



600 Beacon Parkway West, Suite 900
Birmingham, Alabama 35209

800-556-7274 • 205-324-0088 • 205-423-4099 fax
www.revds.com

REVENUE DISCOVERY SYSTEMS – ADMINISTRATIVE LAW DIVISION

THE CHILDREN’S PLACE)
RETAIL STORES, INC.,)
)
Petitioners,)
)
v.)
)
CITY OF ADDISON, AL.)
CITY OF ALBERTVILLE, AL.)
ALEXANDER CITY, AL. *et al*)
)
Respondents,)

RDS PID No. 24352

FINAL ORDER

The taxpayer, Children’s Place Retail Stores, Inc., a New Jersey corporation based in Secaucus, NJ and incorporated in Delaware, is a children’s retail clothing store with 17 store locations in Alabama. The taxpayer also makes a substantial amount of online retail (“ECOM”) sales to customers in Alabama, all of which are delivered via common carrier. Many are shipped from a distribution center which the taxpayer maintains in Fort Payne, Alabama. The taxpayer was audited by Revenue Discovery Systems (“RDS”) on behalf of self-administered county and municipal taxing authorities throughout the State of Alabama. The auditor determined that the taxpayer was properly collecting and remitting sales and seller’s use tax in all jurisdictions where it had nexus (“nexus jurisdictions”). The audit further revealed that the taxpayer was charging and collecting sales tax on ECOM sales in excess the four percent (4%) state sales tax rate on ECOM sales closed in local taxing jurisdictions¹ wherein it lacked the requisite nexus for the collection local sales/seller’s (“sales”) use taxes under Alabama law (“non-nexus jurisdictions”). See ALA. ADMIN. CODE r. 810-6-5-.04.02.

The taxpayer utilizes a 3rd party point-of-sale tax software which determines the amount of sales tax which is applied to ECOM sales based on geo-code settings. The taxpayer could not

¹ For Alabama state and local tax purposes, the sales taxes apply to sales that are “closed” in Alabama, that is, they apply when title to the goods has passed to the purchaser, which occurs as of the time and place of the physical delivery of the goods to the purchaser. *State v. Delta Air Lines, Inc.*, 356 So. 2d 1205 (Ala. Civ. App. 1978).

specify how the software service determined the sales tax rate applied to ECOM sales in various jurisdictions, but the purpose & intent of the sales tax software is to apply the correct amount of state and local sales tax rates to retail ECOM sales, whether or not it is currently doing so correctly. In many instances, the amount of sales taxes collected on ECOM sales from customers in excess of the state's 4% rate drew parallel to the combined tax rates for the local municipal and county sales tax where the sales closed. In other instances, the over-collected tax amounts did not correspond to the combined local municipal and county sales tax rates, but fell somewhere in excess of the municipal rate but less than the combined local rate.

On a monthly basis, the taxpayer would break out its ECOM sales between "nexus jurisdictions" and "non-nexus jurisdictions" prior to preparing and filing its monthly sales tax returns. The taxpayer would file and remit the correct amount of combined state and local sales taxes to the "nexus jurisdictions," and would file and remit all taxes collected for "non-nexus jurisdictions," including the amounts of local sales taxes collected, to the Alabama Department of Revenue ("ADoR"). The taxpayer did not remit any of the sales taxes collected to the local municipal or county taxing authorities in "non-nexus jurisdictions."

The auditor concluded that the sales taxes collected in excess of the state's 4% from sales closed in "non-nexus jurisdictions" were required to be remitted to local taxing jurisdictions pursuant to ALA. CODE § 40-23-26(d), and advised the taxpayer that it was due a refund of the overpayments remitted to the ADoR. Preliminary assessments were entered based upon the findings, and the taxpayer appealed. A preliminary assessment conference was conducted on May 20, 2014. Audit Supervisor Leslie Payne conducted the conference via telephone with the taxpayer's representative, Jean Gendron, CPA. An opinion was issued upholding the conclusions of the audit following the preliminary assessment conference. Upon issuance of the opinion to the taxpayer, final assessments were due to be entered, but were not because the taxpayer's representative filed an appeal of the ruling on September 18, 2014 with the RDS Audit Administration Department. RDS subsequently failed to enter final assessments. Consequently, there have been no effective final assessments entered in this matter, and the taxpayer will be permitted further statutory appeals if it elects to exercise them.

