ALABAMA TAX TRIBUNAL

RUSSELL COUNTY COMMUNITY HOSPITAL, LLC D/B/A JACK HUGHSTON MEMORIAL HOSPITAL,	§	
Taxpayer,	§	DOCKET NO. COUNTY/CITY 21-124-LP
v.	§	
RUSSELL COUNTY, ALABAMA, LEE COUNTY, ALABAMA & PHENIX CITY, ALABAMA.	§	

OPINION AND PRELIMINARY ORDER

This appeal involves the denial of refunds of sales and use tax for the periods August 2015 through February 2019, and an assessment of consumer's use tax for the periods October 1, 2018, through September 30, 2021, by Russell County, Lee County, and Phenix City ("the local jurisdictions") against the Taxpayer.

The Taxpayer filed its petitions for refund after it determined that it had paid sales and use taxes on purchases of tangible personal property that were exempt from sales tax pursuant to Ala. Code 1975 § 40-9-30(d). After those petitions were denied and an assessment had been entered against the Taxpayer, the Taxpayer appealed to the Tax Tribunal. A hearing was held on April 4, 2023. Brandon Peak and Joseph Colwell represented the Taxpayer. Chris Wiggins, the system-wide Chief Financial Officer for the Taxpayer, testified; Aaron Giles, the owner of Agile Consulting Company, which was contracted by the Taxpayer to file the refund petitions at issue, also testified. Kendrick Webb and Mark Cowell represented Russell and Lee Counties. David Johnston and Chan Gamble represented Phenix City. Chris Wills,

the senior audit manager for Avenu Insights and Analytics, which administers taxes for the local jurisdictions, testified for the local jurisdictions.

I. Motion to Dismiss

Russell County has requested that the appeal be dismissed in part for lack of jurisdiction.

A. Timeliness

First, the local jurisdictions assert that the appeal is due to be dismissed with respect to the following refund petitions because the appeal was not timely filed from the date those petitions were deemed denied: (1) the joint petitions filed with Arthrex, Inc., for periods 10/2015 through 7/2017; (2) the joint petitions filed with Globus Medical NA, Inc., for periods 3/2016 through 11/2017; (3) the joint petitions filed with Howmedica Osteonics Corp. for periods 9/2015 through 7/2017; (4) the joint petitions filed with Medtronic Sofamor Danek USA, Inc., for periods 9/2015 through 11/2017; and (5) the direct petition filed for periods 8/2015 through 12/2017.

> "In accordance with Ala. Code § 40-2A-7(c)(3), a refund petition is deemed denied six months after it is submitted unless one of the following happens prior to the deemed denied date: (1) the Revenue Department grants the refund; (2) the Revenue Department denies the refund; or (3) the Revenue Department and the taxpayer agree in writing to extend the six-month period. In accordance with Ala. Code § 40-2A-7(c)(5), a taxpayer has two years from the date a refund petition is denied, or deemed denied, to appeal to the Alabama Tax Tribunal."

AT&T Services v. Alabama Dep't of Rev., Opinion and Preliminary Order DOCKET NO. S. 20-1085-LP (June 28, 2022).[1]

[1] The parties did not dispute that the timelines set forth in §40-2A-7(c)(3) & (5) apply equally to petitions for refund filed with local jurisdictions.

The Taxpayer does not dispute that the above-listed petitions were not timely appealed from the date the petitions were deemed denied pursuant to Ala. 1975, § 40-2A-7(c)(3), after the petitions were not granted or denied within six months from the date they were filed. Instead, the Taxpayer asserted that the local jurisdictions are estopped from asserting the statute of limitations as a defense.

> "The Supreme Court of Alabama has held 'that the State may be estopped from asserting that a taxpayer failed to timely appeal "where the untimeliness of the filing of their appeal was caused by misinformation furnished by the State's officer and relied upon by the petitioners to their detriment."' Magee v. Home Depot U.S.A., Inc., 95 So. 3d 781, 788 (Ala. Civ. App. 2012) (quoting Home Depot U.S.A, Inc. v. State of Alabama, Docket No. S. 06-1079 (ALD 5/2/2007), quoting Ex parte Four Seasons, Ltd., 450 So. 2d 110, 112 (Ala. 1984)). In applying this rationale, the Court has established that 'if a governmental employee acting in his or her official capacity gives an individual or an entity erroneous information that is relied on in good faith by the individual or entity, and which directly results in the individual or entity failing to timely appeal, the government is estopped from asserting the statute of limitations as a defense.' Id. at 788-789.
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> "In Home Depot, the Revenue Department, after the taxpayer's refund petition was deemed denied, 'actively communicated' with the taxpayer concerning its refund claim and sent the taxpayer a refund denial letter notifying it of the date (i.e., two years from the date of the denial letter) in which the refund denial could be timely appealed. See id. at 789. The Alabama Court of Civil Appeals affirmed the Administrative Law Division's finding that such communication was not required and, absent such communication by the department, 'the burden would have been on [Home Depot] to determine how long it had to appeal, i.e., two years from when the petition was deemed denied.' Id. at 789-790. Additionally, '[f]or estoppel to apply, the advice or information must seem reasonable on its face, and the taxpayer must rely on the advice or information in good faith.' Id. at 790."

