

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

A.L.S.S., INC.,)
)
 Petitioner,)
)
 vs.) Case No. 07-0904
)
 DEPARTMENT OF REVENUE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice a formal hearing was held on May 30, 2007, in Miami, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Darlot A. Veloso, Jr., President
A.L.S.S., Inc.
995 Northwest 72nd Street
Miami, Florida 33150

For Respondent: Warren J. Bird, Esquire
Assistant Attorney General
Office of the Attorney General
Revenue Litigation Section
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue in this case is whether the Petitioner, A.L.S.S., Inc. (Petitioner), is entitled to a refund in the amount of \$3,261.47, for sales tax paid on the purchase of a new automobile.

PRELIMINARY STATEMENT

On December 11, 2006, the Respondent, Department of Revenue (Respondent or Department) issued a letter to Mr. Veloso in his capacity as president of the Petitioner that announced its decision to deny the refund of sales tax paid on a new motor vehicle purchased from a Florida dealer and subsequently exported by the taxpayer. The letter constituted notice of a reconsideration of the prior decision that had also denied the refund. Thereafter the Petitioner timely challenged the decision and sought an administrative hearing to contest the denial of the refund. The case was forwarded to the Division of Administrative Hearings for formal proceedings on February 20, 2007.

The case was originally scheduled for a hearing to be conducted on April 16, 2007, but that date was amended to May 30, 2007, following a Request for Continuance filed on March 13, 2007. All parties appeared for the hearing.

At the hearing, the Respondent presented the deposition testimony of Bonnie Everton, a Department employee who works and resides in Tallahassee, Florida. The Respondent's exhibits attached to the deposition along with Respondent's Exhibit 2 were received in evidence. The Petitioner presented the testimony of Mr. Veloso and Petitioner's Exhibit 1 was also admitted into evidence.

The transcript of the proceedings was filed with the Division of Administrative Hearings on July 9, 2007. The parties

were afforded ten days from that date within which to file proposed recommended orders. All proposals filed in this cause have been deemed timely. Post-hearing motions to correct the transcript and for attorneys fees are hereby denied.

Irregularities in the transcript have been deemed minor and not so substantial as to prejudice any party.

FINDINGS OF FACT

1. The Respondent is the state agency charged with the responsibility of collecting sales and use tax owed to the State of Florida. See § 213.05, Fla. Stat. (2006).

2. At all times material to the allegations of this case, the Petitioner was a registered export dealer. The Petitioner routinely purchases new motor vehicles for export to foreign buyers. In this case, the Petitioner purchased a new motor vehicle and subsequently exported it to a buyer in Brazil.

3. More specifically, on or about May 24, 2004, the Petitioner purchased a new 2004 Hummer from Williamson Cadillac-Hummer in Miami, Florida. At the time of the purchase, the Petitioner paid the sales tax associated with the purchase of the vehicle. The total sales tax paid was \$3,261.47. The sale of the vehicle resulted in the Florida registration of the vehicle and issuance of a Florida title in the name of the Petitioner.

4. From the automobile dealership the subject vehicle was loaded on a flatbed wrecker and transported to a warehouse at or near the Port of Miami. In anticipation of its shipment to

Brazil, the vehicle was drained and prepared for exportation in accordance with applicable laws and regulations. The Petitioner never drove the vehicle on the streets of Miami-Dade County and it was not insured.

5. It is undisputed that the subject vehicle was exported to an individual in Brazil.

6. Thereafter, the Petitioner sought a refund of the sales tax paid on the subject vehicle. The Petitioner contacted the Department to seek the refund and maintains that a sales tax was inappropriate in this case as the purchased item was bought for exportation. The Department offered to refund the sales tax upon receipt of an assignment of rights from the new vehicle dealer (Williamson Cadillac-Hummer).

7. When the Petitioner contacted Williamson Cadillac-Hummer for assistance in obtaining the refund, the automobile dealer refused to aide the Petitioner. Williamson Cadillac-Hummer is precluded by its contractual agreement with General Motors from making sales for exportation. The Petitioner knew this at the time of the purchase of the new Hummer. Under its contractual agreement, Williamson Cadillac-Hummer may not directly or indirectly sell new motor vehicles for export.

8. As the transaction was deemed a new car sale to the Petitioner (with the Florida title of the vehicle being put in the Petitioner's name), the Department declined to refund the sales tax even though the vehicle was in fact exported to Brazil.

9. It is the Department's position that a taxable transaction occurred when the new motor vehicle was sold and registered in this state.

