

WESTPOINT STEVENS, INC.  
Tax Department  
507 West 10th Street  
West Point, Georgia 31833,

Taxpayer,

v.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 96-313

FINAL ORDER

The Revenue Department assessed sales and use tax against WestPoint Stevens, Inc. ("Taxpayer") for December 1993 through June 1994. 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 December 10, 1996. Frank O'Connell and Robert Woods, Jr., of Ernst & Young, represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

The Taxpayer purchased tangible personal property without paying sales or use tax using its Alabama direct pay permit. The Taxpayer later sold the property in a nontaxable bulk sale. The issue is whether the Taxpayer owes sales and use tax on the property because of the bulk sale.

The Taxpayer is a subsidiary of WestPoint Pepperell, Inc. The Taxpayer owned and operated a service center in Alabama during the audit period. The service center performed repair and maintenance work on the Taxpayer's facilities, and on the facilities of WestPoint Pepperell's various other subsidiaries in Alabama, Georgia, and elsewhere. The Taxpayer purchased materials, supplies, etc. ("materials") necessary

to perform the work without paying sales or use tax using its Alabama direct pay permit. The Department is authorized to issue direct pay permits by Code of Ala. 1975, ' 40-23-31 and Dept. Reg. 810-6-4-.14.

The service center used the materials as necessary in performing its repair and maintenance work. The service center also sold a small percentage of the materials to unrelated third parties. The Taxpayer reported and paid sales or use tax on the materials, as applicable.

The Taxpayer sold the service center's inventory in bulk in January 1994 to an unrelated entity, Industrial Service and Supply. The sale included \$363,000 worth of materials that the Taxpayer had purchased tax-free using its direct pay permit.

The Department concedes that the bulk sale of the materials was a non-taxable casual transaction. The Department argues, however, that when the Taxpayer purchased the materials under its direct pay permit, it only deferred payment of the tax until the correct rate could be determined. The Department contends that the taxable event remained the initial purchase by the Taxpayer, and that the bulk sale of the materials caused the tax to become due.<sup>1</sup> I disagree.

Code of Ala. 1975, ' 40-23-31 authorizes the Department to issue regulations allowing manufacturers to purchase property without paying sales or use tax if, at the time of purchase, it is impossible "to determine with any degree of certainty the

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<sup>1</sup>The Department taxed a portion of the materials at the reduced 12 percent "machine" rate levied at Code of Ala. 1975, ' ' 40-23-2(3) (sales tax) and 40-23-61(b) (use tax) based on the percentage of "machine" rate transactions reported by the Taxpayer on prior returns.

applicability of such tax . . . ." The statute does not defer payment of the tax until the applicable rate can be determined, as argued by the Department. Rather, it provides that tax shall not be paid until the applicability of the tax itself is determined.

A direct pay permit holder must report and pay sales or use tax on the property "before the twentieth of the month following the month in which such tangible personal property was used for a taxable purpose." Reg. 810-6-4-.14(1)(b). The direct pay permit itself, in paragraph (1), uses the same "was used for a taxable purpose" language. The intent of a direct pay permit, as gleaned from the language of the statute and regulation, is to allow certain manufacturers to purchase all materials without paying tax. The manufacturer is then required to report and pay sales or use tax if and when the property is used for a taxable purpose. If the materials are not used for a taxable purpose, for example, they are used on an exempt pollution control facility, no tax would be due. Likewise, no tax is due in this case because the bulk sale of the materials was not a taxable sale or use of the materials.

The Taxpayer purchased the materials using its direct pay permit. However, the Taxpayer also had an Alabama sales tax number, and sold some of the materials at retail. Approximately five percent or less were sold to unrelated customers. The Taxpayer also sold a substantial portion of the materials in conjunction with the repair and maintenance work to various related, but separate, subsidiary corporations of WestPoint Pepperell. The Taxpayer reported and paid tax on those sales.

If a taxpayer has both a direct pay permit and a sales tax number, it is not clear how many retail sales the taxpayer must make before it should buy at wholesale using a sales tax number instead of using the direct pay permit. Assessment Officer Joe Cowen testified that only a few sales would be treated as isolated casual sales, but that if 50 percent of the items were sold at retail, the taxpayer should purchase at wholesale using its sales tax number. The dividing line is somewhere in between. In any case, the Taxpayer in this case had a substantial number of retail sales. If it had purchased the materials in issue at wholesale using its sales tax number, clearly the nontaxable bulk sale would not have resulted in tax due.

The Department made reference at the close of the December 10 hearing to a tobacco tax case that supported its position. Although the Department failed to cite the case in a post-hearing brief, I believe the case to be State v. Killian Wholesale Grocery Co., 271 So.2d 499 (1972). The Alabama Supreme Court held in Killian Wholesale that a wholesale grocery business was liable for the cigarette tax, even though the subject cigarettes were stolen and never sold.

However, Killian Wholesale was specifically overruled in Butler and Kennamar Wholesale Company, 301 So.2d 176 (1974). Neither case is relevant, however, because they both turned on the statutory construction of the applicable tobacco tax statutes. This case turns on the applicable sales and use tax statute and regulation.

The final assessments are dismissed.

This Final Order may be appealed to circuit court within 30 days pursuant to

Code of Ala. 1975, ' 40-2A-9(g).

Entered April 30, 1997.

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BILL THOMPSON

Chief Administrative Law Judge