INTERNATIONAL PAPER COMPANY 16504 COUNTY ROAD 150 COURTLAND, AL 35618-4108,	§	STATE OF ALABAMA ALABAMA TAX TRIBUNAL
Taxpayer,	§	DOCKET NOS. MISC. 13-1182 MISC. 14-252
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed International Paper Company ("Taxpayer") for forest products severance tax ("FST") and forest products processors tax ("FPT") for October 2008 through September 2011. The Taxpayer appealed to the Tax Tribunal pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. The Tribunal consolidated the cases and conducted a status conference on May 22, 2015. Chris Grissom and Jimmy Long represented the Taxpayer. Assistant Counsel Kelley Gillikin and Craig Banks represented the Revenue Department.

The parties agreed at the conference that the Tax Tribunal should decide various issues of law before an evidentiary hearing is conducted so that the parties would know what facts they needed to submit at the evidentiary hearing. The Tribunal agreed to do so. The parties thereafter submitted a joint stipulation of facts and separate lists of issues they wanted the Tribunal to decide, with supporting briefs. The disputed issues are addressed in this Opinion and Preliminary Order.

FACTS

The Taxpayer operated four pulp and paper mills in Alabama and one in Florida during the period in issue. The Taxpayer purchased pulpwood chips from sawmills, chip mills, veneer mills, and others in Alabama during the period. It also purchased pulpwood

logs and round wood pine and hardwood logs from vendor wood yards in Alabama. It converted the logs into chips and then used the chips in its papermaking process during the period.

The Taxpayer claims that it purchased pulpwood chips from over sixty Alabama-based vendors during the period. The Taxpayer's sawmill and veneer mill vendors used high quality round wood logs to produce lumber and wood veneer, respectively, during the period. Those vendors subsequently used the slabs, edgings, and the other residue leftover from the round wood logs to produce the pulpwood chips that they sold to the Taxpayer. The Taxpayer's chip mill vendors produced the pulpwood chips they sold to the Taxpayer using round wood pulpwood dedicated to the production of the chips. For purposes of this Order, the Tribunal has assumed that there is a distinction between round wood logs used by sawmills and veneer mills to produce wood products, and round wood pulpwood used by chip mills to produce pulpwood chips.

The Taxpayer and its vendors contracted for the vendors to pay the FST on the round wood logs they sold to the Taxpayer and also on the round wood and pulpwood logs that the vendors used to produce the pulpwood chips they sold to the Taxpayer during the subject period. The Taxpayer consequently did not report and remit FST on the logs and pulpwood chips that it purchased during the period.

The Department audited the Taxpayer and determined that the Taxpayer was statutorily required to report and pay the FST and the FPT in issue. It assessed the Taxpayer accordingly. This appeal followed.

ISSUES

Issue (1). The primary issue in dispute involves two sub-issues. First, was the Taxpayer the entity that was statutorily required to report and remit the FST on the logs and pulpwood chips it purchased from its vendors during the assessment period. As explained below, the answer to that question is yes. The question then becomes – what is the legal effect of the presumed fact that the Taxpayer's vendors paid the FST on the logs and pulpwood chips they sold to the Taxpayer.

Code of Ala. 1975, §9-13-86 requires the manufacturer of forest products to quarterly report and pay the appropriate tax due to the Department. Concerning pulpwood, the manufacturer is the owner of the paper mill where the pulpwood is processed. Code of Ala. 1975, §9-13-80(8). The Taxpayer, as the paper mill owner, was thus statutorily required to report and remit the FST to the Department on the logs and pulpwood chips it purchased during the subject period. See, *Colston v. Gulf States Paper Corp.*, 262 So.2d 251 (1973) ("The statutory duty is on (the paper mill) to collect the tax from whomsoever it may buy pulpwood and timber from and pay that tax to the State." *Colston*, 262 So.2d at 255.)

The Department contends that the Taxpayer is liable for the FST in issue because, as discussed, the Taxpayer was statutorily required to report and remit the tax due to the Department. It further asserts that the Taxpayer cannot contract away its statutory responsibility to do so.

