

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

vs.

JOHNNY A. RADFORD
d/b/a Radford and Sons
Water Wells
5044 U. S. Highway 80 West
Selma, AL 36701,

Taxpayer.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. MISC. 92-309

FINAL ORDER

The Revenue Department assessed Johnny A. Radford, d/b/a Radford and Sons Water Wells for the contractor's license levied at Code of Ala. 1975, §40-12-84. The assessment covers the period October 1989 through September 1992. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on February 4, 1993 in Montgomery, Alabama. Johnny Radford (Taxpayer) appeared at the hearing and represented himself. Assistant counsel Claude Patton represented the Department.

The Taxpayer is in the business of drilling water wells. In the course of drilling a well, a relatively small amount of dirt, rock and perhaps other materials is removed or excavated from the ground.

Code of Ala. 1975, §40-12-84 levies a tax in part on any person that "contracts to excavate earth, rock or other material for foundations or any other purpose. . . ". The Department claims

that the Taxpayer is subject to the license because he removes dirt, rock, etc. from the earth when drilling his wells.

The Department cites State v. George H. Jett Drilling Company, 186 So.2d 925, in support of its position. The Alabama Supreme Court held in Jett that a company drilling for oil was excavating earth, rock and other materials so as to be subject to the contractor's license. The Court also held that the language of the license statute should be broadly construed to include any excavation.

The Taxpayer argues that a water well can be distinguished from an oil well because an oil well covers a much larger area. That may be true, but it is not relevant to the issue. A contractor that for any reason removes dirt from the earth by drilling is subject to the contractor's license. The size of the hole drilled and the amount of dirt removed (unless incidental) is irrelevant, as is whether the contractor is drilling for oil or water. The dirt removed in drilling a water well is no more incidental to the job than the dirt removed in drilling for oil in Jett.

I sympathize with the Taxpayer's position, but based on the Jett case and the plain wording of the statute, I must hold that the Taxpayer's activity subjects him to the contractor's tax levied at §40-12-84. The assessment must be upheld.

The Taxpayer complains that he has never paid the license and that no other well drilling company has ever been required to obtain the license unless they also engaged in some other activity subject to the license.

Apparently, the Department never notified all well drilling companies that the license was due until after the Taxpayer appealed in this case. However, there is evidence that other well drillers have in the past obtained the contractor's license.

In any case, the fact that a tax or license has never been uniformly enforced or collected from a taxpayer or a group of taxpayers can not excuse a taxpayer from the tax. Another way of looking at this case is that the Taxpayer escaped the license tax for the many years he operated without a license prior to 1989.

Any time the Department begins for the first time to enforce a tax that has never been uniformly or strictly enforced, or adopts a position contrary to a previous position on which taxpayers have come to rely, the Department should consider enforcing the law or applying the new interpretation prospectively only. However, the Department is not required to do so, and if some well drilling companies have been paying the contractor's license, as appears to be the case, it would be unfair to allow the Taxpayer and all others that have not been paying to escape liability.

The Taxpayer is liable for the license tax in issue and the Department is authorized if not required by law to assess back

taxes for a three year period. Accordingly, judgment is entered for the Department and against the Taxpayer for \$1,219.20, plus interest from October 29, 1992 until the date of payment. This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on February 22, 1993.

BILL THOMPSON
Chief Administrative Law Judge