<table>
<tr><td>IPSCO STEEL (ALABAMA), INC.
12400 HIGHWAY 43
AXIS, AL 36505,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.</td><td>§

§

§

§

§</td><td>STATE OF ALABAMA
ALABAMA TAX TRIBUNAL

DOCKET NOS. S. 07-370
S. 10-269
S. 11-564
S. 12-1435</td></tr>
</table>

OPINION AND PRELIMINARY ORDER

These consolidated appeals involve denied petitions for refunds of sales and use tax filed by the above Taxpayer concerning various periods from August 2001 through June 2014. A hearing was conducted in June 2011. A second hearing was conducted in April 2015. Whitney Compton and Elaine Bialczak represented the Taxpayer at both hearings. The Revenue Department was represented by Assistant Counsel Wade Hope at the June 2011 hearing, and by Assistant Counsel Glen Powers at the April 2015 hearing.

The parties have notified the Tribunal that they have settled most of the disputed issues, and that only four issues are still contested. Three of the issues involve whether the Taxpayer should have purchased (1) railcar brackets, (2) work rolls, and (3) coiler drum rolls tax-free at wholesale. The fourth issue was raised by the Taxpayer at the April 2015 hearing, and involves whether the Taxpayer is due a refund of the sales tax it paid on the work and coiler drum rolls during a portion of the period in issue because use tax, and not sales tax, was due.

(1) The Railcar Brackets.

The Taxpayer began manufacturing steel plates and other heavy steel products at its facility in Axis, Alabama in November 2001. It delivered many of the steel products to its customers on flatbed railcars. The Taxpayer purchased the railcar brackets in issue and

used them to hold the products in place and prevent them from shifting during transport. The brackets were custom-installed to fit the shape of the steel being hauled. They were used only once, were not returned to the Taxpayer, and were not permanently attached to the railcars.

The Taxpayer argues that it erroneously paid sales tax when it purchased the brackets because the brackets are "containers," as defined at Code of Ala. 1975, §40-23-1(a)(9)(c), and thus should have been purchased tax-free at wholesale. That statute provides that a wholesale sale includes:

> A sale of containers intended for one-time use only, and the labels thereof, when containers are sold without contents to persons who sell or furnish containers along with the contents placed therein for sale by persons.

For the reasons explained below, the railcar brackets in issue are not containers within the purview of the above statute.

"Container" is not defined in Alabama's tax code, Title 40, Code of Ala. 1975. In such cases, the word must be given its normal, commonly understood meaning. *State, Dept. of Revenue v. American Brass, Inc.*, 628 So.2d 920 (Ala. Civ. App. 1993). "Container" is defined by the American Heritage Dictionary, 2nd College Edition, as "[c]ontainers, as a box or barrel, in which material is held or carried; receptacle."

A railcar bracket is not a container within the specific wording of or as otherwise contemplated by the statute. A container within the intent of §40-23-1(a)(9)c. is a receptacle into which a manufacturer places or puts its manufactured product, and then sells the product in the container to its customers. For example, empty glass jars and metal cans purchased by a manufacturer and into which the manufacturer places its

manufactured goods for sale are “containers,” as envisioned by §40-23-1(a)(9)(c). The steel plates manufactured and sold by the Taxpayer are not placed in a container for sale. Rather, they are sold, without being in a container, and then after being sold are shipped to the customer via a railcar. A railcar contains the steel in a sense because the steel is carried on the railcars. But railcars are not containers within the context of §40-23-1(a)(9)(c) because the steel products are not “placed (in the railcars) for sale by persons.” And if railcars are not containers under the statute, certainly the brackets that secure the steel on the railcars cannot be containers. That is, the steel is not placed on or in either the railcars or the brackets for sale. Rather, the brackets are merely used to secure the steel during transit to the customer after it is sold. Department Reg. 810-6-1-.69(11) is directly on point.

