

STATE OF ALABAMA  
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

§

vs.

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Docket No. S. 90-257

INDUSTRIAL SAFETY PRODUCTS, INC.  
1502 Telegraph Road  
Mobile, AL 36611,

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§

Taxpayer.

§

FINAL ORDER

The Revenue Department assessed State and local sales tax and Montgomery County, Wilcox County and local use tax against Industrial Safety Products, Inc. (Taxpayer) for the period September, 1986 through August, 1989. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on January 29, 1992. Bruce Ely represented the Taxpayer. Assistant counsel J. Wade Hope represented the Department.

FINDINGS OF FACT

The Taxpayer sold materials at retail to asbestos removal contractors during the period in issue for use in asbestos removal projects. The materials include air and water filters, coveralls, protective glasses, gloves, goggles, boots, hoses, portable decontamination showers, respiratory equipment, trash bags, warning signs and labels, brushes, nozzles and other related items. Most if not all of the materials in issue are required by Alabama and federal law and regulations to be used when conducting asbestos removal work.

The Taxpayer argues that all of the materials in issue were

acquired and used primarily by the contractors for asbestos removal, i.e., pollution control, and should be exempt from sales and use tax pursuant to the pollution control exemptions found at Code of Ala. 1975, §§40-23-4(16) and 40-23-62(18).

The Department concedes that asbestos removal constitutes pollution control and that all materials used to actually remove and contain the asbestos should be exempt. Those items conceded by the Department include decontamination showers, plastic sheeting, storage containers and similar items. However, the Department argues that all "personal safety" materials used primarily to protect the workers should be taxed. Those items include hard hats, respirators, protective foot gear, etc. and are the items included in the assessments in issue.

#### CONCLUSIONS OF LAW

Alabama law exempts from sales and use tax all property acquired primarily for the control, reduction or elimination of air or water pollution. See, §§40-23-4(16) and 40-23-62(18). In applying the exemptions, the primary purpose for which the property was acquired is controlling, and not whether the property was used to control pollution. For example, a water filter installed at a factory primarily to prevent pollutants from escaping into a river would be exempt, but the same filter would be taxable if installed primarily to capture a material in the water and return it for reuse in the manufacturing process. In the latter case, the filter

would still control pollution, but it would not be exempt because it was not installed primarily for pollution control.

If this case turned on the Department's distinction between "pollution control" and "personal safety", all of the materials in issue would be exempt because they would not have been purchased by the contractors "but for" the asbestos removal projects. The personal safety function relates directly to and is incidental to pollution control. Nonetheless, the materials are not exempt because they were acquired by the contractors primarily for use in conducting their profit-motivated business, and not primarily for pollution control.

Material or equipment purchased and used primarily as an integral and necessary part of a profit-making business activity is not tax exempt. In Chemical Waste Management, Inc. v. State, 512 So.2d 115, a pollution control facility and equipment used to control and contain hazardous waste was determined to be integral and necessary to the taxpayer's business and thus not exempt -- ". . . the taxpayer's containment equipment is the very property from which its profits are derived". See, Chemical Waste Management, at page 118. Likewise, the materials in issue were purchased and used by the contractors as a necessary and integral part of their primary business activity. The fact that the contractors' primary business involves pollution control should not allow them to purchase the tools of their trade tax-free.

The Taxpayer argues that any sales tax will be passed on by

the contractors to their customers, thereby defeating the Legislature's intent to reduce the cost to businesses of removing asbestos. But the sales tax in issue is levied on the asbestos contractors as the retail purchasers, and not on the contractors' customers. The contractors are not required to pass the tax on to their customers, and may absorb the tax as a cost of doing business just as any other operating cost. The fact that the economic burden of the tax may be passed to a business that could have directly purchased the materials tax-free cannot relieve the non-exempt contractors (and thus the Taxpayer) in this case from liability. See generally, State v. King and Boozer, 314 U.S. 1, 62 S.Ct. 43.

The fact that the materials could have been purchased tax-free directly by the contractors' customers also does not relieve the Taxpayer of liability. The Alabama Supreme Court has recognized that property may be taxable if acquired for business purposes by one taxpayer, but tax-exempt if purchased primarily for pollution control by another. See, Chemical Waste Management, at page 118, as follows:

It might be true, as the taxpayer contends, that another company engaged in a different business, but with the same equipment to contain, say, solid waste from leaking into a water supply, would get the exemption, whereas the taxpayer here would not. In the case of the taxpayer here, that equipment is integral to and is in fact the very service that the taxpayer purports to provide. It does not represent an unrecoverable cost of the enterprise as it would to a company which

manufactures widgets and is required by law to contain its solid waste; the taxpayer's containment equipment is the very property from which its profits are derived.

There is a valid distinction between non-productive property acquired and used by a business to contain its own pollution (exempt), and property acquired and used by a business as a necessary and integral part of a profit-making activity (taxable).

The contractors did not purchase the materials in issue for the primary purpose of protecting the environment, and would not have purchased the materials "but for" the fact that the materials were necessary to conduct business. The Legislature did not intend for the exemption to apply in that case.

The above holding is supported by the rule of construction that an exemption from taxation must be strictly construed against the exemption and for the Department. Brundidge Milling Company v. State, 228 So.2d 475; Community Action Agency of Huntsville v. State, 406 So.2d 890.

Under this ruling, all of the materials sold by the Taxpayer, including the items previously conceded as exempt by the Department, are taxable. However, I am without specific authority under current law to increase the amount of an assessment. Consequently, the Department is directed to make the preliminary assessments in issue final as entered, plus applicable interest.

Entered on September 17, 1992.

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BILL THOMPSON  
Chief Administrative Law Judge