

STATE OF ALABAMA §  
DEPARTMENT OF REVENUE, §

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ADMINISTRATIVE LAW DIVISION

v. §  
ARAMIS SERVICES, INC., et al. §  
125 Pinelawn Road  
Melville, NY 11747, §

DOCKET NOS. S. 92-263  
S. 92-264  
S. 92-267  
S. 92-268

Taxpayers. §

REVISED OPINION AND PRELIMINARY ORDER

(The original Opinion and Preliminary Order was entered in this case on February 25, 1994. The Taxpayers subsequently filed a Motion for Protective Order requesting that parts of the Order which revealed certain trade secrets of the Taxpayers should be deleted or declared confidential. The Taxpayers and the Department have agreed that certain parts of the Order shall be protected. Accordingly, this Revised Opinion and Preliminary Order is hereby entered with those confidential parts deleted as indicated. All copies of the original Opinion and Preliminary Order should be kept confidential and should not be distributed to the public. The revised text is set out below. Additions to text are underlined.)

The Revenue Department assessed State and various county and city use taxes against Aramis Services, Inc., (text deleted) (jointly "Taxpayers") for the period January 1989 through June 1991. The Taxpayers appealed to the Administrative Law Division.

The appeals were consolidated and a hearing was conducted on December 17, 1992. Herbert Harold West, Jr. and Roy Crawford

appeared for the Taxpayers. Assistant counsel Dan Schmaeling represented the Department.

(Text and footnote deleted) The issue in dispute is whether the Taxpayers are liable for Alabama and various local use taxes on those promotional items delivered into and used in Alabama.

The promotional items in issue can be separated into five categories: (1) counter and display items such as mirrors, light displays, badges, etc. that are shipped from the Taxpayers' warehouses (text deleted) outside Alabama directly to the stores in Alabama, (2) counter and display items shipped first to a department store's distribution center outside of Alabama and then to the stores in Alabama, (3) printed promotional materials shipped by the Taxpayers directly to the stores in Alabama, (4) printed promotional materials ordered by the Taxpayers from third-party printers outside of Alabama and then shipped by the printers into Alabama as directed by the Taxpayers, and (5) packaging materials shipped from the Taxpayers' warehouses (text deleted) outside Alabama to the stores in Alabama.

(Text deleted).

(1) The promotional items delivered from a Taxpayer's warehouse (text deleted) outside Alabama directly to a department store in Alabama.

The Taxpayers argue that they never had title, possession or control of the promotional items in Alabama and thus cannot be liable for Alabama use tax because title to the items passed to the

department stores along with the merchandise sold by the parents when the items were delivered to the common carriers F.O.B. origin outside of Alabama. I disagree.

The legal principle that title to property is transferred upon delivery applies only if a sale is involved.<sup>1</sup> Consequently, title to the promotional items was not transferred to the stores when the items were delivered to the common carriers outside of Alabama or at any other time because the promotional items were never sold by the Taxpayers to the stores. Title was also not somehow

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<sup>1</sup>(Text deleted) The Taxpayers argue that title to the merchandise passed when the parents completed their delivery of the goods to the common carriers outside of Alabama, citing UCC §§7-2-106(1) and 7-2-401(2). However, §40-23-1(a)(5) controls when a sale is completed for sales tax purposes, and that provision designates the Postal Service and all common carriers as agents of the seller. Thus, for sales tax purposes, title to the merchandise did not pass and thus the sales were not completed until the common carriers delivered the merchandise to the department stores in Alabama. However, as discussed herein, the issue of when title to the merchandise passed is not relevant to this case because the promotional items in issue were never sold by the Taxpayers, (text deleted).

transferred because the stores paid the freight for delivering the items into Alabama. Rather, the Taxpayers (text deleted) retained title to all of the items until the items were discarded, distributed to store customers, or otherwise disposed of in Alabama.

The Taxpayers concede that they retained title to and thus owe Alabama use tax on the mirrors and other larger items of value that they would attempt to recover and reuse if a store closed or stopped selling the parent's products. However, the Taxpayers argue that they are not liable for use tax on the smaller, less valuable items that they would not attempt to recover and reuse because title to those items was transferred outright to the department stores. The Taxpayers argue on page 6 of their brief as follows:

Taxpayers retain title to some counter and display items, while title to others is transferred to the department stores. Generally, Taxpayers retain title to those items which Taxpayers would attempt to recover if a department store went out of business or stopped selling their respective Products. A mirror, such as the one admitted into the record as Taxpayers' Exhibit 5, is an example of a counter or display item to which Taxpayers retain title. Taxpayers acknowledge that counter and display items to which they retain title are subject to use tax.

