

ROCKING CHAIR TRUCKSTOP, INC. §
410 HIGHWAY 80 SPUR
CUBA, AL 36907-9503, §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer, §

DOCKET NO. S. 10-176

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

FIFTH PRELIMINARY ORDER ON TAXPAYER'S APPLICATION FOR REHEARING

This appeal involves final assessments of State and local sales tax for February 2005 through March 2008. A Final Order was entered on June 30, 2011 reducing the final assessments in issue. The Taxpayer applied for a rehearing, and a hearing on the application was conducted on November 16, 2011. Greg Yaghmi and Stephen Schniper represented the Taxpayer. Assistant Counsel Margaret McNeill represented the Department.

The Taxpayer raised a procedural issue at the November 16 hearing concerning the Department's delay in responding after the initial hearing on June 1, 2010. Specifically, the Taxpayer submitted additional information to the Administrative Law Division on July 2, 2010. The information was submitted to the Department for review and response by Second Preliminary Order dated July 8, 2010. The Department responded on April 22, 2011. The Taxpayer claims that the long delay violated the Alabama Taxpayer Bill of Rights ("TBOR"), and consequently, that the final assessment should be dismissed. The Taxpayer cites *Plantation Oaks of Alabama, Inc. v. State of Alabama*, Docket U. 04-728 (Admin. Law Div. 1/6/2005) in support of its case.

Plantation Oaks involved the Code of Ala. 1975, §40-2A-9(c) requirement that the Department must file an Answer in an appeal before the Administrative Law Division within 90 days. That case does not apply, however, because there is no statutory requirement within which the Department or a taxpayer must respond to a Preliminary Order issued by the Administrative Law Division. The Division may dismiss an appeal if a party fails to comply with a Preliminary Order, see Code of Ala. 1975, §40-2A-9(b), but the Preliminary Order directing the Department to review the Taxpayer's information and respond did not set a specific response date.

Over nine months is an unusually long time for the Department to act. Consequently, a copy of this Order will be submitted to the Department's Taxpayer Advocate to determine how much accrued interest should be abated due to undue Department delay. Code of Ala. 1975, §40-2A-4(b)(1)c.

The Taxpayer also raised various substantive issues at the November 16 hearing. The Department responded by letter, with attachments, dated February 23, 2012. One of the issues (Paragraph 3) involves the Taxpayer's claim that it paid tax on various items it purchased from Sysco that were not consumables, but rather were resold by the Taxpayer.

Mr. Schniper: Yes, Sir. The items that are listed, it shows clearly these are food items. It shows the sales and it shows the tax amount that was collected and summarized on each one of the invoices.

(T. 31).

The Department has responded that the sixteen pages submitted by the Taxpayer shows tax collected on only consumables. It indicates, however, that it is willing to review any other documents on the issue that the Taxpayer may have.

The Taxpayer is allowed until April 20, 2012 to resubmit the sixteen pages and specifically identify each non-consumable item it claims it paid tax on. It may also submit any other documents showing with specificity that it paid sales tax on items subsequently resold. The documents will be submitted to the Department for review and response. Appropriate action will then be taken.

Entered March 28, 2012.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: Margaret Johnson McNeill, Esq.
Stephen H. Schniper
Gregory Yaghmi, Esq.
Joe Walls
Mike Emfinger
Brenda Russ (w/enc.)