STATE OF ALABAMA § STATE OF ALABAMA
DEPARTMENT OF REVENUE, DEPARTMENT OF REVENUE
§ ADMINISTRATIVE LAW DIVISION

v. § DOCKET NO. S. 88-144

C. JOE ROGERS §
d/b/a Rogers Landscaping & Nursery Co.
112 M. Street §
Anniston, AL 36201,
§
Taxpayer.

ORDER

The Revenue Department entered numerous preliminary assessments of sales and use tax against C. Joe Rogers, d/b/a Rogers Landscaping and Nursery Company for all or a part of the period May 1, 1984 through December 31, 1985; and against Rogers Landscaping and Lawn Service, Inc. for the period January 1, 1986 through June 30, 1987. Both are hereafter jointly referred to as "Taxpayer". The Taxpayer appealed to the Administrative Law Division and a hearing was scheduled for July 26, 1989. The Taxpayer's representative was notified of the hearing by certified mail on May 18, 1989, but failed to appear. The hearing proceeded with assistant counsel J. Wade Hope representing the Department. The following findings of fact and conclusions of law are hereby entered submitted at the hearing.

FINDINGS OF FACT

The relevant facts as set out in the Department's post-hearing brief are adopted as follows:

> Pursuant to an audit by the Department of Revenue (hereinafter "Department") preliminary assessments were entered against C.Joe Rogers, d/b/a Rogers Landscaping

and Nursery Company for the period May 1, 1984 through December 31, 1985 for State, Calhoun County and City of Anniston sales tax and local city use taxes. Preliminary assessments were issued against Rogers Landscaping and Lawn Service, Inc. for the period January 1, 1986 through April 30, 1987 for State and City of Anniston sales tax and local city use taxes. The preliminary assessments were entered against two separate legal entities because Mr. Rogers incorporated his business beginning January 1, 1986. However, throughout the two assessment periods, the character of the business remained basically the same, except that after incorporation the Taxpayer began selling Snapper lawn mowers and patio furniture. The Taxpayer operated a landscaping and nursery business throughout both assessment periods.

In operating the nursery business, the Taxpayer made retail over-the-counter sales of tangible personal property and also engaged in landscaping in Anniston, Alabama and the surrounding area.

The Taxpayer maintained a complete set of records for the audit period which were examined by the Revenue Agent. A comparison of the Taxpayer's sales tax returns and supporting worksheets determined that the taxable measure reported to the State consisted only of the over-the-counter cash sales. The Taxpayer's records revealed that charge sales were omitted from the taxable measure. Charge sales were generally for items picked up by or delivered to a regular customer. The customers were generally billed for the purchase amounts-hence the reference to (charge) sales. Further examination of the Taxpayer's books and records revealed that after the Taxpayer incorporated his business and began selling Snapper lawn mowers and patio furniture, for several months the sale of such items did not get included in the taxable measure reported to the Department. In addition, the Taxpayer had claimed some sales of Snapper mowers and patio furniture as exempt wholesale sales. The auditor disallowed the wholesale sales and included them in the taxable measure when the sales were made to other businesses for their own personal use.

During the examination of the Taxpayer's books and records, the Revenue Agent determined that the sale of tangible personal property with regard to what the Taxpayer called "landscaping contracts" were also excluded from the taxable measure "landscaping contracts" did not separate the amounts attributable to the sale of

taxable tangible property, but rather contained a lump sum price with a listing of the items provided under the contract. The Revenue Agent was unable to obtain from the Taxpayer a breakdown of the amounts attributable to tangible personal property subject to sales tax. Therefore, the entire contract amounts were included in the taxable measure. However, at an informal conference before the Sales and Use Tax Division and further examination of materials provided by the Taxpayer, an adjustment was made to the audit. The Taxpayer was allowed to pay tax based on the amounts charged where the property was listed separately or where the Taxpayer was able to satisfy the auditor as to the amounts charged for taxable items. In those instances where the contracts included the sale of exempt items, such as seed or fertilizer, the amounts charged for those items were deleted from the taxable measure.

Throughout the audit process and the informal conference attended by the Taxpayer, the Taxpayer contended that he should only pay sales tax on the cost of materials drawn from inventory and not the stated retail price. In addition, the Taxpayer argued that straw, sand, mulch, and hay are soil conditioners and should be exempt from sales tax in the same manner as fertilizer and peat moss.

