

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

vs.

COMMUNICATIONS CENTRAL, INC.
1150 Northmeadow Parkway
Suite 118
Roswell, GA 30076,

Taxpayer.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. F. 92-229

FINAL ORDER

The Revenue Department assessed Communications Central, Inc. for the years 1989 through 1991 for the 2.5% telephone gross receipts license tax levied at Code of Ala. 1975 §40-21-58. Communications Central appealed to the Administrative Law Division and a hearing was scheduled for May 27, 1993. Southeastern Pay Telephone, Inc. intervened prior to the hearing as allowed by Code of Ala. 1975, §40-2A-9(1) as a party whose interest may be affected by the appeal. James E. Smith represented both Communications Central and Southeastern Pay at the hearing. Assistant counsel Dan Schmaeling represented the Department.

Southeastern Pay started operating in Alabama in 1987 and was granted "a Certificate of Public Convenience and Necessity to Provide Customer-Owned, Coin-Operated Telephone Service and the Resale of Toll Service" by the Alabama Public Service Commission (PSC) on June 6, 1989.

Southeastern Pay purchased or leased pay telephones from telephone manufacturers and then contracted with various customers,

primarily businesses, to install the telephones on the customers' premises. Southeastern Pay contracted with local service providers for local service and long distance providers for long distance service and then resold the services to the individuals using the pay phones. Southeastern Pay paid each location owner a percentage of the local and long distance revenue generated at the location.

Southeastern Pay refused to file returns or pay the 2 1/2% gross receipts license tax during the years in issue because it did not believe it was subject to the tax.

In early 1992, Southeastern Pay sold its assets and its PSC license to Communications Central. A "Notice of Transfer" was issued by the PSC on February 3, 1992 transferring Southeastern Pay's certificate of public convenience and necessity to Communications Central. Communications Central had not operated in Alabama prior to that date.

The Department requested Communications Central to file the delinquent returns for the years in issue and pay the tax due. Communications Central refused. The Department then estimated the tax due at \$15,000.00 per year and entered a preliminary assessment against Communications Central for the years 1989 - 1991 on May 22, 1992. The preliminary assessment with penalty and interest totaled \$67,865.72. Communications Central appealed to the Administrative Law Division on June 16, 1992.

The Department subsequently obtained copies of Southeastern Pay's annual report to the PSC for the years in issue and based thereon reduced the assessment to \$35,729.52 on August 20, 1992.

An amended 1990 PSC report was subsequently filed with the Department and the Department agrees that the liability for that year should be reduced accordingly.

The issues are (1) was Southeastern Pay subject to the 2.5% gross receipts license tax during the years in issue, and (2) if so, did the Department properly assess the tax against Communications Central.

During the period in issue, §40-21-58 imposed a license or privilege tax upon each person engaged in the telephone business in Alabama. The Court of Civil Appeals in Alabama Department of Revenue v. Telemarketing Comm., 514 So.2d 1388, defined "telephone business" as follows:

We think that such usage of the term "telephone business" or the accompanying term "telephone company" must focus upon the ability of a company, or other entity, to place persons in different locations in communication with each other by the use of telephones.

In this case, Southeastern Pay purchased local service from a local service provider and long distance service from long distance providers and resold those services to its customers, the users of the coin-operated pay telephones. Under those circumstances, Southeastern Pay was in the telephone business as a reseller of telephone service and therefore was subject to the 2.5% telephone

gross receipts tax. The fact that Southeastern Pay did not own any of the lines or transmission facilities is not relevant. See, U.S. Transmission Systems, Inc. v. Board of Assessment Appeals, 715 P.2d 1249, cited and quoted in Telemarketing Communications, at 1390.

The above conclusion is supported by the fact that Southeastern Pay was required to be licensed with the Alabama Public Service Commission as a reseller of toll service in Alabama.

The next issue is whether the Department properly assessed Communications Central for the tax.

The Department assessed Communications Central based on its position "that this transfer of assets (from Southeastern Pay to Communications Central) as well as public service commission certificate also resulted in a transfer of the liability incurred by Southeastern Pay Telephone, Inc." (See letter from assistant counsel Dan Schmaeling dated March 9, 1993). I disagree.

Southeastern Pay and Communications Central are separate entities and for tax purposes must be treated separately. State v. Capital City Asphalt, Inc., 437 So.2d 1291. I know of no statute or other authority by which a successor corporation can be held liable by the Department for a predecessor's liability for the 2.5% telephone gross receipts tax.¹ Southeastern Pay's liability for

¹ To my knowledge the only successor in business statutes are the sales tax statute found at §40-23-25 and the use tax statute found at §40-23-82.

the tax was not transferred to Communications Central by the fact that Southeastern Pay sold its assets and transferred its PSC license to Communications Central. Consequently, Communications Central cannot be held liable by the Department for the tax in issue.

If Communications Central cannot be assessed, the procedural question arises as to whether a judgment can or should be entered against Southeastern Pay for the tax due. An argument can be made that by intervening Southeastern Pay has subjected itself to the jurisdiction of the Administrative Law Division and that a judgment holding Southeastern Pay liable for the tax would be appropriate.

However, to ensure procedural due process, the better course is to require the Department to reinstitute assessment procedures against the responsible taxpayer, Southeastern Pay. Code of Ala. 1975, §40-2A-7(b)(2)a. provides that if a taxpayer fails to file a return, as Southeastern Pay did in this case, then tax may be assessed by the Department at any time.

The assessment in issue against Communications Central is voided. The Department is directed to recompute the tax due to reflect the amended 1990 PSC report, and then institute assessment proceedings for the tax due against Southeastern Pay.

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 26, 1993.

BILL THOMPSON
Chief Administrative Law Judge