

UNIVERSAL PIPELINE, LLC AND
ITS SOLE MEMBER,
GENTRY WILLIAMS
2410 BEAR CREEK ROAD E.
TUSCALOOSA, AL 35405-8612,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA
ALABAMA TAX TRIBUNAL

DOCKET NO. S. 14-203

OPINION AND PRELIMINARY ORDER

This appeal involves a disputed final assessment of consumer use tax for June 2009 through December 2012 entered against the above Taxpayer. A hearing was conducted on May 22, 2014. The Revenue Department contacted various individuals after the hearing, and subsequently included and relied on factual statements from those individuals in its reply brief.

The Department's Administrative Law Division, now the Tax Tribunal, entered an August 12, 2014 Preliminary Order indicating that the post-hearing statements could not be relied on because they were not properly offered and admitted into evidence at the May 22 hearing. The Division also directed the Taxpayer to notify the Division if it disputed any or all of those factual statements, and that if it did, a second hearing would be set in the case. The Taxpayer notified the Division that it did object to the out-of-court statements included in the Department's reply brief.

A second hearing was conducted on January 20, 2015. Assistant Counsel Margaret McNeill represented the Department. The Taxpayer's representative notified the Tax Tribunal on the day of the hearing that he no longer represented the Taxpayer, but that the

Taxpayer was aware of the hearing. The Taxpayer failed to attend the hearing, at which the Department presented the testimony of three witnesses.

The Tribunal forwarded the transcripts of the May 22, 2014 and January 20, 2015 hearings to the Taxpayer. The Taxpayer was allowed until March 13, 2015 to respond. The Taxpayer failed to respond.

The Taxpayer operated a construction company during the subject period that specialized in utility, sewer, road, and revitalization projects. The Department audited the Taxpayer and subsequently assessed it for the use tax in issue. The disputed issues concern three projects involving the City of Northport, the City of Tuscaloosa, and the City of Pell City. The Department identified the disputed issues, and its position relating to those issues, in its post-hearing brief, as follows:

Issues:

1. Whether Taxpayer's purchases of brown top millet seeds from the Tuscaloosa County Cooperative were exempt from sales and use tax?
2. Whether Taxpayer's purchases of fertilizer and lime from the Tuscaloosa County Cooperative were exempt from sales and use tax?
3. Whether Taxpayer's purchases of hay from Wood Kornegay were exempt from sales and use tax?
4. Whether the Taxpayer's purchases for the Northport project, Tuscaloosa project, and Pell City project were exempt from sales tax under the pollution control exemptions found in Ala. Code §§40-23-4(a)(16) and 40-23-62(18)?
5. Whether Taxpayer's purchases of silt fence were exempt from sales and use tax under the pollution control exemptions found in Ala. Code §§40-23-4(a)(16) and 40-23-62(18)?
6. Whether Taxpayer's purchase of a boring bit is subject to Alabama consumers use tax?

7. Whether Taxpayer's purchases of pipe by Dee River Ranch from Consolidated Pipe & Supply, Inc., were erroneously classified as purchases made by the Taxpayer?

LAW AND ANALYSIS

Issues:

1. The Taxpayer's purchases of brown top millet seeds for the Tuscaloosa County Cooperative were exempt from sales and use tax. Ala.Code §§40-23-4(a)(3) and 40-23-62-6. These purchases were included in the audit in error and have been deleted from the audit as shown on SCH SEEDS. (footnote omitted)
2. Sales of fertilizer for agricultural purposes are exempt from sales tax. Ala.Code §40-23-4-(a)(2). In the use tax law, the exemption from use tax for fertilizer found in Ala.Code §40-23-62(5) applies to all fertilizer; however the exemption has been restricted to agricultural use. Sales Tax Rule 810-6-3-.01.01 Agriculture, Definition of gives the definition of agriculture for sales and use tax purposes. In this rule, paragraph (3) states that "highway, railroad, and right-of-way" areas do not fall within the definition of agriculture. Therefore, the purchases of fertilizer by this Taxpayer were not for agricultural use and remain in the audit as shown on SCH MISC.
3. The Taxpayer failed to provide verification that the hay purchased from Wood Kornegay was purchased directly from a farmer/producer. The Examiner was only able to find the listing for a Kornegay Wood Yard, LLC (dissolved) located near the Taxpayer's business; therefore, the hay purchases remain in the audit as shown SCH MISC.
4. The Taxpayer made purchases for three projects termed the Northport project, Tuscaloosa project, and Pell City project. The Taxpayer contended that purchases for these projects were exempt from sales and use tax under the pollution control exemptions found in Ala.Code §§40-23-4(a)(16) and 40-23-62(18). The Taxpayer stated that these purchases were incorporated in municipal raw water line and sewer projects.