The Taxpayer argues that despite its statutory duty to report and pay the FST to the Department, it was relieved of that liability by Code of Ala. 1975, §9-13-82(c), which provides that "[r]ound wood pulpwood on which the tax has been paid shall not be subject

to an additional tax when converted into chips. . . ." The Taxpayer thus argues that because its vendors paid the FST on the round wood logs and round wood pulpwood they used to produce the pulpwood chips, it cannot be taxed again on those chips. As explained below, the Taxpayer is partly correct.

Section 9-13-82(c) only applies if the FST is paid on "round wood pulpwood." The section thus cannot apply to the Taxpayer's sawmill and veneer mill vendors because they used only high quality logs suitable for producing lumber and wood veneer, respectively, not round wood pulpwood.

The Taxpayer's chip mill vendors used round wood pulpwood to produce the chips they sold to the Taxpayer. Consequently, even though the Taxpayer, as the paper mill/manufacturer, was required to report and pay the FST on the pulpwood, if the chip mills paid the FST on the round wood pulpwood, as argued by the Taxpayer, §9-13-82(c) would apply by its plain language, and the Taxpayer could not be taxed on the pulpwood chips purchased from the chip mills. As explained below, however, the burden is on the Taxpayer to present evidence proving that the chip mills paid the FST on the round wood pulpwood during the subject period.

The Department argues that "[b]ecause a chip mill is not a manufacturer as to pulpwood and is not required to report and pay FST to the State, the pulpwood chips that IP purchases from chip mills have not already been taxed for FST." Department's Pre-Trial Brief at 13. The issue, however, is not whether the chip mills have "been taxed for FST." Rather, in determining the applicability of §9-13-82(c), the question is whether the chip mills paid the FST on the round wood pulpwood used to produce the pulpwood chips. If

so, then the paper mill/manufacturer, the Taxpayer in this case, cannot be taxed on the chips.

The Department also contends that "[t]he intent of the Legislature in enacting section 9-13-82(c) was to ensure that a manufacturer, such as IP, who purchased pulpwood logs and paid FST on those pulpwood logs, would not be subjected to FST again on the pulpwood chips when the manufacturer converted the pulpwood logs into pulpwood chips." Department's Pre-Hearing Brief at 13. That is, the Legislature did not envision that the FST due would be paid by an upstream vendor. I agree.

Before 1967, pulpwood chips were not subject to the FST. See, *State of Alabama v. International Paper Company*, 163 So.2d 607 (1964). The Legislature amended Alabama law in 1967 by Act 67-763, Ala. Acts 1967, to make pulpwood chips subject to the tax. That Act also added §9-13-82(c), which, as discussed, in substance exempts pulpwood chips from the FST if the tax was paid on the round wood pulpwood used to produce the chips.

In 1967, as now, the paper mill/manufacturer that processed the pulpwood chips was solely responsible for reporting and paying the FST on round wood pulpwood. Consequently, when the Legislature enacted §9-13-82(c) in 1967, it could only have foreseen that the FST paid on round wood pulpwood would have been paid by the paper mill/manufacturer because only that party was required to report and pay the tax due on that product.[1]

[1] The Taxpayer argues that "even though under the FST statute the operator of a paper mill is deemed a 'manufacturer' that must generally pay the FST, the Legislature contemplated (by enacting §9-13-82(c)) that there might be situations where other parties such as upstream vendors pay the FST instead." Taxpayer's Initial Brief at 8. (continued) I disagree for the reasons explained above.

But again, by the plain language of §9-13-82(c), if the FST is paid on the round wood pulpwood used to produce pulpwood chips, the chips "shall not be subject" to the FST again, even if the tax was erroneously paid by an upstream vendor. The statute also does not specifically require that the tax on the round wood pulpwood must have been paid by the paper mill/manufacturer. And importantly, construing §9-13-82(c) to apply regardless of who paid the FST on the round wood pulpwood prevents the same pulpwood, although in a different form, from being double taxed. That was clearly the Legislature's intent when it enacted §9-13-82(c).[2] As stated by the Alabama Supreme Court, "a statute is to be interpreted, if possible, so as to avoid double taxation." *State Dept. of Revenue v. Sonat, Inc.*, 690 So.2d 412, 417, quoting from *Paramount-Richards Theatres, Inc. v. State*, 55 So.2d 812, 824 (Ala. 1951).