10. In this case, the transaction could not have occurred (per the dealer's agreement with General Motors) as a new motor vehicle sale for export.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. §§ 120.57(1), and 212.06, Fla. Stat. (2007).

12. Pursuant to Section 212.05, Florida Statutes (2007), the State of Florida is entitled to a sales tax that is levied on each taxable transaction or incident for tangible personal property sold at retail in this state. The purchaser bears the cost of the tax but the obligation to collect and remit the tax monies to the state rests with the "dealer," as that term is defined by law. The dealer typically adds the amount of the tax to the price of the item sold. See Florida Department of Revenue v. Naval Aviation Museum Foundation, Inc., 907 So. 2d 587 (Fla. 1st DCA 2005).

13. In connection with the imposition of the sales tax, "sale," as defined by Section 212.02(5), Florida Statutes (2007), means and includes:

Any transfer of title or possession, or both, exchange, barter, license, lease, or rental, conditional or otherwise, in any manner or by

any means whatsoever, of tangible personal property for a consideration.

14. Additionally, "tangible personal property," as defined by Section 212.02(19), Florida Statutes (2007), means and includes:

...personal property which may be seen, weighed, measured, or touched or is in any manner perceptible to the senses, including electric power or energy, boats, motor vehicles and mobile homes as defined in s. 320.01(1) and (2), aircraft as defined in s. 330.27, and all other types of vehicles. The term "tangible personal property" does not include stocks, bonds, notes, insurance, or other obligations or securities or pari-mutuel tickets sold or issued under the racing laws of the state.

15. Section 212.06, Florida Statutes (2007), provides, in part:

212.06 Sales, storage, use tax; collectible from dealers; "dealer" defined; dealers to collect from purchasers; legislative intent as to scope of tax.--

(1)(a) The aforesaid tax at the rate of 6 percent of the retail sales price as of the moment of sale, 6 percent of the cost price as of the moment of purchase, or 6 percent of the cost price as of the moment of commingling with the general mass of property in this state, as the case may be, shall be collectible from all dealers as herein defined on the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state of tangible personal property or services taxable under this chapter. The full amount of the tax on a credit sale, installment sale, or sale made on any kind of deferred payment plan shall be due at the moment of the transaction in the same manner as on a cash sale.

* * *

(2)(a) The term "dealer," as used in this chapter, includes every person who manufactures or produces tangible personal property for sale at retail; for use, consumption, or distribution; or for storage to be used or consumed in this state.

* * *

(5)(a)1. Except as provided in subparagraph 2., it is not the intention of this chapter to levy a tax upon tangible personal property imported, produced, or manufactured in this state for export, provided that tangible personal property may not be considered as being imported, produced, or manufactured for export unless the importer, producer, or manufacturer delivers the same to a licensed exporter for exporting or to a common carrier for shipment outside the state or mails the same by United States mail to a destination outside the state; or, in the case of aircraft being exported under their own power to a destination outside the continental limits of the United States, by submission to the department of a duly signed and validated United States customs declaration, showing the departure of the aircraft from the continental United States; and further with respect to aircraft, the canceled United States registry of said aircraft; or in the case of parts and equipment installed on aircraft of foreign registry, by submission to the department of documentation, the extent of which shall be provided by rule, showing the departure of the aircraft from the continental United States; nor is it the intention of this chapter to levy a tax on any sale which the state is prohibited from taxing under the Constitution or laws of the United States. Every retail sale made to a person physically present at the time of sale shall be presumed to have been delivered in this state.

* * *

(10) No title certificate may be issued on any boat, mobile home, motor vehicle, or other vehicle, or, if no title is required by law, no license or registration may be issued for any boat, mobile home, motor vehicle, or other vehicle, unless there is filed with

such application for title certificate or license or registration certificate a receipt, issued by an authorized dealer or a designated agent of the Department of Revenue, evidencing the payment of the tax imposed by this chapter where the same is payable. A presumption of sales and use tax applicability is created if the motor vehicle is registered in this state. For the purpose of enforcing this provision, all county tax collectors and all persons or firms authorized to sell or issue boat, mobile home, and motor vehicle licenses are hereby designated agents of the department and are required to perform such duty in the same manner and under the same conditions prescribed for their other duties by the constitution or any statute of this state. All transfers of title to boats, mobile homes, motor vehicles, and other vehicles are taxable transactions, unless expressly exempt under this chapter. [Emphasis Added.]

