

ALABAMA TAX TRIBUNAL

LIMESTONE COUNTY WATER & SEWER AUTHORITY,	§	
	§	
Taxpayer,	§	DOCKET NO. S. 17-280-JP
v.	§	
STATE OF ALABAMA	§	
DEPARTMENT OF REVENUE.	§	

FINAL ORDER

In January 2017, the Limestone County Water & Sewer Authority (“Authority”) applied with the Alabama Department of Revenue (“Revenue Department”) for a sales and use tax exemption certificate concerning work to be performed on a water-line improvement project. The Authority submitted the application as a “governmental entity,” pursuant to Act 2013-205, which is codified at Ala. Code § 40-9-14.1. If the Authority’s application had been approved, the Authority’s licensed contractor and subcontractors would have been authorized to purchase materials and supplies for the designated project on behalf of the Authority without having to pay sales or use tax.

The Revenue Department denied the application, however, by stating that “the term ‘governmental entity’ as defined in Section 40-9-14.1(a) does not include public corporations other than industrial or economic development boards or authorities which are specifically named.” The Authority timely appealed.

ISSUE

The issue is whether the Authority, at the time it applied for the exemption certificate, met the legislature’s definition of “governmental entity” in Act 2013-205, so as to utilize that particular process for making tax-free purchases.

LAW AND FACTS

The Authority was created pursuant to Ala. Code § 11-88-1, et seq. Thus, the Authority is “exempt from all taxation in the State of Alabama,” pursuant to § 11-88-16. At the hearing of this appeal, the Revenue Department acknowledged the Authority’s statutory tax exemption in Title 11.

As stated, though, the issue is not whether the Authority is exempt, but whether the Authority qualified under Act 2013-205 so that its contractor and subcontractors could purchase necessary materials and supplies tax free. That issue depends upon the Act’s definition of “governmental entity.”

As initially filed in the 2013 Regular Session, the Act (as House Bill 419) defined “governmental entity” as follows:

any governmental entity or a political subdivision, department, or agency of a governmental entity or a board, commission, or authority of a governmental entity which is tax exempt from sales and use taxes by virtue of its governmental status, including, but not limited to, all of the following: The State of Alabama, a county, a municipality, an industrial or economic development board or authority, and an educational institution of any of the foregoing including a public college or university, a county or city board of education, and the State Board of Education.

However, an amendment was introduced which revised the definition to the following:

the State of Alabama and its political subdivisions, including a county, a municipality, and an industrial or economic development board or authority. A governmental entity shall also include an educational institution of any of the foregoing Alabama political subdivisions including a public college or university, a county or city board of education, and the State Board of Education.

When HB419 became law on May 9, 2013, as Act 2013-205, the phrase “governmental entity” was defined to mean the following:

the State of Alabama and its political subdivisions, including a county, a municipality, and an industrial or economic development board or authority. A governmental entity shall also include an educational institution of any of the foregoing Alabama political subdivisions including a public college or university, a county or city board of education, and the State Board of Education.

(underline in Act)

Subsequently, the Revenue Department amended Ala. Admin. Code r. 810-6-3-.77(1) to define “governmental entity” as follows:

- (a) The State of Alabama.
 - (b) A county or incorporated municipality of the State of Alabama.
 - (c) An educational institution of the State of Alabama, or a county or incorporated municipality of the State of Alabama.
 - (d) An industrial or economic development board or authority that is exempt from the payment of Alabama sales and use taxes.
 - (e) Other governmental agencies that are exempt from the payment of Alabama sales and use taxes excluding those agencies as provided in sections (2) and (3) below.
- (2) The exemption outlined in section (1) shall not apply to any of the following:
- (a) Purchases of tangible personal property by a contractor or subcontractor for storage, use, or consumption in conjunction with performing a contract with a governmental entity that is not itself exempt from Alabama sales and use taxes.
 - (b) Purchases of tangible personal property by a contractor or subcontractor that are not incorporated into realty pursuant to the contract.
 - (c) Purchases of tangible personal property for contracts with the federal government.

