

STATE OF ALABAMA  
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

§

v.

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DOCKET NO. U. 86-245

WILBRO COMPANY, INC.  
P. O. Box 6708  
Dothan, AL 36302,

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§

Taxpayer.

§

ORDER

This case involves a disputed preliminary assessment of use tax entered by the Revenue Department ("Department") against Wilbro Company, Inc. ("Taxpayer") for the period October 1, 1982 through June 30, 1985. A hearing was conducted in the matter on June 30, 1987. The Hon. G. David Johnston was present and represented the Taxpayer. Assistant counsel Charles E. Crumbley appeared on behalf of the Department. Based on the evidence and arguments presented at said hearing, as supplemented by subsequent letter agreements submitted by the parties, the following findings of fact and conclusions of law are hereby made and entered.

FINDINGS OF FACT

During the period in dispute, the Taxpayer operated five retail outlet stores, one in Alabama, two in Florida and two in Georgia. The second Georgia store opened in 1984. The Taxpayer's principal office was and is located in Dothan, Alabama.

Catalogs and advertisement flyers were printed for the Taxpayer by out-of-state printers. Some of the materials were delivered (mailed) to prospective customers outside of Alabama

directly by the printers, and thus never came into the State. However, a portion were delivered to Diversified Mailing, Inc. ("DMI"), an independent professional mailing service, located in Dothan, Alabama. As set out below, the assessment in issue is based on the cost (paper and sometime printing) of those flyers and catalogs that were shipped to DMI in Alabama.

Per agreement with the Taxpayer, upon receipt of the catalogs and flyers, DMI would, using its own mailing lists, label the flyers and either label or place a postcard with the catalogs. Thereafter, the materials would be mailed by DMI to various customers in either Alabama, Georgia or Florida. The evidence indicates that approximately the same number of flyers and catalogs were mailed by DMI to each of the various store locations areas.

The Department audited the Taxpayer and assessed use tax based on either the cost of the paper or both the paper and printing costs relating to all of the catalogs and flyers that were shipped into Alabama. If the Taxpayer purchased the paper directly, only the paper cost was included in the taxable measure. Any subsequent printing was considered a nontaxable service. If the Taxpayer purchased the materials already printed, then both the paper and printing costs were included in the measure of the tax.

Specifically, the audit was performed as follows: The auditor first determined the percentage of total catalogs that were shipped into Alabama. Based on the Taxpayer's shipping documents, it was calculated that 36.71 percent, 27.02 percent and 68.42 percent of

all catalogs were delivered into Alabama in 1982, 1983 and 1984, respectively (see State's Exhibit 3). The evidence is unclear, but it appears that the Department assumed that all of the flyers were shipped to DMI in Alabama. The Taxpayer agreed subsequent to the administrative hearing that the 27.02 percent figure for 1983 was correct (see letter from Hon. G. David Johnston, dated July 13, 1987), and the Department has agreed that the 68.42 percent figure for 1984 should be reduced to 22.83 percent (see letter from Hon. Charles E. Crumbley, dated August 19, 1987).

Next, the auditor determined the paper and printing cost (taxable measure) relating to all of the catalogs and flyers (see State's Exhibit 2). The parties have agreed, as set out in the above-referenced letters from the respective attorneys, that the \$18,642.73 relating to A. D. Weiss and set out on page 1, line 11 of Exhibit 2 should be deleted, as should one-half of the \$15,300.00 relating to the May 7, 1984 transaction with Graphic Representations, found on page 2, line 38 of Exhibit 2. The Department also agreed at the administrative hearing that the transactions on page 2, lines 39 and 40 of Exhibit 2 should be deleted from the audit.

Several items on State's Exhibit 2 remain in dispute, including two transactions relating to purchases from Reynolds-Foley Company in the amounts of \$7,135.64 (page 2, line 3), and \$7,566.46 (page 2, line 29). Those transactions involved catalogs, and the invoices in both cases (State's Exhibits 11 and 17)

indicate a charge for printing only. However, the Department included the entire amounts in the audit on the assumption that because the Taxpayer's records indicated no corresponding paper purchases, that the invoices must also include a paper charge. If that is the case, then the entire amount should be included in the taxable measure. The Taxpayer disagrees, contending that the invoices indicate printing only and should be taken at face value, and consequently, that the invoices were for nontaxable services and should not be included in the taxable measure. Several other disputed invoices present the same issue as set out above.

The auditor then multiplied the Taxpayer's total catalog cost by the percentages set out in Exhibit 3 to determine the entire taxable measure of these catalogs delivered into Alabama. The entire cost of the flyers was then added to arrive at a gross taxable measure.

The Taxpayer argues that those catalogs and flyers that were distributed by DMI to out-of-state locations should be non-taxable under the "temporary storage" exception found within the definition of "storage" at Code of Ala. 1975, §40-23-60(7). That section provides that any property brought into the State but not intended for subsequent use solely outside of Alabama shall not be subject to the use tax.

Relating thereto, the Taxpayer presented evidence at the hearing (Taxpayer's Exhibit 1) as to what percentage of the flyers

and catalogs distributed by DMI were delivered within Alabama. The Department's auditor testified that she found no evidence indicating what percentage of materials had been delivered within Alabama.

The Department denies the applicability of the temporary storage exception based on the Taxpayer's failure to establish compliance with Department Reg. 810-6-5-.23. That regulation requires that for temporary storage to apply, the property must be immediately segregated from other like kind property upon its delivery into Alabama.

