

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

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DOCKET NO. S. 88-214

MANN LAUNDRY & DRY CLEANERS
River Falls Street
Andalusia, AL 36420,

§

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Taxpayer.

§

ORDER

The Revenue Department assessed State, Covington County and City of Andalusia sales tax against Mann Laundry and Dry Cleaners, Inc. ("Taxpayer") for the period June 1, 1985 through May 31, 1988.

The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on August 3, 1989. Jeff Kohn, Esq. appeared for the Taxpayer. The Department was represented by assistant counsel Duncan Crow. 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 leases uniforms, linens, etc. (collectively "uniforms") in Alabama and Florida. The Taxpayer maintains a principal office in Andalusia, Alabama, and also has a warehouse in Pensacola, Florida.

The Taxpayer contracted to lease personalized uniforms to numerous customers in Alabama and Florida during the period in question. The Taxpayer purchased the uniforms necessary to fulfill the leases from various out-of-state sellers. The uniforms were

then personalized, repacked and shipped to the Pensacola warehouse for subsequent distribution to the lease customers in Florida. The Florida uniforms were generally shipped to the Pensacola warehouse within 24 hours after being received at the Andalusia facility.

The Taxpayer paid State, Covington County and City of Andalusia sales tax on the purchase of the uniforms from the out-of-state sellers. The Taxpayer petitioned for a refund of said tax, which was granted by the Department. The Department subsequently audited the Taxpayer, decided that sales tax was due on the purchase of the Florida uniforms, and thus entered the assessments in issue.

The Department initially conceded that the uniforms were properly purchased at wholesale under Code of Ala. 1975, §40-23-1(a)(9)j, but argued that a retail sale subsequently occurred under the sales tax withdrawal provision, Code of Ala. 1975, §40-23-1(a)(10), when the uniforms were withdrawn from inventory at the Andalusia facility to be personalized (see Department's Position Statement). The Department later argued at the administrative hearing that the uniforms were not purchased at wholesale under §40-23-1(a)(9)j because the lease of the uniforms in Florida was not subject to the Alabama lease tax. Section 40-23-1(a)(9)j defines "wholesale sale" to include the sale of any property that is intended for lease if the lease is subject to the Alabama lease tax.

The Taxpayer first argued that the Florida uniforms were not in Alabama long enough to become a part of inventory, and thus could not be subject to tax under the withdrawal statute (see Taxpayer's Response to Notice of Hearing). The Taxpayer now argues that use tax and not sales tax is the correct tax. The Taxpayer also raises various constitutional arguments against imposition of the tax.

CONCLUSIONS OF LAW

The Alabama sales tax is imposed on retail sales within Alabama. Boswell v. General Oils, Inc., 368 So.2d 27, cert. denied 368 So.2d 30. Use tax applies if the retail sale occurs outside of Alabama and the property is subsequently transported into Alabama for use, storage or consumption. State v. Marmon Industries, Inc., 456 So.2d 798. Thus, assuming, as argued by the Department, that the uniforms were purchased by the Taxpayer at retail (and not at wholesale under §40-23-1(a)(9)j), the initial question is whether the retail sales occurred in Alabama, in which case sales tax would be applicable, or outside of Alabama, in which case use tax would be applicable.

"Sale" is defined as "every closed transaction constituting a sale", see Code of Ala. 1975, §40-23-1(a)(5). Prior to 1967, the law on sales in Alabama was controlled by Title 57, §§24 and 25, Code of Ala. 1940. Section 24 provided that a sale occurred where intended by the parties, and §25 set forth certain guidelines by

which the intention of the parties could be ascertained. Hamm v. Continental Gin Company, 165 So.2d 392, which is cited in the Taxpayer's brief, was decided under the above statutes.

Sections 24 and 25 were repealed upon adoption of the UCC in 1967. The UCC changed the law on sales to provide that a sale occurred upon the passage of title by the seller to the buyer, see Code of Ala. 1975, §7-2-106. Title passes, unless otherwise specifically agreed, when and where the seller completes his required performance with respect to delivery of the goods, see Code of Ala. 1975, §7-2-401(2). The above UCC sections are controlling as to when a sale occurs for purposes of the Alabama sales and use tax law, see State v. Delta Airlines, Inc., 356 So.2d 1205, and Oxmoor Press, Inc. v. State, 500 So.2d 1098.

FOB is a delivery term, see Code of Ala. 1975, §7-2-319. Thus, under the UCC, the sale of property which is delivered by common carrier FOB origin is closed at the shipping point upon delivery of the goods by the seller to the common carrier. Conversely, the sale of property which is delivered by common carrier FOB destination is completed upon delivery of the goods by the common carrier at the destination point. Oxmoor Press, Inc. v. State, supra.

However, the law was again changed effective April 30, 1986 by a specific amendment to the definition of "sale" at §40-23-1(a)(5). That 1986 amendment reaffirms the UCC by providing that

for sales tax purposes a sale is complete upon transfer of title, but further specifies that "for the purpose of determining transfer of title, a common carrier or the U. S. Postal Service shall be deemed to be the agent of the seller regardless of any FOB point, and regardless of who selects the method of transportation, and regardless of by whom or the method by which freight, postage or other transportation charge is paid." Consequently, under §40-23-1(a)(5), as amended, the sale of any property that is delivered by common carrier or by mail is complete only upon delivery of the property to the buyer.

Concerning the sales in issue that occurred prior to the 1986 amendment to §40-23-1(a)(5), a reasonable conclusion from the available facts is that the sales were completed FOB origin outside of Alabama in that the sellers delivered the uniforms to the common carrier outside of Alabama and the common carrier was paid by the Taxpayer. Consequently, under the UCC, those sales which occurred prior to April 30, 1986 were completed outside of Alabama and thus would not be subject to Alabama sales tax.¹

However, the sales that occurred after April 30, 1986 would be subject to Alabama sales tax in that under §40-23-1(a)(5), as amended, the common carrier is deemed to be the agent of the

¹Although the pre-April 30, 1986 sales were completed outside of Alabama, use tax would not be due because the uniforms were stored only temporarily in Alabama and were subsequently used exclusively out-of-state in Florida, see Code of Ala. 1975, 540-23-60(7), and Department Reg. 810-6-5-.23.

seller, in which case the sales were not completed until delivery at the Taxpayer's Andalusia facility. The question then becomes whether the Department can assess and collect sales tax against the Taxpayer, as the purchaser, concerning the post-April, 1986 sales.

The purpose of the Alabama sales tax is to tax the ultimate consumer. State v. T. R. Miller Mill Company, 130 So.2d 185. However, the sales tax is levied against the seller and the seller is in all cases required to collect the tax from the consumer and remit the tax to the Department, see Code of Ala. 1975, §§40-23-2 and 40-23-26. Thus, the Department is authorized to assess and collect sales tax against the retail seller only. Consequently, the Taxpayer, as the purchaser and not the retail seller of the uniforms in question, cannot be assessed for sales tax on the transactions.²

A discussion of the constitutional issues raised by the Taxpayer is pretermitted as a result of the above findings. The Department is hereby directed to reduce and make final the assessments in issue showing no additional tax due by the Taxpayer.

Entered this the 20th day of September, 1989.

BILL THOMPSON
Chief Administrative Law Judge

² Thus, even if the sales prior to April 30, 1986 had occurred in Alabama, the Taxpayer would not be liable for sales tax on those purchases.