

| | | |
|------------------------|---|----------------------|
| MAR-JAC POULTRY AL LLC | § | STATE OF ALABAMA |
| P.O. BOX 931 | | ALABAMA TAX TRIBUNAL |
| JASPER, AL 35502, | § | |
| | | DOCKET NO. S. 16-253 |
| Taxpayer, | § | |
| v. | § | |
| STATE OF ALABAMA | § | |
| DEPARTMENT OF REVENUE. | | |

FINAL ORDER

The Revenue Department partially denied a joint petition for refund of 2014 sales tax requested by Mar-Jac Poultry AL LLC (“Taxpayer”) and Animal Health International, Inc. (“Animal Health”). The Taxpayer appealed to the Tax Tribunal pursuant to Code of Ala. 1975, §40-2A-7(b)(5)c. A hearing was conducted on June 9, 2016. Fran Nowak, Lauren Stinson, and Arlene Labrador represented the Taxpayer. Assistant Counsel Jason Paulk represented the Revenue Department.

The Taxpayer operated poultry houses in Alabama during the period in issue. It purchased yellow jacket wettable sulfur and poultry litter treatment (“PLT”) from Animal Health during the period. Animal Health collected and remitted sales tax to the Department on the above sales. Animal Health and the Taxpayer subsequently filed a joint petition for refund of the sales tax paid on the two chemicals in 2014. The Department granted the refund concerning the yellow jacket wettable sulfur, but denied it concerning the PLT. The Taxpayer timely appealed to the Tax Tribunal.¹

¹ The appeal was docketed showing Animal Health as the Taxpayer/Appellant. The notice of appeal filed by the Taxpayer’s representative, Windward Tax, indicates that it represents Mar-Jac. The style of the case has consequently been corrected to *Mar-Jac Poultry AL LLC v. State of Alabama, Department of Revenue*.

The Taxpayer claims that the PLT is exempt from sales tax pursuant to the sales tax pollution control exemption at Code of Ala. 1975, §40-23-4(a)(16). That statute exempts all devices, facilities, etc. “acquired primarily for the control, . . . of air or water pollution,” and the components of or materials used therein.

The Taxpayer argues that PLT reduces ammonia produced from chicken litter. It contends that the exemption applies because “the ammonia had a negative effect on the birds as well as humans, and the PLT controls the release of ammonia into the air. This is pollution control at its heart; reducing the release of harmful pollutants into the air and water.” Taxpayer’s notice of appeal, at 2.

There was no testimony at the June 9 hearing explaining why PLT is used in poultry houses. The Taxpayer’s notice of appeal does explain why PLT is used, and what effect it has on chickens, as follows:

(Taxpayer) purchases PLT from Animal Health as a crucial step in promoting the bird’s health and well-being. As the litter is used by the birds, noxious ammonia is released into the air which is damaging to them. Ammonia is a pungent gas that irritates the eyes and respiratory system, and can also reduce resistance to infection in poultry. Backed by numerous scientific studies, the use of PLT reduces atmospheric ammonia levels, reduces death rates, and produces healthier broiler chickens. Ammonia has also been shown to be harmful to the farmer and the environment.

Taxpayer’s February 4, 2016 appeal letter, at 1.

The Taxpayer also submitted a Product Data Sheet from the PLT manufacturer. The Sheet reads in part – “PLT creates a beneficial environment in the poultry house by controlling ammonia released from the litter and reducing litter PH levels, allowing birds to optimize their genetic potential. The ammonia bound by PLT reduces environmental emissions and increases the nutrient value of the poultry litter.”

The Sheet further states that the ammonia bound in the litter by the use of PLT increases fertilizer value; extends the life of the litter and saves the cost of new litter and cleanout; is good for crops and the environment; and increases the fertilizer value of the litter.

The above information indicates that the use of the PLT serves two functions. First, PLT assists the poultry farmer in growing healthier birds. As admitted by the Taxpayer, ammonia, if left unchecked, is damaging to the birds because it irritates the birds' eyes and respiratory systems, and also reduces their resistance to infection. As stated in the Taxpayer's appeal letter, "the use of PLT reduces atmospheric ammonia levels, reduces death rates, and produces healthier broiler chickens."

It is also clear that the release of ammonia is an environmental concern being studied by the EPA. Taxpayer Ex. 3 – "Atmospheric Ammonia: Understanding Its Effects," states that "[a] recent study by the National Research Council (NRC, 2002) identifies ammonia emissions as a major air quality concern at regional, national, and global levels. Ammonia has many potential negative impacts. . . Atmospheric ammonia is a leading culprit in haze and visibility issues in several areas of the country. Ammonia, through its role in the formation of PM 2.5, is also a concern for human health."

