

STATE OF ALABAMA,

V.

OXMOOR PRESS, INC.
100 West Oxmoor Road
Birmingham, AL 35209,

Taxpayer.

' STATE OF ALABAMA

' DEPARTMENT OF REVENUE

' ADMINISTRATIVE LAW DIVISION

' DOCKET NO. S. 85-100

'
'
ORDER

This matter involves a preliminary assessment of sales tax entered against Oxmoor Press, Inc. (hereinafter "Oxmoor" or "Taxpayer") by the Revenue Department concerning the period June 1, 1981 through May 31, 1984. A hearing was conducted by the Administrative Law Division on March 28, 1985. The parties were represented by attorneys Walter Byars and John Breckenridge, for the Taxpayer and the Revenue Department, respectively. Based on the evidence taken at said hearing and a stipulation of facts agreed upon by the parties, and in consideration of the arguments and authorities submitted by both parties, the following findings of fact and conclusions of law are hereby made and entered.

FINDINGS OF FACT

At issue in this case is the taxability of certain transactions involving the sale by Oxmoor to South Central Bell Telephone Co. ("South Central Bell") of telephone directories which were delivered to South Central Bell's customers outside of Alabama by way of the United States Postal Service.

The parties to the transactions in issue were South Central Bell, Stevens Graphics, Inc. ("Stevens"), and Stevens' wholly owned

subsidiary, Oxmoor. South Central Bell is a telephone utility which provides telephone services in Alabama and our surrounding southern states. Oxmoor, which was incorporated in 1980, is an Alabama corporation engaged in the printing business.

As part of its public offering of telephone services, South Central Bell is required to furnish each of its subscribers with a telephone directory. Toward that end, on October 16, 1980, South Central Bell and Stevens entered into a contract whereby Stevens agreed to print and thereafter sell telephone directories to South Central Bell. The contract allowed that the work could be subcontracted to any of Stevens' subsidiaries, including Oxmoor.

The transactions in issue involve directories that were printed and sold by Oxmoor, as a subcontractor, to South Central Bell pursuant to the contract referred to above between South Central Bell and Stevens. The relevant portions of that contract are discussed below.

During the period in issue, Oxmoor printed and thereafter delivered directories to South Central Bell's customers both within and without Alabama. Oxmoor paid sales tax on those directories delivered within Alabama. Delivery to customers outside of Alabama was made either by common carrier or through the United States Postal Service. The Department concedes that if the directories in issue had been shipped outside of Alabama via common carrier by the seller pursuant to the sales contract, then no sales tax would be due. The transactions in issue involve those directories that were

delivered through the United States Postal Service to destinations outside of Alabama.

Oxmoor addressed the directories in issue with preprinted labels containing the names of telephone subscribers furnished by South Central Bell. By stipulation, the parties agree that the risk of loss remained with Oxmoor until delivery of the directories was completed by the United States Postal Service outside of Alabama.

The stipulation entered into by the parties summarizes the sales in issue as follows:

7. The following are the steps involved in the printing and transportation of telephone directories by Oxmoor using U.S. Postal Service for delivery to telephone subscribers outside Alabama:

a. Oxmoor as a subcontractor has agreed with South Central to print telephone directories and to mail said directories to destinations outside Alabama.

b. South Central provides to Oxmoor the addresses of the telephone subscribers to whom the telephone directories are to be delivered outside Alabama.

c. Oxmoor prints the specified number of copies, applies preprinted address labels furnished by South Central, and otherwise prepares the printed telephone directories for mailing under its bulk mailing permit.

d. Oxmoor deposits the printed materials at a U.S. Postal Service facility in Birmingham (Homewood), Alabama, and pays the postage for mailing to destinations outside the state.

e. Oxmoor invoices South Central for the telephone directories and separately for postage paid by Oxmoor.

The contract pursuant to which the sales in issue were made provides in part as follows:

TITLE - Except as otherwise provided, title to material purchased by us shall vest when the material has been delivered at the f.o.b. point unless this contract calls for additional services such as unloading after delivery in which event title shall vest when such additional services have been performed. However, if you are expressly authorized to invoice us for material prior to shipment, title to such material shall vest in us upon receipt of the invoices.

