

KOPAC INTERNATIONAL CORP.
Southeast Pallet & Box Co., Inc.
P.O. Box 1882
Montgomery, AL 36102-1882,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 99-475

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed sales tax against Kopac International Corporation (ATaxpayer®) for September 1994 through June 1998.¹ The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, '40-2A-7(b)(5)a. A hearing was conducted on February 3, 2000. Chris Simmons represented the Taxpayer. Assistant Counsel Margaret McNeill represented the Department.

ISSUE

The Taxpayer sold wood packing boxes at retail during the subject period. The issue is whether the sales were closed in Alabama. If so, the Taxpayer is liable for the sales tax in question.

FACTS

The Taxpayer is located in Montgomery, Alabama, and manufactures and sells wood pallets and box components at retail. The facts relating to the sales in issue are as follows:

¹The Department also assessed the Taxpayer for use tax for May 1995 through May 1998. The Taxpayer also appealed that final assessment, but now concedes that the use tax final assessment is correct.

James Coleman (AColeman@) owns and operates Coleman American Companies, Inc. (AColeman American@), and various subsidiary corporations, including Covan Worldwide Moving, Inc. (ACovan@) and Coleman American Moving Services, Inc. (AColeman American Moving@). Coleman American and its subsidiaries (AColeman Companies@) are headquartered in Midland City, Alabama. They use a common checking account. The Coleman Companies' internal accounting system allocates costs and income among the various related subsidiaries.

Coleman telephoned the Taxpayer concerning the purchase of wood packing boxes. Coleman explained that one of his companies had contracted with the U.S. Government to ship furniture overseas, and that the boxes were needed for that purpose. The parties agreed to terms, and the Taxpayer manufactured the boxes as specified by Coleman. Coleman never submitted the Taxpayer a purchase order for the boxes.

The Taxpayer notified Coleman by telephone when an order was ready. Some of the boxes were picked up by a Covan truck at the Taxpayer's Montgomery facility. The Covan truck delivered the boxes to a Coleman American Moving facility outside of Alabama. There is also evidence that other carriers on occasion picked up the boxes and delivered them to locations in Alabama.

The Taxpayer invoiced Covan at the Coleman Companies' headquarters in Midland City. The invoices were paid by check issued on the Coleman Companies' common checking account. The Coleman Companies made the appropriate intracompany entries on its internal records.

Covan did not prepare bills of lading concerning the deliveries because it was shipping the boxes for a sister company. Coleman provided the Taxpayer with bills of lading completed after the fact showing that the boxes were purchased by Coleman American Moving, and delivered by Covan outside of Alabama.

The Taxpayer failed to collect sales tax on the sales because it understood that the boxes were being delivered outside of Alabama. The Department assessed the Taxpayer for the sales tax in issue because (1) the Taxpayer had billed Covan in Alabama, and (2) there was no proof that the boxes had been shipped outside of Alabama. The Taxpayer appealed.

This case turns on whether the Taxpayer sold the boxes to Covan in Alabama. If so, the Taxpayer is liable for the sales tax in issue.

A sale is defined for sales tax purposes as every closed transaction constituting a sale . . . Code of Ala. 1975, ' 40-23-1(a)(5). That statute also makes a common carrier the agent of the seller, and provides that a sale is not closed until the time and place when and where title is transferred by the seller or seller's agent to the purchaser or purchaser's agent . . . Consequently, if Covan was acting as a common carrier when it picked up the boxes at the Taxpayer's facility in Alabama, the sales were not closed until Covan delivered the boxes outside of Alabama.

The term a common carrier is not defined in the Alabama Revenue Code, Title 40, Code of Ala. 1975. In that case, the commonly understood definition of the term should apply. IMED Corp. v. Systems Engineering Associates Corp., 602 So.2d 344 (Ala. 1992). The American Heritage Dictionary, 2nd College Edition, at 298, defines a common carrier

as a person or company in the business of transporting the public or goods for a fee. A similar definition is found at Code of Ala. 1975, '37-3-2(6) relating to motor vehicle common carriers.

Covan is a common carrier pursuant to the above definition. It transports goods for hire for the public. That conclusion is affirmed by the fact that Covan is licensed as a common carrier with the Interstate Commerce Commission.

The harder question, however, is whether Covan was acting as a common carrier when it picked up the boxes at the Taxpayer's facility in Alabama. That issue is complicated by the informal nature of the transactions, and the Coleman Companies' failure to fully document the purchase and delivery of the boxes. Given the scant documents available to the Department examiner, it is understandable that he determined that the Taxpayer sold the boxes to Covan in Alabama.

However, substance over form must govern in tax matters. Boswell v. Paramount Television Sales, Inc., 282 So.2d 892 (1973). The evidence confirms that in substance, Coleman American Moving purchased and used the boxes to fulfill its contract with the U.S. Government. Coleman ordered the boxes for Coleman American Moving, and then directed Covan to deliver the boxes to Coleman American Moving outside of Alabama. Covan was acting in its capacity as a common carrier when it did so. Consequently, pursuant to '40-23-1(a)(5), the sales were not closed until Covan completed delivery of the boxes outside of Alabama.

The above holding applies only to those boxes picked up by Covan at the Taxpayer's facility in Montgomery. The Department audit also includes some sales that

were picked up by third party carriers and delivered to Alabama destinations. Those sales were closed upon delivery by the third-party carriers in Alabama. The Taxpayer conceded at the hearing that those boxes delivered to Alabama destinations were taxable and are not being contested. Transcript, at 19, 20.

The Department is directed to recompute the sales tax final assessment by including in the taxable measure only those sales delivered by a third-party carrier to an Alabama location. The boxes delivered by Covan outside of Alabama should be deleted. The Administrative Law Division will enter an appropriate Final Order upon receipt of the adjusted amount due.

This Opinion and Preliminary Order is not an appealable Order. The Final Order, when entered, may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, ' 40-2A-9(g).

Entered August 16, 2000.

BILL THOMPSON
Chief Administrative Law Judge