

ABC RAIL PRODUCTS CORPORATION
P. O. Drawer A
Calera, AL 35040-2001,

Taxpayer,

vs.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 94-393

FINAL ORDER

The Revenue Department denied or refused to recognize an abatement of State and local sales and use taxes previously granted by the City of Calera, Alabama to ABC Rail Products Corporation ("Taxpayer") pursuant to the Tax Incentive Reform Act of 1992. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on January 10, 1995. Herbert Harold West, Jr. represented the Taxpayer. Assistant counsel Margaret McNeill represented the Department.

This case involves two issues:

(1) Does the Revenue Department have statutory authority to deny, either directly or indirectly, an abatement of taxes previously granted by a city, county or public industrial authority pursuant to the Tax Incentive Reform Act of 1992, Code of Ala. 1975, §40-9B-1, et seq; and

(2) If the Department does have the authority to deny the abatement, was the abatement properly denied in this case. That issue turns on whether the construction project in issue involves "replacement equipment", which the Department claims does not qualify for the abatement.

The Taxpayer owns and operates a manufacturing facility in Calera, Alabama at which it manufactures railroad car wheels. The facility at present has a manufacturing capacity of approximately 200,000 wheels per year. The Taxpayer is currently engaged in a construction project ("project"), which when completed will increase the capacity by 240,000, giving the facility a total capacity of 440,000 wheels per year.

On April 19, 1994, the Taxpayer petitioned the City of Calera for an abatement of all construction related transaction taxes relating to the project. The petition was filed as allowed by §40-9B-6(a), which is part of the Tax Incentive Reform Act of 1992. Calera granted the abatement on June 20, 1994, and the parties thereafter executed an Agreement of Abatement as required by §40-9B-6(b). The Taxpayer subsequently filed a copy of the Agreement of Abatement with the Revenue Department on July 29, 1994, as required by §40-9B-6(c).

Upon receiving the Agreement of Abatement, the Department investigated and determined that the project did not qualify for the abatement because it involved "replacement equipment", which is not entitled to the abatement under Department Reg. 810-6-4-.22(11).

The Department notified the Taxpayer on September 16, 1994 that the abatement would not be recognized, and consequently that State and local sales and use tax was due on all tangible personal

property used on the project. The Department in effect refused to issue the Taxpayer a direct pay permit as required by Department Reg. 810-6-4-.24.¹ The Taxpayer subsequently appealed to the Administrative Law Division.

Does the Department have the authority to deny or refuse to recognize the abatement previously issued by the City of Calera?

Section 40-9B-5 is entitled "Granting of abatement". Subparagraph (b) of that section provides as follows:

(b) The abatements authorized to be granted pursuant to subsection (a) may be granted:

(1) By the governing body of a municipality, with respect to private use industrial property located within the limits of the municipality or within the police jurisdiction of the municipality.

(2) By the governing body of a county, with respect to private use industrial property located in the county and not within a municipality or the police jurisdiction of a municipality, unless consented to by resolution of the governing body of the municipality.

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A direct pay permit is authorized by §40-23-31 and allows a manufacturer to purchase all materials tax-free and then report and pay tax directly to the Department on only those materials used for a taxable purpose.

(3) By the governing body of a public industrial authority, with respect to private use industrial property located within the jurisdiction of the public industrial authority.

Section 40-9B-6 is entitled "Procedure for granting abatement". That section provides that any private user of industrial development property or of a major addition "may apply to the governing body of any municipality, county, or public industrial authority" for the abatement. The application must contain sufficient information to allow the governing body to decide whether the abatement should be granted. Subparagraph (b) provides that the "abatements granted shall be embodied in an agreement" Subparagraph (c) then requires that the "private user shall file with the Revenue Department within 90 days after the granting of the abatements, a copy of the agreement required by subsection (b), the contents of which the department shall use solely for its statistical and record-keeping activities but shall otherwise keep confidential unless consented to in writing by the private user".

Sections 40-9B-5 and 40-9B-6 clearly provide that a municipality, county or public industrial authority each has the independent authority to grant an abatement of all construction related transaction taxes, which includes all sales and use taxes levied by Chapter 23 of Title 40. See, §40-9B-3(b).

