ADAMS BEVERAGES, INC. 3116 JOHN D. ODOM ROAD DOTHAN, AL 36303,	§ §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. BPT. 12-221
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed Adams Beverages, Inc. ("Taxpayer") for 2009, 2010, and 2011 business privilege tax. 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 June 21, 2012. David Johnston and Vincent Edge represented the Taxpayer. Assistant Counsel Mark Griffin represented the Department.

The Taxpayer operates a beer distributorship in Dothan, Alabama. The Taxpayer had purchased another beer distributorship, Eagle Budweiser Distributing Company, Inc., in 2001 for $16,000,000. The purchase agreement allocated $12,500,000 of the purchase amount for Eagle's Anheuser-Busch distribution rights in five Alabama counties. The remaining $3,500,000 was allocated to Eagle's physical assets.

The Alabama business privilege tax is levied on a taxpayer's net worth in Alabama. Code of Ala. 1975, §40-14A-22(a). "Net worth" is defined at Code of Ala. 1975, §40-14A-23. Subparagraph (g)(3) of §40-14A-23 specifies that in computing net worth, a taxpayer may subtract "[t]he unamortized portion of goodwill and core deposit intangibles appearing on the taxpayer's balance sheet by reason of a direct purchase of another corporation or limited liability company."

The Taxpayer subtracted or excluded the $12,500,000 it paid for Eagle's Anheuser-Busch distribution rights as unamortized goodwill on its 2009, 2010, and 2011 Alabama business privilege tax returns. The Department disallowed the exclusions and entered the final assessments in issue.

This case turns on whether the goodwill exclusion at §40-14A-23(g)(3) applies to the Anheuser-Busch distribution rights acquired by the Taxpayer in 2001. I have reviewed the excellent briefs filed by both parties. I find that the distribution rights do not qualify as goodwill under generally accepted accounting principles, and thus do not qualify for the §40-14A-23(g)(3) goodwill exclusion.

I agree with the rationale in the Department's brief, which reads in pertinent part as follows:

> The Alabama business privilege tax is imposed on a corporation's "net worth" in Alabama. Ala. Code, §40-14A-22(a). For the purpose of calculating the tax, net worth is defined at Ala. Code, §40-14A-23. Included in the definition are certain exclusions from net worth specified at subsection 'g' . One of those exclusions is for "[t]he unamortized portion of goodwill and core deposit intangibles appearing on the taxpayer's balance sheet by reason' of a direct purchase of another corporation or limited liability entity." §40-14A-23(g)(3). This is the statutory authority for the exclusion claimed by the Taxpayer. Taxpayer claims a goodwill exclusion for the amount of the Anheuser-Busch distribution right purchased from Eagle in 2001. As shown below, the beer distribution right does not qualify for the exclusion.
>
> For purposes of computing the business privilege tax, a beer distribution right is not the same thing as "goodwill". The Taxpayer's beer distribution right is a separately recognized, individually identifiable right arising from a contractual or a legal relationship with Eagle and Anheuser-Busch. This right is not the "goodwill" of Taxpayer, because "goodwill", for business privilege tax purposes, is not separately recognized or individually identifiable. Since it is not goodwill, the $12,500,000.00 is not excluded from the Taxpayer's net worth in computing business privilege tax.

Ala. Code, §40-14A-2(a) directs that for the purpose of computing the business privilege tax, a taxpayer's net worth shall be determined "... in accordance with the accounting principles used in preparing the taxpayer's financial statements reported to its owners." The accounting principles used for the purpose of preparing financial statements are established by the Financial Accounting Standards Board. Since 2009, those principles are codified in the Accounting Standards Codification ("ASC"). ASC Rule 805 provides the rules to be used concerning "business combinations" such as the Taxpayer's purchase of Eagle. The application of Rule 805 clearly shows that the beer distribution right is not "goodwill." For the convenience of the Division, copies of the relevant sections of Rule 805 are attached.