The Taxpayer argues that the Department improperly disregarded §9-13-82(c), and that "in conducting its audit and issuing the assessments, (the Department) did not even examine the extent to which IP's vendors had already paid the FST on the wood used to produce the chips." Taxpayer's Initial Brief at 2. It also asserts that the Department cannot "disregard the practices and contractual arrangements in the forest products industry and dictate through audits and assessments which party in the supply chain must pay the FST." Taxpayer's Initial Brief at 13.

[2] If the Taxpayer is assessed for the FST on the chips purchased from its chip mill vendors during the period in issue, then double taxation would in fact occur, assuming that the chip mills paid the FST on the round wood pulpwood, because the three year statute of limitations at Code of Ala. 1975, §40-2A-7(c)(2)a. within which the chip mills could have petitioned for refunds has long since expired.

Addressing the latter assertion first, the Department is not using the audit and assessment process to dictate who pays the tax. Rather, the Department has simply applied the applicable statutes in determining that the Taxpayer is the party liable for the FST on the logs and pulpwood chips.[3] Sections 9-13-80(8) and 9-13-86 are clear that the Taxpayer, as the paper mill/manufacturer, is statutorily required to report and pay the FST on the logs and pulpwood chips in issue.

The Department also is not bound by a contract between a manufacturer and a third party if the contract conflicts with Alabama law, i.e., a paper mill/manufacturer's duty to report and remit the FST due on pulpwood. The Taxpayer thus cannot divest itself of that statutory duty by contracting for its vendors to report and pay the FST due. "A taxpayer cannot contract away a statutory obligation to pay taxes to the government." *Sam's Group, Inc. v. State of Alabama*, Docket S. 05-440 (Admin. Law Div. 9/13/2006 at 3).

The Taxpayer cites *Colston*, supra, in support of its case. In *Colston*, various pulpwooders sold pulpwood to Gulf States. The parties contracted for the pulpwooders to bear the economic burden for the FST by having Gulf States withhold the amount of tax due from its payments to the pulpwooders. Gulf States then reported and paid the tax due (the amount withheld) to the Department. The Alabama Supreme Court held that the contractual agreements were not contrary to Alabama law or public policy because Gulf States, as the manufacturer required to report and pay the FST to the Department, did so. "But it is agreed that the severance tax is paid to the State. There is no attempt to avoid

[3] As discussed, the Taxpayer is not liable for the FST on the pulpwood chips purchased from its chip mill vendors, again assuming that those vendors paid the tax on the round wood pulpwood used to produce the chips.

payment. The statutory duty is on (Gulf States) to collect the tax from whomsoever it may buy pulpwood and timber from and pay that tax to the State. There is no dispute that this has been done." *Colston*, 262 So.2d at 255.

Colston can be distinguished from this case. I agree with the Department that if the parties had contracted for the Taxpayer to withhold the FST due from the amounts paid by the Taxpayer to its vendors, and then reported and paid the tax due, as in *Colston*, the arrangement would have been appropriate. But as correctly argued by the Department – "However, IP cannot shift the statutory duty to report and pay the tax to the state and *Colston* does not support (the Taxpayer's) argument that it can; rather, it states the opposite – that the duty to report and pay FST to the state remains with the manufacturer." Department's Pre-Hearing Brief at 16, 17.

I also disagree that the Department was required to audit the Taxpayer's vendors for the purpose of determining if the vendors had paid the FST on the wood logs they sold to the Taxpayer or on the logs they used to produce the pulpwood chips they sold to the Taxpayer. The Department is authorized to obtain and review third party records in determining a taxpayer's liability, see generally, Code of Ala. 1975, §40-2A-7(a)(2), but it is not required to do so. It also would have been unduly burdensome for the Department to audit over sixty vendors to determine the amount of FST, if any, they may have paid on the wood sold to the Taxpayer or used to produce the chips sold to the Taxpayer. I agree with the Department's analysis of this issue in its Pre-Trial Brief at 17:

