

BEAUTY & MORE, INC.
5 WEST FAIRVIEW
MONTGOMERY, AL 36105-1617,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. S. 12-336

v.

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed Beauty & More, Inc. (“Taxpayer”) for State sales tax for April 2008 through March 2011. A hearing was conducted on August 30, 2012. The Taxpayer’s owner, Ashraf Hijaz, and his attorney, Dwight Pridgen, attended the hearing. Assistant Counsel Christy Edwards represented the Department.

FACTS

The Taxpayer operated a beauty aid/supply store in Montgomery, Alabama during the period in issue. The store also sold prepaid cellular telephone minutes and other cellular services, i.e., texting, iTunes, Internet access, etc., from providers such as Alltel, Boost, Page Plum, T Mobile, Virgin Mobile, Verizon, and AT&T during the period.

The Department audited the Taxpayer for sales tax for the subject period. The Department examiner determined that the Taxpayer had treated certain merchandise sales as nontaxable wholesale sales during the period, but had failed to maintain adequate records documenting the sales as wholesale sales for resale. The examiner consequently treated those undocumented sales as taxable retail sales. The Taxpayer concedes that issue on appeal.

The examiner also assessed the Taxpayer for sales tax on the gross receipts derived from the sale of the prepaid cellular telephone minutes and the other cellular

services pursuant to Code of Ala. 1975, §40-23-1(a)(13). That statute provides that the “sale of a prepaid telephone calling card or a prepaid authorization number, or both” shall constitute a retail sale subject to Alabama sales tax.

The Taxpayer argues that the prepaid cellular telephone minutes and the other cellular services sold to its customers were not prepaid calling cards or authorization numbers within the purview of §40-23-1(a)(13), and thus were not subject to Alabama sales tax.

The Taxpayer’s owner testified that cellular telephone service providers began offering prepaid cellular telephone minutes in the early 2000’s. He got into the business in the mid-2000’s. He explained that during the audit period, he had two countertop terminals at his business that he used to sell prepaid cellular minutes and other cellular services to his customers. One of the terminals was for one particular service provider, and was rarely used. The other terminal was used to sell services from Boost, Verizon, and all other available service providers.

The owner explained that during the period he sold cellular minutes to customers with active cellphone accounts that wanted to purchase additional minutes from their provider. The additional minutes were unlimited, and were sold in monthly increments. As indicated, some customers also purchased texting, iTunes, Internet, and other additional services for which they paid an additional amount.

In most cases, a customer visited the Taxpayer’s store and paid the Taxpayer for the additional minutes and any other services requested. The Taxpayer then entered the customer’s cellular telephone number into the countertop terminal. The service provider

electronically added the number of minutes and the other services purchased, if any, onto the customer's telephone. The Taxpayer then gave the customer a receipt that included a nine or ten digit reference number. If for some reason the customer later had a problem with the service or services, the customer could call the provider and use the reference number to identify the service or services purchased.

In some cases, the customer did not know the number of the cellphone for which the extra minutes or other services were being purchased. In those cases, the customer paid for the service or services and was given a 16 digit authorization number. The customer would later call the provider's 800 telephone number and give the authorization number to the provider. The provider then downloaded the additional minutes and any other services purchased to the customer's cellular phone.

The Taxpayer did not have a contract or agreement with any of the service providers to sell their services during the period in issue. Rather, the owner had an oral agreement with a third party company, ECS, which acted as a middleman between the Taxpayer and the providers. ECS provided the countertop terminals at the Taxpayer's store, and also handled all of the accounting and the distribution of the sales proceeds received by the Taxpayer. The owner explained that ECS withdrew from his bank account 90 percent of the amount paid by his customers for the cellular services, and he retained the remaining 10 percent as a commission.

ANALYSIS

Section 40-23-1(a)(13), which, as indicated, provides that the sale of a prepaid telephone calling card or a prepaid authorization number shall constitute a taxable retail

sale subject to sales tax, was enacted in 1997 pursuant to Act 97-867, 1st Special Session of the 1997 Alabama Legislature.¹ The controlling issue in this case is determining what the Legislature intended to tax when Act 97-867 was enacted in 1997. That is, what was the Legislature referring to when it used the terms “prepaid telephone calling card” and “prepaid authorization number.”

The above terms are not defined by statute in Alabama. The Revenue Department also does not have a regulation defining the terms, and Alabama’s appellate courts have to my knowledge never addressed the terms or §40-23-1(a)(13) in general in a court case.

