

SERVICE CHEMICAL INDUSTRIES  
201 4th Street West  
Birmingham, AL 35204,

Taxpayer,

v.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 00-710

### **OPINION AND PRELIMINARY ORDER**

The Revenue Department assessed Service Chemical Industries, Inc. (ATaxpayer®) for sales tax for September 1997 through June 2000. 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 26, 2001 in Birmingham, Alabama. Glen Langley represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

### **ISSUES**

The Taxpayer sold sodium hypochlorite to various customers that used the product to kill germs and bacteria in the processing of chickens. The primary issue in this case is whether the sodium hypochlorite was exempt from sales tax pursuant to Code of Ala. 1975, ' 40-23-4(a)(16) as a material acquired primarily for pollution control. If the sodium hypochlorite is not exempt, a second issue is whether it should be taxed at the reduced 12 percent Amachine®rate levied at Code of Ala. 1975, ' 40-23-2(3). A third issue is whether the Department correctly taxed some sales by the Taxpayer that the Taxpayer had treated as nontaxable wholesale sales.

## **FACTS**

The Taxpayer sold sodium hypochlorite and other industrial chemicals to chicken processors and other customers during the audit period. The chicken processors used the sodium hypochlorite in the processing of chickens to kill or prevent salmonella and e-coli.

The Taxpayers failed to charge sales tax on the sodium hypochlorite because its customers claimed that the product was exempt as a pollution control material. The Taxpayer also failed to collect tax on the sale of other chemicals to various customers because the customers claimed they were reselling the chemicals.

The Department audited the Taxpayer, and assessed tax on the gross proceeds derived from the sale of the sodium hypochlorite. The Department also taxed some of the sales which the Taxpayer claimed were at wholesale because the Taxpayer failed to provide adequate records establishing that the sales were for resale. The Taxpayer appealed.

## **ANALYSIS**

Code of Ala. 1975, ' 40-23-4(a)(16) exempts from sales tax the gross proceeds from the sale of all devices or materials acquired primarily for the control, reduction, or elimination of air or water pollution. The exemption applies only if the device or material is acquired primarily for pollution control. The exemption does not apply if the device or material is acquired primarily as an integral part of the purchaser-s profit motivated business activity, even if the device or material serves to control or reduce pollution. *Chemical Waste Management, Inc. v. State*, 512 So.2d 115 (Ala.Civ.App. 1987). See also,

*Air Products & Chemicals, Inc. v. State of Alabama*, U. 95-359 (Admin. Law Div. O.P.O. 12/14/95), and cases cited therein.

The sodium hypochlorite in question was not acquired by the Taxpayer's customers primarily to control water pollution. Rather, the customers used the chemical in the processing of chickens to kill or control salmonella and e-coli bacteria. That is, the chemical was acquired primarily to assist in the processing of chickens for profit, and not to eliminate or control water pollution. Consequently, the pollution control exemption does not apply.

The issue was raised at the April 26 hearing as to whether the sodium hypochlorite, if taxable, should be taxed at the reduced 1 2 percent machine rate levied at ' 40-23-2(3). The Department should notify the Administrative Law Division by August 3, 2001 concerning its position as to the applicability of the machine rate to the sodium hypochlorite. If the Department determines that the machine rate does not apply, it should explain why.

Concerning the sales that the Taxpayer claims were at wholesale, the burden was on the Taxpayer to keep adequate records showing the taxable and nontaxable nature of its sales. The Department is not required to rely on the Taxpayer's verbal assertions, and if records are not available disclosing the nature of the business transacted by the Taxpayer, the Taxpayer must suffer the penalty of noncompliance and pay tax on the sales not properly recorded as exempt or nontaxable. *State v. Ludlum*, 384 So.2d 1089 (Ala.Civ.App.), cert. denied 384 So.2d 1094 (Ala. 1980); *State v. Levy*, 29 So.2d 129 (Ala. 1946).

In this case, the Taxpayer failed to properly denote on its invoices that sales to its various customers were at wholesale. Consequently, those sales were properly taxed by the Department.

This Opinion and Preliminary Order is not an appealable Order. The Department should notify the Administrative Law Division of its position concerning the machine rate by August 3, 2001. An appropriate Order will then be entered.

Entered July 11, 2001.