

MICHELIN NORTH AMERICA, INC.
1 PARKWAY SOUTH
GREENVILLE, SC 29615-5022,

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§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. S. 10-794

v.

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§

FINAL ORDER

The Revenue Department assessed Michelin North America, Inc. (“Taxpayer”) for State sales tax and State use tax for June 2003 through May 2006. 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, 2011. Bruce Ely and Jimmy Long represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

ISSUE

The Taxpayer manufactured tires at three facilities in Alabama during the period in issue. The Taxpayer used what are commonly referred to as “curing presses” to manufacture the tires. It operated boilers at the facilities that produced the steam needed to operate the curing presses. The issue in this case is whether the fuel oil used to power the boilers was exempt from Alabama sales and use tax as “fuel oil purchased as fuel for kiln use in manufacturing establishments” in Alabama. Code of Ala. 1975, §§40-23-4(a)(14) and 40-23-62(15).¹ It is undisputed that the Taxpayer’s tire plants were manufacturing establishments. The issue thus turns on whether the curing presses are

¹ The quoted statutory language is in the sales tax exemption at §40-23-4(a)(14). The use tax exemption at §40-23-62(15) is worded slightly different in that it exempts fuel oil “purchased as fuel for kilns used in manufacturing establishments.” The exemptions are, however, in substance identical.

kilns, pursuant to Alabama case law and Revenue Department regulation.

FACTS

The Taxpayer manufactured tires at its three Alabama plants during the period in issue using approximately 40 to 50 curing presses at each facility. The curing presses were used to shape and also cure or vulcanize “green” tires into finished, ready to use tires. A green tire is comprised of rubber polymers, sulfur, steel belts and beads, and almost 200 other ingredients, and is in a plastic, malleable condition in its raw state.

A curing press generally includes two tire molds inside the press into which the green tires are placed. Rubber bladders are inserted into the green tires in the molds. The bladders are inflated by steam as the molds are closed, and the pressure from the bladders forces the green tires into the molds, thus forming the treads and sidewall labels and patterns.

The curing press is also closed around the tire molds during the shaping and curing process. The press includes refractory materials that minimize heat loss, and is heated via the steam boilers that are powered by the fuel oil in issue. The resulting pressure and heat in the curing press chemically alters the ingredients in the green tires, and causes the tires to harden and develop stable, elastic qualities. The curing or vulcanization process is explained on the Taxpayer’s website, Department Ex. 2, as follows:

Curing takes the tire from a plastic to an elastic state by means of Sulphur bridges created between the elastomer chains: this is called vulcanization. Curing creates the composite structure between the various elements of the tire. The mixings bond together and the plies and wires are intermingled. Mold vulcanization is carried out on special presses by means of the combined action of heat and pressure. The tire is simultaneously heated from the outside (for example with steam circulating on the inside of the mold walls) and from the inside (generally with a hot pressurized fluid contained in

a rubber membrane inside the tire).

Pressure (over 10 bars) is used to compress the tire from the inside and apply it against the mold so that it takes the shape, tread pattern and markings engraved in the mold. Vulcanization time varies according to the tire dimensions, operating techniques and the mixings used: it ranges from a few minutes for a bicycle tire to the 15 minutes required for a passenger car tire and the 24 hours or more needed for large tires for earthmoving equipment. The vulcanization temperature is generally between 100 and 200°.

This operation causes the rubber mixing to lose its initial plasticity by giving it stable elastic properties. It is also during the curing process that the tire acquires its tread pattern and markings.

The shaped and cured tires are removed from the molds and go through various acceptance and quality control tests, but are essentially ready for use at that time.

The steam boilers used by the Taxpayer to provide heat and pressure in the curing presses also provide heat for other uses in the Taxpayer's facilities. The steam used in the curing presses is, however, separately metered from the steam used for other purposes. The Taxpayer has thus computed the amount of fuel oil it burned to create the steam used to operate the curing presses during the assessment period. It contends that that portion of the fuel oil was exempt from sales and use tax pursuant to the exemptions in issue.

ANALYSIS

The §40-23-4(a)(14) sales tax exemption for fuel oil used in kilns has been in issue in three reported cases in Alabama. In *Republic Steel Corp. v. Horn*, 105 So.2d 446 (Ala. 1958), the issue was whether a hearth furnace used in making steel constituted a "kiln" for purpose of the fuel oil exemption in issue. Applying the rule of statutory construction that a word not specifically defined in a statute must be given its generally accepted meaning in everyday usage, the Supreme Court held that the hearth furnace in issue was not a kiln – “.