This case turns on whether the Taxpayer acquired/purchased the PLT in issue "primarily" to reduce or control pollution. As indicated, there was no testimony at the June 9 hearing as to why the Taxpayer purchased the PLT for use in its poultry houses. Based on the information submitted by the Taxpayer, some of which is discussed above, I find that poultry producers purchase PLT primarily to assist in growing healthier, more valuable chickens, and not primarily for pollution control purposes.

The above finding is supported by another document submitted by the Taxpayer authored by three individuals in Auburn University's Department of Poultry Science – "Effectiveness of Litter Treatments for Reduction of Ammonia Volatilization in Broiler Production."

The document first states that "[b]uilt-up litter propagates higher in-house ammonia levels, which can adversely affect poultry health by making the birds more susceptible to respiratory diseases." It goes on to state:

Interest in the use of litter treatments has steadily increased over the last decade as growers and technical personnel alike recognize the health and productivity benefits of improving the broiler house environment. It is known that high ammonia levels make birds more susceptible to respiratory disease. Numerous laboratory and field studies have shown how ammonia levels as low as 10 ppm affect bird health and performance. Ammonia levels above 25 ppm in the poultry house can damage the bird's respiratory system and allow infectious agents to become established, leading to declining flock health and performance. Resistance to respiratory disease may be decreased and *E. coli* bacteria can be significantly increased in the lungs, air sacs and livers of birds exposed to ammonia because of damage that occurs to the tracheal cilia. In addition, body weight, feed efficiency and condemnation rate may be compromised in birds exposed to levels of ammonia exceeding 10 ppm.

The above clearly shows that the primary purpose and function of PLT is to improve/protect the health of the chickens, and not to protect the environment.

Finally, the Auburn University study also states that "[i]f more strict environmental regulations are put into effect regarding ammonia emissions from poultry facilities, litter treatment may become an important technique to allow producers to remain compliant." The University study is not dated, but there is no evidence that the EPA requires poultry farms to use litter treatment or to otherwise reduce ammonia emissions for environmental reasons.

The Taxpayer argues that the Department denied the exemption because the Taxpayer is engaged in a profit-motivated business. But the fact that the Taxpayer's business is profit-motivated is irrelevant to the above holding. All equipment, materials, etc. purchased by a taxpayer primarily for pollution control are exempt from sales and use tax, regardless of whether the taxpayer is a profit-motivated business.

The above is illustrated in *Waste Away Group, Inc. et. al. v. State of Alabama*, Docket S. 02-810 (Admin. Law Div. 7/16/2003). The taxpayer in that case operated a for profit hazardous waste landfill in Alabama. The landfill produced a byproduct leachate that was created when rain fell on the solid waste in the landfills. The issue was whether equipment and materials purchased by the taxpayer to control the leachate produced by the landfill were exempt under the pollution control exemption. The Revenue Department's Administrative Law Division, now the Tax Tribunal, held that the exemption applied, even though the taxpayer was a profit-motivated business.

The Petitioners in this case are not seeking an exemption for the equipment they use to contain and treat the waste obtained from their customers for a fee. Rather, they claim only that the composite liners and other materials used exclusively to control the leachate should be exempt. As stipulated, leachate is a hazardous waste byproduct produced when rain, snow, and other precipitation falls onto the Petitioners' landfills.

Applying the rationale of *Chemical Waste Management*, the property in issue is exempt from sales and use tax because it is acquired and used to treat the Petitioners' own pollution. It is not used to control or treat the waste from the Petitioners' customers, nor does it enhance the profitability of the Petitioners' landfills.

One could argue that but for the Petitioners' profit-motivated activities, i.e. the operation of landfills, there would be no leachate created, and thus no need for the materials used to control and treat the leachate. But that argument would also apply to any industry that creates pollution as a by-product of its profit-motivated activity. For example, but for a paper mill making paper, there would be no need for the scrubbers, defoamers, and

other equipment needed to control and treat the pollution created by the process. Clearly, however, such equipment used to control the pollution created by the paper-making process is exempt. Likewise, the property in issue that is acquired and used to control and treat the ancillary leachate resulting from the Petitioners' profit-motivated activity is also exempt. It is irrelevant that the Petitioners' profit-motivated activity is itself pollution control. (footnote omitted)

Waste Away Group, at 3 -4.

The Department's Administrative Law Division also previously addressed the issue in dispute in this case in *Douglas v. State of Alabama*, Docket S. 01-443 (Admin. Law Div. 10/11/2001). The taxpayer in *Douglas* was a poultry farmer that purchased a product that, like PLT, reduced ammonia in poultry houses. The taxpayer argued that the product was exempt from sales tax pursuant to the pollution control exemption at §40-23-4(a)(16). The Division disagreed.

