

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 ON APPLICATION FOR REHEARING

After a careful review of the Taxpayer's Motion for Rehearing, the Final Order entered in this case on September 17, 1992 is affirmed.

The Taxpayer first argues that Chemical Waste Management, Inc. v. State, 512 So.2d 115, is not applicable. I concede that Chemical Waste Management is not directly on point with this case.

However, the legal theory on which the case was decided is directly applicable. That is, property acquired and used as a necessary and integral part of a profit-making business activity is not tax exempt, even if the property is used for pollution control purposes.

The Legislature could have exempted all property used for pollution control purposes. It did not. Rather, the exemption turns on the reason the property is primarily acquired, not its ultimate use or function. The Taxpayer in this case purchased the materials in issue to fulfill its asbestos removal contracts and thereby make a profit, not for pollution control considerations.

If the exemption is allowed in this case, then logically all

property and materials purchased by any company in the business of removing or disposing of pollutants, i.e., solid waste, garbage, etc., would also be exempt. I do not believe that was intended by the Legislature.

This holding is also consistent with two prior cases decided by the Administrative Law Division, Docket Nos. U. 88-107 and U. 91-144. Those cases both involved the use tax pollution control exemption, Code of Ala. 1975, §40-23-62(18), which is identical in substance to the sales tax exemption.

In U. 88-107, the taxpayer claimed that its trucks and roll-on containers used to collect and dispose of solid waste were exempt as pollution control devices. The exemption was denied as follows: The purpose for the pollution control exemption is to give businesses a break with the cost of purchasing the extra, non-productive equipment necessary to comply with mandatory pollution control legislation. Chemical Waste Management, Inc. v. State, 512 So.2d 115. However, the court of civil appeals ruled in the above case that the exemption should not apply if the property is used as an integral part of the taxpayer's primary business, and is only incidentally related to pollution control. That is, the property must be acquired primarily for pollution control, and not as an essential element of the business activity or services provided by the taxpayer.

The containers and trucks in issue are used directly and are a necessary part of the Taxpayer's primary business activity, the removal and disposal of solid waste. The exemption was not intended to apply to equipment acquired primarily for and used directly in a profit motivated activity. Thus, the containers and trucks were not acquired or used primarily for pollution control purposes and should not be exempted under §40-23-62(18).

In U. 91-144, the taxpayer operated a commercial waste water disposal facility and disposed of toxic waste water produced by oil

and gas wells in the area. The taxpayer claimed that the equipment and materials used at the facility were exempt as pollution control materials. The exemption was denied as follows:

The taxpayer's facility in this case obviously controls pollution in one sense because it disposes of the toxic waste water from surrounding oil and gas wells. However, the primary purpose of the facility is not pollution control but rather profit. Consequently, the facility does not come within the scope of the exemption statute and the tangible personal property used at the facility is subject to use tax.

The Taxpayer argues that the ruling should be applied prospectively only based on the Alabama Supreme Court's decision in Sizemore v. The Dothan Progress, Doc. No. 1910328 (decided September 18, 1992). In that case, the Court interpreted the sales tax "withdrawal" provision so that the transactions in issue were taxable. However, because of prior confusion concerning the "withdrawal" section, the Court relieved the taxpayer in issue of all past liability and applied its new interpretation prospectively only. The prior confusion had resulted from two changes in the law, a series of complicated appellate court decisions, and importantly, the Supreme Court had ruled in favor of the same taxpayer in a prior appeal involving substantially the same facts. See, Dothan Progress v. State, Dept. of Revenue, 507 So.2d 511 (1986).

There was no similar confusion in this case. There are no circuit or appellate court cases holding that property purchased by a contractor to fulfill a pollution control contract is exempt.

Also, the Department has never conceded that all materials used for asbestos removal or similar purposes are exempt.

The Department did concede prior to the administrative hearing that the materials used for pollution control and not for personal safety were exempt. The assessments thus did not include those items. Technically those items should also be taxed. However, the Final Order directed that those items should not be included in the assessments. In effect, the ruling was applied prospectively only to those items. That holding is affirmed. However, there is no compelling reason when the remaining materials in dispute should not be taxed.

The Final Order directed the Department to make the preliminary assessments in issue final. However, under the new Uniform Revenue Procedures Act, Code of Ala. 1975, §40-2A-7, et seq., effective October 1, 1992, the proper procedure is for the order issued by the Administrative Law Division to set out the final amounts due. Accordingly, the assessments as adjusted are affirmed and judgment is entered against the Taxpayer for State sales tax in the amount of \$30,095.82; Local City sales tax in the amount of \$185.51; Montgomery County use tax in the amount of \$1,892.00; Wilcox County use tax in the amount of \$89.43; and Local City use tax in the amount of \$549.18, all with additional interest running from October 27, 1992.

This Final Order on Application for Rehearing may be appealed

to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on November 18, 1992.

BILL THOMPSON
Chief Administrative Law Judge