

V & W SUPPLY COMPANY, INC. §
Post Office Box 10562
Birmingham, Alabama 35202, §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

HOAR CONSTRUCTION, INC. §
Post Office Box 360900
Birmingham, Alabama 35236-099, §

DOCKET NOS. S. 95-180
S. 95-185

Taxpayers, §

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

FINAL ORDER

The Revenue Department assessed sales tax against V & W Supply Company, Inc. ("V & W") for May 1991 through May 1994. The Department also denied a refund of use tax requested by Hoar Construction, Inc. ("Hoar") for February 1992 through June 1993.

Hoar and V & W separately appealed to the Administrative Law Division. The appeals were consolidated and heard together on February 20, 1996. Jefferson County ("County") intervened as allowed by Code of Ala. 1975, §40-2A-9(1). Charles K. Hamilton represented Hoar, R. E. Widick represented V & W, Rob Shattuck, Bill Slaughter, and Tommy Gallion represented Jefferson County. Assistant Counsel Wade Hope represented the Department.

This case involves the sales and use tax exemptions provided to government entities at Code of Ala. 1975, §§40-23-4(11) and 40-23-62(13).

Hoar acted as general contractor on a Jefferson County nursing home construction project ("project"). The Department assessed use tax against Hoar for materials purchased by Hoar from out-of-state

vendors for use on the project. Hoar paid the tax and applied for a refund, which the Department denied. V & W sold some of the materials in Alabama to various subcontractors on the project. The Department assessed V & W for Alabama sales tax on those sales.

The issue is which party purchased the materials, Hoar and the subcontractors or the exempt County. That issue turns on whether Hoar and the subcontractors purchased the materials as agents for the County.

Hoar contracted with Jefferson County in 1992 to act as general contractor on the project. The parties intended that Hoar and the subcontractors would purchase all materials used on the project as tax-exempt agents of the County. The contract provided that "all purchases of materials, equipment, and supplies for said project shall be made by the County through Hoar Construction and their subcontractors on said project in order that such purchases shall qualify for exemption from State and local sales and use taxes." Jefferson County also executed a "Purchasing Agent Appointment" ("agency appointment") which appointed Hoar and all subcontractors as purchasing agents for the County. A copy of the agency appointment was provided to all subcontractors and vendors.

The contract required Hoar and the subcontractors to purchase the materials for the project using their own purchase orders. The purchase orders included the County job description and project number. V & W and the other vendors billed Hoar and the subcontractors directly. Hoar and the subcontractors paid the vendors, and were in turn reimbursed. Hoar reimbursed the

subcontractors. The County paid Hoar.¹

The Department argues that the materials were not purchased by the exempt County, but rather by Hoar and the various subcontractors for use in fulfilling the County contract. The Department's position is presumably based on State of Alabama v. King & Boozer, 62 S.Ct. 43, 314 U.S. 1 (1941).

In King & Boozer, the United States Supreme Court held that materials sold to a contractor for use on a government contract were to the taxable contractor, King & Boozer, and not to the exempt government. The decision turned on the Court's finding that King & Boozer did not purchase the materials as agent for the

¹On prior projects, the County had issued blank County purchase orders that were used by the contractor and subcontractors to purchase the necessary materials. The vendors directly billed the County, and were paid directly by the County. The Department concedes that those purchases were tax-free by the County. The County changed its procedures, however, because the old procedures caused administrative problems and the vendors were not promptly paid.

government.

But however extensively the government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the government to enter into contracts or to pledge its credit.

King & Boozer, at page 47.

Likewise, in the companion case of Curry V. United States, 62 S.Ct. 48, 314 U.S. 14 (1941), the Supreme Court on similar facts again held that the contractors, Curry and others, were liable for tax because they were not agents of the government.

For the reasons stated at length in our opinion in the King & Boozer case we think that the contractors, in purchasing and bringing the building material into the state and in appropriating it to their contract with the Government, were not agents or instrumentalities of the Government; . . .

Curry, at page 49.

King & Boozer and Curry can be distinguished from this case because Jefferson County specifically appointed Hoar and the subcontractors as purchasing agents for the County. An agent acting in the scope of his agency appointment binds and is acting on behalf of the principal. See generally, 41 Ala. Digest, Principal and Agent, Key No. 99 (1995). The materials were thus in legal effect purchased by the exempt County.

The Department argues that the materials are not exempt because (1) they were not purchased in the name of the County, (2) the County's credit was not obligated, and (3) the materials were not paid for with funds belonging to the County. However, those criteria are required by Reg. 810-6-3-.33 and relate only to sales

to an exempt Industrial Development Board ("IDB"), not sales to a government entity.²

²As in this case, the issue in IDB tax cases is who is the "purchaser." The exempt IDB is considered the "purchaser" only if the requirements of Reg. 810-6-3-.33 are strictly followed. For example, in Champion International Corp. v. State, 405 So.2d 932 (1981), the exemption was denied because one of the three requirements was absent - the purchases were not paid for with funds belonging to the Board. Champion, on rehearing, pointed out that it had been appointed as purchasing agent for the IDB and the parties had stipulated that the purchases were by the IDB. Champion, at page 936. The Court rejected Champion's argument, again holding that the IDB is the purchaser only if Reg. 810-6-3-.33 is strictly complied with.

But as stated above, Reg. 810-6-3-.33 applies only to IDBs. There are no similar requirements concerning sales to government entities.

Reg. 810-6-3-.69.02 requires only that a sale to an exempt government entity must be the result of an order issued by someone authorized to purchase for the entity, and with the authority to obligate the government entity to pay for the purchase. That regulation was complied with in this case because Hoar and the subcontractors, as agents for the County, were specifically authorized to purchase the materials for the County. Under general principal/agent law, the County was also ultimately liable to pay for the authorized purchases by its agents. See again, 41 Ala. Digest, Principal and Agent, Key No. 99 (1995).

The Department is concerned that it cannot verify that the sales were to the exempt County. But verifying the tax-exempt status of the sales is separate from the primary issue of whether the materials were purchased tax-free by the County in the first place.

The burden is on a taxpayer to keep proper records verifying an exemption. State v. Ludlum, 384 So.2d 1089 (Ala.Civ.App.), cert. denied, 384 So.2d 1094 (Ala. 1980). V & W and the other vendors, or Hoar as the user for use tax purposes, were thus required to keep adequate records verifying that they purchased the materials tax-free as agents of the exempt County. All purchase orders included the County's project number. All subcontractors and vendors, including V & W, were provided a copy of the agency agreement showing Hoar and the subcontractors as authorized agents of the County. Those documents verify that the materials were

purchased for use on an exempt County project by an authorized agent of the County.

The Department is also concerned that an unscrupulous government contractor may purchase materials tax-free using a County project number and then use the materials on a separate, taxable job. That possibility for tax evasion was recognized in Champion International Corp. v. State, supra, at page 935. However, that situation is not involved here. The Department concedes that all of the materials in issue were used on the exempt County project.

The Department may promulgate regulations requiring exempt government agencies to follow the same or similar procedures as required by Reg. 810-6-3-.33 concerning IDBs. But under current law and regulations, those requirements are not applicable.

The sales in issue were exempt sales to Hoar and the subcontractors as agents of Jefferson County. The final assessment against V & W Supply is accordingly dismissed. The Department is directed to issue the appropriate use tax refund to Hoar.

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

Entered August 6, 1996.

BILL THOMPSON
Chief Administrative Law Judge