KLINE IRON & STEEL CO., INC. 1225-35 Huger Street P.O. Box 1013 Columbia, SC 29202-1013,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 03-726
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed Kline Iron & Steel Company, Inc. ("Taxpayer") for use tax for April 2000 through August 2001. 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 April 7, 2004. Michael McDermott represented the Taxpayer. Assistant Counsel Mark Griffin represented the Department.

The Taxpayer is located in South Carolina and is in the business of fabricating and installing television towers. The Taxpayer erected several television towers in Alabama during the period in issue. It subsequently reported and paid Alabama sales tax at the reduced 1½ percent "machine rate" levied at Code of Ala. 1975, §40-23-2(3) on its cost of the materials used in constructing the towers.

The Department concedes that the 1½ percent machine rate applies. The issue is whether the tax is due on the Taxpayer's wholesale cost of the materials, as argued by the Taxpayer, or on the Taxpayer's sales price of the towers to its Alabama customers, less the separately stated erection charges, as argued by the Department.

Code of Ala. 1975, §40-23-61(b) is identical in substance to the sales tax "machine rate" levied at §40-23-2(3) in that it also levies a reduced 1½ percent use tax on machines

purchased at retail (anywhere) that are subsequently used, stored, or consumed in the processing, manufacturing, or compounding of tangible personal property in Alabama. As indicated, the Department concedes that the television towers in issue are "machines" within the purview of that statute. It argues, however, that the reduced rate should apply to the sales price of the towers, not the Taxpayer's cost of the materials used to fabricate the towers. The Department cites §40-23-61(b), which specifies that the tax is imposed "at the rate of 1½ percent of the sale price of any such machine . . ." The Department contends that the "sale price" in this case is the amount for which the Taxpayer sold the completed towers to its Alabama customers, less the separately stated erection charges.

The Taxpayer counters that the tax should be computed on its cost of the materials used to construct the towers. In support of its position, the Taxpayer cites a Montgomery County Circuit Court case decided in April 1979. That case, *Kline Iron & Steel Corp. v. State of Alabama*, involved the same parties and the same fact scenario involved in this case. The parties stipulated in the 1979 case that the taxable amount was the Taxpayer's purchase price of the materials used to fabricate the tower. The parties only disputed whether the reduced 1½ percent rate applied. The Court ruled that the tower was a necessary part of the process by which microwave signals were transmitted, and thus constituted a machine used in processing tangible personal property. The reduced machine rate was thus applied to the cost of the materials.

The Department argues that the 1979 case should not be followed because the Department erroneously stipulated in the case that the taxable measure was the cost of the materials.

Alabama's sales and use tax laws constitute a seamless system by which either sales tax is due on the retail sale of tangible personal property in Alabama, or use tax is due on property purchased at retail (anywhere) and subsequently used, stored, or consumed in Alabama on which Alabama sales tax was not paid at the time of purchase. See generally, *Whatley Contract Carriers, LLC v. State of Alabama*, U. 03-372 (Admin. Law Div. 3/23/04).[1]

For either sales tax or use tax to apply, the property in issue must be purchased at retail. See, Code of Ala. 1975, §§40-23-2 and 40-23-61, respectively. "Retail sale" is defined for both sales and use tax purposes to include "[s]ales of building materials to contractors, builders or landowners for resale or use in the form of real estate. . ." See, Code of Ala. 1975, §§40-23-1(a)(10) and 40-23-60(5), respectively. Consequently, when the Taxpayer, a contractor, purchased the materials used to fabricate the towers, which were to become permanently attached to and a part of realty, the sales were at retail under Alabama law. However, because the sales occurred outside of Alabama, Alabama sales tax did not apply. Rather, the Taxpayer's subsequent use of the materials in Alabama was subject to Alabama use tax. The "sales price" pursuant to §40-23-61(b) was the sales price paid by the Taxpayer for the materials, i.e. the Taxpayer's cost of the materials.

Having determined the correct taxable base, the issue turns to whether the reduced machine rate should apply. As discussed, the Department concedes that the 1½ percent

[1] Sales and/or use tax is not due, of course, if the sale and/or use of the property in Alabama is specifically exempted by statute from either or both taxes.

rate applies based on the rationale of the Montgomery County Circuit Court's 1979 decision in *Kline Steel*. See also, Dept. Regs. 810-6-1-.04 and 810-6-2-.98. The towers in issue are thus taxable at the 1½ percent machine rate measured by the Taxpayer's cost of the materials.[2]

The above holding is also consistent with how the tower components would have been taxed if the Taxpayer had purchased them in Alabama. In that case, the Taxpayer would have owed Alabama sales tax when, as a contractor, it purchased the materials in Alabama for use in the form of real estate. Section 40-23-1(a)(10). Tax would thus have been paid on the Taxpayer's cost of the materials, and the machine rate would apply because the materials became a part of a machine used in processing.

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[2] I am not convinced that the Alabama Legislature intended that television towers should be taxed at the reduced rate as machines used in processing. However, Alabama's courts have historically taken a very broad view of what constitutes a "machine" for purposes of applying the reduced rate levied at §§40-23-2(3) and 40-23-61(b). For example, the Alabama Supreme Court has construed the term "machine" to include (1) lumber used to make flasks to hold sand in place during the casting of stoves and furnaces, *State v. Taylor*, 80 So.2d 618 (Ala. 1954); (2) sand used to make molds for casting pipe and steel shot used to remove the sand after the casting process, *State v. Newbury Mfg. Co., Inc.*, 93 So.2d 400 (Ala. 1957); (3) barge unloader equipment that was part of a coal-conveying belt system used in the production of electricity, *Alabama Power Co. v. State*, 103 So.2d 780 (Ala. 1958); (4) paper bags used to shape and hold briquets in a furnace during the production process, *State v. Calumet & Hecla, Inc.*, 206 So.2d 354 (Ala. 1968); and (5) explosive materials used to remove or loosen coal in a coal mining operation, *Robertson & Assoc. (Ala.) v. Boswell*, 361 So.2d 1070 (Ala. 1978). See also, *Overseas Hardwood Co., Inc. v. State of Alabama*, S. 00-664 (Admin. Law Div. 10/1/01) (stacking sticks used to separate lumber in the drying process entitled to the reduced rate); *NTN Bower Corp. v. State of Alabama*, S. 01-237 (Admin. Law Div. 10/1/01) (coolant and lubricant necessary and essential to the production of roller bearings entitled to the reduced rate); and *Kykenkee, Inc. v. State of Alabama*, S. 01-618 (Admin. Law Div. O.P.O. 5/7/02) (storage bins attached to a sawdust and wood chip conveyor system in a sawmill entitled to the reduced rate). Considering the liberal meaning given the term by the Alabama Supreme Court, and the fact that the Department concedes that the television towers in issue are machines within the purview of the statute, that determination will be accepted as correct.

The final assessment in issue is voided.

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

Entered July 13, 2004.

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BILL THOMPSON
Chief Administrative Law Judge