AMERICAN CHALKBOARD CO., LLC 100 Barrett Industrial Blvd. Wetumpka, AL 36092-1600,	'	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	'	DOCKET NO. S. 99-473
v.	'	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	'	

FINAL ORDER

The Revenue Department assessed American Chalkboard, Inc. (ATaxpayer@) for State and City of Wetumpka sales tax for August 1995 through September 1998. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, '40-2A-7(b)(5)a.[1] A hearing was conducted on April 13, 2000. Will Sellers represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

ISSUES

(1) Is the Taxpayer liable under the sales tax Awithdrawal@ provision, Code of Ala.1975, '40-23-1(a)(10), for State and City of Wetumpka sales tax on its cost of materials purchased at wholesale and used by the Taxpayer on furnish-and-install contracts performed outside of Alabama or with tax-exempt entities;

(2) Did the Department timely assess the Taxpayer for August and September 1995; and,

(3) Should the penalties assessed by the Department be waived for reasonable cause?

[1]The Taxpayer also appealed final assessments of State and City of Wetumpka use tax for October 1995 through September 1998, but now concedes that those final assessments are correct.

FACTS

The Taxpayer fabricates custom-ordered chalkboards, marker boards, tack boards, etc. (Aboards@) at its facility in Wetumpka, Alabama. The Taxpayer sells some of the boards at retail. Those sales are not in issue. It also contracts to furnish and install the boards for various taxable and tax-exempt customers both inside and outside of Alabama. As indicated, the primary issue is whether the Taxpayer owes sales tax on those materials purchased at wholesale and subsequently used by the Taxpayer on furnish-and-install contracts performed outside of Alabama or with tax-exempt entities.

The Taxpayer purchased the materials used to make the boards tax-free using its Alabama sales tax number. After the Taxpayer received a custom order from a customer, it withdrew materials from inventory as necessary to make the boards. The Taxpayer fabricated the boards as specified, and delivered the boards to the customer in one of its trucks. If the Taxpayer was also obligated to install the boards, it generally hired a subcontractor to do so. The boards were mounted to a wall by anchor bolts and screws, and also glue.

The Department audited the Taxpayer for October 1995 through September 1998. The Taxpayer=s representative signed a waiver of the statute of limitations on November 13, 1998, allowing the Department until December 31, 1998 to enter preliminary assessments for the above period. The Department entered preliminary assessments for August 1995 through September 1998 on December 14, 1998. The Department included August and September 1995 in the assessments, although they were outside the normal three year statute, because the Department contends that the Taxpayer underreported by

more than 25 percent in those months. Code of Ala. 1975, '40-2A-7(b)(2)b. The Taxpayer reported State sales tax of $297 in August and $232 in September. The Department assessed the Taxpayer for additional tax of $135 for August and $287 for September.

The Department assessed the Taxpayer on two types of transactions. First, the Department taxed retail sales by the Taxpayer to various taxable entities, i.e., churches, etc., in Alabama that claimed to be tax-exempt, and thus were not taxed by the Taxpayer. The Taxpayer does not contest that portion of the audit.

Second, the Department assessed the Taxpayer on its cost of materials purchased at wholesale and subsequently used by the Taxpayer on furnish-and-install contracts performed outside of Alabama or with tax-exempt entities. Those are the transactions in issue in this case.

ANALYSIS

Issue (1) - Is the Taxpayer liable for State and City of Wetumpka sales tax on its wholesale cost of materials used on furnish-and-install contracts performed outside of Alabama or with tax-exempt entities?

Two statutes that define a Aretail sale@ for sales tax purposes apply in this case; the Acontractor@ provision and the Awithdrawal@ provision, both found at Code of Ala. 1975,

'40-23-1(a)(10).[2]

(1) The AContractor@ Provision.

The Acontractor@ provision reads as follows - ASales 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 Acontractor@ provision applies when a contractor fabricates a custom-designed product from building materials that subsequently becomes a part of realty. The taxable retail sale occurs when the contractor purchases the raw materials from the vendor. *State, Dept. of Revenue v. Montgomery Woodworks, Inc.*, 389

[2]A third statute that defines Aretail sale,@ the Amanufacturer/contractor@ provision at Code of Ala. 1975, '40-23-1(b), was also discussed at the April 13 hearing. That provision applies when a manufacturer produces a standard product that it subsequently uses in performing a construction contract in Alabama. *Rabren v. U.S. Steel Corp*., 240 So.2d 358 (Ala. 1970); see also, *Scottsboro Structural Steel, Inc. v. State of Alabama*, S. 92-282 (Admin. Law Div. Opinion and Preliminary Order (5/12/96)). The Amanufacturer/contractor@ provision does not apply in this case, and thus will not be discussed at length, because the Taxpayer contracts to furnish and install only custom-ordered boards.

