

TYSON CHICKEN, INC.
2200 DON TYSON PARKWAY CP131
SPRINGDALE, AR 72762,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA
ALABAMA TAX TRIBUNAL

DOCKET NO. S. 15-1338

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed Tyson Chicken, Inc. (“Taxpayer”) for State sales tax for July 2010 through June 2013. The Taxpayer appealed to the Tax Tribunal pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on January 19, 2016. Teresa Brodeou and Chris Jackson represented the Taxpayer. Assistant Counsel Jason Paulk represented the Department.

The Taxpayer produces, processes, and then sells chickens to wholesale food suppliers and various fast food restaurant chains. It is headquartered in Arkansas, and has a processing facility in Marshall County, Alabama.

The Revenue Department issued the Taxpayer a direct pay permit before the period in issue. As discussed below, the Department will issue an Alabama taxpayer a direct pay permit if the taxpayer cannot know when it purchases tangible personal property whether the property will be used for a taxable or nontaxable purpose, or, if taxable, at what rate.¹ The taxpayer then uses the permit to purchase tangible personal property tax-free. It is then required to self-report and pay the applicable sales or use tax to the

¹ For example, a business may use an item on a tax-exempt pollution control project, see, Code of Ala. 1975, §40-23-4(a)(16), or an item may be used as part of a machine used in manufacturing, which is taxable at a reduced “machine” rate, see Code of Ala. 1975, §40-23-2(3).

Department on all property that was used for a taxable purpose.

The Taxpayer issued purchase orders and used its direct pay permit to purchase tax-free most of the tangible personal property it purchased during the period in issue. For convenience and to facilitate its daily operations, however, it also issued corporate credit or purchase cards ("P-Cards") that its employees used to purchase items when it was impractical to purchase the items through the standard purchasing process. It paid sales tax to the vendors on those P-Card purchases, and consequently did not later self-report and pay sales tax to the Department on those purchases.

The Department audited the Taxpayer for the period in issue and determined that the Taxpayer owed additional sales tax on the items its employees had purchased using the P-Cards. The Department's position is that as a direct pay permit holder, the Taxpayer was required to purchase all items tax-free, and then report and pay the applicable sales tax directly to the Department. It cites Department Reg. 810-6-4-.14(1)(a), which reads in part – "[t]he permit holder shall purchase all tangible personal property without payment of sales or use tax to the seller, and shall report and pay all sales and use tax directly to the Department of Revenue."

The Department recognizes that by requiring the Taxpayer to again pay sales tax on its P-Card purchases, the Taxpayer would be paying sales tax twice on those purchases – once to the vendor and again to the Department. It argues, however, that the proper, and only, method for the Taxpayer to avoid double taxation is for the Taxpayer to petition the Department for refunds of the sales tax it paid to its vendors during the audit period.

The Taxpayer argues that it should be allowed a credit for the sales tax it paid to its vendors on the P-Card purchases. It also contends that paying the sales tax to its vendors

facilitated the early receipt of tax revenue by the Department. The Taxpayer's notice of appeal reads in part:

Petitioner request that the Alabama Department of Revenue to give credit for taxes paid to vendors via a P-Card. Petitioner also requests abatement of the Negligence Penalty.

* * *

Petitioner paid sales tax at the time of purchase using a P-Card to facilitate the ease of the transaction. Petitioner also holds a direct pay permit pursuant to Alabama Sales & Use Tax Rule 810-6-4-.14. Petitioner interprets the Sales & Use Tax Rule listed above as a mechanism for administrating sales & use tax exemptions while ensuring tax collection with minimal burden to both the State of Alabama and the taxpayer. In keeping with the spirit of this rule, we instruct the users of P-Cards to pay tax to vendors when it is charged. This benefits the State of Alabama in several ways: 1. The State receives tax revenue earlier. Petitioner's use tax accrual process would take an additional month due to having to wait for the P-Card bill, accrue use tax, and then remit that use tax the next month. This is in comparison to the vendor charging and collecting the tax and remitting it the next month. 2. Improved tax compliance through ease of transaction. The complication of having to issue a direct pay permit for an item of TPP which is clearly taxable adds an undue burden to the vendor and to the Petitioner. This allows for increased compliance with the States sales & use tax laws which is one of the goals of the Department of Revenue. While Alabama Sales & Use Tax Rule 810-6-4-.14(1)(a) states "The permit holder shall purchase all tangible personal property without payment of sales or use tax to the seller. . .", Petitioner has determined that these P-Card transactions should pay tax to the vendor at the time of purchase to facilitate the tax payment to the State of Alabama and to keep in the spirit of Alabama Sales & Use Tax Rule 810-6-4-.14 so that the State of Alabama receives tax revenue in an accurate and expedient manner. In keeping with the spirit of Alabama Sales & Use Tax Rule 810-6-4-.14, Petitioner requests that the P-Card transactions where tax was paid to the vendor be removed as an assessment item and credit for taxes paid to the vendor.

