

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Keith Purdy, d/b/a A Southern Bartender,

Petitioner,

vs.

South Carolina Department of Revenue,

Respondent.

Docket No. 17-ALJ-17-0002-CC

ORDER

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JUL 05 2018
SC Court of Appeals

APPEARANCES: For Petitioner: Bryan A. Raymond, Esquire
For Respondent: Lauren Acquaviva, Esquire

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to a Request for Contested Case Hearing filed by Keith Purdy, d/b/a A Southern Bartender (Petitioner). Petitioner challenges the South Carolina Department of Revenue's (Department) determination of December 7, 2016, that states that Petitioner is operating a beverage catering business subject to sales tax. An evidentiary hearing was held on January 25, 2018. Based on the Court's comprehensive review of the testimony and exhibits presented at the hearing, as well as the applicable law, the Court finds that Petitioner is a person in the business of selling tangible personal property at retail, and that the proceeds of Petitioner's beverage catering business were properly included in Petitioner's gross proceeds of sale.

ISSUE

Whether Petitioner is in the business of selling tangible personal property at retail, such that the sales from Petitioner's beverage catering service business should be included in Petitioner's gross proceeds of sales.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passing upon their credibility, and taking into consideration the burden of persuasion, I make the following Findings of Fact by preponderance of the evidence.

1. Notice of the time, date, place, and nature of the hearing was timely given to all parties.
2. Petitioner owns and operates a business in South Carolina named "A Southern Bartender."

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3. As part of Petitioner's business, a variety of beverage and bartending packages are offered to his customers.

4. Except for the "Private's Party" package, each of the packages offered by Petitioner include specified beer, wine, liquor, and/or mixers, as well as one (1) bartender per ninety (90) people for three (3) hours. The "Private's Party" package includes mixers, set up, and bartenders, and the customer provides his or her own alcohol.

5. The package prices range from \$6.00 per person to \$25.00 per person based upon the quality of the products provided (e.g., no alcohol provided, beer and wine with non-alcoholic beverages, call brands of liquor, premium brands of liquor, super-premium brands of liquor). For an additional charge, customers may add additional bartenders or extend the time. Glassware is included in the "General's Ball" package. Customers who select any of Petitioner's other packages can rent glassware for an additional charge. Petitioner also adds an eighteen percent (18%) gratuity charge to the total price of each package.

6. On occasion, Petitioner provides solely bartending services. In such instances, Petitioner provides the bartenders, and the customer provides everything else.

7. When booking an event, a customer pays a deposit to Petitioner so that Petitioner can purchase the inventory for the event. The inventory consists of beer, wine, liquor, mixers, ice, cups, garnishes, and anything else the customer may want. Petitioner may also provide glassware if the guest count is under one-hundred (100).

8. After an event, Petitioner takes all remaining inventory to his storeroom for use at his next event. Alternatively, Petitioner will allow a customer to keep the excess inventory for an extra charge.

9. On April 27, 2016, the Department emailed Petitioner and advised that it would be conducting an audit examination of Petitioner's books and records for an audit period between April 1, 2013, and March 31, 2016 (the "Audit Period").

10. On Schedule C of his 2013 – 2015 Federal Individual Income Tax returns, Petitioner listed "cost of goods sold." The "cost of goods sold" figures represented all the inventory Petitioner purchased and provided to customers for their events.

11. Petitioner did not file any sales tax returns with the South Carolina Department of Revenue between April 1, 2013, and March 31, 2016. Also, during this Audit Period, Petitioner had neither an alcohol nor a retail license.

12. After reviewing Petitioner's records, the Department determined that Petitioner operated a catering business. This Court has held that catering businesses are retail businesses. Accordingly, the Department concluded that Petitioner should have remitted sales tax to the Department on the gross proceeds of sales from his business.

13. Petitioner was unable to produce accurate accounting records for his business. Therefore, the Department had to calculate Petitioner's total sales using the bank-deposit method. In doing so, the Department treated all deposits minus refunds and transfers as income from sales.

14. Once the Department determined Petitioner's total sales, it had to then decide what amount should be included in Petitioner's gross proceeds of sales. To calculate that amount, the Department subtracted proceeds from sales that did not include any tangible personal property. In other words, the Department excluded from Petitioner's gross proceeds of sales any sales that included only the provision of bartenders and no tangible personal property.

