CHENEY LIME & CEMENT COMPANY P.O. BOX 160 478 GRAYSTONE ROAD ALLGOOD, AL 35013,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. MISC. 12-382
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed Cheney Lime & Cement Company ("Taxpayer") for the Alabama uniform severance tax for August 2008 through July 2011. 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 August 7, 2012. CPA Glenn Bridges and CPA Tom Zobelein represented the Taxpayer. Assistant Counsel Margaret McNeill represented the Department.

ISSUES

The Taxpayer mined high calcium limestone from its mine in Shelby County, Alabama during the period in issue. It processed the raw limestone into a finished lime product at its adjacent processing facility in Shelby County. It then sold the lime to various customers, including Carmeuse Natural Chemicals ("Carmeuse"),during the period.

To access the high calcium limestone at its mine, the Taxpayer was required to remove an overburden of high magnesium limestone that it could not use to produce lime. The Taxpayer sold the raw overburden to Martin Marietta Materials, Inc. ("MMM").

During the period in issue, Code of Ala. 1975, §40-13-52 levied a uniform severance tax on certain materials severed from the ground and sold as tangible personal property in

Alabama. The primary issue in this case is whether the Taxpayer is liable for the severance tax on the lime it sold to Carmeuse and the overburden it sold to MMM during the period. If the Taxpayer is liable for the tax on the lime and overburden, a second issue is whether Carmeuse and MMM subsequently paid the tax on some or all of the materials, and if so, what effect, if any, would that have on the Taxpayer's primary liability for the tax.

FACTS

Carmeuse purchased processed lime from the Taxpayer and resold it to various customers during the period in issue. The Taxpayer loaded the lime sold to Carmeuse onto CSXT railcars at its facility in Shelby County. Carmeuse then produced a bill of lading and directed CSXT where to deliver the lime to its customers. There is no evidence showing whether CSXT delivered the lime in issue to Carmeuse's customers either inside or outside of Alabama.

MMM purchased overburden from the Taxpayer during the period in issue, processed it into aggregate, and then sold the aggregate to various customers. The Taxpayer's mine is adjacent to MMM's processing facility in Shelby County. To facilitate transporting the overburden from the Taxpayer's mine to MMM's processing facility, the parties jointly constructed a tunnel under Shelby County Highway 26 in 2003. The overburden thus was not transported over a public road in Alabama until after it was processed and sold by MMM.

The Taxpayer failed to report and pay the uniform severance tax on the lime and overburden sold to Carmeuse and MMM, respectively. The Department audited the Taxpayer and determined that the Taxpayer was liable for the tax on the materials sold to those customers. It assessed the Taxpayer accordingly. This appeal followed.

Concerning its sales to Carmeuse, the Taxpayer argues that after it delivered the lime to the CSXT railcars, it did not and could not know whether the lime was delivered in Alabama or outside of Alabama. As discussed below, lime and other severed materials are exempt from the severance tax if sold to a purchaser for use outside of Alabama and not transported over a public road in Alabama. Code of Ala. 1975, §40-13-53(a). The Taxpayer claims that if Carmeuse subsequently resold and transported the lime outside of Alabama, its initial sale of the lime to Carmeuse would be exempt under §40-13-53(a). The Taxpayer also contends that Carmeuse may have paid the severance tax when it resold the lime, and that it would be administratively counterproductive to assess the Taxpayer for the tax and then refund to Carmeuse the tax already paid on the materials.

The Department contends that the Taxpayer became liable for the tax on the lime sold to Carmeuse when it delivered the lime to the CSXT railcars at its facility in Shelby County. The Department argues that it is irrelevant that Carmeuse may have resold some of the lime to out-of-state customers, and that in any case, the Taxpayer failed to present evidence proving that the lime was resold to out-of-state customers. Finally, the Department claims that the Taxpayer is primarily liable for the tax, and that there is also no evidence verifying that Carmeuse paid tax on the lime.

Concerning its sales to MMM, the Taxpayer asserts that it is not liable for the tax on those sales because the overburden was not delivered to MMM over a public road in Alabama. The Taxpayer contends that Act 2012-318, which amended the uniform severance tax provisions, effective October 1, 2012, constituted a technical corrections provision, and that the new language in Act 2012-318 shows that the original intent of the

Legislature was to tax only those severed materials transported over a public road in Alabama.