13. In this matter, the Petitioner bears the burden of proof to establish it is entitled to the refund of the sales tax paid. As the party asserting the affirmative of the issue, the Petitioner must demonstrate by a preponderance of the evidence that it is entitled to the refund. See Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

14. The facts of this case are not in dispute. The parties have agreed that the Petitioner exported the motor vehicle that was purchased from Williamson Cadillac Hummer. Nevertheless, statutes allowing exemptions from sales tax are construed against the taxpayer. See State Department of Revenue v. Anderson, 403 So. 2d 397 (Fla. 1981). In this regard, the sales transaction must be reviewed in hindsight at the time of the point of sale.

A Florida title to the subject vehicle passed to the Petitioner at the point of sale. That point of sale triggered a taxable event or not. Since Williamson Cadillac-Hummer could not make a sale for exportation, collected the sales tax for the otherwise taxable sale, secured a Florida title to the vehicle for the Petitioner, and refused to aide the Petitioner in obtaining a refund, the sale must be deemed a taxable event.

15. Florida Administrative Code Rule 12A-1.007, addresses the sale of motor vehicles. In part, the Rule provides:

(1)(a) The sale, including occasional or isolated sales, the use, consumption, or storage for use in this state of any aircraft, boat, mobile home, motor vehicle, or other vehicle of a class or type required to be registered, licensed, titled, or documented in this state or by the United States Government is taxable on the full sales price without any deduction for freight, handling, delivery, commission, repossessions, advertising, future free service, or any other expense or cost whatsoever. Separately stated fees or charges as a requisite to the titling, licensing, registration, transfer of ownership, or recording of lien, or operation of any automobile in this state, mandated by the state, its subdivisions, or any state or licensed tag agency or office, shall not be included in the sales price, and as a result are not subject to tax.

* * *

(6) Sales of Aircraft, Boats, Mobile Homes, Motor Vehicles, or Other Vehicles to a Nonresident Dealer for Resale Outside Florida.

(a) If delivery of any aircraft, boat, mobile home, motor vehicle, or other vehicle is made in Florida to a nonresident aircraft, boat, mobile home, motor vehicle, or other vehicle dealer who does not hold a Florida certificate of registration as an aircraft,

boat, mobile home, motor vehicle, or other vehicle dealer, it is taxable unless the nonresident aircraft, boat, mobile home, motor vehicle, or other vehicle dealer furnishes the seller a notarized statement that the aircraft, boat, mobile home, motor vehicle, or other vehicle will be transported outside of Florida by the dealer for resale and no other purpose. The burden of obtaining this evidential matter rests with the seller, who must retain the documentation to support the exempt sale.

* * *

(8) Motor Vehicles.

* * *

(i) A motor vehicle dealer or a licensed export-import dealer registered under the sales and use tax law must obtain and provide an ocean bill of lading from a regularly operated transportation company engaged in foreign commerce to prove export and exemption from Florida tax, except as otherwise provided in subsection (6), above. Claimed shipment abroad in privately operated vessels or vehicles where no bill of lading is issued as proof of export of specific items cannot be allowed without tax. Such claimed shipment is construed to be acceptance of delivery in Florida by purchaser and is taxable.

* * *

(n) The act of registering any motor vehicle in this state constitutes constructive importation for use of such motor vehicle in this state and shall subject such motor vehicle to Florida use tax.

[Emphasis Added.]

16. If the purpose of Chapter 212 is to raise revenue for the state [see Gauden v. Kirk, 47 So. 2d 567 (Fla. 1950)], the allowance of an exemption from the imposition of a tax must be clear. The Department set procedures for allowing a dealer to refrain from collecting sales tax or to allow a dealer to seek a refund of a sales tax remitted in error. Neither is applicable

in this case. Although this ruling may seem harsh, it is consistent with rulings that hold parties seeking exemptions to a strict construction of the law. See State Department of Revenue v. Anderson, 403 So. 2d 397 (Fla. 1981).

17. The dealer and Petitioner completed a transaction based upon their decision to sell and purchase a new Hummer under the terms set forth in their agreement. The dealer did not sell the vehicle for export. As a new car sale to be titled in Florida in the Petitioner's name the dealer was required (and did) collect sales tax that was remitted to the state. The Petitioner may not after-the-fact restructure that transaction. In this case the seller would not and could not support the exempt sale. Simply stated, if the transaction was not exempt it was a taxable event.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Revenue enter a Final Order denying the refund sought by Petitioner.

DONE AND ENTERED this 24th day of August, 2007, in
Tallahassee, Leon County, Florida.

S

J. D. Parrish
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 24th day of August, 2007.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.