

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

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DOCKET NO. MISC. 86-256

MARY P. SPAIN d/b/a DACO
5417 Caldwell Mill Road
Birmingham, AL 35243,

§

§

Taxpayer.

§

ORDER ON REHEARING

This matter involves a disputed preliminary assessment of license tax entered by the Department against Mary P. Spain, d/b/a DACO (Taxpayer) for the period October 1, 1985 through September 30, 1986. The determinative issue is whether the Taxpayer was an "automobile dealer" within the purview of Code of Ala. 1975, §40-12-51.

A hearing was originally set for July 22, 1987. A continuance was requested by the Taxpayer, and the matter was reset for July 29, 1987. Notice of the continued date was sent to the Taxpayer at 5417 Caldwell Mill Road, Birmingham, Alabama 35243 by certified mail on July 16, 1987. That notice was returned unclaimed on August 3, 1987, with the claim check indicating that the Taxpayer had been notified of the letter on both July 18, 1987 and July 23, 1987.

When the Taxpayer failed to appear at the July 29, 1987 hearing, the hearing proceeded and the Department presented its evidence in the case. Based thereon, an order was entered upholding the assessment in dispute.

The Taxpayer has subsequently, by letter dated August 6, 1987, requested a rehearing on the ground that notice of the July 29, 1987 hearing was not received. so as to allow the Taxpayer every opportunity to present evidence in support of her position, a rehearing was set in the matter for 10:00 a.m. September 9, 1987.

Mr. William H. Spain, Mary P. Spain's husband, appeared at said hearing and represented the Taxpayer. Assistant counsel J. Wade Hope appeared on behalf of the Revenue Department. Based on the evidence and arguments presented at said rehearing, in addition to the evidence originally introduced at the hearing held on July 29, 1987, the following order is hereby entered.

FINDINGS OF FACT

At the July 29, 1987 hearing, the Department, through Lt. L. E. Morgan, presented evidence that the Taxpayer had during the period in dispute purchased and/or sold at least three vehicles within the State of Alabama as follows:

On January 27, 1986, an application for inspection of a salvage vehicle was filed with the Department by DACO, 5417 Caldwell Mill Road, Birmingham, Alabama by Mary P. Spain d/b/a DACO, along with an application for an Alabama assigned vehicle identification number. Said applications related to a 1984 Plymouth Reliant. An application for title was filed by DACO on February 14, 1986, and on February 28, 1986, a certificate of title was issued by the Department in the name of DACO, 5417 Caldwell Mill Road, Birmingham, Alabama. The evidence further indicates

that the above vehicle was sold by DACO to Mr. O. A. Lindsey on August 11, 1986. The assigned certificate of title was received by the Revenue Department on August 21, 1986. Further an application for certificate of title dated August 18, 1986 showing O. A. Lindsey as the owner and DACO as the seller was filed with the Department on August 28, 1986.

On April 7, 1986, DACO, 5417 Caldwell Mill Road, Birmingham, Alabama, by and through Mary P. Spain, filed an application for inspection of a salvage vehicle relative to a 1984 Mercury Cougar.

The vehicle had been purchased by DACO in September, 1985, and subsequently restored. An application for certificate of title, dated May 30, 1986, was also filed with the Department on June 11, 1986 in the name of DACO. According to the assignment section on the back of the certificate of title which was issued to DACO on June 16, 1986, the vehicle was sold by DACO to Mr. Donald Doswell on April 8, 1986, and the certificate of title showing assignment of title to Mr. Doswell was filed with the Revenue Department on September 18, 1986.

On May 6, 1986, Mary P. Spain, d/b/a DACO filed an application for inspection of a salvage vehicle relative to a 1984 Ford Thunderbird. An application for certificate of title for said vehicle, dated May 30, 1986, was filed with the Department on June 11, 1986 in the name of Mary P. Spain, d/b/a DACO. A title was issued to Mary P. Spain, d/b/a DACO on June 28, 1986. The vehicle was sold by Mary P. Spain, d/b/a DACO to Mary P. Spain, individual,

on August 18, 1986, and the title assignment was filed with the Department on August 28, 1986. An application for certificate of title was also filed by Mary P. Spain on August 28, 1986.

Based on the above transactions, the Revenue Department determined that the Taxpayer was an automobile dealer within the scope of §40-12-51, and therefore entered the preliminary assessment in issue. The assessment also includes the license fees levied at Code of Ala. 1975, §40-12-390, et seq. which are companion levies to §40-12-51.

At the rehearing, the Taxpayer's representative, William H. Spain, appeared and presented the following objections. First, Mr. Spain contends that the Taxpayer has never operated a business at 5417 Caldwell Mill Road, Birmingham, Alabama. In support of that argument, Mr. Spain points out that the above address is a residence only, that no cars have ever been offered for sale there, that no signs or other advertising have ever been displayed, that Mary P. Spain is a full-time teacher, and finally, that the address is not zoned for business. Further, Mr. Spain argues that the fact that three automobiles were purchased and sold by either Mary P. Spain, d/b/a DACO or DACO does not constitute the regular conduct of business so as to require a license under §40-12-51.

A second objection put forth by Mr. Spain concerns the amount of the assessment. Section 40-12-51 sets out a table of fees varying from \$140.00 for cities of more than 50,000 inhabitants down to \$30.00 for towns of 2,500 or less or unincorporated areas.