15. For 2014 and 2015, Petitioner did not have sufficient invoices available for review. Petitioner provided the Department with cash flow worksheets to aid the Department in determining what percentage of transactions included sales of tangible personal property. The worksheets listed amounts received for "catering" and amounts received for "consulting." Petitioner represented to the Department that the amounts for "consulting" involved bartender only services, identification verification only services, TIPS¹ training, and expert witness services. Based upon the worksheets provided by Petitioner and his representations, the Department concluded that the percentage of Petitioner's sales of tangible personal property (the amounts for "catering") amounted to the following: 97.74% in 2014, and 92.29% in 2015.

16. While Petitioner had no cash flow worksheets for 2016, he provided some invoices for the Department's review. As those were the only documents Petitioner could provide, the Department used those invoices to calculate an estimated percentage of sales of tangible personal property for January 1, 2016, through March 31, 2016. The Department arrived at a figure of 46.14% as the amount of Petitioner's 2016 sales that involved the sale of tangible personal property.

17. The Department used the following percentages to calculate Petitioner's gross proceeds of sales for the audit period: 97.74% in 2014; 92.29% in 2015; and 46.14% in 2016.

¹ TIPS is an acronym for Training for Intervention ProcedureS. Petitioner testified that TIPS is an international program with the purpose of teaching responsible service of alcohol. Petitioner is an instructor for the program.

18. After determining Petitioner's gross proceeds of sale, it calculated Petitioner's sales tax liability.²

19. On August 19, 2016, the Department provided Petitioner with the auditor's working papers and detailed notes on how the auditor arrived at Petitioner's gross proceeds of sales and his sales tax liability.

20. On or about September 2, 2016, Petitioner advised the Department by email that he disagreed with the Department's determination that he was retailer. The Department accepted this email as Petitioner's formal protest.

21. On September 7, 2016, the Department issued its Determination. On September 9, 2016, the Department mailed the audit package to Petitioner. The package contained Petitioner's proposed liability which totaled \$21,641.51. Of this amount, \$14,979.66 represented sales tax due, \$5,614.59 represented the amount due to penalties for failing to file; and \$1,047.26 represented interest due.³ The audit package also contained an "Explanation of Audit Assessments and Adjustments," as well as Petitioner's options for protesting the proposed assessment.

22. By letter dated September 28, 2016, Petitioner advised the Department that he wanted his file forwarded to its Office of General Counsel for Litigation.

23. On December 7, 2016, the Department issued its Determination stating that Petitioner was a retailer of personal tangible property and that the income derived from Petitioner's alcohol catering service was properly included in Petitioner's gross proceeds of sales.

24. On January 6, 2018, Petitioner timely requested a contested case hearing.

25. A contested case hearing was held on January 25, 2018, at which time both parties appeared with counsel. Prior to the hearing, the parties stipulated to a number of facts⁴ and the admission of certain exhibits necessary for the adjudication of the matter.

26. Petitioner testified on his own behalf. He stated that he believed the true object of his business to be the service and not the sale of alcohol, and that his clients retained his services because of his experience, professionalism, and responsibility. To that end, Petitioner is trained to verify identification cards; he monitors all events for which his services have been retained to ensure that there is no underage drinking and no over-service of alcohol; and, he makes certain

² In doing so, the Department subtracted the amount of sales tax that Petitioner initially paid when purchasing his inventory.

³ Penalties and interest continue to accrue.

⁴ The parties' stipulations are contained herein in Paragraphs 2 through 24.

event guests who have consumed alcohol get home safely. Petitioner stated that he provides these services irrespective of whether he purchases alcohol for his client for a particular event, or the client provides it.

28. When Petitioner contracts with a client and those services include the provision of alcohol, the client gives Petitioner a deposit. The deposit serves a two-fold purpose. First, Petitioner uses it to purchase the alcohol that will be needed for an event as he never purchases alcohol unless the client pays for it up front. Second, it serves as confirmation of the contract that Petitioner will appear at the event. Petitioner pays retail sales tax when he purchases the alcohol.

29. Petitioner does not charge by the drink. Except for when Petitioner provides bartending services only, Petitioner charges a per person rate based upon on the quality of the liquor. His per person package rate also includes bartending services, although a client may add bartenders or extend the time period for service at an additional cost. Petitioner testified that at the conclusion of an event for which he provides alcohol, he either takes the remaining inventory to his storeroom for use at a subsequent function, or allows the client to take it for an additional cost.