Counter and display items that are transferred outright to department stores are items which Taxpayers would not attempt to remove if a department store went out of business or stopped selling their respective Products.

A badge, such as the one admitted into the record as Taxpayers' Exhibit 6, is an example of a counter or display item which is transferred outright to department stores.

First, by conceding that they retained title to some of the items in Alabama, the Taxpayers defeat their own primary argument that title to all (underlined in original) of the items passed upon delivery to the common carriers outside of Alabama. Also, the Taxpayers do not explain how or under what legal theory they retained title to the valuable items that could be reused, but not to the less valuable items they would chose to abandon. In my opinion there is no distinction. The items were all delivered together into Alabama and title to the non-reusable items was not somehow "transferred outright" to the stores. Rather, as discussed above, the Taxpayers retained title to all (underlined in original) of the items in Alabama and title was not transferred to the stores by sale, gift or otherwise.

The Taxpayers are liable for Alabama use tax on all of the items in issue even though the Taxpayers' employees may not have physically used or had possession of some of the items within Alabama.

"Use" is defined for Alabama use tax purposes at Code of Ala. 1975, §40-23-60(a) as "the exercise of any right or power over tangible personal property incident to the ownership of that property, or by any transaction where possession is given . . .".

(Text deleted) [A] taxable "use" occurred when the items were delivered into and used by a store's employees in Alabama. The delivery of the items to the stores constituted a taxable

transaction "where possession (was) given" by the Taxpayers to the department stores within Alabama.

In McNamara v. D. H. Holmes Co., Ltd., 486 U. S. 24 (505 So.2d 102), a Louisiana corporation, Holmes, ordered catalogs from an out-of-state printer and directed the printer to mail the catalogs to various customers in Louisiana. Holmes was held liable for use tax on the catalogs even though Holmes never had physical use or possession of the catalogs in Louisiana. The same is true in this case. The Taxpayers used the items in Alabama for Alabama use tax purposes when the items were delivered for use or consumption in Alabama (text deleted). Actual physical handling of the items by the Taxpayers' employees in Alabama was not required for the Taxpayers to be liable for Alabama use tax on the items.

The Taxpayers argue that Holmes can be distinguished because "distribution" is designated as a specific taxable use under Louisiana law, but not under Alabama law. However, as explained above, the delivery of the promotional items for use in Alabama constituted "a transaction where possession is given", which is a specified taxable use as defined at §40-23-60(a). Holmes is discussed later relative to the printed promotional materials delivered into Alabama by the third party printers.

The Taxpayers discuss the use tax "withdrawal" provision and the effect of Ex parte Sizemore (Re: Sizemore v. The Dothan Progress), 605 So.2d 1221, on pages 19 and 20 of their brief. The

Taxpayers' withdrawal argument is premised on the assumption that the items were purchased by the Taxpayers at wholesale outside of Alabama, which is necessary for the withdrawal provision to apply.

I disagree. As explained below, the Taxpayers purchased the items at retail for Alabama use tax purposes, not at wholesale.

"Wholesale sale" is defined at §40-23-60(4)(a) as the sale of property to a licensed retail merchant for resale. The Taxpayers are not licensed retail merchants and they did not purchase the promotional items in issue for resale. (Text deleted) Thus, although the Taxpayers were somehow allowed to purchase the items tax-free outside of Alabama, the items were not purchased at wholesale for Alabama use tax purposes. Instead, they were purchased at retail under §40-23-61(a), which defines "retail sale" as all sales except those defined as wholesale sales. Consequently, any discussion of the withdrawal provision or Ex parte Sizemore is unnecessary and only confuses the issue.

In summary, the Taxpayers purchased the items at retail outside of Alabama and subsequently used the items in Alabama, either directly or by giving possession and use of the items to the department stores in Alabama. The fact that the department stores paid to have the items delivered into Alabama did not cause title to the items to transfer to the stores. The Taxpayers retained title when the items were being used in Alabama, and even if title to some of the items was at some point transferred to a store or to

a store's customers in Alabama, which it was not, the giving of possession of the items in Alabama constituted a taxable use by the Taxpayers in Alabama.

