

JOE WHEELER ELECTRIC
MEMBERSHIP CORPORATION
25700 AL HIGHWAY 24
TRINITY, AL 35673-5673,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 13-785

FINAL ORDER

Joe Wheeler Electric Membership Corporation ("Taxpayer") appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. concerning a disputed final assessment of local use tax for October 2009 through September 2012. A hearing was conducted on December 4, 2014. George Kitchens, Terry Mitchell, Trey Goldsmith, and Patrick Holmes represented the Taxpayer. Assistant Counsel Keith Maddox represented the Department.

The Taxpayer is an electric cooperative that sells electricity to customers in Morgan and Lawrence Counties in Alabama. The Taxpayer purchased transformers, meters, poles, and other tangible personal property during the audit period that was delivered by the vendors to the Taxpayer's warehouse in Lawrence County. The Taxpayer paid the State and Lawrence County use tax due on the property in the month the property was delivered to the warehouse. It did not pay municipal sales or use tax on the property because the warehouse is not located in the city limits or police jurisdiction of a municipality.

The Taxpayer subsequently installed some of the property in the city limits of Somerville, Courtland, Falkville, and the police jurisdiction of Falkville during the audit

period. It did not pay municipal use tax on the property installed in those jurisdictions because it had franchise agreements with those municipalities whereby it agreed to pay each municipality 1.9 percent of its gross receipts from electricity sold within each municipality in lieu of all other municipal taxes levied by the municipality.

The Department audited the Taxpayer and assessed it for municipal use tax on the property installed/used by the Taxpayer in the above municipalities during the audit period.¹ This appeal followed.

The Taxpayer argues that it is not liable for local use tax in the subject municipalities because the franchise agreements required it to pay 1.9 percent of its gross receipts derived from electricity sales within each jurisdiction in lieu of all other taxes levied by the jurisdiction.

The Department contends that the Local Tax Simplification Act of 1998 provides that all municipal sales and use tax levies must mirror or parallel the corresponding State sales and use tax laws. It thus argues that because the various franchise agreements are not provided or found in the State sales and use tax laws, they cannot apply to local sales and use taxes levied by municipalities. The Department's audit report reads in pertinent part as follows:

The Local Tax Simplification Act of 1998 provides that municipalities and counties must follow corresponding state laws, rules and regulations relative to local sales, use, rental and lodgings taxes. The franchise agreement in lieu of taxes between Joe Wheeler EMC and the local municipalities is outside the sales and use tax code. ADOR personnel are charged with

¹ The Taxpayer also installed transformers, meters, etc. in other municipalities in the two counties during the audit period. The Revenue Department does not, however, administer the local sales and use taxes levied by those other municipalities.

administering the taxes according to the code. This agreement does not apply to sales/use taxes.

I agree that a municipality's sales and use taxes must parallel the State sales and use tax laws and regulations. See, Code of Ala. 1975, §§11-51-200 – 11-51-204. But that does not prohibit a municipality from separately agreeing or contracting to waive collection of its sales or use taxes in lieu of receiving a gross receipts tax or other separate payment from a taxpayer.

There is no evidence that the local sales and use taxes levied by the municipalities in issue in any way vary from or do not parallel the State sales and use tax laws and regulations. The municipalities are simply waiving their right to collect the sales, use, and other municipal taxes owed by the Taxpayer in lieu of 1.9 percent of the Taxpayer's gross receipts derived from its electricity sales in the municipalities. Waiver of the right to collect the local sales and use taxes in lieu of the 1.9 percent gross receipts payments does not bring the local ordinances by which those taxes are levied into conflict with the corresponding State levying statutes.

The agreements specify that the Taxpayer's payment of the 1.9 percent amount to the municipalities is "in lieu of municipal taxes in any manner or form, including franchise taxes." See generally Taxpayer Composite Ex. B submitted with its notice of appeal. That broad language includes all taxes levied by the municipalities, including sales and use taxes.

Finally, the Department was acting as de facto agent for the municipalities when it agreed to administer the municipalities' taxes. As agent for the municipalities, the Department is bound by all legal contracts or agreements entered into by the

municipalities, including the “in lieu of” agreements in issue. That is, the Department cannot assess and collect the municipalities’ sales and use taxes that the municipalities have legally contracted not to collect.

The final assessment is voided.

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

Entered January 16, 2014.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

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Jane Mayberry