

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

vs.

§

DOCKET NO. S. 89-174

JAMES CARPETS OF HUNTSVILLE INC.
3607 S. Memorial Parkway
Huntsville, AL 35801,

§

§

Taxpayer.

§

FINAL ORDER

The Revenue Department assessed Morgan County sales tax against James Carpets of Huntsville Inc. (Taxpayer) for the period August 1985 through June 1988. The Taxpayer appealed to the Administrative Law Division and the case was submitted on a joint stipulation of facts. John R. Barren represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

The issue in this case is whether the Taxpayer owes Morgan County sales tax on carpet purchased at wholesale and subsequently withdrawn from inventory and used by the Taxpayer on furnish and install contracts in the City of Decatur.

The Taxpayer operates a carpet outlet in Morgan County, Alabama outside the City of Decatur. The Taxpayer contracted to furnish and install carpet inside Decatur during the period in issue and withdrew carpet from inventory for use in completing the contracts. The Taxpayer had previously purchased the carpet at wholesale. The Department administers the Morgan County tax and

subsequently assessed the Taxpayer for Morgan County sales tax based on the Taxpayer's wholesale cost of the carpet.

The Taxpayer challenges the assessment on three grounds.

Issue (1) - The Taxpayer paid Decatur sales tax on the transactions and argues that Decatur and Morgan County sales tax cannot both be levied on the same transaction, citing Code of Ala. 1975, §40-23-2.1. I disagree. Section 40-23-2.1 provides only that not more than one city tax or more than one county tax can be levied at the same time. A city and a county (and the State) can both levy a tax on the same transaction.

Issue (2) - The Taxpayer also challenges the constitutionality of the Morgan County tax. However, as administrative law judge for the Department, I am without authority to rule on the constitutionality of a statute. See cases cited in the preliminary order dated September 11, 1991.

Issue (3) - The Taxpayer argues that the transactions cannot be taxed under the "withdrawal" provision found at §40-23-1(a)(10). I agree that the withdrawal provision doesn't apply. However, the transactions are taxable under the "contractor" provision also found at §40-23-1(a)(10).

The sales tax withdrawal section was amended twice and was the subject of much litigation from 1983 through 1992. See preliminary order for details.

The issue was finally settled in Ex Parte Sizemore, 605 So.2d 1221, decided September 18, 1992. The effect of Sizemore is that the withdrawal provision does not apply if the withdrawal occurred prior to September 18, 1992 and title to the property was subsequently transferred. The transactions in issue were thus not taxable under the withdrawal provision because the withdrawals occurred prior to September 18, 1992 and title to the carpet eventually passed to the Taxpayer's customers in Decatur.

However, although the withdrawal provision is not applicable, 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 building 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 & Co., 306 So.2d 5.

Tax is usually due under the contractor provision when the contractor purchases the building materials from his supplier. However, if the contractor also resells materials at retail, as in

this case, he is a "dual operator" 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 furnish and install contract.¹ See, Department 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 withdrawn from inventory and used on a furnish and install contract.

Head is directly on point in this case. The Taxpayer by contracting to supply the carpet and the 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 to become a part of the real estate. The contractor provision applies and the Taxpayer is liable for Morgan County sales tax on the wholesale cost of the carpet in issue.

The preliminary order issued on September 11, 1991 stated that all transactions prior to September 29, 1986 were clearly not taxable under the withdrawal provision and should be deleted from the audit. Although the withdrawal provision does not apply to those transactions, the contractor provision does and thus they

The exception is where the dual operator purchases materials for use on a specific contract. In that case the dual operator is a contractor and tax is due when the materials are purchased from the supplier.

should not be removed from the audit. All withdrawals in issue are taxable under the contractor provision.

The assessment in issue is upheld and judgment is entered against the Taxpayer for Morgan County sales tax in the amount of \$8,012.31, plus additional interest from May 20, 1989.

While the above is dispositive of this case, I will add that in my opinion the Taxpayer should not have paid City of Decatur sales tax because the taxable event occurred when the carpet was withdrawn from the Taxpayer's inventory outside of Decatur. Unfortunately, the statute of limitations for obtaining a refund of City of Decatur may have expired.

The Alabama Supreme Court is presently addressing the issue of whether local tax is due at the point of withdrawal or at the point of use. See, City of Huntsville v. City of Madison, S.Ct. Case No. 1920581. As stated, in my opinion sales tax is due at the time and place of withdrawal under either the contractor or withdrawal provisions of §40-23-1(a)(10).

This Final Order may be appealed to the circuit court within thirty days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on September 21, 1993.

BILL THOMPSON
Chief Administrative Law Judge