

DANCO INDUSTRIAL CONTRACTORS, INC. §
1121 N. BEVERLYE ROAD
DOTHAN, AL 36303-5500, §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. S. 04-993

v.

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§

FINAL ORDER

The Revenue Department assessed Danco Industrial Contractors, Inc. ("Taxpayer") for Town of Pinckard use tax for March 2000 through February 2004. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on March 29, 2005. Dan Newman represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

The Taxpayer is a construction company in Dothan, Alabama. It subcontracted with Tiger Construction Company to perform work on a Mahado LLC construction project located in the police jurisdiction of the Town of Pinckard, Alabama. Tiger Construction provided the Taxpayer with a copy of a sales and use tax exemption certificate issued by the Department concerning the project. The Department had issued the exemption certificate based on an abatement granted for the project by the Ozark Industrial Development Board pursuant to Code of Ala. 1975, §40-9B-1, et seq. The Taxpayer subsequently purchased all of the materials used on the project tax-free in accordance with the exemption certificate.

The Town of Pinckard notified the Department that it had not adopted a resolution consenting to the location of the project within its police jurisdiction, as required by Code of Ala. 1975, §11-54-87(b)(3). The Department consequently denied

the exemption and assessed the Taxpayer for the Pinckard use tax due on the property used on the project. The Taxpayer appealed.

All counties, municipalities, and public industrial authorities are authorized by Code of Ala. 1975, §40-9B-1, et seq., to grant tax abatements for certain private use industrial projects. Municipal IDBs authorized by §11-54-80, et seq., qualify as public industrial authorities, and thus may grant abatements to industrial projects pursuant to §40-9B-1, et seq. Section 11-54-87(b) specifies, however, that a municipal IDB project must be within 25 miles of the municipality; provided, if a project is located in another town or municipality's police jurisdiction, the governing body of such town or municipality must first adopt a resolution agreeing to the location of the project in the police jurisdiction. See, §11-54-87(b)(3).

In this case, the Town of Pinckard did not adopt a resolution authorizing or agreeing to the location of the Mahado project in its police jurisdiction. Consequently, the Ozark IDB did not have jurisdiction to abate the Town of Pinckard taxes on the Mahado project.

Having determined that the Ozark IDB was not authorized to abate the Town of Pinckard's police jurisdiction use tax (or any other State and local taxes due on the project), two other issues must be addressed. First, even though the abatement was improper, does the Revenue Department have the authority to disregard the abatement and assess the Taxpayer for the Pinckard use tax due? Second, is the Department estopped from assessing the Taxpayer because it issued an exemption certificate indicating that all property used on the project would be exempt from sales and use tax?

The Administrative Law Division has previously held that the Revenue Department does not have the general authority to challenge an abatement of taxes granted pursuant to §40-9B-1, et seq. *Ross Breeders, Inc. v. State of Alabama*, S. 95-449 (Admin. Law Div. 10/1/96); *ABC Rail Products Corp. v. State of Alabama*, S. 94-393 (Admin. Law Div. 3/20/95). In this case, however, the Department is acting as the agent for the Town of Pinckard in assessing, collecting, and otherwise administering Pinckard's sales and use taxes. The Department is thus under an affirmative duty to assess and collect all taxes due. The use tax in issue is due because Pinckard never agreed to the project or the abatement of the taxes on the project, as required by §11-54-87(b)(3). Consequently, Pinckard use tax was properly assessed by the Department.

Concerning the estoppel issue, the Taxpayer was told by the project general contractor that the project was tax exempt. Not satisfied, the Taxpayer requested and was provided an exemption certificate issued by the Department indicating that the project was tax exempt. The Taxpayer then relied on that exemption certificate in good faith when it purchased the property for the project tax-free. The Taxpayer would obviously be harmed if it is required to pay the Pinckard use tax due on the project. All of the elements of estoppel are present. See generally, *City of Mobile v. Sumrall*, 727 So.2d 118, 121 (Ala. Civ. App. 1999).

Unfortunately for the Taxpayer, Alabama's Supreme Court has ruled that the Department cannot be estopped from properly assessing a taxpayer for all tax due, even if the taxpayer relied in good faith on some act or statement by the Department or

its employees. *Community Action Agency of Huntsville, Madison County, Inc. v. State*, 406 So.2d 890 (Ala. 1981); *State v. Maddox Tractor and Equip.*, 69 So.2d 426 (1953).

Alabama's appellate courts have applied the doctrine of equitable estoppel against government entities in Alabama under certain circumstances. See, *Ex parte Four Seasons Ltd.*, 450 So.2d 110 (Ala. 1984); *City of Mobile, supra*. Those cases do not, however, support a finding that the Department should be estopped from assessing the Taxpayer for the Pinckard use tax due. As discussed, the Alabama Supreme Court has consistently held that the State cannot be estopped in its duty to collect taxes. Also, while it would be equitable not to require the Taxpayer to pay the taxes due, it would also be unfair for the Town of Pinckard not to receive the taxes due. The Taxpayer is, of course, free to pursue whatever legal remedies it may have against the project owner, the general contractor on the project, and/or the Ozark IDB.

The final assessment is affirmed. Judgment is entered against the Taxpayer for tax and interest of \$10,257.20. Additional interest is due from the date of entry of the final assessment, November 5, 2004.

This Final Order may be appealed to circuit court within 30 days from the date of this Order pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered April 5, 2005.

BILL THOMPSON
Chief Administrative Law Judge