So.2d 510 (Ala.Civ.App. 1980); *Dept. of Revenue v. James A. Head and Co., Inc.*, 306 So.2d 5 (Ala.Civ.App. 1974); *State v. Air Conditioning Engineers, Inc.*, 174 So.2d 315 (Ala. 1965). The Acontractor@ provision applies if three requirements are met: (1) the taxpayer must be a Acontractor@; (2) the raw materials involved must be Abuilding materials@; and, (3) the building materials must be sufficiently attached to the building to become a part of real property. *Montgomery Woodworks, Inc.*, 389 So.2d at 511.

The Taxpayer argues that the Acontractor@ provision does not apply in this case because (1) the boards are not building materials, and (2) the boards do not become a part of realty. I disagree.

ABuilding material@ has been defined Ato include any type of materials used for the improvement of one=s premises,@ and Aanything essential to the completion of a building or structure of any kind for the use intended.@ *Head*, 306 So.2d at 141. Clearly, the boards in issue were essential parts of the schools and other buildings in which they were installed, at least to the same extent that the seats and the library carrels were essential in *Head*.

The test for determining whether materials become a part of real estate was explained in *Head*, as follows:

> A. . . first, annexation to the realty, either actual or constructive; second, adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and, third, intention to make the article a permanent accession to the freehold.@

Head, 305 So.2d at 142, citing *Patterson v. Chaney*, 173 P. 859 (N.M. 1918).

The Taxpayer, or a subcontractor acting as agent for the Taxpayer, affixed the boards to the buildings sufficient for them to become a part of the realty. The boards were anchored to the walls with anchor bolts and screws, and also glue. Certainly they were

intended to become a permanent part of the buildings to which they were attached.

Because the Acontractor@ provision applied, the Taxpayer was technically liable for tax when it purchased the board materials from its vendors. However, if a contractor also sells tangible personal property at retail, as does the Taxpayer in this case, the contractor is allowed to purchase all materials tax-free at wholesale using its sales tax number. See, Dept. Reg. 810-6-1-.56. Tax then becomes due under the Awithdrawal@ provision when the materials are withdrawn from inventory for use or consumption by the contractor. The issue thus is whether the Awithdrawal@ provision applied to the materials used by the Taxpayer on its furnish-and-install contracts performed outside of Alabama or with tax-exempt entities.[3]

(2) The AWithdrawal@ Provision.

The Awithdrawal@ provision reads as follows - AThe term >sale at retail= or >retail sale= shall also mean and include the withdrawal, use, or consumption of any tangible personal property by any one who purchases same at wholesale, . . .@ The Awithdrawal@ provision applies when a taxpayer purchases tangible personal property at wholesale and later withdraws the property from inventory for its own use or consumption, and not for resale. The taxable retail sale occurs under the Awithdrawal@ provision when and where the property is withdrawn from inventory. The taxable measure is the taxpayer=s wholesale cost. *City of Huntsville v. City of Madison*, 628 So.2d 584 (Ala. 1993); *Ex parte Sizemore*,

[3]The Awithdrawal@ provision applies to all taxpayers that purchase tangible personal property at wholesale and then use or consume the property, not just contractors. Consequently, I agree with the Taxpayer that even if the Acontractor@ provision did not apply, the issue would still be whether the Awithdrawal@ provision applies. See, Taxpayer=s Brief at 8.

605 So.2d 1221 (Ala. 1992); *Home Tile and Equip. Co. 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). See also, Dept. Reg. 810-6-1-.196 (AAlabama sales tax becomes due on the aforementioned withdrawals of building materials at the time and place of the withdrawals. Said Alabama sales tax is due on building materials withdrawn from stock in Alabama for use in fulfilling contracts both inside and outside of Alabama.@)

The Taxpayer argues that the Awithdrawal@ provision did not apply to the materials it used on its furnish-and-install contracts with tax-exempt entities or performed outside of Alabama. I disagree. As explained below, the Awithdrawal@ provision, as presently construed by the Alabama Supreme Court, applies to materials purchased at wholesale that are used by the wholesale purchaser to complete a contract. The Aretail sale@ occurs at the time and place of withdrawal. Although title to the materials is ultimately transferred to the contractor=s customer, there is no subsequent retail sale of the materials to the customer. Consequently, it is irrelevant that the customer may be a tax-exempt entity, or that the contract may be performed outside of Alabama.