Alabama's revenue code, Title 40, Code 1975, does not authorize or otherwise address the issuance of direct pay permits. Rather, the Department issues such permits

pursuant to Reg. 810-6-4-.14, which reads in pertinent part as follows:²

(1) Where the Department finds that it is practically impossible at the time of purchase for a manufacturer, transportation company, or persons engaged in the business of mining, quarrying, compounding, or processing tangible personal property, or their vendors, to determine with any degree of certainty the applicability of sales or use tax upon purchases of tangible personal property and where it would facilitate and expedite the collection of the taxes to permit the manufacturer, transportation company, or person engaged in the business of mining, quarrying, compounding or processing tangible personal property to purchase tangible personal property without payment to the vendor of the sales or use tax upon, or with respect to, the property, the manufacturer, transportation company, or person engaged in the business of mining, quarrying, compounding or processing tangible personal property upon application therefor may be permitted to purchase tangible personal property without payment to the vendor of Alabama sales or use tax subject to the following conditions:

(a) The permit holder shall purchase all tangible personal property without payment of sales or use tax to the seller, and shall report and pay all sales and use tax directly to the Department of Revenue.

As discussed, the Department relies on paragraph (1)(a) of the regulation, which requires that a permit holder “shall” purchase all tangible personal property tax-free, and “shall” thereafter report and pay to the Department all taxes due on the property. The Alabama Supreme Court has held that a Department regulation must be followed unless it is unreasonable. *Ex parte White*, 477 So.2d 422 (Ala. 1985). The issue thus is whether that part of Reg. 810-6-4-.14 (1) that requires a taxpayer with a direct pay permit to purchase all items tax-free and then pay sales or use tax on all taxable purchases directly to the Department is unreasonable.

² The Department is empowered to “make reasonable regulations concerning any matter administered by the department.” Code of Ala. 1975, §40-2A-7(a)(5), see also Code of Ala. 1975, §40-23-31.

The rationale for issuing direct pay permits is that some manufacturers and other businesses cannot know when they purchase certain items whether the items will be used for a taxable or nontaxable purpose, or they cannot determine the correct rate of tax at the time of purchase. A direct pay permit thus allows a manufacturer or other business to purchase those items tax-free, and then self-report and pay the correct tax due on those items used for a taxable purpose.

As stated in the first sentence of paragraph (1) of Reg. 810-6-4-.14, a direct pay permit should be used when “it is practically impossible at the time of purchase. . . , to determine with any degree of certainty” whether the property will be used for a taxable or nontaxable purpose, and if taxable, at what rate.

The Taxpayer argues it was not “practically impossible” for its employees to know at the time of purchase if their P-Card purchases were taxable or nontaxable. Rather, the employees knew when they purchased items with their P-Cards that the purchases were taxable. It contends that it is unreasonable for it to be required to issue a purchase order and use its direct pay permit to purchase the items tax-free on those clearly taxable purchases. For example, a Taxpayer employee apparently used a P-Card to purchase food for a company meeting because the Taxpayer stated in its Response attached to its notice of appeal – “To give a direct pay permit to the Domino’s #5836 needlessly complicates a transaction that is clearly taxable. A transaction that the vendor can easily charge, collect, and remit tax to the Department 2 – 3 months earlier than would be remitted by the Taxpayer for the purchase of several pizzas.”

I agree that it is unreasonable and unduly burdensome to require a business with a direct pay permit to purchase all tangible personal property tax-free using its permit. As

argued by the Taxpayer's representatives at the January 19 hearing, the Taxpayer's employees made thousands of P-Card purchases during the audit period, and it would have been unduly burdensome for those employees to have carried with them and used a copy of the Taxpayer's direct pay permit every time they purchased any small or miscellaneous item, i.e., a pizza, that was clearly subject to sales tax.

