

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. U. 86-134

HENRY J. HARPER  
d/b/a H.J.H. Company  
P.O. Drawer 218  
Pike Road, AL 36064,

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WIREGRASS CONSTRUCTION CO.  
P.O. Drawer 218  
Pike Road, AL 36064,

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DELTA HAULERS, INC.  
P.O. Drawer 218  
Pike Road, AL 36064,

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§

Taxpayer.

§

ORDER

The Department assessed Dale County use tax against Henry J. Harper, d/b/a H.J.H. Company for the period July 1, 1983 through December 31, 1984; Wiregrass Construction Company, Inc. for the periods July 1, 1981 through December 31, 1982 and July 1, 1983 through September 30, 1985; and Delta Haulers, Inc. for the period January 1, 1983 through June 30, 1983. The Taxpayers were represented by the Hon. Roy J. Crawford. Assistant counsel J. Wade Hope appeared for the Department. Based on the evidence submitted at the above hearing, the following findings of fact and conclusions of law are hereby made and entered.

FINDINGS OF FACT

During the subject periods, the above-listed Taxpayers operated as construction companies engaged in the business of either hauling road construction materials, gravel mining, asphalt

manufacturing, and/or other roadbuilding related activities. Mr. Henry J. Harper was president of each company, and the companies had a common business address in Montgomery County, Alabama. The businesses also maintained a common primary plant site located in Dale County, Alabama.

The Department audited the Taxpayers and assessed Dale County use tax based on the purchase of 12 Mack Trucks from Gulf Coast Truck & Equipment Company ("Gulf Coast") of Dothan, Alabama, and the purchase of various "non-truck" items from different vendors.

The purchases from Gulf Coast evolved as follows: Gulf Coast's salesmen periodically solicited business at the Taxpayers' facility in Dale County. None of the Taxpayers' officers or employees ever traveled to Gulf Coast's Dothan facility. The Taxpayers ordered the trucks in question from the Dale County facility. Gulf Coast in turn ordered the custom-built trucks from an out-of-state manufacturer. The trucks were in all cases delivered by Gulf Coast to the Dale County plant. Upon arrival in Dale County, the trucks were inspected, test driven and finally accepted by the Taxpayers. The trucks were financed for the Taxpayers by various financial institutions.

The primary non-truck item in dispute involves "petromat", a substance used in resurfacing roads, parking lots, etc. The petromat was purchased by Wiregrass Construction Co., Inc. from Choctaw, Inc. of Memphis, Tennessee. Choctaw, Inc. delivered the

petromat to Wiregrass in Dale County, FOB delivery. The remaining non-truck items in dispute were purchased outside of Dale County and delivered into Dale County either by the vendor, by common carrier FOB origin, or common carrier FOB destination.

The issue in dispute is whether the subject transactions were subject to sales tax, as argued by the Taxpayers, or use tax, as argued by the Department.

#### CONCLUSIONS OF LAW

The Alabama use tax (and corresponding local use tax) is levied on the use, storage or consumption within the State (or local taxing jurisdiction) of tangible personal property that has previously been purchased at retail outside of the State (or local taxing jurisdiction). A sales tax is on the sale of tangible personal property within the taxing jurisdiction. The two taxes are complimentary and must be construed in pari materia. Paramount-Richards Theatres v. State, 55 So.2d 812. As stated in Paramount-Richards, at page 822, "[t]here is exempt from [the use] tax property subject to the sales tax . . . , which means that the use tax does not apply to property whose sale is effected in Alabama." Thus, the determinative fact is where the sale occurred.

Code of Ala. 1975, §40-23-1(a)(5) broadly defines "sale" as "every closed transaction constituting a sale". More specifically, recent Alabama appellate court decisions have relied on the Alabama Uniform Commercial Code ("UCC") to determine when a sale occurs for

sales and use tax proposes. Oxmoor Press, Inc. v. State, 500 So.2d 1098; State v. Delta Air Lines, Inc., 356 So.2d 1205.<sup>1</sup>

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<sup>1</sup>Prior to adoption of the UCC, the Alabama law governing sales and transfer of title was found at Title 57, §§23-46, Code of 1940. Section 24 thereunder provided in substance that title passed "at such times as the parties to the contract intend it to be transferred". Section 25 set out guidelines for ascertaining intention.

