

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. 90-155

COPELAND BUILDING CO., INC.
214 South Fourth Street
Gadsden, AL 35901,

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Taxpayer.

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FINAL ORDER

The Revenue Department assessed State, county and city sales and use tax against Copeland Building Company, Inc. (Taxpayer) for all or part of the period November, 1984 through April, 1988. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on August 29, 1990. Robert C. Walthall appeared for the Taxpayer. Assistant counsel John J. Breckenridge represented the Department. This Final Order is based on the evidence presented at the hearing.

FINDINGS OF FACT

The Taxpayer is in the glass business in Gadsden, Alabama and furnished and installed glass as a contractor on numerous construction projects during the subject years. The Taxpayer also made over \$841,000.00 in retail sales during the same period. The retail sales accounted for approximately 5% of the Taxpayer's gross business.

The Taxpayer acquired State and City of Gadsden sales tax numbers in 1955 and used the numbers to purchase glass from its vendors at wholesale prior to and during the subject period. The

Taxpayer subsequently withdrew the glass from inventory as needed to complete its construction contracts and retail orders. In some few cases the glass purchased by the Taxpayer was never put in inventory but rather was shipped directly by the vendor to the Taxpayer's customer outside of Gadsden.

The Taxpayer reported and paid State sales tax to the Department when the glass was withdrawn from inventory in Gadsden. However, local sales or use tax was paid to the local jurisdictions when and where the glass was delivered and used.

The Department audited the Taxpayer and assessed City of Gadsden sales tax on the withdrawals from inventory in Gadsden. The Department's position is that the Taxpayer purchased the glass at wholesale and that the subsequent withdrawals for use were taxable retail sales under Code of Ala. 1975, §40-23-1(10). The City of Gadsden tax is the primary assessment in dispute. The Department concedes that the Taxpayer should be allowed credit against the Gadsden tax due for local taxes erroneously paid by the Taxpayer.

The Department also entered State sales tax and various tax county use tax assessments against the Taxpayer. The State assessment involved IDB sales and has been settled. The county use tax assessments are based on the glass that was delivered directly by the vendors to the Taxpayer's customer outside of Gadsden. All assessments were computed using the Taxpayer's sales records and the technical accuracy of the assessments is not disputed.

CONCLUSIONS OF LAW

The issue is whether the glass previously purchased at wholesale by the Taxpayer was subject to sales tax when it was withdrawn from inventory in Gadsden for subsequent use on the Taxpayer's construction contracts. The Taxpayer argues that it erroneously purchased the glass at wholesale and instead as a contractor should have purchased at retail and paid sales tax to the vendors at the time of purchase. If the Taxpayer is correct, then the subsequent withdrawals would not be taxable and City of Gadsden sales tax would not be due.

The sale of building materials to a contractor is a retail sale and sales tax should be paid directly by the contractor to the vendor, see second sentence of Code of Ala. 1975, §40-23-1(10). However, the Taxpayer operated a dual business as a contractor and retailer during the subject period and as such properly purchased the glass at wholesale under the Department's dual business regulation, Reg. 810-6-1-.56. reads in part as follows:

Operators of businesses who are both making retail sales and withdrawing for use from the same stock of goods are to purchase at wholesale all of the goods so sold or used and report both retail sales and withdrawals for use under the sales tax law.

In such cases, the subsequent withdrawal from inventory of materials previously purchased at wholesale constitutes a taxable retail sale. See, Code of Ala. 1975, §40-23-1(10), and also Ex Parte Home Tile and Equipment Co., 362 So.2d 239, and Alabama

Precast Products, Inc. v. Boswell, 357 So.2d 985. The withdrawals in this case occurred at the Taxpayer's facility in Gadsden. Accordingly, City of Gadsden sales tax was properly assessed by the Department.

The Taxpayer contends that the dual business regulation is inapplicable because it was a contractor only and did not have a substantial number of retail sales" during the subject period. However, over \$841,000.00 in retail sales constitutes a substantial retail business even though the retail sales accounted for only approximately 5% of the Taxpayer's total gross proceeds.

In any case, §40-23-1(10) defines "sale at retail" in part as the withdrawal for use of "any tangible personal property previously purchased at wholesale". It is undisputed that the Taxpayer (either correctly or incorrectly) purchased the glass in issue at wholesale.

Consequently, the subsequent withdrawals of the glass purchased at wholesale were taxable retail sales under the above provision. The Taxpayer reported and paid State sales tax on the withdrawals and City of Gadsden sales tax should also have been paid in the same manner.

The Taxpayer relies on Hill v. State, 281 So.2d 440. In Hill, the taxpayer operated two separate businesses in Anniston, a retail outlet and a contracting company. The businesses purchased materials from different vendors and kept separate inventories. The contracting business purchased supplies from its vendors, which were

retail sales under §40-23-1(10), but did not pay sales tax directly to the vendors as it should have. Rather, the contractor reported and paid the tax directly to the Department by the 15th of the following month.

The Department argued that the taxpayer's failure to correctly pay the tax to the vendors converted the retail purchases into wholesale sales and that the subsequent withdrawals in Anniston were therefore retail sales subject to City of Anniston sales tax. The Court of civil Appeals disagreed. The Court determined that the taxpayer's contracting and retail businesses were separate and that the retail purchases by the contracting business were not changed into wholesale sales because of the contractor's erroneous method of paying the tax.

A primary factor relied on by the Court was that the taxpayer's retail and contracting businesses were independent and purchased materials from separate vendors and kept different inventories. As stated by the Court, at page 443:

The Department of Revenue in brief insists that the fact that appellant possessed both state and city sales tax numbers is most important, together with the fact that the evidence shows that appellant had never paid sales tax to any vendor selling to either of his two businesses. We concede that such facts would be most important and controlling if the two business operations were operated as one from the same inventory, with purchases made commonly from the same suppliers. . . . (underline added)

The Taxpayer in this case purchased glass in bulk at wholesale and then withdrew the glass as necessary from the same inventory to

complete both the construction contracts and the retail orders. That is, the Taxpayer's contracting and retail businesses operated from the same inventory and purchased materials from the same suppliers, both factors that would have changed the Court's opinion in Hill.

The Hill Court also considered the fact that the taxpayer treated his purchases as retail transactions and reported and paid State sales tax before the materials were withdrawn from inventory.

In this case the Taxpayer unquestionably purchased the glass at wholesale and paid State tax only after the materials were withdrawn from inventory. City of Gadsden sales tax should also have been paid on those same withdrawals.

The above considered, the Department is directed to make the assessments in issue final, with appropriate credits allowed for local taxes previously paid by the Taxpayer.

Entered on August 6, 1991.

BILL THOMPSON
Chief Administrative Law Judge