Allowing a direct pay permit holder to pay sales tax to the seller on clearly taxable items also does not hinder the administration of and collection by the Department of the proper tax owed by the permit holder. If a taxpayer with a permit keeps full and accurate records, as required by law and as the Taxpayer did in this case, the Department can review those records on audit and verify that the taxpayer (1) properly paid sales tax to the vendors on its taxable purchases, and (2) also properly self-reported and paid the correct tax due on those items it purchased tax-free using its direct pay permit. In short, requiring a permit holder to purchase all tangible personal property tax-free and then self-report and remit the tax to the Department is unreasonably burdensome on the permit holder, and allowing the permit holder to pay tax to its vendors expedites and in no way hinders the Department's administration and collection of the proper tax due.

Requiring the Taxpayer to again pay sales tax on its P-Card purchases during the audit period would also result in the Taxpayer being double taxed on many of those purchases. As a general rule, double taxation on the same transaction is to be avoided. *State v. Barnes*, 233 So.2d 83 (Ala. Civ. App. 1970); *Starlite Lanes, Inc. v. State*, 214 So.2d 324 (1968). First, the Taxpayer would be double taxed in this case because the three year refund statute of limitations at Code of Ala. 1975, §40-2A-7(c)(2) has expired for most of the July 2010 through June 2013 period in issue. The Taxpayer also would be

required to file a joint refund petition with each of the hundreds if not thousands of vendors it paid sales tax to during the short period that is still within the statute of limitations. Contacting each of those vendors and having them sign a joint petition would be unduly burdensome, and, as a practical matter, impossible to do.

The Taxpayer's representatives indicated at the January 19 hearing that the Taxpayer also had direct pay permits with the States of Arkansas and Mississippi, and that those States allow the Taxpayer a credit for the sales or use tax it paid on the P-Card purchases in those States. The Tribunal contacted the Department of Revenue in those States concerning the issue.³

The Arkansas Sales and Use Tax Division responded that Arkansas issues direct pay permits pursuant to statute 26-52-509 and regulation GR-87. Concerning whether a direct pay permit holder can also pay tax to the vendor, the Division responded, as follows:

Generally, a Direct Pay Permit allows the holder of that direct pay permit to purchase items and taxable services exempt from tax. The Direct Pay Permit holder will pay all applicable taxes directly to the State of Arkansas.

Invoices on which the tax has been paid at the time of purchase and documentation of these invoices is kept on file will not be subject to later assessment. Tax has already been paid and the proof can be provided.

No tax would be assessed on these invoices on which tax has already been paid at the time of purchase.

The Mississippi Revenue Department also responded that it issues direct pay permits pursuant to Miss. Code. Ann. 27-65-93. As to whether a direct pay permit holder can also purchase items using a credit card and pay tax at the time of purchase, the

³ The Tax Tribunal is not bound by the rules of evidence applicable in Alabama's circuit courts, and may allow and consider all relevant facts. Code of Ala. 1975, §40-2B-2(k)(4).

Department responded – “The purchases made using the company credit cards are taxable at the regular rate of tax and should be paid to the vendor regardless if the company has been issued a Direct Pay Permit. . . .”

The above States thus allow direct pay permit holders to pay sales or use tax to their vendors on clearly taxable purchases. Presumably, allowing the permit holders to do so does not interfere with or hinder the collection of the correct tax due by those States.

Because that part of Reg. 810-6-4-.14 that requires direct pay permit holders to purchase all tangible personal property tax-free is unreasonable and unduly burdensome on the permit holders, it is invalidated. The Taxpayer should thus be allowed a credit against the assessed amount for the Alabama sales/use tax is paid to its vendors on its P-Card purchases during the assessment period.

At the Taxpayer’s request, the Department computed the additional tax in issue using a statistical sampling audit. The Tribunal is unaware as to how an accurate credit for the tax paid by the Taxpayer to its vendors should be computed or determined under those circumstances. The Taxpayer should contact the Department for the purpose of determining/agreeing as to how the credit can be computed. The parties should then notify the Tribunal of the reduced tax due, if any, after the credit is applied. If the parties cannot agree on how the credit should be computed, they should so notify the Tribunal. Appropriate action will then be taken.

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

Entered February 2, 2016.

BILL THOMPSON
Chief Tax Tribunal Judge

bt:dr

cc: Jason C. Paulk, Esq.
Patrick Eastridge