

BOARD OF WATER & SEWER
COMMISSIONERS OF CITY MOBILE
P.O. BOX 2368
MOBILE, AL 36652-1268,

Petitioner,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 10-1003

FINAL ORDER

The Revenue Department revoked the utility gross receipts tax and mobile telecommunications services tax exemption certificate previously issued to the above Petitioner. The Petitioner appealed the revocation to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-8(a). A hearing was conducted on March 24, 2011. Jackie McConaha represented the Petitioner. Assistant Counsel Duncan Crow represented the Department.

The Petitioner is a public utility water and sewer authority created pursuant to Code of Ala. 1975, §11-50-340, et seq. It produces and sells water to customers in the City of Mobile.

The Petitioner applied to the Department for a State utility gross receipts tax and mobile telecommunications services tax exemption certificate pursuant to Department Reg. 810-6-5-.26.05. The Department issued the exemption certificate in July 2010, but subsequently revoked it in October 2010. The Petitioner appealed. The issue is whether the Petitioner is exempt from the cellular and mobile telecommunications service taxes and other taxes pursuant to the exemptions at Code of Ala. 1975, §§11-50-354 and 40-21-83(4).

As a licensed public utility, the Petitioner is required to collect from its customers and remit to the Department the utility gross receipts tax levied at Code of Ala. 1975, §40-21-82. The Petitioner is itself exempt from paying the utility gross receipts tax on the electricity, natural gas, and/or domestic water that it purchases and uses in the production, processing, delivery, etc., of the water that it sells to its customers. Code of Ala. 1975, §40-21-83(4).

The Department initially contended that §40-21-83(4) exempted the Petitioner only concerning the domestic water it purchases for use in its operations. The Department now concedes that the Petitioner is entitled to the §40-21-83(4) utility tax exemption for the electricity that it purchases from Alabama Power Company and uses in the direct production of the water that it sells to its customers. An employee of the Petitioner conceded at the March 24 hearing that the §40-21-83(4) exemption would only apply to electricity used by the Petitioner at its treatment plant. (T. 34)¹ The Department also claims that for the §40-21-83(4) exemption to apply, the Petitioner must separately meter the electricity that it uses for an exempt purpose, i.e., the direct production of the water, and the electricity that it uses for non-exempt purposes.

The Petitioner, and all other similar water boards created pursuant to §11-50-340, et seq., are also granted an exemption from certain State and local taxes pursuant to Code of

¹ In *Board of Water & Sewer Commission of the City of Mobile v. Alabama Power Company*, 363 So.2d 304 (Ala. 1978), the Supreme Court found that based on the record in the case, “the Board was a utility which used the electricity furnished it in the production, etc. of domestic water and thus literally fell within the exclusion of §40-21-83(4). . . .” *Board of Water*, 363 So.2d at 309. As indicated, however, the Petitioner concedes in this case that it is exempt only concerning the electricity used at its treatment plant.

Ala. 1975, §11-50-354. That statute reads in pertinent part as follows:

Each water system shall also be exempt from all sales and use taxes and gross receipts taxes levied by the state and any political subdivision thereof with respect to the purchase, sale, use or consumption of property provided, nothing contained herein shall be construed to exempt each corporation from collecting and remitting the utility gross receipts tax levied at Section 40-21-80.

The Petitioner contends that the telecommunications service taxes levied at §40-21-120, et seq., are gross receipts taxes. It thus argues that it is exempted from those taxes by §11-50-354. I disagree.

To begin, the Petitioner is correct that there should be a semicolon after “property” and before “provided” in the above quoted portion of the statute. See, Petitioner’s Brief at 5. But the exemption, even as correctly punctuated, still does not support the Petitioner’s argument that the statute exempts it “from all gross receipts taxes and any other taxes which would otherwise be due from the Water Board for electricity, gas, telephone, telegraph, and cellular telephone services purchased by the Water Board. . . .” Petitioner’s Brief at 1. Rather, as explained below, the §11-50-354 exemption is limited to only sales, use, and similar type gross receipts taxes that are levied “with respect to the purchase, sale, use, or consumption of property. . . .”

Section 11-50-354 provides an exemption from taxation, and thus must be strictly construed for the Department and against the exemption. *State Department of Revenue v. Medical Care Equipment, Inc.*, 2980092 (Ala. Civ. App. 1999). The statute clearly exempts the Petitioner from sales and use taxes because those taxes are levied on the purchase, sale, use, or consumption of property. It is unclear, however, what, if any, State or local gross receipts taxes are currently levied on the purchase, sale, use, or consumption of

property.