30. I find Petitioner to be a credible witness who has made a sincere effort to operate according to the law. He testified credibly that he structured his business in the manner he did and failed to pay sales tax on these transactions based upon previous advice and instructions he received from the Department of Revenue. While ignorance of the law is no excuse, the Court is convinced Petitioner has made sincere efforts to operate his business properly and to pay the taxes that he believed applied in his situation. Here, Petitioner had a reasonable interpretation of a complex taxation situation. Compliance with the differing laws governing the licensing of alcohol beverage sales and sales of tangible personal property made it difficult for Petitioner to operate his business without being at risk for violating one requirement or the other because the alcohol licensing scheme requires a location for a license to be granted. Petitioner sought advice from the Department and understood from that meeting that the Department's position was that no alcohol license was required because he was performing a service, not selling tangible personal property. Moreover, this is an evolving area of law subject to differing interpretations. Boggero, the case this court relied upon in concluding that a factual inquiry into the intent of the customer is required, was decided by the South Carolina Court of Appeals in September 2015; The Tronco case cited below is persuasive, but not binding authority.

31. The Department's only witness was an audit supervisor who supervised the audit at issue.⁵ The witness testified as to how the Department calculated Petitioner's gross proceeds of sales. For a portion of the audit period, the Department utilized Petitioner's cash flow worksheets to determine the events that were taxable. For another portion of the audit period, Petitioner did not have these worksheets available so the Department utilized invoices provided by Petitioner.⁶ On one invoice dated January 15, 2016, Petitioner contracted with a customer to provide only bartending services; this invoice was treated as non-taxable because no tangible personal property was listed on the invoice. On a second invoice dated February 5, 2015, Petitioner's customer contracted for tangible personal property including wine, table linens, coolers, non-alcoholic beverages, and bartending services; the wine and its cost was listed separately, as was the bartending charge. The Department treated everything in the second invoice as a taxable sale because the bartending service was provided in conjunction with the sale of tangible personal property. The third invoice dated May 23, 2016, reflected that Petitioner was providing tangible personal property including alcohol and non-alcoholic beverages, ice, cups, napkins, and table linens. Petitioner charged \$11.00 per person based on the customer's menu choice and in particular, the "Captain's Choice," which included a variety of alcohol, non-alcoholic beverages and bartending services. The Department treated this transaction as taxable because it involved the provision of tangible personal property and a service so the entire transaction was taxable pursuant to the definition of the gross proceeds of sales.

32. As discussed in detail below, the determination of whether a transaction is the sale of tangible personal property or a service turns on a factual finding of the true object of the customer in entering the transaction. Here, where Petitioner has provided packages that include alcoholic beverages, priced based upon the quality of the beverages, I find that the object, or intent, of the customer was to purchase the beverages for guests at an event. Petitioner testified that his clients provided him with a deposit for the purchase of alcohol prior to an event, and that he merely passed the alcohol through to the customer. However, Petitioner also testified that after an event for which he provides alcohol, he either takes the remaining inventory to his storeroom for use at a

⁵ No hearsay objections were made during this or any other testimony rendered at the hearing.

⁶ At the hearing, Petitioner's counsel made a point of eliciting testimony from the Department that it did not have copies of all of Petitioner's invoices. The Court notes that it is the taxpayer's burden to produce evidence to substantiate his claim. Tronco's Catering, Inc. v. S.C. Dept. of Revenue, 2010 WL 5781622 *5 (S.C.Admin.Law.Judge.Div. Apr. 2010), Cloyd v. Mabry, 295 S.C. 86, 367 S.E.2d 171 (Ct. App. 1988).

subsequent function, or allows the client to take it, but for an additional cost. I find that where the package paid for by the customer is a lump sum for beverages and bartending services with the alcohol provided by the Petitioner in this manner, the objective of the customer was to purchase the catered beverages.

CONCLUSIONS OF LAW

Based upon the forgoing findings of fact, the Court concludes the following as a matter of law:

Jurisdiction and Burden of Proof

This Court has jurisdiction of this matter pursuant to Sections 12-60-460, 1-23-310 and 1-23-600 of the South Carolina Code S.C. Code Ann. §§ 1-23-310 and 1-23-600 (Supp. 2017); and 12-60-460 (2014).

The burden of proof is on the party asserting the affirmative in an adjudicatory administrative proceeding. 2 Am. Jur. 2d Administrative Law § 342 (2018). Here, the taxpayer has requested a contested case hearing to challenge the Department's proposed assessment. Thus, the taxpayer asserts the affirmative and must carry the burden of proving the Department's proposed assessment is incorrect. *Id.* See Cloyd v. Mabry, 295 S.C. 86, 367 S.E.2d 171 (Ct. App. 1988). In addition, Section 12-36-950 provides in part, "It is presumed that all gross proceeds are subject to the tax until the contrary is established. The burden of proof that the sale of tangible personal property is not a sale at retail is on the seller." S.C. Code Ann. § 12-36-950 (2014).

