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ALABAMA FURNITURE MARKET, LLC. Joshua Sullivan, Esq. Chris Akins Petitioners, V. CITY OF ARLEY, ALABAMA, CITY OF CHELSEA, ALABAMA, CITY OF CLAY, ALABAMA, et al. Respondents,	)	**FINAL ORDER**

The taxpayer, Alabama Furniture Market, LLC, is an Alabama limited liability company engaged in the business of retail furniture sales throughout the State of Alabama. The taxpayer maintains a physical business location within the city of Calera in Shelby County, Alabama which is the location of their retail outlet. Some the taxpayer's sales are made at the store location with the customer picking up the merchandise purchased. The taxpayer also provides a delivery service for customers who elect to have the merchandise delivered to their specified location. In all such cases, the taxpayer makes deliveries by use of their own delivery trucks and employees. The taxpayer does not have any other physical presence in jurisdictions outside of the Calera facility other than performing the delivery and requisite setup of their own merchandise. The taxpayer was audited by Revenue Discovery Systems ("RDS") on behalf of self-administered jurisdictions throughout the State of Alabama. While it was accepted that the taxpayer did not have sufficient nexus in jurisdictions other than Calera in order to subject it to the collections of local seller's use taxes, the audit revealed that the taxpayer had a practice by which it would charge the customer an additional, separately stated charge for "sales tax/delivery" on all invoices where the customer elected for delivery of the merchandise. No specific rate of tax or breakdown of the charge was provided for on the invoice, but the taxpayer disclosed that its practice was to collect the total charge, and remit only that portion which was attributable for State sales taxes and applicable local taxes. The remainder of the "sales tax/delivery" fee was retained by the taxpayer as a delivery charge to the customer.

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The auditor determined that the remaining amount of the "sales tax/delivery" fee should have been remitted to the local taxing jurisdictions in accordance with the Ala. Code § 40-23-26(d) (1975), the Alabama "over-collection" statute. The auditor's report stated that because the taxpayer failed to itemize the tax and delivery charges, the fee purported to be a sales tax, and was therefore due to be remitted to local authorities as an over-collection of sales tax from a customer. Preliminary Assessments were entered against the taxpayer on January 14, 2011 based upon the findings of the auditor. The taxpayer filed a petition for review of the Preliminary Assessments in accordance with Ala. Code §40-2A-7(b)(4)a, and a review of the assessments was conducted with the taxpayer's attorney. The taxpayer revealed during the hearing that a civil tax appeal was pending in the Shelby County Circuit Court regarding the precise issue which was discovered during another private examination firm contracted by other self-administered jurisdictions in Alabama. Since the facts and issues were identical, it was decided that the issue would be resolved along with the opinion of the Shelby County Court in order to avoid inconsistencies. However, taxpayer's appeal was dismissed on grounds of subject matter jurisdiction, and the court did not address the substantive issues. It is now necessary to address these issues in order to resolve the taxpayer's appeal.

The only substantive issue for discussion is whether the taxpayer's separate charge on invoices for a "sales tax/delivery" fee purported to be a tax, and should, therefore, be remitted to the local taxing authorities in accordance with Ala. Code § 40-23-26(d). The taxpayer's practice is to charge the fee on all invoices where the customer elects for delivery of their merchandise. The taxpayer then remits the appropriate amount of the fee attributable to the State taxes, remits any applicable local taxes, and retains the remainder as a delivery charge. The taxpayer claims in their appeal that there is no requirement that the tax be listed separately from the delivery fee, and there is no legal basis for the conclusion that the failure to do so renders the entire amount a tax.