> Furthermore, allowing manufacturers to shift the duty to report and remit FST to the state to other parties by using private contracts would make the enforcement of the FST almost impossible. Under such a scheme, when the Department audited a manufacturer, it could produce a set of contracts requiring its numerous suppliers to report and remit the FST. The

> Department would have to investigate whether each of the various suppliers had reported and remitted the FST. However, those suppliers might have also entered into contracts that required another upstream supplier to report and remit the tax. Compared to forest products suppliers, manufacturers are relatively small in number. The FST statutes place the duty to report and pay the FST on those manufacturers to create a system that is easy to track and audit and to ensure that the state receives all the FST that is due to be paid. A manufacturer cannot alter this statutory system by use of contracts with other private parties.
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> IP further argues that the Department is required to investigate whether its suppliers reported and paid FST and, if the suppliers had reported and paid FST, then the Department is required to give IP credit for the tax paid. This is incorrect. The Department's duty is to enforce the tax laws as written. In this case, the law is clear that IP, because it operates the paper mill, is the manufacturer for the purposes of reporting and remitting FST on pulpwood. If a supplier mistakenly reported and/or paid FST on pulpwood, that supplier's incorrect interpretation of the law cannot prevent the Department from properly enforcing the tax laws.

Section 9-13-82(c) is an exemption statute because it in substance exempts the paper mill/manufacturer from being assessed for the FST on pulpwood chips if the FST was previously paid on the round wood pulpwood used to produce the chips. The burden is on the one seeking an exemption, the Taxpayer in this case, and not the Department, to present proof and establish that it is entitled to the exemption. *Brundidge Milling Co. v. State*, 228 So.2d 475 (Ala. Civ. App. 1969). The Taxpayer thus must present evidence establishing that its chip mill vendors paid the FST on the pulpwood logs used to produce the chips sold to the Taxpayer.

The Taxpayer argues that its sawmill vendors computed the FST on the logs they used to produce the chips in issue based on the weight of the logs – "the evidence will show that the majority of (the Taxpayer's) vendors calculated and paid the FST on their returns using the weight of the whole logs, portions of which produced the chips that were sold to IP." Taxpayer's Initial Brief at 2.

The Department argues that pursuant to §§9-13-82(a)(1) and (2), sawmills producing lumber in Alabama must compute the FST due on the lumber based on the board measure of the lumber, i.e., the lumber tally, and not on the weight of the logs. I agree. As explained by the Department in its Pre-Trial Brief at 4 – 12, sawmills are required to report and pay the FST on the lumber they produce based on the lumber tally, or the actual measure of lumber produced, and not by log weight.

To summarize the Department's argument on this issue, in *Ray E. Loper Lumber Co. v. State of Alabama*, 113 So.2d 686 (1959), the Alabama Supreme Court interpreted the predecessor statute to §9-13-82(a) as requiring a sawmill manufacturing lumber in Alabama to compute the tax due based on the actual board feet of lumber tally, whereas timber severed in Alabama and shipped out-of-state is computed or based on the log scale estimate. The Legislature had even clarified before the *Loper* decision, by Act 1955-385 in 1955, that the tax on lumber is based on the lumber tally by adding the words "lumber tally" to the end of the tax base measurements for both pine and hardwood lumber, see §§9-13-82(a)(1) and (2).

The Legislature again amended the applicable provisions, §§9-13-82(a)(1) and (2), by Act 93-888 in 1993. That amendment allowed an alternative measurement based on the weight of the logs. The alternative measurement applies, however, only concerning timber sold as logs that are not converted into lumber in Alabama. The amendment did not change the measurement for lumber produced in Alabama, which is still based on lumber tally. Consequently, the Taxpayer's sawmill vendors should have paid the FST on the lumber tally, i.e., the actual lumber produced from a log, not on the log's weight.

To summarize, the Taxpayer's sawmill vendors were required to pay the FST only on the lumber they produced measured by lumber tally. If they paid based on log weight, and thus paid more FST than was due based on lumber tally, as argued by the Taxpayer, then the sawmills would be due refunds for the amounts overpaid. As discussed, however, the statute of limitations for petitioning for refunds for the October 2008 through September 2011 period in issue has expired.[4] In any case, the pulpwood chips produced from the log residue were a separate product from the lumber produced from the logs. Consequently, the fact that the Taxpayer's sawmill vendors may have overpaid the FST on the lumber they produced does not relieve the Taxpayer from liability for the FST due on the pulpwood chips it purchased from the sawmills.

