

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

vs.

§

SARA GRANT AND ASSOCIATES,
a partnership composed of
Howard Lee Grant and Sara
S. Grant,
309 South Quintard Avenue
P. O. Box 2308
Anniston, AL 36202,

DOCKET NO. S. 89-211

§

§

§

§

Taxpayers.

§

FINAL ORDER

The Revenue Department assessed State, Madison County and City of Anniston use tax against Sara Grant and Associates, a partnership composed of Howard Lee Grant and Sara S. Grant ("Taxpayer"), for the period October 1985 through September 1988.

The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on March 1, 1994. Sara Semmes represented the Taxpayer. Assistant counsel Wade Hope represented the Department.

The issue in dispute is whether the Taxpayer is liable for Madison County, City of Anniston and State use tax on newspapers purchased by the Taxpayer from various printers outside of the above jurisdictions and subsequently distributed or delivered by the Taxpayer inside the jurisdictions.

The Taxpayer contracted with the U. S. Government (the "Army") for the right to publish two military newspapers during the period in issue, The Redstone Rocket and The Fort McClellan News.

The Army allowed the Taxpayer to use the name of each newspaper and to sell advertising to be included in each newspaper.

In return, the Taxpayer was obligated to have the newspapers printed and then delivered to the Army on a weekly basis. The Taxpayer received no money from the Army. Rather, the Taxpayer received advertising revenues from which it paid expenses and earned a profit.

The Army controlled the article content and also approved the advertisements to be included in each newspaper. Army personnel assisted in preparing a "proof" of each weekly edition. The Taxpayer subsequently delivered the proof to a printer for printing. During the period in issue, the Taxpayer used printers in Georgia, Jefferson County, Alabama and Marshall County, Alabama.

The Taxpayer picked up the newspapers at the printers and then delivered the newspapers to either Fort McClellan or Redstone Arsenal. The Taxpayer subsequently paid the printer for the newspapers.

The Department audited the Taxpayer and assessed State, Madison County and City of Anniston use tax on those newspapers printed outside of those jurisdictions that were subsequently delivered into and distributed by the Taxpayer inside those

jurisdictions. For example, if a weekly edition of the Redstone Rocket was printed in Marshall County and subsequently picked up by the Taxpayer and delivered to Redstone Arsenal, which is located in Madison County, Madison County use tax was assessed. State use tax was not assessed on the newspapers printed in Alabama because the retail sale of those newspapers occurred within Alabama. In that case, sales tax would be owed (by the printer/seller). See generally, State v. Dees, 333 So.2d 818.

The Taxpayer argues that it operated as an agent for the Army and thus is exempt from State and local sales or use tax. I disagree.

The above issue was decided in Calhoun Publishing Company, Inc. v. State, 513 So.2d 643 (1987). That case involved the issue of whether a printer (Calhoun Publishing) was liable for sales tax on the sale of the Ft. McClellan News to Sara Grant and Associates, the Taxpayer in this case. Calhoun Publishing argued that Grant was an agent of the Army and thus that the sale of newspapers to Grant was exempt from tax. Grant was not a party in the case. However, the Court of Civil Appeals determined that Grant was not an agent of the Army as follows:

The taxpayer contends that the degree of control exercised by the Army over the content and preparation of the newspaper made Grant an agent of the Army, despite the written agreement between Grant and the Army disclaiming such a relationship. It is true that a contract which directly disclaims an agency relationship will not preclude a finding of agency if there is independent evidence of a retained right of control.

Wood v. Shell Oil Co., 495 So.2d 1034 (Ala. 1986). However, the control that the Army exercised did not include control over the actual publication of the paper.

The taxpayer had in its possession the agreement between Grant and the Army, which makes quite clear who would be obligated by Grant in having the paper printed, or should there ever occur such legal consequences as libel resulting from the paper's publication and distribution.

That is, neither the reservation nor the exercise of the Army's power over the content of the paper gave to Grant the status of an agent of the federal government to enter into contracts or to pledge its credit. Considering the nature of the contractual relationship between the taxpayer and Grant and further considering that the taxpayer had in its possession the agreement between Grant and the Army, we do not think it credible that the taxpayer believed it had a recourse against the Army should Grant breach its contract with the taxpayer. Such a belief is also a test of agency. *All South Bonding Co. v. State*, 497 So.2d 499 (Ala.Civ.App. 1986). The trial court did not err on this ground.

Use tax is due on tangible personal property purchased at retail outside of a taxing jurisdiction that is subsequently used, stored or consumed within the taxing jurisdiction. See, Code of Ala. 1975, §40-23-61. The Department thus properly assessed Alabama use tax on those newspapers printed in Georgia that were subsequently delivered into and distributed (used) by the Taxpayer in Alabama to fulfill its contracts with the Army. The retail sale in those instances occurred outside of Alabama when the Taxpayer picked up or accepted delivery of the newspapers at the printer's location in Georgia.

Likewise, Madison County and City of Anniston use tax was also properly assessed on those newspapers printed and picked up by the Taxpayer outside of Madison County or Anniston and subsequently

delivered into and distributed by the Taxpayer in those jurisdictions. Again, the retail sales occurred when the Taxpayer accepted delivery of the newspapers from the printers outside of Madison County or Anniston.

In summary, the Taxpayer purchased the newspapers in issue at retail and subsequently used the newspapers to fulfill its contracts with the Army. The Taxpayer did not purchase the newspapers at wholesale from the printers for the purpose of reselling them to the Army, nor, as discussed above, did the Taxpayer purchase the newspapers as agent for the Army. See, Calhoun Publishing, supra. Use tax is thus due.

The Taxpayer would be allowed a credit against the State use tax for any tax paid to Georgia (§40-23-65), or against Madison County or Anniston tax due for any tax paid to any other county or city in Alabama (§40-23-2.1). However, there is no evidence that any such taxes were paid in this case.

The Taxpayer also initially contested the tax assessed on various mailing labels purchased by the Taxpayer during the subject period. The Taxpayer now concedes that use tax was properly assessed on those labels.

The above considered, the assessments in issue are upheld and judgment is entered against the Taxpayer for State use tax in the amount of \$11,205.83, Madison County use tax in the amount of \$1,483.61 and City of Anniston use tax in the amount of \$9,278.53.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on November 30, 1994.

BILL THOMPSON
Chief Administrative Law Judge