

A-1 ROOFING CO., INC.
449 Julia Street
P.O. Box 236
Montgomery, AL 36101-0236,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§
§
§
§
§
§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. U. 03-388

FINAL ORDER

The Revenue Department assessed A-1 Roofing Company, Inc. ("Taxpayer") for use tax for January 2000 through September 2002. 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 November 12, 2003. Will Sellers and Riley Roby represented the Taxpayer. Assistant Counsel Glen Powers represented the Department.

The Taxpayer is a roofing contractor headquartered in Montgomery, Alabama. The issue in this case is whether the Taxpayer is liable for Alabama use tax on materials it purchased tax-free in Alabama and then used to perform a roofing contract with the Brewton City Board of Education.

The Taxpayer contracted with the Brewton City Board of Education ("Board") in May 2000 to re-roof T.R. Miller High School in Brewton. The contract provided that the Board may provide the Taxpayer with purchase orders to be used to purchase the materials needed for the project. In that case, the Board would also pay the vendors for the materials, and then issue a change order subtracting the cost of the materials from the contract amount.

The materials were not purchased as indicated above. Rather, to reduce paperwork, and because the above procedure was “cumbersome” (T. at 45), the parties agreed that the Taxpayer would buy the materials in its own name and pay for the materials with its own funds. The Taxpayer subsequently purchased the materials tax-free from Alabama vendors using the Board’s federal tax number.¹ The Board issued a change order at the conclusion of the project that backed out the sales tax the Taxpayer had included in its bid amount.

The Department audited the Taxpayer and assessed it for use tax on the materials it had used on the Brewton project in June, July, August, and September 2000. The Department did not assess the Taxpayer for materials used on the project after September 30, 2000 because materials purchased and used after that date were exempted from sales and use tax by Act 2000-684.²

The sale of building materials to a contractor for use in the form of real estate constitutes a taxable retail sale. Code of Ala. 1975, §§40-23-1(a)(10) and 40-23-60(5); *Dept. of Revenue v. James A. Head & Co., Inc.*, 306 So.2d 5 (Ala.Civ.App. 1974), writ denied 306 So.2d 12. Consequently, the Taxpayer was liable for and should have paid Alabama sales tax when it purchased the materials from the Alabama vendors. It avoided

¹ The fact that the Taxpayer erroneously used the Board’s federal tax number instead of an Alabama sales and use tax exemption certificate is irrelevant to this case.

² Act 2000-684 is codified at Code of Ala. 1975, §40-9-33, and became effective on October 1, 2000. It exempts from sales and use tax any property purchased by a contractor that is subsequently incorporated into realty pursuant to a contract with a federal, state, or local governmental entity. For a recent case involving the §40-9-33 exemption, see, *Safety Guide of Alabama, LLC v. State of Alabama*, S. 03-412 (Admin. Law Div. Amended F.O. 2/3/04).

paying sales tax, however, by purchasing the materials using what it thought was the Board's sales tax exemption number. It improperly did so (even if the number had been an Alabama exemption number and not a federal tax number) because the Taxpayer purchased the materials, not the Board. A purchaser cannot use an exemption certificate or tax number of another person or entity to purchase property tax-free.

In any case, having purchased the materials tax-free, the Taxpayer became liable for Alabama use tax when it used the materials to complete its furnish-and-install contract with the Board.³ See, Dept. Reg. 810-6-1-.46 ("Contractors or builders must pay either to the seller or directly to the Department of Revenue sales or use tax on . . . (b) All building materials attached by them to real property"); see also, *Head, supra*; *American Chalkboard Co., LLC v. State of Alabama*, S. 99-473 (Admin. Law Div. 10/3/00).

The Taxpayer argues that by exempting municipal school boards from sales and use taxes at Code of Ala. 1975, §§40-23-4(a)(15) and 40-23-62(16), respectively, the Legislature intended "to eliminate the imposition of sales and use tax on tangible personal property (that) directly benefits an entity such as a municipal school board like Brewton." Taxpayer's Brief at 5. I disagree.

The exemptions cited above apply only to sales directly to or property directly used by a school board.⁴ As discussed, however, the materials were purchased by the

³ The materials were not exempt from use tax pursuant to Code of Ala. 1975, §40-23-62(1) because since 1997, that exemption has applied only if Alabama sales tax was actually paid when the property was purchased in Alabama. See generally, *Whatley Contract Carriers, LLC v. State of Alabama*, U. 03-372 (Admin. Law Div. 3/23/04).

⁴ The Department concedes that if the materials had been purchased with the Board's purchase orders and paid for with the Board's funds, as allowed by the contract, the
(continued)

Taxpayer, not the Board. The Taxpayer then used the materials to complete its furnish-and-install contract with the Board. The school board exemptions thus do not apply. It is also irrelevant that title to the materials eventually passed to the Board, or that the Board may ultimately bear the economic burden of the tax.

The U.S. Supreme Court's holding in *Alabama v. King & Boozer*, 62 S.Ct. 43 (1941) is directly in point. King & Boozer entered into furnish-and-install contracts in Alabama with the federal government. It subsequently purchased lumber in Alabama that it used to complete the contracts. Title to the lumber ultimately passed to the government, which reimbursed King & Boozer pursuant to the contract. The Supreme Court held that King & Boozer was liable for Alabama sales tax on the lumber, notwithstanding that title to the lumber and also the economic burden for the tax passed to the government.

We think, as the Supreme Court of Alabama held, that the legal effect of the transaction which we have detailed was to obligate the contractors to pay for the lumber. The lumber was sold and delivered on the order of the contractors, which stipulated that the Government should not be bound to pay for it. It was in fact paid for by the contractor, who were reimbursed by the Government pursuant to their contract with it. The contractors were thus purchasers of the lumber, within the meaning of the taxing statute, and as such were subject to the tax. They were not relieved of the liability to pay the tax either because the contractors, in a loose and general sense, were acting for the Government in purchasing the lumber or, as the Alabama Supreme Court seems to have thought, because the economic burden of the tax imposed upon the purchaser would be shifted to the Government by reason of its contract to reimburse the contractors.

King & Boozer, 62 S.Ct. at 48.⁵

purchases would have been tax exempt. See, Dept. Reg. 810-6-3-.47.03. Unfortunately, the parties elected not to follow that approved procedure.

⁵ For an Alabama Supreme Court case on point, see *Hamm v. The Boeing Company*, 216 So.2d 288 (Ala. 1968).

The final assessment is affirmed. Judgment is entered against the Taxpayer for use tax and interest of \$5,799.04. Additional interest is also due from the date of entry of the final assessment, May 27, 2003.

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

Entered April 2, 2004.