Administrative interpretations of statutes by the agency charged with their administration and not expressly changed by the legislative body, are entitled to great weight. Marchant v. Hamilton, 279 S.C. 497, 500, 309 S.E.2d 781, 783 (1983). When, as in this case, the construction or administrative interpretation of a statute has been applied for a number of years and has not been changed by the Legislature, there is created a strong presumption that such interpretation or construction is correct. Ryder Truck Lines Inc. South Carolina Tax Commission, 248 S.C. 148, 149 S.E.2d 435 (1966); Etiwan Fertilizer Company v. South Carolina Tax Commission, 217 S.C. 354, 60 S.E.2d 682 (1950).

Tangible Personal Property at Retail

South Carolina law provides that "A sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business of

selling tangible personal property at retail.” S.C. Code Ann. § 12-36-910(A) (2014). Section 12-36-1110 imposes an additional one percent sales tax beginning on June 1, 2007, bringing the total sales tax to six percent of the gross proceeds of sale. S.C. Code Ann. § 12-36-1110 (2014). The South Carolina Sales and Use Act defines “tangible personal property” in part as “personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses.” S.C. Code Ann. § 12-36-60 (2014).

South Carolina courts have stated that the test to be applied in making such a determination is “true object test.” Meyers Arnold, Inc. v. S.C. Tax Commission, 285 S.C. 303, 328 S.E.2d 920 (Ct. App. 1985); Tronco’s Catering, Inc. v. S.C. Dept. of Revenue, 2010 WL 5781622 (S.C.Admin.Law.Judge.Div. Apr. 2010). Under the “true object test,” the case-by-case analysis involves a factual inquiry into whether the customer’s purpose for entering the transaction was to procure a good or a service. Boggero v. S.C. Dept. of Revenue, 414 S.C. 277, 777 S.E.2d 842 (Ct. App. 2015).

Here, Petitioner was engaged in the business of selling tangible personal property at retail. While there were instances in which Petitioner provided bartending services,⁷ most of his business transactions during the audit period involved providing both alcohol and bartending services as a package. The fact that Petitioner “may provide only service or labor to customers on some occasions is irrelevant in this case because of the transactional nature of the sales tax; each sales transaction must be viewed in isolation.” Tronco’s Catering, Inc., 2010 WL 5781622 *5.

As an example, Petitioner’s menu of services included the offering of assorted packages to customers ranging from \$6.00 to \$25.00 per person depending upon the quality of the alcohol to be served. The packages not only included the service of the alcohol, but also, the provision of alcohol and non-alcoholic beverages, cups, ice, napkins, and other items. The bartending services remained the same irrespective of the package chosen. That fact demonstrates that in those transactions, the provision of service was merely incidental to the sale of tangible personal property.⁸

⁷ In those occasions on which bartending services were charged separately from the drinks, there is no sale of tangible personal property. Generally, the gross proceeds from services are not subject to sales and use tax. See S.C. Code Ann. Regs. §117-308 (2012) (“The receipts from services, when the services are the true object of the transaction, are not subject to the sales and use tax unless ... [certain inapplicable exceptions apply].

⁸ Similarly, in Boggero, the waste removal services remained the same irrespective of the type of portable toilets (including its more expensive “special event” toilets) used.

In other instances, Petitioner provided both bartending services and alcohol, and there was a separate line item on the invoice for bartending services. In those scenarios, the bartending services were separable from the provision of alcohol and/or other tangible goods, and thus, do not represent the retail sale of tangible personal property.

A sales tax of the gross proceeds of sales is imposed upon every person in the business of selling tangible personal property at retail. S.C. Code Ann. § 12-36-910 (2014). Section 12-36-90 (formerly Section 12-35-30) of the South Carolina Code defines “gross proceeds of sale as the value proceeding or accruing from the sale, lease, or rental of tangible personal property.” S.C. Code Ann. § 12-36-90 (2014). The term includes “the proceeds from the sale of tangible personal property without any deduction for ... the cost of goods sold [or] the cost of materials, labor, or service....” *Id.* See also Meyers Arnold, Inc.; Tronco’s Catering, Inc. Section 12-36-90 has been deemed to be a “transactional tax.” *Id.* Thus, except in those instances in which bartending services were invoiced separately from the beverages, Petitioner’s catered beverage business constitutes the retail sale of tangible personal property. Because I find that the true object of those sales is the catering of beverages, Petitioner must remit sales tax on the entire value of the sale and cannot deduct the costs of goods sold or the costs of materials, labor, or services from his gross proceeds of sale.

