

RIVERSIDE TRUST §
726 N. W. SPRING LAKE BLVD.
PORT CHARLOTTE, FL 33952, §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Petitioner, §

DOCKET NO. S. 09-421

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

FINAL ORDER

This appeal involves a denied petition for refund of lodgings tax for January 2001 through July 2004 requested by Riverside Trust ("Trust"). The Trust appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(c)(2)a. A hearing was conducted on April 20, 2010. Will Sellers represented the Trust. Assistant Counsel Wade Hope represented the Department.

Francis Joseph Hesser ("Hesser") deeded certain property located in Demopolis, Alabama to the Trust in November 2007. The deed was duly recorded in the Judge of Probate's Office in Marengo County, Alabama.

Hesser subsequently constructed and operated a motel on the subject property. The Department audited the motel for lodgings tax and assessed Hesser, individually, as the owner/operator of the motel, for lodgings tax for January 2001 through July 2004. Hesser appealed to the Administrative Law Division.

Hesser argued on appeal that the Trust owned the motel, and consequently, that he was not personally liable for the lodgings tax in issue. The Administrative Law Division disagreed, holding that Hesser, and not the Trust, had owned and operated the motel, and was thus personally liable for the lodgings tax owed by the business. The Division thus affirmed the final assessment entered against Hesser, individually, by Final Order dated

August 17, 2005. See, *Hesser v. State of Alabama*, S. 05-225 (Admin. Law Div. 8/17/2005).

Hesser appealed to Marengo County Circuit Court. That Court dismissed the appeal in April 2007 for lack of subject matter jurisdiction.

In December 2004, while the case was pending before the Administrative Law Division, the Department filed a lien in the Marengo County Probate Judge's Office against Francis Joseph Hesser for the lodgings tax in issue. Hesser died in November 2005. The Department subsequently refiled the above tax lien against the Estate of Francis Joseph Hesser in the Marengo County Probate Office in January 2006.

The Trust sold the subject property by warranty deed in July 2008. The title insurance commitment issued by the title insurance company in conjunction with the sale required that the liens filed by the Department against Hesser and the Estate of Hesser in December 2004 and January 2006, respectively, must be satisfied.

The Trust's closing agent, Reli, Inc., duly issued a check to the Department on July 10, 2008 in the amount of \$41,107.18, as payment in full for the lodgings tax owed by the Estate of Hesser.

The Trust petitioned the Department in October 2008 for a refund of the above amount. The petition was deemed denied after six months, Code of Ala. 1975, §40-2A-7(c)(3). This appeal followed.

The Trust argues (1) that the 1997 conveyance of the property from Hesser to the Trust was valid; (2) that the Trust was not liable for the lodgings tax in issue; and (3) that the Department's tax liens did not attach to the Trust's property. The Trust thus contends

that the amount it paid to satisfy the liens against Hesser and the Estate of Hesser was erroneously paid, and is due to be refunded. The Trust's excellent brief reads as follows:

A. The Instrument of Conveyance was Sufficient to Vest Title to the Property in Riverside Trust.

In the instant case, a Special Warranty Deed was filed on November 10, 1997 and recorded in Book 9C, at Page 458, in the Probate Court of Marengo county. This deed conveyed certain property owned by Francis J. Hesser to Riverside Trust. A copy of this deed was attached to Taxpayer Petition for Refund as Exhibit "A". No assertion is made that the deed was deficient, invalid or otherwise failed to convey title. Any instrument in writing, signed by the grantor is effective to transfer legal title to the grantee if such was the intent of the grantor as determined by the entire instrument. (Ala. Code 35-4-21.) A review of the deed transferring property to the trust clearly indicates an intent to transfer legal title. And, once the deed was recorded in the Marengo County probate office, no other acknowledgement or probate was necessary to validate the deed. (See, ala. Cod 35-4-63, *Benrow v. Brown*, 94 So. 772 (Ala. 1922) and *Christopher v. Shockley*, 75 So. 158 (Ala. 1917)). In fact, when the property was sold in 2008, both the Warranty Deed and the Title Insurance Commitment (attached to the Taxpayer's Petition for Refund as Exhibits "B" and "D" respectively), listed Riverside Trust as the owner of the property. Title to the property was vested in Riverside Trust when the lodging taxes accrued.

