

ALABAMA TAX TRIBUNAL

UNITED LAUNCH ALLIANCE, LLC,	§	
Taxpayer,	§	DOCKET NO. S. 18-1033-JP
v.	§	
STATE OF ALABAMA	§	
DEPARTMENT OF REVENUE.		

**PRELIMINARY ORDER DENYING MOTION TO STRIKE
OF ALABAMA DEPARTMENT OF REVENUE**

United Launch Alliance, LLC (the Taxpayer), manufactures rockets for the U.S. government at the Taxpayer's facility in Decatur, Alabama. During the months of May 2014 through December 2016, the Taxpayer purchased helium and nitrogen from Air Products & Chemicals, Inc., for use at that facility. The Taxpayer paid state sales tax on those gas purchases at the general rate of 4 percent. Air Products & Chemicals remitted the sales tax to the Alabama Department of Revenue.

In 2017, the Taxpayer and Air Products & Chemicals jointly petitioned the Revenue Department for a sales-tax refund of \$197,103.75 for the periods mentioned previously. The Taxpayer claimed that the helium and nitrogen it purchased qualified as machines that were used in the manufacture of tangible personal property and thus should have been taxed at the reduced machine rate of 1.5 percent. Therefore, the companies requested a refund of the difference between the two rates. (A small portion of the refund request involved argon gas, which the Taxpayer concedes should not be refunded because it was used for welding.)

In 2018, the Revenue Department granted the Taxpayer a partial refund of

\$2,708.90 and denied the remainder of the amount requested, claiming that certain purchases did not qualify for the machine rate. The Taxpayer appealed the partial denial to the Alabama Tax Tribunal and a hearing was conducted on January 14, 2020. The Tax Tribunal subsequently set a briefing schedule for the parties, with the Taxpayer being directed to file its brief first, followed by the Revenue Department. The briefing schedule allowed for the Taxpayer to then file a reply brief.

During the hearing, the Taxpayer provided testimony and exhibits (7 and 8) to support a refund amount of \$193,524.37, apparently prior to the calculation of interest, if the Taxpayer prevails on the legal question concerning the machine rate. However, the Taxpayer acknowledged that a refund would have to be reduced to account for certain of its tax periods being outside the statute of limitations, as argued by the Revenue Department.

Also, the Taxpayer's test engineering manager, Terry Carroll, testified that argon was not used for leak testing, but only for welding, and that some helium was used for welding and some nitrogen for laser cutting. (Mr. Carroll stated that the helium and nitrogen gases are stored at six large, on-site "pads" and then distributed to particular areas of the plant as needed, with usage of the gases being recorded by meters.) Of course, the Revenue Department contends that those uses of helium and nitrogen disqualify their purchases from the machine rate, partly because of an administrative rule stating that gases used for welding are taxed at the regular rate.

After the hearing, the Taxpayer filed its initial brief. That brief included an affidavit from Mr. Carroll concerning his post-hearing determinations of the amount of helium used for welding purposes and the amount of nitrogen used for laser-cutting purposes. Mr.

Carroll stated that he used the shipping information in the Taxpayer's invoices to identify which pad received that shipment of gas. According to the affidavit, all of the helium in question, except for a small amount sent to Pad 1, and all of the nitrogen in question, except for a small amount sent to Pad 5, was used for leak testing and structural stabilization. (Again, the Taxpayer argues that the helium and nitrogen used for those purposes were subject to the reduced machine rate.) Nevertheless, Mr. Carroll "removed all purchases of helium that were sent to Pad 1 and all purchases of nitrogen that were sent to Pad 5" from the Taxpayer's refund request, as well as "all purchases of argon, all purchases that the Department contends are outside the statute of limitations, and all purchases of helium and nitrogen" that could not be sourced to any pad. This process reduced the Taxpayer's claim to \$170,845.72 and, according to Mr. Carroll, was done "to provide a conservative calculation of how much helium and nitrogen are subject to the machine tax rate." Alternatively, Mr. Carroll calculated a refund amount of \$189,734.34, which includes the purchases of helium sent to Pad 1 and nitrogen sent to Pad 5, "in the event that the Tribunal determines that helium and nitrogen used in connection with welding and laser cutting equipment are subject to the machine tax rate." Both recalculated refund amounts contained in the affidavit are lower than the initial joint-petition amount of \$197,103.75 that was filed with the Revenue Department and the amount of \$193,524.37 requested at the hearing.

