VISION SOUTHEAST COMPANIES, INC. 143 BUSINESS CENTER DRIVE BIRMINGHAM, AL 35244-2022,	§	STATE OF ALABAMA ALABAMA TAX TRIBUNAL
Taxpayer,	§	DOCKET NO. S. 14-1006
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed Vision Southeast Companies, Inc. ("Taxpayer") for consumer use tax for October 2009 through August 2013. The Taxpayer appealed to the Tax Tribunal pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on August 6, 2015. Joe Mays and Will Thistle represented the Taxpayer. Assistant Counsel Mary Martin Mitchell and Hilary Parks represented the Department.

The Taxpayer designs, furnishes, and installs security systems primarily for governmental and commercial customers throughout the Southeastern United States. It also sometimes sells various of the security systems components, i.e., computers, servers, monitors, cards, software, etc., and other materials to customers at retail without also installing the components and materials.

The Taxpayer maintains a general inventory of components and materials in a storeroom at its headquarters in Pelham, Alabama. When the Taxpayer sells an item to a customer at retail, and is not also required to install the item, it removes the item from its inventory and delivers it to the customer. When the Taxpayer contracts to furnish and install a security system for a customer, it moves the components and materials needed for

the job from its general inventory and places the items in separate, job-specific cages in the inventory room. It thereafter withdraws and uses the items to fulfil the contract.

The Taxpayer purchased all components and materials tax-free during the period in issue using its Alabama sales tax license number. If it subsequently sold a component or material to a nonexempt customer at retail in Alabama, it charged the customer sales tax on the retail sales price it charged for the item. If the Taxpayer used a component or material on a furnish and install contract with a nonexempt customer in Alabama, it treated the transaction as a taxable retail sale. It accordingly charged sales tax on the separately stated sales prices for the components and materials. It filed monthly sales tax returns during the period in issue and remitted the sales tax collected from its customers as indicated above.

The Department audited the Taxpayer for the subject period and determined that the Taxpayer should have paid sales tax when it purchased the components and materials from its vendors pursuant to the sales tax "contractor" provision at Code of Ala. 1975, §40-23-1(a)(10). That provision defines a sale at retail to include "[s]ales of building materials to contractors, . . . for resale or use in the form of real estate. . . ." Under the contractor provision, the taxable sale occurs when the contractor purchases building materials from its vendors. See generally, *State, Dept. of Revenue v. Montgomery Woodworks, Inc.*, 389 So.2d 510 (Ala. Civ. App. 1980), writ denied 389 So.2d 513. The Department determined that because the Taxpayer failed to pay sales tax when it purchased the components and

materials from its vendors, it was liable for use tax based on its cost of the components and materials.[1] It assessed the Taxpayer accordingly. This appeal followed.

The Taxpayer argues that the contractor provision does not apply because (1) the component parts of the security systems were not building materials, and (2) most of the components and materials were not attached to and did not become a part of real property, both of which are required for the contractor provision to apply.

The Taxpayer also contends that it operated as a "dual business" during the subject period pursuant to Department Reg. 810-6-1-.56(1) because it both sold components and materials at retail to the public on a recurring basis, and also used the components and materials on its furnish and install contracts. It argues that as a dual business, it correctly purchased all items tax-free at wholesale, and that it also correctly collected sales tax on its over-the-counter retail sales. It concedes, however, that as a dual business it should not have paid sales tax on the prices it charged its customers on the items used on the installation contracts. Rather, if should have paid sales tax on its wholesale cost when it withdrew the items from inventory. It thus contends that because sales tax was due and should have been paid on the items, the Department incorrectly assessed it for use tax instead of sales tax, and consequently, that the use tax assessment in issue must be voided.

The Department counters that it correctly assessed the Taxpayer pursuant to the contractor provision because while some of the security system components and materials

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[1] The Department assessed the Taxpayer for use tax on all of its purchases during the audit period. It then allowed the Taxpayer a credit against the use tax due for the sales tax the Taxpayer had reported and paid during the period.

were not sufficiently attached to become a part of realty, those items were necessary and required for the security system to function. The Department thus argues that the system as a whole should be treated as realty, citing the Revenue Department's Administrative Law Division's holding in *Hunter Security, Inc. v. State of Alabama*, Docket S. 05-1309 (Admin. Law Div. 6/25/2006).

