STATE OF ALABAMA, DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE
	§	ADMINISTRATIVE LAW DIVISION
vs.		
	§	
JONES FENCE ENTERPRISES, INC. d/b/a Jones Fence and Decks Route 2, Box 270 Trinity, AL 35673,	§	DOCKET NO. S. 92-212
Taxpayer.	§	

FINAL ORDER

The Revenue Department assessed State and Morgan County sales tax against Spencer D. Jones, d/b/a Jones Fence and Decks, for the period July 1988 through September 25, 1990, and also against the successor corporation, Jones Fence Enterprises, Inc. ("Taxpayer"), for the period September 26, 1990 through April 1991. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on October 14, 1993. Larry Weaver represented the Taxpayer. Assistant counsel Gwen Garner represented the Department.

The issues in this case are as follows:

(1) Is the Taxpayer liable for Morgan County sales tax on materials purchased by the Taxpayer tax-free, stored in inventory in Morgan County, and subsequently withdrawn from inventory and used by the Taxpayer to fulfil furnish and install contracts outside of Morgan County?

(2) What are the tax consequences if the above materials were delivered by the Taxpayer's supplier directly to the job site outside of Morgan County?

(3) Is the Taxpayer liable for either Morgan County or State sales tax if the Taxpayer's furnish and install customer was a Reg. A direct pay permit holder, an Industrial Development Board ("IDB"), or some other tax-exempt entity?[1]

(4) Should the Department be estopped from assessing the tax in issue because the Department misled or misinformed the Taxpayer concerning how tax should be paid?

(5) Even if tax is technically due as argued by the Department, should the Taxpayer be assessed prospectively only based on the Supreme Court's holding in Ex parte Sizemore, 605 So.2d 1221.

(6) Finally, should the Taxpayer be allowed a credit against the Morgan County tax pursuant to Code of Ala. 1975, §40-23-2.1 for tax paid to other counties?

The facts are undisputed.

The Taxpayer is in the fence business and maintains an office and warehouse in Morgan County, Alabama. The Taxpayer is primarily engaged in contracting to furnish and install fences for its customers. The Taxpayer also makes some "over-the-counter" retail

[1] A direct pay permit holder is allowed to purchase all materials tax free and then pay the Department directly on those materials used for a taxable purpose. See, Dept. Reg. 810-6-4-.14. Sales to an IDB are also tax exempt, if properly structured. See, State v. Saginaw Gear Div., 435 So.2d 95.

sales, which accounted for approximately 8% of the Taxpayer's total business during the audit period.

The Taxpayer has an Alabama sales tax license and purchased all materials tax-free during the period in issue. Most of the materials were purchased in bulk, stored in the Taxpayer's warehouse in Morgan County, and subsequently withdrawn either for resale at retail or for use on a furnish and install contract. The Taxpayer also special ordered some materials for use on specific projects. Those special ordered materials were either stored temporarily at the Taxpayer's facility in Morgan County before delivery to the job site, or delivered by the supplier directly to the job site.

The Taxpayer properly collected and remitted sales tax on its over-the-counter retail sales based on the gross proceeds received from its customers. Those sales are not in issue.

Concerning the materials used on the furnish and install contracts, the Taxpayer paid local sales tax on its cost of the materials to the county and/or city in which the materials were installed. For example, if the Taxpayer contracted to furnish and install a fence in Huntsville, the Taxpayer paid City of Huntsville and Madison County (and State) sales tax on its cost of the materials used. However, the Taxpayer failed to pay either local or State tax on those contracts with direct pay permit holders or

which involved IDB projects. The Taxpayer assumed in those instances either that the direct pay permit holder would pay all applicable taxes, or that the IDB project was tax exempt. The Department had audited the Taxpayer in 1984 and instructed the Taxpayer at that time to pay tax as indicated above.

The Department audited the Taxpayer again in 1991 and assessed the Morgan County and State tax in issue under the sales tax "contractor" provision at Code of Ala. 1975, §40-23-1(a)(10). The Department argues that tax accrued under the "contractor" provision when the materials were withdrawn from inventory in Morgan County for use on the furnish and install contracts, regardless of the tax status of the customer or where the contract was performed.