Analysis

On appeal, the taxpayer contends that it properly remitted the excess sales taxes collected on sales in non-nexus jurisdictions to the ADoR in accordance with ALA. CODE § 40-23-26(d), and that it has no responsibility to remit taxes to those local jurisdictions in which it has no nexus, regardless of whether it collected tax in excess of the ADoR's 4% rate on sales therein. The sales taxes were charged on the invoices to customers in a lump sum amount, and were not broken out to delineate between state, municipal, and/or county taxes.

ALA. CODE 40-23-26(d) provides that;

“In the event that any sum is collected from a consumer that purports to be collected because of this section, whether or not the amount is actually provided for hereunder, then any such sum, except

such as is collected solely because of rounding the correct amount of tax upward to the nearest cent, shall be paid to the Department of Revenue . . .”

The Legislative intent of that Section was “to provide that any over collection of sales tax by a retailer from the customer is paid over to the state and not retained by the retailer as windfall. . .” *Dandy’s Discount Package Store, Inc. v. Sizemore*, 597 So. 2d 1370, 1372 (Ala. Civ. App. 1992).

In the 1998 session, the Alabama legislature enacted the Local Tax Simplification Act of 1998 (“LTSA”), Act No. 98-192, Ala. Acts 1998. The statutory provisions adopted under the LTSA permit the counties and municipalities to administer and collect, or contract for the collection of, any tax authorized to be levied by ordinance, resolution, general or local act. ALA. CODE § 11-3-11.2(a) & § 11-51-204. Moreover, the LTSA expressly provided that “[a]ll taxes levied or assessed by any municipality pursuant to the provisions of Section 11-51-200 (sales taxes) shall be subject to all definitions, exceptions, exemptions, proceedings, requirements, provisions, rules and regulations promulgated under the Alabama Administrative Procedure Act, direct pay permit and drive-out certificate procedures, statutes of limitation, penalties, fines, punishments, and deductions for the corresponding state tax as are provided by Sections 40-2A-7, 40-23-1, 40-23-2, 40-23-2.1, **40-23-4 to 40-23-31, inclusive**, 40-23-36, 40-23-37.” ALA. CODE §§ 11-51-201(a) & 11-3-11.2(b). Accordingly, the over-collection provisions of ALA. CODE § 40-23-26(d) were explicitly made applicable to amounts purportedly collected as municipal and county² sales taxes by operation of the LTSA in 1998.³

The taxpayer’s invoices to customers on all ECOM sales contain a line item designated as “sales tax.” While they do not delineate a state and local breakdown for the total percentage charged, it is clear that the amounts collected were purportedly collected as sales tax subject to the purview of ALA. CODE § 40-23-26(d) for purposes of state and local taxation. The taxpayer does not dispute that it over-collected state and local taxes, but rather contends that it is not required to remit the amounts collected which would purport to be local sales taxes in non-nexus jurisdictions. I disagree.

The intent and result of a state and local complementary sales and use tax scheme is to impose a sales tax on sales which occur within the state or local taxing jurisdictions, and a use tax measured by the retail sale price of goods purchased outside of the state or local taxing jurisdictions for use within. *Paramount-Richards Theatres v. State*, 55 So. 2d 812, 820 (Ala. 1952). The use tax is referred to as a compensatory measure, to equalize the burden of the sales tax and prevent avoidance of the tax by the purchase of goods from outside of the state or local jurisdictions. *Id.* at 821. It is for this reason these two taxes are referred to as being

² The language in the County statute actually states “[a]ny rules and regulations *adopted or utilized* by the county or its designee shall be consistent with the rules and regulations adopted through the provisions of the Alabama Administrative Procedure Act by the Department of Revenue for the corresponding state tax, but would be construed together as a whole, *in pari materia*, with the LTSA provisions applicable to municipalities, as is the case with all statutes of the same subject matter and purpose. *Locke v. Wheat*, 350 So. 2d 451, 453 (Ala. 1977).