The Department contends, as supported by testimony at the hearing by the Revenue Agent, that the "landscaping contract" entered into by the Taxpayer were primarily contracts for the sale of sod, plants and top soil. Since those items were straight retail sales of tangible personal property, which in most instances were delivered by the Taxpayer to the Purchaser's location, the taxable measure is the full retail selling price.

Under Sales and Use Tax Rule 810-6-1-.175 the sale of top soil is subject to sales tax and the taxable measure is the total amount received from the sale of the top soil, including charges for transportation furnished by the seller. In addition the regulation states that the sale of top soil is a retail sale in every instance where it is supplied to a builder or a contractor and no deduction is allowed for labor or services which goes into producing and delivering the top soil.

Under Sales and Use Tax Rule 810-6-3-.29 the sale of grass sod is only exempt from sales tax when the seller is also the producer of the grass sod and the producer or a member of his family makes the sale of the sod.

Otherwise, the sale of grass sod is a retail sale subject to sales tax when sold by persons in the business of selling plants, seedlings, nursery stock or floral products.

Under Sales and Use Tax Rule 810-6-3-.43, Subparagraph 3, a nurseryman is making a retail sale subject to sales tax when he sells shrubbery or other nursery stock and, as part of the transaction, plants the items in the ground for the purchaser. The taxable measure includes the full sale price paid by the purchaser, including the cost of the planting.

Under Sales and Use Tax Rule 810-6-3-.20 "fertilizer" is defined as "any material which results in an increase in plant growth when added to the basic natural substances in which plants are grown.' However, basic natural substances such as sand, clay, top soil, and water are not considered within the meaning of the word fertilizer. Therefore, such items are not exempt from sales tax. However, under Sales and Use Tax Rule 810-6-3-.45 "Peat moss, is a soil conditioner or plant food and is exempt from sales tax.

In the present case, the evidence presented at the hearing through the testimony of the Revenue Agent clearly shows that the Taxpayer made retail sales of tangible personal property that was subject to sales tax. The evidence also shows that although the Taxpayer collected sales tax on some sales of taxable items such as sod and top soil, the Taxpayer excluded the entire amounts of the "landscaping contracts" and the "charge sales"' from the taxable measure reported to the Department. The evidence clearly shows that the Taxpayer only remitted tax on those retail sales which were over-the-counter cash sales. In addition, the testimony of the Revenue Agent also revealed that for several months the Taxpayer did not report and remit the tax due on the sales of Snapper lawn mowers and patio furniture-even which such sales were made for cash.

The testimony furnished by the Revenue Agent also established that the Taxpayer knew that items such as grass sod and top soil were subject to sales tax, because the Taxpayer actually charged and collected sales tax on the sale of such items on several contracts.

CONCLUSIONS OF LAW

The Taxpayer reported and paid tax only on its cash sales during the audit period and failed to report (1) charge sales (all non-cash sales), (2) sales involving landscaping contracts, (3) various retail sales of lawnmowers and patio furniture, and (4) sales of straw, sand, mulch and hay.

The charge sales and lawnmower and furniture sales were clearly taxable and thus were properly included in the audit.

The landscaping contracts were recorded by the Taxpayer in lump sum amounts. That is, the taxable and non-taxable items were not separated. All taxpayers are required to keep accurate records from which taxable and nontaxable items can be distinguished, and the taxpayer must suffer the Penalty for not accurately recording the exempt sales. State v. Ludlam, 384 So.2d 1089, cert denied, 384 So.2d 1094. Consequently, the entire contract amount was initially included in the audit as taxable. The Taxpayer subsequently identified some of the nontaxable items, which were excluded from the audit. However, the remaining items not identified as exempt were properly taxed by the Department.

Finally, while fertilizer is exempt from sales and use tax, see Code of Ala. 1975, §§40-23-4(a)(2) and 40-23-62(5), respectively, the straw, sand, mulch and hay sold by the Taxpayer was not fertilizer and was thus properly taxed by the Department, see Department Regs. 810-6-1-.175, 810-6-3-.20, 810-6-3-.29, 810-6-

3-.43, and 810-6-3-.45.

The above considered, the assessments in issue are correct and should be made final as entered, with statutory interest.

Entered this 24th day of August, 1989.

BILL THOMPSON
Chief Administrative Law Judge