KING CHURCH FURNITURE, INC. 3125 OXMOOR INDUSTRIAL BLVD. DOTHAN, AL 36303,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 04-917
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed King Church Furniture, Inc. ("Taxpayer") for State sales tax and State use tax for August 2000 through June 2003.[1] The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conduced on April 21, 2005. Mitch McNab and Steadman Shealy represented the Taxpayer. Assistant Counsel Margaret McNeill represented the Department.

ISSUE

Code of Ala. 1975, §40-23-1(a)(10) includes the sales tax "withdrawal" provision, which defines "retail sale" for Alabama sales tax purposes to include the withdrawal from inventory of tangible property previously purchased at wholesale that is subsequently used or consumed by the wholesale purchaser.

The Taxpayer contracted to construct and install church pews for customers in the Southeastern United States during the period in issue. The issue is whether the Taxpayer's withdrawal from inventory in Alabama of the materials used to construct the pews constituted a taxable retail sale in Alabama under the "withdrawal" provision.

[1] The Taxpayer does not contest the use tax final assessment. Consequently, only the sales tax final assessment is addressed in this Final Order.

FACTS

The Taxpayer manufactures church pews and other church-related furniture at its facility in Dothan, Alabama. It purchased the materials used to construct the church pews and furniture tax-free during the subject period. It subsequently withdrew the materials from inventory as needed to construct the special-ordered pews and furniture.

The Taxpayer sold pews and furniture tax-free to various licensed dealers for resale during the subject period. Those sales are not in issue. The Taxpayer also sold or furnished pews and furniture to churches in Alabama and other Southeastern states during the period. The transactions involving the pews are in issue in this case.

The Taxpayer contracted to construct the pews and also to deliver and install the pews at its customers' churches. The Taxpayer hired independent contractors to deliver the pews to the customers. The contractors assembled the pews on-site and then bolted or screwed the pews to the church floors, although in some cases the customer directed the contractor not to attach the pews to the floor.

The Taxpayer treated the transactions involving the pews as retail sales. It thus reported and paid sales tax, if applicable, to the state in which the pews were delivered.[2] The Taxpayer thus paid Alabama sales tax on only the pews that were delivered to customers in Alabama.

The Department audited the Taxpayer and determined that because the pews were attached to realty, the taxable retail sale occurred when the Taxpayer withdrew the

[2] Some states, including Florida, exempt purchases by churches from sales tax. Consequently, the Taxpayer would not have paid sales tax on the pews and furniture furnished or sold to churches in those states.

materials from inventory in Alabama pursuant to the "withdrawal" provision. The Department thus assessed the Taxpayer for sales tax on its wholesale cost of the materials used to construct the pews, including the pews furnished to customers outside of Alabama.

The Taxpayer contends that it sold the church pews at retail, and that it properly reported and paid sales tax on the retail sales to the states where the pews were delivered. It concedes that the pews were usually bolted or screwed to the floor, but argues that the pews did not become a part of realty because they could be moved without defacing the property. The Taxpayer also asserts that if the Department's position is correct, it will be required to pay tax twice on the pews, first on the retail sales price to the states where the pews were delivered, and also to Alabama on the wholesale cost of the materials used to construct the pews.

ANALYSIS

The sales tax "withdrawal" provision at §40-23-1(a)(10) has been addressed numerous times by Alabama's appellate courts. In *Alabama Precast Products, Inc. v. Boswell*, 357 So.2d 985 (Ala. 1978), an Alabama company contracted to furnish precast roof slabs and install the slabs in South Carolina. The Alabama Supreme Court held that the withdrawal from inventory in Alabama of the materials used to construct the slabs constituted a taxable retail sale in Alabama under the "withdrawal" provision.

> The withdrawal of the building materials was a retail sale under (§40-23-1(a)(10)). This event occurred in Birmingham, Alabama, and thus constituted a closed, taxable transaction within this state. The fact that the raw materials were used to manufacture roof slabs which were later transported and used outside the state did not transform this retail sale into a sale in interstate commerce. See *Rite Tile Company v. State*, 278 Ala. 100, 176 So.2d 31 (1965).

Alabama Precast, 357 So.2d at 988.

In *Home Tile & Equipment Co., Inc. v. State*, 362 So.2d 236 (Ala. Civ. App.), cert. denied, 362 So.2d 239 (Ala. 1978), the Court of Civil Appeals held that carpet withdrawn from inventory in Alabama and subsequently installed for customers in Mississippi constituted a taxable retail sale in Alabama.

