ROHR AERO SERVICES, INC. P.O. Box 1107 Fairhope, AL 36533-1107,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 01-317
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed Rohr Aero Services, Inc. ("Taxpayer") for sales tax for January 1996 through May 1999. 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 June 13, 2002 in Mobile, Alabama. Marilyn George and Jeff Harris represented the Taxpayer. Assistant Counsel Duncan Crow represented the Department.

ISSUE

The Taxpayer sold repair parts to an out-of-state customer during the subject period. The issue is whether the sales were closed in Alabama, in which case Alabama sales tax would be due, or outside of Alabama, in which case Alabama tax would not be owed.

FACTS

The Taxpayer operates a repair facility in Baldwin County, Alabama at which it repairs aircraft engine housings. The Taxpayer purchases the parts needed to repair the housings at wholesale, and then resells the parts to the customers at retail as part of the repaired housings.

The Department audited the Taxpayer for sales tax and made various adjustments. The Taxpayer paid most of the audit deficiency. The only dispute involves tax on repair parts sold to Federal Express.

Fed Ex delivered engine housings to the Taxpayer in Alabama for repair. The Taxpayer purchased and installed the parts needed to repair the housings. Fed Ex trucks then picked up the repaired housings at the Taxpayer's facility and delivered them to the Fed Ex air facility in Memphis, Tennessee.[1] The bills of lading indicated that the housings would be delivered to Memphis. Fed Ex selected the method of transportation. It also reserved the right to reject the repaired housings upon their delivery to Memphis, although none have ever been rejected.

ANALYSIS

For Alabama sales tax purposes, a sale is closed when and where title is transferred by the seller to the purchaser. Code of Ala. 1975, §40-23-1(a)(5). Although not specified in §40-23-1(a)(5), title is transferred under Alabama law when the seller or the seller's agent completes the physical delivery of the goods to the purchaser or the purchaser's agent.[2] Code of Ala. 1975, §7-2-401(2); *State v. Delta Air Lines, Inc.*, 356 So.2d 1205 (Ala.Civ.App. 1978).

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[1]If the housing was too large to fit in a Fed Ex truck, it was shipped to Memphis via another common carrier. The parts used to repair those larger housings are not in issue.

[2]Older Alabama cases held that the intention of the parties controlled in determining when a sale was closed, not when the goods were delivered. See, *Hamm v. Continental Gin Co.*, 161 So.2d 394 (Ala. 1964). However, those older cases were decided under the old Alabama Uniform Sales Act, Title 57, §§23-46, Code of 1940.

The Uniform Sales Act was repealed effective December 31, 1966 and the UCC became effective in Alabama on January 1, 1967. Under the UCC, a sale is closed when title passes, Code of Ala. 1975, §7-2-106(1), and, as discussed, title passes upon delivery, §7-2-401(2). However, Alabama's appellate courts

Section 40-23-1(a)(5) further provides that for purposes of determining transfer of title, a common carrier and the U.S. Postal Service shall be deemed agents of the seller, regardless of F.O.B. point or which party selects and/or pays for transportation.[3] Thus, if goods sold by an Alabama retailer are delivered by common carrier outside of Alabama, the sale is closed outside of Alabama when the common carrier completes delivery.

The deciding issue in this case is whether Fed Ex picked up the engine housings in Alabama in its capacity as a common carrier, or as the purchaser.

The Taxpayer cites *Kopac International Corp. v. State of Alabama*, S. 99-475 (Admin. Law Div. 8/16/00) in support of its claim that Fed Ex was acting as a common carrier when it picked up the engine housings in Alabama.

Kopac manufactured and sold wood boxes and crates in Alabama. James Coleman owned several related corporations involved in the moving business. Coleman ordered a number of boxes from Kopac. He explained that the boxes were for one of his companies that had contracted to ship furniture overseas for the federal government. However, he never identified the specific corporation involved.

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were slow in applying the UCC in sales and use tax cases. For example, in *State v. Matthews Electric Supply Co.*, 221 So.2d 126 (Ala. 1969), the Alabama Supreme Court relied on repealed §§24 and 25 of Title 57, Code of 1940, and also cited numerous pre-UCC cases in determining when a sale occurred. See also, *State v. Altec, Inc.*, 243 So.2d 713 (Ala. 1971). The Court of Civil Appeals finally cited UCC §7-2-401(2) as authority for when title passes in *Delta Air Lines*, 356 So.2d at 1207.

[3]The Alabama Legislature amended the sales tax definition of "sale" at §40-23-1(a)(5) in 1986 to substantially adopt the UCC language in §7-2-106(1), i.e. a sale is closed upon transfer of title. The 1986 amendment also added that for purposes of determining transfer of title, a common carrier and the U.S. Postal Service are deemed to be agents of the seller.

Kopac notified Coleman when the boxes were ready. Coleman directed one of his corporations, Covan Worldwide Moving, Inc., to pick up the boxes at Kopac's facility in Alabama and deliver them to another of his corporations, Coleman American Moving Services, Inc., outside of Alabama. Coleman American Moving subsequently used the boxes to complete its contract with the federal government.