Issue (1) - Was the withdrawal of the materials in Morgan County taxable under the "contractor" provision?

"Retail Sale" is defined for sales tax purposes at Code of Ala. 1975, §40-23-1(a)(10). That section includes the sales tax "contractor" provision, which reads as follows:

> Sales of building materials to contractors, builders, or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold.

The intent of the "contractor" provision is to tax the purchase of building materials by a contractor that intends to use or resell the materials in the form of real estate. The contractor

is considered the retail consumer, and tax is due when the contractor buys the materials from the supplier.

The words "resale or use" both relate to the phrase "in the form of real estate". The "contractor" provision thus does not apply if building materials are sold at retail not in the form of real estate. Consequently, if a contractor also sells building materials over-the-counter at retail, as the Taxpayer did in this case, the contractor/retailer is considered a "dual operator".

A dual operator cannot know when building materials are purchased in bulk whether the materials will later be used on a contract in the form of real estate or resold at retail. Consequently, the dual operator is allowed by Department regulation to purchase all materials tax-free and then report and pay tax either (1) as a contractor on the cost of the materials when and where the materials are subsequently withdrawn from inventory and identified as building materials to be used in the form of real estate, or (2) as a retailer on the retail sales price if the materials are resold at retail. See, Department Regs. 810-6-1-.56, 810-6-1-.191 (repealed May 1993) and 810-6-1-.196 (effective May 1993).[2]

[2] There is no specific statutory authority allowing a dual operator to purchase all materials tax-free. However, there is no other practical way to handle purchases by a taxpayer that both uses materials as a contractor on furnish and install contracts and

also resells some of the materials at retail.

The alternative is to require the taxpayer to pay tax on all building materials when purchased from the supplier. But in that case, the taxpayer would avoid some tax on those materials resold at retail based on the difference between the taxpayer's cost on which tax was paid to the supplier, and the retail sales price charged to the retail customer. Clearly that cannot be allowed because sales tax must be collected and remitted by a retail seller on total gross proceeds derived from a retail sale.

The Taxpayer operated as a dual operator during the subject period and thus properly purchased the building materials in issue tax-free. The issue then is whether tax accrued under the "contractor" provision when the materials were subsequently withdrawn from inventory in Morgan County for use on the furnish and install contracts.

The "contractor" provision applies in this case if (1) the Taxpayer was a "contractor", (2) the fence materials in issue constituted "building materials", and (3) the fence materials were sufficiently attached to the land to become part of real estate. See, State, Department of Revenue v. Montgomery Woodworks, Inc., 389 So.2d 510; Department of Revenue v. James A. Head and Company, 306 So.2d 5.

A "contractor" is someone that contracts to supply labor and/or materials for specific work under a contract. Montgomery Woodworks, Inc., supra, at page 512. The Taxpayer is clearly a contractor under the above definition.

"Building materials" are any materials used in construction work, although not necessarily used in the construction of a building. Head, supra, at page 9. The fence materials in issue constitute building materials pursuant to the above definition. See also, Department Reg. 810-6-1-.66(1) (fencing defined as building materials).

The third requirement is the most difficult. Were the building materials used in the form of real estate?

The Taxpayer furnished and installed different types of fence materials during the period in question. Most were permanently attached to the property to which they were affixed. Others were intended to be removed after a year or two. However, in all cases the materials were initially used in the form of real estate. Consequently, tax accrued under the "contractor" provision when the materials were withdrawn from inventory in Morgan County tax for use on the furnish and install contracts.

Issue (2) - The Taxpayer's liability on materials delivered directly to the job site.

If the materials were special ordered and delivered by the supplier directly to the job site outside of Morgan County, clearly Morgan County tax would not be due. Rather, tax accrued in those cases at the job site when the Taxpayer "withdrew" and used the materials on the project.[3]

[3] The materials delivered directly to the job site obviously were not commingled with the Taxpayer's warehouse inventory in Morgan County. The only logical place for tax to accrue under the

Issue (3) - What if the Taxpayer's customer was an exempt entity?