The Department also contends that the Taxpayer was not a dual business during the subject period because (1) it did not make a sufficient number of retail sales during the period; (2) it did not make routine, over-the-counter sales to the general public at its facility in Pelham; and (3) it did not maintain a general inventory from which it both sold items at retail and also withdrew and used items on its furnish and install contracts.

After the audit, a Department examiner performed a month by month analysis of the Taxpayer's invoices for the sample period May through October 2012 to determine if the Taxpayer qualified as a dual business. The analysis indicated that for May 2012, the Taxpayer's retail sales, referred to as "box sales," totaled approximately 22 percent of the Taxpayer's total receipts for the month. The examiner removed a retail sale to UAB during the month that totaled $60,775.36, however, because he considered it extraordinary. "This amount is by far the largest box sale in the sample period. This amount should be considered an extraordinary amount, and removed from the calculation. . . ." Dept. Ex. 4 at 2. The retail or box sale percentage for May 2012 was approximately 10 percent after removal of the UAB sale. The percentage of retail sales for June through October 2012, as determined by the examiner, was approximately 8 percent, 3 percent, 17 percent, 2.5 percent, and 10 percent, respectively. The average monthly percentage was 10.58 percent before the UAB sale was removed, and 8.58 percent after that sale was removed. Based

on his analysis, the examiner concluded that the Taxpayer had not operated as a dual business:

> Vision Southeast Companies has asserted that they are a dual business based on the box sales made during the sample period. I do not believe that the box sales shown during the sample period are sufficient to qualify them as a dual business. Rule 810-6-10.55 Dual Business (1) states "The term 'dual business' as used in this rule shall mean a business which both makes retail sales of tangible personal property to the public on a recurring basis and withdraws tangible personal property for use from the stock of goods." The term public is defined to mean ordinary people in general, the community. The box sales made by Vision Southeast were made to companies which already had a business relationship with the company. The rule further states, in part, in paragraph (3) "To qualify as a dual business, the business must have a substantial number of retail sales." The examination of the box sales for the sample period shows that the average of the dollar percentage of the box sales to the total invoices is on 10.5%, if the box sales are accepted with no adjustments. Therefore I do not believe that Southeast Vision Co has met the qualifications of substantial retail sales to the public to qualify as a dual business.

The Department primarily relies on *Hunter Security*, supra, in support of its position that the contractor provision applies. The taxpayer in that case installed security and fire alarm systems. The Department's Administrative Law Division held that the contractor provision applied because the system components, i.e., television monitors, video recorders, etc., constituted building materials, and that while some of the components were not attached to realty "they are required for the system to operate, and together make up a single, integrated security system that was intended to be and is a fixed part of the building or structure in which it is installed. Those items are necessary to make complete or usable the overall system, and thus became a part of the real property. . . ." *Hunter Security* at 7.

As discussed, the Taxpayer argues that the contractor provision does not apply because most of the components and materials in issue were not building materials, and also that some of the items were not sufficiently attached so as to become a part of the

realty. The above arguments are not easily dismissed, notwithstanding the holding in *Hunter Security*.[2] But those issues need not be decided here because even if the contractor provision technically applied, the Taxpayer was also a dual business during the period in issue.[3] Consequently, the dual business regulation, Reg. 810-6-1-.56, and not the contractor provision, governed how the Taxpayer should have reported and paid sales tax during the period. The dual business regulation reads in pertinent part:

