

SCOTTSBORO STRUCTURAL STEEL, INC. §
1705 Ashley Street
Scottsboro, Alabama 35768, §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer, §

DOCKET NO. S. 92-282

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed Scottsboro Structural Steel, Inc. ("Taxpayer") for State, Jackson County, and City of Scottsboro sales tax for the period April 1987 through December 1989, and also Limestone County and City of Athens use tax for the period January 1988 through December 1989. The Taxpayer appealed to the Administrative Law Division, and a hearing was conducted on January 3, 1996. Mike Wisner represented the Taxpayer. Assistant Counsel Gwen Garner represented the Department.

This case involves one disputed issue - is the Taxpayer liable for State and local sales tax in Alabama on raw steel purchased by the Taxpayer at wholesale, fabricated by the Taxpayer at its facility in Alabama, and then used by the Taxpayer on furnish and install contracts outside of Alabama?

The facts are undisputed.

The Taxpayer is located in Scottsboro, Alabama and contracts to provide fabricated steel that is used to construct buildings both in and outside of Alabama. The Taxpayer sometimes contracts to also erect or install the steel.

The Taxpayer purchases raw steel at wholesale, fabricates the steel to

specifications at its Scottsboro facility, and then delivers the steel to the job-site. If the Taxpayer has also contracted to install the steel, the Taxpayer subcontracts for a third-party to actually erect the steel. The Taxpayer paid sales tax on the steel in issue to the state in which the steel was delivered.

As stated, the only disputed issue is whether the Taxpayer is liable for sales tax in Alabama on the steel used on the furnish and install contracts outside of Alabama. The Department concedes that tax initially assessed on a City of Athens Hospital project should be deleted from the assessments. The Taxpayer does not otherwise dispute the assessments.

The Taxpayer contends that Alabama tax is not owed on the subject transactions because it is a "manufacturer" pursuant to Code of Ala. 1975, §40-23-1(b).¹ If that

¹Section 40-23-1(b) reads in pertinent part as follows:

(b) The use within this state of tangible personal property by the manufacturer thereof, as building materials in the performance of a construction contract, shall, for the purposes of this division, be considered as a retail sale thereof by such manufacturer, who shall also be construed as the ultimate consumer of such materials or property, and who shall be required to report such transactions and pay the sales tax thereon, based upon the reasonable and fair market price thereof at the time and place

provision applies, then sales tax became due outside of Alabama when the steel was "used or consumed" by the Taxpayer in performing the out-of-state contracts.

However, §40-23-1(b) does not apply because the Taxpayer is not a "manufacturer" within the context of §40-23-1(b). Section 40-23-1(b) applies only if a taxpayer manufactures a standard finished product. Fabricating steel to specifications for individual contracts does not qualify the Taxpayer as a "manufacturer." See, Rabren v. U.S. Steel Corp., 240 So.2d 358 (1970); State v. Acker, 233 So.2d 514 (1970); State v. Air Conditioning Engineering Supply, Inc., 174 So.2d 315 (1965). In addition, §40-23-1(b) also does not apply because the steel was not used by the Taxpayer "within this state" as required by the statute.

On the other hand, the Department argues that the Taxpayer is liable for sales tax in Alabama under either the "contractor" or the "withdrawal" provision set out at Code of Ala. 1975, §40-23-1(a)(10).

The "contractor" provision at §40-23-1(a)(10) 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 quantities sold.

The "contractor" provision technically applied to the transactions in issue because the Taxpayer, as a contractor, knew that the steel, as a building material, was to be used

where same are used or consumed by him or it.

on a real estate contract. The Taxpayer thus should have paid sales tax when it purchased the raw steel from its suppliers. However, the Taxpayer instead purchased the steel tax-free at wholesale by using its Alabama sales tax number.

Having purchased the steel at wholesale, the issue then is whether the "withdrawal" provision applies. The "withdrawal" provision at §40-23-1(a)(10) reads as follows:

The term "sale at retail" or "retail sale" shall also mean and include the withdrawal, use or consumption of any tangible personal property by anyone who purchases same at wholesale . . . and such wholesale purchaser shall report and pay the taxes thereon.

The "withdrawal" provision applies when a taxpayer purchases tangible property at wholesale and then withdraws the property for personal use or consumption, which includes fulfilling a furnish and install contract. The taxable event is the withdrawal from inventory in Alabama. It is irrelevant that the materials are subsequently used or installed outside of Alabama, or that a third-party subcontractor actually installs the materials. Home Tile and Equipment Company v. State, 362 So.2d 236 (Ala.Civ.App) cert. denied 362 So.2d 239 (Ala. 1978); Alabama Precast Products, Inc. v. Boswell, 357 So.2d 985 (Ala. 1978).