> These materials were withdrawn from the inventory of the taxpayer to be used by the taxpayer pursuant to its obligation to furnish and install carpeting for the Mississippi builder. Thus, the withdrawal of the materials from inventory qualified as a taxable "retail sale" under §40-23-1(a)(10). . . This withdrawal occurred in Mobile, Alabama, and thus constituted a closed, taxable transaction within this state. The fact that the flooring materials were transported and used out of the state did not transform this sale into a sale in interstate commerce.

Home Tile, 362 So.2d at 238, 239.

The Alabama Legislature amended the "withdrawal" provision in 1983. A series of confusing and sometimes conflicting appellate court decisions followed. The Legislature was obviously displeased with the judicial interpretation of the "withdrawal" provision, as amended in 1983. Consequently, it again amended the provision in 1986 to restore it to its pre-1983 language. See, Act No. 86-689. Further litigation followed, and not until the Supreme Court's 1992 decision in *Ex parte Sizemore*, 605 So.2d 1221 (Ala. 1992), was it settled that the pre-1983 interpretation of the statute again applied.[3]

The Supreme Court reaffirmed in *City of Huntsville v. City of Madison*, 628 So.2d 548 (Ala. 1993), that pre-1983 case law again controlled concerning the "withdrawal" provision. In that case, Intergraph withdrew materials from its warehouse in Huntsville and used the

[3] For a discussion of the "withdrawal" provision cases before the 1983 amendment, see *Ex parte Disco Aluminum Products Co., Inc.*, 455 So.2d 849 (Ala. 1984). For a discussion and analysis of the cases decided from 1983 until 1992, see *American Chalkboard Co., LLC v. State of Alabama*, S. 99-473 (Admin. Law Div. 10/3/00).

materials in Madison. Both municipalities claimed the tax due on the materials. The Supreme Court held that the withdrawal of the materials from inventory in Huntsville constituted a taxable retail sale.

> Applying the rules of *Alabama Precast Products, Inc.*, *Ex parte Home Tile and Equipment Co.*, and *Ex parte Sizemore* to the present facts, we conclude that the withdrawal by Intergraph of tangible personal property from its inventory located within the taxing jurisdiction of Huntsville is a closed taxable event within the City of Huntsville. Sales tax becomes due at the time and place of the withdrawal from inventory of tangible personal property . . . Under the provisions of the statute a "retail sale" occurred when the items were withdrawn for use or consumption by the taxpayer; the withdrawal occurred in the taxing jurisdiction of the City of Huntsville.

City of Huntsville v. City of Madison, 628 So.2d at 590, 591.

The Administrative Law Division also addressed the "withdrawal" provision in *American Chalkboard*, *supra*. In that case, the taxpayer contracted to furnish and install special-ordered chalkboards for customers both inside and outside of Alabama. The taxpayer constructed the boards at its Wetumpka, Alabama facility using materials previously purchased at wholesale. It then hired subcontractors to install or attach the boards to the wall using anchor bolts, screws, and glue.

The taxpayer argued that sales tax was not due on the boards furnished to customers outside of Alabama or to tax-exempt entities in Alabama. The Administrative Law Division disagreed, holding that the taxable retail sales occurred under the "withdrawal" provision when the taxpayer withdrew the materials from inventory in Alabama.

> In summary, the Taxpayer's withdrawal of materials purchased at wholesale for use on its furnish-and-install contracts constituted a taxable retail sale under the "withdrawal" provision, as presently construed by the Alabama Supreme Court. The taxable event was the withdrawal of the materials from inventory in Wetumpka. Because the retail sales occurred in Wetumpka, it is irrelevant that some of the Taxpayer's contracts were with tax-exempt or out-of-state entities.

American Chalkboard, *supra*, at 15.

Turning to this case, the Taxpayer contracted to furnish the pews and also to deliver and install the pews for its customers. The Department examiner stated in her audit report, Dept. Ex. 1, that "we were given a tour of the manufacturing plant at which time we were told that the pews were assembled on site and bolted to the floor either by a screw or a bolt depending on whether the floor was concrete or wood." The Taxpayer's owner also explained that the pews were bolted to the floor.

> Administrative Law Judge: Is this the only method by which they are bolted?
>
> Mr. King: No. There's several different methods that could be used.
>
> Administrative Law Judge: Well, explain the others.
>
> Mr. King: There could be some that – where you would drill a hole and put a lead shield in and then a little bolt would come up and you could reverse it and put a nut.
>
> Administrative Law Judge: Okay. But in all cases, it's screwed to the floor?
>
> Mr. King: In all cases, it is attached or screwed to the floor.
>
> Administrative Law Judge: By screws? That's what I'm asking.
>
> Mr. King: By screws.