City of Northport Raw Water Project – Per Mr. Larry Ingram of the City of Northport, Universal Pipeline, LLC was hired by the city of Northport to provide construction services for the Raw Waterline project. The project included the installation of a new raw water supply line from the intake on Lake Tuscaloosa to the water treatment plant, installation of a new pump at the intake, modification to the interior of the intake structure, all controls and appurtenances to provide an operational system. The intake structure is located approximately 2 ½ miles from the water treatment plant. The

Department has consistently held that the piping, pumps, etc. used for transporting raw water to the plant for treatment does not qualify for the pollution control exemption. In Rush v. Dept. of Revenue of State of Ala., 416 So. 2d 1023 (Ala. Civ. App. 1982), cited by the Taxpayer, the exemption was only given to the chlorinators used in the treatment process. In addition, Jerry Bobo of the Tuscaloosa Taxpayer Service Center was contacted regarding the Northport project by Lacon Carver, CPA in 2010. Mr. Bobo informed Mr. Carver that “the exemption would not apply because the function of these water lines is merely to transport the water to the plant for treatment and the water lines themselves do not play a direct part in the cleaning of the non-potable water.” In response, Mr. Carver advised that he had discussed this with his client and his client was not impacted as “he has included sales tax on the materials in his bid.” Email attached. Therefore, Taxpayer’s purchases were not tax exempt and remain in the audit as shown on SHC Northport.

City of Tuscaloosa Project – the Taxpayer was awarded the contract by the city of Tuscaloosa to provide driveways, gutters, concrete sidewalks, etc. This street and drainage work only included some incidental sewer work. This work was not performed at a water treatment facility. The street and drainage work was not primary for pollution control purposes and does not qualify for the pollution control exemption. These purchases (Ready Mix U.S.A.) remain in the audit as shown on SCH Tuscaloosa.

Pell City Project - Mr. Josh Moon of P.F. Moon Inc. (general contractor) stated that Universal Pipeline was hired to construct an access road from the highway to a water treatment facility. The access road went from the highway down to the river to the intake structure and approximately 300 yards to the water treatment facility. Mr. Moon stated that only a small portion of this access road was inside the secured area of the intake structure or the water treatment facilities. Mr. Moon stated that materials purchased from Sherman Dixie Concrete Industries and Webb Concrete Building Materials (included in the audit) were the type of materials needed to construct the driveway. This access road was not primarily for pollution control; therefore, these purchases remain in the audit as shown on SCH Pell City.

5. The Taxpayer contends that purchases of silt fence were exempt from the sales and use tax pollution control exemptions found in Ala. Code §§40-23-4(a)(16) and 40-23-62(18). However, it is the Department’s position that the silt fencing is a supply item used by contractors. Silt fencing is normally not permanent and is not an identifiable component of a pollution control project. It was not intended for use in a structure built for pollution control purposes. Therefore, the silt fence purchases remain in the audit as shown on SCH MISC.

6. The Taxpayer's purchase of a boring bit is not subject to Alabama consumers use tax. The Taxpayer stated that it was purchased in Ohio and has only used or stored the boring drill bit in Pennsylvania. Therefore, this purchase has been deleted from the audit as shown on SHC MISC.
7. The Taxpayer contends that the purchases of pipe by Dee River Ranch from Consolidated Pipe & Supply, Inc., were erroneously classified as purchases made by the Taxpayer since the Taxpayer's records mistakenly reflected the transaction. The Taxpayer stated that the invoice for the pipe was ultimately paid by Dee River Ranch. However, the Department's examination revealed that the piping in question was purchased and invoiced to the Taxpayer. The supplier invoiced and remitted sales tax at the reduced 1.5% rate. The piping was furnished and installed by the Taxpayer on an irrigation construction project. It is the Department's position that the permanently installed piping, pumps, and risers that are part of an irrigation system are subject to 4% tax as additions to realty. Therefore these purchases were scheduled for 2.5% rate (1.5% was paid at the supplier) and these purchases remain in the audit as shown on SHC MISC.