The Revenue Department filed a motion to strike the affidavit of Mr. Carroll, as well as its attachments and the portions of the Taxpayer's brief that referenced the affidavit. The Revenue Department also requested the suspension of the briefing schedule while its

motion is pending. The motion is based on 3 grounds – that the Taxpayer violated the Tax Tribunal’s administrative rule of evidence concerning the submission of affidavits; that the affidavit contains hearsay and statements that are not within the personal knowledge of Mr. Carroll; and that the post-hearing affidavit would prejudice the Revenue Department if admitted.

The Taxpayer responded by stating that the Tax Tribunal, by rule, has wide latitude concerning evidentiary matters and that the Revenue Department is not prejudiced by the submission of the affidavit. Specifically, the Taxpayer notes that the Revenue Department has always known that a refund is being claimed based on the reduced machine rate and that the affidavit does not change that position. Instead, it merely lowers the amount claimed. “Thus, the Department has taken the awkward position that it has been ‘unduly’ or ‘unfairly’ prejudiced by an affidavit that has been offered to lower [the Taxpayer’s] refund claim. This cannot be seen as prejudicial to the Department.” Alternatively, the Taxpayer proposes reopening the hearing to determine how much helium and nitrogen was used for welding and laser cutting, if the Taxpayer prevails concerning the machine-rate issue.

In reply, the Revenue Department argues that the Taxpayer failed to keep records that distinguish between the amounts of gases used for general-rate purposes and for reduced-rate purposes. Thus, the Revenue Department claims that there is no need for the Tax Tribunal to address the legal question “of whether some undocumented portion of the purchases of helium and nitrogen were taxable at the machine rate rather than the general rate. But allowing the Taxpayer to ‘get around’ or attempt to ‘limit its application to a lesser dollar amount of the refund’ (i.e. supplement) the testimony of its witness at trial, would

greatly prejudice the Department. Allowing this testimony, unreliable as it may be, forces the Department to change its trial defense strategy to defend itself against newly dressed refund claims by the Taxpayer asserted for the first time after the trial and address the viability of claims its auditors have never seen or were allowed to audit.”

In creating the Tax Tribunal, the legislature declared the following:

The Alabama Tax Tribunal shall not be bound by the rules of evidence applicable to civil cases in the circuit courts of this state. The Alabama Tax Tribunal shall admit relevant evidence, including hearsay, if it is probative of a material fact in controversy. The Alabama Tax Tribunal shall exclude irrelevant and unduly repetitious evidence. Notwithstanding the foregoing, the rules of privilege recognized by law shall apply.

Ala. Code § 40-2B-2(k)(4)

Subsequently, the Tax Tribunal adopted the following administrative rule concerning evidence:

The Tax Tribunal is not bound by the rules of evidence applicable in civil cases in circuit court. The Tax Tribunal may, at the discretion of the Tax Tribunal Judge, admit any evidence, including hearsay, that is probative and relevant to a material fact in issue. The Tax Tribunal Judge also has discretion to allow sworn affidavits in lieu of testimony if, in the Tax Tribunal Judge’s discretion, the sworn affidavit is sufficiently reliable to prove the fact or facts asserted. Notwithstanding the foregoing, the affidavit of a party to the appeal, a party’s agent, employee, family member, or any other individual whose interests appear to be aligned with the party, will be admissible in lieu of testimony only upon a showing that (1) the affiant is unavailable due to death or then existing physical or mental illness or infirmity, or (2) requiring the affiant’s presence at a hearing would be unduly burdensome and that the inability to cross examine the affiant will not unduly prejudice another party to the appeal. Any party that intends to submit a sworn affidavit in lieu of testimony must attest that the affiant is unavailable or that the affiant’s presence would be unduly burdensome, and also submit a copy of the affidavit to the Tax Tribunal at least 30 days before the date set for the hearing. The Tax Tribunal shall provide the opposing party with a copy of the affidavit, and allow that party 10 days to object to the affidavit. If the opposing party timely objects, the Tax Tribunal Judge shall thereafter have discretion to allow or disallow the affidavit, or to take such other action as deemed

appropriate under the circumstances. If deemed appropriate by the Tax Tribunal Judge, a sworn affidavit may be allowed without the affidavit being submitted for prior review, but only if, in the discretion of the Tax Tribunal Judge, the opposing party is not unduly or unfairly harmed or prejudiced by allowing the affidavit.