Issue (2). A separate issue raised by the Taxpayer, although related to Issue (1), concerns one of the Taxpayer's vendors that presumably paid the FST on the weight of the whole logs that it sold to the Taxpayer. The Department audited that vendor, allowed the vendor a credit for the FST paid on the whole logs, and assessed the Taxpayer for the FST due on the chips produced from the logs.

As discussed, §9-13-82(c) applies only to round wood pulpwood that is converted into pulpwood chips. The above vendor sold the Taxpayer whole logs, not round wood pulpwood. Consequently, the Department was not barred by §9-13-82(c) from assessing the Taxpayer for the FST due on the chips produced from the logs.[5]

[4] The Department argues in its Pre-Hearing Brief at 11 – 12, that even if the Taxpayer's sawmill vendors paid the FST on the weight of the logs, the sawmills would have paid "a substantially similar amount of tax" that they would have paid using the lumber tally. That issue need not be decided under the circumstances.

[5] It is assumed that the Department allowed the vendor a credit for the erroneously paid tax within the three year statute for allowing a refund or credit at §40-2A-7(c)(2).

Issue (3). This issue involves an exception to the general rule in §9-13-86 that the manufacturer of forest products must report and pay the FST to the Department. The exception, also found in §9-13-86, reads as follows:

> provided, that in the case that any lumber is sold or delivered to a concentration yard as is defined in this article, then the taxes provided for in this article shall be reported and paid by the owner or owners of such concentration yard to the state instead of the manufacturer, but it shall be the duty of the owner or owners of any such concentration yard to collect the tax in all cases from the seller.

The exception requires the owner of a concentration yard to report and pay the tax due on any lumber sold or delivered to the concentration yard. "Concentration yard" is defined at §9-13-80(9) as "[a] place where lumber is brought or received within the State of Alabama in a green or rough form or in condition for manufacturing or for processing or for resale."

The dispute involves the definition of the word "lumber," as used in §9-13-86. The Taxpayer argues that the word should be defined to include raw, unprocessed whole logs. "The 'lumber' as used in (the) statutory definition of (a) concentration yard should include the whole logs that IP acquires from vendor wood yards, and thus the 'owner or owners' of the vendor wood yards are responsible for remitting the FST and FPT on the whole logs, not IP." Taxpayer's Initial Brief at 20.

The Department contends that the word "lumber," as used in §9-13-86, can only refer to a manufactured product, and not to the unprocessed wood logs purchased by the Taxpayer. I agree with the Department's position on this issue, as stated in its Pre-Trial Brief at 20-26, as follows:

What is lumber for purposes of FST

The requirement for a concentration yard to report and pay FST to the state only applies when "lumber is sold or delivered to a concentration yard as is defined in this article." Thus, a critical question that must be answered is: what is the definition of lumber for purposes of the FST? The definition of a concentration yard also refers to lumber that is "in a green or rough form," which raises the further question: what is green lumber and what is rough lumber?

The terms lumber, green lumber, and rough lumber are not defined in the statutes governing FST. When a term is not defined in a statute, it must be given its ordinary, common meaning. See Alabama Farm Bureau Mut. Cas. Ins. Co. v. City of Hartselle, 460 So. 2d 1219, 1223 (Ala. 1984) ("Words used in the statute must be given their natural, plain, ordinary, and commonly understood meaning.").

Lumber is commonly defined as "[t]imber sawed into standardized boards, planks, or other structural members." The American Heritage Dictionary, 2nd College Ed. (1982). Beyond its common dictionary definition, the intended definition of lumber in the FST statutes can be discerned from its use in the statutes, case law, and industry documents. Lumber is used in five provisions in the FST statutes. Its first use is in the definition of manufacturer in section 9-13-80(8), which states:

> Manufacturer. As applied to forest products suitable for manufacture into lumber, the person who operates the sawmill or plant in which such products are so manufactured into lumber; as applied to pulpwood, chemical wood and bolts, the person who operates the paper mill, chemical plant or other plant in which such forest products are processed; as applied to crossties, switch ties, mine ties, props, poles and piles, the person who purchases from the producer; as applied to turpentine, the person who processes or cooks the crude gum; as applied to stumpwood, the person who operates the plant or retort in which such product is processed. (Emphasis added.)