T. 37 – 38.

The above facts confirm that the Taxpayer did not sell the pews at retail. Rather, it contracted to furnish and install the pews for its customers. Consequently, the materials withdrawn from inventory and used to construct the pews were used and consumed by the Taxpayer in completing the furnish-and-install contracts. The retail sales thus occurred when the Taxpayer withdrew the materials from inventory in Alabama pursuant to the

"withdrawal" provision.

The Taxpayer argues that the pews were not "installed" because they did not become a part of the reality. I disagree. The pews were bolted or screwed to the floor, and were intended to become permanent fixtures in the churches.[4] See, *Dept. of Revenue v. James A. Head & Co., Inc.*, 306 So.2d 5 (Ala. Civ. App. 1974), in which auditorium seats and library carrels that were bolted or otherwise attached to the floor or building were determined to be a part of the realty.

The above conclusion is not altered because the pews could be unbolted and moved without defacing the property. Dept. Reg. 810-6-1-.28(2) defines "building materials" to include any property which, if removed, would substantially damage or deface the property. However, paragraph (3) of the regulation provides that if removal of the item will not deface the property, the item may still be a part of the realty if it is physically connected or attached by screws, bolts, etc., and the purpose for the item is appropriate or necessary in the structure. As discussed, the pews in issue were attached with screws or bolts, and certainly pews are necessary and appropriate in a church. The pews thus became a part of realty pursuant to Reg. 810-6-1-.28(3).

In any case, it is not necessary that tangible personal property withdrawn from inventory must become a part of realty for the "withdrawal" provision to apply. Rather, the property must only be personally used or consumed by the wholesale purchaser. For example, in *City of Huntsville v. City of Madison*, Intergraph used and consumed the

[4] At least one other state, Illinois, considers church pews to be permanently affixed to and a part of realty. See, Illinois General Information Letter ST 01-0207-GIL ("As a general proposition, the (Illinois Department of Revenue) would consider pews and sound panels to be permanently affixed to a church's building structure.").

subject property in its manufacturing, testing, and development processes. The Supreme Court held that the "withdrawal" provision applied even though the property did not become a part of realty.[5] As a general rule, however, if the property is used by the wholesale purchaser to complete a furnish-and-install contract, the property will become a part of realty. That was the situation in *Alabama Precast*, *Home Tile & Equipment*, *American Chalkboard*, and in this case.[6]

The Taxpayer also argues that imposing Alabama sales tax on the materials used to make the pews would constitute impermissible double taxation because tax was previously paid to the state in which the pews were installed. The Alabama Supreme Court rejected a similar argument in *Home Tile & Equipment.*

> The taxpayer further contends that the imposition of a sales tax under §40-23-1(a)(10) would result in double taxation. As noted above, the taxpayer has already paid approximately $11,000 in sales tax in Mississippi in which no credit can be given. This contention fails in that it is not interstate

[5] Another easily understood example is when a grocery store owner takes food previously purchased at wholesale from the shelf and provides it for his family. The grocer owes sales tax on his wholesale cost of the food under the "withdrawal" provision, even though obviously the food does not become a part of realty.

[6] Section 40-23-1(a)(10) not only contains the "withdrawal" provision, but also the "contractor" provision, which specifies that a retail sale includes the sale of building materials to a contractor for use in the form of real estate. Thus, if the Taxpayer only contracted to furnish and install pews for its customers, it would be required to pay sales tax under the "contractor" provision when it purchased the materials it used to construct the pews. However, because the Taxpayer also sells pews and other furniture at wholesale and/or retail, it is allowed to purchase all of the materials tax-free. It is then required to later pay the appropriate tax due, if any, depending on how the materials are ultimately used. That is, if the Taxpayer uses the materials to construct furniture that is subsequently sold at wholesale, no tax would be due. If the manufactured furniture is sold at retail, tax would be due on the retail sales price, assuming the sale is in Alabama and not to an exempt customer. And finally, if the materials are withdrawn from inventory and used or consumed in completing a furnish-and-install contract, tax would be due under the "withdrawal" provision on the wholesale cost when the materials are withdrawn from inventory in Alabama, as in this case.

> commerce which is being taxed, but an intrastate transaction. That the installation of the carpet in Mississippi may be subjected to a tax in Mississippi does not change the fact that the withdrawal of the goods constituted a taxable event irrespective of the ultimate destination of the goods. See *Rite Tile Company v. State*, *supra*.

Home Tile & Equipment, 362 So.2d at 239.