B. The Proper Taxpayer is Riverside Trust.

In the Final Order in *Hesser*, the Taxpayer was Francis Joseph Hesser and not Riverside Trust. In that case, the Administrative Law Judge held that Mr. Hesser and not the Riverside Trust was personally liable. In fact the issue squarely before the court then was, "is . . . [Hesser] personally liable for the lodging tax." (See, *Hesser* at page 1). This court found that "the Taxpayer (Hesser) [is] personally [liable] for the tax due." (See, *Hesser* at page 6). The Revenue Department would now seek to overturn *Hesser* and support the claim that Riverside Trust and not Hesser should be responsible for the taxes paid. Liens filed to collect taxes against an individual cannot attach to property vested in a trust.

C. Tax Liens Should Not Attach to Trust Property.

The liens in this case arose from taxes accrued from January 2001 through 2004. However, the deed was recorded in 1997; it would be impossible for any liens for lodging tax to have accrued at that point to attach

to the property and prevent the conveyance from vesting good and marketable title in Riverside Trust. There is no allegation of a fraudulent conveyance and nothing in the facts indicates that a lien accruing more than three years after the conveyance could somehow interrupt the clear title vested in Riverside Trust. Indeed, it would be difficult, if not impossible for a conveyance in 1997 to anticipate a deficiency for taxes accruing more than three (3) years after that date. The liens as filed were invalid against the property owned by Riverside Trust.

D. Riverside Trust Was the Valid Owner of the Property.

There is no allegation that Riverside Trust is an invalid trust and was not the owner of the property at the time the taxes accrued (January 2001 – 2004) or when the liens were filed (Dec. 8, 2004 and Jan. 23, 2006). Alabama law is clear: in order to create a valid trust to hold real property, there must be an instrument in writing, signed by the parties manifesting the objects of the trust with reasonable certainty. *First Alabama Bank of Tuscaloosa, N.A. v. Webb*, 373 So.2d 631 (Ala. 1979). The Declaration of Trust creating Riverside Trust certainly meets the criteria to form a valid trust to hold real property in Alabama. And, when the deed was filed conveying the property to the trust, that conveyance was valid, was not fraudulent in any way and certainly was formed and the property conveyed. Thus, the liens filed against that property are not liens encumbering the property owned by Riverside Trust but were liens against property owned by Francis Joseph Hesser.

E. Riverside Trust is not Liable for Lodging Taxes.

The Taxpayer here believes that the prior decision in *Hesser* confirms that Riverside Trust is not liable for the lodging tax at issue. As such, the liens should never have attached to property owned by Riverside Trust. When Riverside Trust conveyed its property in Marengo County in 2008, no tax lien for lodging tax from 2001 through 2004 should have attached to the property requiring a payoff. When the Title Insurance Commitment required the payment and satisfaction of the tax liens from 2004 and 2006, this was a mistake at closing, the satisfaction of the liens should have been omitted as a requirement to convey title; the check tendered in satisfaction of such liens was issued inappropriately, by mistake and should be refunded to the Taxpayer.

Trust's Post-Hearing Brief at 2 – 3.

The Department argued in its Answer that the Trust is improperly attempting to re-

litigate the *Hesser* lodgings tax appeal.

The issues being raised in the current appeal were also raised and addressed by the ALD in its Final Order in the Hesser case dated August 17, 2005. A copy is attached hereto. In that case it was alleged that Riverside Trust was the owner of the Motel and not Mr. Hesser. The ALD disagreed and the case was appealed to the Marengo County Circuit Court. Accordingly, the substantive issues raised were previously addressed by the ALD and Riverside Trust can not again come before the ALD and attempt to re-litigate the issues that were previously raised or that should have been raised at that time. In addition, the case was appealed to the Circuit Court of Marengo county whereby, as an appeal trial de novo, all issues could have again been addressed there. You can not get two bites of the appeal. Here, there is an attempt to get 3 bites!

Department's Answer at 1 -2.

