

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. S. 87-182

COUCH, INC.
P. O. Box 7106
Dothan, AL 36302,

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Taxpayer.

§

ORDER

Couch, Inc. ("Taxpayer") filed petitions for refund of State and City of Dothan sales tax for the period January 1, 1982 through April 30, 1984. The Department denied the refunds and the Taxpayer appealed to the Administrative Law Division. The Taxpayer was represented by Robert R. Reid, Jr., Esq. Assistant counsel Ron Bowden appeared for the Department. Based on a joint stipulation of facts, and in consideration of briefs filed by both parties, the Administrative Law Judge entered a recommended order on March 28, 1988. After a review of the Administrative Law Division record in the case and the recommended order, the following findings of fact and conclusions of law are hereby made and entered.

FINDINGS OF FACT

The relevant facts are undisputed.

The Taxpayer is in the business of producing and selling asphalt products and has its principal plant and offices in Dothan, Houston County, Alabama.

During the subject period, the Taxpayer made retail sales to the State of Alabama and its political subdivisions on which no sales

tax was charged. Sales to the State and its political subdivisions are exempted from sales tax by Code of Ala. 1975, §40-23-4(11).

The Taxpayer also made retail sales to the Georgia Department of Transportation (D.O.T.). The Georgia D.O.T. initiated the sales by inquiring whether the Taxpayer had available the desired quality and quantity of asphalt mix. if the desired product was available, the Georgia D.O.T. drove its trucks to the Taxpayer's Dothan plant and picked up the asphalt. The Taxpayer subsequently billed the Georgia D.O.T. at its offices in Georgia, and the Georgia D.O.T. mailed payment to the Taxpayer in Alabama.

No sales tax was charged by the Taxpayer on its sales to the Georgia D.O.T. The Department audited the Taxpayer and assessed State and City of Dothan sales tax on the gross receipts derived from said sales. The Taxpayer paid the tax and timely filed a petition for refund. The Department denied the refund and the Taxpayer appealed to the Administrative Law Division.

The Georgia D.O.T. also purchased asphalt from plants within Georgia during the subject period. No tax was charged on those sales in that the State of Georgia is exempt from the Georgia sales tax. All asphalt purchased by the Georgia D.O.T. was used to build or repair roads or highways in Georgia.

The issue, as stated by the Taxpayer in "Taxpayer's Response to Notice of Hearing", is as follows:

Whether the Alabama sales tax structure that exempts sales to the State of Alabama and its political subdivisions but not sales to other states and their political subdivisions is, as so applied, a discrimina-

tion against interstate commerce and a denial of equal protection of the laws in violation of the commerce clause and equal protection clauses of the United States and the State of Alabama Constitutions.

CONCLUSIONS OF LAW

The Commerce Clause, Article I, §8, Cl. 3 of the U.S. Constitution, prohibits a state from imposing a tax which discriminates against interstate commerce by providing a direct commercial advantage to in-state business. Boston Stock Exch. v. State Tax Com'n., 97 S.Ct. 599, 429 U.S. 318; Northwestern Cement Co. v. Minnesota, 79 S.Ct. 357, 358 U.S. 450; Maryland v. Louisiana, 101 S.Ct. 2114, 451 U.S. 725.

The Taxpayer argues that the exemption provided to the State of Alabama unconstitutionally discriminates against out-of-state purchasers, and specifically the Georgia D.O.T. However, the State of Alabama does not compete either directly or indirectly with the Georgia D.O.T. or any other in-state or out-of-state business or government entity, and its exemption from sales tax in no way inhibits or restricts interstate commerce. All non-exempt Alabama consumers must pay sales tax on purchases within the State just as do all non-exempt out-of-state consumers.