The Department assessed the Taxpayer for \$140.00 (plus \$70.00 for local tax) because the Taxpayer's mailing address was Birmingham, a city of over 50,000 population. However, at the hearing, Mr. Spain argued and presented evidence indicating that the address in question, 5417 Caldwell Mill Road, Birmingham, Alabama, was located outside of the city limits of Birmingham and in an unincorporated area. The Department does not dispute that the Taxpayer's address is located in an unincorporated area outside of Birmingham and therefore agrees that the assessment should be reduced to \$45.00 for the combined state and local license tax due, plus interest and penalty and the fees required by §40-12-390, et seq.

Concerning the vehicles in question, Mr. Spain testified that the 1984 Plymouth Reliant was originally purchased for use by a relative, but that it proved unsatisfactory for that purpose and was thus sold. Mr. Spain further testified that he and his wife are presently operating the 1984 Ford Thunderbird for personal use. No explanation was given relating to the 1984 Mercury Cougar.

CONCLUSIONS OF LAW

Code of Ala. 1975, §40-12-51 requires a license for "[E]very person dealing in, selling or purchasing for resale automobiles, trucks or other self-propelled vehicles. . .".

Code of Ala. 1975, §40-12-391 requires that no person shall be licensed under §40-12-51 without first obtaining a license as provided by §§40-12-390 through 40-12-400.

Code of Ala. 1975, §40-12-390(3) defines "motor vehicle

dealer" in pertinent part as follows:

(3) MOTOR VEHICLE DEALER. Any person, firm or corporation engaging in the business of buying, selling, exchanging or negotiating the sale of motor vehicles . . . The term "motor vehicle dealer" does not include. . . , nor shall such term include an individual or firm disposing of a motor vehicle acquired for his or its use.

Code of Ala. 1975, §40-12-392 sets out the requirements of the form necessary to apply for a dealer's license, and provides in part that the location must be a permanent one, that the location must afford sufficient space to display one or more vehicles for sale, and that an appropriate sign must designate the location as being the place of business of a motor vehicle dealer.

In compliance with the above §40-12-392, the Department's application for motor vehicle dealer's permit, at paragraph 10, provides that the applicant must verify that the business location is permanent, that the location affords adequate space to display one or more vehicles for sale, and that an appropriate sign designates the location as a place of business of a motor vehicle dealer. Further, the application provides that a dealer is not allowed to operate from their residence unless the location is zoned for business.

The Taxpayer argues that because the location in question is his residence and is not zoned for business, that no vehicles have ever been displayed or otherwise offered for sale there, and there has never been any signs or other advertising for the sale of vehicles there, that clearly no automobile dealer's license is required. However, the fact that the Taxpayer operates out of a

residence and does not publicly advertise or keep an inventory of vehicles for sale is not determinative. Rather, the question is whether the sale and subsequent purchase of the three vehicles discussed herein by either DACO of Mary P. Spain, d/b/a DACO, constitutes the "dealing in, selling or purchasing for resale" of those vehicles within the purview of §40-12-51.

Of the three automobiles, there is some evidence (the testimony of Mr. Spain) to indicate that the 1984 Plymouth Reliant was originally purchased for the personal use of a relative. Section 40-12-390(3) specifically excludes from the definition of "motor vehicle dealer" the sale of a vehicle which was purchased by an individual or firm for his or its own use. However, the 1984 Reliant was purchased by DACO, not for use by DACO, but for use by a relative of the Spains, which arguably would make the "personal use" exclusion in §40-12-390(3) inapplicable.

Concerning the 1984 Ford Thunderbird, Mr. Spain contends that the vehicle is presently being used personally by he and his wife.

However, the facts show that DACO purchased the vehicle and applied for and received a certificate of title, and that DACO subsequently sold the vehicle to Mary P. Spain, individually, on August 18, 1986. Thus, while Mary P. Spain may presently own the vehicle for personal use, the evidence is that DACO purchased the vehicle and then sold it approximately two months later, which is indicative of a business dealing in automobiles.

Finally, DACO purchased the 1984 Mercury Cougar in question in

September, 1985. The vehicle was restored and on April 7, 1986 an application for inspection of a salvage vehicle was filed with the Department by DACO. An application for title was filed on May 30, 1986, and a title was issued to DACO on June 16, 1986.

In the meantime, the evidence shows that on April 8, 1986, DACO sold the vehicle to Mr. Donald Doswell. Mr. Doswell filed an application for certificate of title dated April 9, 1986. Finally, DACO's certificate of title showing an assignment to Mr. Doswell was received by the Department on September 18, 1986.

Standing alone, there could be some question as to whether the transactions relating to the 1984 Plymouth Reliant and the 1984 Ford Thunderbird could make the Taxpayer a motor vehicle dealer.

However, it is clear that the 1984 Mercury Cougar was purchased and subsequently sold by DACO in the normal course of business, and considered along with the other two recorded transaction would clearly indicate that the Taxpayer did operated as a dealer during the fiscal year in question. It is not necessary that a person must transact a large volume of business to be classified as a motor vehicle dealer.

The above considered, the assessment in issue should be adjusted downward to \$30.00 for a state license and \$15.00 for the corresponding local license, and should thereafter be made final, with applicable interest and penalty as required by statute.

Done this 17th day of September, 1987.

BILL THOMPSON
Chief Administrative Law Judge