Specifically, the Taxpayer cites §40-13-53, as amended by Act 2012-318. That statute now provides that the term "severed materials" shall not include "severed materials that are further processed into a finished aggregate or limestone product without being transported on a public road." The Taxpayer contends that "[t]his technical correction . . . truly indicates the intention of the (original) severance tax act and the original position taken by the taxpayer." Taxpayer's Supplemental Brief at 1. The Taxpayer thus argues that because the overburden purchased by MMM was not transported on a public road and was subsequently processed into aggregate, it did not constitute severed materials subject to the tax.

The Taxpayer also contends that MMM paid the severance tax when it resold the processed aggregate to its customers. It thus asserts that it would be administratively counterproductive for it to again pay the tax and then for MMM to get a refund.

The Department argues that the Taxpayer is liable for tax on the overburden sold to MMM because the severance tax statutes, as they read during the period in issue, exempted materials not transported over a public road in Alabama only if the materials were also sold for use outside of Alabama. See, §40-13-53(a). Consequently, because the overburden was not sold to MMM for use outside of Alabama, the "not transported on public roads" exemption did not apply and tax is due. And as with the sales to Carmeuse, the Department argues that the Taxpayer is primarily liable for the tax on the materials sold to MMM, and that even if MMM paid some tax when it resold the processed aggregate, there is no evidence showing the amount paid.

ANALYSIS

The threshold issue is whether the original severance tax statutes, Code of Ala. 1975, §40-13-51 et seq., as enacted in 2004 by Act 2004-629, should control, or whether those sections, as amended in 2012 by Act 2012-318, should control. As indicated, the Taxpayer argues that Act 2012-318 should control because it was a technical corrections provision that only clarified what the Legislature originally intended when it enacted Act 2004-629 in 2004.

> This piece of legislature was the culmination of efforts by the producers, Alabama County Commissioners Association, and Municipal Governments over a number of months by all groups involved. I had the privilege to serve on the committee, as did Rick Townson, General Manager Cheney Lime and Cement, Company Inc., that drafted the legislation. We can confirm first hand that the final bill was a compromise by all parties involved. This Act serves as a technical correction to the original Act 2004-629, and as you will observe from the reading of Act 2012-318, this act has no name but instead opens by amending the various Statutes contained in the severance tax in dispute. A technical corrections Act becomes necessary when the initial legislation contains drafting issues that created unintended consequences contrary to legislative intent of the law. This is clearly the case with Act 2012-318, as both the group taxed and the group receiving the tax agree that Act 2004-629 had unintended consequences that needed legislative correction.

Taxpayer's Supplemental Letter Brief at 1.

I agree that Act 2004-629 may have resulted in unintended consequences, and also that Act 2012-318 made it clear that the tax does not now apply to certain materials sold and used in Alabama that are not transported over the public roads in Alabama. But the Legislature did not make Act 2012-318 retroactive. Rather, the Act's effective date was October 1, 2012, after the period in issue. Consequently, the original provisions, as enacted by Act 2004-629, were in effect during the subject period and must control. Those provisions are discussed below.

Code of Ala. 1975, §40-13-52, as enacted by Act 2004-629, levied a uniform severance tax on all materials severed and sold as tangible personal property in Alabama.[1] Section 40-13-53(a) provides, however, "that no tax shall be due on any materials that are sold to a purchaser for use outside of the state if such materials are not transported on public roads in Alabama. Records relating to materials purchased for use outside the state, including method of delivery, shall be available for verification and audit purposes to the department."

The tax rate is $.10 per ton. Code of Ala. 1975, §40-13-54(a). The tax must be collected by the producer, and becomes "due and payable by the purchaser thereof at the time of sale or delivery" by the producer. But if the producer/seller fails to show the severance tax on a bill of sale, invoice, or similar sales document, "the tax shall instead be the obligation of the producer." Code of Ala. 1975, §40-13-54(b).

