

F & W CONSTRUCTION CO., INC.
947 COUNTY ROAD 18
OZARK, AL 36360-5888,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. S. 09-949

v.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed F & W Construction Company, Inc. ("Taxpayer") for consumer use tax for May 2005 through October 2008. 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 3, 2009. Nigel Wells represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

ISSUES

This case involves two issues:

(1) Tangible personal property purchased by a contractor for use on a government contract entered into between October 1, 2000 and July 1, 2004 was exempt from sales and use tax pursuant to Code of Ala. 1975, §40-9-33. The first issue is whether certain tangible property purchased and used by the Taxpayer on a bridge contract with the Alabama Department of Transportation ("ALDOT") was exempt under the above statute.

(2) A second issue is whether the Taxpayer owes Alabama use tax on a used barge it purchased from an out-of-state company and subsequently used in Alabama.

FACTS

The Taxpayer operates a construction company in Ozark, Alabama. It

contracted with the ALDOT to work on a bridge in Barbour and Henry Counties in Alabama. The contract was awarded after October 1, 2000, but before July 1, 2004.

The Taxpayer entered into a supplemental contract concerning the bridge project on May 12, 2005. The new contract required the Taxpayer to purchase and use additional items not included in the original contract. It also included, however, some materials that had also been required by the original contract.

The Taxpayer also purchased a used barge during the audit period in issue. It purchased the barge from Heartland Barge Management, LLC, who sold the barge on behalf of the owner, Baxter & Associates, Inc. Heartland Barge is in the business of managing barges.

The Department audited the Taxpayer and assessed it for use tax on the materials it had purchased and used on the ALDOT job after the date of the supplemental contract, May 12, 2005. The Taxpayer was unaware when it purchased the materials that the §40-9-33 exemption had been repealed. It consequently purchased the above materials tax-free based on its good faith belief that the exemption still applied.

The Department also assessed the Taxpayer for use tax on the barge purchased from Heartland Barge.

ANALYSIS

Section 40-9-33 exempted from Alabama sales and use tax any property purchased and used by a contractor on any contract entered into after October 1, 2000 with the State of Alabama and various other related entities. The exemption was repealed in 2004 concerning property purchased pursuant to contracts entered into after

July 1, 2004.

The materials purchased by the Taxpayer for use on the ALDOT job pursuant to its initial contract qualified for the §40-9-33 exemption because the initial contract was executed before the July 1, 2004 repeal date. The exemption would apply to all such materials, even if the materials were actually purchased and used after July 1, 2004. See, Dept. Reg. 810-6-3-.69.02(4).

The Department assessed the Taxpayer in this case for all materials required by and purchased pursuant to the May 12, 2005 supplemental contract. But that contract included some materials that were also required by the original contract. In some cases, only the quantity of the material was altered. In that case, the materials included in the original contract would be exempt, and only the materials added by the supplemental contract would be taxable. For example, if the original contract required the Taxpayer to purchase and use 1000 widgets, and the supplemental contract required 1100 widgets, the Taxpayer would owe tax on only the 100 widgets added by the supplemental contract.

The Department agreed at the November 3 hearing that it would review the Taxpayer's records to determine if any materials taxed by the Department were required by the original ALDOT contract, and thus exempt from use tax. The Taxpayer agreed to assist the Department in doing so. The Department should contact the Taxpayer in due course for that purpose.

Concerning the barge, the Department claims that Heartland Barge sold the barge to the Taxpayer on consignment, and that consignment sales constitute taxable retail sales subject to Alabama sales tax, if the sale occurs in Alabama, or Alabama use

tax, if the sale occurs outside of Alabama and the subject property is first used for its intended purpose in Alabama. The Department contends that Heartland Barge is in the business of managing and selling barges, in which case the Taxpayer's purchase of the barge was a retail sale, and the Taxpayer's subsequent use of the barge in Alabama was subject to use tax.

The Taxpayer contends that its purchase of the barge constituted a non-taxable casual sale. If so, the Taxpayer's use of the barge in Alabama would not be subject to use tax. See generally, *State of Alabama v. Bay Towing & Dredging Company, Inc.*, 90 So.2d 743 (Ala. 1956).

A final assessment is *prima facie* correct, and the burden is on the taxpayer to prove that a final assessment is incorrect. Code of Ala. 1975, §40-2A-7(b)(5)c. The burden was thus on the Taxpayer to establish that the barge sale was a non-taxable casual sale, i.e., that Heartland Barge was not in the business of selling barges on consignment for its customers. It has to date failed to do so.

The Taxpayer may, pending the issuance of a Final Order in this case, present additional evidence showing that Heartland Barge only managed barges, and was not in the business of selling barges or other vessels at retail. Any additional evidence will be submitted to the Department for review and response.

The Department should notify the Administrative Law Division of the results of its review of the Taxpayer's records concerning the property used on the ALDOT project. Any information submitted by the Taxpayer on the barge issue should be submitted first to the Administrative Law Division, and will be forwarded to the Department for review.

This Opinion and Preliminary Order is not an appealable Order. The Final Order, when entered may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered December 7, 2009.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

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