

L & J DIRT, INC.  
463 5<sup>TH</sup> AVENUE  
CHICKASAW, AL 36611,

Taxpayer,

v.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

DOCKET NO. MISC. 10-823

#### **FOURTH PRELIMINARY ORDER**

This appeal involves a final assessment of Alabama uniform severance tax entered against the above Taxpayer for October 2004 through December 2007. The Taxpayer owned and operated a “dirt pit” in Mobile County, Alabama during the subject period. It severed materials from the pit and either used them on a contract with a customer or sold them to a customer.

The Alabama Legislature enacted the Alabama Uniform Severance Tax Act in 2004. That Act levies “a severance tax on the purchaser of all materials severed from the ground and sold as tangible personal property.” Code of Ala. 1975, §40-13-52. The Act also exempts “materials when severed and used for fill by an operator, producer or any other person. . . .” Code of Ala. 1975, §40-13-53(b)(2).

The issue in this case is whether the “materials used for fill” exemption applies to the materials that the Taxpayer severed and sold to customers that subsequently used the materials for fill. The Department argues that the exemption applies only if the operator, producer, or any other person both severs and also uses the materials for fill. The Taxpayer contends that the exemption applies to all severed materials used as fill, even if the user did not also sever the materials.

A hearing was conducted on January 25, 2011. The parties thereafter filed post-hearing briefs. The Administrative Law Division entered an Opinion and Preliminary Order on April 18, 2011 holding that the Taxpayer's interpretation of the exemption statute was correct. That is, all severed materials that are used as fill are exempt from the tax.

The Order also held, however, that the burden was on the taxpayer to maintain records showing that its sales were exempt pursuant to the §40-13-53(b)(3) "fill" exemption. The Taxpayer had maintained records of its sales during the subject period, but had not maintained records verifying that the purchasers intended to use the materials for fill. The Taxpayer's owner testified at the January 25 hearing that all of the materials he sold were used as fill.

The April 18 Order found that "[u]nder the circumstances, the Taxpayer should be allowed to gather affidavits, potential witnesses, or other evidence verifying that the materials sold to customers during the period in issue were used as fill, and thus exempt." Opinion and Preliminary Order at 7. The Taxpayer subsequently submitted eight notarized affidavits in May 2011 and 12 more in July 2011. The affiants stated that all of the materials they purchased from the Taxpayer during the subject period were used exclusively for fill on construction projects.

The Department has objected to the use of the affidavits to compute the Taxpayer's exempt sales. The Department's July 27, 2011 response states – "To now allow a taxpayer to substitute affidavits for actual records is not good tax policy. Anyone can get someone to sign an affidavit. There is no way to challenge the affidavits and they are self-serving."

I agree that reviewing a taxpayer's actual records is the best tax policy. Under the

circumstances, however, the affidavits should be accepted as evidence that the sales to those customers were exempt. As discussed in the Opinion and Preliminary Order, the Department notified the Taxpayer's owner on July 19, 2004 that the severance tax in issue had been enacted. The notice also stated – "In addition the severance tax does not apply to severed materials used for fill. . . ." The Taxpayer's owner read the notice and determined that his sales of fill materials were not subject to the tax.<sup>1</sup> He also asked his attorney whether he was subject to the tax. The attorney wrote the Taxpayer a letter confirming that he was not subject to the tax. Given those facts, it is understandable that the Taxpayer did not keep records showing what materials it sold that were used as fill.

The affidavits support the Taxpayer's position, and for that reason are inherently self-serving. I disagree, however, that "[a]nyone can get someone to sign an affidavit." The affidavits were all sworn and attested to by a notary public. The affiants all knew when they signed the affidavits that the Taxpayer was involved in a dispute with the Revenue Department. It is doubtful that the affiants would falsely attest to something under oath in writing, knowing that the Department could later investigate and determine the truthfulness of the affidavits. And contrary to the Department's claim that there "is no way to challenge the affidavits," the Department certainly could contact the affiants, either in person or over the telephone, and verify the accuracy of the affidavits.

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<sup>1</sup> The Department argues in its post-hearing submissions that a second notice was issued on September 30, 2004 which stated – "In addition, the severance tax does not apply to material severed and used by a producer, operator, or any other person for fill." That notice was not submitted into evidence at the January 25, 2011 hearing, and to date has not been submitted to the Administrative Law Division. In any case, the September 30, 2004 "clarifying" notice can still be read to mean that all materials used for fill are exempt, which, as found in the Opinion and Preliminary Order, is the correct interpretation of the exemption.

There is still one problem the Taxpayer must overcome. The affidavits provide that all materials purchased by the affiants from the Taxpayer were used as fill. But the amounts purchased by each affiant are not provided. Without that information, it cannot be determined how much of the Taxpayer's sales during the assessment period should be exempted.

The Taxpayer should notify the Administrative Law Division by April 13, 2012 if it has records or other information/evidence from which the amounts purchased by the affiants during the subject period can be computed. Appropriate action will then be taken.

Entered March 15, 2012.

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BILL THOMPSON  
Chief Administrative Law Judge

bt:dr

cc: Duncan R. Crow, Esq.  
C. Mark Erwin, Esq.  
Janet Stathopoulos  
Randy Winkler