In this case, the tax became due and payable by the purchasers, Carmeuse and MMM, when the Taxpayer, as the producer, delivered the lime sold to Carmeuse to the CSXT railcars, and when it delivered the overburden to MMM's facility in Shelby County. However, because the Taxpayer failed to charge Carmeuse and MMM for the tax, and thus failed to show the tax on the bills of sale or invoices issued to those entities, the tax became an obligation of the Taxpayer. See again, §40-13-54(b). The Taxpayer thus

[1] Curiously, the levy section included in Act 2004-629 and subsequently codified at §40-13-52 was omitted from Act 2012-318. The legal effect of the current law not having a levy section will not be addressed, however, because, as discussed, the provisions of Act 2004-629 control in this case.

became liable for the tax when it completed delivery of the materials to Carmeuse and MMM.[2]

As discussed, the Taxpayer contends that CSXT delivered some of the lime resold by Carmeuse to customers outside of Alabama. The Taxpayer thus claims that because that lime was sold for use outside the State and not transported on a public road in Alabama, it was exempt pursuant to §40-13-53(a).

The language in §40-13-53(a) is vague on this point. It provides that the tax is not due on materials "that are sold to a purchaser for use outside" of Alabama. That phrase could be construed to mean that materials are exempt only if the first purchaser intends to use the materials outside of Alabama. It could also be interpreted to mean that materials are exempt even if they are resold by the first purchaser and later used outside of Alabama by the subsequent or a later purchaser. If the latter interpretation is correct, an obvious problem is how could the producer/seller know when the tax is due at the time of first sale and delivery in Alabama if the materials were to be ultimately used outside of Alabama. For example, if Carmeuse had stored some of the lime in issue at a facility in Alabama, and then resold the lime to various customers inside and outside of Alabama over the next year, the Taxpayer could not have known at the time of sale to Carmeuse if and how much of the lime would ultimately be used outside of Alabama. It thus could not have known if

[2] In this regard, the uniform severance tax previously levied at §40-13-52 was similar to the sales tax levied at Code of Ala. 1975, §40-23-1 et seq. The sales tax is a direct tax on the retail purchaser, but must be collected and remitted to the Department by the retail seller. And like the retail seller's liability for sales tax if it fails to charge and collect the sales tax from the purchaser, see, Code of Ala. 1975, §40-23-26, the producer is also liable for the severance tax if it fails to charge and collect the tax from the purchaser.

the materials were taxable or exempt. Given that problem, the more reasonable interpretation is that the "for use outside the state" exemption at §40-13-53(a) applies only if the first purchaser intends at the time of purchase to use the materials outside of Alabama. The above interpretation is supported by the rule of statutory construction that an exemption or exclusion from taxation must be construed for the government and against the Taxpayer. *Fleming Foods of Alabama, Inc. v. Dept. of Revenue*, 648 So.2d 580, cert. denied 115 S. Ct. 1690 (1995).

In this case, the purchaser, Carmeuse, did not itself use or intend to use the lime outside (or inside) of Alabama. Rather, it resold the lime to various customers. Consequently, because the sale and delivery of the lime by the Taxpayer to Carmeuse, i.e., the taxable event, was not a sale of the lime for use outside of Alabama, the §40-13-53(a) exemption did not apply.

But even if the §40-13-53(a) "for use outside the state" exemption could technically apply to the lime sold by the Taxpayer to Carmeuse, the exemption still cannot be allowed because there is no evidence verifying or documenting that Carmeuse in fact resold some of the lime to out-of-state customers. The Taxpayer contends that it had no way of knowing where CSXT delivered the lime. But the Taxpayer, as the producer, was required to maintain "[r]ecords relating to materials purchased for use outside the state, including method of delivery," and that such records "shall be available for verification and audit purposes to the department." Section 40-13-53(a).[3]

[3] The fact that the producer/first seller of the materials must keep such records showing delivery outside of Alabama further supports the conclusion that the §40-13-53(a) "for use outside the state" exemption applies only if the initial sale of the materials by the producer to the first purchaser is for use outside of Alabama. This case illustrates that only then

The burden is generally on a taxpayer to maintain records verifying a deduction or exemption. *Alabama Dept. of Revenue v. National Peanut Festival Assn., Inc.*, 51 So.3d 353 (Ala. Civ. App. 2010). In this case, the Taxpayer also had a statutory duty to maintain records showing that the lime sold to Carmeuse was delivered for use outside of Alabama.[4] It failed to do so. If a taxpayer fails to maintain records showing it is entitled to an exemption, the exemption cannot be allowed. *Ala. Dept. of Revenue v. National Peanut Festival Assn., Inc.*, *supra*; *State v. Ludlum*, 384 So.2d 1089 (Ala. Civ. App.), cert. denied 384 So.2d 1094 (Ala. 1980).

