

PORT CITY MOBILE HOMES, INC.
151 SCHILLINGER ROAD S
MOBILE, AL 36608-5027,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 05-767

FINAL ORDER

The Revenue Department assessed Port City Mobile Homes, Inc. ("Taxpayer") for State sales tax for July 2001 through June 2004. Hearings were conducted on March 7, 2007 and July 3, 2007. John Crowley and CPA Bobby Hall represented the Taxpayer. Assistant Counsel Duncan Crow represented the Department.

ISSUES

The Taxpayer sells mobile homes at retail in Alabama. It also offers its customers various "improvements," i.e., decking, fencing, driveways, etc., and also various financial and other services related to the mobile homes, which are discussed in more detail below. The Taxpayer charges its customers a lump-sum amount for the mobile home and delivery and installation, and a separate lump-sum amount for the improvements and services. The threshold issue is whether the lump-sum charge for the improvements and services is subject to sales tax as taxable gross proceeds derived from the sale of the mobile homes. If some or all of the improvements and/or services are taxable, a second issue is whether the Taxpayer maintained adequate records from which the taxable and non-taxable proceeds can be identified.

FACTS

The Taxpayer is based in Mobile, Alabama, and sells new and used mobile homes

at retail. The advertised sales price for a mobile home includes the Taxpayer's charge for delivering and installing the home to a location selected by the customer. Such charges typically include escorting the mobile home during delivery, providing steps and skirting, removing the tires and axles, and leveling, tying down, and anchoring the home. The Taxpayer charges a lump-sum amount for the home and the delivery and set-up.

The Taxpayer also provides the customer with or performs various intangible services and lot improvements, as requested by the customer. The services and improvements may include any of the following, at the option of the customer: closing costs, home buyer warranty, land surveying, termite bond, septic tank, water meter deposit, perk tests (relating to the septic tank), providing dirt, clay, and sod, designing and pouring a concrete foundation, lot clearing and stump removal, providing a driveway, decking and fencing, and power pole setup, among others.

The Taxpayer includes its charges for the services and improvements requested by a customer as a separately stated lump-sum amount on the customer invoice. The Taxpayer also maintains other records identifying the separate amounts it charged a customer for the various services and improvements.

During the first part of the audit period, the Taxpayer charged a single lump-sum amount for the mobile home, delivery and installation, and any miscellaneous improvements. It paid sales tax on that lump-sum charge. The Taxpayer's owner explained that during the first part of the audit period, it provided very few services and improvements, and those that it did do were so minimal that a separate charge was not included on the invoice.

The owner further explained that midway through the audit period, the mobile home industry changed because financing companies began requiring the mortgage to include both the mobile home and the land on which the home was situated. That allowed customers to also finance the various services and lot improvements, which induced them to request more services and improvements. As discussed, the Taxpayer thereafter began charging a separate lump-sum amount on its invoices for the improvements and services. It did not charge sales tax on that separately stated amount.

The Department audited the Taxpayer and determined that the entire invoice amounts, including the separately stated charges for services and improvements, were taxable. It assessed the Taxpayer accordingly.

ANALYSIS

The Alabama sales tax is measured by the gross proceeds derived from the retail sale of tangible personal property. Code of Ala. 1975, §40-23-2(1). "Gross proceeds" is defined as "[t]he 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 materials used, labor or service costs, interest paid or any other expenses whatsoever." Code of Ala. 1975, §40-23-1(a)(6)

In *State of Alabama v. Frander & Frander, Inc.*, S. 86-131 (Admin Law Div. 5/18/1987), the issue was whether a mobile home retailer in Alabama was liable for sales tax on its charges for delivering and setting-up the mobile homes. The delivery and set-up charges were not separately stated on the sales invoices, but the retailer maintained other records that itemized those charges.

In deciding the case, the Administrative Law Division analyzed three Alabama cases on point: *Alabama Precast Products, Inc. v. State*, 332 So.2d 160 (Ala. Civ. App. 1976); *East Brewton Materials, Inc. v. State*, 233 So.2d 751 (Ala. Civ. App. 1970); and *State v. Natco Corp.*, 90 So.2d 385 (Ala. 1956). The Administrative Law Division summarized the above cases as follows:

As stated, the rule of general applicability that can be taken from the above cases and regulations is that transportation, delivery and installation charges made in conjunction with a sale are taxable if the services are performed as a part of and prior to completion of the sale. If the services are rendered subsequent to the sale, the charges are not a part of taxable gross proceeds.

Under Alabama law, a sale occurs with the passing of title (§7-2-106), and unless otherwise provided, title passes upon completion of physical delivery by the seller (§7-22-401(2)). *State v. Delta Airlines, Inc.*, 356 So.2d 1205 (1977); *American Cast Iron Pipe Co. v. Boswell*, 350 So.2d 438 (1977).

