ALABAMA TAX TRIBUNAL

REYNOLDS BRANDS, INC., LORILLARD LICENSING CO., LLC, AND R.J. REYNOLDS TOBACCO COMPANY,	§	DOCKET NOS. BIT. 19-1160-JP BIT. 19-1161-JP
Taxpayers,	§	BIT. 20-419-JP
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND PRELIMINARY ORDER REGARDING REVENUE DEPARTMENT'S JURISDICTIONAL CHALLENGE

These consolidated appeals involve final assessments of business income tax for the year 2015 and the denial by the Alabama Department of Revenue of a requested refund of business income tax for the same year. In its Answer to the Companies' Notices of Appeal, the Revenue Department argues that the constitutional challenges in two of the appeals – Nos. BIT 19-1160-JP and BIT 19-1161-JP – constitute facial challenges to Ala. Code § 40-18-31.2(b). Thus, the Revenue Department asserts that the Alabama Tax Tribunal lacks jurisdiction to hear and decide the challenges.

In reply, the Companies argue that they are not making facial challenges to the statute, but that they merely are challenging the constitutionality of the statute as it applies to their particular facts. Thus, the Companies assert that their challenges are within the Tax Tribunal's jurisdiction.

Question Presented

By the express wording of the legislature, the Tax Tribunal has no authority to

declare a statute unconstitutional on its face. And according to the Alabama Supreme Court, a facial challenge is one which asserts that a statute always operates unconstitutionally. Thus, the jurisdictional question here is whether a ruling that upholds the Companies' constitutional challenges would leave the statute with a field of operation as to other companies.

Law

In Ala. Code § 40-2B-2(g)(6), the legislature stated that "[t]he Alabama Tax Tribunal shall decide questions regarding the constitutionality of the application of statutes to the taxpayer and the constitutionality of regulations promulgated by the Department of Revenue, but shall not have the power to declare a statute unconstitutional on its face." Alabama's Supreme Court has distinguished between a facial constitutional challenge and an as-applied constitutional challenge as follows:

> A "'facial challenge' ... is defined as '[a] claim that a statute is unconstitutional on its face – that is, that it *always* operates unconstitutionally.'" *Board of Water & Sewer Comm'rs of Mobile v. Hunter*, 956 So.2d 403, 419 (Ala. 2006) (quoting *Black's Law Dictionary* 244 (8th ed. 2004)). To prevail on a facial challenge to the constitutionality of a statute, a party must establish "that no set of circumstances exists under which the [statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). In contrast, an "as-applied challenge" is "a claim that a statute is unconstitutional on the facts of a particular case or in its application to a particular party." *Black's Law Dictionary* 278 (10th ed. 2014).

Ex parte Tulley, 199 So.3d 812, 822-23 (Ala. 2015).

In *U.S. v. Salerno, supra*, which was cited in *Tulley*, the U. S. Supreme Court stated:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of

> circumstances exists under which the Act would be valid. The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

Salerno, supra, at 745.

Background

Reynolds Brands, Inc., previously known as Reynolds Innovation, Inc., stated the following in its Notice of Appeal:

> The Company is a corporation organized under the laws of North Carolina with its principal place of business and commercial domicile in North Carolina. The Company is engaged primarily in managing, protecting, utilizing and licensing the intellectual property that it owns including trademarks, trade names and product formulas ("Intellectual Property"). The Company does not have any property or employees located in Alabama and the Company does not perform any of its business activities related to the Intellectual Property in Alabama.
>
> The Company is a wholly-owned subsidiary of R.J. Reynolds Tobacco Company ("Reynolds"). Pursuant to a license agreement between Reynolds and the Company, Reynolds uses the Intellectual Property of the Company and is charged an arms-length royalty for such use. Reynolds manufactures cigarettes and affixes the cigarettes with the Company's Intellectual Property outside of Alabama and ships those cigarettes to its wholesaler customers located throughout the United States (including in Alabama) from outside of Alabama and title to the cigarettes passes outside of Alabama. The license agreement was entered into outside of Alabama. The Company has no control over where in the United States that Reynolds ships and sells its inventory affixed with the Company's Intellectual Property.
>
> Reynolds filed an Alabama Corporation Income Tax Return for the Year at Issue. In calculating its Alabama Taxable Income, Reynolds added back the royalties that it paid to the Company to its federal taxable income, and claimed an exception to the addback to the extent that the Company filed returns and apportioned its income to the states where it was subject to a net income tax.