> (1) The term "dual business" as used in this rule shall mean a business which both makes retail sales of tangible personal property to the public on a recurring basis and withdraws tangible personal property for use from the same stock of goods.
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> (2) Dual businesses in Alabama shall obtain a sales tax license and purchase all of the items they sell and withdraw for use at wholesale, tax-exempt. These businesses shall collect sales tax on their retail sales to nonexempt customers and compute sales tax on items which they withdraw from stock for use. The taxes collected on their sales to nonexempt customers and the taxes computed on their withdrawals shall be reported on their sales tax returns and remitted to the Department of Revenue. State and local sales taxes are due on withdrawals at the time and place of the withdrawal from inventory and shall be computed on the cost of the property to the business making the withdrawal. The sales taxes applicable to withdrawals are those taxes applicable in the jurisdiction where the withdrawal occurs. (Sections 40-23-1(a)(9), 40-23-1(a)(10), and 40-23-6, Code of Alabama 1975)
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> (3) To qualify as a dual business, the business must have a substantial number of retail sales. Contractors, plumbers, repairmen, and others who make isolated or accommodation sales and who have not set themselves

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[2] The Administrative Law Division was unaware when it ruled in *Hunter Security* that the Department treated many of the system components in issue as personal property for property tax purposes. And before *Hunter Security*, the Department apparently treated those components of a security system that were attached to realty as taxable at the time of purchase under the contractor provision, and those components that were not attached to realty as personal property that the contractor was selling at retail. See, Rev. Rul. 97-014.

[3] The dual business regulation did not apply in *Hunter Security* because the taxpayer in that case did not also sell the system components at retail.

> up as being engaged in selling do not qualify as a dual business. Where only isolated sales are made, tax should be paid on all of the taxable property purchased with no sales tax return being required of the seller making such isolated or "accommodation" sales. (Section 40-23-1(a)(10), Code of Alabama.

If a contractor also qualifies as a dual business pursuant to Reg. 810-6-1-.56, as in this case, the contractor is not required to pay sales tax pursuant to the contractor provision when it purchases components, building materials, etc. from its vendors. Rather, pursuant to paragraph (2) of the dual business regulation, the dual business contractor must purchase all items tax-free at wholesale, as the Taxpayer did in this case. It should then collect and remit sales tax on the gross proceeds from its over-the-counter retail sales in Alabama, and also report and remit sales tax on its wholesale cost of the items it withdrew from inventory in Alabama and used on its furnish and install contracts.[4]

The Department argues that the Taxpayer did not qualify as a dual business during the audit period because it did not "make retail sales . . . to the public on a recurring basis and also withdraw tangible personal property for use from the same stock of goods. . .," and also that it did not "have a substantial number of retail sales," as required by paragraphs (1) and (3), respectively, of Reg. 810-6-1-.56. I disagree.

The Taxpayer made approximately $2 million dollars in retail sales during the audit period. It made 149 retail sales to 40 different customers that totaled over $388,000 in retail sales during the 6 month sampling period reviewed by the Department. Those retail

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[4] The practical and obvious purpose for the dual business regulation is that if a contractor also makes over-the-counter retail sales, the contractor cannot know when it purchases building materials whether it will sell the materials at retail or use them to fulfill a furnish and install contract. Consequently, the contractor is required to purchase materials tax-free and then later report and pay tax based on whether the items are sold at retail or used and consumed by the contractor on a contract or otherwise.

sales totaled approximately 10 percent of the Taxpayer's total business during the period. Clearly, those amounts establish that the Taxpayer made substantial and recurring retail sales during the audit period.

The above is supported by the Administrative Law Division's holding in *Copeland Building Co., Inc. v. State of Alabama*, Docket S. 90-155 (Admin. Law Div. 8/6/1991). The taxpayer in *Copeland* contracted to furnish and install glass on various construction projects. It also made approximately $840,000 in over the counter retail sales during the three and one-half year audit period, which accounted for approximately five percent of its gross business during the period. The taxpayer argued that it was not a dual business because it did not make a sufficient number of retail sales during the audit period. The Administrative Law Division disagreed:

> The Taxpayer contends that the dual business regulation is inapplicable because it was a contractor only and did not have a substantial number of retail sales during the subject period. However, over $841,000.00 in retail sales constitutes a substantial retail business even though the retail sales accounted for only approximately 5% of the Taxpayer's total gross proceeds.

Copeland at 4.

