ALABAMA TAX TRIBUNAL

PHYSICAL SECURITY, LLC,	§	
Taxpayer,	§	DOCKET NOS CITY 17-100-JP
v.	§	CITY 17-104-JP
CITY OF BESSEMER.	§	

OPINION AND PRELIMINARY ORDER

Physical Security, LLC (Taxpayer), requested a refund of use tax in the amount of $51,257.79 from the City of Bessemer, Alabama (the City), for the periods of September 2013 through October 2014. Because the City did not rule on the Taxpayer's refund petition within 6 months, the petition was deemed denied. In the meantime, the City audited the Taxpayer for the same type of tax and issued a final assessment of $326,384.33 for the periods of May 2013 through April 2016.

The Taxpayer appealed the denial of its refund petition to the Alabama Tax Tribunal prior to the City's entry of the final assessment. Once the final assessment was entered, the Taxpayer appealed that assessment to the Tax Tribunal. The parties' joint request for a consolidation of the appeals was granted.

Question Presented

The State of Alabama levies an excise tax "on the storage, use or other consumption in this state of tangible personal property … purchased at retail … for storage, use or other consumption in this state …" The City of Bessemer levies a parallel tax on taxable incidents occurring within its municipal limits.

Here, the parties stipulated that the Taxpayer primarily furnishes and installs custom

curtain wall on the exterior of buildings for protective purposes. The job materials in question related to jobs that were performed outside of Alabama, and those materials were purchased by the Taxpayer from vendors outside of Alabama who did not collect Alabama sales or use tax. Each of the Taxpayer's purchase orders and vendor invoices for the materials referred to the specific out-of-state (non-Alabama) job for which the materials were ordered. Once purchased out of state, the materials were delivered to the Taxpayer's facility in Bessemer where the Taxpayer performed some initial assembly or fabrication on the materials. The materials then were removed from the Taxpayer's facility and installed on buildings at out-of-state job sites.

The question presented is whether the materials were purchased by the Taxpayer for storage, use, or other consumption in the City.

Facts

For this appeal, the parties stipulated to the following:

1. Physical Security is headquartered in Bessemer, Alabama.

2. Physical Security is a "contractor," for purposes of Alabama sales and use tax law, including Ala. Code §§ 40-23-1(a)(10) and -60(5).

3. Physical Security is primarily engaged in the business of furnishing and installing custom curtain wall on buildings located throughout the Southeastern and Mid-Atlantic portions of the United States.

4. The curtain walls are designed to protect the interior of the building from the elements (e.g., air and water infiltration, as well as sway inducted by wind and seismic

forces), as well as potential terrorist attacks, and to create a safe and comfortable work environment for the building occupants.

5. The curtain walls installed by Physical Security are primarily made of glass and aluminum.

6. Physical Security assembles and glazes the curtain walls at its facility (the "Facility"), which is located in the City.

7. After initial assembly, the curtain walls are delivered to Physical Security's customers' locations.

8. Physical Security, acting as a contractor, attaches the curtain wall to its customers' buildings to serve as an outer covering of the buildings.

9. Upon installation, the curtain walls are incorporated into and become a part of a customer's building.

10. Physical Security does not make retail sales of tangible personal property; all of its contracts are for furnish and install jobs.

11. Physical Security does not maintain an inventory of materials; instead, it orders materials on a job-by-job basis and keeps them separated by job at the Facility.

12. Physical Security purchased all the materials at issue in both these appeals (collectively, the "Materials") from vendors located outside of Alabama that did not collect Alabama sales or use tax.

13. The Materials were delivered from outside Alabama to the Facility for initial assembly and/or fabrication by the Taxpayer.

14. Each of the Taxpayer's purchase orders and vendor invoices for the Materials refers to the specific out-of-state job for which they were ordered.

15. The Taxpayer's records show that after initial assembly and preparation at the Facility, Physical Security removed the Materials from the Facility and installed them at out-of-state job sites.

16. Specifically, Physical Security purchased Materials during the periods September 1, 2013 through October 31, 2014 (the "Refund Period") with the intention to use them at a job site in Palm Bay, Florida for Harris Technology (the "Harris Technology Job").

17. Each of the purchase orders and vendor invoices for the Materials purchased during the Refund Period for the Harris Technology Job refer to the job for Harris Technology in Palm Bay, Florida.

18. After initial assembly and preparation at the Facility, Physical Security installed all of the Materials it purchased during the Refund Period for the Harris Technology Job at the job site in Palm Bay, Florida.

