

DEBORAH WEBSTER
WEBSTER ENTERPRISES
County Road 78
P.O. Box 1005
Guin, AL 35563-1005,

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Taxpayer, §

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 03-165

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed Deborah Webster (“Taxpayer”), d/b/a Webster Enterprises, for sales tax for March 1999 through February 2002. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on May 6, 2003 in Birmingham, Alabama. Gordon Mayfield represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

FACTS AND ISSUES

The Taxpayer operates an auctioneering company in Guin, Alabama. She conducts auctions at her facility in Guin and also at various customer sites.

The Department audited and assessed the Taxpayer for additional sales tax for the subject period. Part of the audit is uncontested. The Taxpayer appealed, however, concerning the following issues:

(1) The taxability of a three percent fee she charged customers that paid with credit cards;

(2) The taxability of a five or ten percent labor fee she charged customers for packing, storing, and delivering items for the customers;

(3) Whether sales tax is due on the gross proceeds from an auction the Taxpayer conducted for the Walker County Commission; and,

(4) Whether the Taxpayer owes sales tax on sales for which the customer provided either someone else's sales tax number or a federal tax ID number.

ANALYSIS

(1) The three percent credit card fee.

The Taxpayer charged her credit card customers a three percent fee during the subject period to offset the merchant fee charged by credit card companies. She did not charge her customers sales tax on the three percent fee. The Department taxed the fee as part of the Taxpayer's taxable gross proceeds.

"Gross proceeds" is defined for Alabama sales tax purposes as "the value proceeding or accruing from the sale of tangible personal property . . . without any deduction on account of the cost of the property sold, the cost of the materials used, labor or service costs, interest paid, . . . or any other expenses whatsoever, . . ." Code of Ala. 1975, §40-23-1(a)(6).

The Alabama Court of Civil Appeals has held that credit card fees paid by a retailer to a credit card company are an expense or cost of doing business, and thus cannot be deducted from gross proceeds subject to sales tax. *Marks-Fitzgerald Furniture Co., Inc. v. State, Dept. of Revenue*, 678 So.2d 121 (Ala.Civ.App. 1995). Likewise, the three percent credit card fee charged by the Taxpayer in this case also constituted taxable gross proceeds.

(2) The five or ten percent labor fee.

Generally, any charge for labor, transportation, or other services performed by a retailer in conjunction with and before the sale of tangible personal property constitutes taxable gross proceeds. *East Brewton Materials, Inc. v. State*, 233 So.2d 751 (Ala.Civ.App. 1970). In this case, the Taxpayer charged a five or ten percent fee to offset her labor costs incurred in packing, storing, and delivering merchandise for her customers. The sale of the merchandise was not closed until the merchandise was delivered to the customers. *State v. Delta Air Lines*, 356 So.2d 1205 (Ala.Civ.App. 1978). Consequently, the five or ten percent labor charges constituted gross proceeds subject to sales tax.

(3) The Walker County Commission auction.

The Walker County Commission hired the Taxpayer to conduct an auction of Walker County property at a Walker County facility. The Taxpayer had previously conducted auctions for Walker County on which she charged sales tax. Various individuals complained to the Taxpayer that sales tax should not be charged when County property was being sold. The Taxpayer inquired with her accountant, who informed her that the sale of Walker County property was not taxable unless the Taxpayer sold the property at her own auction facility. Consequently, because the Walker County auction in question was conducted on Walker County property, the Taxpayer did not charge sales tax on the sales.

The accountant's advice was incorrect. An auctioneer is liable for sales tax when he or she receives payment for the property sold, issues a bill of sale or invoice to the customer, and then pays the owner of the property the net proceeds of the auction (gross receipts less auction commission). Dept. Reg. 810-6-1-.05(2). That is what occurred concerning the Walker County auction in issue. Consequently, the Taxpayer is liable for sales tax on those sales.

(4) The disallowed wholesale sales.

Sales for resale to a licensed retailer constitute non-taxable wholesale sales. *State v. Advertiser Co.*, 337 So.2d 942 (Ala.Civ.App. 1976). However, the wholesale purchaser must present the seller with a valid sales tax license in order to purchase tax-free. Dept. Reg. 810-6-1-.144.03. The burden is on the seller to know the general nature of the wholesale purchaser's business, and that the purchaser is in the business of reselling the type of items purchased. Dept. Reg. 810-6-1-.184; *J.P.'s Finishing Products v. State of Alabama*, S. 98-338 (Admin. Law Div. 8/1/00).

The following customers purchased merchandise from the Taxpayer tax-free using either a federal tax ID number or a sales tax number that belonged to someone else. The Department disallowed the wholesale status of the sales. The Taxpayer claims she reasonably believed that the sales were wholesale sales for the reasons explained below.