AT&T Services v. Alabama Dep't of Rev., supra.

In the present case, the Taxpayer contends that, even after the six-month period expired, Avenu's actions in continuing to request additional documentation and work

with the Taxpayer to consider and resolve the refund claim form a basis for a finding of estoppel. Mr. Giles testified that Avenu, specifically, often takes more than six months to resolve a refund claim. The local jurisdictions assert, however, that it was not their responsibility to notify the Taxpayer of the deemed denied date or the appeal deadline. At the hearing, Mr. Wills testified that, even after the deemed denied date, Avenu will consider a refund petition up until the date the statute of limitations runs.

Based on the reasoning adopted and further explained by the Alabama Court of Civil appeals in Magee v. Home Depot U.S.A., Inc., 95 So. 3d 781, 788 (Ala. Civ. App. 2012) as well as the Tax Tribunal's opinion in AT&T, supra, I conclude that Avenu's actions of continuing to request additional documentation and working with the Taxpayer to consider and resolve the refund claim does not equate to "giv[ing] … an entity erroneous information." Therefore, Avenu's working on the refund claim past the six-month deemed denied date does not warrant a finding of estoppel.

The Taxpayer also referenced two specific communications from Avenu that the Taxpayer contends support a finding of estoppel. On August 16, 2021, a representative of Avenu sent the Taxpayer a letter notifying the Taxpayer that the refund petitions were denied because there was insufficient information to show that a refund was due. The August 16, 2021, letter also stated that the statute of limitations had run on several of the refund petitions. The Taxpayer filed its notice of appeal in the Tax Tribunal on November 24, 2021, stating specifically that it was requesting a formal hearing with the Tribunal in response to the August 16, 2021, letter. There was no false information regarding an appeal of the refund denial in the August 16, 2021,

letter that would support a claim of estoppel.

The second specific communication from Avenu that the Taxpayer referenced is a February 6, 2020, email from Mr. Wills that states, in pertinent part:

> "I have finished the review of the items presented as support to the refund petition. Based on what has been reviewed, I do not see how these items fall within the exemption….If you have any additional information to show that the amounts should be refunded, please provide those and I will review. Otherwise, the refund petitions as a whole (Arthrex, Inc. – Joint Petitioner, Stryker-Joint Petitioner, Medtronic-Joint Petition, Globus-Joint Petition, and Direct Petition) will be deemed denied."

The Taxpayer correctly points out that the email was erroneous because the petitions subject to the motion to dismiss had already been deemed denied prior to that email correspondence. However, the Court of Civil Appeals has explained: "Estoppel would not, of course, apply in all cases where a Department employee gives a taxpayer erroneous advice concerning the taxpayer's appeal rights. Rather, it must be applied (or rejected) on a case-by-case basis. For estoppel to apply, the advice or information must seem reasonable on its face, and the taxpayer must rely on the advice or information in good faith." Magee v. Home Depot U.S.A., Inc., 95 So. 3d 781 (Ala. Civ. App. 2012).

In this case, there was insufficient evidence indicating that the Taxpayer relied on the February 6, 2020, email to determine its time to appeal. The February 6, 2020, email triggered no action of the Taxpayer regarding an appeal. The Taxpayer continued its conversations with Avenu concerning the merits of the refund petitions. Mr. Giles admitted on cross-examination that Avenu did not state that the statute of limitations for appeal was extended. He further testified that Avenu did not

misrepresent the time to appeal or the deemed denial time. Only after the Taxpayer received the August 16, 2021, letter from Avenu, a letter which contained no incorrect information regarding an appeal of the refund denial, did the Taxpayer appeal to the Tax Tribunal. As noted previously, the Notice of Appeal filed by the Taxpayer specifically stated that it was requesting a formal hearing with the Alabama Tax Tribunal in in response to the August 16, 2021, letter.

Based on the foregoing, I conclude that there was insufficient evidence to prove that the local jurisdictions are estopped from asserting a statute of limitations defense in this case. Therefore, because the petitions referenced at the beginning of this section were not timely appealed, the appeal is dismissed with respect to the challenges to the denial of those petitions.

B. Ripeness

The local jurisdictions have also moved to dismiss the Taxpayer's appeal to the extent that it challenges an assessment of consumer's use tax for the periods October 1, 2018, through September 30, 2021.

