ALABAMA TAX TRIBUNAL

STRAW SOURCE, LLC, and its SOLE MEMBER, TOMMY JACQUES, JR.,	§	
Taxpayers,	§	DOCKET NO. S. 17-1074-JP
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND FINAL ORDER

This case involves sales tax on sales of pine straw. The Alabama Department of Revenue entered a final assessment of state sales tax against Straw Source, LLC, and its sole member, Tommy Jacques, Jr. (collectively, the Taxpayer), for the periods of February 2014 through March 2016. The assessment totaled $15,773.42, including interest. The Revenue Department also assessed the LLC and Mr. Jacques for local sales tax for the same periods. That assessment totaled $1,015.25, including interest. Neither assessment included penalties. The Taxpayer appealed timely to the Alabama Tax Tribunal.

Question Presented

The Taxpayer contracted with land owners for the right to obtain pine straw. The pine trees that eventually produced the straw were not planted by the Taxpayer but were already growing on the land at the time that the pine-straw contracts were executed. However, the Taxpayer would burn or apply herbicide to certain areas near the trees to get rid of unwanted growth and would fertilize areas in an attempt to increase the yield of straw. The Taxpayer baled and later sold the pine straw.

Generally, in Alabama, the selling of tangible personal property at retail is subject to sales tax. However, Alabama law exempts from sales tax "[t]he gross proceeds of sales of

. . . other products of the farm, dairy, grove, or garden, . . . when such sale or sales are made by the producer. . .” The question presented is whether the Taxpayer operated more as a merchant of the pine straw than as a farmer or producer.

Law and Analysis

As stated, Alabama imposes a privilege or license tax on the retail sale of tangible personal property. *See* Ala. Code § 40-23-2. But certain exemptions exist. One reads as follows:

> (a) There are exempted from the provisions of this division and from the computation of the amount of the tax levied, assessed, or payable under this division the following:
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> …
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> (5) The gross proceeds of sales of all livestock by whomsoever sold, and also the gross proceeds of poultry and other products of the farm, dairy, grove, or garden, when in the original state of production or condition of preparation for sale, when such sale or sales are made by the producer or members of his immediate family or for him by those employed by him to assist in the production thereof. Nothing herein shall be construed to exempt or exclude from the measure or computation of the tax levied, assessed, or payable hereunder, the gross proceeds of sales of poultry or poultry products when not products of the farm.

Section 40-23-4(a)(5).

A substantially-similar version of that exemption appeared in Acts 1936-1937, No. 126 (Ex. Sess.), p. 128. That version exempted the sales of “other products of the farm, dairy, grove or garden, when said sale or sales are made by the producer or members of his immediate family, or employees forming a part of the producer’s organization, in the original state of condition of preparation for sale …” Beginning shortly thereafter, the Alabama Supreme Court issued opinions concerning the exemption that are pertinent here.

In *Curry v. Reeves*, 195 So. 428 (Ala. 1940), the taxpayer owned a farm and also owned a wholesale and retail feed store, which was located approximately ten miles from the farm. The taxpayer brought chicken eggs from his farm to his store and hatched the eggs by using an incubator. The chicks hatched from those eggs were sold at the store. The taxpayer claimed an exemption from sales tax pursuant to the predecessor to § 40-23-4(a)(5).

The *Curry* court first looked to an analogous case from the State of New York, where the New York taxpayer had sold meat in his butcher shop that had been raised on his own farm. The New York taxpayer claimed that these sales were exempt from sales tax as being sales of "other products of the farm." *Curry*, *id*., at 429.

The *Curry* court continued:

> Though the defendant in [*Pettinger*, the New York case] owned and operated a farm, yet he also owned and operated as a regular business a butcher shop, and the holding was that the meat sold in the butcher shop was not within the exempt class though it came from the butcher's own farm.
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> The court observed that his regular business was that of a butcher and the farm an adjunct and largely a convenience to that business, and of consequence the defendant did not occupy the farm as a farmer within the meaning of the exemption provision, but as a butcher, saying: "He would occupy it, not as a farmer, but as a butcher, with a view the better to promote his business in that line".
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> We consider the logic of this old authority entirely sound and worthy to be followed. And we think the same reasoning applicable here. It is clear enough this exemption feature was enacted for the benefit of the farmer and in order to encourage a wider market for his products. It was just as much for the farmer as if so named in the statute as it was in the Pettinger case, supra. It bore no relation to a mercantile business but contemplated such "products of the farm" when in the original state of production or condition of preparation for sale when made by the producer or members of his immediate family or some one employed in the production.