Pursuant to Rule 805, goodwill is defined as "[a]n asset representing the future economic benefits arising from other assets acquired in a business combination ... that are not individually identified and separately recognized." Rule 805-20-20 - Glossary. The Rule defines "identifiable" by stating that "[a]n asset is identifiable if it meets either of the following criteria: (1) It is separable, that is, capable of being separated or divided from the entity and sold, transferred, licensed, rented, or exchanged, either individually or together with a related contract, identifiable asset, or liability, regardless of whether the entity intends to do so; (2) It arises from contractual or other legal rights, regardless of whether those rights are transferable or separable from the entity or from other rights and obligations." (Emphasis added). Rule 805-20-20 - Glossary. An asset is "identifiable" if it is either separable or arising from contractual or other legal rights. Rule 805 defines "intangible assets" as "[a]ssets (not including financial assets) that lack physical substance. The term 'intangible assets' is used to refer to intangible assets other than goodwill." Rule 805-20-20 - Glossary. By definition, "intangible assets" specifically excludes goodwill.

The Taxpayer's acquisition of the additional beer distribution right from Eagle is both "individually identified" and "separately recognized" in the Eagle purchase agreement with the price tag of $12,500,000.00. As noted, an asset is "identifiable" if it is either separable or "arises from a contractual or other legal right." The beer distribution right for additional counties is both separable and arising from a contractual or legal right. The right is "separable" because the parties placed a price tag of $12,500,000.00 on the right to distribution in the five counties. This identification of value for the distribution right makes it subject to a separate transfer regardless of whether the Taxpayer intends to do so. The distribution right is also "aris[en] from contractual or other legal rights". The distribution right to additional counties arose from the contract between the Taxpayer and Eagle and is plainly identified as a distribution right in the contract. Taxpayer's Exhibit 6 - p. 5, Agreement. The distribution right also arises from the Taxpayer's legal

relationship with Anheuser-Busch. The distribution right is both individually identifiable and separately recognized. Clearly, the right does not qualify for the definition of "goodwill."

ADOR's position is supported by other sections of ASC Rule 80;. Under the heading "Identifiable Intangible Assets", Rule 805-20-25-10 states:

> [t]he acquirer [Taxpayer] shall recognize separately from goodwill the identifiable intangible assets acquired in a business combination. An intangible asset is identifiable if it meets either the separability criterion <u>or</u> 'the contractual-legal criterion described in the definition of identifiable. (Emphasis added.)

The application of this section of the Rule requires that the Taxpayer recognize its $12.5 million distribution right separately from goodwill because, as noted above, the distribution right meets both the separability criterion and the contractual-legal criterion described in the definition of "identifiable."

Pursuant to the heading of "Contract - Based Intangible Assets", Rule 805-20-55-31 gives examples of contract-based intangible assets. The Rule states, in part,

> [c]ontract-based intangible assets represent the value of rights that arise from contractual arrangements. ...Examples of contract-based intangible assets are:
>
> a. Licensing, royalty, standstill agreements #
>
> * * *
>
> e. Franchise agreements#

Rule 805-20-55-31. The Taxpayer's $12.5 million distribution right is in the nature of a "licensing" and/or "franchise" agreement, which are both included in the examples of contract based intangible assets identified above. The Taxpayer also acknowledges that the distribution right is " ... similar to a franchise... ". Taxpayer's Brief, p. 13. Pursuant to this section of the Rule, a distribution (franchise) right is clearly a "contract-based intangible asset." As an "intangible asset, it cannot be identified as goodwill. Rule 805-20-25-10.

The above analysis proves that the $12.5 million distribution right is a contract-based intangible asset, both individually identified and separately

