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| ALPHA MORTGAGE, INC.<br>d/b/a Better Bilt Homes<br>1502 S. Memorial Drive<br>Prattville, AL 36066-5583, | § | STATE OF ALABAMA<br>DEPARTMENT OF REVENUE<br>ADMINISTRATIVE LAW DIVISION |
| Taxpayer, | § | DOCKET NO. S. 02-788 |
| v. | § | |
| STATE OF ALABAMA<br>DEPARTMENT OF REVENUE. | § | |

**AMENDED FINAL ORDER**

This case involves a final assessment of sales tax entered against Alpha Mortgage, Inc. ("Taxpayer") for March 1999 through February 2002. A hearing was conducted on January 23, 2003. Michael Braun represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

The Administrative Law Division entered a Final Order on April 15, 2003 affirming the final assessment. The sole issue addressed in the Final Order was whether the Taxpayer, a licensed retailer, had sold used mobile homes on consignment. The Administrative Law Division held that the Taxpayer had made the sales on consignment, and was thus liable for sales tax on those sales.

The Administrative Law Division realized after the Final Order was entered that the consignment sales were on credit, and that Code of Ala. 1975, §40-23-8 should have been addressed. As discussed below, that section provides that a retailer making credit sales is not required to report and pay sales tax on the sales until the amounts are collected. Because the applicability of §40-23-8 was not addressed in the April 15 Final Order, that Order was voided, and the parties were directed to file briefs concerning the applicability of §40-23-8. The Taxpayer filed its brief as directed.

The April 15, 2003 Final Order correctly stated the relevant facts and the legal analysis concerning the consignment issue, as follows:

**"FACTS**

The Taxpayer, d/b/a Better Bilt Homes, sells used and new mobile homes at retail at two locations in Alabama, one in Prattville and another in Dothan.

Conseco finances mobile homes. Conseco and the Taxpayer had an informal agreement during the period in issue whereby Conseco delivered repossessed mobile homes to the Taxpayer's business location in Prattville. The Taxpayer then offered the homes for sale at a price fixed by Conseco. The Taxpayer's salesmen showed the Conseco homes to any potential customers, but could not negotiate or change the price set by Conseco for the homes. Conseco also paid the Taxpayer a fixed percentage sales commission for selling the homes.

When the Taxpayer sold a Conseco home, the customer made a down payment to the Taxpayer, signed a buyer's order form, and completed a credit application to Conseco. The Taxpayer sent the documents to Conseco. If Conseco approved the sale, it would send the documents back to the Taxpayer with a bill of sale showing Conseco as the seller, and the customer as buyer. Conseco also secured its interest in the mobile home by listing itself as lienholder on the customer's title application for the home.

The Taxpayer received its sales commission after the sale was closed. If the commission was less than the customer's down payment, the Taxpayer deducted the commission from the down payment and remitted the balance to Conseco. If the commission was more than the down payment, the Taxpayer retained the entire down payment and Conseco paid the Taxpayer the balance.

The Taxpayer failed to collect sales tax on its sales of the Conseco homes. The Department audited the Taxpayer and assessed the Taxpayer on those sales. It also made other adjustments that are not contested. The Taxpayer appealed.

The Department argues that the Taxpayer sold the Conseco homes on consignment, and thus is liable for sales tax on those sales pursuant to Dept. Reg. 810-6-1-.38 ("Sellers of property held on consignment are required to include the gross proceeds of sales of such property in sales tax returns filed under the sales tax law. §40-23-1(6).").

The Taxpayer argues that Conseco sold the homes and that it was only acting as Conseco's agent. It also argues that the sales were not on consignment because it could only sell the Conseco homes at the prices set by Conseco.

**ANALYSIS**

Alabama sales tax is levied on every person engaged in the business of selling tangible personal property at retail in Alabama. Code of Ala. 1975, §40-23-2(1). The tax is measured by the "gross proceeds of sale," which is defined as "the value proceeding or accruing from the sale of tangible personal property, and including the proceeds from the sale of any property handled on consignment by the taxpayer, . . . ." Code of Ala. 1975, §40-23-1(a)(6).

The Alabama sales tax law does not define consignment sale. However, before 2002, a consignment sale or "sale or return" was defined in the U.C.C. Article on sales, at Code of Ala. 1975, §7-2-326(3), as follows:

> Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return.

