GARY N. & PEGGY M. DRUMMOND, et al	'	STATE OF ALABAMA DEPARTMENT OF REVENUE
Taxpayers,	'	ADMINISTRATIVE LAW DIVISION
v.	'	DOCKET NO. INC. 99-455
STATE OF ALABAMA DEPARTMENT OF REVENUE.	'	

PRELIMINARY ORDER
DENYING DEPARTMENT=S MOTION TO STRIKE

The Taxpayers filed their appeal in this case on September 22, 1999. Included with the appeal were letters from Bill Gray, Governor Fob James= legal advisor, and Representative Kenneth Guin, Jr. The Taxpayers offer the letters as evidence of how the statute in issue should be construed. The Department moved to strike the letters as inadmissable.

The Department is correct that the letters are not relevant and thus inadmissable to show the Legislature=s intent. In Pilgram v. Gregory, 594 So.2d 114 (Ala.Civ.App. 1991), the Court held as follows:

> We find that the testimony concerning the intentions of the department head and the draftsman should not govern the decision regarding the intent of the legislature. It is well settled that the intent of the legislature is that expressed in the statute, and the motives of individual members of the legislature or the intentions of the draftsman, or any other person, will not be looked into by the court if their motives or intentions are not expressed in the statute, and the court will not be influenced by their views or opinions. *James v. Todd*, 267 Ala. 495, 103 So.2d 19 (1957).

For other cases on point, see R. McCurley & K. Norman, Alabama Legislation, (4th Ed. 1997) at 356, et al.

Although the letters are inadmissable, they will be included in the administrative record.

The issue of whether an inadmissable document should be included in the administrative record was addressed in J.C. Penney Co., Inc. v. State of Alabama, F. 96-140 (Admin. Law Div. Preliminary Order 6/5/96). The Administrative Law Division held that although a document was inadmissable, it should remain in the record for the benefit of any reviewing court.

> The Administrative Law Division is governed by the rules of evidence applicable in non-jury civil cases in circuit court, with some exceptions. Code of Ala. 1975, '40-2A-9(j). Rule 43(c) of the Alabama Rules of Civil Procedure provides in substance that evidence deemed inadmissible in a civil trial shall be included in the record. The committee comments explain the reason for the rule as follows - "The last sentence of Rule 43(c) relates to non-jury matters and permits the court to take and report the challenged evidence in full." The comments continue - "Rule 43(c) simply gives a party a right to place in the record for appellate purposes, the proof he was denied the opportunity to adduce at the trial level after the objection had been sustained against him."
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> In addition, although not directly applicable, the rules of evidence under the Alabama Administrative Procedure Act, at Code of Ala. 1975, '41-22-13, provide that "Whenever any evidence is excluded (in an administrative hearing) as inadmissible, all such evidence existing in written form shall remain a part of the record as an offer of proof."
>
> The better practice is for the Administrative Law Division to include everything submitted or offered by either party in the administrative record. The final order will still be based only on such evidence as is relevant, competent and material. See, Code of Ala. 1975, '40-2A-9(j).
>
> I do not share the Department's concern that an appellate court may erroneously rely on inadmissible evidence included in the record. The case cited by the Department, Life Insurance Co. of Georgia v. Miller, 269 So.2d 900 (Ala. 1974), does provide that an appellate court may review the record for a complete understanding as to why the lower court ruled as it did. However, that rule applies only if there is no dispute concerning the facts. Certainly it does not allow or require the appellate court to recognize or rely on inadmissible evidence.

J.C. Penney, at page 1.

The Department argues that Rule 43(c) was incorrectly cited in the J.C. Penney Order because it was deleted effective January 1, 1996. I agree. According to the committee comments, Rule 43(c) was deleted because offers of proof and making a record are treated in Evidence Rule 103. However, Evidence Rule 103 does not address whether an inadmissable document offered in evidence should be included in or excluded from the record.

The Department is also correct that Code of Ala. 1975, '41-22-13 is not applicable in hearings before the Administrative Law Division. See, Code of Ala. 1975, '40-2A-2(3). As indicated, that section specifies that any document excluded from evidence shall remain in the record as an offer of proof. But while '41-22-13 is not directly applicable, it certainly can be viewed as a reasonable guideline.

Code of Ala. 1975, '40-2A-9(j) provides that the administrative law judge may announce before a hearing Athat it shall not be necessary . . . to make objections during the hearing to any testimony or evidence offered by either party, and such objections shall be preserved and may be made on appeal.@ By this Preliminary Order, I am announcing that the above provision shall apply in this case. It will not be necessary for either party to object to any evidence offered in this case. All testimony and documents offered will be included in the record. Any objections will be preserved for either party to make on appeal. The Final Order will be based only on the evidence that the administrative law judge deems to be relevant, competent, and material. See again, '40-2A-9(j).

Entered February 29, 2000.

BILL THOMPSON
Chief Administrative Law Judge

BT:dr
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