

ABLE SERVICE & SALES, INC.  
1512 Azalea Road  
Mobile, AL 36693-5218,

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

Taxpayer,

DOCKET NO. S. 00-272

v.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

### FINAL ORDER

The Revenue Department assessed State, Baldwin County, and City of Prichard sales tax and State use tax against Abel Service & Sales, Inc. (ATaxpayer@) for December 1995 through November 1998. 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 October 14, 2000 in Mobile, Alabama. Thomas Tompkins represented the Taxpayer. Assistant Counsel Duncan Crow represented the Department.

### ISSUES

This case involves two issues:

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

(2) Should the Taxpayer be allowed a bad debt deduction for its cost of materials used on a contract for which it was not paid?

### FACTS

The Taxpayer is based in Mobile, Alabama, and is in the business of furnishing and

installing, servicing, and repairing air conditioning and heating systems. During the period in issue, the Taxpayer contracted with various government agencies and other tax-exempt entities both inside and outside Alabama. The Taxpayer's customers included the Mobile and Baldwin County School Boards, the Alabama Department of Conservation, The University of South Alabama, the Mobile YMCA, Perry County, Mississippi, and others. Under the contracts, the Taxpayer was required to furnish and install heating and air conditioning systems, and also to service and repair such systems.<sup>1</sup> The Taxpayer purchased the equipment and materials needed to fulfill the contracts tax-free using its Alabama sales tax number.

The Taxpayer failed to report and remit sales tax on the equipment and materials used on the above contracts. The Taxpayer's owner assumed in good faith that if his customer was a government agency or other tax-exempt entity, no sales tax was due. He also assumed that if his company performed work as a subcontractor for a general contractor on a large project, the equipment and materials used on the subcontract were not subject to sales tax.

The Department assessed the Taxpayer for State, Baldwin County, and City of Prichard sales tax on its wholesale cost of the equipment and materials used on the above

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<sup>1</sup>The Taxpayer also contracted to furnish and install systems, and perform service and repair work for residential customers. The Taxpayer remitted tax on those contracts. Consequently, they are not in issue in this case.

contracts. The Department claims that the Taxpayer's use of the property to fulfill the contracts was a taxable retail sale under the sales tax "withdrawal" provision, ' 40-23-1(a)(10).

The Department excluded from the audit any equipment purchased by the Taxpayer outside of Alabama that was drop shipped by the seller to a job site outside of Alabama. The Department also excluded any property purchased outside of Alabama that was shipped to the Taxpayer's facility in Alabama, temporarily stored, and thereafter shipped to an out-of-state job site. See, Dept. Reg. 810-6-5-.23.

The Department refused to allow the Taxpayer a bad debt deduction for the cost of materials used on a Monroe County project on which the Taxpayer was not paid. The Department's position is that under the "withdrawal" provision, the Taxpayer is the party liable for the tax, not the Taxpayer's customer.

The Department also assessed the Taxpayer for State use tax on the purchase of supplies and other items used by the Taxpayer at its office in Mobile. The Taxpayer appealed that final assessment, but has offered no evidence or arguments as to why the assessment is incorrect.

## **ANALYSIS**

**Issue (1). Is the Taxpayer liable for sales tax on its wholesale cost of materials used on furnish-and-install, service, and repair contracts with tax-exempt entities?**

As indicated, the Department claims the Taxpayer is liable under the sales tax "withdrawal" provision for sales tax on its wholesale cost of equipment and materials used on contracts with tax-exempt entities. I agree.

The withdrawal provision was explained in *American Chalkboard Co., LLC v. State of Alabama*, S. 99-473 (Admin. Law Div. 10/3/00), as follows:

The withdrawal provision reads as follows - The 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 withdrawal 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 withdrawal 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*, 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 (Alabama 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 withdrawal 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 withdrawal 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 retail 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.

*American Chalkboard*, S. 99-473, at 6-7.<sup>2</sup>

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<sup>2</sup>For a detailed history of how Alabama's courts have interpreted the withdrawal



The Awithdrawal@provision applies in this case because the Taxpayer purchased the materials in issue at wholesale, and subsequently used and consumed the materials in performing the furnish-and-install, service, and repair contracts with its customers. The Department thus correctly assessed the Taxpayer on its wholesale cost of the equipment and materials used on the contracts.<sup>3</sup>

**Issue (2). Should the Taxpayer be allowed a bad debt deduction?**

The Taxpayer claims it should not be required to pay sales tax on its wholesale cost of materials used on a Monroe County contract because it was never paid on that contract. Dept. Reg. 810-6-4-.01 does provide that a retailer is not required to pay sales tax on an uncollectible account, and may obtain a credit if tax was previously paid. But that regulation applies only to over-the-counter retail sales on which the buyer is ultimately liable for the sales tax. Code of Ala. 1975, ' 40-23-26; *Alabama, Dept. of Revenue v. Fox*, 609 F.2d 178 (5th Cir.), cert. denied 101 S.Ct. 78 (1980) (Ultimate burden of sales tax is on the buyer).

Reg. 810-6-4-.01 does not apply int his case because, as indicated, under the Awithdrawal@provision, the taxable event was the use of the equipment and materials by the Taxpayer. The Taxpayer, and not its customer, was the entity liable for the tax. It is thus irrelevant that the Taxpayer was not paid by its customer.

The final assessments in issue are affirmed. Judgment is entered against the Taxpayer for consumer use tax of \$105.49; Baldwin County sales tax of \$4,317.94; State

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<sup>3</sup>The Taxpayer no longer has an Alabama sales tax license. It now correctly pays sales tax when it purchases equipment and materials from its vendors.

sales tax of \$45,837.53; and City of Prichard sales tax of \$2,350.81. Additional interest is also due from the date of entry of the final assessments, March 24, 2000.

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

Entered December 4, 2000.