The Alabama sales tax is measured by the gross proceeds derived form the retail sale of tangible personal property. Ala. Code § 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." Ala. Code § 40-23-1(a)(6). Under Alabama statutes and rules of general applicability from Alabama case law, transportation, delivery, and installation charges made in conjunction with a retail sale are taxable when rendered by the seller if the services are performed as a part of and prior to completion of the sale. *Alabama Precast Products, Inc. v. State Dept. of Revenue*, 332 So.2d 160 (Ala.Civ.App. 1976). A retail sale occurs with the passing of title, and unless otherwise provided, title passes upon completion of the physical delivery by the seller. Ala. Code §§ 7-2-106 & 7-22-401(2); *State v. Delta Airlines, Inc.*, 356 So.2d 1205 (Ala.Civ.App. 1977). In no case is the seller permitted to make a separate

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charge for his own service in the delivery and transportation, by his own means, of merchandise sold at retail in such a manner as to entitle the seller to deduct the amount from the gross proceeds of the sale subject to tax. Such delivery charges are taxable even if billed separately. Ala. Admin. Code r. 810-6-1-.178(a).

Ala. Code § 40-23-26(d) provides that in the event that any sum is collected from a consumer that "purports" to be a sales tax, then any such sum shall be paid to the Department of Revenue and not retained by the retailer. Political subdivisions within the State of Alabama are authorized to adopt their own rules and regulations for enforcement of local taxes, but they are required to generally parallel their state counterparts. *Yelverton's Inc. v. Jefferson County*, 742 So.2d 1216, 1222 (Ala.Civ.App. 1997). In addition, the model ordinances adopted by the political subdivisions in Alabama adopt all "provisions" of the State sales tax laws, thus making the state over-collection statute applicable to local sales taxes. Section 40-23-26(d) is in the nature of a tax levy statute because it requires an amount of to be paid to the State and local tax authorities. It is a well settled principle that tax levy statutes must be strictly construed and any doubts resolved in favor of the taxpayer, and against the taxing powers. *State v. Calumet & Hecla, Inc., Alamet Division*, 206 So.2d 354 (Ala. 1968). Consequently, the application of the Alabama over-collection statute must be strictly construed against the taxing power under the pertinent facts of this case.

The plain language of § 40-23-26(d) states that an amount must be paid over to the taxing authority only if it "purports" to be a sales tax. The generally accepted meaning of "purport" is "to profess or claim falsely." *Black's Law Dictionary* 573 (2nd pocket ed. 2001). The taxpayer specified on its invoices that the additional fee associated with the merchandise was for "sales tax/delivery," and the taxpayer was not required to include the delivery charge along with the price of the merchandise, but only to include the amount charged for delivery within the sales price subject to tax. Ala. Admin. Code r. 810-6-1-.178(a). Strictly construing the statute in favor of the taxpayer, the statute does not apply unless the amount collected is identified as a sales tax. *McDaniel Window & Door Company, Inc. v. State Dept. of Revenue*, Admin. Law Div., Dkt. No. S. 02-313 (September 25, 2002). The taxpayer's practice regarding merchandise deliveries was to charge the additional fee for a combination of sales tax and delivery costs, remit the State portion of the tax, remit the local taxes in jurisdictions in which it had nexus, and retain the remainder as a delivery charge. This does not necessarily amount to falsely claiming that the entire additional fee is a tax. While it appears that the taxpayer likely failed to properly include the delivery charge within the sales price subject to tax, the unreported portion of tax on these transactions are not in issue here, and the taxpayer specifically designated on the invoice that the addition charge was also attributable to the cost of delivery. The auditor concluded that the taxpayer did not have nexus in any jurisdiction other the City of Calera and Shelby County, Alabama, and, therefore, would not have been required to collect the local sales tax (seller's use tax) on the delivery portion of invoices outside of those jurisdictions. The taxpayer satisfied all

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additional Calera taxes assessed under the Preliminary Assessments which did not pertain to the subject matter of this appeal. Finding that the taxpayer's combination of a sales tax and delivery fee on invoices did not purport to consist entirely of a sales tax is dispositive of the remaining balances assessed. However, the taxpayer is instructed to re-compute the sales tax due in the city of Calera on transactions where it failed to include the delivery charge within the taxable base on invoices, and remit the resulting taxes due in accordance with rules set forth in this opinion.

Entered this 9th day of September, 2011,

Jonathan V. Gerth, Esq. as,
Administrative Hearing Officer