

GREAT AMERICAN INSURANCE CO. §  
c/o STARNES & ATCHISON, LLP §  
7TH FL., 100 BROOKWOOD PLACE §  
P. O. BOX 598512 §  
BIRMINGHAM, AL 35259-8512, §

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

Petitioner, §

DOCKET NO. S. 08-533

v. §

STATE OF ALABAMA §  
DEPARTMENT OF REVENUE.

### FINAL ORDER

Great American Insurance Company ("Petitioner"), as surety for William Cary Jones, d/b/a Bear Creek Motors; Robert Miller, d/b/a Auto Trends, LLC; Racynta Pollard, d/b/a H & R Auto Sales; and Platinum Automotive, Inc., appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-8(a) concerning bond claims filed against it by the Department. A hearing was conducted on September 23, 2008. Brian Dodd and Thomas Selden represented the Taxpayer. Assistant Counsel David Avery represented the Department.

The Petitioner issued \$10,000 bonds on behalf of the above four Alabama motor vehicle dealers pursuant to Code of Ala. 1975, §40-12-398. As discussed below, that statute requires all Alabama motor vehicle dealers to post a \$10,000 bond with the Department. The Department subsequently entered sales tax final assessments against each of the dealers. The Department attempted but failed to collect the sales tax from the dealers. It then demanded that the Petitioner discharge its obligation under the bonds by remitting the amounts owed by the dealers to the Department, up to the \$10,000 bond limit. The Petitioner appealed to the Administrative Law Division.

Section 40-12-398 requires that a used motor vehicle dealer in Alabama must provide a \$10,000 surety bond to the Department. The bond “shall be conditioned that the motor vehicle dealer . . . shall comply with the conditions of any contract made by such dealer in connection with the sale or exchange of any motor vehicle and shall not violate any of the provisions of law relating to the conduct of the business for which he is licensed.” Section 40-12-398. That statute further provides that the bond “shall be payable to the commissioner (of revenue). . . , and shall be in favor of any person who shall recover any judgment for any loss as a result of any violation of the conditions herein above contained.” The bond must be renewed or continued in effect every license year.

The Petitioner argues that the Department is not a “person” under the statute, and thus is not entitled to recover under the bonds. It also contends that the §40-12-398 bond provision was not intended to protect the Department from the risk of unpaid sales tax. Rather, the Petitioner asserts that the provision was intended to protect customers that had been defrauded or otherwise harmed by a dealer in connection with the purchase or trade of a motor vehicle. It claims that if a dealer’s bond is applied to pay the dealer’s unpaid sales tax, customers would have no recourse if they were subsequently defrauded or otherwise harmed by the dealer.

The Department argues that the Petitioner’s liability under the bonds should be broadly construed. It argues that by failing to pay the sales tax due, the dealers in issue violated Alabama law, and thus violated a condition of the bond, i.e., they violated a provision of Alabama law “relating to the conduct of the business for which (it) is licensed.” Section 40-12-398.

I disagree with the Petitioner's claim that the Department is not a "person," as the term is used in the statute. "Person" is not defined in Article 5 of Chapter 12, Title 40, Code 1975, which is where the §40-12-398 bond provision is found. The term is, however, defined at Code of Ala. 1975, §40-1-1, which applies to Title 40 generally. Section 40-1-1(8) defines "person" as "[a]ny individual, association, estate, trust, partnership, corporation, or other entity of any kind." An "entity" is "[s]omething that exists as a discrete unit." American Heritage College Dictionary, Fourth Ed. at 468. The Revenue Department is a discrete unit of the government of the State of Alabama. As such, it is an entity, and thus a "person" within the scope of the §40-12-398 bond provision.

The Petitioner is correct that a primary purpose of the bond provision is to protect a dealer's customers from fraud or malfeasance by the dealer. That protection is expressed in the first condition specified in §40-12-398, which requires that the dealer must comply with any contract concerning the sale or exchange of a motor vehicle.<sup>1</sup>

But a second condition in the statute also provides that the dealer "shall not violate any of the provisions of law relating to the conduct of the business for which he is licensed." Motor vehicle dealers are required by Alabama law to collect sales tax on all taxable retail sales and remit the tax to the Department. See, Code of Ala. 1975, §40-23-1, et seq. The four motor vehicle dealers in issue violated Alabama law, and thus a condition of their bonds, when they failed to pay the sales tax in issue.

