

ALABAMA TAX TRIBUNAL

SOUTHERN HEARING ASSOCIATES,	§	
Taxpayer,	§	
v.	§	DOCKET NO. S. 16-310-CE
STATE OF ALABAMA	§	
DEPARTMENT OF REVENUE.		

FINAL ORDER

This appeal involves final assessments of State and local sales tax for May 2008 through April 2011 entered by the Revenue Department against Southern Hearing Associates (“Taxpayer”). Evidentiary hearings were conducted on August 2, 2017 and May 21, 2018. Attorneys Lee Russell and Wade Hope represented the Taxpayer. Assistant Attorney General Mary Martin Mitchell represented the Department.

The Taxpayer makes retail sales of hearing aids to the general public and to various federal and state agencies. The Taxpayer also provides services to its customers related to their purchase of hearing aids from the Taxpayer. The Taxpayer is headquartered in Enterprise, Alabama, and has numerous sales offices in Alabama.

The Taxpayer was audited by the Department to determine compliance with State and local sales and use tax laws during the period of May 2008 through April 2011. The Department determined that the Taxpayer failed to collect State sales tax and local sales tax on the full purchase price of the products it sold during the audit period. Consequently, it assessed the Taxpayer for tax due, plus interest. The assessments were entered on January 19, 2016.

The Taxpayer appealed the assessments at issue to the Tax Tribunal pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. On appeal, the Taxpayer argues that the Department's assessments incorrectly assess sales tax on non-taxable services rendered by the Taxpayer, such as adjustment, maintenance and repair services. The Department asserts that the Taxpayer did not separately list the amount charged for non-taxable services on invoices to its customers during the audit period. Consequently, it argues, sales tax is due on the entire bundled transaction pursuant to Ala. Admin. Code r. 810-6-1-.84. Further, citing *East Brewton Materials v. Dept. of Revenue*, 233 So. 2d 751 (Ala. Civ. App. 1970), the Department argues that some of the services performed by the Taxpayer occur prior to the sale, and therefore must be included in the taxable measure.

It is undisputed that the Taxpayer did not separately list charges for non-taxable services on its invoices during the audit period. The Taxpayer's customers were billed for one charge that included the purchase price of the hearing aids and the charge for any and all services rendered to the customer before and after the sale. These type charges are commonly referred to as bundled transactions, in that they include charges for taxable good and non-taxable services.

"Gross proceeds of sale" is defined 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, any consumer excise taxes that may be included within the sales price of the property sold, or any other expenses whatsoever, . . ." Code of Ala. 1975, §40-23-1(a)(6). Reg. 810-6-1-.84(2) further provides that sales tax is due on labor or service charges, whether included in the total price of a product or billed as a separate item, if the labor or service is incurred

incidental to preparing the product for sale and is performed before the sale is closed.

The above statute and regulation clearly require that sales tax must be collected on the full amount received by a seller from a customer. A seller cannot deduct his or her labor or other costs incurred in selling a product. This same issue was addressed in *Webster Enterprises v. State of Alabama*, Docket No. S. 03-165 (Admin. Law Div. O.P.O. 6/12/03), which also involved a separate labor fee charged by an auctioneer:

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.

The Taxpayer's owner testified that the Taxpayer computed the purchase price and any pre-sale service charges to be the Taxpayer's cost plus a ten percent mark-up, and that the remainder of the charge constituted non-taxable, post-sale service charges. It is very clear to me from the evidence presented and from testimony given by the Taxpayer's owner that a significant portion of the purchase price billed to the Taxpayer's customers includes charges for non-taxable services rendered after the sale of the hearing aids. However, after pouring over the voluminous documents and other evidence presented in this case for months and months, I am still unable to determine with any certainty what portion of the charge is attributable to the taxable sale of hearing aids and all labor and other costs incurred in selling such aids, and what portion of the charge is attributable to

non-taxable services rendered by the Taxpayer after the sale.

While I believe the Taxpayer's owner to have testified honestly, the law requires that the Taxpayer keep books and records from which the Taxpayer's tax liability can be correctly ascertained. The documents presented in this case do not allow me, with any certainty, to ascertain that the taxable portion of each bundled transaction in the audit period is the Taxpayer's cost plus a ten percent markup. Consequently, I am unable to determine what portion of the Taxpayer's gross proceeds of sale are attributable to non-taxable, post-sale service charges.

The final assessments are affirmed. Judgment is entered against the Taxpayer for State sales tax and interest in the amount of \$83,672.06 and local sales tax in the amount of \$1,624.16. Additional interest has accrued since the date the final assessments were entered, January 19, 2016, and will continue to accrue until the assessments are paid in full.

This Final Order may be appealed to circuit court within 30 days, pursuant to Ala. Code § 40-2B-2(m).

Entered January 14, 2019.

/s/ C. O. Edwards

CHRISTY O. EDWARDS

Associate Tax Tribunal Judge

cc: Lee M. Russell, Jr. Esq.
J. Wade Hope, Esq.
Mary Martin Mitchell, Esq.