(a) Garve Ivey – Garve Ivey is an attorney in Jasper, Alabama. His wife operates a gift/antique shop in Jasper. The Taxpayer testified that the Iveys had purchased numerous items from her for resale in Mrs. Ivey's shop.

When the Iveys first attended one of the Taxpayer's auctions, Mr. Ivey registered using his federal tax ID number instead of his wife's Alabama sales tax number. Upon discovering the mistake, the Taxpayer immediately contacted Mrs. Ivey, obtained her sales tax number, and recorded it on her permanent records.

The Department examiner reviewed the Taxpayer's records and only saw Mr. Ivey's improper federal tax ID number. Consequently, he treated the sale to Mr. Ivey during the audit period as a taxable sale.

The Taxpayer knew that Mrs. Ivey operated a retail shop in Jasper, and that Mr. Ivey

often purchased items for his wife to resell in the shop. She had also recorded Mrs. Ivey's sales tax number on her permanent records, which is sufficient pursuant to Dept. Reg. 810-6-4-.10. Under the circumstances, the Taxpayer reasonably believed that Mr. Ivey was purchasing merchandise for resale in his wife's shop when he purchased the items in issue from the Taxpayer. Consequently, those sales should be deleted from the audit.

(b) Brady Brown – Mr. Brown operated an antique mall in downtown Jasper. He hired the Taxpayer to auction off his merchandise in the mall. The Taxpayer claims that Brown continued to sell antiques at other locations after he sold his mall business. Consequently, she continued to allow him to purchase merchandise tax-free using his sales tax number.

Unfortunately for the Taxpayer, Brown's sales tax number was closed after his mall closed. Even if a sale is for resale, to be an exempt wholesale sale under Alabama's sales tax law, the purchaser must be a licensed retail merchant. *State v. Advertiser Company, supra*. The reasoning is that unless the purchaser is a licensed retailer that files returns and pays tax to the Department, sales tax will never be collected on the merchandise. Consequently, because Brown did not have a valid tax number when he purchased the merchandise in issue from the Taxpayer, those sales were properly included as taxable.

(c) David Spike – The Taxpayer testified that Spike and Susan Pool operated an antique business, Cream of the Crop, in Hayden, Alabama. The first time they attended one of the Taxpayer's auctions, they were together and registered using Pool's sales tax number. During the audit period, Spike purchased items tax-free using Pool's tax number. The Department examiner taxed those sales because the tax number used was not

Spike's.

The Taxpayer knew that Spike and Pool were in business together. Consequently, she had reason to believe that the purchases by Spike using Pool's number were valid sales for resale. Those sales should be removed from the audit.

(d) Max McClusky – McClusky's daughter operates a retail shop in Destin, Florida. She has purchased merchandise from the Taxpayer on numerous occasions, sometimes accompanied by her father. The daughter told the Taxpayer that her father was authorized to buy merchandise on her behalf using her sales tax number, which he did on occasion. The Taxpayer thus reasonably believed that the purchases in issue by McClusky were authorized by and on behalf of his daughter, a licensed retail merchant. Those sales should also be removed from the audit.

(e) Billy Underwood – This individual purchased merchandise using the sales tax number of Sonya Gilbert, d/b/a Gilbert Furniture. The Taxpayer testified that she understood that Underwood provided merchandise to Gilbert Furniture for resale. However, the Taxpayer does not know Sonya Gilbert.

It is unclear why the Taxpayer understood that Underwood was buying merchandise on behalf of Gilbert for resale. Unlike the above situations, the Taxpayer apparently did not have first-hand knowledge that Underwood was in business with Gilbert, or otherwise had permission to purchase merchandise using Gilbert's sales tax number. Consequently, these sales were properly taxed by the Department.

(f) T.E. McLemore – The Taxpayer testified that Danny Robilo purchased clocks from her on numerous occasions for resale at his business in Mississippi. He usually paid in cash or by credit card. However, on one occasion, he attempted to write the Taxpayer a

check for the merchandise.

The Taxpayer refused Robilo's check because she was unsure if it was any good. T.E. McLemore, who apparently knew Robilo, offered to take Robilo's check and then write his own check to the Taxpayer. The Taxpayer knew McLemore, and agreed. She subsequently put Robilo's registration number on the sales invoice.

In this instance, the Taxpayer clearly had reason to believe that the merchandise was being purchased by a licensed retailer, Robilo, for resale. This sale should be removed from the audit.

The Department is directed to recompute the Taxpayer's liability as indicated above. A Final Order will then be entered for the adjusted amount due.

This Opinion and Preliminary Order is not an appealable Order. The Final Order, when entered, may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered June 12, 2003.