> The Company did not file an Alabama Corporate Income Tax Return for the Year at Issue based on its conclusion that it did not have a substantial nexus with Alabama. The Department audited Reynolds for the tax years 2013 through 2015. During the course of its audit of Reynolds, the Department asserted that the Company had a substantial nexus with Alabama during the Year at Issue, computed an Alabama corporate income tax liability for the Company, and entered a Notice of Preliminary Assessment ....

Attachment to Notice of Appeal, pp. 1-2.

The Revenue Department asserted that Reynolds Brands was subject to Alabama income tax pursuant to Alabama's factor-presence nexus statute in Ala. Code § 40-18-31.2(b)(3). Among other things, § 31.2(a) and (b) state the following:

> (a) (1) ...
> (2) Nonresident individuals and business entities organized outside of the state that are doing business in this state have substantial nexus and are subject to the taxes provided for in Chapters 14A, 18, and 16 of this title, when in any tax period the property, payroll, or sales of the individual or business in the state, as they are defined in subsection (d), exceeds the thresholds set forth in subsection (b).
>
> (b) Substantial nexus is established if any of the following thresholds are exceeded during the tax period:
>
> (1) A dollar amount of fifty thousand dollars ($50,000) of property.
> (2) A dollar amount of fifty thousand dollars ($50,000) of payroll.
> (3) A dollar amount of five hundred thousand dollars ($500,000) of sales, as defined in subdivision (3) of subsection (d).
> (4) Twenty-five percent of total property, total payroll, or total sales.

The Revenue Department relied upon a sourcing schedule supplied by Reynolds Brands that showed that Alabama sales of products that bore its intellectual property exceeded $500,000 during 2015. Therefore, the Revenue Department entered the final assessment in issue.

Reynolds Brands primarily argues that the factor-presence standard is unconstitutional as applied to the Company.

> The Department's assertion that the Company has a substantial nexus with Alabama as a result of exceeding the sales threshold of the Factor Presence Standard is erroneous inasmuch as the Factor Presence Standard violates both the Due Process Clause and the Commerce Clause of the U.S. Constitution as applied to the Company. The United States Supreme Court recently made clear that substantial nexus is an independent constitutional requirement apart from apportionment and a company must purposefully avail itself of conducting business in the taxing state before the state may constitutionally assert jurisdiction to tax, regardless of the state's apportionment rules.
>
> The unconstitutional application of the Factor Presence Standard to the Company becomes clear when considering how the Factor Presence Standard would apply to the Company if Alabama used a cost of performance methodology for apportioning revenue from the licensing of intangibles. None of the income producing activity of the Company occurs in Alabama and, therefore, under a cost of performance methodology, the Company would have no sales apportioned to Alabama. Inasmuch as the Company would have no sales apportioned to Alabama, the Company would not have substantial nexus with Alabama under the Factor Presence Standard. ...
>
> Here, the Company did not purposefully avail itself of the privilege of conducting business in Alabama. The Company did not have any property or payroll in Alabama and did not conduct any business activities in Alabama. The Company's arm's-length license agreement with Reynolds was entered into outside of Alabama. Reynolds affixed the Company's Intellectual Property to its inventory outside of Alabama and shipped its inventory to its customers from outside of Alabama. Moreover, the Company had no control over where Reynolds shipped and sold its inventory or where Reynolds' customers shipped and sold their inventories and did not direct Reynolds to conduct activities in Alabama or any other state.
>
> The mere foreseeability that Reynolds would sell inventory affixed with the Company's Intellectual Property in Alabama is insufficient to create a constitutional nexus with Alabama for the Company. Moreover, the fact that the Company directed its activities to Reynolds and Reynolds directed its activities to Alabama is also insufficient to create a constitutional nexus with Alabama for the Company. Both the U.S. Supreme Court and the Alabama

> Supreme Court have made clear that when a state seeks to assert jurisdiction over a person, it is the activities of the person itself, and not the activities of third parties, that are relevant to the question of constitutional nexus.