Petitioner argues that if he is considered a retailer of tangible personal property which was subject to taxation by the Department, it would result in him being unfairly taxed a second time as he already paid sales tax on the alcohol and other items that he purchased (e.g., cups and non-alcoholic beverages). The Court rejects this argument. In calculating Petitioner’s assessment, the Department gave Petitioner credit for the sales tax that he paid when he initially purchased the inventory. Thus, double taxation did not occur.

On the record and testimony presented at the hearing, it appears that the Department has counted all transactions that included any tangible personal property as wholly subject to the sales tax regardless of whether some bartending or consulting services were invoiced separately. For that reason, it is necessary to remand this matter to the Department to recalculate the sales tax due from Petitioner. Amounts Petitioner received for which he has presented invoices or other proof that customers were invoiced separately for bartending or consulting services must be deducted from his gross proceeds of sales. This is true even if those charges are part of a larger transaction in which tangible personal property was also sold.

In light of my finding that Petitioner has made a good faith effort to comply with the law and pay the taxes as he understood they applied to his situation, it is necessary to consider whether the penalties and interest sought by the Department are appropriate in this case. Section 12-54-25 provides for interest on unpaid taxes: "If any tax is not paid when due, interest is due on the unpaid portion from the time the tax was due until paid in its entirety. For administrative convenience, the department may waive up to thirty days' interest." S.C. Code Ann. § 12-54-25(A). Section 12-54-42 provides for civil penalties for failure to pay taxes that must be shown on a return where the amount in question is not shown on the return, such as the sales tax here. It provides for graduated penalties for continued failure to pay after a demand for payment by the Department. However, Section 12-4-320(3) provides that the Department may "compromise any tax, interest, or penalty imposed by this title or other law." In a contested case such as this, the ALC becomes the final agency decision-maker and exercises the authority of the agency. See, Engaging & Guarding Laurens Cty.'s Env't (EAGLE) v. S.C. Dept. of Health & Env'tl. Control, 407 S.C. 334, 345, 755 S.E.2d 444, 450 (2014).

S.C. Revenue Procedure 08-6 provides procedural guidance as to what circumstances the Department has determined justify a complete or partial waiver of penalties. While the Revenue Procedure is not promulgated as a regulation and is not binding on this Court, it provides thoughtful guidance for dealing with penalty waivers in a uniform manner. As an example of a circumstance justifying a complete waiver of penalties, Revenue Procedure 08-6 states, "The taxpayer may have reasonable cause for noncompliance where difficult and complex issues are involved when reasonable persons differ as to the appropriate tax treatment of the issue and there is no Department guidance with respect to the issue." S.C. Rev. Proc. 08-6(F) at 7. Because this is just such a complex issue where reasonable persons differ as to whether the tax treatment of the bartending packages provided by Petitioner to his customers were tangible personal property or a service, I conclude that it is appropriate to waive the penalties in this case. However, the justification for waiving penalties does not extend to the interest due on the unpaid taxes. I decline to waive the interest.

ORDER

THEREFORE, IT IS HEREBY ORDERED that in those instances during the audit period in which Petitioner provided bartending services as part of a package that included beverages, the proceeds from his beverage catering sales are subject to sales tax.

IT IS ALSO ORDERED that all penalties related to this matter are waived.

IT IS FURTHER ORDERED that this matter is **REMANDED** to the Department of Revenue to calculate the sales tax and interest. In doing so, the Department shall deduct from the gross proceeds of sales any payments made for bartending or other services that were not invoiced as part of a beverage package.

AND IT IS SO ORDERED.

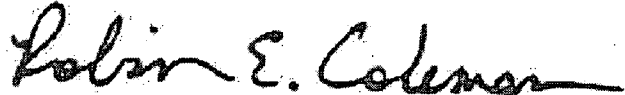


Deborah Brooks Durden, Judge
S.C. Administrative Law Court

April 26, 2018
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Robin E. Coleman
Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

April 26, 2018
Columbia, South Carolina

FILED

April 26, 2018

SC ADMIN. LAW COURT