(d) Purchases of tangible personal property made for any contracts for the construction of any highway, road or bridge for, or on behalf of, any governmental entity as outlined above.

(e) Purchases of tangible personal property made pursuant to any contract entered into prior to January 1, 2014.

(3) The exemption outlined in section (1) shall not apply to the sale to, or the storage, use, or consumption by, any contractor or subcontractor of any tangible personal property to be incorporated into realty pursuant to a contract with a state other than the State of Alabama, a county or incorporated municipality of a state other than the State of Alabama, an industrial development board created pursuant to the Constitution or general or local laws of a state other than the State of Alabama, an educational institution of a state other than the State of Alabama, or an educational institution of a county or incorporated municipality of a state other than the State of Alabama.

Based on Act 2013-205, the Authority submitted eight applications to the Revenue Department from February 2014 through July 2016 for certificates of exemption concerning various projects. All of those applications were approved.

In January 2017, the Authority submitted another application pursuant to the 2013 Act. Unlike the previous eight applications, however, the Department denied this request for an exemption certificate by stating that the Authority does not qualify as a "governmental entity" as defined in § 40-9-14.1(a). The Department also stated:

We are aware that you have previously been issued an exemption certificate for a government entity project. However, after further review of the law and based on advice from legal counsel, we will not be issuing any new project exemptions for public corporations. Any active exemption certificates which you were already awarded will remain in effect until the project's completion.

Please know that, if applicable, you may still utilize your organization's tax exempt status by entering into a purchasing agent appointment with the contractor. The purchasing agent appointment is simply an agreement between the contractor and the tax exempt entity. The purchasing agent agreement is not submitted to the Department of Revenue for review or approval as it is simply a contract between the two parties. With the purchasing agent agreement method, the contractor may purchase items on

behalf of or in care of the tax exempt entity. However, the material invoices must be billed directly to the exempt entity and the payments must be made directly from the exempt entity's funds. The contractor may not use their own funds to purchase materials using a purchasing agent agreement.

Later, during the legislature's 2018 Regular Session, Governor Ivey signed HB35 into law as Act 2018-234. The 2018 Act amended the definition of "governmental entity" in § 40-9-14.1(a) to include "any public water or sewer authority, district, system, or board that otherwise is sales and use tax exempt." Importantly, the operative date for the additional language concerning water and sewer authorities was addressed as follows:

- (i) This section shall be operative for contracts entered into with governmental entities as defined in subsection (a), **not including public water or sewer authorities, districts, systems, or boards that otherwise are sales and use tax exempt, on January 1, 2014**, or thereafter, and shall not apply to any contract entered into prior to January 1, 2014. This section shall be operative for contracts entered into **with public water or sewer authorities, districts, systems, or boards that otherwise are sales and use tax exempt on January 1, 2019**, and thereafter, and shall not apply to any contract entered into with such entities prior to January 1, 2019. In addition, this section shall not apply to any contract change orders or contract extensions, including revised, renegotiated, or altered contracts, when the original contract was entered into prior to January 1, 2014, with a governmental entity. Nor shall this section apply to any contract change orders or contract extensions, including revised, renegotiated, or altered contracts with any public water or sewer authority, district, system, or board that otherwise is sales and use tax exempt, when the original contract was entered into prior to January 1, 2019.

(emphasis added)

ANALYSIS

"The cardinal rule of statutory interpretation is to determine and give effect to the intent of the legislature as manifested in the language of the statute. *Gholston v. State*, 620 So.2d 719 (Ala. 1993). Absent a clearly expressed legislative intent to the contrary,

the language of the statute is conclusive.” *Ex parte State Dep’t of Revenue*, 683 So.2d 980, 983 (Ala. 1996).