I agree with the Department examiner that the taxable event was the Taxpayer's sale and delivery of the lime to Carmeuse's delivery agent, CSXT, at the Taxpayer's facility in Shelby County.

> Ms. Lacy: Right. But the law states that, you know, the tax is due on sale and delivery, which were both happening at that point between when Carmeuse was taking possession of the product at (the Taxpayer's) site. So you're right, the fact if it went out of state or not at that point is irrelevant because the tax was due at that point.
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> ALJ Thompson: I think there's an exemption if something goes out of state and it's not delivered over the highways of Alabama - -
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> Ms. Lacy: Correct.
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> ALJ Thompson: - - is that correct?

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could the producer maintain records showing the sale and method of delivery to the out-of-state purchaser/user.

[4] This again assumes that the subsequent use of the lime outside of Alabama by Carmeuse's customers would trigger the §40-13-53(a) "for use outside the state" exemption. As previously discussed, the better view is that the above exemption applies only when the first purchaser uses the materials outside of Alabama.

> Ms. Lacy: If it's by the producer. But (the Taxpayer) had already sold it at that point. They had already sold it in-state at that point regardless if it went out of state at that point or not.

(T. 17 – 18).

Concerning the overburden sold to MMM, the Taxpayer argues that the Legislature intended for the tax to apply only if the severed materials are transported over a public road in Alabama, citing *Wilburn Quarries, LLC v. State Dept. of Revenue*, 50 So.3d 1078 (Ala. Civ. App. 2010). The Taxpayer thus argues that it is not liable for tax on the overburden because the materials were not transported over a public road in Alabama until after MMM resold the processed aggregate to its customers. I disagree.

The Court of Civil Appeals did affirm the Administrative Law Division's holding in *Wilburn Quarries* that the severance tax was intended to reimburse the county for the use of the county's roads. But while the levying statute, §40-13-52, provided that the tax was levied "primarily to compensate the county for the use of its roads and infrastructure," it was also levied "for the benefit, health, safety, and economic development of the county. . . ." Consequently, the tax was not limited to only severed materials transported on the public roads in Alabama. If that was the case, then all severed materials transported by rail or barge to locations in Alabama would not be taxable. Clearly that was not provided by the statute, nor was it the intent of the Legislature.

In summary, the Taxpayer, as the operator/producer, was required to collect the severance tax when it sold and delivered the materials in issue to Carmeuse and MMM. Pursuant to the provisions in Act 2004-629, which controlled during the period in issue, it was irrelevant that the overburden sold to MMM was not transported over a public road in

Alabama[5]; nor was it relevant that Carmeuse may have resold some of the lime to customers outside of Alabama. The tax became "due and payable . . . at the time of sale or delivery" of the materials by the Taxpayer in Alabama. Section 40-13-54(b). And because the Taxpayer failed to charge and show the tax on invoices or bills of sale to Carmeuse and MMM, the Taxpayer, as the producer, became liable for the tax. See again, §40-13-54(b).

Finally, the Taxpayer argues that it should not be required to pay the tax because MMM paid the severance tax due when it sold the processed aggregate to its customers. It offered a letter from MMM after the August 7 hearing indicating that MMM has always filed returns and paid the severance tax due on all of the processed aggregate sold at its Shelby County facility. Rich Townson, the Taxpayer's general manager, also testified that "Martin Marietta told me they collect the severance tax." (T. 8). The Taxpayer also asserts that Carmeuse may have also paid the tax when it resold the lime to its customers.