The Legislature is free to choose subjects of taxation and to grant exemptions therefrom. Such classifications will pass an equal protection challenge if the distinction is based on some difference having a fair relation to the legislation. Allied Stores v. Bowers, 358 U.S. 522, 79 S.Ct. 437. In State Dept. of Revenue

v. Teague, 441 So.2d 914, the Court of Civil Appeals stated as follows:

"In Haden v. Watson, 270 Ala. 277, 694 (1960), the law governing legislative classifications for purposes was summarized as follows:

'The legislature has the broadest range and powers in establishing classifications or subclassifications for the purpose of license and excise taxes. State v. Pure Oil Co., 256 Ala. 534, 55 So.2d 843. Further the legislature in classifying subjects for taxation is not required to state the grounds for classification. State v. Pure Oil Co., supra. Legislative classifications in tax matters are presumably valid, the burden being on the challenger to prove that such a classification or subclassification does not rest on a reasonable basis and such statutes are not to be deemed unconstitutional or invalid if any state of facts can be conceived which would support the subject of the tax. Glass v. Prudential Ins. Co. of America, 246 Ala. 579, 22 So.2d 13; Johnson v. State ex rel. City of Birmingham, 245 Ala. 499, 17 So.2d 662; State v. Pure Oil Co., supra.

Furthermore particular privileges, occupations, classes or subclasses therefrom. Henry v. Shevinsky, 239 Ala.293, 195 So. 222; State

In other words the classification of occupations and privileges for taxation is largely a matter of legislative discretion, and it will not be interfered with by the courts as being in violation of the rules of equality and uniformity unless it is palpably arbitrary and unreasonable and unless there is no conceivable state of facts which would support it. State v. Pure Oil Co., supra; Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245, 109 A.L.R. 1327; Frazier v. State Tax Commission, 234 Ala. 353, 175 So. 402, 116 A.L.R. 1479.'

The State of Alabama, along with its political sub-divisions, constitutes a class unto itself. The Legislature may reasonably exempt the sovereign and its subdivisions from a tax levied by

itself within its own boundaries. Foreign state agencies, such as the Georgia D.O.T., are not in the same class for purposes of Alabama taxation.

The Alabama Highway Department does not compete with the Georgia D.O.T. and the two are not similarly situated. The Georgia D.O.T. operates exclusively within its own jurisdiction, as does the Alabama Highway Department. The Georgia D.O.T. is exempt from sales tax on purchases within Georgia, but if it chooses for business reasons to purchase materials from an Alabama vendor, it cannot claim constitutional privilege to escape Alabama's sales tax.

In any case, if unconstitutional discrimination did exist, the injured party would be the Georgia D.O.T., and not the Taxpayer.

The Taxpayer implies that its business is adversely affected because it is more profitable to sell to public entities in Alabama than to public entities in Georgia (see stipulation at paragraph (13)). However, assuming that the Taxpayer's price per unit of asphalt is \$100.00, that base price, and presumably the Taxpayer's profit margin, would be the same for sales to the State of Alabama, the State of Georgia, or any other in-state or out-of-state purchaser. While sales tax must be added to all non-exempt sales, the tax would simply be remitted to the State and the Taxpayer's profit margin would be unaffected.

The Alabama sales tax is on all retail sales within the State except those specifically exempted. The tax is passed on by law to

the consumer. It is irrelevant whether the consumer is an Alabama resident or a nonresident that comes into and makes a retail purchase within the State. Residents are not favored over nonresidents. Further, nonresidents are not exempt from sales tax on a sale within Alabama simply because the subject property is subsequently transported across the state line. The taxable event is the sale within Alabama and the fact that the property is subsequently transported into another state does not make the sale a transaction in interstate commerce. Alabama Precast Products, Inc. v. Boswell, 375 So.2d 985; Rite Tile Company v. State, 176 So.2d 31.

An exemption from taxation necessarily favors the exempted party. But the exemption is unconstitutional only if it unreasonably discriminates against members of the same class or unduly restricts interstate commerce by favoring in-state business over foreign competition. By exempting the State of Alabama and its subdivisions from sales tax, the Alabama sales tax scheme does neither.

The above considered, the refunds in question should be denied. This order constitutes a final order for purposes of judicial review under Code of Ala. 1975, §41-22-20.

Done this 29th day of April, 1988.