The contract further designates the F.O.B. point as follows:

- F.O.B. - 1. Louisville, Kentucky with delivery to and unloading at Post Office at no extra charge.
2. Atlanta, Georgia, Freight Prepaid and charges based on lowest rate from Birmingham, Alabama.
3. Birmingham, Alabama, Freight Prepaid and Invoiced Back, (with delivery to and unloading at Post Office at no extra charge) or Destination, Freight Prepaid and Invoiced Back, at our option.

The directories in issue were mailed by Oxmoor from Birmingham, Alabama. Consequently, the third F.O.B. designation set out above is applicable. Under that section, the F.O.B. point was either Birmingham, or at the option of South Central Bell, the point of destination. The contract contains no statement or designation specifying either directly or indirectly that South Central Bell opted for the F.O.B. point to be the point of destination. Other than that section of the contract set out above, there is no designation concerning the F.O.B. point.

Mr. John Parker, Oxmoor's treasurer, did testify that the F.O.B. point was the destination point. However, Mr. Parker's

testimony as to the F.O.B. point was only his conclusion, and was based only on the fact that the risk of loss was with Oxmoor until the directories reached their destination outside of Alabama. Upon examination, Mr. Parker testified that South Central bell did not issue any written order or document stating that the F.O.B. point was the point of destination. Further, Mr. Parker knew of no oral instructions issued by South Central Bell to that effect.

The parties agree that if the Department is correct in its position, that the amount of the preliminary assessment is calculated accurately, and that if Oxmoor's position is found to be correct, the assessment should be voided in its entirety.

CONCLUSIONS OF LAW

The Taxpayer presents three arguments In support of its position that the sales in issue are not subject to the Alabama sales tax.

First, it argues that the sales were for resale, and thus, were non-taxable wholesale sales. Second, the Taxpayer contends that the sales occurred outside of Alabama and that to impose the Alabama sales tax would violate the Commerce Clause (Article 1, Section 8) of the U.S. Constitution. Finally, the Taxpayer argues that the Department's interpretation of the relevant statutes, as expressed in Revenue Department Sales and Use Tax Regulations P18-033 and I14-012, and the application of said regulations to the Taxpayer in the present case, is violative of the equal protection and due process provisions of both the Alabama and the United States Constitutions.

Concerning the Taxpayer's first argument, the Taxpayer contends that the directories were subsequently resold by South Central Bell to its subscribers, thereby causing the transactions between the Taxpayer and South Central Bell to be tax exempt sales for resale.

However, the facts are clear that South Central Bell did not sell the directories to its subscribers, but rather, provided said directories as part of its overall service plan. As set out in the stipulation entered into by the parties: "As part of its public offering of telephone service, South Central is required to furnish each of its residential and business telephone subscribers with a telephone directory". South Central Bell does not sell the directories, but rather, provides them as a service. Consequently, the sale of the directories to South Central Bell is a retail sale.

The Taxpayer next contends that title to the directories did not pass, and consequently that the sales were not consummated, until delivery was completed by the Postal Service outside of Alabama.

Code of Alabama 1975, '40-23-1(5) defines a sale as "every closed transaction constituting a sale". Under Alabama law, a sale occurs with the passing of title from the seller to the buyer, Code of Alabama 1975, '7-2-106, and title passes, unless otherwise explicitly agreed, when the seller completes his performance with respect to the physical delivery of the goods, Code of Alabama 1975, '7-2-401(2). Thus, a sale is completed when and where the seller physically delivers the goods, unless the sales contract

explicitly states to the contrary. See American Cast Iron Pipe Company v. Boswell, 350 So.2d 458 (1977); State v. Delta Air Lines, Inc., 356 So.2d 1205 (1977); and State Tax Commission v. Pacific States Cast Iron Pipe Company, 372 U.S. 605, 83 S.Ct. 925 (1963).

In the present case, the sales contract provided that title to the directories would vest in South Central Bell at the F.O.B. point. The F.O.B. point was designated as Birmingham, or, at the option of South Central Bell, the point of destination. There is no evidence to indicate that South Central Bell opted for the F.O.B. point to be the destination point outside of Alabama. Further, the parties had no agreement, explicit or otherwise, that title to the directories would pass outside of Alabama. Thus, while the contract did provide that title would pass at the F.O.B. point, there was no agreement that the F.O.B. point would be the point of destination outside of Alabama. Consequently, the provisions of '7-2-401(2) concerning physical delivery must govern. That is, title passed, and the sale of the directories occurred, at the point of delivery by the Taxpayer at the Post Office in Birmingham. That conclusion is in accordance with Code of Alabama 1975, '7-2-401(2)(a), which reads as follows:

(a) If the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment;

The parties agreed through stipulation that Oxmoor retained the risk of loss until completion of delivery by the Postal Service.

