

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. 88-107

WASTE AWAY GROUP, INC.
648 South Perry Street
Montgomery, AL 36104,

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Taxpayer.

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FINAL ORDER

The Revenue Department assessed State sales tax and State, Local City, City of Leeds, Elmore County, Montgomery County and Talladega County use tax against Waste Away Group, Inc. (Taxpayer) for all or a part of the period April 1, 1984 through March 31, 1987. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on September 19, 1989. Robert E. L. Gilpin, Esq., William B. Sellers, Esq. and Lester Sanders appeared for the Taxpayer. Assistant counsel J. Wade Hope represented the Department. The following Final Order is entered based on the evidence and arguments submitted by the parties.

FINDINGS OF FACT

The Taxpayer collects and disposes of garbage, refuse and other solid waste for residential, commercial and other customers. The Taxpayer contracts with a customer to provide collection services and then delivers to the customer any one of three different containers; (1) a small 90 gallon cart for residential customers, (2) a medium sized front-end loader (dumpster) for small commercial businesses, and (3) a large roll-off container for large businesses

and construction companies.

The customers dispose of garbage or other waste in the containers, and the Taxpayer uses specially designed trucks to periodically pick-up and empty the containers and transport the contents to a landfill or transfer station. The customers are charged based on the type of container used, the regularity of pick-up service, and the volume of garbage or waste disposed of by the Taxpayer.

The residential carts and front-end loaders are emptied on site and the garbage is then transported to a landfill for dumping.

The large roll-offs are lifted onto the bed of a specially designed truck, secured in place on the truck, and then transported to a transfer station or landfill for dumping. The empty roll-off is then returned to the customer for reuse. Most of the trucks have a built-in compactor which compacts the garbage in the garbage bin.

The trucks used by the Taxpayer have specially designed chassis and bodies which are separately ordered by the Taxpayer on different purchase orders. During the audit period, the chassis were ordered through various in-state and out-of-state Mack truck dealers. The truck bodies were ordered from several body dealers, although most were purchased through a Heil dealer in Fort Payne, Alabama.

After receiving an order for a chassis, the Mack dealer

forwarded the order to the Mack factory in Pennsylvania. The factory then manufactured the chassis and delivered it to the specified body dealer for assembly. The body dealer assembled the chassis and body and then delivered the completed vehicle to the Mack dealer for service and inspection. The finished vehicle was then delivered by the Mack dealer to the Taxpayer in Alabama. After delivery, the Taxpayer separately paid the Mack dealer for the chassis and the body dealer for the body.

The Department audited the Taxpayer and discovered that the Taxpayer had failed to pay any State, city or county tax on the residential carts during the period in question, and had paid only State use tax on the front-end loaders. Lease tax was paid on the large roll-offs. The Department subsequently assessed State, city, and county use tax on all the containers. State sales tax was also assessed based on several retail sales of equipment made by the Taxpayer within Alabama.

The Department also assessed use tax on the truck chassis and bodies as follows: Both the chassis and the body was taxed at the reduced automotive rate levied at §40-23-61(c) if the vehicle was assembled outside of Alabama and then delivered into the State. However, if the body and chassis were delivered separately into Alabama and then assembled, the chassis was taxed at the automotive rate, but the body was taxed at the higher general rate. The Department's position is that the unassembled body was not part of

an automotive vehicle when it entered the State, and thus cannot be taxed at the lower automotive rate.

The Taxpayer objects to the assessments on several grounds, as follows:

(1) The Taxpayer first argues that the containers and trucks should be exempt from use tax because they are devices acquired primarily for the control, reduction or elimination of air or water pollution, see S§40-23-62(18). The Taxpayer contends that the pollution control exemption should be broadly construed and that the primary function of the containers and trucks is the control and disposal of garbage, trash and other solid waste, i.e., pollution.

(2) The Taxpayer also contends that the truck bodies assembled in the State should be taxed at the same reduced automotive rate as the bodies assembled outside the State. The Taxpayer maintains that the regulation relied on by the Department, Reg. 810-6-2-.103, is unreasonable and discriminates assemblers because bodies assembled in Alabama are taxed at the higher general rate, whereas bodies assembled outside of Alabama and then brought into the State are taxed at the reduced automotive rate.

(3) The Taxpayer argues in the alternative that if the large roll-off containers are not exempt as pollution control devices, then the special automotive rate should apply. As noted, the large roll-off containers are lifted onto special truck beds, secured in

place, and then transported to a landfill or transfer station for dumping. The Taxpayer contends that the container becomes a part of the truck when it is secured on the truck bed, and thus is identical to a semi-trailer, which is specifically subject to the automotive rate, see §40-23-61(c) and Reg. 810-6-1-.110.

(4) The Taxpayer's next alternative argument is that the truck bodies are machines used in the processing or compounding of tangible personal property and thus should be taxed at the reduced "machine" rate levied at §40-23-61(b). The Taxpayer's position is "that the truck bodies have a compactor that processes garbage so that more trash can be picked-up with fewer trips to the landfill (R. 44-45). Indeed, the purpose of having the types of bodies installed on the chassis is for the garbage to be compounded, compacted and reduced to a more manageable size. This allows Respondent (Taxpayer) to customers with a single truck." See Taxpayer's brief at page 21.