To begin, the issue in this case is not the same as the issue in *Hesser*. The issue in *Hesser* was whether Hesser or the Trust was liable for the lodgings tax in issue. The issue in this case is whether the amount paid by the Trust, through Refi, Inc., was an "overpayment of tax" within the scope of the general refund statute, Code of Ala. 1975, §40-2A-7(c)(1). Consequently, this appeal is not an attempt by the Trust to relitigate the issue in *Hesser*.

The Administrative Law Division held in *Hesser* that the Trust was a sham entity that did not actually operate the motel. The Final Order in *Hesser* found in part that "[t]here is no evidence the trust in issue was created for any purpose other than tax avoidance. Consequently, it will not be recognized for Alabama tax purposes." *Hesser* at 6. That statement must, however, be read in context.

The issue in *Hesser* was whether the Trust or Hesser, individually, operated the motel, and was thus liable for the lodging tax in issue. As indicated, the Administrative Law Division held that the Trust was not a viable, operating entity. It found that Hesser in

substance owed and operated the motel, and was thus individually liable for the lodgings tax in issue.

The Administrative Law Division did not hold in *Hesser* that the Trust could not receive and hold title to real property. I find that the property in issue was validly transferred to the Trust in 1997, and that the Trust thereafter had title to the property until 2008.

I further agree that the Trust was not liable for the lodgings tax in issue, and also that the liens filed in Marengo County against Hesser and the Estate of Hesser did not attach and were not valid against the property owned by the Trust. Notwithstanding the above, however, the refund is still due to be denied.

The Trust, through its closing agent, Refi, Inc., voluntarily paid the lodgings tax owed by the Estate of Hesser. “The Alabama Supreme Court has held that if one party, with full knowledge of the facts, voluntarily pays the debt of another, the amount cannot be recovered unless there is fraud, duress, or extortion. *Mt. Airy Ins. Co. v. Doe Law Firm*, 668 So.2d 534 (Ala. 1995).” *Smith v. State of Alabama, Inc.* 08-142 (Admin. Law Div. 8/13/2008) at 3. The Revenue Department’s Answer in the above *Smith* case read in part as follows:

As a general rule, Alabama courts have long recognized the defense of voluntary payment. In *Mt. Airy Ins. Co. v. Doe Law Firm*, 668 So.2d 534, 537 (Ala. 1995), the Court noted, “It has been the law in Alabama for over 150 years that where one party, with full knowledge of all the facts, voluntarily pays money to satisfy the colorable legal demand of another, no action will lie to recover such a voluntary payment, in the absence of fraud, duress, or extortion.” And while the Department recognizes that the general rule regarding voluntary payments has evolved somewhat, it is, “...equally well-settled that money voluntarily paid with full knowledge of the facts by reason of mistake of law cannot be recovered.” *Sherrill v. Frank Morris Pontiac-*

Buick-GMC, Inc., 366 So.2d 251, 257 (1978). See also *H.A. Edwards Ins. Agency v. Jones*, 7 So.2d 567 (Ala. 1942) (A person cannot recover back money which he has voluntarily paid with full knowledge of all the facts, without fraud, duress, or extortion in some form); *Rutherford v. Mclvor*, 21 Ala. 750 (Ala.) (A party cannot recover money, voluntarily paid, with a full knowledge of all the facts, although no obligation to make such payment existed); *Weaver v. American Nat. Bank*, 452 So.2d 469 (Ala. 1984) (One who pays more than he owes may recover the excess if the payment was involuntary or was procured through fraud, duress, or misrepresentation.)”

Department’s Answer in *Smith* at 5 – 6.

The Trust, through its agent, Refi, Inc., was aware of all relevant facts when it paid the lodgings tax in issue to the Department. The title insurance commitment itself stated that the liens in issue were against Hesser and the Estate of Hesser, and not the Trust. There was also no fraud or duress by the Department. Rather, the Department’s only acts were to record the above liens against Hesser and the Estate of Hesser in the Marengo County Probate Office. It made no claim or threat against the Trust for the unpaid taxes. As the Administrative Law Division stated in *Smith* – “The Petitioner thus voluntarily paid the amount, and pursuant to the above case law, cannot now recover the amount as erroneously paid. See also, *National Bank of Boaz v. Marshall County*, 157 So.2d 444 (Ala. 1934).” *Smith* at 4.

The Department’s denial of the Trust’s refund petition is affirmed.

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

Entered July 20, 2010.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

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