

HIGGINS ELECTRIC, INC. OF DOTHAN	§	STATE OF ALABAMA
Post Office Box 447		DEPARTMENT OF REVENUE
Dothan, Alabama 36302-0447,	§	ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 94-444
v.	§	
STATE OF ALABAMA	§	
DEPARTMENT OF REVENUE.		

FINAL ORDER

The Revenue Department denied a refund of State, Houston County, and City of Dothan sales tax requested by Higgins Electric, Inc. of Dothan ("Taxpayer"). The Taxpayer appealed to the Administrative Law Division, and a hearing was conducted on March 21, 1995. F. E. Rhodes appeared for the Taxpayer. Assistant Counsel Wade Hope represented the Department.

The issue in this case is whether electrical supplies and materials withdrawn from inventory and used by the Taxpayer in performing an electrical contract on a project owned by a tax-exempt entity were subject to sales tax.

The Taxpayer sells electrical supplies over-the-counter at retail and also withdraws some of the supplies from inventory to perform electrical contracting work. The Taxpayer has a sales tax license and purchases all of its supplies in inventory tax-free at wholesale. The Department audited the Taxpayer and assessed additional sales and use tax due. The Taxpayer agreed with some of the adjustments and paid the uncontested tax due. The Taxpayer also issued a separate check for the contested tax, and then applied for a refund of that tax. The Department denied the

refund, and the Taxpayer subsequently appealed to the Administrative Law Division.

The contested tax involves two projects on which the Taxpayer performed electrical work, a project in North Carolina and the Showell Farms project. The Department now concedes that the materials used by the Taxpayer on the North Carolina project are not subject to Alabama use tax pursuant to the "temporary storage" exclusion. See, Department Reg. 810-6-5-.23. The Taxpayer is due a refund of the tax paid on those materials.

Concerning the Showell Farms project, Showell Farms contracted with Smith's, Inc., as general contractor, to build a new poultry hatchery for Showell Farms (see, State's Exhibit 2). The Taxpayer had previously submitted certain specifications to Showell Farms for the electrical work on the project. The contract between Showell Farms and Smith's, Inc. required Smith's, Inc. to perform the work to the Taxpayer's specifications. Smith's, Inc. consequently sub-contracted for the Taxpayer to do the electrical work.

The Taxpayer withdrew the necessary materials from inventory and used the materials to perform the electrical work at the hatchery. According to the Department's examiner, the Taxpayer issued periodic billings to Smith's, Inc. for its work. Smith's, Inc. in turn billed Showell Farms, which subsequently paid Smith's, Inc. by check. Smith's, Inc. then endorsed the check over

to the Taxpayer.

Showell Farms had previously been issued a tax abatement certificate by the Revenue Department. The Taxpayer claims that it was the intent of all parties concerned that Showell Farms would purchase tax-free all materials used on the project, including the electrical materials and supplies used by the Taxpayer. Unfortunately for the Taxpayer, that is not how the transactions were handled.

The Taxpayer contracted with and was paid by Smith's, Inc., not Showell Farms. In any case, even if the Taxpayer had dealt directly with Showell Farms, an exempt entity, the Taxpayer would still be liable for the tax in issue.

Code of Ala. 1975, §40-23-1(a)(10) defines "retail sale" and includes what is commonly known as the "contractor's" provision.

The contractor's provision provides that "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 Taxpayer in this case clearly was an electrical contractor that purchased the building materials in issue for use in the form of real estate. The contractor provision is thus applicable. Normally, if the contractor provision applies, the contractor must pay tax when the materials are purchased from the supplier. However, because the Taxpayer in this case also resold materials at retail, it was required to buy all materials tax-free. Tax then

accrued on the building materials in question when they were withdrawn from inventory and identified for use in the form of real estate.

Under the contractor provision, the contractor that uses the building materials is liable for the tax. It is irrelevant that the owner of the real property on which the contract is performed, Showell Farms in this case, is a tax-exempt entity.

The Department is directed to issue the Taxpayer a refund of the tax erroneously paid on the North Carolina project. However, the Department properly denied the refund of the tax paid on the materials used on the Showell Farms project.

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

Entered August 30, 1995.

BILL THOMPSON
Chief Administrative Law Judge