The Taxpayer argues that the intentions of the parties is controlling on the question of passage of title, and that its assumption of the risk of loss during delivery showed an intention that title not pass until the directories were delivered outside the State. The Taxpayer cites in support of its argument the holdings of State v. Matthews Electric Supply Company, 221 So.2d 126, and the cases cited therein, Hamm v. Continental Gin Company, 165 So.2d 392 and State v. Mobile Stove and Pulley Manufacturing Company, 52 So.2d 693. Those cases do hold that the intention of the parties is determinative as to passage of title, and that actual delivery is of secondary importance. However, those cases were decided under statutes different from the ones presently applicable.

As part of the Uniform Commercial Code (UCC), ''7-2-106 and 7-2-401(2) which are discussed above, were enacted into law in 1965, and became effective on January 1, 1967. Prior to the enactment of the UCC, the law governing transfer of title and sales was found at Article 4 of Title 57, Code of Alabama 1940, and specifically ''24 and 25 contained therein. Section 24 was titled, "Property in specific goods passes when parties so intend", and '25 was titled "Rules for ascertaining intention". In effect, those statutes held that the intention of the parties, as evidenced by various key circumstances, was determinative on the question of passage of title. However, said sections were specifically repealed with the

adoption of the UCC, see Acts 1965, p. 1008. Consequently, the UCC, and specifically ''7-2-106 and 7-2-401(2), has been controlling since January 1, 1967.

The Mobile Stove and Pulley and Continental Gin decisions cited by the Taxpayer were issued prior to 1965 and were thus decided under the now repeated ''24 and 25 of Title 57, Code of 1940. Consequently, the reasoning in those cases relative to passage of title is not presently applicable.

The Matthews Electric case was decided in 1969 by the Supreme Court, subsequent to the repeal of ''24 and 25 and the effective date of the UCC. However, from a reading of that case, it is clear that the Supreme Court relied on ''24 and 25, and pre-UCC authorities, including Continental Gin and Mobile Stove and Pulley, in making its decision. The Court cited ''24 and 25 throughout, and seven of eight keyword headnotes cite those sections as authority.

When deciding the Matthews Electric case, the Supreme Court was either unaware of or failed to recognize the impact of the then recently adopted UCC on the question of transfer of title. Subsequent to that case, the Supreme Court has recognized the changes resulting from the UCC, and specifically the fact that under '7-2-401(2), title passes with delivery by the seller, except when explicitly agreed otherwise. State v. Delta Air Lines, Inc., supra; and American Cast Iron Pipe Company v. Boswell, 357 So.2d

438.

In summary, prior to the UCC, Title 57, ''24 and 25, Code of 1940 required that the courts determine passage of title based on the intentions of the parties to the sale. After passage of the UCC, and the repeal of ''24 and 25, delivery by the seller became the determining factor, and conclusive unless otherwise agreed, and the intention of the parties of less importance, unless explicitly set out. Thus, although the Taxpayer In the present case did retain the risk of loss until delivery of the directories outside of Alabama, under current law, whether or not that fact indicated an intention that title not pass until delivery outside of Alabama was of no consequence as to passage of title.

Finally, the Taxpayer challenges the propriety of Department Regulations P18-033 and I14-012. The purpose of regulations promulgated by the Revenue Department is to clarify and interpret the revenue laws of the State, and said regulations are to be given favorable consideration by the courts, except where the interpretation is erroneous and a different construction is required by the statutes. Boswell v. Abex Corporation, 317 So.2d 317.

The Taxpayer argues that Regulation P18-033 is applicable by its terms only to direct mail advertising, and is not relative concerning telephone directories. The title of the regulation does imply that it is relevant only to direct mail advertising by

printers. The title reads as follows: "Direct Mail Advertising, Printer's Liability". However, the substantive wording of the regulation does not so limit its applicability. The regulation begins with the following words, "The sales of printed matter by anyone . . .". By that language, the present case would come within the scope of the rule.