Ala. Admin. Code r. 887-X-1-.5

Here, the Taxpayer argues that the helium and nitrogen gases it used in leak testing and structural stabilization constituted machines. Therefore, it requests a refund of the amount of sales tax it paid in excess of the reduced machine rate. Obviously, Mr. Carroll's assertion of a specific refund amount is both relevant and probative of a material fact in controversy.

Further, Tax Tribunal judges have discretion to allow the submission of affidavits that were not submitted for prior review, if "the opposing party is not unduly or unfairly harmed or prejudiced..." Ala. Admin. Code r. 887-X-1-.5 However, the Revenue Department argues that the post-hearing submission of the affidavit would be unfairly prejudicial.

Specifically, the Revenue Department states that the Taxpayer was aware of the need to distinguish between uses of the gases prior to the hearing and that it should have presented the information contained in the affidavit during the hearing. The Revenue Department then asserts that the Taxpayer apparently kept the use of the gases for welding and laser cutting "their little secret until things went badly for them at trial. ... It was all a big gamble. ... The Taxpayer's representatives well knew that some of the helium and nitrogen was used for purposes that would make its purchase taxable at the general rather than the machine rate before the trial. They should explain exactly why they proceeded to trial without telling anyone about this. As I understand this situation, the Taxpayer just

gambled and lost.” According to the Revenue Department, the purpose of the affidavit is to assert a new, post-hearing claim because of Mr. Carroll’s testimony during the hearing.

The Tax Tribunal does not accept the Revenue Department’s characterization of the Taxpayer’s motive in submitting the affidavit. During the hearing, both parties – and the Tax Tribunal – raised questions concerning the specific refund amount that would be due if the Taxpayer prevails on the primary issue of whether the helium and nitrogen qualified as machines. And some of those questions concerned the Taxpayer’s different uses of the gases. On both direct and cross examination, Mr. Carroll testified that the Taxpayer uses helium and nitrogen for purposes other than leak testing and structural stabilization. On direct examination, he stated: “I think testing uses the most helium and nitrogen. They do use helium for blocking purges on the welders and tank center. Skin, ring, and dome uses some – that’s where they build the skins, the aluminum skins for the tanks. They use it on their laser cutter. I don’t know how much. I don’t think it’s much. I’m not familiar with those areas.” Likewise, on cross examination, Mr. Carroll testified that helium and nitrogen are used for purposes other than testing and stabilization, but not in large amounts.

Following the hearing, the Taxpayer submitted Mr. Carroll’s affidavit, in which he stated that all helium in issue, except the helium sent to Pad 1, and all nitrogen in issue, except the nitrogen sent to Pad 5, were used entirely for testing and structural stabilization. He further stated that the amounts of helium sent to Pad 1 and nitrogen sent to Pad 5 that were used for other purposes were *de minimis*. Nevertheless, he stated that all purchases of helium and nitrogen sent to Pads 1 and 5 were removed from Taxpayer’s Exhibit 8, thus reducing the requested refund amount.

Of course, accepting the affidavit as is, without allowing the Revenue Department the opportunity to question its assertions, would be unduly prejudicial. But such is not the situation here. First, the refund amount is not the primary issue, and the amount will be a nonissue if the Taxpayer does not prevail on the primary issue of whether the machine rate applies. Second, the Tax Tribunal has the authority to reopen the hearing and to allow discovery concerning the refund amount due if the machine rate applies. See Ala. Code § 40-2B-2(j)(3) and Ala. Admin. Code r. 887-X-1-.4(2)(f).

Therefore, the Revenue Department's Motion to Strike is denied. The suspension of the briefing schedule is rescinded. The Revenue Department's brief is due no later than **December 11, 2020**. The Taxpayer may file a reply brief no later than **December 21, 2020**.

Entered November 10, 2020.

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

jp:cm

cc: Alan Decker, Esq.
Doug Sigel, Esq.
Josh Veith, Esq.
David E. Avery, III, Esq.