The Taxpayer's retail sales in this case clearly exceeded the dollar value of the retail sales involved in *Copeland*, and the percentage of the Taxpayer's retail sales was more than double the percentage in *Copeland.* The Taxpayer thus clearly had retail sales sufficient to trigger the dual business regulation.[5]

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[5] The Taxpayer's $60,000 plus sale to UAB in May 2012 was extraordinary for the six month sampling period, but not for the entire audit period. But the facts establish that the Taxpayer operated as a dual business during the audit period, whether the UAB sale is removed from the sampling or not.

The fact that the Taxpayer made only a relatively few walk-in retail sales at its headquarters in Pelham is irrelevant, as is the fact that many, but not all, of the Taxpayer's retail sales were to customers for which the Taxpayer had previously installed a security system. To begin, many retail businesses make only a few, if any, sales to walk-in customers. Amazon and any local pizza delivery business are prime examples, to name only a few. Rather, those businesses primarily take orders over the telephone, via e-mail, or through their website, and then deliver the goods to their customers, as the Taxpayer did in this case. A retail sale is a retail sale, regardless of where or how the goods are ordered or delivered.

Nor is it relevant that many of the Taxpayer's retail or box sales were to customers for which the Taxpayer had previously installed a security system. Retailers have different business models, and many sell primarily to only a limited or niche group of customers, as the Taxpayer did in this case, and not to the public at large. When the Taxpayer sold a component or any other item to a customer for which it had previously installed a security system, that subsequent transaction constituted a standalone retail sale. In short, the Taxpayer's commercial and governmental customers for which it installed security systems and also later sold items to at retail were the Taxpayer's "public" within the context of the dual business regulation. And as discussed, the Taxpayer also made some retail sales to customers for which it had not also installed a security system.

The Department is correct that the dual business regulation applies only if a taxpayer maintains a general inventory or stock of goods that it both sells at retail and also withdraws and uses on furnish and install contracts. See generally, *Tennessee River Steel, et al. v. State of Alabama*, Docket S. 10-612 (Admin. Law Div. 4/26/2012). I

disagree, however, with the Department's claim that the Taxpayer did not maintain such a general inventory of goods during the period in issue. As explained by the Taxpayer's Senior Vice President at the August 6 hearing, while the Taxpayer special ordered some items for use on specific installation contracts, it also maintained a general inventory of items that it either sold at retail or used on its contracts.

Q. Do you maintain an inventory?

A. We do.

Q. Do you have a large room there in the back that's full of parts and components and so forth in that inventory?

A. We have a large warehouse that holds significant inventory.

Q. And when you get a job or when people order things do you take things out of inventory to fulfill that order?

A. Yes, sir.

Q. Do you sometimes order things specially for a job if it's something you don't already have in inventory?

A. We do.

Q. And do you do that for business instate and out of state?

A. Yes.

Q. But when you're dealing with things that you have in inventory do you try to maintain a sufficient inventory supply that you can fill those needs?

A. We do.

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Q. So am I correct that once you identify the components that you're going to need for a job or for an order you transfer them off those big shelves into those cages and then can ship them right out of the cage?

A. That's correct.

Q. An so is that the way you identify stuff out of your inventory and put it on jobs?

A. Yes, sir.

Q. And then once you deplete your inventory by shipping it out to customers or putting it in jobs do you order more inventory to keep your level of inventory up?

A. Yes. We via monitoring our job pipeline, what we know that we're going to use in combination with our historical needs, we try to keep that main cage that you see stocked to a level to accommodate what we expect.

Q. And do you keep that inventory, not only for jobs that you've got on order but for customers that walk in the door, customers that call you and say I'm going to need this and that; you try to maintain that inventory to satisfy those needs?

A. Yes, sir. The boxes that you see that I was talking about similar to these are core products that we sell or have an expectation to sell. We keep a running inventory of those items. Specialty items that we talked about earlier we order those, typically.

(T. 40 – 41 and 44 – 45).