. . the answer to the question posed above must be in the negative, for it is clearly established that the word 'kiln' as used and accepted in everyday parlance does not include a hearth furnace used in making steel." *Republic Steel*, 105 So.2d at 447.

In *State of Alabama v. Bunge Corporation*, Docket S. 88-117 (Admin. Law Div. 12/16/1988), the issue was whether certain devices, i.e., grain dryers, conditioners, toasters, meal dryers, etc., used to process soybeans constituted kilns for purposes of the exemption. Citing various definitions of the term, the Administrative Law Division held that the devices were kilns:

In summary, a kiln is an oven-type device used in the drying of any number of substances, including grain, meals, etc. Thus, clearly the devices in issue, which are used exclusively to dry or demoiseurize soybeans, are kilns within the context of the above definitions.

Bunge at 4 – 5.

In *State of Alabama v. American Brass, Inc.*, Docket S. 86-141 (Admin. Law Div. 7/15/1991), the issue was whether large rotating ovens used to melt various scrap metals into ingots were kilns for purposes of the §40-23-2(a)(14) exemption. The Administrative Law Division found that the ovens were not kilns. The Henry County Circuit Court reversed, holding, without analysis, that the ovens were kilns. The Court of Civil Appeals reversed, finding that the ovens were not kilns within in the context of the exemption statute. *State of Alabama v. American Brass, Inc.*, 628 So.2d 920 (Ala. Civ. App. 1993).

The Court adopted the reasoning of the Administrative Law Division, as follows:

The word "kiln" is not defined in the revenue code. In such cases, a word must be given its plain, ordinary meaning, which is accepted in popular everyday usage. *Darks Dairy, Inc. v. Alabama Dairy Commission*, 367 So.2d 1378; *Guthrie v. Civil Service Board of the City of Jasper*, 342 So.2d 372; *Republic Steel Corporation v. Horn*, 105 So.2d 446.

Research reveals a number of definitions and uses for a kiln, some of which are set out below:

The *American Heritage Dictionary*, Second College Edition, provides the following definition:

Kiln, Any of various ovens for hardening, burning or drying substances such as grain, meal, or clay, esp. a brick-lined oven used to bake or fire ceramics.

Webster's New International Dictionary, Second Unabridged Edition, defines the word as follows:

Kiln: A large stove or oven; a furnace of brick or stone, or a heated chamber, for the purpose of hardening, burning, or drying anything; often specif., a brick kiln, a lime kiln or a cement kiln.

The New Columbia Encyclopedia, Fourth Edition, states as follows:

Kiln, furnace for firing pottery and enamels, for making brick, charcoal, lime and cement, for roasting ores, and for drying various substances (e.g. lumber, chemicals). Kilns may be updraft or downdraft; round, conical, annular, or rectangular; arranged for intermittent or continuous firing and of the multiple (double-wall) or direct contact type, as required. Rotary kilns are much used in continuous processing, including cement manufacturing and the drying of granular materials. They consist of long tubes lying almost horizontally that are rotated slowly as heat is applied to the material being treated inside the tube. Fuel used may be electricity, oil, gas, or coal. The temperature of firing and the length of time required depend on the design of the kiln and the type of material being fired.

The most in-depth and helpful description of a kiln is provided by the *McGraw-Hill Encyclopedia of Science and Technology, Inc.*, Fifth Edition, as follows:

A device or enclosure to provide thermal processing of an article or substance in a controlled temperature environment or atmosphere, often by direct firing, but occasionally by convection or radiation heat transfer. Kilns are used in many different industries, and the type of device called a kiln varies

with the industry.

"Kiln" usually refers to an oven or furnace which operates at sufficiently high temperature to require that its walls be constructed of refractory materials. *The distinction between and kiln and a furnace is often based more on the industry than on the design of the device.* For instance, an electrically heated refractory tunnel oven equipped with a stainless mesh conveyor belt to carry the work through is referred to as a tunnel kiln if it is used for sintering small ceramic electronic parts such as ferrite transformer cores. The same device used to sinter small metal parts from powdered aluminum alloys is called a sintering furnace.