> recognized. Goodwill is defined to exclude an asset which is individually identified and separately recognized. As a result, the distribution right does not fit the definition of goodwill. Since it is not "goodwill", the distribution right does not qualify for the exclusion from net worth authorized by §40-14A-23(g)(3).
>
> The fact that the Taxpayer was already a distributor of Anheuser-Busch products in other counties is irrelevant to the determination of whether the additional distribution right arose from a contract. The additional right clearly arose from a contract, as evidenced by the contract itself. Taxpayer's Exhibit 6, p. 5 - Agreement. Further, the distribution right in the contract is "separately recognized." It is separately recognized in the amount of $12,500,000.00. That is the amount specified in the Eagle contract for the distribution right to the five counties.
>
> In its brief, the Taxpayer quotes the "fair value" definition in ASC Rule 820-10-20, specifically "[f]air value is the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date", to support its position that the distribution right cannot be separately recognized, Taxpayer's Brief, p.9. Actually, the definition supports ADOR's position. The definition can be easily applied to the distribution right. $12.5 million is the price received by Eagle from Taxpayer to sell its distribution right "in an orderly transaction between market participants" at the date of the contract. Taxpayer's Exhibit 6. Pursuant to the "fair value" definition, the distribution right can be separately recognized.

Department's Brief at 2 – 6.

The beer distribution rights acquired by the Taxpayer in 2001 do not constitute goodwill for the above stated reasons. As discussed, the distribution rights are "identifiable" because they can be separated and sold, as Eagle did when it sold the rights to the Taxpayer in 2001. The rights also arose from the contract between Eagle and the Taxpayer.

The Taxpayer's CPA testified at the June 21 hearing that the distribution rights constituted goodwill. The Taxpayer argues that because the CPA's testimony was not

impeached or contradicted by other evidence, it is conclusive and binding on the Administrative Law Division. I disagree.

The Administrative Law Division is not bound by the CPA's opinion testimony for the reasons again explained in the Department's brief, as follows:

> Contrary to the Taxpayer's assertion, the Administrative Law Division is not bound by the opinion testimony of the Taxpayer's accountant, Randy Eberhart. Taxpayer's Brief, p. 6 – 7. Pursuant to the Alabama Rules of Evidence, Rule704, "[t]estimony in the form of an opinion or inference otherwise admissible is to be excluded if it embraces an ultimate issue to be decided by the trier of fact." Mr. Eberhart's opinion on the ultimate issue in this appeal, whether the Taxpayer's beer distribution right qualifies as a "goodwill" exclusion from net worth, is just Mr. Eberhart's opinion. It cannot be forced upon the Administrative Law Division.
>
> As noted by the Alabama Supreme Court in Hannah v. Gregg, Bland and Berry, Inc., 840 So.2d 839 (Ala. 2002),
>
>> [g]enerally, a witness, whether expert or lay, cannot give an opinion that constitutes a legal conclusion or amounts to the application of a legal definition. Phillips v. Harris, 643 SO.2d974, 976 (Ala.1994); see also C. Gamble, *McElroy's Alabama Evidence* § 128.07 (5th ed.1996).
>
> 840 So.2d 852. Any testimony from Mr. Eberhart concerning the ultimate issue to be decided should be ignored by the Administrative Law Division. Only the Division can determine whether the subject distribution right qualifies for the statutory exception.
>
> To support its conclusion that the Administrative Law Division is bound by the opinion of Mr. Eberhart, the Taxpayer cites the case of AmSouth Bank, N.A. v. Martin, 559 So.2d. 1058 (Ala. 1990). The case stands for the proposition that a jury cannot ignore the undisputed factual testimony of an unimpeached witness and substitute its own conclusion for that testimony. The subject testimony involved in that case was factual testimony, not opinion testimony. Mr. Eberhart gave both factual and opinion testimony. The holding in AmSouth has no bearing on Mr. Eberhart's opinion testimony. The rules of evidence and case law clearly show that only the Administrative Law Division can determine the ultimate issue in this appeal.

Department's Brief at 7 – 8.

The tax and interest as assessed by the Department is affirmed. The penalties are waived for reasonable cause under the circumstances. Judgment is entered against the Taxpayer for 2009, 2010, and 2011 business privilege tax and interest of $13,327.84, $15,232.91, and $15,351.89, respectively. Additional interest is also due from the date the final assessments were entered, January 17, 2012.

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

Entered February 12, 2013.

____
BILL THOMPSON
Chief Administrative Law Judge

bt:dr
cc: Mark Griffin, Esq.
G. David Johnston, Esq.
J. Vincent Edge, Esq.
Cathy McCary