Finally, the dual business regulation, at paragraph (3), provides that "[c]ontractors . . . who make isolated or accommodation sales, and who have not set themselves up as being engaged in selling do not qualify as a dual business." In that case, "no sales tax return (is) required of the seller making such isolated or accommodation sales." By arguing that the Taxpayer did not qualify as a dual business, the Department's position must be that the Taxpayer was not a retailer, and that the approximately $2 million in retail sales the Taxpayer made to customers, and paid sales tax on, during the audit period were nontaxable isolated or accommodation sales. Clearly that was not the case. The Department also concedes in its Post-Hearing Brief at 12, note 1, "that it is undisputed that Vision operated as a retailer during the audit period, . . ." If the Taxpayer was a retailer, as

conceded by the Department, then by definition the Taxpayer was operating as a dual business that both made retail sales and also withdrew items from the same inventory for use on its furnish and install contracts.

As discussed, the Taxpayer argues that because the dual business regulation applied, the Department should have assessed it for sales tax, not use tax, on the components and materials it withdrew from inventory and used on its installation contracts. It thus asserts that the use tax final assessment in issue was erroneously entered, and must be voided. I disagree.

The Taxpayer is correct that its withdrawal of the components and materials from inventory for use on the furnish and install contracts constituted retail sales on which sales tax was due. The Department thus could have assessed the Taxpayer for sales tax on its wholesale cost of the components and materials.[6] But as explained below, the fact that the Department could have assessed sales tax did not prevent the Department from assessing the Taxpayer for Alabama use tax.

Alabama's use tax at Code of Ala. 1975, §40-23-61(a) is levied on the storage, use, or other consumption of tangible personal property in Alabama that was previously purchased at retail. See generally, *In re Culverhouse, Inc.*, 358 B.R. 806 (M.D. Ala. 2006), affirmed 214 Fed. Appx. 921. As discussed, the components and materials used on the installation contracts were "purchased at retail" when withdrawn from inventory under the

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[6] Sales tax is due pursuant to the withdrawal provision when and where the withdrawal occurs. See generally, *City of Huntsville v. City of Madison*, 628 So.2d 584 (Ala. 1993). Consequently, because the Taxpayer's withdrawals were from its facility in Alabama, the Department could have assessed the Taxpayer for sales tax on all of its withdrawals, regardless of the exempt status of the customer or where the contract was performed.

§40-23-1(a)(10) withdrawal provision. The Taxpayer also used and consumed the items when it used them to complete the installation contracts. The Alabama use tax thus applied, but only concerning those items that the Taxpayer used on contracts performed in Alabama because Alabama's use tax applies only to property used or consumed in Alabama. Consequently, Alabama use tax is not due on the components and materials the Taxpayer used on its furnish and install contracts performed outside of Alabama during the audit period.

Importantly, Alabama's sales tax and use tax are not mutually exclusive. That is, a retail sale in Alabama can be subject to Alabama sales tax, and the subsequent use of the property in Alabama can also be subject to Alabama's use tax levy. As explained below in *Whatley Contract Carriers, LLC v. State of Alabama*, Docket U. 03-372 (Admin. Law Div. 3/23/2004), to prevent double taxation, the Legislature initially exempted from the use tax any property the sale of which was subject to Alabama's sales tax. See, Code of Ala. 1975, §40-23-61(1). Again as explained below in *Whatley Contract Carriers*, the Legislature amended the §40-23-61(a) exemption in 1997 to close a loophole in the sales and use tax law identified by the Administrative Law Division in *Bluegrass Bit Co. v. State of Alabama*, Docket U. 96-294 (Admin. Law Div. 1/16/1997). The amended statute now exempts property purchased at retail and subsequently used in Alabama from Alabama's use tax only if Alabama sales tax was actually paid on the property. The Final Order in *Whatley Contract Carriers* reads in part, as follows:

> The Taxpayer argues that the trucks in issue were not subject to Alabama use tax because the use tax applies only to property purchased at retail outside of Alabama, but not also to property purchased at retail in Alabama. I disagree.

