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ALABAMA DEPARTMENT OF REVENUE REVENUE RULING 06-001 (Modified)

This document may not be used or cited as precedent. Ala. Code § 40-2A-5(a) (2003 Replacement Volume).

TO:

FROM: Commissioner of Revenue
Alabama Department of Revenue

DATE: March 22, 2006

RE: Whether a taxpayer may control where a sale occurs and therefore where county and municipal sales tax is due through control of passage of title.

Pursuant to Ala. Code § 40-2A-5(c) Revenue Ruling 06-001, issued January 20, 2006, is hereby superseded and replaced by this modified ruling.

FACTS

The facts as represented by the Taxpayer are as follows:

The Taxpayer is planning to open a retail store within the police jurisdiction of City "A" (the "retail store municipality") and County "A." The retail store will be serviced by a near-by distribution center ("distribution center") to be located in City "B," City "C," City "D," or City "E," (collectively, "distribution center municipality"). The retail store municipality, the County, and the distribution center municipality are all self-administered. The Taxpayer has not yet finalized its choice of distribution center municipality.

Except in very limited circumstances, customers purchasing goods at the retail store will not be able to take delivery at the store.¹ Instead, customers will be required to pick up their purchases at the distribution center or have the Taxpayer's truck, or its contract carrier ("contract carrier"), (the Taxpayer's trucks and the contract carrier are hereinafter collectively referred to as

¹ In some instances, merchandise will be paid for and picked-up at the retail store – for items such as close-outs, floor samples, etc. In those cases, sales tax will be collected and remitted to City of "A," County "A," and the state.

“trucks”) deliver the goods to their home or other designated delivery point. The trucks delivering goods sold from the retail store will originate from the distribution center. Common carriers will not be used for delivery.²

With respect to delivered goods, the Taxpayer’s invoice signed by the customer provides that:

“Title to merchandise purchased by you passes from [the Taxpayer] to you at our Distribution Center at the moment it is loaded onto a ... truck for delivery.”

With respect to goods that are picked up by the customer at the distribution center, the Taxpayer’s invoice signed by the customer provides that:

“Title to merchandise purchased by you passes from [the Taxpayer] to you at our Distribution Center at the moment the merchandise is loaded into your vehicle.”

ISSUES

1. Whether the Taxpayer may control where the sale occurs by indicating in its invoice documentation that title passes at the distribution center and thus determine which local sales taxes are due to be collected?
2. Whether local sales tax will be due only to the distribution center municipality and County “A” since title to the purchased merchandise passes at the distribution center and therefore the sale is “closed” in the distribution center municipality and County “A.”
3. Since local sales tax will be remitted to a distribution center municipality and County “A,” whether another county’s or municipality’s local sales or use tax may be due from either the customer or the Taxpayer?

LAW AND ANALYSIS

(1)/(2) Transfer of Title: *Ala. Code* section 7-2-106(1) defines a “sale” of goods as “the passing of title from the seller to the buyer for a price.”

For sales and use tax purposes, sales are deemed to be closed in Alabama when title to the goods passes to the purchaser. *See State v. Delta Airlines, Inc.*, 356 So. 2d 1205 (Ala. Civ. App. 1978); *Hamm v. Continental Gin Co.*, 165 So. 2d 392 (Ala. 1964); *State v. Altec, Inc.*, 243 So. 2d 713 (Ala. 1971).

Ala. Code section 40-23-1(a)(5) provides that:

² “Contract carrier” and “common carrier” are two different types of motor vehicle carriers. Both have different licensing requirements and are two separately defined statutory terms. *See Ala. Code* § 37-3-2(3) and -2(6). Moreover, a motor vehicle carrier cannot generally be both a “common” and “contract” carrier. *See Ala. Code* § 37-3-14. Thus a “contract carrier” is not the same as a “common carrier” for sales and use tax purposes.

a transaction shall not be completed *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, and for the purpose of determining transfer of title, a common carrier or the U.S. postal service shall be deemed to be the agent of the seller, regardless of any F.O.B. point and regardless of by whom or the method by which freight, postage, or other transportation charge is paid.

(emphasis added).

Section 7-2-401(2) provides that:

[u]nless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place, and in particular and despite any reservation of a security interest by the bill of lading.

(emphasis added).

As a result of the interplay between section 40-23-1(a)(5) and sections 7-2-106 and 7-2-401, Alabama courts have generally applied those statutes together in determining when a sale closes for purposes of the Alabama sales tax. *See, e.g., Rohr Aero Services, Inc. v. State Department of Revenue*, Admin. Law Div. Dkt. No. S. 01-317 (August 21, 2002); *Delta Airlines; Oxmoor Press, Inc. v. State*, 500 So. 2d 1098 (Ala. Civ. App. 1986); *Altec, Inc.*

In *Rohr Aero Services*, the Department of Revenue's Chief Administrative Law Judge elaborated on these general rules, as they are construed together:

For Alabama sales tax purposes, a sale is closed when and where title is transferred by the seller to the purchaser. Code of Ala. 1975, § 40-23-1(a)(5). Although not specified in § 40-23-1(a)(5), title is transferred under Alabama law when the seller or the seller's agent completes the physical delivery of the goods to the purchaser or the purchaser's agent. Code of Ala. 1975, § 7-2-401(2); *State v. Delta Air Lines, Inc.*, [356 So.2d 1205](#) (Ala. Civ. App. 1978).