Generally, the word "kiln is used when referring to high-temperature treatment of nonmetallic materials such as in the ceramic, the cement, and the lime industries. When melting is involved as in steel manufacture, the term "furnace" is used as in blast furnace and basic oxygen furnace. In glass manufacture, the melting furnace is often called a glass tank when the process is continuous. (emphasis supplied)

From the above authorities, it can be said that rotary kilns are generally used for calcining various materials such as rock, clays, granular materials, etc. Calcining is the heating of a substance below the melting or fusing point, causing a loss of moisture (drying), reduction or oxidation. In other words, a kiln is generally used to dry or bake various materials, but is not used to melt or fuse metal. As set out above, a device used for the melting of metal is commonly known as a furnace. Further, in *Casting Brass*, by C. W. Amman, the author discusses the melting of various brass items, and describes the various types of furnaces that are generally used for such purposes. None are described as kilns.

The only Alabama case on point is *Republic Steel Corporation v. Horn*, supra, in which the Alabama Supreme Court in 1958 determined that an open hearth furnace used in the making of steel did not qualify as a kiln under the exemption statute in question. The Court reached its conclusion through application of the commonly accepted definition for kiln, as is necessary in the present case. The Court also applied the well-recognized principle that an exemption from taxation must be construed against the taxpayer and for the taxing authority. *Brundidge Milling Co. v. State*, 228 So.2d 479; *Beam Dredging Corp. v. State*, 454 So.2d 1009, appeal dismissed 105 S. Ct. 1156, rehearing denied 105 S. Ct. 2350.

While in some instances the words "kiln" and "furnace" can be used interchangeably, a kiln is generally used with reference to the high temperature treatment of non-metallic materials such as ceramic and cement, whereas any oven used in the melting and manufacture of metal constitutes a furnace. Accordingly, it must be determined that the ovens or devices used by the Taxpayer in its manufacturing process are not kilns within the purview of §40-23-4(14), and thus, the fuel oil used in said devices is not exempt from sales tax.

American Brass, Inc., 628 So.2d at 921.

The Department regulation on point, Reg. 810-6-3-.25(1), titled "Fuel Oil Used in Firing Kilns," was amended after the *American Brass* case, and reads as follows:

The term "kiln" as used in Code of Alabama 1975, Sections 40-23-4(a)(14) and 40-23-62(15) and in the regulation shall mean an oven, stove, chamber, or other device or enclosure to provide thermal processing of nonmetallic articles or substances in a controlled temperature environment or atmosphere, often by direct convection or radiation heat transfer. A "kiln" is used in the high temperature treatment of nonmetallic materials and generally operates at sufficiently high temperatures to require that its walls be constructed of refractory materials. The term "kiln" as used in the aforementioned Code sections and in this regulation shall not include a furnace, oven, chamber, or other device or enclosure used in the melting, fusing, or manufacture of metal. Examples of devices which qualify as "kilns" are brick kilns, lime kilns, dry kilns (for lumber), and cement kilns. Examples of devices which do not qualify as "kilns" are blast furnaces, basic oxygen furnaces, and open hearth furnaces used in steel manufacturing. (*State of Alabama v. American Brass, Inc.*, Court of Civil Appeals, decided November 5, 1993).

The Taxpayer argues that the curing presses in issue are kilns because they are "enclosed devices . . . consisting of certain refractory materials . . . that provide thermal processing . . . of nonmetallic materials . . . in a [controlled temperature and controlled environment]." Taxpayer's Post-Hearing Brief at 9. The Department's regulation does indicate, as did the Court of Civil Appeals in *American Brass*, that a device that heat-treats or processes metal materials is not a kiln. It does not follow, however, that all machines or

devices that process nonmetallic materials through the use of heat are kilns.

The Taxpayer correctly argues that because the word “kiln” is not defined by Alabama’s Revenue Code, Title 40, Code 1975, the term “must be given its plain, ordinary meaning, which is accepted in popular everyday usage.” Taxpayer’s Post-Hearing Brief at 8, citing *State v. American Brass*, 628 So.2d at 921. The various dictionary definitions of the term cited by the Court of Civil Appeals in *American Brass*, and quoted above, refer to kilns as devices that apply heat for “hardening, burning or drying substances such as grain, meal, or clay, esp. a brick-lined oven used to bake or fire ceramics.” *The American Heritage Dictionary*, Second College Edition. *Webster’s New International Dictionary*, Second Unabridged Edition, defines the term as “[a] large stove or oven, a furnace of brick or stone, or a heated chamber, for the purpose of hardening, burning, or drying anything; often specif., a brick kiln, a lime kiln or a cement kiln.” *The New Columbia Encyclopedia*, Fourth Edition, defines “kiln” as “a furnace for firing pottery and enamels, for making brick, charcoal, lime and cement, for roasting ores, and for drying various substances (e.g. lumber, chemical).” Finally, the *McGraw-Hill Encyclopedia of Science and Technology*, Fifth Edition, provides that “[g]enerally, the word ‘kiln’ is used when referring to high temperature treatment of nonmetallic materials such as in the ceramic, the cement, and the lime industries.”

