

GOURMET PANTRY, INC §
5121 OLD LEEDS ROAD §
BIRMINGHAM, AL 35210-3027, §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer, §

DOCKET NO. S. 13-295

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

FINAL ORDER

The Revenue Department assessed Gourmet Pantry, Inc. (“Taxpayer”) for State sales tax for January 2009 through January 2012. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on July 11, 2013. The Taxpayer’s owner, Willy Dielen, attended the hearing. Assistant Counsel Kelley Gillikin represented the Department.

The Taxpayer operated a catering business in the Birmingham area during the period in issue. The Department audited the Taxpayer for sales tax for the period and determined that the Taxpayer had failed to pay sales tax on taxable service fees and gratuities that the Taxpayer had separately stated on its invoices. It subsequently concluded that the gratuities were not taxable because they went directly to the Taxpayer’s employees and did not benefit the Taxpayer. The Department accordingly removed the gratuities from the audit and entered the final assessment in issue on only the service fees.

The Taxpayer’s owner argued at the July 11 hearing that the Department had audited his business on several occasions before the audit in issue, and that the Department examiners that conducted those audits never taxed the service fees included on his invoices. The Taxpayer has since sold the business, and thus contends that he has no way of recouping the sales tax in issue from his customers.

A similar issue was addressed by the Administrative law Division in *Kambiz Adeli v.*

State of Alabama, Docket S. 05-1103 (Admin. Law Div. 8/1/2006).

The Department audit indicates that the Taxpayer was in the catering business. The Taxpayer disputes that characterization, and claims that it only buys pre-prepared food that it resells to its customers. In any case, the Taxpayer concedes that he owes sales tax on his food sales. He disputes, however, that he owes tax on an 18 percent “service charge” he adds to the food charge. He contends that the 18 percent is not for preparing or serving the food, but is a nontaxable gratuity distributed to the cleaning crew.

Alabama sales tax is levied on the gross proceeds derived from the sale of tangible personal property. Code of Ala. 1975, §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 the materials used, labor or service cost, . . .” Code of Ala. 1975, §40-23-1(a)(6).

In *State v. International Trade Club, Inc.*, 351 So.2d 895 (Ala. Civ. App. 1977), the Court of Civil Appeals addressed the issue of whether a 15 percent service charge added to each meal ticket in lieu of a tip was subject to sales tax. The taxpayer used the service charge to (1) pay the minimum wage to its busboys, (2) pay part of the salaries guaranteed to its bartenders, and (3) give its waiters and waitresses a bonus above their \$4 per hour pay. Citing a Florida case, *Green v. Surf Club*, 136 So.2d 354, cert. denied 193 So.2d 694 (Fla. 1962), the Court held that the taxability of the service charge depended on whether the taxpayer benefited from the charge. “The determinative question is each instance should be whether or not the (taxpayer) receives a benefit from the involuntary charge. If he does, he should be taxed. If he does not, no tax should be levied.” *International Trade Club*, 351 So.2d at 897, citing *Green v. Surf Club*, 136 So.2d at 356. Applying the above test, the Court held that the service charges used to pay the busboys and bartenders were taxable because the taxpayer benefited from the charges. That is, but for the taxpayer using the service charges to pay the busboys and bartenders, the taxpayer would have otherwise been required to pay those individuals their minimum wages and guaranteed salaries, respectively. The Court held, however, that the amounts that went to the waiters and waitresses were in the nature of a gratuity or tip, and thus not taxable, because the taxpayer would not have been required to pay the amounts in the absence of the service charge.

In this case, the 18 percent service charge went to pay the cleaning crew. Presumably, the cleaning crew members are either employees of the

Taxpayer or independent contractors hired by the Taxpayer to do the cleaning. In either case, the Taxpayer would have been required to pay the cleaning crew. The Taxpayer thus clearly benefited from the service charges because he used the money to pay for a service that he would have otherwise been required to pay for. The charge is thus taxable.

Adeli at 3 – 6.

In this case, the owner testified that the Taxpayer paid the service fees to its employees as a part of their wages. Consequently, pursuant to the rationale of *International Trade Club*, the service fees constitute taxable gross receipts.

I sympathize with the Taxpayer's owner. It is undisputed that he kept full and complete records and was a good taxpaying corporate citizen. The Department is correct, however, that it cannot be estopped from properly following or enforcing the tax laws based on erroneous advice given by a Department employee. *State v. Maddox Tractor & Equipment Co.*, 69 So.2d 426 (Ala. 1953).

The final assessment is affirmed. Judgment is entered against the Taxpayer for State sales tax and interest of \$6,183.93. Additional interest is also due from the date the final assessment was entered, February 19, 2013.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered July 16, 2013.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: Kelley A. Gillikin, Esq.
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