The purpose of the Alabama use tax is to tax property purchased at retail outside of Alabama that would have been subject to Alabama sales tax if purchased in Alabama. State v. Hanna Steel Corp., 158 So.2d 906. The Taxpayers would have owed Alabama sales tax if they had purchased the promotional materials in issue in Alabama. Consequently, for the reasons stated above, the Taxpayers are liable for use tax on those items.

(2) The promotional items shipped first to distribution centers outside of Alabama and then to the department stores within Alabama.

I find no substantive difference between the promotional items temporarily stored at distribution centers outside of Alabama and those items discussed in (1) above. Title to the items was not somehow transferred to the stores because the items were temporarily stored in warehouses outside of Alabama before being delivered into Alabama. As in (1) above, the Taxpayers retained title and used the items in Alabama to fulfill their Service Agreements with the parent companies.

The printed materials either (3) delivered directly from the Taxpayers' warehouses to the stores in Alabama, or (4) delivered by third-party printers to the stores in Alabama as directed by the Taxpayers.



(3) Again, I find no substantive difference between the printed materials shipped directly by the Taxpayers for use in the department stores in Alabama and the counter and display items discussed in (1) and (2) above. Title to the printed materials may have eventually passed when the materials were handed out to customers in the stores, but that occurred only after the Taxpayers' use tax liability had accrued when the materials were delivered into and came to rest at the stores in Alabama. State v. Toolen, 167 So.2d 546.

(4) Concerning the printed materials ordered by the Taxpayers from third-party printers outside of Alabama and then delivered by the printers to the stores in Alabama, McNamara v. D.H. Holmes Company, Ltd., supra, is directly on point.

As discussed above, Holmes is a Louisiana company that contracted with out-of-state printers to print catalogs and then mail the catalogs to Holmes' customers in Louisiana. The Louisiana Court of Appeals held that delivery of the catalogs into Louisiana by the out-of-state printers as directed by Holmes constituted a taxable use of the catalogs by Holmes in Louisiana. The U. S. Supreme Court affirmed.

The facts in Holmes are in substance the same as in this case. The Taxpayers ordered the printed materials from the out-of-state printers and directed the printers to deliver the materials to the department stores in Alabama. The delivery of the materials to the stores in Alabama constituted a giving of possession to the stores,

and thus was a taxable "use" under Alabama law the same as distribution of the catalogs in Holmes was a taxable use under Louisiana law.<sup>2</sup> The fact that the materials were then remailed by the department stores is irrelevant. As with the printed materials handed out in the stores, the taxable event occurred when the printed materials were delivered into and came to rest in Alabama. State v. Toolen, supra.

(5) The packaging materials supplied by the Taxpayers that were used to wrap merchandise sold by the department stores.

The packaging materials are also subject to Alabama use tax for the same reasons set out in (1), (2) and (3) above.

The Taxpayers contend that use tax is not owed on the packaging materials because the materials were purchased at wholesale under the "container" provision found at §40-23-60(4)(c). I disagree.

The container provision applies only if the taxpayer that purchases the packaging materials also uses the materials to

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<sup>2</sup> The Taxpayers argue on page 23 of their brief that "Taxpayers never had title, possession or control of Printed Materials--Direct anywhere, much less in Alabama". I disagree.

As discussed in footnote 2, infra, for use tax purposes a sale is completed when the seller completes his delivery of the goods. Thus, the sales by the third-party printers to the Taxpayers were completed when the printers mailed the items outside of Alabama as directed by the Taxpayers and thereby completed their responsibility for delivering the goods. See, §7-2-401(2). The Taxpayers obtained title to the materials at that time, and the subsequent distribution of the materials to the stores in Alabama constituted a taxable transaction whereby possession of the materials was given by the Taxpayers to the stores.

package or wrap tangible personal property for sale. The taxpayer is allowed to purchase the packaging materials tax-free because the one-time use containers in a sense become a part of the item being sold and sales tax is subsequently collected on both the packaging and contents when the packaging and contents are later sold together.

The Taxpayers in this case did not use the packaging in issue to wrap or contain property that they subsequently resold. (Text deleted). Consequently, the container provision does not apply in this case.

The Department conceded at the administrative hearing that various tester and sampler items initially included in the assessments should be deleted. (Text deleted). Consequently, the Department is directed to delete the sampler and tester items from the audit and then inform the Administrative Law Division of the adjusted amounts due. A Final Order will then be entered, which may be appealed pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on September 21, 1994.

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BILL THOMPSON  
Chief Administrative Law Judge