

PROVIDENCE HOTEL PARTNERS,LLC§
d/b/a SPRINGHILL SUITES
308 N. PETERS RD., SUITE 110 §
KNOXVILLE, TN 37922, §

Taxpayer, §

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE. §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 12-1392

PRELIMINARY ORDER

The Taxpayer in this case appealed to the Administrative Law Division concerning the Department's denial of the Taxpayer's application for a sales tax exemption certificate. The Department has filed its Answer and Motion to Dismiss, a copy of which is enclosed with the Taxpayer's copy of this Order.

The Department contends that the Taxpayer's appeal must be dismissed because the Taxpayer failed to appeal to the Administrative Law Division within 30 days pursuant to Code of Ala. 1975, §40-2A-8. The Department notified the Taxpayer by letter dated October 10, 2012 that it was denying the Taxpayer's exemption certificate. The Taxpayer did not appeal until November 15, 2012.

The Administrative Law Division previously addressed this issue in *Juan Hernandez v. State of Alabama*, Docket S. 12-1392 (Admin. Law Div. P.O. 9/27/2005). The taxpayer in the above case also failed to appeal a denied exemption certificate within 30 days. The Administrative Law Division did not dismiss the appeal based on the following rationale:

Unlike the 30 day period within which taxpayers must appeal a final assessment, the 30 day appeal period in 40-2A-8(a) is not jurisdictional. Code of Ala. 1975, §40-2A-7(b)(5)c. specifies that if a final assessment is not timely appealed, "the appeal shall be dismissed for lack of jurisdiction." Likewise, if a taxpayer fails to timely appeal a denied refund, §40-2A-7(c)(5)c. specifies that "the appeal shall be dismissed for lack of jurisdiction."

There is no such jurisdictional provision in §40-2A-8.

The Petitioner's appeal also should not be dismissed as a practical matter because the Petitioner could simply apply to the Department for another exemption certificate, and then appeal from the Department's denial of the request.

The Administrative Law Division could dismiss the Taxpayer's appeal in this case based on the 30 day appeal period in §40-2A-8. But as indicated in *Hernandez*, the Taxpayer could then reapply for an exemption certificate, and if and when the Department denied the certificate, the Taxpayer could then reappeal within the 30 day limit.

For the sake of judicial economy, the Department should notify the Administrative Law Division by February 15, 2013 if it wishes to withdraw its motion to dismiss and allow the case to proceed on the merits.

The Department also argues that the Taxpayer's appeal should be dismissed because the Taxpayer raised an argument on appeal that was not previously addressed by the Department, citing *Rheem Mfg. Co. v. Alabama Dep't of Revenue*, 33 So.3d 1, 4 (Ala. Civ. App. 2009).

The Taxpayer's application is not in evidence, but it is presumably based on the Taxpayer's claim that it is reselling the breakfast food it provides to its customers without extra charge, and thus should be allowed to purchase the food tax-free. The Department's October 10, 2012 letter denying the certificate stated that "[y]our hotel is considered to be the end user of food and products that are given away. Those items are subject to tax, therefore disqualifying you for a Certificate of Exemption." Consequently, it appears that the Department at least indirectly addressed the determinative legal issue of whether the Taxpayer is giving the breakfast food away, in which case the Taxpayer would owe sales or

use tax on its cost of the food, or whether the Taxpayer is selling the food, in which case it would not owe sales or use tax when it purchases the food.¹ The Administrative Law Division thus has the authority to review the Department's rationale for denying the certificate.

As indicated, the Department should respond by February 15, 2013. Appropriate action will then be taken.

Entered January 23, 2013.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: Christy O. Edwards, Esq.
Sonja Holbert (w/enc.)
Joe Walls
Traci Floyd

¹ If the Taxpayer is correct that it is selling the breakfast food to its guests, then the Taxpayer should purchase the food tax-free at wholesale using a sales tax number. The limited record in this case does not indicate, however, if the Taxpayer has a sales tax license or is otherwise making taxable retail sales. And again assuming that the Taxpayer is correct that it is reselling the food, the issue arises as to how much the Taxpayer is "selling" the food for since there is no extra charge for the food.