

JOE KEENUM EXCAVATION &
CONSTRUCTION, INC.
302 BRICK PIKE
MUSCLE SHOALS, AL 35661-1372,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 09-1185

FINAL ORDER

The Revenue Department assessed Joe Keenum Excavation & Construction, Inc. ("Taxpayer") for State sales tax, State use tax, and local tax for February 2006 through December 2008. 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 April 28, 2010. The Taxpayer's owner, Joe Keenum, and its representative, Donald Harriman, attended the hearing. Assistant Counsel Wade Hope represented the Department.

The Taxpayer is in the excavation and construction business, and is headquartered in Muscle Shoals, Alabama. It performed work for the State of Alabama and various other exempt entities in Alabama during the period in issue.

Before 2000, contractors that performed work for governmental and other exempt entities in Alabama were required to pay sales or use tax on the materials they purchased and used to complete the contracts. In 2000, the Legislature enacted Act 2000-684, subsequently codified at Code of Ala. 1975, §40-9-33. That Act exempted from sales and use tax all tangible personal property sold to contractors that was subsequently incorporated into realty pursuant to a contract with an exempt governmental entity in Alabama.

In 2004, the Legislature enacted Act 2004-638, which repealed the §40-9-33 exemption, effective July 1, 2004. The Act also amended Code of Ala. 1975, §40-23-2 to distribute a greater portion of the sales tax collected on automobiles to the General Fund. Section 6. of that part of the Act that amended §40-23-2 stated that “[t]he provisions of this amendatory act shall terminate on October 1, 2006.”

The Taxpayer was informed in June 2004 that the §40-9-33 exemption had been repealed. It contacted the Department’s Muscle Shoals Taxpayer Service Center on June 22, 2004 to verify that the exemption had been repealed. The Department confirmed that the exemption was repealed, effective July 1, 2004. It also provided the Taxpayer with a “Notice to Contractors” that it had recently issued concerning the exemption repeal. The Notice confirmed that the exemption had been repealed, and also included the following statement – “The Act (2004-638) states that ‘its provisions. . . shall terminate on October 1, 2006.’” The Notice did not inform contactors that the above termination date of October 1, 2006 applied only to the amendment to §40-23-2.

Before the July 1, 2004 effective date of the exemption repeal, various parties raised questions about the new Act, and specifically whether the repeal of the §40-9-33 exemption would terminate on October 1, 2006. An Attorney General’s Opinion was requested in which various issues were raised, including whether the exemption would be revived on October 1, 2006. The Attorney General issued an expedited Opinion on June 30, 2004 holding in pertinent part that “Section 40-9-33 will not be revived when the provisions of Act 2004-638 terminate on October 1, 2006.” Attorney General Opinion 2004-170 at 5. The Department never notified the Taxpayer, or Alabama contractors in general, concerning the Attorney General’s Opinion, or that the §40-9-33 exemption would not be revived on

October 1, 2006.

The Taxpayer began paying sales and use tax on materials it used on government contracts after the July 1, 2004 effective date of the exemption repeal. The Taxpayer stopped paying sales and use tax on such materials after October 1, 2006 based on its understanding of the Department's June 2004 Notice to Contractors that the exemption repeal would terminate on that date. The Taxpayer was unaware of Attorney General's Opinion 2004-170, and was otherwise never notified that the exemption would not revive on October 1, 2006.

The Department audited the Taxpayer for the period in issue and assessed it for sales or use tax on the materials it used on governmental contracts after October 1, 2006. It also assessed the Taxpayer on various other uncontested items. The Taxpayer paid the uncontested tax due and appealed the final assessments in issue, which are based solely to tax on materials used on government contracts after October 1, 2006.

The Taxpayer argues that it should not be liable for the disputed tax in issue because the Department's Notice to Contractors misinformed it that the repeal of the §40-9-33 exemption would expire or terminate on October 1, 2006. It contends that the Department failed to inform contractors of the June 30, 2004 Attorney General's Opinion, or otherwise that the exemption would not be revived on October 1, 2006.