As is clear from the use of the phrase "forest products suitable for manufacture into lumber" and the declaration that, for these products, the manufacturer is a sawmill or other plant "in which such products are so manufactured into lumber," section 9-13-80(8) regards lumber as a manufactured product, not a raw material. Encompassing whole logs in unmanufactured form into the definition of lumber is incompatible with the view in section 9-13-80(9) that lumber is something that is manufactured from forest products, not the forest products themselves. Supporting the

reading that lumber is a product manufactured by a sawmill from forest products rather than the raw materials themselves is the fact that the definition of forest products in section 9-13-80(5) does not include lumber but includes items such as logs and timber. Section 9-13-80(5)(defining forest products as "[l]ogs, timber, pulpwood, chemical wood, bolts, crossties and switch ties, mine ties, coal mine props, ore mine props, poles, piles, turpentine (crude gum) and stumpwood (tarwood)").

The second use of the term lumber is in the definition of concentration yard, which will be discussed in detail later. The third FST statute that uses the term lumber is section 9-13-82(a)(1) and (2), which provide the measure of FST for pine and hardwood lumber. These sections state:

> (a) The measure of the tax is at the following rates:
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> (1) On pine lumber $0.50, per 1,000 feet board measure lumber tally. Where the timber is sold as logs and is not converted into lumber in Alabama, the rate shall be $0.75 per 1,000 feet log scale (Doyle rule), except that logs under eight inches in diameter inside the bark at the small end shall be scaled as containing one foot log scale for each foot of length, or, at the election of the taxpayer, the rate shall be $0.10 per ton (2,000 pounds).
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> (2) On hardwood, cypress, and all other species of lumber, $0.30, per 1,000 feet board measure lumber tally. Where the timber is sold as logs and is not converted into lumber in Alabama, the rate shall be $0.50, per 1,000 feet log scale (Doyle rule), except that logs under eight inches in diameter inside the bark at the small end shall be scaled as containing one foot log scale for each foot of length, or, at the election of the taxpayer, the rate shall be $0.065 per ton (2,000 pounds).

The Alabama Supreme Court considered the predecessor statutes to sections 9-13-82(1) and (2) in the Loper case, supra. As the Department discussed above, the Supreme Court in Loper recognized that whole logs and lumber were not interchangeable terms and that lumber, as used in the predecessor statutes to sections 9-13-82(1) and (2) referred to a manufactured product. See Loper, supra (noting that the parties had stipulated that "[l]umber tally is the actual measurement of lumber sawed from a log" and holding that an in-state sawmill should measure FST by the actual measurement of board feet of lumber tally and that "[a] clear distinction is made by the statute in the measurement of the tax when imposed on logs and when imposed on lumber."). Thus, in sections 9-13-82(a)(1) and (2) lumber can only refer to a manufactured product, not whole

logs, because the tax base of lumber tally can only be calculated using the actual amount of lumber product created.

Also supporting the definition of the term lumber to mean a manufactured product and not whole logs is the use of the term lumber in the language of sections 9-13-82(a)(1) and (2) themselves. The second sentence of each section begins: "Where the timber is sold as logs and is not converted into lumber in Alabama …." The statutes clearly contemplate that logs will be converted into lumber, which obviously means that logs and lumber are not interchangeable items and that lumber is something that is manufactured from logs.

The fourth use of the term lumber in the FST statutes is in section 9-13-86, which was discussed above. The final use of the term lumber in the FST statutes is in section 9-13-88. This section provides that

> It shall be the duty of every manufacturer of forest products in this state and of every producer who shall ship forest products out of the State of Alabama in an unmanufactured condition and of every concentration yard as is defined in this article where any lumber is sold or delivered to it to keep and preserve suitable records with the items separated into the various items on which privilege taxes are levied in this article, and such other books or accounts as may be necessary to determine the amount of taxes for which he is liable under the provisions of this article. Said books and records shall be kept and preserved for a period of three years, and all such records shall be open for examination at any time by the department or its duly authorized agent.

