

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. S. 89-120

ASPHALT CONTRACTORS, INC.
P.O. Box 6152
Montgomery, AL 36106,

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Petitioner.

§

RECOMMENDED ORDER

Asphalt Contractors, Inc. (Petitioner) filed a petition for refund of sales tax with the Department concerning the period July 11 1985 through December 31, 1985. The Department partially denied the petition and the Petitioner appealed to the Administrative Law Division. A hearing was conducted on August 30, 1989. E. Hamilton Wilson, Jr., Esq. appeared for the Petitioner. Assistant counsel Gwendolyn Garner represented the Department. The following recommended order is hereby entered based on the evidence and arguments presented by the parties.

FINDINGS OF FACT

The Petitioner has operated as an asphalt contractor since 1973 and manufactured asphalt at a single plant in Selma, Alabama prior to 1985. The Petitioner purchased a second asphalt plant in Selma in early 1985. That plant had operated at the same location in Selma for six to eight years prior to 1985.

The Petitioner operated both plants in Selma until 1987, at which time the newly acquired plant was moved to Montgomery. Prior to moving, the Petitioner hired a geotechnical testing company to

make recommendations concerning site preparation and foundation work for the new plant site. The move was completed in approximately six to eight weeks and cost approximately \$125,000.00.

The Petitioner subsequently petitioned for a refund of sales tax that had been paid on fuel oil used in both plants during the period July 1, 1985 through December 31, 1985. The petition was based on Code of Ala. 1975, §40-23-4(14), which allows an exemption for "fuel oil purchased as fuel for kiln use in manufacturing establishments".

The Department allowed the refund relating to the fuel oil used in the Petitioner's original plant in Selma, but denied the petition relating to the fuel oil used in the plant that subsequently moved to Montgomery.

The Department's position is that the Montgomery plant is portable and thus is not a manufacturing establishment within the purview of §40-23-4(14). The Department argues that the facility is portable because various components are housed or based on a flatbed trailer which has an axle and a trailer hitch, but no wheels. Also, parts of the Montgomery facility are bolted to a concrete foundation, whereas the Selma facility is embedded in the concrete foundation.

The Petitioner argues that the Montgomery facility is in substance the same as the Selma facility and that both are

permanent manufacturing facilities. The Petitioner also points out that the Montgomery plant has never been used or operated at a job site.

CONCLUSIONS OF LAW

The Department concedes that the subject fuel oil was for kiln use. Thus, the determinative issue is whether the Montgomery plant constitutes a manufacturing establishment within the purview of §40-23-4(14).

The Court of Civil Appeals has ruled that a portable kiln used to mix asphalt at a job site does not constitute a manufacturing establishment. State v. Hunt Oil Company, 273 So.2d 205, citing State v. Blount Brothers Corp., 172 So.2d 389. The Department cites the Hunt Oil decision in support of its position.

However, the Montgomery facility is clearly not a portable asphalt mixer of the type involved in the Hunt Oil decision, but rather is an established manufacturing facility. The entire facility is intended to remain permanently at its present location and none of the plant components are intended for use or have been used on a job site. The permanent nature of the facility is not altered by the fact that some of the components are situated on a trailer base which has an axle and a trailer hitch. Those components are a fixed part of the facility and have never been moved other than from Selma to

Montgomery, and have never been used on a job site.

Further, the distinction, if any, between the Selma facility being embedded in concrete and the Montgomery facility being bolted to the concrete foundation is inconsequential. Theoretically, any manufacturing facility regardless of size can be moved, and the fact that one facility may be easier or less expensive to move than another is irrelevant in determining whether the facility constitutes a manufacturing establishment.

The subject facility was constructed or setup the same in Selma during the last half of 1985 as it is now in Montgomery. Thus, the plant was clearly a manufacturing establishment during the subject period, and all fuel oil purchased for use therein was exempt from sales tax 'under §40-23-4(14). Accordingly, the refund in dispute should be granted by the Department.

This is a recommended order only. The original along with the record and transcript has been forwarded to the Commissioner of Revenue for entry of a final order. The final order issued by the Commissioner 1975, §41-22-20.

Entered this 14th day of September, 1989.

BILL THOMPSON
Chief Administrative Law Judge