The Revenue Department is not authorized by the Act to either

deny or refuse to recognize an abatement previously issued by a municipality, county or public industrial authority. Rather, as indicated above, the exclusive authority to grant or deny an abatement is with the governing body of the municipality, county or public authority. A copy of the abatement agreement must be filed with the Revenue Department, but only for statistical and record keeping purposes.

The Department's duty to recognize an abatement granted by a municipality, county or public industrial authority is also set out in the Department's own regulations.

Reg. 810-6-4-.22(7) repeats the statutory requirement that a copy of the abatement agreement must be filed with the Department.

That regulation then provides that "such filing will suffice to evidence the granting of an abatement from all sales and use taxes imposed and/or collected by the Alabama Department of Revenue."

Reg. 810-6-4-.24(4) reiterates that "such filing (of an abatement agreement) will suffice to evidence the granting of an abatement from sales and use taxes." Subparagraph (5) of the above regulation provides that "upon receiving a properly executed application . . . , the necessary direct pay permit accounts will be assigned."

The Department argues that it is not denying the abatement per se, but is only refusing to issue a direct pay permit to the Taxpayer. However, refusing to issue a direct pay permit is in

substance and effect the same as denying or refusing to recognize the abatement, which the Department is not authorized to do. Also, by refusing to issue a direct pay permit to the Taxpayer, the Department has violated Reg. 810-6-4-.24(5). As shown above, that regulation requires that upon receipt of an abatement agreement and a properly executed application, "the necessary direct pay permit account will be assigned". Because the Department is not authorized to deny an abatement, the issue of whether the project in issue qualifies for the abatement is moot. However, I will still address that issue for the benefit of the parties and any reviewing court.

The Department argues that the abatement should not be allowed because the equipment added by the project is "replacement equipment". Reg. 810-6-4-.22(11) provides that replacement equipment (and also capitalized repairs, rebuilds, and maintenance) does not qualify for the abatement.

First, the Incentive Act does not directly specify that "replacement equipment" shall not qualify for the abatement. However, the intent of the Act is to attract new businesses and encourage existing businesses to expand their facilities in Alabama. See, §40-9B-2. The abatement covers all construction related transaction taxes relating to industrial development property. "Industrial development property" is defined at §40-9B-

3(e) to include all property acquired in connection with "establishing or expanding" industry in Alabama. Replacing old equipment with new equipment that performs the same function does not constitute "establishing or expanding" a business. Consequently, I must agree with Reg. 810-6-4-.22(11) that "replacement equipment" does not qualify for the abatement. Is the equipment in issue "replacement equipment", and thus not subject to the abatement?

The Department concluded that the project involved "replacement equipment" based on a Department agent's interview with the comptroller and another employee at the Taxpayer's Calera facility. The agent testified that the above individuals told him that the old equipment being used at the facility was obsolete and worn out, and that the new equipment would replace the old equipment. The agent understood that the old equipment would be scrapped and sold. The agent further understood that no new employees would be hired as a result of the project. Based on the above information, the Department determined that the project involved "replacement equipment", and thus would not be entitled to the abatement.

The Taxpayer disputed the Department's findings through the testimony of Richard Stang, the Taxpayer's Director of Project Engineering. Stang testified that the project is to include a new 21,000 square foot building to be constructed at the facility. The

new equipment purchased on the project will be in addition to the old equipment. The old equipment will continue to operate along with the new equipment, giving the facility a total annual wheel capacity when the project is completed of 440,000 wheels per year (200,000 in existing facility and 240,000 in new project facility).

Based on the above evidence, it is clear that the equipment involved in the project is not "replacement equipment", but rather is in addition to the old equipment. Consequently, even if the Department did have the authority to refuse or deny the abatement, the abatement should nonetheless be granted in this case.

The above considered, the Department is directed to issue to the Taxpayer, upon application, a direct pay permit in accordance with Department Reg. 810-6-4-.24(5). All tangible personal property purchased on the project will be exempt from all construction related transaction and other taxes to the extent provided in the Tax Incentive Reform Act of 1992.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on March 20, 1995.

BILL THOMPSON
Chief Administrative Law Judge