The above definitions show that a kiln is generally recognized as an enclosure or chamber, i.e., an “oven or furnace,” in which various materials such as grains, ceramics, bricks, lumber, etc. are dried or demoiaturized through the application of heat. The Taxpayer is correct that the curing presses in issue have some characteristics in common

with a kiln, i.e., they include refractory materials and use steam generated heat to cure the green tires. There is no evidence, however, that a tire curing press is or ever has been generally recognized or referred to as a kiln.

In *Republic Steel*, the Alabama Supreme Court relied on the testimony of the owner of a brick business in holding that an open hearth furnace was not a kiln – “That during the fifty years he has been in the brick business he has never heard of an open hearth furnace being referred to as a kiln.” *Republic Steel*, 105 So.2d at 447. The Supreme Court relied on that evidence in affirming that an open hearth furnace was not a kiln because it was not generally recognized or accepted as a kiln in everyday usage. The lack of evidence in this case showing that a tire curing press has ever been generally recognized or referred to as a tire kiln or kiln is equally telling.

The Taxpayer was represented by very competent and thorough representatives before the Administrative Law Division that were well aware of the rule of statutory construction that an undefined word in a statute, i.e., “kiln,” must be given its normal, commonly accepted meaning. See again, Taxpayer’s Post-Hearing Brief at 8. Consequently, the fact that no evidence was presented showing that a tire curing press has ever been referred to or called a kiln or tire kiln in everyday usage indicates that the device has never been referred to as such before this appeal. Rather, as conceded by the Taxpayer, the tires are manufactured “inside an enclosed metal device, commonly known as a ‘curing press,’” Taxpayer’s Post-Hearing Brief at 2. The Taxpayer is correct. The

devices are tire curing presses that include tire molds, and are not tire kilns or kilns.²

Importantly, a curing press performs an essential function apart from the heat treating of the green tires. That is, the tire molds in the press function to shape the tire's tread pattern and imprint the markings on the side of the tires. That shaping is accomplished by pressure from the steam-inflated bladders inside the green tires, and is clearly not a function of a kiln. And while the Taxpayer can calculate the amount of fuel oil used to generate the steam going to the curing presses, there is no suggested method for measuring the steam that produces the heat used to cure the green tires versus the steam used to inflate the bladders and thereby shape the tires in the molds. By exempting fuel oil used to operate kilns, the Legislature certainly did not intend to also exempt fuel oil used to shape and imprint tires in tire molds.

It is at best unclear as to whether tire curing presses constitute kilns for purposes of the exemption statutes.³ It is in just such cases that the rules of statutory construction applied by the appellate courts in *Republic Steel* and *American Brass* and discussed above must apply. Strictly construing the sales and use tax exemptions in issue against the Taxpayer, and giving the undefined word "kiln" its usual, commonly accepted meaning, the curing presses in issue are not kilns. The fuel oil burned to create the steam used in the

² A Taxpayer witness testified that in his opinion, a tire curing press met the definition of a kiln. (T. 70) The witness was, however, an expert in how tires are manufactured and how curing presses operate, but not as to what constitutes a "kiln."

³ If the Taxpayer's broad interpretation is accepted, then a conventional or convection kitchen oven, or a commercial pizza oven, for example, would qualify as a kiln because such devices contain refractory materials that provide thermal processing, i.e., by baking, broiling, etc., of nonmetallic materials (food) in a controlled environment. Certainly, that broad definition was not intended by the Legislature.

curing presses thus was not exempt from sales or use tax.

The final assessments are affirmed. Judgment is entered against the Taxpayer for State sales tax and interest of \$31,570.74, \$2,071.72, and \$27,336.19; and State use tax and interest of \$2,071.72, \$27,106.44, and \$31,570.74. Additional interest is also due from the date the final assessments were entered, August 9, 2010.

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

Entered November 8, 2011.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

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