TAFT COAL SALES & ASSOCIATES INCORPORATED RR 1 P.O. Box 328 Oakman, AL 35579-0328,	'	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	'	DOCKET NO. U. 99-109
v.	'	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	'	

FINAL ORDER

The Revenue Department assessed Town of Oakman use tax against Taft Coal Sales and Associates, Inc. (ATaxpayer@) for January 1995 through March 1998. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, '40-2A-7(b)(5)a. A hearing was conducted on June 1, 1999. Robert C. Walthall represented the Taxpayer. Assistant Counsel Wade Hope represented the Department. The issue in this case is whether a use tax enacted by Oakman on the use, storage, or consumption of tangible property outside its town limits, but inside its police jurisdiction, is invalid because Oakman failed to conduct a study or otherwise estimate the cost of services to be provided in the police jurisdiction.

The facts are undisputed. Pursuant to Code of Ala. 1975, '11-51-206, Oakman enacted a use tax on the use, storage, or consumption of tangible property located within its police jurisdiction, but outside its town limits. There is no evidence that before enacting the tax, Oakman attempted to estimate its cost of services to be provided in the police jurisdiction.

The Taxpayer=s facility is located outside Oakman=s town limits, but within its police jurisdiction. The Taxpayer used, stored, or consumed tangible property at its facility during the subject period, but failed to pay the police jurisdiction use tax. The Department, on behalf of Oakman, assessed the Taxpayer for the unpaid tax. The Taxpayer appealed.

The Taxpayer argues that the tax is invalid because Oakman failed to conduct a study or otherwise estimate how much it would cost to provide services in the affected area, citing Department of Revenue v. Reynolds Metals Co., 541 So.2d 524 (Ala. 1988), and cases cited therein. The Department argues that an estimate of the cost of services is not required for a police jurisdiction sales or use tax, as opposed to a police jurisdiction business license tax, based on the Alabama Supreme Court=s decision in City of Hoover v. Oliver & Wright Motors, 730 So.2d 608 (Ala. 1999).

This case involves an issue of first impression in Alabama. Concerning business license taxes, Alabama law is clear that before a municipality can levy such a tax on businesses outside its city limits, but within its police jurisdiction, the municipality must Aestimate the amount reasonably necessary to provide@ services to the affected businesses. Reynolds Metals, 541 So.2d at 532. The issue here is whether a study or estimate is also required before a municipality can levy a police jurisdiction use (or sales) tax. An analysis of the business license tax cases will assist in answering that question. In Van Hook v. City of Selma, 70 Ala. 361 (1881), the

City of Selma levied a business license tax pursuant to its police powers granted by the Legislature. The Alabama Supreme Court held that the City had the authority to levy a tax outside its corporate limits, either to raise revenue or to regulate businesses within its jurisdiction. The Court stated further, however, that if the tax was levied as a regulatory license tax, as was the tax in issue, it could not be used to raise revenue.

> AThe power of the State to authorize the license of all classes of trades and employments cannot be doubted. And there is just as little doubt of the power to delegate this right to municipalities, either for the purpose of revenue, or that of regulation. (cites omitted).
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> The right here conferred is, to regulate and license for police purposes merely; and the power to license for the purpose of revenue is not to be inferred. It is, indeed, excluded by the clearest implication. ---2 Dillon Mun. Corp ' 768. It seems well settled by authority, that the power to license, if granted as a police power, must be exercised as a means of regulation only, and cannot be used as a source of revenue. (cites omitted).@

Van Hook v. City of Selma, 70 Ala. at 363.

Numerous cases followed involving the authority of a municipality to levy a police jurisdiction business license tax under its police power.[1] Those cases affirmed

[1]Many of those cases are cited in the annotations to Code of Ala. 1975, '11-51-91, and need not be cited here.

Van Hook that a municipality must relate the tax to the cost of services provided to businesses in the affected area.

The Alabama Supreme Court explained the reason for the rule in Reynolds Metals. The Court first recognized that the statute that authorizes municipalities to levy police jurisdiction business license taxes, Code of Ala. 1975, '11-51-91, limits such taxes to one-half of the amount levied within the city limits. The Court explained, however, that business licenses taxes are authorized pursuant to a municipality=s police power granted by Code of Ala. 1975, '11-45-1. The Court pointed out that '11-45-1 further limits such taxes Ato an amount reasonably necessary for the protection of the lives, health and property of the citizens, the maintenance of good order and quiet of the community, and the preservation of public morals.@ Reynolds Metals, 541 So.2d at 529, quoting Alabama Gas Co. v. City of Montgomery, 30 So.2d 651 (1947).[2] Consequently, the requirement that business license taxes are limited to the cost of services provided was first contained in '11-45-1.