If the "contractor" provision applies, it is irrelevant that the Taxpayer's furnish and install customer was a direct pay permit holder, an IDB, or some other exempt entity. The Taxpayer was the retail consumer, and tax accrued on the Taxpayer's cost of the materials when the materials were withdrawn from inventory in Morgan County. See generally, State v. Algernon Blair Indus. Contractors, Inc., 362 So.2d 248.

Issue (4) - Estoppel

The Taxpayer argues that even if the Department's position is correct, the Department should be estopped from assessing the tax in issue because the Department had previously approved the Taxpayer's method of paying tax at the job site. However, the Department cannot be estopped from correctly assessing tax for any period open to assessment because of prior incorrect or misleading advice or actions by a Department employee. Maddox Tractor and

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"contractor" provision is at the job site when the Taxpayer used the materials on the project.

Equipment Company v. State, 69 So.2d 424; Boswell v. Abex, 317 So.2d 317.

Issue (5) - The applicability of Ex parte Sizemore.

The Taxpayer also argues that tax should be assessed prospectively only based on Ex parte Sizemore, supra. The Alabama Supreme Court ruled in that case that although the taxpayer involved in the case (The Dothan Progress) was technically liable for the tax in issue, because of past confusion concerning the statute in issue, the taxpayer should be assessed prospectively only from the date of the Court's decision in September 1992.

Ex parte Sizemore does not apply in this case because it involved the sales tax "withdrawal for use" provision, which is separate and distinct from the "contractor" provision under which tax was assessed in this case.[4] Unlike the "withdrawal" provision,

[4] Tax accrues under the "withdrawal" provision when materials previously purchased at wholesale are withdrawn from inventory for the personal and private use of the wholesale purchaser/withdrawer. Use of the materials by the wholesale purchaser to fulfil a furnish and install contract is considered a personal and private use. See, Home Tile and Equip. Co. v. State, 362 So.2d 236.

The "withdrawal" provision is also found at §40-23-1(a)(10) and can be confused with the "contractor" provision because a dual operator's liability under the "contractor" provision attaches when building materials are withdrawn from inventory for use in the form of real estate. However, the "contractor" and "withdrawal" provisions are separate and distinct and have different fields of operation. As previously stated, Ex parte Sizemore does not apply in this case because it involved the applicability of the "withdrawal" provision only, not the "contractor" provision.

which was amended in 1983 and 1986 and was the subject of much litigation from 1983 until 1992, the "contractor" provision has been consistently interpreted and has not been amended since enacted in 1959.

Issue (6) - Should the Taxpayer be allowed a credit for the tax paid to other counties?

The Taxpayer paid county tax on most of the materials in issue to the county in which the contract was performed. Can additional Morgan County tax be assessed on the same transactions?

Code of Ala. 1975, §40-23-2.1 requires that only one county and one municipal sales or use tax should be paid on any one sale. However, the local taxes erroneously paid by the Taxpayer at the job site were not paid "under a requirement of law" as necessary for §40-23-2.1 to apply. Rather, Morgan County tax is due as set out above, and the Taxpayer is technically entitled to a refund of those city and county taxes erroneously paid at the job site.

The Taxpayer clearly attempted in good faith to properly pay all State and local sales tax during the audit period. However, additional tax is due for the above-stated reasons.

The final assessments in issue are affirmed. Judgment is accordingly entered against the Taxpayer for Morgan County sales tax for the period July 1988 - September 25, 1990 in the amount of $41,222.51, Morgan County sales tax for the period September 26,

1990 - April 1991 in the amount of $5,341.92, State sales tax for the period July 1988 - September 25, 1990 in the amount of $8,323.63, and State sales tax for the period September 26, 1990 - April 1991 in the amount of $1,033.19.

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

Entered on November 9, 1994.

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BILL THOMPSON
Chief Administrative Law Judge