STATE OF ALABAMA, DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
vs.	§	DOCKET NO. S. 91-203
MARKS-FITZGERALD FURNITURE COMPANY, INC. 2011 University Drive Huntsville, AL 35805,	§	
Taxpayer.	§	

FINAL ORDER

The Revenue Department assessed Marks-Fitzgerald Furniture Company, Inc. (Taxpayer) for sales tax for the period July 1987 through June 1990. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on January 14, 1993. Michael Seibert appeared for the Taxpayer. Assistant counsel Wade Hope represented the Department.

The Taxpayer operates two retail furniture stores in Huntsville, Alabama. The issues in dispute involve the Taxpayer's sales tax liability on (1) credit card sales, and (2) discounted account receivables.[1]

CREDIT CARD SALES

On credit card sales, the issue is whether the fee paid by the Taxpayer to a credit card company for use of the credit card company's services should be included in gross receipts subject to

[1] Several other issues previously disputed by the parties have been settled. Specifically, the Taxpayer now concedes that sales to an automobile dealership previously treated as tax-free wholesale sales should be taxed. On the other hand, the Department concedes that sales to a jewelry store initially treated as taxable by the Department were tax-free wholesale sales. Cash discounts were also excluded from gross proceeds as allowed by Department Reg. 810-6-1-.53.

sales tax.

The Taxpayer added sales tax to the sales price on credit card sales and then entered the transactions through an electronic terminal. The credit card company deducted a previously negotiated fee of between 1 1.2% - 5% and then paid the Taxpayer the balance either by electronically crediting the Taxpayer's bank account or by check through the mail. The Taxpayer's customer was then obligated to pay the credit card company the full sales price plus sales tax.

The Taxpayer reported and paid sales tax to the Department on only the amount received from the credit card company - that is, the sales price less the 1 1/2% - 5% credit card fee.

The Department argues that sales tax is due on the full sales price without deducting the credit card user fee.

DISCOUNTED ACCOUNT RECEIVABLES

The issue here is whether sales tax is due on the full retail sales price or only on the discounted amount received by the Taxpayer.

The Taxpayer sold a number of its doubtful account receivables to finance companies during the period in issue for between 80% - 95% of the face value of the account. The Taxpayer then reported and paid sales tax to the Department on the amount actually received. For example, if the Taxpayer sold a chair on credit for $1,000.00, 8% sales tax was added for an account balance of $1,080.00. If the Taxpayer elected to sell the account at a 20% discount, the finance company paid the Taxpayer 80% of $1,080.00,

or $864.00. The Taxpayer then backed out the 8% sales tax of $64.00 and reported and paid tax on the balance of $800.00.

The Department argues that the Taxpayer owes sales tax on the full sales price ($1,000.00 in the above example) at the time the account is sold.

A retailer acts as a conduit and is required to collect sales tax from the retail customer and remit the tax to the Department. Code of Ala. 1975, §40-23-26. The taxable measure is the retail sales price and tax accrues at the time of sale. However, on credit sales the retailer is not required to remit the tax "until collections of such credit sales shall have been made". Code of Ala. 1975, §40-23-8.

The Taxpayer argues that §40-23-8 applies to both the credit card sales and the discounted account receivables, and that tax is owed only on the net amount received from the credit card or finance companies.

First, in my opinion credit card sales are not credit sales governed by §40-23-8. Rather, on credit card sales the retailer receives payment immediately or almost immediately and in return pays the credit card company a fee for its services.

"Gross proceeds of sale" is defined at Code of Ala. 1975, §40-23-1(6) as the value proceeding or accruing from the sale of tangible personal property, without deduction for any expenses whatsoever. The credit card fee paid by a retailer to a credit card company is a non-deductible expense or cost of doing business. The fact that the credit card company deducts the fee before

paying the retailer does not change the nature of the fee. The credit card fees paid by the Taxpayer in this case must be included in gross receipts subject to sales tax.