As discussed, while MMM and Carmeuse, as the purchasers from the Taxpayer, were initially liable to pay the tax to the Taxpayer, the Taxpayer became liable for the tax when it failed to charge and show the tax on the bills of sale or invoices issued to MMM and Carmeuse. Section 40-13-54(b). MMM and Carmeuse also were not required to collect and remit the tax when they resold the aggregate and lime, respectively, because

[5] Under current law, as amended by Act 2012-318, the Taxpayer's sale of the overburden to MMM would have been exempt pursuant to §40-13-53(b)(5). The section, as amended, exempts materials severed and sold to the first purchaser if the materials are not transported over a public road and are later processed into aggregate or a limestone product for resale. In that case, the first purchaser that processes and resells the aggregate or limestone product is instead made liable for the tax. MMM would thus have been liable to collect and remit the tax under current law.

the tax, as originally levied, was against the operator/producer that severed and then first sold the materials as tangible personal property in Alabama. The resale of the materials, processed or otherwise, was not a taxable event.[6] Any tax paid by MMM and/or Carmeuse on the materials was thus erroneously paid.

The Department concedes that it "is only interested in collecting the tax once. . . ." Department's October 2, 2012 letter brief, at 2. The Department argues, however, that any payments by MMM and Carmeuse have not been verified, and that in any case, the Taxpayer is primarily liable for the tax.

Although the post-hearing letter from MMM and the hearsay testimony of the Taxpayer's general manager are inadmissible as evidence, I have no reason to doubt that MMM did pay tax on some of the Taxpayer's overburden that it processed into aggregate and subsequently sold. The problem is that without auditing MMM, there is no way of knowing how much tax MMM may have paid on the processed overburden.

Other problems are self-evident. The Taxpayer owes the $.10 per ton tax on the full amount of overburden it sold to MMM. But when MMM processed the materials into aggregate, some of the raw overburden – the Taxpayer estimates ten percent – was lost in the process. Consequently, even if MMM paid tax when it sold the processed overburden, it did not pay on the full tonnage sold by the Taxpayer.

MMM may also have sold some of the processed overburden for pollution control or other exempt purposes in Alabama, or for use outside of Alabama, and thus may have

[6] As discussed above in n. 5, a first purchaser that processes and resells the materials may now be liable for the tax in certain instances. See, §40-13-53(b)(5), as added by Act 2012-318.

treated the materials as exempt pursuant to §§40-13-53 or 40-13-53(a). MMM would not have reported and paid the tax on those sales; but again, without auditing MMM, there is no way of knowing how much tax MMM may have paid, if any, on the Taxpayer's overburden. MMM may also have purchased overburden or like-kind materials from other suppliers and then mixed those materials with the Taxpayer's overburden before it processed the materials into aggregate, which would further complicate how to compute how much tax, if any, MMM paid on the overburden.

The Taxpayer speculated that Carmeuse also paid some tax when it resold the lime in issue, but it concedes that it has no way of knowing. As stated by one of the Taxpayer's representatives at the August 7 hearing – "And we don't know, and (Carmeuse) may have charged tax, severance tax on (the resold lime). We don't know." (T. 13). Again, as with MMM, there is no way of knowing what tax, if any, Carmeuse may have paid on the lime purchased from the Taxpayer without auditing Carmeuse.

The best and most reasonable, and statutorily correct, method of unraveling the problem is for the Taxpayer to pay the tax due on its taxable sales to MMM and Carmeuse. It is clear that all parties concerned were confused as to how the tax should have been charged and collected. The Department thus correctly did not penalize the Taxpayer for failing to collect and remit the tax due.

MMM and Carmeuse may petition for refunds of the tax they erroneously paid on the materials purchased from the Taxpayer during the subject period.[7] They should also

[7] MMM is also entitled to a refund of any tax it may have paid on the processed aggregate after the period in issue up to the October 2012 effective date of Act 2012-318. MMM would be liable for the tax on the sale of the processed aggregate after the effective date of Act 2012-318 pursuant to §40-13-53(b)(5), as amended. Carmeuse is also due a refund of

provide the Department with records and an explanation as to how their refund claims were computed.

The final assessment is affirmed. Judgment is entered against the Taxpayer for severance tax and interest of $87,664.16. Additional interest is also due from the date the final assessment was entered, April 12, 2012.

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

Entered November 8, 2012.

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BILL THOMPSON
Chief Administrative Law Judge

bt:dr
cc: Margaret Johnson McNeill, Esq.
W. Glenn Bridges, CPA
Thomas C. Zobelein, CPA
Janet Stathopoulos
Randy Winkler

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any tax it may have paid on the lime purchased from the Taxpayer and resold after the period in issue.