

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. 89-134

AMERICAN BUILDINGS COMPANY
P.O. Box 800
Eufaula, AL 36072,

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Taxpayer.

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FINAL ORDER

The Revenue Department denied two petitions for refund of sales tax filed by American Buildings Company, Inc. (Taxpayer) concerning the periods August 26, 1986 through November 21, 1986 and July 9, 1987 through February 23, 1988. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on January 10, 1991. Charles Blackmon and Joyce Lawson appeared for the Taxpayer. Assistant counsel Dan Schmaeling represented the Department. This Final Order is based on the evidence and arguments presented by the parties as well as the complete record of the proceedings.

FINDINGS OF FACT

The Taxpayer sold building materials tax free to Sparks Technical College and the Alabama Public School and College Authority (jointly Sparks College or College) for use on two separate projects at the College. The Department audited the Taxpayer and determined that the sales were actually taxable sales to the general contractor on the projects, General Building Corporation (General Building). The Taxpayer paid the disputed tax

and subsequently filed Petitions for refund. The Department denied the refunds and the Taxpayer appealed to the Administrative Law Division.

The relevant facts are as follows: General Building contracted with Sparks College to furnish and install the materials and labor necessary for completion of a construction project at the College.

General Building contacted the Taxpayer concerning the materials necessary for the project and the Taxpayer explained that the materials could be purchased tax free if the sales were made directly to the tax exempt College. The parties thus attempted to restructure the transaction so that the Taxpayer would sell the materials tax free directly to the College.

General Building performed the work on the project and was paid the full amount by the College in accordance with the original furnish and install- contract. However, the necessary materials were ordered directly by the College and the Taxpayer issued the invoices and delivered the materials directly to the College. The Taxpayer was paid by checks issued by the College (Sparks College Professional Association). General Building then issued its own checks as reimbursement to the College for the exact amounts paid by the College to the Taxpayer.

The College and General Building entered into a second furnish and install contract which was handled in exactly the same manner as the first contract except that the Taxpayer initially issued a purchase invoice to General Building with instructions to ship the

materials to Sparks College. The Taxpayer quickly discovered its "mistake", voided the invoice to General Building, and issued a substitute invoice to Sparks College as purchaser. Again, Sparks College paid the Taxpayer for the materials and was subsequently reimbursed by General Building, the same as on the first project.

CONCLUSIONS OF LAW

The Department argues that the materials were sold by the Taxpayer for use on a furnish and install contract between General Building and the College and therefore the sales were taxable sales to the contractor, General Building. The legal authority for the Department' s argument is Hamm v. Boeing Co., 89 S.Ct. 1194, 394 U.S. 320, in which the U. S. Supreme Court decided that the sale of materials to a contractor for use on a furnish and install contract with the U. S. government constituted taxable sales to the contractor and not tax exempt sales to the government. That is, sales to a contractor are taxable even though the contractor uses the materials on a furnish and install contract with an exempt entity and the materials eventually become the property of the exempt entity.

However, Hamm v. Boeing Co. applies only if the sales in question are to the taxable contractor. The sales in this case were directly to the tax exempt College. General Building was not a party to the sales and the fact that Sparks College and General Building had previously entered into a furnish and install contract is not relevant for purposes of determining the Taxpayer's

liability for sales tax.

A taxpayer can structure its business dealings so as to pay as little tax as possible or take advantage of its tax exempt status.

The sales in this case were not sham transactions whereby the exempt College purchased the materials tax free and then transferred the materials to an unrelated taxable entity. The materials were used and consumed by the College and the College was the ultimate consumer.

The sales in issue were tax exempt sales to the College and the refunds in issue should be granted by the Department. This is a Final Order and may be appealed pursuant to Code of Ala. 1975, §41-22-20.

Entered on February 8, 1991.

JAMES M. SIZEMORE, JR., Commissioner