".

The temporary storage exceptions is based on the §40-23-60(7) definition of "storage", which states as follows:

> (7) STORAGE. Any keeping or retention in this state for any purposes except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased at retail. (emphasis added)

The use tax attaches when property previously purchased at retail outside of Alabama is brought into the State. Horne v. Goldenrod Enterprises, Inc., 101 So.2d 310; State v. Toolen, 167 So.2d 546. Thus, for the temporary storage exception to apply, the property must be intended or obligated for out-of-state use at the time it is delivered into Alabama. The exception does not apply to general inventory that was not initially intended for out-of-state use but is subsequently withdraw and shipped out-of-state, see subsection (5) of Reg. 810-6-5-.23.

The taxpayer has the burden of proving that the subject property was or is intended for subsequent use out of state. Normally, no particular or exclusive method of proof is necessary. State v. Mims, 30 So.2d 673. However, Reg. 810-6-5-.23 limits the method by which temporary storage can be proved by requiring that the property must be physically separated from general inventory.

A record showing actual segregation would in some cases be a reasonable method of verification. But in other cases, physical segregation would be impractical and unnecessary. Thus, to require

segregation in all cases is unreasonable, especially when any other record or evidence indicating that the property was intended for and subsequently shipped out-of-state would be sufficient.

In the present case, the materials involved in each mail-out were delivered in bulk to DMI. In-state and out-of-state address labels were applied randomly and the entire batch was mailed together. Thus, for DMI to have physically separated and marked that percentage of flyers and catalogs to be delivered out-of-state would have been impractical, unnecessary and unreasonable.

DMI's mailing lists would have settled the matter without dispute. Unfortunately, DMI is defunct and its records are unavailable for audit. However, the Taxpayer established at the administrative hearing that a portion of the materials were at all times intended for delivery out-of-state and that a percentage (see Taxpayer's Exhibit 1) was in fact mailed to out-of-state locations. The percentages presented by the Taxpayer indicate that in each mailing between 68.0% and 80.3% of the materials were mailed outside of Alabama. Those percentages roughly correspond to the number of Taxpayer's in-state stores (1) versus out-of-state stores (4). The exception should not be denied to those materials that clearly were intended for and subsequently delivered out-of-state simply because there is no record of physical segregation.

This decisions does not hinder the Department's ability to administer the exception. The Department's examiner did a thorough and complete audit and property denied the exception absent

evidence as to what materials were delivered out-of-state. Any claimed exemption or exception must be denied without adequate proof, and the Department is generally not required to rely on a taxpayer's oral assertions. State v. T. R. Miller Mill Co., 130 So.2d 1089. However, in some instances alternative methods of proof can be used to compute liability. State v. Ludlum, 384 So.2d 1089, cert. denied 384 So.2d 1094.

DMI used its own mailing lists to distribute the materials throughout the targeted areas. As noted, those mailing lists are unavailable through no fault of the Taxpayer. Consequently, alternative evidence should be allowed that is based on the best records and other information available to the Taxpayer.

A regulation must be followed which prescribes a particular method for measuring taxable services, and failure to comply is allowed only if the regulation is unreasonable. Shellcast Corp. v. White, 477 So.2d 425.

Reg. 810-5-6-.23 requires that out-of-state property must by physically segregated. As noted, segregation would have been unreasonable in the present case. Thus, the Taxpayer's failure to comply is not fatal.

Done this 10th day of December, 1987.

BILL THOMPSON
Chief Administrative Law Judge