Also, while the retailer receives the sales price less the credit card fee, the customer is still obligated to pay the credit card company the full sales price plus sales tax. Thus, if the retailer is allowed to exclude the credit card fee from taxable gross proceeds, the customer will be obligated and may pay more sales tax (to the credit card company) than is collected by the State. That should not be allowed to happen. All sales tax paid by a retail customer, whether paid to the seller or to a third party, must be remitted to the State.

The discounted account receivables do involve credit sales. However, even on credit sales the retailer is still obligated to remit tax to the Department on the full amount paid by the customer. A retailer cannot avoid its legal obligation by selling or transferring the account receivable to a third party. Section 40-23-8 allows a retailer to delay remitting tax until the customer pays, but the retailer is obligated to remit all the tax paid by the customer, even if the customer pays a third party. As with credit card sales, a retailer cannot be allowed to remit less tax to the Department than may be paid by the retail customer.

If tax is not due on the discounted amount received by the retailer, then what about §40-23-8 and how much and when is tax due? One answer is that the Legislature intended §40-23-8 to apply only if the retailer is also the collecting party. That is, if a

retailer elects to sell an account to a third party, §40-23-8 is no longer applicable because the retailer has given up control of the account. In that case, tax would be due as argued by the Department on the full sales price when the account is sold by the retailer.

Another and I think better answer is set out in Administrative Law Docket No. S.90-152, decided June 1991. In that case, a furniture store discounted delinquent account receivables to a related collection company for 40% of the face value of the account. I held as follows:

> A simple answer in this case is that tax should be computed on the 40% that is received by the Taxpayer for the delinquent accounts. However, the 40% has no relationship to the tax actually collected from the customers and which the Taxpayer is required to pay to the Department. The customers may eventually pay more than the 40%, in which case tax would be paid by the customer but not remitted to the State. In no event should the Department receive less than is paid by the customer.
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> The seller is obligated to remit to the State any tax paid by the customer. The seller cannot avoid that duty by transferring accounts receivable to a third party. Rather, if a seller elects to transfer delinquent accounts to a third party for collection, the seller remains liable for any tax collected by the third party. The seller should be required to monitor how much is paid and thereafter remit the correct tax to the Department.
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> A retail seller must keep or have access to accurate records from which the Department can determine how much tax is due. See, Code of Ala. 1975, §40-23-9. Consequently, if a retailer sells or transfers delinquent accounts, the retailer is required to keep accurate records from which the Department can determine how much is collected each month by the third party from the retail customer. If the seller fails to maintain or provide access to accurate records showing payments by the purchasers, then the retailer must bear the

> consequences and the Department would be justified in assessing tax on the entire balance due.
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> In summary, the general rule is that a retailer remains liable on any transferred accounts and must report and pay tax on any amounts subsequently paid by the customers. The retailer is obligated to keep or provide the Department with reasonable access to records from which the Department can verify the amounts collected on the accounts. If the retailer fails to provide the necessary records, then the retailer must bear the consequences and must pay tax on the full amount due. In no event shall the retailer pay before the tax is collected, but the retailer is obligated to keep records showing how much if any has been paid.

I understand the above holding imposes an added administrative burden on retailers, and that some finance and collection companies may balk at giving a retailer (or the Department) access to records showing how much is actually collected. However, the sales tax consequences must be considered by a retailer in deciding to discount an account. The retailer must keep track of and remit all taxes paid by a credit customer. If the retailer cannot provide the Department reasonable access to records showing collections on credit sales, the retailer must pay on the full sales price. That rule applies whether the collection company is a related party, as in S. 90-152, or an unrelated party, as in this case.

The Taxpayer in this case failed to provide records showing how much has or hasn't been paid on the transferred accounts. Consequently, the Department properly assessed tax on the full sales price charged by the Taxpayer.

The assessment is upheld and judgment is entered against the Taxpayer for sales tax in the amount of $17,063.85, with additional

interest running from March 20, 1991. That amount reflects the agreed issues discussed in footnote 1.

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

Entered on August 25, 1993.

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BILL THOMPSON
Chief Administrative Law Judge