

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

vs.

LANE CARPET COMPANY, INC.
1201 Church Street
Huntsville, AL 35804,

Taxpayer.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 89-149

FINAL ORDER

The Revenue Department assessed sales tax against Lane Carpet Company, Inc. (Taxpayer) for the period July 1, 1985 through June 30, 1988. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on May 14, 1991. Julian D. Butler appeared for the Taxpayer. Assistant counsel Beth Acker represented the Department.

A decision in the case was delayed until the Alabama Supreme Court ruled in a pending issue-related case involving the Dothan Progress newspaper. That case (hereinafter "Dothan Progress") was finally decided on September 18, 1992, see Ex Parte Sizemore, 605 So.2d 1221.

The relevant facts in this case are undisputed.

The Taxpayer is in the business of selling and installing carpet, vinyl flooring and related items (hereinafter "carpet") in Huntsville, Alabama. The Taxpayer purchases the carpet at wholesale and either resells the carpet at retail or withdraws the carpet from inventory for use in furnish and install contracts.

The assessment in issue involves carpet purchased at wholesale and subsequently withdrawn from inventory and used by the Taxpayer in furnish and install contracts with various tax exempt entities (schools, hospitals and industrial development boards). The Department assessed the Taxpayer on the wholesale cost of the carpet.

The Taxpayer contends that the transactions were exempt sales to the tax exempt entities.

The Department contends that sales tax is due under either (1) the sales tax "withdrawal" provision or (2) the "contractor" provision, both found at §40-23-1(a)(10).

The "withdrawal" provision reads as follows:

The term "sale at retail" or "retail sale" shall also mean and include the withdrawal, use, or consumption of any tangible personal property by anyone who purchases same at wholesale, . . .; and such wholesale purchaser shall report and pay the taxes thereon."¹

Prior to 1983, the withdrawal provision (as quoted above) was interpreted so that the withdrawal of property previously purchased at wholesale and used on a furnish and install contract constituted a taxable retail sale at the time of withdrawal. The taxable

¹This is how the withdrawal provision read prior to a 1983 amendment and also after a 1986 amendment. The amendments and their effect are discussed below.

measure was the wholesale cost of the property. See, Alabama Precast Products, Inc. v. Boswell, 357 So.2d 985; Home Tile and Equipment Company, Inc. v. State, 362 So.2d 236. The withdrawals in issue would be taxable under the above interpretation.

However, the Legislature amended the withdrawal provision in 1983 and added the phrase "without transfer of title". The 1983 amendment resulted in a number of appellate court decisions, see, Ex Parte Disco Aluminum Products Company, 455 So.2d 849; White, Commissioner of Revenue v. Campbell and Associates, Inc., 473 So.2d 1071; State v. Morrison Cafeterias Consolidated, Inc., 487 So.2d 895; Ex Parte State of Alabama, 487 So.2d 898; Morrison Food Service of Alabama v. State, 497 So.2d 131; Ex Parte Morrison Food Service of Alabama, 497 So.2d 136; Dothan Progress v. State, Department of Revenue, 507 So.2d 511; and Ex Parte Dothan Progress, 507 So.2d 515.

The Alabama Supreme Court finally interpreted the 1983 amendment so that the withdrawal provision applied only to withdrawals for personal use or consumption without transfer of title. "Thus, when the taxpayer transfers title to the goods which have been withdrawn, he cannot be taxed under the withdrawal provision". See, Ex Parte Morrison Food Service of Alabama, supra, at p. 141. The withdrawals in this case would not be taxable under the 1983 amendment because title to the carpet eventually passed to the Taxpayer's customers.

However, the Legislature again amended the withdrawal provision in 1986, this time deleting the phrase "without transfer of title". The effect of the 1986 amendment was finally settled in the aforementioned Dothan Progress case, decided on September 18, 1992.

The Supreme Court held in Dothan Progress that the intent of the 1986 amendment was to repeal the 1983 amendment and reinstate the pre-1983 interpretation of the statute. See, Sizemore, supra, at p. 1227. That is, transfer of title is no longer a factor in deciding if the withdrawal provision is applicable.

However, the Supreme Court also declared that the 1986 amendment should be applied prospectively only. "Therefore, the interpretation of the law in this case is prospective only, . . ."

See, Sizemore, supra, at p. 1227. Consequently, the 1983 amendment is applicable to all transactions prior to the Dothan Progress decision, September 18, 1992, a period which includes the transactions in issue in this case. Accordingly, the 1983 amendment is applicable in this case and the withdrawals in issue are not taxable under the withdrawal provision because title to the carpet passed to the Taxpayer's customers upon installation.

However, the transactions are taxable under the contractor provision of §40-23-1(a)(10). The contractor provision defines "retail sale" to include the following:

Sales of building materials to contractors, builders, or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold.

The contractor provision applies if three conditions are met: "(1) the taxpayer must be a "contractor"; (2) the raw materials involved must be "building materials", and (3) the building materials must be sufficiently attached to the buildings to become part of the real estate". See, State, etc. v. Montgomery Woodworks, Inc., 389 So.2d 510, at p. 511, citing Department of Revenue v. James A. Head and Company, 306 So.2d 5. If the contractor provision applies, then tax is due when the contractor purchases the materials from his supplier.²

Head, supra, is directly on point in this case. The Taxpayer, by contracting to supply the carpet and labor necessary to install the carpet, was a "contractor". The carpet was a "building material", just as in Head. Finally, the carpet was sufficiently attached so as to become a part of the real estate. The contractor

² However, if the contractor also resells materials at retail, as in this case, then he is in a "dual business" and is allowed to purchase all materials tax-free because he cannot know at the time of purchase whether the materials will be resold at retail or used in a contract. See, Dept. Regs. 810-6-1-.30 and 810-6-1-.56. The contractor/retailer must then pay either on the retail sales price if the materials are later sold at retail, or on his wholesale cost if the materials are later used in a furnish and install contract. The Taxpayer in this case is a dual operator and thus purchased the carpet in issue at wholesale.

provision applies and the Taxpayer is liable for sales tax on the wholesale cost of the carpet in issue.

The Taxpayer started using carpet squares instead of wall to wall carpet sometime during the audit period. Carpet squares are approximately 12-16 inches square and are attached to the floor with pre-applied adhesive. The Taxpayer argues that carpet squares are not permanently affixed and do not become a part of the real estate because each square can be easily pried-up and replaced if necessary. I disagree.

Carpet squares are securely attached and are intended to become a permanent part of the building in which they are installed. Wall to wall carpet and carpet squares can both be replaced if necessary, and the fact that carpet squares are easier to replace is irrelevant. Certainly a property owner that purchases carpet squares hopes that the squares are permanent and will never need replacing. The carpet in issue clearly became a part of real estate within the criterion set out in Head, supra, at p. 10.

Finally, the fact that the Taxpayer's customers were tax exempt entities is not relevant. Head, supra; State v. King and Boozer, 314 U.S. 1, 62 S.Ct. 43. Under the contractor provision, the taxable retail sale occurs when the contractor purchases the materials from the supplier (or if a dual business, when the materials are withdrawn from the contractor's inventory for use on

a contract). The contractor is the taxpayer and the exempt status of his customer is irrelevant.

The above considered, the assessment is upheld and judgment is entered against the Taxpayer in the amount of \$26,769.64, with additional interest computed from February 14, 1989.

This Final Order may be appealed to the circuit court within 30 days pursuant to Code of Ala., §40-2A-9(g).

Entered on April 9, 1993.

BILL THOMPSON
Chief Administrative Law Judge