Section 11-50-354 was amended by Act 95-688 in 1995 to include the exemption language in issue concerning sales, use, and gross receipts taxes. At the time, the City of Mobile and Mobile County levied local gross receipts taxes that were in the nature of a sales tax. I agree with the Department's Mobile District Office sales tax supervisor, who speculated at the March 24 hearing that the reference to gross receipts taxes in the 1995 amendment to §11-50-354 may have been intended to refer to the local Mobile County and City of Mobile gross receipts "sales" taxes. (T. 23)

The above conclusion is supported by the language in Section 2 of Act 95-688. As discussed at page 4 of the Petitioner's brief, Section 2 of Act 95-688 states that the purpose for the 1995 amendment was to clarify that water and sewer facilities such as the Petitioner were exempt from "paying sales and use taxes and similar gross receipts taxes to the state and any political subdivision. . . ." (underline added). The 1995 amendment clearly affected the Petitioner, which operates within the City of Mobile and Mobile County. It is thus reasonable to conclude that the drafters of the amendment were aware that the City and County levied local gross receipts taxes in the nature of a sales tax, and thus included the phrase "similar gross receipts taxes" in the amendment to also exempt the Petitioner (and all other water and sewer boards) from those local Mobile County and City of Mobile taxes.

In any case, the §11-50-354 exemption by its language applies only to those gross receipts taxes levied with respect to the purchase, sale, use, or consumption of property. The telecommunications taxes levied at §§40-21-121 and 40-21-126 are designated as "privilege or license taxes," but are measured by gross receipts, and thus could be

construed as gross receipts taxes.² But the §11-50-354 exemption does not apply to those taxes because they are levied on the providing of telecommunications services, not on the purchase, sale, use, or consumption of property. That is, they are not gross receipts taxes similar to the sales and use taxes.

In summary, the Petitioner is entitled to the §40-21-83(4) exemption from the utility gross receipts tax for the electricity (and natural gas, if applicable) that it purchases and uses in the production of the water that it sells to its customers. To claim the exemption, however, the Petitioner must separately meter the exempt and non-exempt usage. Dept. Reg. 810-6-5-.26(8)(c); *Ex parte White*, 477 So.2d 422 (Ala. 1985), on remand 477 So.2d 425.

Section 11-50-354 also exempts the Petitioner from State and local sales and use tax on its purchase and use of tangible personal property. It is my understanding that the City of Mobile and Mobile County gross receipts taxes in the nature of a sales tax have been repealed and replaced by traditional sales and use taxes. Consequently, I am unaware of any current gross receipts tax levied on the purchase, sale, use, or consumption of property to which the §11-50-354 tax exemption would now apply.

The Department contends that it does not issue an exemption certificate to a licensed utility such as the Petitioner that is only entitled to the §40-21-83(4) exemption from the utility gross receipts tax. This is confirmed by the Department regulation that governs the issuance of the exemption certificate – Reg. 810-6-5-.26.05. Paragraph (4) of

² Section 40-21-126 levies a “tax” on mobile telecommunication services at the same rate as the tax levied at Section 40-21-121. Because the §40-21-121 tax is measured by gross receipts, the §40-21-126 tax can also be construed as a gross receipts tax.

the regulation specifies who is entitled to an exemption certificate, as follows:

(4) Persons (i) who are not required to have a utility tax license pursuant to Section 40-21-84, Code of Alabama 1975, and who are entitled to make tax-exempt purchases of utility services without payment of utility tax to the provider or (ii) persons who are not required to have a mobile communications services tax license pursuant to Section 40-21-124, Code of Alabama 1975, and who are entitled to make tax-exempt purchases of mobile communication services without payment of mobile communication services tax to the provider may obtain a utility gross receipts tax or mobile communication services tax certificate of exemption (Form STE-3) by applying for the certificate on forms provided by the Department.

The Petitioner is not entitled to an exemption certificate under (4)(i) because it is a public utility that is licensed under §40-21-84. It also is not entitled to a certificate under (4)(ii) because, although it does not have a mobile communication services tax license pursuant to §40-21-124, it is not exempted from the communication service taxes by §11-50-354 or any other statute, and thus is not entitled to purchase such services tax-free.

The Department's revocation of the Petitioner's exemption certificate is affirmed.

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

Entered June 8, 2011.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: Duncan R. Crow, Esq.
Jackie McConaha, Esq.
Joe Cowen
Traci Floyd