Alabama's use tax levy does not and has never limited the use tax to only property purchased at retail outside of Alabama. Rather, it is broadly imposed on all "tangible personal property . . . purchased at retail . . . for storage, use, or other consumption in this state. . ." Section 40-23-61(a). However, until 1997, the use tax applied as a practical matter to only property purchased outside of Alabama because the use tax law (at the time) included an exemption at §40-23-62(1) for "property, the gross proceeds of sales of which are required to be included in the measure of the (Alabama sales tax)." (footnote omitted) That is, property sold at retail in Alabama and thus subject to Alabama sales tax was exempt from Alabama use tax. Because the §40-23-62(1) exemption limited the use tax as a practical matter to only property purchased at retail outside of Alabama, Alabama's appellate courts often stated the general rule that the "sales tax statutes apply to retail sales or purchases taking place within the state; the use tax statutes apply to goods purchased at retail outside of the state and brought into the state for use by the purchaser." *State of Alabama v. Marmon Industries, Inc.*, 456 So.2d 798, 801 (Ala. Civ. App. 1984), citing *State of Alabama v. Thiokol Chemical Corp.*, 246 So.2d 447, 448 (Ala. Civ. App. 1970); see also, *State v. Toolen*, 167 So.2d 546 (Ala. 1964); *Paramount-Richards Theatre, Inc. v. State*, 55 So.2d 812 (Ala. 1951). It must be emphasized, however, that the use tax applied as a practical matter only to property purchased at retail outside of Alabama only because property purchased at retail in Alabama, and thus subject to Alabama sales tax, was exempted from the tax.

The purpose for the §40-23-62(1) exemption was to avoid double taxation. Without the exemption, property sold at retail in Alabama and subsequently used in Alabama would have been subject to both Alabama sales tax and Alabama use tax. The Alabama Supreme Court recognized in *Paramount-Richards*, *supra*, that the Alabama use tax levy also applied to property sold at retail in Alabama, and that the use tax exemption for property subject to Alabama sales tax was necessary to avoid double taxation:

> The technical means of confining the use tax to interstate sales or sales (purchases) made outside of the state for use in the state, is accomplished by exempting from the provisions of the use tax any property sold under such circumstances as would make the sale taxable under the provisions of the Sales Tax Act. In other words, the Use Tax Act is drafted in such manner as to impose a use tax upon the use of tangible personal property within the state, at the same rate as the sales tax. In order to limit the use tax to interstate transactions, the Act is so worded as to exempt from the measure of the tax all retail sales of tangible personal property made within the state. Sec. 789, Title 51, Code 1940. But for this provision, the Use Tax Act would have the effect of imposing an additional tax in the

> same amount as imposed by the Sales Tax Act. In this way, retail sales made within the state would be subjected to a double tax.

Paramount-Richards, 55 So.2d at 821.

The use tax exemption at §40-23-62(1) was amended in 1997 in response to the Administrative Law Division's decision in *Bluegrass Bit Co. v. State of Alabama*, U. 96-294 (Admin. Law. Div. 1/16/97). Bluegrass Bit purchased property at retail from out-of-state vendors that it subsequently used in Alabama. Delivery occurred and the sales were closed in Alabama. The Department nonetheless assessed Bluegrass Bit for use tax on the property based on its long-held position that regardless of where the retail sale occurred, Alabama use tax applied if the seller was physically located outside of Alabama. The Administrative Law Division held that because the sales were closed in Alabama, Alabama sales tax applied, citing *State v. Dees*, 333 So.2d 818 (Ala. Civ. App. 1976). (footnote omitted) The use tax assessment was thus voided because the property, being subject to Alabama sales tax, was exempt from Alabama use tax pursuant to the §40-23-62(1) exemption discussed above.

In *Bluegrass Bit*, the Administrative Law Division also discussed a loophole in Alabama's sales and use tax structure. The loophole occurred if an out-of-state retailer with no nexus with Alabama made retail sales closed in Alabama. The sales would be subject to Alabama sales tax, but the out-of-state retailer could not be assessed because of lack of nexus with Alabama. (footnote omitted) The in-state purchaser also could not be assessed for sales tax because a purchaser cannot be directly assessed for sales tax under Alabama law. Alabama use tax also could not be assessed because the sales were subject to Alabama sales tax, and thus exempt from use tax pursuant to the §40-23-62(1) exemption. Consequently, neither Alabama sales tax nor Alabama use tax could be collected on the transactions.