19. Physical Security remitted consumer's use tax on the Materials it purchased during the Refund Period for the Harris Technology Job to the Alabama Department of Revenue (the "Department"), Jefferson County (the "County"), and the City of Bessemer.

20. The City's sales, use, and business license taxes are administered by RDS.

21. On January 19, 2015, Physical Security filed a direct petition for refund of the local consumer's use tax of $51,257.79, along with applicable interest, it erroneously paid

to the City during the Refund Period on the Materials for the Harris Technology Job (the "City Refund Petition").

22. On or about that same date, Physical Security also filed direct petitions for refund of State of Alabama consumer's use tax with the Department (the "State Refund Petition") and County consumer's use tax with the County Revenue Department (the "County Refund Petition"), requesting refunds of the consumer's use tax Physical Security erroneously paid on the Materials it installed for Harris Technology in Palm Bay, Florida during the Refund Period.

23. Physical Security's basis for the State Refund Petition, the County Refund Petition, and the City Refund Petition was that Physical Security only temporarily stored the Materials at the Facility and otherwise complied with Ala. Admin. Code Rule 810-6-5-.23.

24. The Department granted the State Refund Petition.

25. The County granted the County Refund Petition.

26. More than six months passed after the date on which Physical Security filed the City Refund Petition without RDS or the City acting on it.

27. Thus, the City is deemed to have denied the City Refund Petition pursuant to § 40-2A-7(c)(3), Code of Alabama, 1975, on July 19, 2015.

28. RDS reviewed the City Refund Petition and also Physical Security's books and records for the periods May 1, 2013 through April 30, 2016 (the "Assessment Period").

29. Based on this review, RDS determined that the City Refund Petition was not due [to] be granted on the grounds that the temporary storage rule in Ala. Admin. Code r. 810-6-5-.23 did not apply to the Materials.

30. On June 2, 2017, RDS issued a preliminary assessment of City consumer's use tax, interest, and penalties of $325,314.79 with respect to the Assessment Period (the "Preliminary Assessment") on the Materials that Physical Security purchased during the Assessment Period for installation at job sites outside of Alabama, but which were delivered to the Facility for initial assembly and preparation.

31. Physical Security timely filed a petition for review of the Preliminary Assessment on June 30, 2017.

32. On November 16, 2017, RDS mailed the Taxpayer a final assessment of Bessemer consumer's use tax (with related interest and penalties) for the Assessment Period in the amount of $326,384.33 (the "Final Assessment").

33. The Taxpayer filed a Notice of Appeal from the Final Assessment with the Alabama Tax Tribunal pursuant to Ala. Code §§ 40-2A-7(b)(5)a and 40-2B-2(g)(2)a on December 14, 2017.

Law and Analysis

As mentioned, the relevant portion of Alabama's use-tax levy reads as follows:

> An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property ... purchased at retail ... for storage, use or other consumption in this state ...

Ala. Code § 40-23-61(a)

The terms "storage" and "use," as used in the levy, are defined as follows by our legislature:

> (7) STORAGE. Any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased at retail.

> (8) USE. The exercise of any right or power over tangible personal property incident to the ownership of that property, or by any transaction where possession is given, except that it shall not include the sale of that property in the regular course of business.

Ala. Code § 40-23-60

As early as 1961, the Alabama Department of Revenue adopted an administrative rule to address the taxability of property that is stored in Alabama temporarily for use outside of this state. The rule was revised and readopted several times, most recently in August 2001 (which preceded the refund period here). The "temporary storage" rule reads as follows:

> (1) Section 40-23-60(7), Code of Alabama 1975, defines storage to mean, "any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state".
>
> (2) In the court case State v. Toolen, 277 Ala. 120, 167 So. 2d 546 (1964), the court states that the tax liability attaches after the act of transportation ends and the property comes to rest in this state for use or consumption unless there is a contractual intent to the contrary.
>
> (3) In order for property to be claimed as tax free because of temporary storage for use solely outside of Alabama, records must reflect that it was the intent of the purchaser to use the property in another state at the time of its coming to rest in Alabama. Also, records must reflect that, in fact, the property was removed from Alabama.
>
> (4) The qualified seller is required to collect tax on all retail sales in Alabama. If it is determined by the purchaser's records that temporary storage applies, the Department will process a petition for refund or allow credit for any overpayment of use tax on the subsequent use tax liability.
>
> (5) No credits are to be allowed for property shipped out of state when such property is drawn from general stock. (Section 40-23-60(7))
>
> (6) The temporary storage provisions outlined in this rule apply to all municipalities and counties as defined in the Local Tax Simplification Act of 1998, Act 98-192. Section 11-51-204, Code of Alabama 1975, provides that local governing bodies interpretations, rules, and regulations shall not be

> inconsistent with any rule and regulation which may be issued or promulgated by the Department of Revenue from time to time pursuant to the Alabama Administrative Procedure Act, for the corresponding state tax.