However, without deciding the specific applicability of P18-033 in the instant case, it can be said that in substance the regulation does provide an accurate general summary of the present law concerning sales. The crux of the regulation provides that a sale is complete when and where the sales item is placed in the mail by the seller. That is consistent with '7-2-106 and 7-2-401(2), which provide, as a general rule, that a sale is complete when the seller completes his physical delivery with respect to the goods.

The only shortcoming concerning the regulation is that it fails to mention the exception to the general rule. That is, the parties may expressly agree that title should pass at a point other than the seller's delivery point. If the sales agreement specifically designates when and/or where title should pass, then the sales agreement, and not the regulation, is controlling. However, other than not allowing for the exception to the general rule, the regulation is an accurate interpretation of the law. Having made that determination, it is unnecessary to determine if

said regulation is specifically applicable in the present case. Even if the regulation itself is not applicable because of its self-limiting title, the principles set out therein, in addition to the exception mentioned above, are applicable and controlling.

Regulation 114-012 is titled "Interstate Commerce, Sales In", and sets out three hypothetical situations involving sales in interstate commerce. The first and third examples involve delivery of goods by a seller outside of Alabama. Those examples, which are not presently applicable, are correct and in accordance with the above discussion concerning "7-2-106 and 7-2-401(2) as to physical delivery and passage of title. The remaining portions of the regulation are applicable in the present case and provide as follows:

(2) The seller is required by the sales agreement to deliver the goods to a common carrier or to the United States Post Office for transportation outside the state at the sellers direction either F.O.B. point of origin or F.O.B. point of destination,

Property is not sold in interstate commerce when the buyer takes actual possession of the goods in this state or when an agent of the buyer accepts delivery for him to make delivery outside the state at the buyer's direction. (emphasis added)

Subsection (2) above provides in short that a sale is complete outside of Alabama if the goods are delivered to the Post Office "at the seller's direction", either F.O.B. origin or F.O.B. destination. The second paragraph quoted above provides that a sale is not in interstate commerce if an agent of the buyer accepts

deliver in Alabama "to make delivery outside the state at the buyer's direction". As can be seen, the regulation puts controlling emphasis on who "directs" the delivery of the goods, and the F.O.B. point, which under '7-2-319 is a delivery term, is given little significance.

This Court agrees with the Taxpayer that the distinction between "at the seller's direction" and "at the buyer's direction" is without any basis in the law. The distinction can also be confusing and uncertain. In the present case, the directories were delivered through the Postal Service, as mutually agreed upon by the parties in the sales contract. The buyer provided the mailing addresses and the seller applied said addresses and delivered the goods to the Post Office. Under those facts, it could be argued that both or either of the parties directed the delivery of the goods. In other words, the one who "directed" the goods could arguably be either the party that provided the address labels (South Central Bell), or the party that applied the labels and thereafter made the transportation arrangements with the Postal Service (Oxmoor), or both parties in that the delivery terms were mutually agreed upon in the contract.

If a sales contract required that the seller must deliver a sales item to the Post Office for mailing, the sale would be complete when the seller completed physical delivery to the Post Office, unless the contract provided for passage of title else-

where. Why, how, and at whose direction the goods were delivered to the Post Office would be irrelevant, as would be who provided and attached the address labels. As discussed previously, the controlling factor would be delivery, unless the parties explicitly agreed otherwise. Consequently, contrary to subsection (2) of 114-012, a sale would not be in interstate commerce if the seller delivered the goods to a Post Office in Alabama, either F.O.B. origin or with no F.O.B. point designated. The sale would be complete upon delivery of the goods to the Post Office.

Having found that the relevant portions of Regulation 114-012 are at best unclear and not applicable in all instances, that determination should not relieve the Taxpayer of liability for the tax in issue. As stated above, where a regulation provides an erroneous interpretation of a statute, the regulation must be disregarded and the true wording of the law must be followed. Boswell v. Abex Corporation, supra. Under the relevant statutes, the Taxpayer is liable for the tax in issue, irrespective of the confusion provided by Regulation 114-012.

Based on the above, it is hereby determined that the assessment in issue is correct and due to be upheld. The Revenue Department is directed to make the assessment final in accordance herewith.

Done this 2nd day of July, 1985.

BILL THOMPSON
Chief Administrative Law Judge