Concerning the sales in issue, the Taxpayer was obligated to deliver and install the trailers. Clearly, such delivery was an integral part of the sale, and title did not pass until the Taxpayer had completed his contractual performance with respect to the goods. Consequently, the charges relating to delivery and installation constituted a part of taxable gross proceeds.

Frander at 7.

In this case, the Taxpayer included the delivery and set-up or installation charges as a part of its lump-sum charge for the mobile homes. It correctly collected sales tax on that lump-sum amount in accordance with the rationale of *Frander & Frander* and the cases cited therein. The dispute is whether the separately stated lump-sum charge for the services and improvements was also subject to sales tax as gross proceeds derived from the sale of the mobile homes.

As discussed, a mobile home dealer's charges for delivery and set-up of a mobile home are subject to sales tax, whether separately stated on the invoice or not, because

those services are an integral and necessary part of the sale, and are performed before transfer of title, i.e., before the sale is closed.¹

The services and improvements in issue were separate from the sale of a mobile home and the related delivery and set-up charges, and thus were not subject to sales tax. Rather, they were either an intangible service not involving the sale of tangible property, or, if tangible property was involved, i.e., decks, fencing, septic tanks, driveways, etc., the property was either exempt from sales tax or an improvement to realty. If the latter, sales tax was due when the tangible materials used to complete the improvement were purchased. "Sales of building materials to contractors, builders, or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold." Code of Ala. 1975, §40-23-1(a)(10).

Tangible property was involved when the Taxpayer, through independent contractors, provided a septic tank, a driveway or sidewalks, a deck or fence, sod or landscaping, etc. However, those activities constituted improvements to realty separate from the sale of the mobile homes. As indicated, sales tax was due on the materials when the subcontractors that performed the work purchased the materials. Section 40-23-1(a)(10). The septic tanks were also otherwise exempt from sales tax, as was the sod if sold by the person that produced it. See, Reg. 810-6-3-.75 and Code of Ala. 1975, §40-23-4(a)(16), respectively.

¹ Of course, the purchaser may take possession of the mobile home at the dealer's lot and arrange for the delivery and set-up of the home. In that case, the sale would be closed at the lot, and the delivery and set-up charges paid by the purchaser to a third party would not be a part of the dealer's taxable gross proceeds.

The intangible services included the loan closing expenses, surveys, appraisals, inspections, title insurance, soil tests, home buyer warranties, termite bonds, utility deposits and connections, appliance installation services, lot clearing and stump removal, etc. The Taxpayer's charge for those services, while included on the mobile home sales invoices, were not derived from the sale of the mobile homes or any other tangible property, and thus were not taxable.

The Department concedes that some of the items included in the lump-sum services and improvements charge were not subject to sales tax. The Department contends, however, that the entire lump-sum must be taxed because the Taxpayer did not identify on its invoices the separate charges for the taxable and non-taxable services and improvements.

All taxpayers are required to keep records from which the Department can determine their correct liability. Code of Ala. 1975, §40-2A-4(a)(1). If a taxpayer has taxable and non-taxable sales, but fails to keep records identifying the non-taxable sales, "[t]he taxpayer must suffer the penalty and pay on the sales not so accurately recorded as exempt." *State v. Ludlum*, 384 So.2d 1089, 1091 (Ala. Civ. App. 1980), quoting *State v. T.R. Miller Mill. Co.*, 130 So.2d 185, 190 (Ala. 1960).

The above rule of law does not apply in this case because, as discussed, none of the lump-sum charges for the services and improvements were derived from the taxable sale of tangible property, and thus were not subject to sales tax. Consequently, because none of the lump-sum charges were taxable, the Taxpayer was not required to itemize the

various services and improvements on its sales invoices.²

In any case, the Taxpayer, through its CPA, maintained internal records identifying the separate charges for the various services and improvements. Consequently, even if some of the services or improvements were taxable, the Taxpayer maintained adequate records from which the taxable and non-taxable items could be identified.³

In summary, a mobile home dealer owes sales tax on the charge for the mobile home, plus any related delivery and set-up charges. The dealer is not liable for tax on financing-related or other intangible services, or for improvements or additions to a customer's real property, even if those charges are included on the sales invoice for the mobile home.⁴

The final assessment is voided. Judgment is entered accordingly.

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

Entered November 20, 2007.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

² To avoid possible problems in the future, the Taxpayer should itemize on its invoices the separate charges for the services and lot improvements.

³ The Taxpayer's CPA testified that he offered to show the Department auditor the records that identified the separate charges. The auditor elected not to view the records based on the Department's position that to be non-taxable, the separate charges had to be itemized on the sales invoices.

⁴ A dealer would owe sales tax on the materials used to complete any additions to realty, but only if the dealer performs the work. If an independent contractor performs the work, then the contractor would owe sales tax when it purchases the materials.

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