Attachment to Notice of Appeal, p. 3 (emphasis in original, citations omitted)

The Revenue Department answered by arguing that the constitutional challenges constitute facial challenges and, thus, are beyond the scope of the Tax Tribunal's authority, citing *Ex parte Tulley*.

> Under the Taxpayer's theory of the case, the Factor Presence Nexus Statute has no scope at all for application consistent with the Due Process and Commerce Clauses of the U.S. Constitution. Stated succinctly, the Taxpayer's complaint is that "substantial nexus is an independent constitutional requirement apart from apportionment and a company must purposefully avail itself of conducting business in the taxing state before the state may constitutionally assert jurisdiction to tax, regardless of the state's apportionment rules." Thus, under the Taxpayer's theory, either a taxpayer has availed itself of conducting business in a state or it has not, and whether this is true depends on many facts and circumstances, but in no event on the thresholds set in the Factor Presence Nexus Statute. That is, the thresholds set in the Factor Presence Nexus Statute are wholly irrelevant to the question whether a taxpayer has or has not availed itself of a state's market; rather, this is an enquiry that will produce one result or another from the taxpayer's activities themselves and the taxpayer's intentions when engaging in those activities. If a taxpayer purposefully avails itself of a state's market, then under the Taxpayer's arguments, nexus will have been created, regardless of the Factor Presence Nexus Statute thresholds; and likewise, if a taxpayer does not purposefully avail itself of a state's market, then no quantum of activity will serve to create nexus, however so exceeding of the thresholds such activities may be.
>
> Therefore, the Taxpayer's complaint is not that the Factor Presence Nexus Statute is being enforced against it, in particular, in an unconstitutional manner. Rather, if the Taxpayer is correct, the Factor Presence Nexus Statute is <u>always</u> either (a) unconstitutional, or (b) wholly irrelevant, <u>any time</u> it is applied to <u>any taxpayer.</u> This is the very essence of a facial challenge, which the Tribunal lacks jurisdiction to consider.

> This Tribunal has previously held that "the facts which trigger these [tax] obligations are found in the express wording of the statute that is being challenged. In other words, the tax obligations complained of by the Taxpayer and the facts which trigger these obligations are found on the face of [the statute complained of]. . . ." And, [t]herefore, a ruling here by the Tax Tribunal would be a ruling on the facial constitutionality - or lack of constitutionality - of Alabama's statute. But the legislature has expressly prohibited such action. And although the Taxpayer states that it asks for a ruling only as to the application of the statute to itself, the overarching effect of such a ruling would bring the ruling within the legislature's prohibition." Black Eagle Minerals, LLC v. Alabama Dep't of Rev., Ala. Tax Trib., dkt. nos. BIT. 11-975-JP, BIT. 12-1229-JP (Jan. 23, 2018), at 8. The Department argues that the same is true in this case.

Revenue Department's Answer, pp. 3-4.

In reply, Reynolds Brands stated that its only assertion is that the application of Alabama's nexus statute is unconstitutional as applied to its specific facts.

> Rather, the Factor Presence Statute may operate constitutionally when it is applied to a person that has purposefully availed itself of the substantial privilege of conducting business in Alabama, which may be presumed in some cases by application of the Factor Presence Statute's sourcing rules. Not all companies challenging the Factor Presence Statute will own intellectual property and earn income by licensing intellectual property like the Company does and, therefore, not all companies will be subject to Alabama's sourcing rule for the licensing of intangibles based on the licensee's "use," which does not create a presumption about licensor's activities in Alabama. Moreover, the applicability of the Factor Presence Statute will not always be affected by its interaction with Alabama Code Section 40-18-31.2 (the "Addback Statute"), as it is in this case as discussed below.
>
> The Department argues that if the constitutional requirement is met, then the Factor Presence Statute is rendered wholly irrelevant. This is erroneous because, as Alabama courts have explained, both the constitutional and statutory standards must be satisfied in order for Alabama to impose a tax. If the requirements of the Factor Presence Statute are satisfied, then Alabama courts consider "the permissible reach of Alabama taxing authority." Scholastic Book Clubs, 276 So.3d at 707. If imposition of the tax

> is within Alabama's constitutional jurisdiction, then the Alabama Factor Presence Statute operates constitutionally under those circumstances.