Again in section 9-13-88, the statute differentiates between lumber and the more general term of forest products. The language of section 9-13-88 shows yet another instance where the legislature chose to use different terms to describe what records manufacturers and concentration yards must keep. It is only with respect to lumber that a concentration yard has to maintain records relating to the FST.

When statutes form a common statutory scheme, they should be read together and construed "reasonably so as to harmonize its provisions." McRae .v Security Pac. Hous. Servs., Inc., 628 So. 2d 429, 432 (Ala. 1992). In addition, where the Legislature uses different terms, such as logs, timber, forest products, and lumber, a court must presume that the Legislature intended the words to have different meanings. See Surtees v. VFJ Ventures, Inc., 8 So. 3d 950, 975 (Ala. 2008) ("[T]his court must assume that the legislature intended that the terms 'reported' and 'included' have different

meanings. The courts must presume that in enacting the add-back statute, the legislature intended that each word of the statute have effect, and we must also presume that the legislature did not include meaningless language or redundancies in the statute."). The uses of the terms lumber, logs, and forest products in the FST statutes demonstrate that each has a distinct meaning and that the term lumber does not include whole logs.

In addition to its use in the FST statutes and in Loper, further support for the Department's view of the definition of lumber is provided by the same document cited by IP to support its view that a concentration yard is responsible for FST on unmanufactured logs. IP cites to a document titled "Chapter 1 – Introduction to the Timber Industry – Hardwood Timber Industry" (the "Timbertax document"), which can be located at http://www.timbertax.org/publications/irs/msp/hardwood/chapter1/ and which is also attached in full to this brief. See Attachment 4. This document, according to IP, provides common "industry standard" definitions. On page 2 of 6 of the printed version of the document, it explains:

> Hardwood lumber is sold green (with a relatively high moisture content) or kiln-dried. Kiln drying is a process of using a heat source to extract moisture from lumber. Most hardwood must be dried prior to using in a final product. Kiln drying adds value to the lumber, and may reduce shipping costs since the weight of the lumber is reduced. However, some buyers prefer to purchase green lumber and dry it themselves. Hardwood lumber is also sold rough (the surfaces of the boards are unfinished) or surfaced. As with drying, surfacing adds value but is not desired by all types of buyers.

This same document, on page 3 of 6, discusses how sawmills market their lumber, including selling it to concentration yards. The Timbertax document states:

> Brokers and sawmill trading offices sell to a variety of customers including other intermediaries. These additional intermediaries include concentration yards and distribution yards. They differ in that concentration yards purchase lumber from sawmills, brokers, or wholesalers and may grade, sort, dry or surface the lumber to increase its value.

The description and activities of concentration yards expressed in the Timbertax document align with the Department's view of the terms uses in the FST statutes. IP argues that the reference in section 9-13-80(9) to a concentration yard receiving lumber "in a green or rough form or condition for manufacturing or for processing or for resale" mandates an expansive

definition of the term lumber, which, according to IP, would include timber or whole logs. However, the Timbertax document explains the common industry meaning of green lumber and rough lumber and that meaning excludes whole logs. As quoted above, the Timbertax document states that green lumber is lumber that has not been dried. It also explains that rough lumber is lumber that has not been surfaced. In both instances, it references lumber – a product manufactured in a sawmill – not logs. The Timbertax document also explains that concentration yards often receive lumber in rough or green condition and dry and/or finish the lumber at the concentration yard. The fact that concentration yards sometimes perform further manufacturing operations on rough or green lumber explains why the definition of concentration yard in section 9-13-80(9) encompasses green or rough lumber and why it anticipates that the green or rough lumber will undergo further "manufacturing or processing" or be resold by the concentration yard. The industry-standard definitions in the Timbertax document, the manner in which the Alabama Supreme Court used the term lumber in Loper, the use of the term lumber in the FST statutes, and the ordinary, common definition of the term, all support a definition of lumber that includes only a manufactured product from a sawmill and excludes whole logs in unmanufactured form or any form of pulpwood.