(5) Finally, the Taxpayer maintains that the penalties included in the assessments should be waived because the Department had instructed the Taxpayer during an earlier audit that the containers were subject to lease tax and-not sales or use tax. The Taxpayer also contends that if use tax is due, then the lease tax paid on the roll-off containers should be refunded.

CONCLUSIONS OF LAW

The Taxpayer initially argued that the containers were being

leased, and that lease tax, not use tax, was the appropriate tax.

However, the Taxpayer does not lease the containers, but rather uses them in providing a service to its customers. The Taxpayer now apparently concedes that the containers are not being leased because the issue was not addressed in the Taxpayer's post-hearing brief.

(1) The containers and trucks were not acquired primarily for the control, reduction or elimination of pollution within the scope of the pollution control exemption, §40-23-62(18).

The purpose for the pollution control exemption is to give businesses a break with the cost of purchasing the extra, non-productive equipment necessary to comply with mandatory pollution control legislation. Chemical Waste Management, Inc. v. State, 512 So.2d 115. However, the Court of Civil Appeals ruled in the above case that the exemption should not apply if the property is used as an integral part of the taxpayer's primary business, and is only incidentally related to pollution control. That is, the property must be acquired primarily for pollution control, and not as an essential element of the business activity or services provided by the taxpayer.

The containers and trucks in issue are used directly and are a necessary part of the Taxpayer's primary business activity, the removal and disposal of solid waste. The exemption was not

intended to apply to equipment acquired primarily for and used directly in a profit motivated activity. Thus, the containers and trucks were not acquired or used primarily for pollution control purposes and should not be exempted under §40-23-62(18).

(2) The truck bodies transported into and assembled in the State should be taxed at the reduced automotive rate.

Reg. 810-6-2-.103 holds that a truck body purchased outside of Alabama but transported into and assembled in Alabama should be taxed at the general rate because it is not a part of an automotive vehicle when it enters and becomes subject to use tax in the State.

However, while the regulation is correct insofar as it relates to bodies purchased outside of Alabama and then delivered into the State, it does not apply in the present case because the transactions were not completed until the vehicles were assembled, inspected and then delivered by the Mack dealer to the Taxpayer in Alabama. A sale is not consummated when the property is ordered, but rather only when the property is delivered by the seller to the buyer, see Code of Ala. 1975, S§7-2-106 and 7-2-401(2); and State v. Delta Airlines, Inc., 356 So.2d 1205.

The use tax attached in the present case only after the Taxpayer received the vehicles and then placed them in service in the various counties and cities in which it does business. At that time, the truck bodies were a part of the completed automotive vehicles and thus should be taxed at the reduced automotive rate.

(3) The Taxpayer next argues that the large roll-off containers are similar to semi-trailers and thus should be taxed at the automotive rate. The automotive rate specifically applies to any "automotive vehicle or truck trailer, semi-trailer or house trailer", see §40-23-61(c). However, the roll-off containers are similar to semi-trailers only in that they are temporarily attached to a truck and hauled away for dumping. They do not have wheels and cannot be classified as semi-trailers, and thus should not be taxed at the lower automotive rate.

(4) Any machine used in mining, quarrying, compounding, processing or manufacturing tangible personal property is taxable at a reduced "machine" rate, see §40-23-61(b). "Processing" has been defined as "to subject to some special treatment, to prepare for the market, to convert into marketable form, to make usable, marketable, or the like". State v. Four States Drilling Co., 177 S.2d 828, at 832.

The Taxpayer argues that the compactors in the trucks process the trash and other solid waste, and thus should be subject to the special rate. However, the compaction of trash does not specially prepare, treat, or otherwise change the waste into a different form, but rather only makes it easier to transport. The mere transporting of property does not constitute the processing of tangible personal property. Alabama-Georgia Syrup Co. v. State, 42 So.2d 796; Anderson and Sons Co. v. Glander, 97 N.E. 2d. 29. Thus,

the bodies are not machines used in the processing of tangible personal property and should not be taxed at the reduced machine rate.

(5) The Taxpayer was informed during an earlier audit that lease tax was due on the containers. However, during the audit period in question, the Taxpayer remitted lease tax on only the large roll-off containers. The Taxpayer failed to pay any tax on the residential carts, and only State use tax was paid on the medium-sized dumpsters. The Department had not advised the Taxpayer that no tax was due on those items. Consequently, the ten percent failure to pay penalty levied at §40-23-69 was properly included in the assessments.

The preliminary assessments in issue should be recomputed as set out above, and should thereafter be made final, with appropriate interest. The lease tax paid on the roll-off containers should be refunded pursuant to the refund petitions previously filed by the Taxpayer.

Entered this 16th day of February, 1990.

BILL THOMPSON
Chief Administrative Law Judge