Reply, p. 5.

In response, the Revenue Department stated that the Company's argument about its "own activities" is a question that the Tax Tribunal would not address unless it first determined that the challenges were not facial challenges. And the Revenue Department reiterated that the distinction between an as-applied challenge and a facial challenge is determined according to *Ex parte Tulley* and according to its recent application by the Tax Tribunal in *Black Eagle Minerals, supra.*

In the appeal of *Lorillard Licensing Co.*, BIT 19-1161-JP, Lorillard and the Revenue Department make the same arguments as made in the *Reynolds Brands* appeal, which is docketed as BIT 19-1160-JP. And in the appeal of *R.J. Reynolds*, BIT 20-419-JP, the company argues, among other things, that the Revenue Department's denial of its refund request was unconstitutional as applied to the company, because the effect of the denial was to subject the royalties to tax twice - once at the subsidiary level and again at the parent (R.J. Reynolds) level. Oral argument concerning the jurisdictional question was held on May 4, 2021, followed by the filing of briefs.

Analysis

As noted, a statute that always operates unconstitutionally is unconstitutional "on its face;" that is, there exists no set of circumstances "under which the [statute] would be valid." *Ex parte Tulley, supra,* at 822-23 (quoting *Salerno, supra,* at 745).

Practically speaking, if a statute is unconstitutional on its face, the defect is seen from the very words of the statute (its "face") and not from the way in which the statute applies to a particular taxpayer. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575-76 (1997).

Alabama's nexus statute deems an out-of-state business to have substantial nexus with Alabama if that business's Alabama sales exceed $500,000 during the tax period. Ala. Code § 40-18-31.2(b)(3). That section defines "sales" as follows:

> (3) Sales counting toward the threshold include the total dollar value of the taxpayer's gross receipts from transactions in the current period, from a. the sale, lease, or license of real property located in this state; b. the lease or license of tangible personal property located in this state; c. the sale of tangible personal property received in this state as indicated by receipt at a business location of the seller in this state or by instructions, known to the seller, for delivery or shipment to a purchaser, or to another at the direction of the purchaser, in this state; and d. the sale, lease, or license of services, intangibles, and digital products for primary use by a purchaser known to the seller to be in this state. If the seller knows that a service, intangible, or digital product will be used in multiple states because of separate charges levied for, or measured by, the use at different locations, because of other contractual provisions measuring use, or because of other information provided to the seller, the seller shall apportion the receipts according to usage in each state; e. if the seller does not know where a service, intangible, or digital product will be used or where a tangible will be received, the receipts shall count toward the threshold of the state indicated by an address for the purchaser that is available from the business records of the seller maintained in the ordinary course of business when such use does not constitute bad faith. If that is not known, then the receipts shall count toward the threshold of the state indicated by an address for the purchaser that is obtained during the consummation of the sale, including the address of the purchaser's payment instrument, if no other address is available, when the use of this address does not constitute bad faith.

Ala. Code § 40-18-31.2(d)(3).

Here, Reynolds Brands and Lorillard argue that the statute is being applied unconstitutionally by attributing sales to the companies when they have not availed themselves of Alabama's market; *i.e.*, they have not licensed intellectual property to licensees in Alabama.

> The Subsidiaries earn income by licensing the intellectual property that they own to [R.J. Reynolds], not to customers or licensees in Alabama. Under the Factor Presence Statute, the Subsidiaries are directed to source their sales to Alabama for purposes of the sales threshold based on [R.J. Reynolds's] "use" of the intellectual property in Alabama to deem nexus, although they do not have nexus based on their own activities in Alabama. These distinctions provide grounds for the Tribunal to determine that the Factor Presence Statute is unconstitutional as applied to the Subsidiaries, without the need to declare the Factor Presence Statute unconstitutional on its face in all circumstances.

Taxpayers' Opening Brief Regarding Jurisdictional Issue, p. 9.