> (11) Except for supplies which qualify for the exemptions (not relevant to this case), shipping supplies such as nails, lumber, metal straps, dunnage, and plates which are used for fastening or securing manufactured or compounded products into railroad cars, trucks, aircraft, or vessels for shipment are taxable at the time of purchase.

A Department regulation interpreting a statute should be given great weight, and should be followed unless it is unreasonable or contrary to the statute that it seeks to interpret. *East Brewton Materials, Inc. v. State, Dept. of Revenue*, 233 So.2d 751 (1970). The holding in Reg. 810-6-1-.69(11) that shipping supplies used to fasten or secure manufactured items to railroad cars, etc. during transit are taxable when purchased is

reasonable, and certainly not contrary to the language and intent of the statute.[1]

The Taxpayer argues that the Department treated banding and blocking lumber that was also used to transport the steel as containers, and that the railcar brackets should not be treated any differently. The fact that the Department may have improperly treated some shipping supplies as containers does not, however, require the Department to make the same mistake concerning the brackets.

The Taxpayer also argues that even if the brackets are not containers, it still should have purchased the brackets tax-free at wholesale because it resold the brackets to its customers at retail. "Uncontroverted testimony in the record establishes that IPSCO, a licensed retailer, purchased the railcar brackets, transferred title to the brackets to its customers, and charged for the brackets as part of the shipping fee. . . No clearer purchase for resale could occur." Taxpayer's Reply Brief at 10. I disagree.

A retail merchant can purchase tangible personal property at wholesale only if the merchant is in the business of reselling that particular type of property at retail. The Taxpayer in this case is in the business of manufacturing and selling steel products only, not railcar brackets. Rather, as discussed, the Taxpayer purchased the brackets in issue for its own use to secure the steel products during delivery to its customers.

It is irrelevant that after their one-time use, the customers did not return the brackets to the Taxpayer. The brackets were custom-formed to fit the particular size of the steel

---

[1] The Taxpayer argues that Reg. 810-6-1.69(11) applies only to common carriers that transport goods for their customers. Nothing in the statute suggests that reading. Rather, the regulation clearly applies to manufacturers such as the Taxpayer that purchase shipping supplies, i.e., railcar brackets, for use in delivering their manufactured goods to their customers.

products being shipped, and thus could not be reused. Consequently, after their one-time use, they were of no value to either party, and were scrapped by the customers. Returning the brackets to the Taxpayer would also have been an unnecessary cost for the customers.

The Taxpayer claims that it transferred the title to the brackets to its customers. I agree that if the Taxpayer had sold the brackets to the customers, title would have transferred upon delivery, see Code of Ala. 1975, §40-23-1(a)(5). As discussed, however, the Taxpayer did not sell the brackets to the customers. The fact that the customers ended up with physical possession of the brackets does not equate with a transfer of title.

It is also telling that the Taxpayer included the cost of the brackets as a part of its shipping fee. If the Taxpayer was selling the brackets, the charge for the brackets would have been a part of the sales price, not a part of the separate shipping fee. The evidence is undisputed that the Taxpayer billed its customers for the brackets as a part of the shipping fees, not as part of the sales price for the steel products being sold.

> ALJ Thompson: Excuse me a minute. When y'all bill the customer for the steel, do you bill them for the brackets?
>
> The Witness: No, sir.
>
> ALJ Thompson: Okay.
>
> Q. Are the brackets included in the cost of the steel?
>
> A. They're included as part of the shipping supplies so, yes, they're part of the cost, ...

(June 24, 2011 T. 79 – 80).

The Department properly denied the Taxpayer's refund petitions concerning the railcar brackets.

(2) Work and Coiler Rolls.

Work and coiler rolls are component parts of machines used by the Taxpayer to produce the steel products. Specifically, they come into contact with and are used to shape the raw steel into the thickness specified by the Taxpayer's customers.