A short history will illustrate how the Awithdrawal@ provision has been and is presently construed.

In 1978, the Alabama Supreme Court clarified the scope of the Awithdrawal@ provision in *Alabama Precast*. Alabama Precast, an Alabama corporation, contracted to furnish precast roof slabs and also install the slabs in South Carolina. The Court held that the withdrawal of the materials from inventory in Alabama and used on the furnish-and-install contract in South Carolina constituted a taxable retail sale closed in Alabama. The

Court thus held for the first time that the Awithdrawal@ provision applied to materials purchased at wholesale and subsequently used to complete a furnish-and-install contract. The taxable retail sale occurred when the materials were withdrawn from inventory in Alabama.

The same conclusion was reached in *Home Tile*. In that case, the taxpayer withdrew carpet from inventory in Mobile, Alabama, and installed the carpet for customers in Mississippi. The Court of Civil Appeals held that the withdrawal in Alabama was the taxable retail sale.

> These materials were withdrawn from the inventory of the taxpayer to be used by the taxpayer pursuant to its obligation to furnish and install carpeting for the Mississippi builder. Thus, the withdrawal of the materials from inventory qualified as a taxable Aretail sale@ under '40-23-1(a)(10). . . This withdrawal occurred in Mobile, Alabama, and thus constituted a closed, taxable transaction within this state. The fact that the flooring materials were transported and used out of the state did not transform this sale into a sale in interstate commerce.

Home Tile, 362 So.2d at 238, 239.

The Legislature amended the Awithdrawal@ provision in 1983. The amendment specified in pertinent part that the Awithdrawal@ provision applied only if title to the subject property was not transferred by the wholesale purchaser.

Morrison Ford Service of Alabama, Inc. v. State of Alabama, 497 So.2d 131 (Ala.Civ.App.1985) was decided while the 1983 amendment was in effect. Morrison had contracted with both taxable and non-taxable entities to operate food service programs for the entities. At issue was whether the food purchased at wholesale by Morrison and used to fulfill the contracts was taxable under the Awithdrawal@ provision, as amended in 1983. The Court of Civil Appeals held that Morrison was not selling the food, but was instead

using and consuming the food in fulfilling the contracts with its customers. Consequently, because title to the food never passed, the Court held that the withdrawal and use of the food by Morrison constituted a taxable retail sale under the Awithdrawal@ provision.

The Alabama Supreme Court reversed. *Ex parte Morrison Food Service of Alabama, Inc.*, 497 So.2d 136 (Ala. 1986). The Court, in an opinion by Justice Maddox, first correctly recognized that the Awithdrawal@ provision, as amended in 1983, did not apply if title to the subject property was transferred. The Supreme Court, unlike the Court of Civil Appeals, then concluded that title to the food had at some point transferred from Morrison to its customers, and consequently that the Awithdrawal@ provision, as amended, did not apply.

On rehearing, the State suggested that the Court=s holding Amight be interpreted as holding that Morrison did not owe a tax on the sale price of the raw food sold by it to non-tax-exempt entities.@ *Morrison*, 497 So.2d at 142. Justice Maddox rejected the State=s claim. He explained that while the transactions were not taxable under the Awithdrawal@ provision because title passed, the transfer of title itself constituted a retail sale under the general sales tax provision, Code of Ala. 1975, '40-23-2(1). Consequently, Morrison owed sales tax, but only on the food sold to the non-exempt entities. Sales to the tax-exempt entities were, of course, exempt.

> In its brief in opposition to the application for rehearing, Morrison properly concedes that it is taxable on its sales price of the raw food sold to the non-tax-exempt entities because such sales of raw food would still be a sale at retail and taxable under Code 1975, '40-23-2(1), even though the transaction was not taxable under the above quoted provision of Code 1975, '40-23-1(a)(10) (the Awithdrawal@ provision).

Morrison, 497 So.2d at 142.

The Alabama Legislature was obviously displeased with the judicial interpretations of the Awithdrawal@ provision, as amended in 1983, and again amended the provision in 1986. The 1986 amendment deleted the Awithout transfer of title@ and other language added by the 1983 amendment. The title to the 1986 amendment, Act 86-689, read in pertinent part as follows:

> The intent of this bill is to repeal the 1983 amendment of these definitions so as to replace the repealed definitions with the preexisting definition of these terms; and it is further intended that no provision of this bill is to be construed or interpreted in any manner inconsistent with the preexisting body of interpretive materials, policies, and court decisions as in existence prior to the 1983 amendment.