The evidence, although limited, indicates that the sale of prepaid cellular telephone minutes and other cellular telephone services, i.e., iTunes, texting, Internet access, etc., did not exist before 2000, and perhaps later. Rather, in 1997, when Act 97-867 was enacted, the only type of prepaid telephone calling card that was available for purchase was a physical card that contained an authorization number. The card allowed the purchaser to make telephone calls for a fixed number of minutes using the authorization number. The purchaser was required to enter the authorization or access number on the card into the telephone before making a call. Once the authorization or access number was entered, the caller could then dial the telephone number he or she wished to call. It is assumed that when §40-23-1(a)(13) was enacted in 1997, a person could also purchase a

¹ The Act also exempted from the utility gross receipts tax levied at Code of Ala. 1975, §40-21-82 and the utility service use tax levied at Code of Ala. 1975, §40-21-102 all utility services furnished through the use of a prepaid telephone card, see Code of Ala. 1975, §§40-21-83(10) and 40-21-103(10), respectively. The Act further excluded from the cellular telecommunication services tax levied at Code of Ala. 1975, §40-21-121 the furnishing of such services through the use of a prepaid telephone calling card, a prepaid authorization number, or both, see Code of Ala. 1975, §40-21-122(4).

prepaid (telephone) authorization number without a card that could be used the same as a card number.

Section 40-23-1(a)(13) is a tax levy because it in substance levies a sales tax on the sale of prepaid telephone calling cards and authorization numbers. It must be presumed that when the Legislature levies a tax, it intends for the levy to apply to an activity, event, or item in existence or being used at the time of the levy. *Ex parte Dixie Tool & Die Company, Inc.*, 537 So.2d 923 (1988) (a statute must be construed with the presumption that the Legislature was aware of the applicable law and facts when the statute was enacted); see also *Abbot Laboratories, et al. v. Cecil Burrett, et al.*, 746 So.2d 316, 339 (Ala. 1999) (“ . . . we have followed the well-settled rule of statutory construction that it is permissible in ascertaining [the purpose and intent of a statute] to look to the history of the times, the existing order of things, the state of the law when the instrument was adopted, and the conditions necessitating such adoption.”). Consequently, §40-23-1(a)(13) must be construed to apply only to the prepaid calling cards and authorization numbers described above that were available in 1997 when Act 97-867 was enacted. The above conclusion is also supported by the rule of statutory construction that a statute levying a tax must be narrowly construed against the government and for the taxpayer. *City of Arab v. Cherokee Elec. Co-op.*, 673 So.2d 751 (Ala. 1995); *Alabama Farm Bureau Mutual Consolidated Insurance Co. v. City of Hartselle*, 460 So.2d 1219 (1984); *State v. Mack*, 411 So.2d 799 (Ala. 1982).

The prepaid cellular telephone minutes and other cellular services sold by the Taxpayer in this case can easily be distinguished from the prepaid telephone

cards/authorization numbers available in 1997. As described above, the prepaid cards and numbers available in 1997 required the user to enter the authorization number into the telephone before making a call. That is, the number gave the caller access to use the telephone to call a number.

The Taxpayer in this case provided its customers with either a reference number or an authorization number. As discussed, it gave a reference number to those customers that knew their cellular phone number when they came into the Taxpayer's store. The Taxpayer entered the customer's number into the countertop terminal, and the service provider downloaded the minutes and any other services purchased into the customer's cell phone at that time. End of transaction. The Taxpayer then gave the customer a reference number to use if the customer later had problems with the service. The reference number was thus in the nature of a receipt the customer could use to identify and prove that it had purchased the services. It clearly was not a prepaid authorization number within the purview of §40-23-1(a)(13).

The Taxpayer gave a customer an authorization number if the customer did not know the number of the cellular phone he or she was purchasing service for. The customer would later telephone the provider and give the provider the authorization number. The provider then downloaded the minutes and the other services onto the customer's telephone. Again, the customer was purchasing the service minutes and the other cellular services, not the authorization number, which was merely a type of receipt used to identify and obtain the services. Unlike the authorization numbers available in 1997, the authorization numbers provided by the Taxpayer were not access numbers that

had to be used each time the purchaser made a call.

The intent of §40-23-1(a)(13) was also to tax only telephone calls because other cellular telephone services, i.e., iTunes, texting, Internet access, etc., sold by the Taxpayer during the audit period were not available (and mostly not imagined) in 1997. Again, the Legislature could not have intended to levy a tax on an activity, event, or item that did not exist at the time of the levy.

The Taxpayer points out in its post-hearing brief that other states have in recent years updated their laws concerning the taxation of prepaid cellular telephone services. If the Alabama Legislature wishes to also tax the prepaid cellular telephone minutes and the other cellular services in issue in this case, it must also do the same.

Finally, the Department argues that if the cellular services sold by the Taxpayer are not subject to sales tax pursuant to §40-23-1(a)(13), then they are also not exempt from the cellular telecommunication services tax pursuant to §40-21-122(4). I agree. The question then is whether the Taxpayer or the service provider, i.e., Alltel, Boost, etc., is liable for that tax. But that question is not in issue in this case, and thus will not be addressed.

The Department should remove from the final assessment the tax assessed on the gross receipts derived from the Taxpayer's sale of the prepaid cellular minutes and other cellular services. It should then notify the Division of the remaining tax due, plus applicable penalties and interest, on the undocumented sales on which the Taxpayer failed to collect and remit sales tax. A Final Order will then be entered showing the remaining 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 10, 2013.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

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