

SMITH COOSA LAND CO., LLC
Route 1, Box 225
Alexander City, AL 35010,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. CORP. 01-435

FINAL ORDER

Smith Coosa Land Company, LLC (the ALLC@) petitioned the Department for refunds of 2000 and 2001 business privilege tax. The Department denied the refunds. The LLC appealed to the Administrative Law Division pursuant to Code of Ala. 1975, ' 40-2A-7(c)(5)a. A hearing was conducted on August 30, 2001. Jim Sizemore represented the LLC. Assistant Counsel Jeff Patterson represented the Department

ISSUE

The issue in this case is whether the LLC was liable for the Alabama business privilege tax in 2000 and 2001. That issue turns on whether the LLC was dissolved before the tax accrued for those years. If so, the refunds in issue should be granted.

FACTS

The LLC was organized on December 30, 1994. The original members were John A. Smith, III and James Jackson Smith. Additional members were later added to the LLC, including Brenda Smith Sizemore, individually, and in her capacity as trustee of trusts for each of her two children.¹

¹John A. Smith, III, deceased, was the father of John A. Smith, IV, deceased, and James Jackson Smith. Brenda Smith Sizemore is the widow of John A. Smith, IV, by which

she had two children. She is currently married to James M. Sizemore, Jr., the LLC's representative in this case.

When the LLC was organized, John A. Smith, III conveyed to the LLC 973 acres of real property in Coosa County, Alabama. The LLC leased the land for hunting purposes before 1999.

John A. Smith, III died on December 9, 1998. The remaining LLC members did not unanimously agree in writing within 90 days after the death of John A. Smith, III that the business of the LLC would continue; nor did they take any action within that period indicating their agreement that the business of the LLC would continue. Brenda Smith Sizemore testified at the August 30 hearing that she never consented for the LLC to continue in business, and understood that it would dissolve by operation of law 90 days after the death of John A. Smith, III.

The 973 acres owned by the LLC was again leased in the Fall of 1999 for \$3,500. Some of the lease proceeds were used in early 2000 to pay the real property tax on the property. The balance was distributed to the LLC members/tenants-in-common in accordance with their pro-rata shares.

James Jackson Smith, as a general partner of the LLC, filed 2000 and 2001 Alabama business privilege tax returns for the LLC on April 8, 2000 and April 13, 2001, respectively. The LLC elected family limited liability entity status on the returns, and with each return paid the maximum \$500 tax levied on such entities at Code of Ala. 1975, ' 40-14A-22(d)(2).

Brenda Smith Sizemore, as a member of the LLC, filed articles of dissolution for the LLC with the Coosa County Probate Judge on May 31, 2001. The articles indicated that the effective date of dissolution of the LLC was March 9, 1999, 90 days after the death of John A.

Smith, III. The Coosa County Probate Judge issued a certificate of dissolution to the LLC on May 31, 2001.

The LLC subsequently petitioned the Department for refunds of the business privilege tax it had paid with its 2000 and 2001 returns. The Department denied the refunds. The LLC appealed to the Administrative Law Division.

ANALYSIS

The Alabama business privilege tax accrues on January 1 of each year. An entity subject to the tax is liable for the tax for each year beginning before the (entity) has been dissolved . . . Code of Ala. 1975, ' 40-14A-22(a).

As indicated, the deciding question in this case is whether the LLC was dissolved before the tax accrued for the years in issue. Code of Ala. 1975, ' 10-12-37 specifies that a limited liability company is dissolved upon an event of dissociation of a member, unless the legal existence and business of the limited liability company is continued by the written consent of all of the remaining members within 90 days after the occurrence of the event of dissociation or as otherwise stated in the articles of organization. See, ' 10-12-37(3)b.

The death of John A. Smith, III on December 9, 1998 constituted an event of dissociation pursuant to Code of Ala. 1975, ' 10-12-36(b)(3). It is undisputed that the remaining members did not unanimously consent in writing that the business of the LLC would continue after the death of John A. Smith, III, as required to prevent dissolution under ' 10-12-37(3)b. But while ' 10-12-37(3)b. requires unanimous written consent for the LLC to continue in business, Article 7.2 of the LLC's articles of organization required only unanimous consent, not written consent.

I agree with the LLC that the remaining members did not unanimously consent, verbally or otherwise, within 90 days after the death of John A. Smith, III that the LLC would continue in business. Inaction by the remaining members during the 90 day period did not constitute their tacit agreement that the LLC would continue in business. Consequently, the LLC was dissolved by operation of law, and by the specific terms of its articles of organization, upon the death of John A. Smith, III in December 1998.² The fact that the property owned by the LLC was again leased in the Fall of 1999 is irrelevant. Any action by the LLC members after the LLC was legally dissolved could not revive the LLC.

If the remaining members of a limited liability company continue to actively operate the ongoing business of the company after the death of a member, with the tacit agreement that the business will continue indefinitely, then arguably their affirmative actions may constitute a unanimous consent for the entity to continue in business. But in this case, the LLC-s only

²Section 10-12-37(3) specifies that a limited liability company is dissolved upon an event of dissociation, unless the surviving members unanimously agree within 90 days to continue the limited liability company. Because the remaining members did not consent to continue the LLC within the 90 days, the technical date of dissolution related back to the December 9, 1998 date of death of John A. Smith, III, i.e. the event of dissociation.

business activity was the leasing of the 973 acres. The land was under annual lease when John A. Smith, III died in December 1998. The remaining LLC members could not have unilaterally terminated the existing lease, and as indicated, they took no action within 90 days after the death of John A. Smith, III, indicating their agreement or intent to continue leasing the property after the existing lease expired.

The effective date of dissolution of a limited liability company is also separate from the date on which articles of dissolution should be filed with the probate judge. Code of Ala. 1975, ' 10-12-42 specifies that Aafter the dissolution@of a limited liability company, the company shall file articles of dissolution with the probate judge. Articles of dissolution are filed to notify third parties that the business of the limited liability company is being wound up. Consequently, the filing of articles of dissolution by the LLC on May 31, 2001 had no legal effect on the LLC-s prior dissolution by operation of law upon the death of John A. Smith, III in December 1998.³

Because the LLC was dissolved before the taxes in issue accrued, those taxes were erroneously paid to the Department. The Department is directed to refund the taxes, plus applicable interest.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, ' 40-2A-9(g).

Entered October 31, 2001.

³After dissolution, a limited liability company may continue operating its going business concerns for a reasonable period, dispose of property, pay its liabilities, distribute assets, and otherwise wind up its affairs. Code of Ala. 1975, ' 10-12-39. The leasing of the 973 acres in the Fall of 1999 may be viewed as a continuation of the LLC-s business for a reasonable period after dissolution, as allowed by ' 10-12-39.