Here, it is clear from Act 2013-205 that the Authority did not qualify as a “governmental entity” during the period at issue. First, water and sewer authorities simply are not listed within the definition of “governmental entity” in Act 2013-205. Instead, the only type of authority that is included in that definition is “an industrial or economic development board or authority.” The legislature’s inclusion of industrial or economic development authorities, but not water and sewer authorities, is controlling. See, e.g., *In re Haas*, 48 F.3d 1153, 1156 (11th Cir. 1995), on remand 195 B.R. 933, rev’d on other grounds, 162 F.3d 1087 (11th Cir. 1998), stating that, “[w]here Congress knows how to say something but chooses not to, its silence is controlling.” Here, Alabama’s legislature demonstrated that it knew how to include a certain type of authority in the applicable definition. Its decision to not include water and sewer authorities in that definition is a clear manifestation of the legislature’s intent to exclude those authorities.¹

Second, water and sewer authorities were included in the definition of “governmental entity” in the original bill (HB419) that was introduced in the 2013 Regular Session. Specifically, the original definition included the phrase “authority of a governmental entity which is tax exempt from sales and use taxes. . .” As noted, however,

¹ See also, § 40-9-14.2(a)(1), defining “governmental entity” to include “the Federal Government, the State of Alabama, Alabama public schools, Alabama public universities, **healthcare authorities**, Alabama counties and municipalities, and public corporations incorporated under any of the provisions of Chapter 50 of Title 11, Chapter 50A of Title 11, Chapter 5 of Title 37, or Chapter 7 of Title 39.” (emphasis added)

that language was stricken from the bill prior to its passage. These events also show an intent by the legislature to not include water and sewer authorities in the applicable definition in Act 2013-205.

Third, the 2018 Act amended the definition of “governmental entity” in § 40-9-14.1 to include “any public water or sewer authority, district, system, or board that otherwise is sales and use tax exempt.” But the legislature made it clear that its inclusion of these authorities in the definition does not begin until 2019. Again, the legislature’s intent is very clear from the words that it used – and did not use – that the Limestone County Water & Sewer Authority was not a “governmental entity” during the period at issue.

In its brief, the Authority focuses on Ala. Admin. Code r. 810-6-3-.77(1)(e), in which the Revenue Department defines “governmental entity” as “[o]ther governmental agencies that are exempt from the payment of Alabama sales and use taxes excluding those agencies as provided in sections (2) and (3) below.” The Authority states that the Revenue Department does not dispute that the Authority was formed pursuant to § 11-88-1, et seq., as a public corporation or that the Authority is tax exempt pursuant to §11-88-16. Therefore, according to the Authority, because it “is itself exempt from Alabama sales and use tax, Administrative Rule § 810-6-3-.77(1)(e), by its plain language, would make the Taxpayer eligible to obtain a certificate of exemption for its project.”

In response, the Revenue Department cites various Alabama appellate cases for the proposition that public corporations such as the Authority are not governmental agencies. Specifically, the Revenue Department relies on a case involving this very Authority, in which the Alabama Court of Civil Appeals stated: “In other words, a public corporation is an ‘instrumentality of the state’ in the sense that it is created pursuant to the laws of the

State and for the public benefit, but it is 'independent' of the State and 'is not an agency of the State' because the State does not own or operate the corporation." *Limestone County Water & Sewer Authority v. City of Athens*, 896 So.2d 531, 543 (Ala. Civ. App. 2004), citing *Dobbs v. Shelby County Economic & Indus. Dev. Auth.*, 749 So.2d 425, 430 (Ala. 1999).

The Authority counters by arguing that the determination in its case involving the City of Athens was limited to whether the Authority was the alter ego of the State. Therefore, the Authority contends that the narrow holding in that case is not definitive in this appeal before the Tax Tribunal.

It is unnecessary, however, to resolve this contention between the parties, because Alabama law is clear that a rule of an administrative agency cannot enlarge the scope of a statute. "The provisions of a statute will prevail in any case of a conflict between a statute and an agency regulation. An administrative regulation must be consistent with the statutes under which its promulgation is authorized. An administrative agency cannot usurp legislative powers or contravene a statute. A regulation cannot subvert or enlarge upon statutory policy. [Revenue Department] Regulation 810-3-15-.05(10) therefore cannot override Ala. Code 1975, § 40-18-8(j)." *Ex parte Jones Mfg. Co., Inc.*, 589 So.2d 208, 210 (Ala. 1991) (citations omitted).