The evidence indicates only that the materials were delivered into Alabama and subsequently mailed by DMI to both out-of-state and in-state locations in accordance with DMI's own mailing lists. No evidence was submitted indicating as to how DMI stored, segregated or otherwise handled the materials once they were delivered to DMI's facility in Dothan. Attempts by both parties to obtain such information from DMI were unsuccessful.

#### CONCLUSIONS OF LAW

The initial issues to be addressed involve the audit, and are (1) whether the auditor, per State's Exhibit 3, properly computed the percentage of catalogs that were shipped into Alabama, and (2) whether the auditor, per State's Exhibit 2, properly calculated the correct paper and printing costs (taxable measure) relating to the catalogs and flyers.

State's Exhibit 3 was computed using the Taxpayer's shipping

records and indicates the percentage of catalogs that were shipped to DMI in Alabama. The percentages for 1983 and 1984 were, as set out above, agreed upon by the parties. There is apparently no dispute concerning the other periods. Consequently, those percentages as set out in State's Exhibit 3, with the above referenced adjustment for 1984, are proper.

The transactions in dispute on State's Exhibit 2 involve various invoices which indicate printing charges only. Normally, such charges would be considered as nontaxable services. However, the Department included the amounts as taxable because the Taxpayer's records did not indicate a corresponding paper purchase. Thus, the Department assumes that the invoices included both printing and paper, which would make the entire amount taxable.

The Taxpayer argues that the invoices should be taken at face value as involving printing only. However, as pointed out by the Department, the Taxpayer has presented no evidence indicating a source for the paper on which the printing was done.

Code of Ala. 1975, §40-1-5(c) requires that any person liable for tax must keep adequate records sufficient to show the correct amount of tax due. Code of Ala. 1975, §40-23-83 specifically requires that such records must be kept for purposes of properly computing a taxpayer's use tax liability. Consequently, if the invoices in dispute were for printing only, then the Taxpayer

should have on hand adequate records which would indicate a prior paper purchase. But because the Taxpayer provided no such records, it is reasonable to assume that the printer also supplied the paper, in which case the entire invoice amount should be included in the taxable measure. The Taxpayer must bear the burden when insufficient records are kept. State v. T. R. Miller Mill Co., 130 So.2d 185.

The next issue is whether the tax should be applied to all of the catalogs and flyers that were delivered into Alabama, or whether the temporary storage exemption should apply to those catalogs and flyers that were subsequently mailed by DMI to out-of-state locations.

Code of Ala. 1975, §40-23-60(7) defines "storage" as follows:

Any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased at retail.

Department Reg. 810-6-6-.23 relates to the above section and provides that for property to come within the temporary storage exception, it must be segregated from other like kind property and marked for out-of-state use at the time of its coming to rest in Alabama. There is no evidence as to how DMI handled the materials in question. Thus, the determinative issue is not only whether the catalogs and flyers were being temporarily kept for subsequent use outside of Alabama, but also whether the regulatory requirement of segregation is reasonable and must be followed for the exception to

apply.

A close reading of §40-23-60(7) indicates that any property that comes into the State for any purpose, except sale in the regular course of business or subsequent use outside of the State, shall be subject to the use tax. Use tax applies when such property comes to rest within the State. Paramount-Richards Theatres v. State, 55 So.2d 812; State v. Toolen, 167 So.2d 546.

However, as stated, property that is intended to be used outside of the State is specifically excluded from the coverage of the tax.

A reasonable interpretation of that section would require that property is not subject to the use tax if, at the time it is transported into the State, it is intended or contractually obligated for use outside of Alabama and is subsequently delivered and used outside of Alabama.

Applying that interpretation to the present situation, the use tax would not apply to those catalogs and flyers that at the time they were delivered to DMI in Alabama and were intended to be mailed to out-of-state customers in either Florida or Georgia. While no specific contract was presented into evidence, it is clear from the facts that the Taxpayer and DMI had agreed, prior to delivery of the materials to DMI, that a certain percentage would be delivered to the Taxpayer's store location areas in Florida and Georgia, as well as Alabama. Thus, when the materials were brought into Alabama, a portion was intended for subsequent use outside of



Alabama and thus should not be subject to the use tax.

Concerning the segregation requirement of Reg. 810-6-5-.23, the temporary storage exception should not be denied because there is no evidence as to whether DMI segregated or set aside those catalogs and flyers that were to be mailed outside of Alabama. The statute only requires that the property must be intended for use outside of the State, as a portion of the catalogs and flyers clearly were. To add an additional requirement of immediate segregation goes beyond the scope of the statute and is not necessary, especially where there is evidence as to what portion of the materials were in fact mailed for use outside-of-state.

Taxpayer's Exhibit 1 provides a percentage breakdown of the materials that were delivered by DMI into Alabama. The percentages range from 19.7% to 32%. Considering that only one of the Taxpayer's five stores was located within Alabama, and that an approximately equal volume of catalogs and flyers were delivered to each location area, the percentages set out in Taxpayer's Exhibit 1 are reasonable. No evidence was introduced to the contrary, or in dispute. Accordingly, the figures set out in Taxpayer's Exhibit 1 should be accepted as correct.

The Department is hereby directed to recompute the preliminary assessment as set out above, and to thereafter make said assessment final.

Done this 14th day of October, 1987.

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BILL THOMPSON  
Chief Administrative Law Judge