Title 57, §§23-46 and related sections were repealed effective December 31, 1966, and the UCC became effective on January 1, 1967. However, the courts were slow in applying the UCC in sales and use tax cases. For example, in State v. Matthews Electric Supply Company, 221 So.2d 126 (1969), the Supreme Court relied on repealed §§24 and 25 of Title 57, Code of 1940 and also cited numerous pre-UCC cases in determining when a sale occurred, see also State v. Altec, Inc., 243 So.2d 713 (1971).

While the courts still on occasion cite cases decided under pre-UCC law, the point cited generally conforms to current UCC principles. For example, a 1964 case, Hamm v. Continental Gin Company, 165 So.2d 392, was cited in Delta Airlines, Inc., supra, at page 1207, for the principle that a sale is closed when title to the goods passes to the purchaser. That point is consistent with current UCC authority. Notwithstanding the slow transition, the courts have made clear that the UCC controls on questions of sales and use



Under the UCC, a "sale" constitutes the "passing of title from the seller to the buyer for a price", Code of Ala. 1975, §7-2-106(1). Title passes "unless otherwise explicitly agreed . . . to the buyer at the time and the place at which the seller completes his performance with respect to the physical delivery of the goods". Code of Ala. 1975, §7-2-401(2). Thus, under normal circumstances, a sale occurs upon delivery of the goods to the buyer.

Applying the above sections to the present facts, the sale of the trucks and the non-truck items was complete upon delivery by the sellers, or common carrier FOB destination, to the Taxpayer's facility in Dale County. Consequently, sales tax and not use tax would be applicable to those transactions. The use tax would apply to only those sales by which title transferred outside of Dale County, i.e. all sales involving F.O.B. origin.

State v. Dees, 333 So.2d 818 (1976), is directly on point. In that case, the taxpayer purchased an airplane from a Mississippi vendor. The airplane was brought to Montgomery for viewing. The purchase was negotiated and completed and delivery accepted in Montgomery. The Court of Civil Appeals held that sales tax, and not use tax, was applicable.

Though Adams Aircraft is a Mississippi corporation, does not maintain a place of business in Alabama and is not licensed under the provision of the Sales Tax Act, it nevertheless, at least on the occasion of this transaction, engaged in the business of selling an airplane in this state at retail to a resident of the

state. By doing so it fell squarely within the terms of the Sales Tax Act and specifically, §753 of Title 51 (Code of Ala. 1975, §40-23-2). The sale of property at retail within the state of Alabama being subject to sales tax, its use or consumption is exempt from the provisions of the Use Tax Act. Section 789(a), Title 51, Code (Code of Ala. 1975, §40-23-62). It was stipulated in the trial court that the negotiation of sale was begun and concluded in Alabama. The price was paid and delivery made in Alabama. The sale was made directly for the use or consumption of the purchaser. It was a retail sale subject to sales tax upon the gross sales price. Construing the Sales Tax Act in para [sic] materia with the Use Tax Act, the sale was subject to sales tax. The use or consumption of the property was exempt from use tax.

The Department argues at page 3 of its brief that the UCC should not control in determining when a sale occurs for sales and use tax purposes, citing Department of Revenue, Commonwealth of Kentucky v. Cox Machinery Co., Inc., 650 S.W.2d 261. However, Alabama's courts, in Oxmoor, Delta Airlines, Inc., and numerous other cases, have made clear that the provisions of the UCC are controlling.

The Department also contends that the "sales tax statutes were meant to apply where sellers and purchasers transact their business within the boundaries of a taxing jurisdiction and the use tax statutes were meant to apply where the seller and purchaser transact their business across taxing jurisdiction boundaries", Department's brief at page 4. That position reflects the Department's long-held belief that a sale by an out of state vendor must be subject to the use tax. As illustrated above, that position is incorrect if the sale itself occurs within Alabama.

It is understood that the Department's position, if accepted, would greatly facilitate the assessment and collection of tax against out-of-state sellers. But the basic tenet of sales and use tax law cannot be ignored which holds that sales tax applies to sales within the taxing jurisdiction and use tax applies to the use or consumption of property which was purchased outside of the taxing jurisdiction.

The above considered, the Department is hereby directed to reduce and make final the assessments in issue showing use tax due on only those sales which were completed outside of Dale County, i.e. F.O.B. origin sales.

Done this 14th day of March, 1988.

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BILL THOMPSON  
Chief Administrative Law Judge