The Department assessed Kopac for sales tax, arguing that the sales were closed when Covan, as the purchaser, picked up the boxes in Alabama.

The Administrative Law Division held that Covan was acting as a common carrier, not as purchaser, when it picked up the boxes in Alabama. Alabama sales tax was thus not owed because the sales were not closed until Covan delivered the boxes to Coleman American Moving outside of Alabama.

> The harder question, however, is whether Covan was acting as a common carrier when it picked up the boxes at the Taxpayer's facility in Alabama. That issue is complicated by the informal nature of the transactions, and the Coleman Companies' failure to fully document the purchase and delivery of the boxes. Given the scant documents available to the Department examiner, it is understandable that he determined that the Taxpayer sold the boxes to Covan in Alabama.
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> However, substance over form must govern in tax matters. Boswell v. Paramount Television Sales, Inc., 282 So.2d 892 (1973). The evidence confirms that in substance, Coleman American Moving purchased and used the boxes to fulfill its contract with the U.S. Government. Coleman ordered the boxes for Coleman American Moving, and then directed Covan to deliver the boxes to Coleman American Moving outside of Alabama. Covan was acting in its capacity as a common carrier when it did so. Consequently, pursuant to §40-23-1(a)(5), the sales were not closed until Covan completed delivery of the boxes outside of Alabama.

Kopac, S. 99-475 at 4.

Kopac can be distinguished from this case because in *Kopac,* the common carrier, Covan Worldwide Moving, Inc., and the purchaser of the boxes, Coleman American Moving Services, Inc., were separate entities. In this case,

the common carrier deliverer and the purchaser are the same entity, Federal Express.

A statute should not be construed so that an absurd or unintended result follows. *State of Alabama v. Gus V. Bryan*, 231 So.2d 118 (Ala. 1970). That part of §40-23-1(a)(5) that deems a common carrier to be the agent of the seller must be construed to apply only to third party common carriers. The Legislature did not intend that a common carrier that purchases tangible personal property at retail in Alabama should also be deemed the agent of the seller. Otherwise, Fed Ex or any other common carrier located outside of Alabama could buy office supplies, furniture, or anything else tax-free in Alabama by simply picking up the items in Alabama and then delivering them outside of Alabama. If the common carrier purchaser was treated as the agent of the seller in such cases, the sale would in all cases be closed outside of Alabama, and Alabama tax would never be due. Certainly, the Legislature did not intend to allow such a blanket sales tax loophole for common carriers.

Because the Taxpayer delivered the repair parts to the purchaser, Fed Ex, in Alabama, the sales were closed in Alabama, and Alabama sales tax is due.

The above holding is supported by the Illinois Supreme Court's rationale in *Pressed Steel Car Co., Inc. v. Lyons*, 129 N.E.2d 765 (1955). Pressed Steel Car was located in Illinois and sold railroad equipment to five railroads. The bills of lading indicated that Pressed Steel would ship the equipment to the railroads outside of Illinois. However, in each instance, the railroads took possession of the goods in Illinois. The Illinois Supreme Court held that regardless of the bills of lading, the sales were closed in Illinois upon delivery by Pressed Steel, as seller, to the railroads, as purchasers. See also, *Dept. of Treasury v. Wood Preserving Corp.*, 61 S.Ct. 885 (1941), which is cited in *Pressed Steel Car*, 129 N.E.2d at 769.

The Department initially billed the Taxpayer for additional tax due of $152,973.32 and a five percent negligence penalty of $7,648.49, plus interest. The Taxpayer paid all of the tax and interest except concerning the Fed Ex sales. The disputed tax and interest, as shown on the final assessment in issue, is $42,679.56 and $13,708.26, respectively. The negligence penalty of $7,648.49 assessed on both the uncontested and contested tax is also included in the final assessment.

A penalty may be waived for reasonable cause. Code of Ala. 1975,§40-2A-11(h). The Taxpayer failed to collect and remit tax on the Fed Ex sales based on its understanding that the sales were closed outside of Alabama. While the Taxpayer was wrong in its understanding of the law, its failure to pay the contested sales tax was not due to negligence or a careless disregard of the law. Consequently, that part of the penalty, or $2,133.98, attributable to the contested tax is waived for reasonable cause.

The balance of the penalty relates to unidentified adjustments by the Department. It is not known if the Taxpayer was negligent in failing to pay that tax. The burden was on the Taxpayer to prove reasonable cause. Section 40-2A-11(h). It offered no evidence showing that the penalty on the uncontested tax should be waived. Consequently, the balance of the penalty is affirmed.

The final assessment, less that part of the penalty relating to tax on the Fed Ex sales, is affirmed. Judgment is entered against the Taxpayer for $61,902.33. Additional interest is also due from the date of entry of the final assessment, April 9, 2001.

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

Entered August 21, 2002.