Section 40-2B-2(g)(2)a. provides, in pertinent part:

> "Unless a self-administered county or municipality elects, in the manner prescribed below, to divest the Alabama Tax Tribunal of jurisdiction over appeals of final assessments or denied refunds in whole or in part, of any sales, use, rental, or lodgings taxes levied or collected from time to time by or on behalf of the self-administered county or municipality, a taxpayer may appeal a final assessment or denied refund involving any such tax to the Alabama Tax Tribunal."

Additionally, "[i]f a preliminary assessment is not withdrawn or made final by the department within five years from the date of entry, the taxpayer may appeal the

preliminary assessment to the Alabama Tax Tribunal or to the appropriate circuit court as provided by subsection (b)(5) for an appeal of a final assessment." Ala. Code 1975 40-2A-7(b)(4)c.

The assessment at issue here was dated November 8, 2021, and was not a final assessment. Therefore, the appeal from that assessment is premature and, to the extent the appeal challenges that assessment, it is dismissed from the Tax Tribunal's docket.

C. Motion to Dismiss Lee County

Lee County has moved the Tax Tribunal to dismiss it as a party to this appeal because Lee County says no taxes were paid to it in connection with a purchase made by the Taxpayer. The Taxpayer, however, stated that Boston Scientific Corporation mistakenly remitted taxes paid by the Taxpayer to Lee County. Therefore, the Taxpayer submitted a joint refund petition with Boston Scientific Corporation to Lee County for taxes paid in the amount of $1,281.

At the trial, though, the Taxpayer produced no evidence that it made tax payments on tax-exempt items, directly or indirectly, to Lee County. Therefore, Lee County's denial of the refund is upheld; the motion to dismiss is denied as moot.

II. The Merits of the Denial of the Refund Petitions

A. Certificate of Exemption

Regarding the merits of the denial of the refund petitions from which an appeal was timely filed, the local jurisdictions contended in their pleadings that the denials of the refund petitions were proper because the Taxpayer did not obtain a certificate

of exemption prior to making the purchases that the Taxpayer contends are exempt from taxation.

Section 40-9-60(a), Ala. Code 1975, provides, in pertinent part:

> "All persons or companies, including, but not limited to, those cited in this chapter, other than governmental entities, which have statutory exemption from the payment of Alabama sales and use taxes levied in, including, but not limited to, Chapter 23, or lodgings taxes levied in Chapter 26, regardless of the type of transaction or whether the tangible personal property is subject to sales and use tax or whether the accommodations are subject to lodgings tax, shall be required to annually obtain a certificate of exemption from the Department of Revenue. This requirement does not supersede or replace the provisions of Section 40-9-14.1 or any other provision of statute requiring an entity to obtain a certificate of exemption.
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> "<u>This article only applies to entities that have been granted a general exemption from sales, use, or lodging taxes. The requirements of this article are not triggered by the purchase of tangible personal property that is exempt from sales and use tax</u>."

(emphasis added).

In the present case, the undisputed evidence indicates that the Taxpayer did not have a general exemption from sales tax. Instead, it was seeking a refund for taxes paid for the purchase of tax-exempt tangible personal property. Therefore, as a matter of law, the Taxpayer was not required to possess a certificate of exemption in this case.

<u>B. Application of Ala. Code 1975 § 40-9-30(d)</u>

According to the Taxpayer, its refund petitions were improperly denied because, it contends, it paid sales tax on items that were exempt from taxation pursuant to § 40-9-30(d).

Ala. Code 1975 § 40-9-30(d) provides:

> "In addition to any other exemptions provided in subsection (b) or (c), any items used for the treatment of illness or injury or to replace all or part of a limb or internal body part purchased by or on behalf of an individual pursuant to a valid prescription and covered by and billed to Medicare, Medicaid, or a health benefit plan shall be exempt from state, county, and municipal sales, use and rental and leasing taxes, including, but not limited to, any of the following: Durable medical equipment, including repair parts and the disposable or single patient use supplies required for the use of the equipment; medical oxygen and related equipment and supplies; prosthetic and orthotic devices; and medical supplies, as defined and covered under the Medicare program, including, but not limited to, items such as catheters, catheter supplies, ostomy bags and supplies related to ostomy care, specialized wound care products, and similar items that are covered by and billed to Medicare, Medicaid, or a health benefit plan."

The local jurisdictions contend that the Taxpayer did not introduce evidence indicating that the items sought for refund were "purchased by or on behalf of an individual pursuant to a valid prescription and covered by and billed to Medicare, Medicaid, or a health benefit plan." The local jurisdictions state that many of the invoices are dated after a surgery took place. According to the local jurisdictions, the evidence shows that the Taxpayer purchased the items at issue to restock its inventory following a procedure and not for a specific patient.

