

STAR IMPORTERS & WHOLESALERS §  
2043 MOUNTAIN INDUSTRIAL BLVD.  
TUCKER, GA 30084-6308, §

STATE OF ALABAMA  
ALABAMA TAX TRIBUNAL

Taxpayer, §

DOCKET NO. MISC. 13-420-JP

v. §

STATE OF ALABAMA §  
DEPARTMENT OF REVENUE.

**EIGHTH PRELIMINARY ORDER CONCERNING  
REVENUE DEPARTMENT'S MOTION TO  
AUTHORIZE FORMAL DISCOVERY**

This appeal involves final assessments of State and County tobacco tax for January 2007 through July 2012 and September 2009 through July 2012, respectively. The assessments resulted from an audit conducted by the Department, with the Department issuing its audit report on November 1, 2012. In that report, the auditor proposed liabilities of tax, interest, and the fraud penalty.

A hearing on the Taxpayer's appeal was conducted by the Department's Administrative Law Division (predecessor to the Alabama Tax Tribunal) on January 23, 2014. Subsequently, an Opinion and Preliminary Order was entered which determined that the Taxpayer was subject to the tobacco-tax levy in Ala. Code § 40-25-2, by virtue of the Taxpayer being a "distributor." The determination also was made that the Taxpayer was not subject to the fraud penalty. In that opinion, the Chief Judge acknowledged the Taxpayer's secondary arguments that some of the sales in question had been closed outside of Alabama, and thus that no Alabama tax was due on those sales, and also that most of the Taxpayer's Alabama customers had paid any tax due. Therefore, the Taxpayer was allowed until July 11, 2014, to provide information to the Administrative Law Division that supported the Taxpayer's arguments. The Taxpayer submitted certain

documents on July 11, 2014, and those documents were forwarded on July 14, 2014, to the Department's Legal Division for review.

On July 24, 2017, the Taxpayer filed a Motion to Quash Department's Notices of Deposition. The attachments to the Taxpayer's motion showed that, on or about July 13, 2017, the Department issued three Notices of Deposition (to individuals affiliated with three different companies, including the Taxpayer), with the depositions scheduled for August 17, 2017, in Montgomery. The Taxpayer moved to have those deposition notices quashed, and the Taxpayer's motion was granted by Sixth Preliminary Order dated August 9, 2017, because the Department did not follow applicable statutory or regulatory law concerning discovery.

On August 21, 2017, the Department requested the Tribunal to authorize formal discovery in the form of depositions. The Taxpayer filed a Motion to Strike the Department's Motion to Authorize Formal Discovery, based upon the Department emailing its motion to the Taxpayer's representative instead of sending the motion by U.S. mail (to which the Department responded by filing an Amended Motion that was served by U.S. Mail). The Taxpayer also filed a response in opposition to the Department's request to be allowed to take deposition testimony.

The Department's Motion and Amended Motion to Authorize Formal Discovery are denied. Alabama law states that the question of whether to allow formal discovery is to be decided solely within the discretion of the Tax Tribunal Judge. Ala. Admin. Code 887-X-1-.14(c). Here, the documents that form the basis for the Department's motion for formal discovery have been in the possession of the Department for more than 3 years (mid-July 2014 through the present date), yet the Department did not attempt to commence

deposition discovery until mid-July 2017. And, as stated, that attempt was non-compliant with applicable law concerning discovery in matters pending before the Tribunal. See Sixth Preliminary Order Concerning Taxpayer's Motion to Quash Department's Notices of Deposition (August 9, 2017). Also, the Department has yet to respond substantively to the then Administrative Law Division's Fourth Preliminary Order, which was entered July 14, 2014, and which forwarded the Taxpayer's documents to the Department so that the Department could file a response concerning those documents with the Administrative Law Division. In fact, in its Sixth Preliminary Order, the Tax Tribunal set a date certain (of September 29, 2017) by which the Department must respond to the Administrative Law Division's Fourth Preliminary Order.

It is time for this case to resume moving toward a resolution of the issues on appeal before the Tribunal. Therefore, as stated, the Department's Motion to Authorize Formal Discovery and its Amended Motion are denied. Yesterday, the Department filed a motion requesting additional time to respond to the Fourth Preliminary Order. In light of this order concerning formal discovery, the Department's motion requesting additional response time is granted. The Department's response to the Fourth Preliminary Order must be filed with the Tribunal no later than **October 27, 2017**. The Taxpayer's Motion to Strike is denied as moot.

After October 27, 2017, the Tribunal will take appropriate action to finally decide this case. That action may include entering a preliminary order directing the parties to take such further action deemed necessary, setting another hearing if necessary, or entering a final order.

Entered September 28, 2017.

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JEFF PATTERSON  
Chief Judge  
Alabama Tax Tribunal

jp:dr

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