The use of Ammonia Hold Plus is clearly an effective product in the growing of chickens, and, in a sense, controls pollution by eliminating ammonia and bacteria in the chicken houses. However, it is not acquired by chicken farmers primarily for the control, reduction, or elimination of air or water pollution within the purview of the sales tax exemption statute.

The sales tax pollution control exemption at §40-23-4(a)(16) is intended to ease the financial burden on businesses that are required to purchase non-productive equipment and materials to comply with mandatory pollution control laws. *Chemical Waste Management, Inc. v. State*, 512 So.2d 115 (Ala. Civ. App. 1987). The exemption applies only if the property in question is "acquired primarily" for pollution control purposes.

In *Service Chemical Industries v. State of Alabama*, S. 00-710 (Admin. Law Div. 7/11/01), the Administrative Law Division held that sodium hypochlorite used in the processing of chickens to kill or prevent salmonella and other diseases was not exempt as a material acquired primarily to control or reduce pollution.

Code of Ala. 1975, §40-23-4(a)(16) exempts from sales tax the gross proceeds from the sale of all devices or materials acquired primarily for the control, reduction, or elimination of air or water pollution. The exemption applies only if the device

or material is acquired primarily for pollution control. The exemption does not apply if the device or material is acquired primarily as an integral part of the purchaser's profit motivated business activity, even if the device or material serves to control or reduce pollution. *Chemical Waste Management, Inc. v. State*, 512 So.2d 115 (Ala. Civ. App. 1987). See also, *Air Products & Chemicals, Inc. v. State of Alabama*, U. 95-359 (Admin. Law Div. O.P.O. 12/14/95), and cases cited therein.

The sodium hypochlorite in question was not acquired by the Taxpayer's customers primarily to control water pollution. Rather, the customers used the chemical in the processing of chickens to kill or control salmonella and e-coli bacteria. That is, the chemical was acquired primarily to assist in the processing of chickens for profit, and not to eliminate or control water pollution. Consequently, the pollution control exemption does not apply.

Service Chemical at 2, 3.

The above rationale applies in this case. The Petitioner's customers purchase the Ammonia Hold Plus primarily to reduce ammonia and kill beetles and bacteria in their chicken houses. Use of the product allows the customers to grow larger, healthier chickens at less cost. The customers thus purchase the product primarily to benefit their profit-motivated business, not to comply with mandatory pollution control laws. For similar holdings, see, *Air Products & Chemicals, Inc. v. State of Alabama*, U. 95-359 (Admin. Law Div. 12/14/95) (equipment purchased by a contractor to fulfill a contract was not exempt because it was necessary to and used in the contractor's profit-motivated business); *Industrial Safety Products, Inc. v. State of Alabama*, S. 90-257 (Admin. Law Div. 9/17/92) (filters, protective glasses, goggles, boots, etc. used by a taxpayer in its asbestos removal business were not exempt because they were acquired primarily for use in the taxpayer's profit-motivated business); *Waste Away Group, Inc. v. State of Alabama*, U. 88-107 (Admin. Law Div. 2/16/90) (containers and trucks used by a taxpayer in its waste disposal business were not exempt because the equipment was acquired primarily for and used directly in a profit-motivated activity).

Douglas at 3 – 4.²

² Code of Ala. 1975, §40-2B-2(l)(7) provides that the Tribunal's interpretation of a statute in a case shall be followed by the Tribunal in subsequent cases involving similar facts, unless the "Tribunal provides satisfactory reasons for reversing prior precedent." (continued)

As discussed, the use of PLT to reduce ammonia emissions serves a dual purpose. It betters the health and well-being of the poultry, and also prevents ammonia from escaping into the atmosphere. Based on the evidence before the Tribunal, the primary purpose for the acquisition and use of PLT is to grow healthier, more valuable chickens at less cost, not to protect the environment. The burden is on the taxpayer claiming an exemption to prove that the exemption applies. *Fleming Foods of Alabama, Inc. v. Dept. of Revenue*, 514 U.S. 1063, cert. denied 115 S. Ct. 1690 (1995). The Taxpayer has failed to do so in this case.

The Department's partial denial of the joint petition for refund is affirmed. Judgment is entered accordingly.

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

Entered August 10, 2016.

BILL THOMPSON
Chief Tax Tribunal Judge

bt:dr

cc: Jason C. Paulk, Esq.
Fran Nowak

I can find no satisfactory reason in this case to reverse the prior precedent set in *Douglas* concerning the issue in dispute.