The Taxpayer argues that miniscule parts of the work and coiler rolls wear off while in contact with the steel being manufactured. It asserts that parts of the rolls become a part of either the steel products or the residue mill scale, both of which are subsequently sold by the Taxpayer. It thus contends that it improperly paid sales tax when it purchased the rolls during the periods in issue because they became "ingredient or component parts" of the steel products or mill scale, and thus should have been purchased tax-free at wholesale pursuant to Code of Ala. §40-23-1(a)(9)b.

The Department argues that the §40-23-1(a)(9)b. ingredient or component part provision does not apply because the Taxpayer failed to present sufficient technical and/or scientific evidence showing that parts of the rolls became an ingredient or component part of the steel products or the mill scale. It also contends that even if the rolls became a part of the steel products, the ingredient or component part wholesale sale provision at §40-23-1(a)(9)b. still does not apply because the rolls constituted depreciable capital equipment/machinery that is specifically excluded from the provision. Section 40-23-1(a)(9)b. reads in pertinent part:

> . . . provided, however, that it is the intent of this section that no sale of capital equipment, machinery, tools, or product shall be included in the term "wholesale sale." The term "capital equipment, machinery, tools, or product" shall mean property that is subject to depreciation allowances for Alabama income tax purposes.

The Department is correct that there was no technical or scientific study introduced into evidence showing that miniscule parts of the rolls became a part of the steel products or the mill scale manufactured and sold by the Taxpayer. There is, however, testimony that the rolls "wear" during the manufacturing process. When asked if "a portion of the drum wears into the steel," the Taxpayer's plant manager of the Axis facility answered "[y]es. It will wear." (April 13, 2015 T. at 41).

The evidence is sufficient to find that the rolls wear during the manufacturing process, and that parts of the rolls become an ingredient or component part of the steel or mill scale. Alabama law does not require that the Taxpayer must have intended that the rolls become a part of the steel products or mill scale for the ingredient or component part provision to apply. See generally, *Carlisle Engineered Products, Inc. v. State of Alabama*, Docket U. 99-528 (O.P.O. 4/17/2000), and cases cited therein.

As indicated, the ingredient or component part providsion does not apply to machinery "that is subject to depreciation." As a rule, property that has a useful life of less than one year is not depreciable. See, IRS Publication 946. The evidence shows that the Taxpayer wears out approximately 25 to 30 work rolls in a year. Those items have a useful life of less than a year, and thus are not subject to depreciation. Consequently, they are not "machines," as the term is used in §40-23-1(a)(9)b. The tax paid on the work rolls is due to be refunded.

The testimony of the Taxpayer's plant manager indicated that the useful life of a coiler drum roll is "[s]lightly over a year . . . maybe thirteen months." (April 13, 2015 T. at 45).

With a useful life of over a year, the coiler rolls are subject to depreciation. The ingredient or component part provision thus does not apply because the coiler rolls are depreciable machines that are specifically excluded from the §40-23-1(a)(9)b. wholesale provision. The Department thus correctly denied the refunds relating to the coiler rolls.

(3) The Sales Tax Versus Use Tax Issue.

The Taxpayer also argued for the first time at the April 2015 hearing that it is due a refund of all of the sales tax it erroneously paid on the rolls in the early part of the audit period because it purchased the rolls from out-of-state vendors, and consequently, Alabama use tax was properly due, not sales tax.

The evidence confirms that the Taxpayer purchased the rolls from out-of-state vendors, and that the Taxpayer should have reported and remitted Alabama use tax on its cost of the rolls it used in Alabama. The evidence also shows that after the Taxpayer opened its Axis plant in 2001, it incorrectly accrued and remitted Alabama sales tax based on its usage of the rolls.

The Department audited the Taxpayer for sales and use tax beginning in 2004. The Department examiner concluded during the audit that use tax was due on the rolls, and also that the Taxpayer should be computing the tax based on its cost of the rolls, not its usage of the rolls. The Department consequently opened a use tax account for the Taxpayer. The Taxpayer closed the account on the day it was opened, and except for a few zero tax due use tax returns filed in 2003, the Taxpayer never filed use tax returns or paid any use tax on the rolls.