In effect, the 1986 amendment restored the Awithdrawal@ provision to its pre-1983 language, and validated as correct those court decisions interpreting the pre-1983 statute, i.e. *Alabama Precast* and *Home Tile.*

In *Sizemore v. Dothan Progress*, 605 So.2d 1217 (Ala.Civ.App.1991), the issue was whether a publisher was liable under the Awithdrawal@ provision, as amended in 1986, on ink and newsprint purchased at wholesale and subsequently used to print newspapers that were distributed free to the public. The Court of Civil Appeals held that the 1986 amendment had not changed the original intent of the Legislature that the Awithdrawal@ provision should apply only if title to the property is not transferred. The Court thus held that transfer of title was still a factor, even after the 1986 amendment, and consequently that the Awithdrawal@ provision did not apply because title to the ink and newsprint was transferred when the newspapers were given away.

In a special concurring opinion, Judge Russell pointed out various inconsistencies in prior cases involving the Awithdrawal@ provision. He then declared:

> The state of the law as it relates to ' 40-23-1(a)(10) continues to need further clarification by the supreme court or the legislature. The supreme court=s explanation of *Morrison* in *Ex parte Campbell* does not lay to rest the issues of the required construction and interpretation of the body of materials, policies, and court decisions coming both before and after the 1983 amendment. The exact meaning of the body of interpretive materials, policies, and court decisions prior to 1983, as referred to in the title of Act No. 86-689, also remains unclear.

Sizemore v. Dothan Progress, 605 So.2d at 1220.

On appeal, the Supreme Court acknowledged in *Ex parte Sizemore* that the law concerning the Awithdrawal@ provision was uncertain, and in response to Judge Russell=s concurring opinion, clarified the provision once and for all.

The Supreme Court held that the clear intent of the 1986 amendment was to restore the Awithdrawal@ provision to its pre-1983 interpretation. The Court thus held that transfer of title was no longer relevant, and that the withdrawal of the ink and newsprint from inventory was a taxable retail sale under the Awithdrawal@ provision, as amended in 1986. *Ex parte Sizemore*, 605 So.2d at 1227.

This rationale was reaffirmed by the Supreme Court the next year in *City of Huntsville v. City of Madison*. In that case, Intergraph withdrew materials purchased at wholesale from its warehouse in Huntsville, and subsequently used the materials for testing and other purposes in Madison. Both municipalities claimed sales tax on the materials. The Supreme Court held that pre-1983 case law now controls, and that the withdrawal of the materials in Huntsville constituted a retail sale under the Awithdrawal@ provision. The taxable sale occurred in Huntsville at the time and place of withdrawal. It was irrelevant that the materials were used outside of Huntsville.

> Applying the rules of *Alabama Precast Products, Inc.*, *Ex parte Home Tile and Equipment Co.*, and *Ex parte Sizemore* to the present facts, we conclude

> that the withdrawal by Intergraph of tangible personal property from its inventory located within the taxing jurisdiction of Huntsville is a closed taxable event within the City of Huntsville. Sales tax becomes due at the time and place of the withdrawal from inventory of tangible personal property . . . Under the provisions of the statute a Aretail sale@ occurred when the items were withdrawn for use or consumption by the taxpayer; the withdrawal occurred in the taxing jurisdiction of the City of Huntsville.

City of Huntsville v. City of Madison, 628 So.2d at 590, 591.

Having reviewed the post-1978 history of the Awithdrawal@ provision, I now turn to the Taxpayer=s contention that the Awithdrawal@ provision does not apply to materials used on contracts performed outside of Alabama or with tax-exempt entities.

The Taxpayer=s argument concerning the tax-exempt entities is based on Justice Maddox=s separate opinion in *Ex parte Sizemore*, in which he attempts to explain his opinion in *Morrison*. An analysis of *Morrison* is thus necessary to fully understand Justice Maddox=s rationale in *Ex parte Sizemore*.

As discussed, Justice Maddox correctly held in *Morrison* that because title to the food was transferred to Morrison=s customers, the Awithdrawal@ provision, as amended in 1983, did not apply. He further held on rehearing that although the Awithdrawal@ provision did not apply, the transfer of title itself constituted a retail sale by Morrison to the entities in issue. Morrison thus owed sales tax on the sales price of the food, but only on the sales to the non-exempt entities.

