

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. S. 87-223

BIGBEE STEEL BUILDINGS, INC.
P. O. Box 2314
Muscle Shoals, AL 35662,

§

§

Taxpayer.

§

ORDER

The Revenue Department entered preliminary assessments of State, Colbert County and City of Muscle Shoals sales tax against Bigbee Steel Buildings, Inc. ("Taxpayer") for all or a part of the period October 1, 1983 through October 31, 1986. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on June 1, 1989. Conrad Pitts, Esq. appeared for the Taxpayer. Assistant counsel J. Wade Hope represented the Department. The following findings of fact and conclusions of law are hereby entered based on the evidence and arguments presented by the parties.

FINDINGS OF FACT

The Taxpayer fabricates steel building materials and has a facility located in Muscle Shoals, Alabama. The Taxpayer purchases building materials at wholesale and either sells the materials at retail or withdraws the materials from inventory for use in completing furnish and install contracts.

The Taxpayer withdrew materials from inventory during the period in issue to complete various furnish and install contracts within

the city limits of Huntsville. The Taxpayer remitted sales tax on the withdrawals pursuant to the "withdrawal for use" provision, Ala. 1975, §40-23-1(a)(10).

The Department commenced an audit of the Taxpayer and during the audit the Taxpayer filed petitions for refund relating to the tax paid on the materials used in the Huntsville furnish and install contracts. The refund petitions were merged with the audit and the Department made the following findings, on which the assessments in issue are based:

(1) The Department determined that the materials withdrawn from inventory for use in the Huntsville contracts were taxable under the withdrawal section, §40-23-1(a)(10).

(2) The Taxpayer also withdrew materials from inventory during the period September 30, 1986 through October 31, 1986 for use in completing furnish and install contracts outside of Alabama. The Taxpayer now concedes that tax is due on the cost of said materials, for reasons which will be discussed below.

(3) The Taxpayer on occasion made retail sales and charged tax only on its cost of goods sold. The Department assessed additional tax based on the full retail sales price, which the Taxpayer concedes is correct.

CONCLUSIONS OF LAW

The only issue in dispute concerns (1) above and is whether the withdrawal of materials from inventory by the Taxpayer for use in completing furnish and install contracts in Huntsville was subject to tax under the "withdrawal for use" section of the sales tax law, Code of Ala. 1975, §40-23-1(a)(10), as that section read from 1983 until September 29, 1986.

Prior to 1983, the withdrawal provision was interpreted so that the withdrawal of property previously purchased at wholesale for use in fulfilling a furnish and install contract was taxable at the point of withdrawal based on the cost of the goods withdrawn, see Alabama Precast Products, Inc. v. Boswell, 357 So.2d 985 (1978), and Home Tile and Equipment Company v. State, 362 So.2d 236 (1978).

However, the withdrawal provision was amended in 1983 to include the below underlined language:

The term "sale at retail" or "retail sale" shall also mean and include the withdrawal, use or consumption of any tangible personal property previously purchased at wholesale by a person engaged in the business of selling at retail tangible personal property from the business or stock for the personal and private use or consumption, without transfer of title, in connection with the business or by the person so withdrawing, using or consuming the same. . .

Subsequent to the 1983 amendment, the courts apparently interpreted the "without transfer of title" language added by the amendment to mean that if a taxpayer subsequently transferred title

to the materials withdrawn from inventory, then the withdrawal provision would not apply and no tax would be due, see Ex parte Morrison Food Services of Alabama, 497 So.2d 136 (1986); Ex parte Dothan Progress, 507 So.2d 515 (1987); State v. S. E. A. Wire and Cable, Inc., 506 So.2d 345 (1987).

The "without transfer of title" language was deleted from the statute by amendment effective September 29, 1986. The specific and stated intent of the 1986 amendment was to repeal the 1983 amendment and reinstate the pre-1983 statute and case law.

The Taxpayer in the present case recognizes that the 1986 amendment reinstated pre-1983 case law and thus concedes that all withdrawals after September 29, 1986 are taxable, see (2) above concerning furnish and install contracts outside of Alabama. However, the Taxpayer also argues that the materials withdrawn from inventory and used to fulfill the furnish and install contracts in Huntsville should not be taxed because those withdrawals occurred during the effective period of the 1983 amendment and title to the materials was ultimately transferred to the Taxpayer's customers in Huntsville.

However, in Ex parte Campbell and Associates, Inc., 87-1418 decided May 12, 1989, the Supreme Court discussed the Morrison decision and limited the applicability of the "without transfer of title" language to situations where the property was withdrawn to fulfill a contractual obligation to a exempt entity. Thus, if

property is withdrawn from inventory for use by the withdrawer and title subsequently passes to a non-tax exempt entity, then the withdrawal would be taxable.

Ex parte Campbell involved a period prior to the 1983 amendment. However, the Court's explanation of the Morrison decision is apparently the Court's latest interpretation of how the "without transfer of title" language added by the 1983 amendment should be construed. The Court explained as follows:

The Legislature apparently thought that Morrison had broad implications in situations where a person withdrew materials from supplies and used them to perform a contractual obligation and was thereby excused from paying sales taxes. That is a misreading of Morrison. Morrison is applicable only to situations where material bought at wholesale is subsequently used to fulfill a contractual obligation to a tax exempt entity. Consequently, when one enters into and fulfills a performance contract with a non-tax exempt entity, title passes and there is a taxable retail sale . . .

In the present case, there is no evidence that the furnish and install contracts in Huntsville involved tax-exempt entities. That is, title to the materials was not transferred to a tax exempt entity. Consequently, under the limiting language set out by the Supreme Court in Ex parte Campbell, the withdrawal of the materials by the Taxpayer for use in completing the furnish and install contracts in Huntsville was during the effective period of the 1983 amendment.

The above considered, the Department is hereby directed to make final the preliminary assessments as statutory interest.

Entered this the 19th day of July, 1989.

BILL THOMPSON
Chief Administrative Law Judge