The Timbertax document, on page 5 of 6, does include the language cited by IP that states that "[a] concentration yard primarily acts as a middlemen in the selling and marketing of logs. Concentration yards tend to be located near hardwood forests." The fact that concentration yards may buy and sell logs does not change the fact that it is only with respect to lumber that the concentration yard is responsible for remitting FST to the state. § 9-13-86 (stating that "in the case that any lumber is sold or delivered to a concentration yard as is defined in this article, then the taxes provided for in this article shall be reported and paid by the owner or owners of such concentration yard to the state instead of the manufacturer, but it shall be the duty of the owner or owners of any such concentration yard to collect the tax in all cases from the seller.") As is clear from the FST statutes, the Loper case, and the Timbertax document, lumber is distinct from logs.

The responsibility to remit FST to the state shifts from the manufacturer to a concentration yard only when the manufacturer delivers or sells lumber to the concentration yard. IP purchases pulpwood logs from its suppliers, including vendor woodyards. Because pulpwood logs are not included in definition of lumber, IP is the responsible party for remitting FST on any pulpwood logs that IP purchased from a vendor woodyard.

As explained above, there is a clear distinction between unprocessed whole wood logs and processed or manufactured lumber. And lumber in a green or rough form is still

lumber, and not raw, unprocessed whole logs. To repeat – "The Timbertax document states that green lumber is lumber that has not been dried. It also explains that rough lumber is lumber that has not been surfaced. In both instances, it references lumber – a product manufactured in a sawmill – not logs." Department's Pre-Trial Brief at 25. Because the duty to report and pay the tax due shifts to a concentration yard owner only concerning lumber that is sold or delivered to the yard, the duty remained with the Taxpayer concerning the whole logs the Taxpayer purchased from its vendor wood yards.

Issue (4). This issue involves pulpwood logs severed in Alabama that were sold or shipped by vendors for use in the Taxpayer's Pensacola, Florida paper mill. The Taxpayer argues that its vendors are liable for the tax on those logs pursuant to Code of Ala. 1975, §9-13-87. That section provides that "the producer of forest products" that are shipped outside of Alabama in their unmanufactured condition is required to report and pay the tax due. A "producer" is defined at Code of Ala. 1975, §9-13-80(4) as the person that either (1) severs forest products in Alabama, and (2) assembles or causes to be assembled forest products shipped outside of Alabama in an unmanufactured condition.

The Department contends that there are not sufficient facts in the record for the Tribunal to decide this issue. Specifically, there is no evidence as to what party or parties assembled or caused to be assembled the logs in issue for shipment outside of Alabama. I agree. The facts necessary to decide this issue should be submitted at the evidentiary hearing in the case.

Issue (5). The Taxpayer argues that applying the FPT to out-of-state processors or manufacturers violates the Commerce, Due Process, and Equal Protection Clauses of the U.S. Constitution. The specific statute in issue is §9-13-82(b), which levies the FPT on

Alabama-based processors and manufacturers, and also on "out-of-state processors or manufacturers who obtain the timber within this state and ship it outside the state for completion of the manufacturing process."

I agree with the Department that the Taxpayer's challenge to the constitutionality of §9-13-82(b) is a facial challenge to the statute itself. The Tribunal consequently does not have jurisdiction to hear and decide the Taxpayer's constitutional arguments. "The Alabama Tax Tribunal . . . shall not have the power to declare a statute unconstitutional on its face." Code of Ala. 1975, §40-2B-2(g)(6). The Taxpayer has, however, preserved its constitutional challenge, and thus may raise the issue if and when the case is appealed. Section 40-2B-2(g)(6)b.

If either party wishes to challenge any of the above findings before an evidentiary hearing is conducted in the case, it should do so by May 13, 2016. Either party should also notify the Tribunal by the above date if there are other issues of law they believe the Tribunal should decide before an evidentiary hearing. Appropriate action will then be taken. If the parties do not contact the Tribunal by May 13, 2016, the case will be set for a hearing.

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 April 21, 2016.

Bill Thompson

BILL THOMPSON
Chief Tax Tribunal Judge

bt:dr

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