Morrison did not hold that the Awithdrawal@ provision did not apply to materials used on contracts with tax-exempt entities. Rather, the Court held only that the Awithdrawal@ provision, as amended in 1983, did not apply on any of Morrison=s contracts because title to the food was transferred by Morrison. The Awithdrawal@ provision did not apply regardless of the tax status of Morrison=s customers. The Court instead found that

Morrison had made a Aregular@ retail sale of the food to its customers. Only then did the tax status of Morrison=s customers become relevant. Morrison owed sales tax on those retail sales to the taxable entities, but not on the sales to the tax-exempt entities.[4]

It must be emphasized that *Morrison* was decided under the Awithdrawal@ provision, as amended in 1983. As explained, the 1986 amendment repealed the Awithout transfer of title@ language of the 1983 amendment, and again made *Alabama Precast* and *Home Tile*

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[4]I question the Court=s rationale that because title to the food transferred, there was necessarily a retail sale. In any case, it could be argued that title to the food passed to the individuals that consumed the food in the hospitals, nursing homes, and fraternities with whom Morrison contracted. Consequently, if the food was sold at retail, the Apurchasers@ may have been those individuals that consumed the food, not the entities that had contracted with Morrison. There is also a question as to the Asale price@ received by Morrison for the food. The contracts provided that Morrison would be reimbursed for its out-of-pocket expenses, and also receive a management fee. *Ex parte Morrison Food Service of Ala., Inc.*, 497 So.2d at 137. Presumably, the individuals that consumed the food also paid some amount to the entities. Would the Asale price@ be Morrison=s wholesale cost of the food for which it was reimbursed, or would it be the amounts the individuals that consumed the food paid to the various entities? In any case, for purposes of this case, the Court=s rationale is accepted that Morrison sold the food at retail to the entities.

good law. Consequently, the rationale of *Morrison* is no longer valid. Because transfer of title is no longer relevant, the withdrawal of the food by Morrison to complete its contracts would clearly constitute a taxable retail sale under the current Awithdrawal@ provision, as amended in 1986. There would be no retail sale of the food by Morrison to its customers. The tax status of Morrison=s customers would thus be irrelevant.

Turning to *Ex parte Sizemore*, Justice Maddox, in a separate opinion concurring in part and dissenting in part, attempted to explain his rationale in *Morrison*, even though the 1986 amendment had changed the statute and *Morrison* was no longer applicable. It is that explanation that the Taxpayer relies on in this case. With due respect, Justice Maddox incorrectly states how the Awithdrawal@ provision, as amended in 1986, should be and has been construed by the Supreme Court in its majority opinion in *Ex parte Sizemore*, and also in *City of Huntsville v. City of Madison*. I will attempt to explain.

Justice Maddox states in *Ex parte Sizemore* what he believes to be the principle of law governing the Awithdrawal@ provision:

> Taxpayer if you purchase tangible property at wholesale, and if you sell it, you must collect the tax from the consumer, unless the consumer is exempt from the payment of a sales tax; if you use and consume the property purchased at wholesale yourself, then you owe a sales tax; if you use the property in performing a contract, you owe the tax, unless, of course, the user or consumer is exempt from the payment of sales tax;. . .

Ex parte Sizemore, 605 So.2d at 1229, 1230.

The first clause is correct. If a taxpayer purchases property at wholesale and sells it to a consumer, tax is due (under the general sales tax provision at '40-23-2(1)), unless the customer is exempt.

The second clause is also correct. If a taxpayer purchases property at wholesale

and uses or consumes it, sales tax is due (under the Awithdrawal@ provision).

The third clause reads - Aif you use property in performing a contract you owe the tax, unless, of course, the user or consumer is exempt from the payment of sales tax.@ The first phrase of the clause is correct. If a taxpayer uses property purchased at wholesale to perform a contract, tax is due (under the Awithdrawal@ provision). The next phrase, however, is incorrect. That is, Justice Maddox incorrectly concludes that the customer for whom the contract is performed is the Auser or consumer@ of the materials, and that if the Auser or consumer@ is exempt, no tax is owed.