³ The ADoR’s Administrative Law Division recognized this application in *McDaniel Window & Door Co., Inc. v. State Dep’t of Revenue*, Admin. Law Div., Dkt. No. S. 02-313 (Sept. 25, 2002) wherein it clearly stated that “[t]he State over-collection statute thus also applies to over-collected municipal sales tax.”

complementary in nature; combining together as one integrated, cohesive system of taxation. *State v. Bay Towing & Dredging Co.*, 90 So. 2d 743, 746 (Ala. 1956).

In this instance, the taxpayer charged and collected an amount from customers clearly designated as “sales tax.” Whether or not the amounts collected precisely correspond to the combined state and local sales tax rate, or whether or not the taxpayer had nexus in those local jurisdictions where it over-collected sales tax from customers, is inconsequential for purposes of ALA. CODE § 40-23-26(d). When a purchaser orders merchandise from the taxpayer and pays and/or receives the invoice which includes taxes in excess of the state’s 4% rate, and in a range close or parallel to the combined state and local rates, it impresses upon the purchaser that they have paid the amount of local sales tax necessary on that purchase to avoid the shifting imposition of a complementary use tax burden upon them for the local taxing jurisdictions.

It is the mandatory duty of the seller to collect and pay the sales tax lawfully due and a like mandatory duty to add the proper amount thereof to the sales price and collect the same from the customer. *Meriwether v. State*, 42 So. 2d 465, 466-467 (Ala. 1949); ALA. ADMIN. CODE r. 810-6-4-.20(1). The taxpayer here knowingly, continuously, and almost universally collected sales taxes in excess of the requisite 4% state rate in local taxing jurisdictions in which it did not have the requisite nexus. The taxes overpaid to the ADoR are subject to be refunded to the taxpayer, and the taxpayer has submitted a petition to have them refunded. It is thus required to remit those over-collected taxes to the respective local jurisdictions in a proportionate manner based upon the respective city and county rates over-collected as mandated by ALA. CODE § 40-23-26(d). Otherwise, the taxpayer would receive a windfall of over-collected taxes to the detriment of those purchasers in local jurisdictions who have overpaid them.

The taxpayer has also requested on appeal that any penalties associated with the over-collection of sales taxes be waived. Alabama law provides for the waiver of civil penalties upon a determination of reasonable cause. ALA. CODE §§ 40-2A-4(d) & 40-2A-11(h); ALA. ADMIN. CODE r. 810-14-1-.33.01(3). The burden of proof of reasonable cause rests with the taxpayer. *Id.* The events set forth which are sufficient to constitute “reasonable cause” are: (i) death, major illness, unavoidable absence; (ii) casualty or natural disaster; (iii) inability to obtain necessary records; (iv) nonrecurring honest mistake (instances where the taxpayer acted in good faith); (v) reliance on the advice of a competent tax advisor; and (vi) reliance on erroneous advice of a taxing authority or its authorized agent or designee. ADMIN. CODE r. 810-14-1-.33.01(3)(a). Thus far, the taxpayer has not met its burden of establishing reasonable cause for the abatement of penalties and the penalties are thus due to be assessed absent further evidence supporting a finding of reasonable cause.

The taxpayer is due to pay local taxes over-collected on ECOM sales, including penalties and interest thereon, in the amount of \$137,842.25. The taxpayer may file an application for rehearing and/or penalty waiver on this matter with the RDS hearings officer within 30 days.

Entered November 18, 2014

/s/ Jonathan V. Gerth

Jonathan V. Gerth, Esc.
Administrative Law Judge