> All of these specific provisions tend to show that the exemptions were for the farmer as such and for none other. We think it a reasonable inference that complainant's principal business was that of a wholesale and retail dealer in feed stuffs. Presumably it was a business of no small consequence, and the farm, ten miles distant, was used in connection therewith and as an adjunct thereto.
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> . . .
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> In considering the exemption feature of the [Alabama] statute we should bear in mind the universally recognized rule that taxation is the rule and exemption the exception and that the legislative intent to release property from its just proportion of the public burden "ought to be expressed in clear and unambiguous terms; it ought not to be deduced from language of doubtful import." Bowman et al. v. State Tax Commission, 235 Ala. 190, 178 So. 216, 217.
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> We are at the conclusion that the exemption was for the farmer, and that complainant is claiming the benefit thereof more as a merchant than as a farmer and that such sales do not come within the exemption feature of the statute. At least, to our minds, the clear and unambiguous terms of the statute do not lead to that end.

Id. at 429-30.

The *Curry* court's interpretation of the predecessor to § 40-23-4(a)(5) has been accepted as correct. Nine years later, in *State v. Wertheimer Bag Co.*, 43 So.2d 824, 826 (Ala. 1949), our state Supreme Court reiterated that the predecessor to § 40-23-4(a)(5) "does . . . show that the exemption provision as regards the 'gross proceeds of poultry and other products of the farm, [dairy, grove, or garden] when such sale or sales are made by the producer or members of his immediate family' is designed to benefit the farmer alone. And such was the holding in *Curry v. Reeves*. . ." *See also State v. Southland Hatchery*, 45 So.2d 302, 304 (Ala. 1950); and *Sanitary Dairy v. State*, 75 So.2d 611, 613 (Ala. 1954).

Here, the facts show that the Taxpayer operated more as a merchant than as a farmer or producer. First, the Taxpayer acquired access to land owned by others for the

sole purpose of obtaining pine straw to sell. (One of the Taxpayer's contracts stated that "[t]he Buyer [Taxpayer] shall rent the said amount of acreage for the harvesting of Pine Straw only. The Seller [landowner] agrees to allow the Buyer to gather the Straw in a timely manner effective as of the date of this Contract and no more than one year after the execution of this Contract," although the contract automatically renewed for a total of six consecutive years.) Also, the tracts of land were located in numerous counties throughout the state, depending on the Taxpayer's ability to contract with various landowners. The Taxpayer paid the landowners by the acre or by the bale. And, to the Taxpayer's credit, the record showed that the Taxpayer's operation "was a business of no small consequence." *Curry* at 430.

As noted, the Taxpayer burned, mowed, and/or applied herbicide to grasses or competing types of trees that were too close to the pine trees. And the Taxpayer sometimes fertilized areas near the pine trees. But these measures were taken to increase the amount of straw that the Taxpayer could gather and sell.

Therefore, the Taxpayer operated his business more as a merchant. Thus, the exemption in § 40-23-4(a)(5) does not apply to the sales at issue. *Curry*.

The Taxpayer also claims that the Revenue Department violated the Alabama Taxpayers' Bill of Rights during the audit process, specifically § 40-2A-4, and that these violations render the final assessments void. Assuming (without deciding) that the Revenue Department did not follow the procedures of § 40-2A-4, the legislature clearly stated the following in paragraph (c) of that section:

> The failure of the department to comply with any provision of this section shall not prohibit the department from assessing any tax as provided in this

> chapter, nor excuse the taxpayer from timely complying with any time limitations under this chapter. However, if the department fails to substantially comply with the provisions of this section, the commissioner shall, upon application by the taxpayer or other good cause shown, abate any penalties otherwise arising from the examination or assessment.

Here, as stated, neither assessment included penalties. Thus, the final assessments are not void on procedural grounds. Any other procedural arguments raised by the Taxpayer likewise are insufficient to void the assessments and, thus, are rejected.

Conclusion

The burden was on the Taxpayer to prove the right to an exemption pursuant to § 40-23-4(a)(5). *See Curry* at 430. The Taxpayer has not done so. (The Taxpayer already had conceded in the "Response to Department's Answer" that a different exemption in § 40-23-4(a)(45) was inapplicable here.) Therefore, the final assessments are affirmed in the amounts of $15,773.42 and $1,015.25, respectively. Additional interest also is due from the date that the final assessments were entered. Judgment is entered accordingly.

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

Entered October 11, 2019.

/s/ *Jeff Patterson*
JEFF PATTERSON
Chief Judge
Alabama Tax Tribunal

jp:dr
cc: Dwight W. Pridgen, Esq.
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