Ala. Admin. Code r. 810-6-5-.23

In the rule, the Revenue Department cited the case of *State v. Toolen*. There, the Alabama Supreme Court stated that "the [use] tax liability attaches after the act of transportation ends and the property comes to rest in this State for use or consumption, unless there is a contractual intent to the contrary." *Id.*, 167 So. 2d at 551. It is this quote which the rule incorporated.

After the decision in *Toolen*, other courts in Alabama acknowledged that the use-tax levy contains the element of intent. *See In re Culverhouse, Inc.*, 358 B.R. 806, 813 (M.D. Ala. 2006), which states that the levy in Ala. Code § 40-23-61(c) "contains an intent element, which requires property to be purchased 'for storage, use or other consumption in this state.'" (Although § 40-23-61(c) applies to vehicles and trailers, whereas § 40-23-61(a) applies to tangible personal property, both require that the items be "purchased at retail ... for storage, use or other consumption in this state ...") *See also Boyd Bros Transportation, Inc. v. State Dep't of Rev.*, 976 So.2d 471, 479 (Ala. Civ. App. 2007) (quoting Culverhouse). In *Boyd Bros*, 976 So.2d at 479, the appellate court agreed with the taxpayer that "there was no evidence indicating that, at the time of the purchase, Boyd Brothers intended to use the trucks and trailers in Alabama."

By law, the City's use-tax levy must be parallel to the state levy and "shall be subject to all definitions, exceptions, exemptions, proceedings, requirements, provisions, rules and regulations promulgated under the Alabama Administrative Procedure Act ..." *See* Ala.

Code §§ 11-51-202(a) and 11-51-203(a), as amended by the Local Tax Simplification Act of 1998, Act 1998-192. The City has acknowledged as much in its Bessemer Code of Ordinances, §§ 98-24 and 98-26. In fact, its levy reads virtually identical to the state levy, except for the obvious use of the phrase "in the city" instead of "in this state."

Here, the parties stipulated that the Taxpayer primarily furnished and installed custom curtain wall on buildings throughout various parts of the United States. The Taxpayer maintained no inventory at its facility in the City. Instead, the materials in question for both appeals were purchased by the Taxpayer from vendors located outside of Alabama. The parties also stipulated that each purchase order submitted by the Taxpayer to an out-of-state vendor for these materials referred to the specific out-of-state job for which the materials were ordered. Likewise, each invoice provided by an out-of-state vendor to the Taxpayer for these materials referred to the specific out-of-state job for which the materials were being provided. When the materials were purchased, they were delivered to the Taxpayer's facility in the City for initial assembly or fabrication. After this initial work was performed, the Taxpayer removed the materials from its facility within the City and installed the materials (as custom curtain wall) on buildings at out-of-state job sites. The walls then became a part of the building and served as an outer, protective covering.

These stipulated facts show that the materials in question were not purchased "for storage, use or other consumption in the city," as required by the levying ordinance. Clearly, the materials were purchased for "storage, use or other consumption" outside of the City in the Taxpayer's fulfillment of its furnish and install contracts in other states.

Therefore, based on the express wording of the ordinance, the materials were not subject to the City's use tax.

It is not surprising that this result fits squarely within the Revenue Department's temporary-storage rule. Again, that rule acknowledges that the use-tax liability "attaches after the act of transportation ends and the property comes to rest in this state for use or consumption *unless there is a contractual intent to the contrary.*" Ala. Admin. Code r. 810-6-5-.23(2), citing *Toolen* (emphasis added). *See also Culverhouse, supra*, and *Boyd Bros Transportation, supra.*

Here, such an intent was manifested – and documented – via purchase orders and vendor invoices which identified each specific out-of-state job to which they pertained. The intent also was shown by the Taxpayer's separation of materials at its facility until those materials were shipped out of state for installation at specified job sites. Thus, the records reflected "the intent of the [Taxpayer] to use the property in another [city] at the time of its coming to rest in [the city]" and that "the property was removed from [the city]." Ala. Admin. Code r. 810-6-5-.23(3). It also is unsurprising that the State of Alabama and Jefferson County each granted the Taxpayer's refund petitions.