Section 40-23-1(a)(5) further provides that for purposes of determining transfer of title, a common carrier and the U.S. Postal Service shall be deemed agents of the seller, regardless of F.O.B. point or which party selects and/or pays for transportation. Thus, if goods sold by an Alabama retailer are delivered by common carrier outside of Alabama, the sale is closed outside of Alabama when the common carrier completes delivery.

(footnotes omitted).

In *Oxmoor Press*, the Alabama Court of Civil Appeals confirmed the ability of a buyer and seller to determine where a sale closes through the use of contractual passage of title provisions. The taxpayer printed phone books for South Central Bell Telephone Company. The Department assessed the taxpayer for sales taxes on phone books it shipped to telephone book subscribers residing outside of Alabama. The contract between the taxpayer and South Central Bell specified that South Central Bell had the discretion to determine whether title would pass at the point the phone books were delivered to the Birmingham U.S. post office or at the subscriber's residence. Uncontroverted evidence presented to the trial court showed that South

Central Bell had selected that title would pass at the subscriber's out-of-state residence. Thus the parties had "otherwise agreed" where title would pass under section 7-2-401(2) instead of relying on the default rule of "physical delivery." Accordingly, title to the phone books passed—and the sale closed—outside the State of Alabama and no Alabama sales tax was due.³

The terms of the transactions in *Oxmoor Press* specified where title would pass instead of relying on the default "physical delivery" rule in section 7-2-401(2). This same state rule applies in determining where sales close among Alabama counties and municipalities and thus what local sales tax is due. *See generally*, Op. Ala. Att' y Gen. 2000-128 (April 13, 2000); *Ala. Code* §§ 11-3-11.2; 11-51-201(a), -203(a), & -204(b).

In the present case, the Taxpayer's invoices provide that title passes in all instances at the distribution center. When a customer picks up his purchase at the distribution center, title passes when the goods are placed in the customer's vehicle. When the goods are delivered to a customer via the Taxpayer's truck or the contract carrier, title passes to the customer at the moment the goods are loaded onto the truck at the distribution center. Accordingly, given that title passes and the sale closes at the distribution center, the Taxpayer should collect and remit local sales tax on its sales to County "A" and to the distribution center municipality.

(3) Payment to only one county or municipality: Subsections (a) and (b) of *Ala. Code* section 40-23-2.1 provide that a taxpayer only pay one local sales or use tax:

(a) *If a sales tax ... [or] use tax ... levied by or on behalf of an Alabama municipality is paid under a requirement of law, the property which is the subject of such tax, when imported for use, storage, or consumption into another Alabama municipality, is not subject to the sales tax,[or] use tax ... regardless of rate, which is required by the second municipality under any municipal ordinance or any act of the legislature. ...*

(b) *If a sales tax ... [or] use tax ... levied by or on behalf of an Alabama county is paid under a requirement of law, the property which is the subject of such tax, when imported for use, storage, or consumption into another Alabama county, is not subject to the sales, [or] use ... regardless of rate, which is required by the second county under any county ordinance, resolution, or any act of the legislature. ...*

Thus, since the Taxpayer will remit sales tax to County "A" and to the distribution center municipality, no additional local sales or use tax will be due from any Alabama county or municipality.

³ The Alabama Legislature amended the sales tax definition of "sale" in section 40-23-1(a)(5) in 1986 to substantially adopt the UCC language in section 7-2-106(1), i.e., a sale is closed upon transfer of title. *Acts of Ala.* 86-536. The 1986 amendment also added that for purposes of determining transfer of title, a common carrier and the U.S. Postal Service are deemed to be agents of the seller. *Oxmoor Press* was decided based on tax years prior to the enactment of the 1986 amendment. Under the current version of section 40-23-1(a)(5), the U.S. Postal Service would be deemed the agent of the seller and the sale would be closed upon delivery, outside Alabama, regardless of the contractual language. However, the case is still instructive because the Court allowed the parties to control where title passed by terms of the sales agreement.

HOLDING

1. The Taxpayer may control where the sale occurs by indicating that title to goods purchased passes at the distribution center and thus determine which local sales taxes are due to be collected.
2. If the distribution center is located in City “B,” City “C,” City “D,” or City “E,” those respective local municipal sales taxes and County “A” sales tax will be due since title to the purchased goods will pass in one of those respective localities under the terms of the customer invoice.
3. Since local sales tax will be remitted to the distribution center municipality and County “A,” another county’s or municipality’s sales or use tax will not be due from either the purchaser or the Taxpayer.

G. THOMAS SURTEES, Commissioner
Alabama Department of Revenue