MOTOROLA, INC. 1303 E. Algonquin Road, 9th Floor Schaumburg, IL 60196,	'	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	'	DOCKET NO. U. 99-179
v.	'	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	'	

FINAL ORDER

This appeal involves a final assessment of use tax entered against Motorola, Inc. (ATaxpayer@) for January 1994 through June 1996. The procedural history and facts of the case were stated in a Preliminary Order entered on June 25, 1999, as follows:

> AThe Revenue Department assessed use tax against Motorola, Inc. for the period January 1994 through June 1996. Motorola appealed to the Administrative Law Division pursuant to Code of Ala. 1975, '40-2A-7(b)(5)a. A hearing was conducted in the matter on June 17, 1999. Assistant Counsel Wade Hope represented the Department. Tom Brylka, Motorola=s State & Local Tax Manager, telephoned the Administrative Law Division the day before the hearing. He had earlier submitted information to the Department which he thought would dispose of the case. The information did not change the Department=s position, however, and Mr. Brylka, upon learning that the case had not been settled, requested a continuance so he could discuss the matter with Assistant Counsel Hope. The hearing was not continued because a Department witness was in route to the hearing from out-of-state. Mr. Brylka was informed that he would be allowed sufficient opportunity to respond to the Department=s position as established at the June 17 hearing, and to discuss the matter with Assistant Counsel Hope.
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> AThe facts, as submitted at the June 17, 1999 hearing, are as follows:
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> AMotorola conducted several business activities in Alabama during the subject period, including the sale of communications equipment, computer hardware and software, and semi-conductors. The Department audited Motorola for sales tax, use tax, and rental tax. The sales tax and rental tax audits are not disputed.

AThe parties agreed that the Department would conduct the use tax audit using a sample month, March 1996. The Department accordingly used Motorola=s records to compute the percentage of error in Motorola=s March 1996 use tax return. The Department then applied that percentage of error to the entire audit period.

AThe only item disputed by Motorola is a March 22, 1996 invoice to Pine Belt Cellular that was included as taxable by the Department. That invoice includes two items, a >EMX100 SYSGEN= for $20,000, and a >SUB XFER SERV VIA DATA LNK= for $3,000. The Department included the $20,000 item as taxable equipment, but excluded the $3,000 charge as a non-taxable service. Motorola claims that the entire invoice was for non-taxable services.

AThe Department included the $20,000 as taxable because the invoice included the statement >Invoice for equipment and services=. The delivery instructions indicated that >equipment= was to be delivered free on board. The invoice also included instructions - >Call 24 hrs. in advance of delivery=.

AAfter the field audit was completed, a Supervisor in Montgomery followed up by telephoning Pine Belt Cellular concerning the invoice. The Supervisor talked to Ms. Sherry McGilberry at Pine Belt, who confirmed that the EMX100 SYSGEN was taxable, tangible equipment.

AThe above referenced information submitted by Motorola before the June 17 hearing was a statement from John C. Nettles, President of Pine Belt, dated May 7, 1999. The statement reads in part as follows:

> >Engineering charges related to the EMX100+ in the amount of $33,000. This includes a $20,000 charge for system engineering services referred to as model number EMX100 SGEN and a description of EMX100 SYSGEN. There were no equipment charges included in this amount.=

AMotorola should contact Assistant Counsel Hope concerning the disputed item. The invoice on its face appears to be for equipment. However, if Motorola can sufficiently satisfy the Department that the invoice was for services only, the audit will be adjusted accordingly.@

Motorola, Inc. v. State of Alabama, U. 99-179 (Admin. Law Div. 6/25/99), at 1 - 3.

The Taxpayer=s representative subsequently wrote the Department attorney a July 16, 1999 letter setting out the Taxpayer=s position, as follows:

> AAfter receiving the Preliminary Order, I was unsuccessful in reaching you by telephone on several occasions, so I am writing to ask if you want me to contact the Audit Division or do I continue to work directly with you to resolve this final issue of the Pine Belt invoice.
>
> ABased on the Preliminary Order, we do not believe that there is sufficient evidence to dispute the facts of the case. Namely, the contract with Pine Belt, a statement signed by the President of Pine Belt and the $116,000 invoice for the EMX100+ equipment that included sales tax. These facts document that the $20,000 charge was for non-taxable services.
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> AIn response to the Department=s position that the invoice include the statement >Invoice for equipment and services= and delivery instructions >free on board=, these are simply part of the standard format for the invoice. Enclosed is an invoice for sales tax that has this same wording. The instructions on the invoice to call 24 hrs. in advance of delivery was a note to make sure the customer was notified so arrangements could be made for the people performing the services versus the mere delivery of equipment.
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> AWith regard to the telephone call to Ms. McGilbery at Pine Belt Cellular, I have no doubt that she answered to the best of her knowledge. However, I question whether her answer was in regard to our contract with Pine Belt in general, did she have knowledge of the details of the contract and was she aware there was more than one invoice? I would think that the signed statement by the President of Pine Belt Cellular supersedes the telephone response by Ms. McGilbery.@

The Department has notified the Administrative Law Division that it is still the Department=s position that the $20,000 item should be included in the taxable measure for the test month of March 1996.

A final assessment on appeal is prima facie correct, and the burden of proving that

the final assessment is incorrect is on the taxpayer. Code of Ala. 1975, '40-2A-7(b)(5)c. The Taxpayer in this case asserts that the $20,000 charge was for non-taxable services. However, the only evidence submitted by the Taxpayer supporting that claim is the unsworn affidavit from John C. Nettles, President of Pine Belt Cellular, Inc. Unfortunately for the Taxpayer, that affidavit cannot be relied on because it constitutes hearsay, which is not admissible under the Alabama Rules of Evidence, Rule 802. Those rules apply to appeals before the Administrative Law Division. Code of Ala. 1975, '40-2A-9(j). If Mr. Nettles had appeared and testified to the facts in his affidavit and subjected himself to cross examination by the Department, then his testimony, if reliable and not contradicted by other evidence, would have been sufficient to prove the Taxpayer=s claim. That did not occur. Consequently, the prima facie correct final assessment must be affirmed.

The Taxpayer may apply for a rehearing from this Final Order within 15 days. Code of Ala. 1975, '40-2A-9(f). The Taxpayer may also appeal to circuit court within 30 days pursuant to Code of Ala. 1975, '40-2A-9(g).

Entered November 9, 1999.