In so concluding, Justice Maddox incorrectly presumes, again relying on the now invalid holding in *Morrison,* that the contractor is making a Aregular@ retail sale to its customer. But under current law, the Awithdrawal@ provision would apply, despite transfer of title. The taxable retail sale would occur when and where the contractor withdrew the materials from inventory. Contrary to Justice Maddox=s conclusion, the contractor, and not the contractor=s customer, would be the Auser or consumer@ of the materials. There would be no retail sale of the materials to the customer. Consequently, it would be irrelevant that the customer may be tax-exempt, or that the contract may be performed outside of Alabama.[5]

In summary, the Taxpayer=s withdrawal of materials purchased at wholesale for use

[5]Justice Maddox=s separate opinion in *Ex parte Sizemore* constitutes dicta, and is contrary to the majority opinion of the Court. Consequently, and again with all due respect, it is not binding. *Ex parte Sizemore, Alabama Precast,* and *Home Tile* are now controlling authority. See, *City of Huntsville v. City of Madison*, 628 So.2d at 590.

on its furnish-and-install contracts constituted a taxable retail sale under the Awithdrawal@ provision, as presently construed by the Alabama Supreme Court. The taxable event was the withdrawal of the materials from inventory in Wetumpka. Because the retail sales occurred in Wetumpka, it is irrelevant that some of the Taxpayer=s contracts were with tax-exempt or out-of-state entities.[6]

The Taxpayer=s other argument - that materials used to complete contracts outside of Alabama are not subject to the Awithdrawal@ provision - is largely addressed by the above analysis. That is, the Taxpayer=s withdrawal of the materials was the taxable event, and it is irrelevant that the materials were installed outside of Alabama. See generally,

[6]Effective October 1, 2000, materials sold to contractors and subcontractors for use in fulfilling contracts with various tax-exempt entities are exempt from sales and use tax. See, Act No. 2000-684. Consequenty, the materials used by the Taxpayer to complete its furnish-and-install contracts with schools and other tax-exempt entities are now exempt. If materials used by a contractor on contracts with tax-exempt entities had not been taxable under the Awithdrawal@ provision, there would have been no need to specifically exempt those materials.

Alabama Precast and *Home Tile*, supra.

The Taxpayer cites *Ex parte Disco Aluminum Products Co., Inc.*, 455 So.2d 849 (Ala. 1984) in support of its position concerning the out-of-state contracts. Taxpayer=s Brief at 2-4. In *Disco Aluminum*, the Alabama Supreme Court held that the Awithdrawal@ provision, as amended in 1983, did not apply to furnish-and-install contracts outside of Alabama. The Taxpayer argues that although the 1986 amendment in effect repealed the 1983 amendment, Ano cases after *Disco Aluminum* overruled its holding that these (out-of-state contracts) were exempt under the withdrawal provision.@ Taxpayer=s Brief at 4. I disagree.

The Supreme Court held in *City of Huntsville v. City of Madison* that the pre-1983 cases of *Alabama Precast* and *Home Tile* now govern. Those cases clearly hold that materials withdrawn from inventory in Alabama and used on furnish-and-install contracts outside of Alabama are taxable in Alabama under the Awithdrawal@ provision. *Disco Aluminum* is contrary to those cases, and no longer applies.

Issue (2) - Were August and September 1995 timely assessed?

The Department generally has three years to enter a preliminary assessment for additional tax due. Code of Ala. 1975, '40-2A-7(b)(2). The preliminary assessments in issue were entered on December 14, 1998, more than three years after the returns for August and September 1995 were due. However, those months were timely assessed within the special six year statute at Code of Ala. 1975, '40-2A-7(b)(2)a.

Section 40-2A-7(b)(2)a. allows the Department six years to assess tax if a taxpayer omits more than 25 percent from the tax base. The Department audit established, and the

Administrative Law Division has affirmed, that the Taxpayer underreported its sales tax liabilities by well over 25 percent for August and September 1995. The Department thus timely assessed those months within the six years allowed.

Issue (3) - Should the penalties be waived for reasonable cause?

A penalty assessed by the Department may be waived for reasonable cause. Code of Ala. 1975, '40-2A-11(h). AReasonable cause@ includes instances in which a taxpayer acts in good faith.

The Taxpayer claims it was previously audited by the Department, and was not taxed on its withdrawal of materials used on furnish-and-install contracts outside of Alabama or with tax-exempt entities. It thus reasonably believed that such withdrawals were not taxable. It also reasonably believed that its sales to churches and other entities that claimed to be exempt were, in fact, non-taxable. The sales tax related penalties are thus waived.

The final assessments, less the penalties included in the sales tax assessments, are affirmed. Judgment is entered against the Taxpayer for State sales tax of $25,931.10, State use tax of $982.36, City of Wetumpka sales tax of $12,317.91, and City of Wetumpka use tax of $1,049.49. Additional interest is also due from the date of entry of the final assessments, September 1, 1999.

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

Entered October 3, 2000.