

ROSS BREEDERS, INC. § STATE OF ALABAMA  
5015 Bradford Road DEPARTMENT OF REVENUE  
Huntsville, Alabama 35805, § ADMINISTRATIVE LAW DIVISION  
Taxpayer, § DOCKET NO. S. 95-449  
v. §  
STATE OF ALABAMA §  
DEPARTMENT OF REVENUE.

FINAL ORDER

The Revenue Department denied an abatement of State and local sales and use taxes previously granted by the City of Talladega and Talladega County to Ross Breeders, Inc. pursuant to the Tax Incentive Reform Act of 1992, Code of Ala. 1975, §40-9B-1 et seq.

Ross Breeders appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-8(a). A hearing was conducted on May 29, 1996. Mike O'Brien represented Ross Breeders. Assistant Counsel Wade Hope represented the Department.

This case involves two issues:

(1) Is the Revenue Department authorized to deny or refuse to recognize an abatement of taxes previously granted by a city, county, or public industrial authority pursuant to the 1992 Incentive Act; and

(2) If the Department is authorized to deny the abatement, was the abatement properly denied in this case.

Ross Breeders is an international corporation engaged in producing and selling breeder chickens to various chicken processors. The chickens are genetically engineered to meet the particular needs of the customers.

Ross Breeders purchased an abandoned chicken hatchery in Talladega County in April 1994. The facility had been unoccupied for several years and needed extensive repairs.

Ross Breeders initially intended to renovate and expand the facility before using it. However, because of heavy demand, Ross Breeders made some minimum repairs, and then operated the facility for approximately 6 to 12 months. In mid-1995, Ross Breeders began a major renovation and expansion project at the facility. The project's estimated cost was over two million dollars.

Ross Breeders petitioned the Talladega City Council and the Talladega County Commission in September 1995 for an abatement of all applicable transactional taxes relating to the project as provided by the 1992 Incentive Act.<sup>1</sup> The County and City granted the abatement on September 25, 1995. Ross Breeders and Talladega County also entered into an abatement agreement on that date.

Ross Breeders applied for a direct pay permit and filed a copy of the abatement agreement with the Department on September 27, 1995. The Department disallowed the direct pay permit and the

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<sup>1</sup>There apparently was some question whether the facility was located in the city limits of the City of Talladega. To be safe, Ross Breeders' attorney applied for and obtained the abatement from both the County and the City.

abatement by letter dated October 16, 1995. Ross Breeders appealed to the Administrative Law Division.

The Department denied the abatement because it claims that Ross Breeders does not have the correct Standard Industrial Code classification ("SIC code") as required by Code of Ala. 1975, §40-9B-3(f). The Department also argues that the property does not qualify as industrial development property pursuant to Code of Ala. 1975, §40-9B-3(e) because the project involved the renovation and repair of the facility.

Ross Breeders concedes that it does not have a correct SIC code. However, it argues that the abatement should still be allowed because the project otherwise satisfies the letter and intent of the 1992 Incentive Act.

The threshold issue is whether the Department is authorized to deny the abatement. In my opinion, it is not.

The legislative purpose for the 1992 Incentive Act was "to continue to allow county and municipal governments and certain public corporations to provide substantial tax incentives." Code of Ala. 1975, §40-9B-2. For that purpose, the Legislature granted municipalities, counties, and public industrial authorities the power to grant abatements. Code of Ala. 1975, §40-9B-5. Once granted, the Department is not authorized to deny or otherwise not recognize an abatement. Rather, the Department is only required to keep a copy of the abatement agreement, which it is authorized to

use "solely for its statistical and record keeping activities . . . ."  
Code of Ala. 1975, §40-9B-6(c).

The Department is also required by its own regulations to recognize an abatement previously issued by a city, county, or public industrial authority. Specifically, Reg. 810-6-4-.22(7) provides that the filing of an abatement agreement with the Department "will suffice to evidence the granting of an abatement from all sales and use taxes imposed and/or collected by the Alabama Department of Revenue." Reg. 810-6-4-.24(4) reiterates that "such filing (of an abatement agreement) will suffice to evidence the granting of an abatement from sales and use taxes."

Subparagraph (5) of the same regulation provides that "upon receiving a properly executed application for a direct pay permit from the private user, the necessary direct pay permit accounts will be assigned."

This same conclusion was reached in a prior Administrative Law Division case, ABC Rail Products Corp. v. State, S. 94-393 (Admin. Law Div. 3/20/95):

The Revenue Department is not authorized by the Act to either deny or refuse to recognize an abatement previously issued by a municipality, county or public industrial authority. Rather, as indicated above, the exclusive authority to grant or deny an abatement is with the governing body of the municipality, county or public

authority. A copy of the abatement agreement must be filed with the Revenue Department, but only for statistical and record keeping purposes.

ABC Rail, at page 4.

The Department appealed ABC Rail to Shelby County Circuit Court. The appeal was subsequently dismissed with prejudice. The Circuit Court Order allowed the specific abatement in issue, but declined to decide the larger issue of whether the Department is authorized to deny an abatement.

The Department is authorized by Code of Ala. 1975, §40-2-11 to generally administer taxes in Alabama. But just as the Legislature can grant the Department authority, it can also limit the Department's authority. Under the 1992 Incentive Act, only local governments are authorized to grant or deny abatements, not the Department. By refusing to issue Ross Breeders a direct pay permit or otherwise recognize the abatement, the Department is in effect denying the abatement, which the Department is not authorized to do.

A legitimate question may be whether the Legislature can constitutionally empower a city or county to waive a State sales or use tax which goes to the Special Education Trust Fund to finance public education statewide.<sup>2</sup> But an administrative agency must presume that an act of the Legislature is constitutional, and

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<sup>2</sup>I can find no case addressing this question. However, the Legislature can empower a local governing body to grant exemptions from taxes used for local purposes. Pullman Car & Mfg. Corp. v. Hamilton, 181 So. 244 (1938).

certainly the Administrative Law Division is not authorized to rule on the constitutionality of a statute. Beaird v. City of Hokes Bluff, 595 So.2d 903 (Ala.Civ.App. 1992); Custis v. Taylor, 648 F.2d 946 (1980).

Because the Department is not authorized to deny the abatement, the second issue of whether the abatement was properly granted by Talladega County is moot.

Ross Breeders purchased and paid sales or use tax on some of the materials before the abatement was granted on September 25, 1995. Department Reg. 810-6-4-.22(6) provides, and Ross Breeders' attorney concedes, that the abatement was not effective for those materials. Consequently, Ross Breeders properly paid sales and/or use tax on the property purchased before September 25, 1995.

The Department is directed to grant Ross Breeders' application for a direct pay permit. Concerning tax paid on materials purchased after the effective date of the abatement, Ross Breeders is required to file a joint petition for refund with its vendors.

Code of Ala. 1975, §40-2A-7(c)(1). Those refunds should then be granted by the Department.

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

Entered October 1, 1996.

BILL THOMPSON  
Chief Administrative Law Judge