

ALABAMA TAX TRIBUNAL

MOBILE ASPHALT COMPANY, §
Taxpayer, §
v. § DOCKET NO. CITY/COUNTY 17-102-LP
VARIOUS ALABAMA CITIES §
& COUNTIES

FINAL ORDER

Mobile Asphalt Company (the “Taxpayer”) appealed the final assessments of local sales and use taxes issued by Mobile County, Conecuh County, Monroe County, Choctaw County, Clarke County, and the cities of Coffeerville, Loxley, Bay Minette, Millry, Monroeville, Silas, Pennington, Camden, Citronelle, Evergreen, and Repton (the “Localities”). A hearing was conducted on June 28, 2018, before the Honorable Christy Edwards, former Alabama Tax Tribunal judge. Paul Kalifeh, CPA, of Kalifeh, Bedsole, Adams, P.C., represented the Taxpayer. Jonathan V. Gerth, Esq., of Avenu Insights & Analytics, LLC (successor of RDS), represented the Localities.

FACTS

Following the hearing, Avenu Insights and the Taxpayer reached an accord on the recovery of alleged past-due amounts on the audit, and thus this ruling is limited to the issue surrounding the taxing of Tack. The parties stipulated to the following facts:

1. Tack is an emulsion oil by-product purchased by asphalt paving contractors such as the Taxpayer for repaving jobs. The use of Tack is not required to pave new roads, only in repaving jobs.

2. The Taxpayer is a dual business contractor pursuant to Ala. Admin. Code r. 810-6-1-.56.

3. The Taxpayer does not manufacture or produce Tack in any of its operations, but rather purchases the product directly from vendors tax-free using its sales tax license.

4. The Taxpayer purchases Tack on a rolling basis from vendors to be used on paving contract jobs it performs. Although the Taxpayer does not commingle inventory of Tack with that of the asphalt plant mix it manufactures, withdraws, and sells, it does in some instances maintain an inventory of Tack in certain stationary warehouses and tankers it owns, from which it makes withdrawals for personal use or consumption. In other instances, the Tack is delivered via over-the-road tankers directly to the site of the paving jobs where it is withdrawn for use on repaving jobs.

5. The Taxpayer testified that it does not make a substantial number of retail sales of Tack.

6. Tack is not an ingredient or component part of the asphalt plant mix and is not mixed with asphalt plant mix during any portion of the manufacturing process.

7. The Taxpayer uses Tack as an emulsion product that allows it to lay and bond new hot asphalt plant mix over old, previously scraped asphalt roads, without which the new asphalt would not properly adhere to the old asphalt.

ISSUE

The issue is whether Tack is (1) a “building material” purchased by a contractor for use in the form of realty pursuant to the “contractor provisions” of Ala. Code §§ 40-23-1(a)(10) and (a)(5), and thus taxed at the time and place of title transfer from the vendor to the buyer as determined in the audit, or (2) a part of the “production process” of asphalt plant mix and taxed at the point where it is laid in accordance with Ala. Code § 40-23-1(b). The Localities argue the first position, while the Taxpayer argues the second.

LAW & ANALYSIS

The “contractor provision” states that “[s]ales 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.” Section 40-23-1(a)(10). Under Section 40-23-1(a)(5), the sale closes upon transfer of the title to the purchaser – the contractor. It is clear that Tack is a building material used by the Taxpayer, a contractor, as part of real estate – the road. Thus, absent an applicable exception, the purchase of Tack by the Taxpayer constitutes a taxable retail sale.

The Taxpayer believes that an exception does apply in Section 40-23-1(b), which would require the tax be remitted where the Tack is laid rather than where it is purchased:

(b) The use within this state of tangible personal property by the manufacturer thereof, as building materials in the performance of a construction contract, shall, for the purposes of this division, be considered as a retail sale thereof by manufacturer, who shall also be construed as the ultimate consumer of materials or property, and who shall be required to report transaction and pay the sales tax thereon, based upon the reasonable and fair market price thereof at the time and place where same are used or consumed by him or it. Where the contractor is the manufacturer or compounder of ready-mix concrete or asphalt plant mix used in the performance of a contract, whether the ready-mix concrete or asphalt plant mix is manufactured or compounded at the job site or at a fixed or permanent plant location, the tax applies only to the cost of the ingredients that become a component part of the ready-mix concrete or the asphalt plant mix. The provisions of this subsection shall not apply to any tangible personal property which is specifically exempted from the tax levied in this division.

In light of the testimony and stipulated facts, this exception is inapplicable. The Taxpayer is not a manufacturer of Tack; it purchases the Tack. And, as the stipulated facts provide, the Tack is not compounded with the asphalt mix. Thus, the Taxpayer cannot be considered a compounder with regards to Tack. And because the Tack is separate from the asphalt mix, never mixed with the asphalt mix, but acts as a glue, Tack should be considered a building material that is not asphalt mix.

Nevertheless, the Taxpayer argues that because Tack is used in the “production process” of asphalt paving, it should fall within the asphalt-mix exception.

The Taxpayer cites *Capitol Machine & Equip. Co. LLC v. State Department of Revenue*, Admin. Law Div. Dkt. No. S 08-619, to argue that Tack is still being processed until it is laid and should not be taxed until processing is complete. In that case, the Administrative Law Judge found that insulation was being processed through a blower which was used to install the insulation on buildings and houses. The judge concluded that that blower should be taxed at the machine rate because it was processing the insulation. It was noted that the contractor paid tax on the insulation at purchase, but that tax was not at issue and was not discussed. The Tack is akin to the insulation, not the blower. Thus, *Capitol Machine* is not comparable to the facts at hand.

The Localities argue that Tax Tribunal case *Akzo Nobel Functional Chemical, LLC v. State Department of Revenue*, Ala. Tax Trib., Dkt. Nos. S. 15-1278; County 16-107 (March 23, 2017) at 7 – 9, demonstrates that there is no exemption to the contractor provisions for supplies that are merely a part of the production process. “Alabama law is clear, however, that if the contractor provision applies, as in this case, it is irrelevant that the structure or machine involved is subsequently used in the manufacturing or production process.” *Akzo* at 7. I agree. As the tax event is the contractor’s purchase of the materials – in this case, the Tack – and the Tack is not a component of the asphalt mix, the Taxpayer as contractor must pay the tax on the purchase. *See Akzo* at 8 – 9, quoting *Layne Central Co. v. Curry*, 8 So.2d 839 (Ala. 1942).

Furthermore, the Localities point out that the dual-business-contractor stature of the Taxpayer does not permit it to purchase Tack tax-free if it is not intended to be sold at retail or be withdrawn for use at wholesale. As indicated, the Taxpayer very rarely resells Tack and purchases it for the sole

purpose of fulfilling its road-paving contracts. Thus, I agree with the Localities that the Taxpayer may not purchase Tack without paying tax as part of its dual-business position. See, *Tennessee River Steel, LLC, et al. v. State of Alabama*, Admin. Law Div. Dkt. No. S. 10-612 (4/26/2012) at 6.

The Final Assessments of sales tax on Tack are affirmed. Judgment is entered accordingly. Additional interest is also due from the date the final assessments were entered. This Final Order may be appealed to circuit court within 30 days, pursuant to Ala. Code § 40-2B-2(m).

Entered January 9, 2020.

/s/ Leslie H. Pitman
LESLIE H. PITMAN
Associate Tax Tribunal Judge

lhp:dr

cc: Paul Kalifeh, CPA
Jonathan V. Gerth, Esq.