At the hearing, Mr. Wiggins testified that Hughston Memorial Hospital ("the hospital") is a regional facility that has been recognized for orthopedic excellence. He testified that 90-95% of the procedures done at the hospital are orthopedic procedures, a great number of which involve implants. According to Mr. Wiggins, most of the procedures are elective procedures that are planned in advance. Mr. Wiggins testified that every implant that is placed in a patient is purchased on behalf of that patient pursuant to a prescription issued by a physician. He testified that

most of the implants are billed to insurance companies; however, a small percentage of the hospital's patients are self-pay patients. According to Mr. Wiggins, since purchases attributable to self-pay patients do not qualify for the tax exclusion, he determined a percentage of revenue from self-pay patients from the hospital's records. Mr. Wiggins unequivocally testified that the hospital does not purchase implants to maintain in inventory.

Mr. Wiggins testified that the hospital's standard practice is that a physician places an order, the surgery is scheduled, and the type of implant is included on the order. That order triggers a notice to the implant vendor, who either brings the implant in advance of the surgery or on the date of the surgery. After the surgery, the vendor issues an invoice for the implant that includes the item number for the implant, the patient information, and the service date. Mr. Wiggins testified that although the hospital does store items such as cement and blood drainage bags in its inventory, any such items designated on the implant invoices submitted with the petitions for refund were not pulled from the hospital's inventory but, instead, were purchased from a vendor on behalf of a particular patient.

I conclude that the Taxpayer sufficiently proved that the purchases at issue in the refund petitions[2] were "purchased by or on behalf of an individual pursuant to a valid prescription." § 40-9-30(d). As noted previously, the hospital determined a percentage of revenue from self-pay patients from its records. That percentage shall be used to determine the portion of the items submitted for refund that were not

[2] The Taxpayer stated that it did not petition for a refund of tax paid on items that it considered to be inventory. Therefore, this opinion does not address whether any such items are tax exempt.

"covered by and billed to Medicare, Medicaid, or a health benefit plan." Id.

At the hearing, the local jurisdictions, referencing PX-19 through PX-22, asserted that taxes related to some of the invoices submitted were not actually remitted to the local jurisdictions. The Taxpayer is directed to submit to the Tax Tribunal by **May 23, 2023**, documentation proving that the taxes for which it requested a refund in PX-19 through PX-22, were remitted to the local jurisdictions.

III. Conclusion

In conclusion, the appeal is dismissed as having been untimely filed to the extent that it challenges the denial of the following refund petitions (1) the joint petitions filed with Arthrex, Inc., for periods 10/2015 through 7/2017; (2) the joint petitions filed with Globus Medical NA, Inc., for periods 3/2016 through 11/2017; (3) the joint petitions filed with Howmedica Osteonics Corp. for periods 9/2015 through 7/2017; (4) the joint petitions filed with Medtronic Sofamor Danek USA, Inc., for periods 9/2015 through 11/2017; and (5) the direct petition filed for periods 8/2015 through 12/2017.

The appeal is dismissed as premature to the extent that it challenges the assessment dated November 8, 2021.

Lee County's denial of the petition for refund is upheld, and the Motion to Dismiss filed by Lee County is denied as moot.

As a matter of law, the Taxpayer was not required to possess a certificate of exemption in order to claim an exemption for items that satisfy the requirements of § 40-9-30(d).

The Taxpayer is directed to submit to the Tax Tribunal by **May 23, 2023**, documentation proving that the taxes for which it requested a refund in PX-19 through PX-22, were remitted to the local jurisdictions.

The Taxpayer sufficiently proved that the purchases at issue in the refund petitions were "purchased by or on behalf of an individual pursuant to a valid prescription." § 40-9-30(d). The hospital's determination of the percentage of revenue from self-pay patients shall be used to determine what portion of the items submitted for return were not "covered by and billed to Medicare, Medicaid, or a health benefit plan." Id. After the Tax Tribunal receives Taxpayer's submission that is required by this Opinion and Preliminary Order, Avenu will be directed to submit to the Tax Tribunal its determination of the portion of the items submitted for refund that were not "covered by and billed to Medicare, Medicaid, or a health benefit plan," see § 40-9-30(d)., based the percentage submitted by the Taxpayer. Avenue will also be directed to submit the refund amount due considering the post-hearing submissions and this Opinion and Preliminary Order.

If either party has any questions, the party should contact the Tax Tribunal at 334-954-7195. The Tribunal's mailing address is 7515 Halcyon Summit Drive, Suite 103, Montgomery, AL 36117. The parties also may email the Tax Tribunal at taxtribunal@att.alabama.gov.

Entered April 18, 2023.

/s/ Leslie H. Pitman
LESLIE H. PITMAN
Associate Tax Tribunal Judge

lhp:ac
cc: Brandon L. Peak, Esq.
Joseph M. Colwell, Esq.
Chan Gamble, Esq.
Kendrick E. Webb, Esq.
J. Mark Cowell, Esq.
David Johnston, Esq.