I agree with the Department, except concerning the City of Northport project. The City of Northport's utilities director testified concerning the Northport project at the January 20, 2015 hearing, as follows:

Q. Can you explain what Universal Pipeline did for the City of Northport on the raw water project?

A. Yes, ma'am. The project consisted of the installation of a new 24-inch ductile iron main from our raw water intake on Lake Tuscaloosa along Highway 69 to the water treatment plant, along with some modifications to the pumps at the intake – I believe it was installation of a new five million gallon pump – and wiring and controls associated with that pump; and also the removal of a raw water booster station we had utilized previously on our 18-inch main.

Q. And so if I understand correctly, what Universal Pipeline did is they basically installed a pipe to take the nonpotable water to the water treatment plant.

A. Yes, ma'am.

(T. 4 – 5).

The use tax pollution control exemption at Code of Ala. 1975, §40-23-62(18) reads as follows:

The storage, use, or consumption of all devices or facilities, and all identifiable components thereof or materials for use therein, used or placed in operation primarily for the control, reduction or elimination of air or water pollution, and the storage, use, or consumption of all identifiable components of or materials used or intended for use in structures built primarily for the control, reduction or elimination of air or water pollution.

The Alabama Court of Civil Appeals held in *Rush v. Dept. of Revenue*, 416 So.2d 1023 (Ala. Civ. App. 1982), that a municipality's water treatment plant that was part of the municipality's water system was a pollution control facility for purposes of the sales and use tax pollution control exemptions at Code of Ala. 1975, §§40-23-4(16) and 40-23-62(18), respectively.¹

The issue is whether a water pipeline through which raw, untreated water is transported to a water treatment facility where it is treated and made potable is an "identifiable component" of a wastewater treatment plant. I believe that it is.

For raw water to be treated at a municipal water treatment facility, the raw water must first be transported to the facility. A water line through which the water is transported is thus an essential and necessary, i.e., an "identifiable component" of the treatment facility. The materials used by the Taxpayer on the City of Northport project were thus exempt from use tax.

The Department cites an e-mail from the Taxpayer's CPA in which the CPA states that the Taxpayer included tax on the materials used on the Northport project in its bid for

¹ See, also Code of Ala. 1975, §11-54-88(c)(2), which defines "pollution control facility" to include a water purification facility, a wastewater collection system, and a waste water treatment works.

the project. See e-mail attached to Department's post-hearing brief. Although not specifically addressed in its brief, the Department is arguably contending that because the Taxpayer collected the tax from the customer, it is required to remit the tax to the Department pursuant to Code of Ala. 1975, §40-23-26(d). I disagree.

Section 40-23-26(d) reads as follows:

In the event that any sum is collected from a consumer that purports to be collected because of this section, whether or not the amount is actually provided for hereunder, then any such sum, except such as is collected solely because of rounding the correct amount of tax upward to the nearest cent, shall be paid to the Department of Revenue for the purposes provided in Section 40-23-35.

To begin, the Taxpayer's customer, the City of Northport, was not a "consumer" within the purview of §40-23-26(d). That is, the Taxpayer did not sell the materials used on the project to the City. Rather, the Taxpayer used and consumed the materials in fulfilling its contract with the City. Consequently, the Taxpayer, and not the City of Northport, was the consumer, and, but for the pollution control exemption would have owed use tax on the materials. See generally, *State, Dept. of Revenue v. Montgomery Woodworks, Inc.*, 389 So.2d 510 (Ala. Civ. App. 1980). The fact that a contractor may have included either sales or use tax in its bid for a contract, and then been awarded the contract and paid the bid amount, does not constitute an erroneous collection of the tax for purposes of §40-23-26(d). And by the specific language used in §40-23-26(d), the statute applies only to erroneously collected sales tax, and there is no corresponding use tax over-collection statute.

The Department is directed to recompute the use tax due by removing the materials used by the Taxpayer on the City of Northport project from the taxable base. A Final Order will then be entered for the adjusted amount due.

This Opinion and Preliminary Order is not an appealable Order, the Final Order, when entered, may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2B-1(m).

Entered April 2, 2015.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: Margaret Johnson McNeill, Esq.
Gentry Williams