Therefore, we believe that Joe Keenum Excavation & Construction Inc. should not be held liable for this tax because the company was misinformed by the false and/or misleading information contained in the Department of Revenue's NOTICE TO CONTRACTORS – ACT NO. 2004-638, and the Department failed to correctly and fully inform the company once the Attorney General had issued his opinion.

Taxpayer's Notice of Appeal at 2.

I agree with the Taxpayer that a reasonable interpretation of the Department's June 2004 Notice to Contractors was that the repeal of the §40-9-33 exemption would terminate on October 1, 2006, and consequently, that the exemption would revive and again be in effect after that date. In an ideal world, the Department should have notified the Taxpayer and all other contractors of the June 30, 2004 Attorney General's Opinion to the contrary, especially considering that the Department's June 2004 Notice to Contractors indicated that the provisions of the 2004 Act, i.e., the exemption repeal, would terminate on October 1, 2006. It failed to do so.

Unfortunately for the Taxpayer, the fact that the Department's Notice to Contractors misled the Taxpayer into believing that the §40-9-33 exemption would be revived in October 2006 is of no legal consequence. The Alabama Supreme Court has held that the State cannot be estopped from assessing a tax that is legally due based on erroneous or misleading advice concerning the tax from the Revenue Department or a Revenue Department employee. The Court's opinion in *State v. Maddox Tractor & Equipment Co.*, 69 So.2d 426 (Ala. 1953), reads in part, as follows:

But it is argued that the State should be estopped from taking the position which it has taken in this case and from assessing the tax when the appellees were advised that they were not responsible for the tax. 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, 179 P.2d 252, 260, 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.

See also *Durr Drug Co. v. Long*, 237 Ala. 689, 188 So. 873; *State ex rel. Lott v. Brewer*, 64 Ala. 287, 298; *Henderson v. Gill*, 229 N.C. 313, 49 S.E.2d 754.

The case at bar is not a case where the State was acting in its proprietary capacity. *State v. Mobile & O. R. Co.*, 201 Ala. 271, 78 So. 47.

In addition to what we have said, we must take note of §100 of the Constitution of Alabama of 1901, which provides as follows:

No obligation or liability of any person, association, or corporation held or owned by this state, or by any county or other municipality thereof, shall ever be remitted, released, or postponed, or in any way diminished, by the legislature; nor shall such liability or obligation be extinguished except by payment thereof; nor shall such liability or obligation be exchanged or transferred except upon payment of its face value; provided, that this section shall not prevent the legislature from providing by general law for the compromise of doubtful claims.

In view of this provision of the constitution, the doctrine of estoppel cannot be applied against the State acting in its governmental capacity in the collection of taxes duly levied by the legislature of the *State, Union Bank & Trust Co. v. Phelps*, 228 Ala. 236, 153 So. 644.

Maddox, 69 So.2d at 430.

I sympathize with the Taxpayer in this case. If the Taxpayer had been notified that the exemption was not revived on October 1, 2006, it could have included tax in its contract bid amounts after that date, and thus passed that cost onto the various governmental entities. It presumably did not do so, and thus must now bear the economic burden for the taxes. The various governmental entities, including the State, benefited by not having to bear the economic burden for the tax on the materials used by the Taxpayer, and the State is now again benefiting by collecting the tax from the Taxpayer. Unfortunately for the Taxpayer, Alabama law is clear that the State cannot be estopped from collecting the tax due in such cases. I consequently have no choice but to affirm the final assessments in issue.

Judgment is entered against the Taxpayer for State sales tax and interest of \$105,907.16; local tax and interest of \$58,092.02; and consumers use tax and interest of \$20,502.40. Additional interest is also due from the date the final assessments were entered, November 13, 2009.

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

Entered May 26, 2010.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: J. Wade Hope, Esq.
Joe Kennum
Donald Harriman
Joe Cowen
Mike Emfinger