Reynolds Brands and Lorillard are correct as to the scope of their argument. A favorable ruling on their constitutional challenges would not invalidate the state's factor-presence nexus statute. On the contrary, such a ruling would not even address the statute's assertion of nexus concerning the property threshold, the payroll threshold, or the minimum apportionment ratio, any one of which could trigger the application of the statute. Nor would the ruling address other aspects of the statute's definition of "sales" besides the one that the companies claim is unconstitutional as applied to them.

Thus, the companies are not challenging the constitutionality of the statute on its face.

In its Answer and in a pre-argument brief, the Revenue Department asserted that

the effect of a ruling by the Tax Tribunal in favor of the companies on their constitutional claims would be to strike the nexus statute on its face, citing *Black Eagle Minerals, supra*. That case is distinguishable from these present appeals on the facts, however.

In *Black Eagle Minerals*, a pass-through-entity challenged income tax assessments that were entered because of the entity's failure to make composite tax payments to the Revenue Department on behalf of its members that were not Alabama residents. Although the taxpayer entity claimed that its constitutional challenge was an as-applied challenge to Alabama's composite-payment statute, the Tax Tribunal decided that the effect of a ruling in favor of the Taxpayer would be to invalidate the statute because such a ruling would apply equally to all others subject to the statute.

> Here, as stated, the Taxpayer argues that § 40-18-24.2(b)(1) violates the Commerce Clause because the tax burden placed upon the Taxpayer by the statute is "based solely on the fact that its investors were nonresidents" and that "Black Eagle would not have incurred this tax liability if it were wholly owned by Alabama residents." The Taxpayer's factual premises are correct; *i.e.*, its tax burden is predicated on the fact that it had nonresident members (for whom the Taxpayer did not make composite tax payments), and the Taxpayer would not have had such filing and payment obligations if its members were Alabama residents only.
>
> But the facts which trigger these obligations are found in the express wording of the statute that is being challenged. In other words, the tax obligations complained of by the Taxpayer and the facts which trigger these obligations are found on the face of § 40-18- 24.2(b)(1). ...
>
> Therefore, a ruling here by the Tax Tribunal would be a ruling on the facial constitutionality – or lack of constitutionality – of Alabama's statute.
>
> Simply stated, there is nothing particular about this Taxpayer's fact

> situation that would distinguish it from the facts of other taxpayers who also are subject to Alabama's composite reporting and payment requirements. This Taxpayer is subject to those requirements because it has nonresident members. If other entities are subject to the statute's requirements, it is because those entities have nonresident members. And to come within the scope of those requirements, one need look no further than the face of the statute.

Black Eagle Minerals, pp. 7-8.

In the present appeals, though, the Companies' facts are distinguishable from facts concerning other companies, as discussed. Therefore, the ruling in *Black Eagle Minerals* does not support the Revenue Department' position.

Also, during oral argument, the Revenue Department raised, for the first time, two U.S. Supreme Court cases which the Revenue Department contends support its argument that the Companies' constitutional challenges are facial challenges. The first case is *Doe v. Reed*, 561 U.S. 186 (2010), which involved a claim that the State of Washington's Public Records Act violated the U.S. Constitution's First Amendment as applied to referendum petitions. Specifically, certain signers of a petition (the Plaintiffs in the case) argued that public disclosure of their names and addresses would violate their First Amendment right to free speech. However, in Count I of their Complaint, the Plaintiffs argued that the Act violated First Amendment rights as applied to referendum petitions in general; whereas, in Count II, they argued that the Act was unconstitutional as applied to the specific petition they signed. The courts addressed only Count I.