The "withdrawal" provision, as it read during the subject period, technically applied to the transactions in issue because the steel was purchased by the Taxpayer at wholesale, withdrawn from inventory in Alabama, and then used by the Taxpayer to fulfill the subject furnish and install contracts.

The Taxpayer argues, however, that even if the "withdrawal" provision technically applies, tax still should not be assessed based on the Alabama Supreme Court's holding in Ex parte Sizemore, 605 So.2d 1221 (1992). A brief history of the "withdrawal" provision

is needed to understand the Taxpayer's argument.

Prior to 1983, the "withdrawal" provision was construed by the courts as indicated above. That is, if a taxpayer purchased property at wholesale and then withdrew and used the property to fulfill a furnish and install contract, sales tax was due on the taxpayer's wholesale cost at the point of withdrawal.

The Legislature amended the "withdrawal" provision by Act 83-720 in 1983. That Act added certain "without transfer of title" language, and also excepted from the provision any property manufactured, fabricated, or compounded for sale or use in the performance of a real estate contract outside of Alabama.

Much litigation followed the 1983 amendment. See, Ex parte Disco Aluminum Products Company, Inc., 455 So.2d 849 (1984), and Ex parte Morrison Food Serv. of Ala. Inc., 497 So.2d 136 (Ala. 1986), among others. As a result, the Legislature enacted Act 86-689, which in substance repealed Act 83-720 and restored the "withdrawal" provision to its pre-1983 language. Unfortunately, the confusion continued. See, White v. Campbell & Associates, Inc., 544 So.2d 971 (Ala. 1989). Not until the Alabama Supreme Court decided Ex parte Sizemore in September 1992 was the issue finally settled. The Supreme Court held in Ex parte Sizemore that the 1986 amendment restored the provision to its pre-1983 interpretation. However, because of the confusion concerning the 1986 amendment, the Court also held that the 1983 amendment governed all transactions prior to its holding in Ex parte Sizemore in September 1992. The 1986 amendment was applied prospectively only from that date.

Arguably, the prospective application afforded the 1986 amendment in Ex parte

Sizemore was intended to apply only to the specific taxpayer in the case. However, because a taxing statute should be applied uniformly to all taxpayers, the 1986 amendment should be applied prospectively only for all taxpayers beginning in September 1992. A similar conclusion was reached in State v. Lane Carpet Co., Inc., Admin. Law Docket S. 89-149, decided April 9, 1993:

The Supreme Court held in (Ex parte Sizemore) that the intent of the 1986 amendment was to repeal the 1983 amendment and reinstate the pre-1983 interpretation of the statute. See, Sizemore, supra, at p. 1227. That is, transfer of title is no longer a factor in deciding if the withdrawal provision is applicable.

However, the Supreme Court also declared that the 1986 amendment should be applied prospectively only. "Therefore, the interpretation of the law in this case is prospective only, . . ." See, Sizemore, supra, at p. 1227. Consequently, the 1983 amendment is applicable to all transactions prior to the (Ex parte Sizemore) decision, September 18, 1992, a period which includes the transactions in issue in this case. Accordingly, the 1983 amendment is applicable in this case and the withdrawals in issue are not taxable under the withdrawal provision because title to the carpet passed to the Taxpayer's customers upon installation.

State v. Lane Carpet Co., Inc., at page 4.

Applying the 1983 amendment to the transactions in issue, the "withdrawal" provision does not apply because (1) title to the steel was eventually transferred to the building owners, and (2) the steel was fabricated for use in real estate contracts outside of Alabama. Under the 1983 amendment, either of the above circumstances removed a transaction from the scope of the "withdrawal" provision. Consequently, the steel in issue used on the out-of-state projects cannot be taxed in Alabama.

I note that the Taxpayer has not escaped tax on the steel because it paid sales tax to the state in which the steel was delivered. Alabama tax was also paid on the in-state

projects.

The Department is directed to delete the Athens Hospital project and the above out-of-state transactions from the assessments. A Final Order will then be entered for the adjusted amounts due. This Opinion and Preliminary Order is not an appealable Order.

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

Entered May 1, 1996.

BILL THOMPSON
Chief Administrative Law Judge