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Sales Tax – Use Tax – Nexus – Common Carrier Exception – Counties

Local tax is due in the jurisdiction where title to the goods is transferred, which will be at the time of delivery, unless explicitly agreed otherwise. If parties to a retail sales transaction are not using a common carrier for delivery and so agree to allow title to transfer at the place of the sale, then local tax is due in the jurisdiction where the sale takes place. If, however, common carrier is the method of delivery, then local tax is due in the jurisdiction where delivery is completed, regardless of any agreement to allow title to transfer at the place of the sale.

Dear Mr. Hill:

This opinion of the Attorney General is issued in response to your request on behalf of the St. Clair County Commission.

QUESTION

Where is local tax due when parties to a retail sales transaction execute an explicit agreement to allow title to transfer at the place of the sale and not at the time of delivery?

FACTS AND ANALYSIS

Alabama sales tax is levied on the gross proceeds derived from the sale of tangible personal property that closes in Alabama. ALA. CODE § 40-23-2(1) (2011). Section 40-23-1(a)(5) of the Code of Alabama defines a "sale" for tax purposes as follows:

> Installment and credit sales and the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale. Provided, however, a transaction shall not be closed or a sale 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 . . . .

ALA. CODE § 40-23-1(a)(5) (Supp. 2015). This section plainly states that a sale is closed or completed when and where title is transferred by the seller or by the seller's agent to the purchaser or to the purchaser's agent. Accordingly, for sales tax purposes, sales are deemed to be closed in Alabama when title to the goods passes to the purchaser. *Id.*; *see also State v. Delta Airlines, Inc.*, 356 So. 2d 1205 (Ala. Civ. App. 1978); *Hamm v. Cont'l Gin Co.*, 165 So. 2d 392 (Ala. 1964); *State v. Altec, Inc.*, 243 So. 2d 713 (Ala. 1971); *Oxmoor Press, Inc. v. State*, 500 So. 2d 1098 (Ala. Civ. App. 1986).

When determining where title passes for Alabama sales tax purposes, Alabama courts have looked to the Uniform Commercial Code regarding sales, codified in article 2 of title 7 of the Code of Alabama ("the UCC"), for guidance. Although the UCC does not specifically address or control Alabama sales tax laws, the courts have construed sections 40-23-1(a)(5), 7-2-106, and 7-2-401 of the Code of Alabama together to determine when a sale closes for purposes of sales tax. *See, e.g.*, *Rohr Aero Services, Inc. v. State of Alabama Department of Revenue*, Op. of Dep't of Revenue, Admin. Law Div., Docket No. S. 01–317 (Aug. 21, 2002) (Final Order); *Delta*; *Altec*; *Oxmoor*. Section 7-2-106(1) defines a "sale" of goods as "the passing of title from the seller to the buyer for a price." ALA. CODE § 7-2-106(1) (2006). Section 7-2-106(1) references section 7-2-401, which, in subsection (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." ALA. CODE § 7-2-401(2) (2006) (emphasis added).

In *Oxmoor*, the Alabama Court of Civil Appeals confirmed the ability of a buyer and a seller to determine where a sale closes through the execution of an explicit contractual agreement. It is important, however, to note that the agreement

must be explicit and that "no binding contract can come into being until there is a meeting of the minds. *Jones v. McGivern*, 274 Ala. 232, 147 So. 2d 813; *Obermark v. Clark*, 216 Ala. 564, 114 So. 135, 55 A.L.R. 1153." *Christian v. Rabren*, 290 Ala. 45, 51, 273 So. 2d 459, 464 (Ala. 1973). The agreement must be valid, conform to the UCC, and the UCC default provisions will control any necessary term not provided for, such as risk of loss. In analyzing whether a binding agreement was made, the entire agreement, along with the totality of the transaction at issue, will be considered because the title-transfer provision does not stand in isolation. Accordingly, parties to a sales transaction must execute an explicit and binding agreement regarding where title passes and the sale closes or the default rule that title passes at delivery will control.

In 1986, after the time of the *Oxmoor* decision, the Alabama Legislature amended section 40-23-1(a)(5) to adopt the UCC language in section 7-2-106(1), i.e., a sale is closed upon transfer of title, and to include a common-carrier exception. Specifically, section 40-23-1(a)(5), states, in its entirety, as follows:

> Installment and credit sales and the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale. Provided, however, a transaction shall not be closed or a sale 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 who selects the method of transportation, and regardless of by whom or the method by which freight, postage, or other transportation charge is paid.*** Provided further that, where billed as a separate item to and paid by the purchaser, the freight, postage, or other transportation charge paid to a common carrier or the U.S. Postal Service is not a part of the selling price.

ALA. CODE § 40-23-1(a)(5) (Supp. 2015) (emphasis added).

The statute distinguishes where title must pass between those sales using common carrier and those that use another method of delivery. The Alabama Court of Civil Appeals has explained the common-carrier exception as follows: "For the purposes of the imposition of the sales tax, then, a sale is deemed completed at the point of delivery, regardless of agreements to the contrary or the mode of delivery." *Yelverton's, Inc. v. Jefferson Cty.*, 742 So. 2d 1216, 1219 (Ala. Civ. App. 1997).

The above analysis focuses on state sales tax law. The same law and analysis, however, applies in determining where title passes and a sale closes among Alabama counties and municipalities, thus governing where local sales tax is due. *See, generally*, ALA. CODE § 11-3-11.2(b) (2008); ALA. CODE § 11-51-200 (2008). Therefore, if parties to a retail sales transaction are not using a common carrier for delivery and execute an explicit and binding agreement to allow title to transfer at the place of the sale, then local tax is due in the jurisdiction where the sale takes place as that is the point where title was transferred. If, however, the parties use common carrier, then regardless of any explicit agreement otherwise, title passes at the point of delivery, making local tax due in the jurisdiction where delivery is completed.

CONCLUSION

Local tax is due in the jurisdiction where title to the goods is transferred, which will be at the time of delivery, unless explicitly agreed otherwise. If parties to a retail sales transaction are not using common carrier for delivery and so agree to allow title to transfer at the place of the sale, then local tax is due in the jurisdiction where the sale takes place. If, however, common carrier is the method of delivery, then local tax is due in the jurisdiction where delivery is completed, regardless of any agreement to allow title to transfer at the place of the sale.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Mary Martin Mitchell, Legal Division, Department of Revenue.

Sincerely,

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By:

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