

AIR PRODUCTS & CHEMICALS, INC. §  
7201 Hamilton Boulevard  
Allentown, Pennsylvania 18195-1501,

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

Taxpayer, §

DOCKET NO. U. 95-359

v. §

STATE OF ALABAMA §  
DEPARTMENT OF REVENUE.

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed use tax against Air Products and Chemicals, Inc. ("Taxpayer") for the period January 1991 through January 1994. The Taxpayer appealed to the Administrative Law Division, and a hearing was conducted on November 1, 1995. John Yardley represented the Taxpayer. Assistant Counsel Margaret McNeill represented the Department.

This is a use tax "pollution control" exemption case. The primary issue is whether certain equipment purchased by the Taxpayer during the subject period was "used or placed in operation primarily" for pollution control purposes, and thus exempt from use tax pursuant to Code of Ala. 1975, §40-23-62(18). If the equipment is not exempt, a second issue is whether the tax was timely assessed by the Department.

The facts are undisputed.

The Taxpayer is in the business of manufacturing and selling oxygen, nitrogen, and other gases to customers for industrial use.

The Taxpayer contracted to supply Alabama River Pulp Company, Inc. ("ARP") with oxygen at ARP's pulp facility in Alabama. The

oxygen is used by ARP to speed-up the breakdown of wastewater pollutants flowing from the facility. The equipment in question was purchased by the Taxpayer to produce the oxygen for the facility.

The Taxpayer is required to produce, and ARP is required to take, a fixed amount of oxygen each month. ARP in turn pays the Taxpayer a fixed monthly amount based on the cost of the equipment used by the Taxpayer, plus a rate of return on the Taxpayer's investment.

The equipment is housed at the facility on space provided by ARP. The equipment is connected directly with ARP's facility, and the oxygen is pumped directly into ARP's wastewater holding ponds.

ARP pays all utilities necessary to operate the Taxpayer's equipment. However, the equipment itself is operated by employees of the Taxpayer.

The Taxpayer purchased the equipment in issue outside of Alabama and paid "consumer's" use tax on the equipment to the State.<sup>1</sup> The Department audited the Taxpayer and advised the Taxpayer that the equipment was exempt from use tax as "pollution control" equipment. The Taxpayer accordingly applied for a refund in late 1993. The refund was granted in late 1993 or early 1994.

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<sup>1</sup>A single Alabama use tax is levied at Code of Ala. 1975, §40-23-60 et seq. If the tax is assessed against the seller, the levy is designated a "seller's" use tax by the Department. If levied against the buyer or user, the tax is designated a "consumer's" use tax.

The Department subsequently changed its position and entered a preliminary assessment on April 14, 1995 for the use tax that had been previously refunded. A final assessment was entered on August 4, 1995, from which the Taxpayer timely appealed.

All tangible personal property "acquired primarily" or "used or placed in operation primarily" for pollution control purposes is exempt from Alabama sales and use tax, Code of Ala. 1975, §§40-23-4(a)(16) and 40-23-2(18), respectively.

The exemption does not apply to all property that performs a pollution control function. Rather, the exemption applies only if the property is acquired or placed in operation by the purchaser/user primarily for pollution control purposes. Consequently, material or equipment is not exempt if it is purchased and/or used by the purchaser primarily as an integral and necessary part of a profit-motivated business activity. Chemical Waste Management, Inc. v. State, 512 So.2d 115 (1982).

In Chemical Waste Management, the Alabama Supreme Court held that equipment used in a hazardous waste disposal facility was an integral and necessary part of the taxpayer's business activity, and thus was not exempt from tax. ". . . The taxpayer's containment equipment is the very property from which its profits are derived". Chemical Waste Management, at page 118. Chemical Waste Management has been relied on by the Administrative Law Division in at least three cases.

In U. 88-107, the exemption was denied to a taxpayer that used trucks and roll-on containers in its solid waste disposal business:

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).

U. 88-107, at page 6.

In U. 91-144, an exemption was denied to a commercial wastewater disposal facility that disposed of toxic wastewater produced by oil and gas wells:

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.

U. 91-144, at page 2.

Finally, in S. 90-257, the exemption was denied to a taxpayer engaged in the asbestos removal business:

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.

S. 90-257, at page 3.

The Taxpayer argues that if the exemption is not allowed, the use tax will be passed to ARP, thus defeating the Legislature's intent to exempt businesses from tax on pollution control equipment. But the tax in this case is levied against the Taxpayer as the user of the equipment, not on the customer, ARP. The fact that the economic burden of the tax is passed to an exempt entity, or in this case to a business that could have directly purchased the equipment tax-free, also cannot relieve the Taxpayer from liability. State v. King & Boozer, 62 S.Ct. 43 (1942).

It is true that ARP could have itself purchased the equipment tax-free. But ARP elected to contract the work to the Taxpayer.

The Supreme Court recognized in Chemical Waste Management that identical property may be taxable in one instance but exempt in another, depending on who purchases the property and for what purpose it is purchased. "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." Chemical Waste Management, at page 118.

Finally, the Taxpayer argues that this case can be distinguished from the above cited cases because the pollution control equipment was used to serve a single customer, ARP. While that is true, the distinction is irrelevant to the issue in dispute. The Taxpayer still purchased the equipment for the primary purpose of fulfilling its contract with ARP, and thereby making a profit. The Legislature did not intend to extend the pollution control exemption to allow businesses to purchase equipment or materials tax-free that are then used by the business directly in a profit-motivated activity.

The next issue is whether the tax was timely assessed by the Department. The assessment in issue covers the period January 1991 through January 1994. The Department entered a preliminary assessment for the tax due on April 14, 1995.

Code of Ala. 1975, §40-2A-7(b)(2) provides that the Department is required to enter a preliminary assessment of tax due within three years from the due date of the return or three years from the date the return is filed, whichever is later. There is no special statute of limitations under Alabama law for recovery of tax

erroneously refunded by the Department.<sup>2</sup> Consequently, the general three year statute applies, and thus the Department is prohibited from assessing tax more than three years prior to entry of the preliminary assessment on April 14, 1995. The Department is directed to adjust the final assessment to include only the use tax due for the month of March 1992 (return due April 20, 1992, within the statute) and later periods.

This Opinion and Preliminary Order is not an appealable Order. The Final Order, when entered, may be appealed by either party to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered December 14, 1995.

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BILL THOMPSON  
Chief Administrative Law Judge

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<sup>2</sup>The Internal Revenue Code contains specific provisions which allow the IRS two years to recover erroneously refunded tax, see 26 U.S.C. §§6532(b) and 7405.