To insure that a police jurisdiction business license tax was not a revenue

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[2]The Alabama Supreme Court, in earlier cases, had also ruled that a business license tax must correspond to the cost of services provided and could not be a general revenue measure because such a tax Awould amount to taxation without representation and the taking of private property without due process of law and uses not authorized by the Constitution.@ White v. City of Decatur, 144 So. 873, 874 (1932); see also City of Mountain Brook v. Beaty, 349 So.2d 1097 (1977). As discussed below, the Alabama Supreme Court subsequently rejected that rationale in Oliver and Wright Motors.

measure, the courts initially required municipalities to estimate the cost of services to be provided to each particular business in the affected area. Ex parte City of Leeds, 473 So.2d 1060 (Ala. 1985), and cases cited therein.

In response to Ex parte City of Leeds, the Legislature amended '11-51-91 in 1986 to require that a municipality must only estimate the total cost of providing services to all businesses in a police jurisdiction, not to each particular business. The amendment also added what was already required by '11-45-1, that the amount of the tax shall not exceed the cost of services provided. As recognized by the Supreme Court in Reynolds Metals, Athe 1986 amendment added the additional proviso that had been judicially engrafted onto '11-45-1: >that the total amount of such license shall not be in an amount greater than the cost of services provided by the city or town within the police jurisdiction.=@ Reynolds Metals, 541 So.2d at 529.

Are municipalities also required to estimate their cost of services before levying a police jurisdiction sales or use tax pursuant to '11-51-206? In my opinion, they are not, for the reasons explained below.

Police jurisdiction business license taxes levied pursuant to '11-51-91 are regulatory in nature, and are authorized pursuant to a municipality=s police power granted at '11-45-1. As explained, '11-45-1 limits a regulatory business license tax to the cost of providing services to the affected businesses. That limitation was also added to '11-51-91 by the 1986 amendment. Consequently, municipalities are

required to estimate the cost of services to ensure that a business license tax is not a revenue raising measure. On the other hand, police jurisdiction sales and use taxes levied pursuant to '11-51-206 are not regulatory in nature, but rather are general revenue measures. Because they are not an exercise of a municipality=s police power authorized by '11-45-1, the limitation inherent in that statute does not apply. Consequently, it is not required that the taxes collected must bear some relationship to, and cannot exceed, the cost of services provided. It follows that a municipality is not required to estimate the cost of services before levying a police jurisdiction sales or use tax pursuant to '11-51-206.

The above holding is supported by the Alabama Supreme Court=s recent ruling in Oliver & Wright Motors, supra. At issue in Oliver & Wright Motors was the constitutionality of '11-51-206. Oliver and Wright argued that the Legislature could not constitutionally authorize a municipality to levy a revenue raising tax, such as a sales and use tax, outside its city limits but in its police jurisdiction. Oliver and Wright contended that such a tax amounted to taxation without representation, and the taking of property without due process of law.

The Court rejected Oliver and Wright=s arguments, holding first that the police jurisdiction tax levied at '11-51-206 Ais constitutionally valid as an exercise of the plenary power of the State of Alabama that the Legislature has properly delegated to municipalities.@ Oliver and Wright Motors, 730 So.2d at 611-12. The Court next distinguished between a regulatory business license tax, which cannot

be employed to raise revenue, and a general revenue raising tax such as the sales tax in issue. ATherefore, we are not presented with a statute that grants only regulatory or licensing authority but under which a municipality improperly attempts to raise general revenues.@ Oliver and Wright Motors, 730 So.2d at 612.