The City argues, however, that the *Toolen* quote concerning the element of intent was based on commercial and revenue statutes that pre-dated Ala. Code § 40-23-61. First, the use-tax levy at issue in *Toolen* was identical to the current levy as to all relevant elements, including the requirement that the property be purchased "for storage, use or other consumption in this state..." *Toolen* at 548, quoting Title 51, § 788, Code 1940. Second, the intent element exists, not because of *Toolen*, but because of the wording of

the levying statute. *Toolen* simply acknowledged as much, as did *Culverhouse* and *Boyd Bros.*

At various points in its briefs, the City refers to the issue here as one involving an exemption from tax. However, as noted by the Taxpayer, there is no exemption statute at issue. Instead, the question is whether the facts fit within the levy so as to create a tax liability in the first place. If not, no exemption is needed. Therefore, there is no application of the rule that tax exemptions are to be construed against the one claiming the exemption.

Concerning the temporary-storage rule, the City states that paragraph (3) requires temporarily-stored property to be used "subsequently" and "solely" outside of Alabama to not be subject to use tax. Based on the dictionary definition of the word "solely," the City argues that "*any* 'use' or 'storage,' regardless of the degree, of or upon the property within this State renders the property subject to use tax in this State, as is the case here." City's initial brief, p. 8 (emphasis in original).

The Revenue Department's rule does use the word "solely" in paragraph (3), as follows: "In order for property to be claimed as tax free because of temporary storage for use solely outside of Alabama ..." But the Revenue Department qualified that phrase in the immediately-following language by requiring taxpayers to keep records reflecting "that it was the intent of the purchaser to use the property in another state at the time of its coming to rest in Alabama. Also, records must reflect that, in fact, the property was removed from Alabama." This qualifying language could mean that such property would be considered to have been used solely outside of Alabama if the Taxpayer kept proper records, regardless of initial assembly or fabrication.

The Alabama Associated General Contractors, Associated Builders and Contractors, Inc. Alabama Chapter, and Subcontractors Association of Alabama submitted an *amicus curiae* brief in support of the Taxpayer. Concerning "sole use," the Associations stated:

> It is widely understood that a contractor owes Alabama consumer's use tax on materials it uses on a construction job in Alabama. The published rulings by the Department and the ALD are consistent with that general understanding, and merely provide that Alabama use tax is not due on materials brought into Alabama briefly for use on an out-of-state construction job, as long as the contractor satisfies the record-keeping requirements of the Temporary Storage Rule, which establish the contractor's intent to use the materials out-of-state. And because building materials are incorporated into real estate - they can only be used once. In other words, their "sole use" can only be at the job site, which is the appropriate place for use tax to be due.

Brief of *Amicus Curiae*, 9.

This argument of the Associations also suggests that, for purposes of the temporary-storage rule, property is used solely outside of Alabama if the record-keeping requirements are met. But such a question need not be answered here. Instead, as discussed, the materials in question also must have been "*purchased* ... for storage, use or other consumption *in this state* ..." Such was not the case. As stated by the Taxpayer: "[The Taxpayer's] customers did not engage [the Taxpayer] to fabricate the Materials into curtain wall at the Facility. In all instances, [the Taxpayer] was contractually bound to install the Materials in the form of curtain wall at the job site." Taxpayer's Reply Brief, 8.

Conclusion

The materials in question were not purchased by the Taxpayer for storage, use or other consumption in the City. Therefore, the City's use tax was inapplicable to the Taxpayer as to these materials.

The City is directed to issue a refund to the Taxpayer in the amount of $51,257.79,

plus additional interest, as requested by the Taxpayer in its refund petition for the periods of September 2013 through October 2014. Also, the City's final assessment against the Taxpayer for the periods of May 2013 through April 2016 in the amount of $326,384.33 is voided. Judgment is entered accordingly.

In its Notices of Appeal, the Taxpayer requested an award of costs, including attorney fees. The Taxpayer is directed to submit to the Tax Tribunal, no later than **March 16, 2021**, any legal authority which it contends authorizes an award of costs and a factual statement which it contends justifies such an award.

It is so ordered.

Entered February 24, 2021.

/s/ Jeff Patterson
JEFF PATTERSON
Chief Judge
Alabama Tax Tribunal

jp:cm
cc: William T. Thistle, II, Esq.
Jonathan V. Gerth, Esq.