The Alabama Legislature closed the *Bluegrass Bit* loophole by enacting Act 97-301. That Act amended §40-23-62(1) to provide that the use tax exemption applies only to "property on which the sales tax imposed (by Alabama law) is paid by the consumer to a person licensed under (the Alabama sales tax law)." Section 2 of Act 97-301 provided – "The intent of this Act is to clarify that current law exempts from use tax only that property sold at retail in Alabama on which sales tax was paid." (footnote omitted) As amended, §40-23-62(1) now exempts from Alabama use tax only that property sold at retail in Alabama on which Alabama sales tax was paid. Property sold at retail in Alabama on which Alabama sales tax is not paid is not exempt.

Whatley at 6 – 10.

The components and materials used on the installation contracts in issue would have been exempt from use tax under the pre-1997 version of the §40-23-61(1) exemption because the items were "subject to" Alabama sales tax when withdrawn from inventory in Alabama. The use tax exemption does not apply under the amended statute, however, because the Taxpayer failed to pay the sales tax due on the items. Consequently, the Taxpayer's subsequent use of the components and materials on its Alabama furnish and install contracts was not exempt from Alabama use tax. The fact that some of the Taxpayer's furnish and install customers were exempt entities is also irrelevant because the Taxpayer did not sell the components and materials to the exempt customers. Rather, as discussed, it personally used the items to fulfil the contracts with its customers.[7] See

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[7] For a similar result, see, *Alabama Marble, Inc. v. State of Alabama*, Docket S. 10-257 (Admin. Law Div. 11/30/2010). In that case, the taxpayer purchased marble tax-free at wholesale using its Alabama sales tax number. It then manufactured the marble into custom ordered tubs, sinks, etc. that it subsequently installed on specific jobs. The taxpayer did not also resell marble at retail, so the dual business did not apply. Rather, the Division held that the contractor provision applied, and consequently, that the taxpayer should have paid sales tax when it purchased the marble from its vendors. Because the taxpayer failed to do so, the Division upheld the Department's assessment of use tax on the taxpayer's use of the marble on its Alabama furnish and install contracts. The Final Order in *Alabama Marble* reads in part, as follows:

> Because the contractor provision applies, the sales by the marble vendors to the Taxpayer were retail sales. The Taxpayer thus should have paid sales tax when it purchased the marble from the vendors. It failed to do so, and instead purchased the marble tax-free using its Alabama sales tax number. Consequently, it is now liable for use tax on the marble. The Department thus correctly assessed the Taxpayer for use tax on its cost of the marble purchased from the out-of-state vendors and on which no sales or use tax was previously paid.

Alabama Marble at 4.

generally, *Alabama v. King & Boozer, a partnership, et al.*, 62 S. Ct. 43 (1941).

In summary, the Taxpayer correctly reported and remitted sales tax on the items it sold at retail (box sales) to nonexempt purchasers in Alabama during the audit period. It incorrectly paid sales tax on the marked-up prices it charged for the components and materials it used on the furnish and install contracts in Alabama. Rather, it should have paid sales tax on its wholesale cost of the components and materials when it withdrew the items from inventory, regardless of where the contract was performed or the tax status of the customer. Because it failed to do so, the Department could have assessed it for sales tax on its wholesale cost of the items. The Department failed to do so, however, and instead assessed the Taxpayer for use tax on all of its wholesale purchases. As discussed, the Department properly assessed the Taxpayer for use tax, but only on those items withdrawn and used on contracts performed in Alabama, including those contracts performed for tax exempt entities.

The Department's audit report includes a detailed list of the Taxpayer's purchases from October 2009 through November 2012. The December 2012 through August 2013 purchases were estimated because the Taxpayer failed to provide records for those months. It is not known if the purchase information in the audit report is adequate to allow the Department to recompute the use tax due as indicated above.

The Department should notify the Tribunal by January 8, 2016 as to whether it can recompute the correct tax due using its audit report information. If the information is insufficient, it should identify what information it needs to recompute the tax due. In that case, it is expected that Department and Taxpayer representatives would need to meet to identify and review the relevant records. Appropriate action will be taken after the

Department responds concerning whether it can recompute the tax due using the audit report information.

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, §40-2B-2(m).

Entered December 7, 2015.

BILL THOMPSON
Chief Tax Tribunal Judge

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