The sales in issue were consignment sales pursuant to §7-2-326(3). Conseco delivered the mobile homes to the Taxpayer's mobile home lot in Prattville for sale. The Taxpayer then sold the homes under a name, i.e. Better Bilt Homes, other than that of Conseco. See generally, *Murphy v. SouthTrust Bank of Alabama, N.A. 611 So.2d 269 (Ala. 1992).*

I agree that the Taxpayer was acting as Conseco's agent when it sold the homes, but that is consistent with the nature of a sale on consignment. In *Bischoff v. Thomasson*, 400 So.2d 359 (Ala. 1981), the Alabama Supreme Court quoted a leading commentator on consignment sales, as follows:

> The hallmark of the consignment . . . is the absence of an absolute obligation on the part of the consignee to pay for the goods. He is not obligated to pay for the goods because he is not a buyer, but only an agent. The title does not move to him or through him. The title moves from the principal-consignor to the purchaser. "A consignment of goods for sale does not pass the title at any time, nor does it contemplate that it should be passed. The very term implies an agency, and that title is in the consignor, the consignee being his agent." Starting at this doctrinal base, it has been relatively easy for courts to find no consignment where the dealer is permitted to act like something more than a mere agent. Thus, if the dealer is given the right to sell the goods at any price or under such terms as he sees fit, keeping as his profit all he receives over the invoice price, the courts are apt to find no consignment, even though a formal consignment agreement has been executed.

*Bischoff*, 400 So.2d at 365, quoting Hawkland, *Consignment Under the Uniform Commercial Code*, 67 Commercial L.J. 146, 147 (1962) (cites omitted).

The above quote indicates that when goods are sold on consignment, the consignee is acting as the consignor's agent, and title to the goods passes directly from the consignor to the purchaser. That is what occurred in this case.

The above quote also addresses the Taxpayer's argument that it could not negotiate with a customer concerning the Conseco homes. Again, that is consistent with a consignment sale. If the Taxpayer had been allowed discretion to negotiate, then the sale may not have been on consignment.

Before 2002, the U.C.C. Article involving secured transactions, Article 9, Title 7, Code 1975, included a provision concerning consignment, Code of Ala. 1975,§7-9-114. However, that section only addressed what a consignor had to do to perfect a security interest in consigned goods. It did not define what a consignment sale was.

Article 9 of Title 7, including §7-9-114, was repealed effective January 1, 2002 by Act 2001-481. That Act also repealed §7-2-326, and replaced Article 9 of Title 7 with Article 9A, entitled "Uniform Commercial Code – Secured Transactions." Code of Ala. 1975, §7-9A-319 now controls the priority rights of parties claiming an interest in consigned goods. But like §7-9-114 before it, §7-9A-319 does not define a consignment sale.

However, pursuant to Act 2001-481, "consignment," is now defined at §7-9A-102(a)(20). The Taxpayer argues that the Conseco homes were not sold on consignment, as defined at §7-9A-102(a)(20), because (1) Conseco acquired a security interest in the goods, and (2) the mobile homes were "consumer goods." Taxpayer's brief at 4,5.

Section 7-9A-102(a)(20) defines "consignment" in part as "a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and: . . . (C) the goods are not consumer goods immediately before delivery; and (D) the transaction does not create a security interest that secures an obligation."

The definitions in §7-9A-102 apply only to the U.C.C. Article on secured transactions. But even assuming that the definition applies generally to sales tax, the

Taxpayer still sold the Conseco homes on consignment.[1]

First, the mobile homes were not consumer goods. Consumer goods are defined at Code of Ala. 1975, §7-9A-102(a)(23) as "goods that are used or bought for use primarily for personal, family, or household purposes."[2] Such goods are generally considered to be items that are wasted or used up by an individual or family in day-to-day living. A person's home is not a consumer good. See generally, 77 A.L.R.3d 1225 ("The courts in the following cases determined that in order for any collateral to be properly considered 'consumer goods' under U.C.C. §9-109(1), it must be of the type which is subject to being wasted, used up or destroyed through its use by the purchaser.").

Second, the "transaction" referred to in §7-9A-102(a)(20)(D) is the delivery of the consigned goods to the merchant for sale, not the subsequent sale of the goods to the buyer. The transactions in issue, i.e. the delivery of the homes by Conseco to the Taxpayer, did not create a security interest in the homes. It is irrelevant that after the Taxpayer sold the mobile homes, Conseco obtained a security interest by listing itself as lienholder on the purchasers' titles to the homes."

Having determined in the April 15 Final Order that the sales were on consignment, and that the Taxpayer was liable for sales tax on those sales, the issue now turns to the applicability of §40-23-8. As indicated, that section provides that when a retailer makes credit sales, it is not required to report and remit sales tax on the sales until the amounts

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[1]In any case, the §7-9A-102 definition of consignment would have applied only for the last two months of the audit period in issue, January and February 2002. Section 7-2-326 was in effect and controlled before January 1, 2002.

[2]Before 2002, the same definition of the term was found at Code of Ala. 1975, §7-9-109(1).

are collected. The statutes is easy to administer when the retailer is also the collecting party. The issue is complicated, however, when the retailer liable for the tax, the Taxpayer in this case, is not the collecting party. A similar issue involving §40-23-8 was addressed in *Marks-Fitzgerald Furniture Co., Inc. v. State*, 678 So.2d 211 (Ala.Civ.App. 1995).