Before the U. S. Supreme Court, the parties disagreed as to whether the claim should be viewed as a facial or as-applied challenge. The Court stated the following:

> The label is not what matters. The important point is that plaintiffs' claim and the relief that would follow—an injunction barring the secretary of state "from making referendum petitions available to the public," App. 16 (Complaint Count I)—reach beyond the particular circumstances of these plaintiffs. They must therefore satisfy our standards for a facial challenge to the extent of that reach.
>
> ...
>
> The question before us, however, is not whether PRA disclosure violates the First Amendment with respect to those who signed the R-71 petition, or other particularly controversial petitions. The question instead is whether such disclosure in general violates the First Amendment rights of those who sign referendum petitions.
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> The problem for plaintiffs is that their argument rests almost entirely on the specific harm they say would attend disclosure of the information on the R-71 petition, or on similarly controversial ones. ...
>
> Plaintiffs have offered little in response. They have provided us scant evidence or argument beyond the burdens they assert disclosure would impose on R-71 petition signers or the signers of other similarly controversial petitions.
>
> ...
>
> Faced with the State's unrebutted arguments that only modest burdens attend the disclosure of a typical petition, we must reject plaintiffs' broad challenge to the PRA. In doing so, we note—as we have in other election law disclosure cases—that upholding the law against a broad-based challenge does not foreclose a litigant's success in a narrower one.
>
> ...
>
> We conclude that disclosure under the PRA would not violate the First Amendment with respect to referendum petitions in general and therefore affirm the judgment of the Court of Appeals.
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> *Doe v. Reed*, 561 U.S. 186, 194, 200-202 (2010).

Neither the facts of *Doe v. Reed*, nor the wording of the opinion support the Revenue Department's position here. The question before the Court in *Doe* concerned the much broader category of referendum petitions in general, as opposed to the Plaintiffs' particular petition. And it was that point that caused the Supreme Court to apply standards relating

to a facial challenge. Here, though, Reynolds Brands and Lorillard specifically argue that the application of the statute to their particular facts creates an unconstitutional result.

In short, the challenges in this case do not concern a broad category, but instead concerns the Companies' specific facts. Further, as noted by the Companies, the U.S. Supreme Court has recognized a different standard for facial unconstitutionality in First Amendment cases than the traditional standard expressed in *Salerno*, which was cited with approval by the Alabama Supreme Court in *Ex parte Tulley*. In *U. S. v. Stevens*, 559 U.S. 460 (2010), the Court stated:

> To succeed in a typical facial attack, Stevens would have to establish "that no set of circumstances exist under which [§ 48] would be valid," *U.S. Salerno* ... Which standard applies in a typical case is a matter of dispute that we need not and do not address, and neither *Salerno* nor *Glucksberg* is a speech case. ...
>
> In the First Amendment context, however, this court recognizes "a second type of facial challenge," whereby a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." ...
>
> *Stevens*, at 472-73.

Obviously, this appeal does not involve the First Amendment. Thus, *Doe v. Reed* is inapplicable.

The second case that was raised by the Revenue Department during oral argument is *Bucklew v. Precythe*, 139 S.Ct. 1112 (2019). Without much analysis, the Revenue Department stated that *Bucklew* cited *Doe v. Reed* and that Mr. Bucklew presented a challenge that did not seek to strike a statute in its entirety but, nevertheless, was considered to be a facial challenge because of the breadth of the remedy. So the Revenue

Department argued that "[t]he remedy that would be afforded to the Taxpayers (if their challenge is successful) would invalidate a significant enough portion of the statute, that relating to sales, that a facial standard must be applied." Revenue Department's Supplemental Brief, p. 2. But this claim has been rejected in this Opinion's discussion of *Doe v. Reed*. Further, the Supreme Court acknowledged in *Bucklew* that "he presented an as-applied Eighth Amendment challenge to the State's new [lethal injection] protocol." *Id.* at 1120. However, the Court reiterated that the same standard governed "*all* Eighth Amendment method-of-execution claims," *Bucklew* at 1126 (emphasis in original), regardless of whether the claim is facial or as-applied. Thus, *Bucklew* does not support the Revenue Department's position.

Conclusion

A ruling by the Tax Tribunal in favor of the Companies on their constitutional challenges would leave Alabama's factor-presence nexus statute with a field of operation as to others. Thus, the challenges are as-applied challenges, in accordance with *Ex parte Tulley*, and are within the jurisdiction of the Tax Tribunal. Because the Revenue Department's jurisdictional challenge is rejected, these appeals will proceed.

It is so ordered.

Entered October 22, 2021.

/s/ Jeff Patterson
JEFF PATTERSON
Chief Judge
Alabama Tax Tribunal

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