The Court next explained that the police jurisdiction sales tax authorized by '11-51-206 did not constitute taxation without representation, and did not violate due process, citing Commonwealth Edison Company v. Montana, 453 U.S. 609 (1981), and Holt Civic Club v. Tuscaloosa, 439 U.S. 60 (1978). The Court also cited Commonwealth Edison for the proposition that a general revenue-raising tax need not be reasonably related to the cost of services provided:

> AThis Court has indicated that States have considerable latitude in imposing general revenue taxes. The Court has, for example, consistently rejected claims that the Due Process Clause of the Fourteenth Amendment stands as a barrier against taxes that are >unreasonable= or >unduly burdensome.= Moreover, there is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular

activity must be reasonably related to the value of the services provided to the activity. Instead, our consistent rule has been:

> A>Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
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> A>A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionality entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government--that it exists primarily to provide for the common good.=@

Oliver and Wright Motors, 730 So.2d at 613, citing Commonwealth Edison, 453 U.S. at 622-23 (quoting Carmichael v. Southern Coal and Coke Co., 301 U.S. 495, 521-23 (1937)).

In summary, the Supreme Court affirmed in Oliver & Wright Motors that a municipality may constitutionally levy a general revenue sales (or use) tax outside its city limits but within its police jurisdiction. The Court did not discuss whether a municipality must first estimate the cost of services before levying such a tax. But the only reason a municipality is required to estimate the cost of services before levying a business license tax is to ensure it is not a general revenue measure prohibited by '11-45-1. Because the police jurisdiction sales and use taxes

authorized by '11-51-206 are not regulatory taxes, but rather are general revenue taxes, '11-45-1 does not apply, and there is no rationale for requiring a municipality to estimate the cost of services before levying such a tax.

The difference in the wording of '11-51-91 and '11-51-206 also supports the above conclusion.

Section 11-51-206 was enacted in 1969. When '11-51-91 was amended in 1986, '11-51-206 had been in effect for 17 years. However, while the Legislature deemed it necessary to amend '11-51-91 to clarify that a municipality need not estimate the cost of services to each particular business in the police jurisdiction, and to specify that a police jurisdiction business license tax could not exceed the cost of services, '11-51-206 was not amended. The Legislature was certainly aware that numerous municipalities had levied police jurisdiction sales and use taxes throughout the State. The only logical explanation why '11-51-206 was not also amended in 1986 is that the Legislature understood that a municipality is not required to estimate its cost of services before levying a general revenue police jurisdiction sales or use tax, and that the amount raised by such a tax is not limited to the cost of services provided. Otherwise, the Legislature would have amended '11-51-206 to correspond with '11-51-91.

As a practical matter, it would also be difficult, if not impossible, to reasonably estimate the cost of services provided to taxpayers subject to a police jurisdiction sales or use tax. The cost of providing fire, police, and other municipal

services to businesses subject to a police jurisdiction business license tax can be reasonably estimated because those businesses are physically located in the police jurisdiction, can be easily identified, and are provided services on a constant basis. However, a police jurisdiction use or sales tax is on taxpayers that use, store, or consume tangible property within the police jurisdiction (concerning use tax), or taxpayers that purchase tangible property at retail within the police jurisdiction (concerning sales tax).[3] Those taxpayers may not reside or conduct business in the police jurisdiction, and may receive little or no benefits from the municipality in return for paying the tax. For example, a resident of Birmingham may make a taxable retail purchase while passing through Oakman=s police jurisdiction. It could be argued that Oakman provided that individual with police and fire protection while the individual was in the police jurisdiction, but how could Oakman reasonably estimate its cost of providing those services to that taxpayer, or similarly situated taxpayers? In short, there is no adequate method by which the tax proceeds collected from a police jurisdiction sales or use tax could be reasonably tied to the cost of providing services to the taxpayers (individuals and businesses)

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[3]The Taxpayer incorrectly states in its brief, at page 1, that the Oakman use tax is on businesses in the police jurisdiction. Rather, it is on all individuals, corporations, or other entities that use, store, or consume tangible property in the police jurisdiction. Certainly, Oakman is not attempting to Aregulate@ that diverse group of taxpayers subject to the tax, which further illustrates that police jurisdiction sales and use taxes are not regulatory in nature, but rather are general revenue measures.

paying the tax.

The Taxpayer has not otherwise objected to the final assessment in issue. The final assessment is accordingly affirmed. Judgment is entered against the Taxpayer for Town of Oakman use tax, penalty, and interest of $79,871.71, plus applicable additional interest.

This Final Order may be appealed to circuit court within 30 days pursuant to Code

of Ala. 1975, '40-2A-9(g).

Entered August 18, 1999.

BILL THOMPSON
Chief Administrative Law Judge

BT:ks

cc: J. Wade Hope, Esq.
Robert C. Walthall, Esq.
James Browder