As discussed, the legislature has shown a clear intent that water and sewer authorities did not meet the applicable definition of "governmental entity" during the period at issue. Consequently, Ala. Admin. Code r. 810-6-3-.77(1)(e) cannot be read to include the Authority in that definition.

Understandably, the Authority emphasizes the fact that the Revenue Department did not arrive at its current interpretation of § 40-9-14.1(a) until the Authority's submission of its ninth application, with the first eight having been granted on the premise that the Authority was a "governmental entity." The Authority stated: "Naturally, the Taxpayer has relied upon the Department's proper granting of certificates of exemption for the Taxpayer's projects when planning for the project for which the Taxpayer's request for certificate of exemption has now been denied. The Taxpayer should be able to rely upon prior determinations of the Department." The only explanation offered by the Revenue Department was that, "after further review of the law and based on advice from legal counsel, we will not be issuing any new project exemptions for public corporations."

Again, any frustration of the Authority with the Revenue Department is completely understandable. As a matter of law, however, it has been well settled for decades by our state's highest court that the Revenue Department is not subject to estoppel in its enforcement of the tax laws.

In the assessment and collection of taxes the State is acting in its governmental capacity and it cannot be estopped with reference to these matters. In the case of *Duhame v. State Tax Commission*, 65 Ariz. 268, 171 A.L.R. 684, the court said:

It is true that during the time plaintiff was engaged in the contracting here in question he might have passed this tax on to the government had he not been misled, by an improper interpretation of the Act by the Commission, into believing no tax was due. Still, it is the settled law of the land and of this jurisdiction that as taxation is a governmental function, there can be no estoppel against a government or governmental agency with reference to the enforcement of taxes. Were this not the rule the taxing officials could waive most of the state's revenue.

State v. Maddox Tractor & Equipment Co., 69 So.2d 426, 429 (1953). Therefore, the Revenue Department's denial of the Authority's ninth application (which was the correct legal interpretation) was not precluded by its previous decisions.

After the hearing and initial briefing on the governmental-entity issue, the Tax Tribunal invited the Authority to file a brief and to participate in oral argument concerning a secondary issue involving the Alabama Administrative Procedure Act ("AAPA") that had been raised by a different taxpayer.² In its first brief regarding the AAPA question, the Limestone County Water & Sewer Authority argued that the Revenue Department's denial of the Authority's application did not implicate the AAPA. In a subsequent brief, however, the Authority argued just the opposite. The Tax Tribunal scheduled oral argument on the AAPA issue (and other issues) for August 22, 2018. On August 15, 2018, the Tax Tribunal received from the Authority a "Notice of Waiver of Oral Argument." (The Orange Beach Water, Sewer, and Fire Protection Authority had withdrawn its appeal by that time, and none of the other authorities responded to the Tax Tribunal's invitations concerning the AAPA issue.) Therefore, the AAPA issue is pretermitted.

CONCLUSION

As shown, the Authority did not meet the legislature's definition of "governmental entity" in Act 2013-205, so as to utilize that process for making tax-fee purchases during the period in question. Thus, the Revenue Department's denial of the Authority's application is upheld.

² There were four other appeals pending that involved this same governmental-entity issue. However, the AAPA issue was raised only by the Orange Beach Water, Sewer, and Fire Protection Authority in Docket No. S. 17-1016-JP.

This Final Order may be appealed to circuit court within 30 days, pursuant to Ala. Code § 40-2B-2(m).

Entered August 28, 2018.

JEFF PATTERSON
Chief Judge
Alabama Tax Tribunal

jp:dr

cc: D. Ashley Jones, Esq.
Mary Martin Mitchell, Esq.
Hilary Y. Parks, Esq.