The audit remained active and open for an extended period, and in 2008 the Department examiner computed the correct tax owed by the Taxpayer on its cost of the rolls during the periods in issue. The examiner's audit workpapers showed that tax was underpaid on some rolls and overpaid on others. Because the Taxpayer had accrued and paid sales tax on the rolls, the workpapers showed that the tax was "sales tax." The examiner ultimately concluded that the Taxpayer had overpaid tax on the rolls. The Department accordingly refunded to the Taxpayer the amount overpaid, plus interest.

The Department concedes that use tax was technically due and should have been paid. It argues, however, that because Alabama's sales and use taxes are complementary taxes, the mislabeling of the tax as a sales tax and not a use tax on the examiner's workpapers is irrelevant. It claims that any additional refund of the tax paid on the rolls "would result in inequity and windfall to the Taxpayer. And it is because, in substance, there is no overpayment of the underlying tax, it was simply mislabeled." (emphasis in original) Department's Second Post-Hearing Brief at 23. Finally, the Department also claims that the Taxpayer is not entitled to an additional refund on the rolls based on the doctrine of equitable estoppel.

The Taxpayer is mostly to blame for the confusion over whether it owed sales tax versus use tax on the work and coiler rolls because it initially, and erroneously, accrued and remitted sales tax on the rolls for the period November 2001 through September 2004. It also incorrectly computed the amount due based on usage as opposed to its cost of the rolls. The Department examiner notified the Taxpayer of its erroneous reporting during his audit in 2004, and the Department even opened the Taxpayer a use tax account at that

time. The Taxpayer immediately closed the account and thereafter never filed a use tax return with the Department.

The Tribunal has held that the type of tax included on a final assessment is not a mere technicality. *Diversified Sales, Inc. v. State of Alabama*, Docket S. 02-458 (Admin. Law Div. O.P.O. 3/13/2003). That rule of law does not apply in this case because the Department never assessed the Taxpayer on the work and coiler rolls. The Taxpayer's representative repeatedly claimed at the April 2015 hearing that the Department had assessed the Taxpayer for sales tax on the rolls during its audit in 2008. That is not correct. The examiner simply identified the tax paid on the rolls as sales tax on his workpapers, which is the type of tax the Taxpayer had in fact reported and paid on the rolls from November 2001 through September 2004. The sales tax and the use tax machine rates are both one and one-half percent, and it is of no legal consequence that the examiner labeled the tax as sales tax versus use tax on his workpapers. The end result was that he computed the correct tax owed by the Taxpayer on the rolls, and the Department subsequently refunded the amount overpaid.

There is also a good argument that the Department's equitable recoupment argument has merit. The Tribunal is, however, without jurisdiction to address the sales tax versus use tax issue based on the Alabama Court of Civil Appeals' opinion in *Rheem Manu. Co. v. Alabama Dept. of Revenue*, 33 So.3d 1 (Ala. Civ. App. 2009). The Court held in *Rheem* that if a taxpayer fails to raise an issue in a petition for refund filed with the Revenue Department, the issue cannot be first raised on appeal to the Revenue Department's Administrative Law Division, now the Tax Tribunal.

The Taxpayer in this case first raised the issue that the Department had incorrectly assessed it for sales tax, not use tax, at the April 2015 hearing. Because the issue was not first raised in the Taxpayer's petitions for refund, *Rheem* holds that the Tribunal does not have jurisdiction to address the issue.

The Department is directed to compute and notify the Tribunal of the refund due on the work rolls. A Final Order will then be entered for the refund due, plus applicable interest.

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 February 23, 2017.

____
BILL THOMPSON
Chief Tax Tribunal Judge

bt:dr
cc: Glenmore P. Powers, II, Esq.
Whitney Compton, Esq.