Even though the Taxpayer would be subject to sales and/or use tax in two states, it could be allowed a credit in the foreign state for sales tax paid to Alabama. Most Southeastern states that levy sales and use taxes allow reciprocal credits. Tax would thus generally be paid only once on the pews. For Alabama's credit statute, see Code of Ala. 1975, §40-23-65.

As discussed above, the Alabama Supreme Court clarified the "withdrawal" provision in *Ex parte Sizemore* in 1992. The taxpayer in *Sizemore* was technically liable for the tax in issue. The Supreme Court determined, however, that due to the confusion concerning the "withdrawal" provision from 1986 until its decision in 1992, the "clarified" interpretation of the statute should be applied prospectively only. The taxpayer was thus relieved of liability for the pre-1992 tax in issue.

Likewise, in *Morgan County v. Jones*, 740 So.2d 1063 (Ala. 1999), the taxpayer was found to be technically liable for sales tax for a pre-1992 period. But the Supreme Court, relying on its rationale in *Ex parte Sizemore*, again relieved the taxpayer of liability because of the confusion concerning the "withdrawal" provision before 1992.

In *Ex parte Sizemore*, the Court concluded, after relieving the taxpayer of liability for the pre-1992 period in issue, that "as to similar situations arising in the future, the law to be applied should be that set out in this opinion." *Ex parte Sizemore*, 605 So.2d at 1227. This case involves the period August 2000 through June 2003. Consequently, the Taxpayer

cannot be relieved of liability based on the confusion concerning the "withdrawal" provision before 1992. After 1992, the law was clear that the "withdrawal" provision applied to materials withdrawn from inventory and used to complete a furnish-and-install contract.

This case is complicated by the fact that the Taxpayer also sold other furniture to its customers at retail. The Taxpayer correctly paid sales tax on those retail sales to the state where the furniture was delivered, i.e., where the sales were closed. Alabama law requires, however, that building materials purchased at wholesale that are subsequently withdrawn from inventory and used in fulfilling a furnish-and-install contract are taxable under the "withdrawal" provision. There is no substantive difference between the bolted pews in this case and the bolted or otherwise attached auditorium seats and library carrels that were in issue in *Head*. In both cases, sales tax was due in Alabama on the wholesale cost of the materials.

The above result is not changed by the fact that the Taxpayer's customers sometimes instructed the independent contractor that delivered the pews not to attach the pews to the realty. The Taxpayer was still obligated to furnish and install the pews, and thus still used or consumed the materials to satisfy that personal obligation. And even if the tax consequences were altered because some pews were not attached, the Taxpayer failed to maintain records showing which pews were attached and which were not. In the absence of such records, the Department correctly taxed those transaction that the Taxpayer failed to properly verify as exempt or nontaxable. "Where there are no proper entries on the records to show the business done, the taxpayer must suffer the penalty of noncompliance and pay on the sales not so accurately recorded as exempt." *State v. T.R. Miller Mill Co.*, 130 So.2d 185, 190 (1961), citing *State v. Levey*, 29 So.2d 129 (1946).

Finally, the Taxpayer argues that it has always attempted to pay all taxes due, and that it was never notified that paying tax to the state in which the pews were delivered was incorrect. It thus contends that even if the Department's position is technically correct, it should be applied prospectively only.

In support of its argument, the Taxpayer offered a June 3, 1993 letter from the Department indicating that delivery charges concerning church pews were subject to sales tax. See, Taxpayer Ex. 3. However, the letter assumes that the pews were being sold at retail, and not used in a furnish-and-install contract, as in this case. The letter also was not to the Taxpayer, and even if the Department had previously misinformed the Taxpayer about how the pews should be taxed, the Department cannot be estopped from now correctly applying the law. "In the assessment and collection of taxes the State is acting in its governmental capacity and it cannot be estopped with reference to these matters." *State v. Maddox Tractor & Equipment Co.*, 69 So.2d 426, 429 (Ala. 1953).

There is no evidence that the Taxpayer was not attempting in good faith to correctly report and pay Alabama sales tax during the subject period. However, the duty of the Administrative Law Division is to determine the Taxpayer's correct liability under applicable law. Any equitable relief to which the Taxpayer may be entitled is left to the circuit or appellate courts to decide on appeal; see *Ex parte Sizemore*, *supra*, and *Morgan County v. Jones*, *supra*.

The final assessments are affirmed. Judgment is entered against the Taxpayer for sales tax and interest of $112,695.29 and use tax and interest of $1,087.86. Additional interest is also due from the date the final assessments were entered, September 24, 2004.

This Final Order may be appealed to circuit court within 30 days from the date of this

Order pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered November 8, 2005.

_____
BILL THOMPSON
Chief Administrative Law Judge