In *Marks-Fitzgerald*, a furniture company sold furniture on credit. It subsequently sold some of its credit accounts to an unrelated finance company at a discount. It reported and paid sales tax to the Department on the discounted amounts it received from the finance company.

The Department audited and assessed the furniture company for sales tax on the difference between the discounted amounts it had received from the finance company and the full sales price of the furniture. The company appealed to the Administrative Law Division, which affirmed the assessment. See, Docket S. 91-203 (Admin. Law Div. 8/25/93). The Madison County Circuit Court also affirmed. The company appealed to the Court of Civil Appeals.

The Court of Civil Appeals also affirmed, quoting with approval from the Final Order issued by the Administrative Law Division in the case, as follows:

> 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.
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> 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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> 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, <u>but</u> the retailer is obligated to keep records showing how much if any has been paid.

*Marks-Fitzgerald*, 678 So.2d at 123, 124.

Adopting the above rationale, the Court of Civil Appeals affirmed the Administrative Law Division's finding that because Marks-Fitzgerald had failed to provide records showing the amounts paid by the customers each month on the transferred accounts, it was liable for tax on the full sales price of the merchandise.

The facts in this case are slightly different than in *Marks-Fitzgerald*. Marks-

Fitzgerald sold its own accounts receivable, whereas the Taxpayer in this case never owned the accounts. Rather, the customers financed the mobile homes directly with Conseco. That factual distinction does not, however, change the applicability of the Court's legal analysis in *Marks-Fitzgerald*.

The Taxpayer was liable for sales tax on the consignment sales in issue. Applying the rationale of *Marks-Fitzgerald*, the Taxpayer was required to maintain or provide the Department with access to records verifying the amounts collected by Conseco on the accounts during the audit period. The Taxpayer failed to provide such records. "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." *Marks-Fitzgerald*, 678 So.2d at 124. Consequently, the Department correctly assessed the Taxpayer on the full sales price of the mobile homes.

The holding in *Marks-Fitzgerald* creates difficult administrative problems for retailers. If the retailer and the collecting party are related entities, the retailer will have easy access to records showing how much is collected each month on the transferred accounts, and can report and pay tax accordingly.[3] However, if the retailer and the collecting party are not related, it may be difficult if not impossible for the retailer to gain access to the records of the third-party collector. The Department may subpoena such records, assuming that the collector is located in Alabama, but the Department should not be required to obtain third-party information for the purpose of determining a retailer's sales

[3] That was the case in Docket S. 90-152, which is referred to by the Court of Civil Appeals in *Marks-Fitzgerald*, 678 So.2d at 124, and which was the first case the Administrative Law Division decided on the issue.

tax liability. As the Court stated in *Marks-Fitzgerald*, that burden is on the retailer.[4]

But despite the additional record-keeping requirement imposed on a retailer by *Marks-Fitzgerald*, the retailer that makes the retail sale must be held accountable for the sales tax due on the sale. If the Taxpayer in this case is not required to pay the sales tax in issue, the State could never collect the tax because Conseco is not a licensed retailer, and thus is not obligated to report and remit sales tax to the Department. The customers would pay the tax due (plus interest) in installments, but the tax would never be remitted to the State. As stated in *Marks-Fitzgerald*, "[i]n no event should the Department receive less than is paid by the customer." *Marks-Fitzgerald*, 678 So.2d at 124. That would occur if the Taxpayer was not held liable in this case.

The tax and interest included in the final assessment is affirmed. The penalty is waived for reasonable cause. Code of Ala. 1975, §40-2A-11(h). Judgment is entered against the Taxpayer for tax and interest of $66,137.31. Additional interest is also due from the date of entry of the final assessment, October 3, 2002.[5]

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[4] A valid policy argument could be made that §40-23-8 should apply only if the retailer is also the collecting party. That would avoid the awkward requirement that the retailer liable for the tax must provide the Department with reasonable access to the records of a third-party collector. Instead, tax would become due on the full sales price when a retailer elected to sell an account payable, or when a retailer sold goods on consignment that were financed by a third party, as in this case. Interestingly, the Court of Civil Appeals stated in *Marks-Fitzgerald* that "[t]he administrative law judge determined that §40-23-8 would apply only if the retailer is also the collecting party." *Marks-Fitzgerald*, 678 So.2d at 123. That was suggested as one answer to the issue. However, the Administrative Law Division then determined that the better answer was to require the retailer to keep records of all subsequent collections, and that in the absence of such records, the retailer is liable for the full amount due. As discussed, the Court of Civil Appeals adopted that rationale.

[5] If the Taxpayer has or can obtain records showing the amounts collected (and not collected) by Conseco on the sales in issue during the subject period, it can pay the final

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

Entered August 14, 2003.

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assessment and then petition for a refund based on the amounts not collected by Conseco. Code of Ala. 1975, §40-2A-7(c)(1). However, the Taxpayer would also be liable for sales tax on any amounts collected subsequent to the audit period in issue.