---

<sup>1</sup> That condition also covers transactions in which a bonded dealer purchases a motor vehicle from a wholesaler. See, *Old Republic Surety Company v. Auto Auction of Montgomery, Inc.*, 816 So.2d 1059 (Ala. Civ. App. 2001).

The above holding is supported by the Louisiana Court of Appeals' decision in *Aetna Casualty & Surety Co. v. Lively-Culpepper Chevrolet Oldsmobile, Inc.*, 609 So.2d 1055 (La. Ct. App. 1992). In that case, Aetna had issued a bond to a motor vehicle dealership in Louisiana. The bond was required by Louisiana law, LSA-R.S. 32:1254(M)(4), and contained statutory conditions substantively identical to the conditions in §40-12-398. Specifically, the bond was "conditioned so that the (dealer) shall comply with the conditions of any written contract made by such dealer . . . in connection with the sale or exchange of any motor vehicle and shall not violate any of the provisions of this Chapter or any other law of Louisiana in the conduct of the business for which he is licensed."

The motor vehicle dealership failed to pay sales tax to the State. The State filed a claim with Aetna concerning the liability. Aetna paid the State and sued the dealership for reimbursement of the amount paid. The dealership argued that the sales tax liability was not covered by the bond, and also that the State was not a "person" under the bond statute. The Louisiana Court first rejected the dealership's claim that its failure to pay sales tax had not violated a condition in the bond:

The statute clearly states that '[s]uch bonds... shall be conditioned so that the..., dealer,... shall comply with the conditions of any written contract made by such dealer... in connection with the sale or exchange of any motor vehicle and shall not violate any of the provisions of this Chapter *or any other law of Louisiana in the conduct of the business* for which he is licensed.' (emphasis in original).

Louisiana law requires motor vehicle dealers to collect sales tax on vehicles sold. LSA-R.S. 47:303B. When the dealer fails to remit those taxes, the Department of Revenue and Taxation must seek collection under LSA-R.S. 47:1569, et seq. If in the present case, the dealership did not remit taxes it collected from the sale of the vehicle to the Department of Revenue and Taxation, it violated the law. Such a violation is one of

those activities covered by the fidelity bond. See LSA-R.S. 32:1254(M)(4), *supra*.

*Aetna Casualty*, 609 So.2d at 1057.

The Court also found that the State and its agencies were included in the term “person” for purposes of the bond statute.

Although LSA-R.S. 32:1254(M)(4) does not explicitly state that a governmental entity is to benefit from the bond, the context and legislative policy behind the statute allows us to find the state and its agencies to be included in the term “person.”

Such an application is consistent with, and tends to effectuate the public policy evidenced by the statute. The purposes of taxation on the part of the government is to provide funds with which to promote the general welfare and protection of its citizens. The state demands and receives taxes so that it can perform the functions of government. The citizen pays these taxes in order that he may, by means thereof, be secured in the enjoyment of the benefits of an organized society. Thus, it is in the public’s welfare and interest that sales taxes be collected and remitted to the state’s coffers. Additionally, the consumer is ultimately responsible for payment of the sales tax and it is appropriate for the state to insure its payment from the dealer.

We hold that all the considerations which moved the legislature to confer the right to recover under the bond upon individuals, firms, corporations, partnerships or associations injured by violations of the statute apply with equal force to the State of Louisiana and its governmental entities.

*Aetna Casualty*, 609 So.2d at 1059.

The §40-12-398 bond is “in favor of any person who shall recover any judgment” against a motor vehicle dealer. A final assessment unappealed from is tantamount to a circuit court judgment against a taxpayer in favor of the Department. *Lambert v. State Dept. of Revenue*, 414 So.2d 983 (Ala. Civ. App. 1982). The Department is thus entitled to recover from the Petitioner the sales tax, penalties, and interest owed by the four dealers in issue, up to the \$10,000 limit on each bond.

Judgment is entered against the Petitioner for \$30,000 relating to the bonds issued on behalf of William Cary Jones, d/b/a Bear Creek Motors; Racynta Pollard, d/b/a H & R Auto Sales; and Platinum Automotive, Inc.; and \$3,401.35 relating to the bond issued on behalf of Robert Miller, d/b/a Auto Trends.

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

Entered December 1, 2008.

---

BILL THOMPSON  
Chief Administrative Law Judge

bt:dr

cc: David E. Avery, III, Esq.  
Brian A. Dodd, Esq.  
Thomas L. Selden, Esq.  
Joe Cowen  
Joan Crumbley