

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

v.

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DOCKET NO. UTIL. 87-110

ALABAMA RIVER PULP CO., INC. §
P.O. Box 100
Birmingham, AL 35209, §

Taxpayer. §

FINAL ORDER

The Revenue Department denied a petition for refund of utility gross receipts tax filed by Alabama River Pulp Company, Inc. (Taxpayer) concerning the period April, 1984 through Mays, 1986 . The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on November 20, 1990. William J. Ward, Esq. represented the Taxpayer. Assistant counsel J. Wade Hope appeared for the Department. This Final Order is based an the evidence Presented by the parties as well as the complete record of the proceedings.

FINDINGS OF FACT

The issue in dispute is whether electricity purchased by the Taxpayer from Alabama Power Company (APC) during the period in issue should be exempt from the utility gross receipts tax as electricity used in an electrolytic manufacturing or compounding process. The relevant facts are undisputed.

The Taxpayer operates a bleached kraft pulp mill (mill) in Monroe County, Alabama. The mill was constructed in 1979 and Monroe County, Alabama. The mill was constructed in 1979 an

includes its own electric generating facility. The Taxpayer also has a "co-generator" agreement with APC whereby it purchases additional electricity as needed from APC and sells to APC any excess electricity generated at the mill. The Taxpayer generated more electricity than it used from 1979 until 1984 and thus was a net seller of electricity to APC during those years.

Sodium chlorate is an essential Ingredient in the production process. To Insure an adequate supply of sodium chlorate at the mill, the Taxpayer contracted in 1983 for HO Processing Company (HO) to construct a sodium chlorate production plant (NO Plant) adjacent to the Taxpayer's facility. The HO Plant Is owned and operated by HO and was completed In April 1984.

Sodium chlorate is manufactured at the HO Plant by an electrolytic process. The Taxpayer provides all electricity to the HO Plant and in return is allowed a credit against the purchase price of the sodium chlorate. The credit Is based on the rates paid by the Taxpayer for electricity purchased from APC. The HO Plant substantially increased the overall demand for electricity at the mill and consequently the Taxpayer has been a net purchaser of electricity from APC since 1984.

The electricity purchased from APC is metered as it enters the mill and Is merged at a copper bus bar with the electricity generated by the Taxpayer. The commingled electricity is then routed through nine metered breakers for use throughout the mill and In the NO Plant.

All electricity going to the HO Plant is metered at breaker No. 6. The Taxpayer estimates that 99.97% of the electricity routed to the HO Plant is used in the electrolytic processing of sodium chlorate. The remaining .03% Is used to operate the lights, copier machines, etc., In the HO Plant office.

The Taxpayer paid utility tax during the period in question on all the electricity Purchased from APC. The Taxpayer now claims that the electricity measured through breaker No. 6 and used in the HO Plant should be exempt as electricity used in an electrolytic process.

The Taxpayer provided a chart showing the electricity purchased each month from APC during the period April, 1984 through May, 1986 and also the electricity actually metered through breaker No. 6 to the HO Plant during that same period. If the amount purchased from APC exceeded the amount used in the HO Plant for the month, the Taxpayer claims that the entire amount used in the HO Plant should be exempt and concedes that the excess purchased from APC was used elsewhere in the mill for taxable purposes. Conversely, if the amount purchased from APC during a month was less than the amount used in the HO Plant, the Taxpayer claims that the entire amount purchased from APC was used In the HO Plant and should be exempt.

CONCLUSIONS OF LAW

The utility gross receipts tax is levied on the furnishing of utility services by a utility. Seep Code of Ala. 1975, 940-21-82.

However, electricity furnished to a manufacturer for use in an

electrolytic process is exempted from the tax. See Code of Ala. 1975, §40-21-83(5).

The Department first argues that the exemption should be denied because the electricity routed to the HO Plant and used in the exempt electrolytic process was not separately metered from the small amount of taxable electricity used in the HO Plant office, citing Reg. 810-6-5-.26 and Ex Parte White, 477 So.2d 422. The Taxpayer counters that the approximately .03% of taxable electricity used in the HO Plant office is de minimis and should be disregarded and not allowed to defeat the exemption for the approximately 99.97% that was used in the exempt electrolytic process.

However, even if the taxable electricity used in the HO Plant office is disregarded, the exemption cannot be allowed because the Taxpayer cannot identify how much if any of the electricity purchased from APC was actually used in the HO Plant. There is no basis for the Taxpayer's assumption that all APC electricity is routed directly to the HO Plant. Rather, the APC electricity loses its identity when it is merged with the electricity generated by the Taxpayer. The commingled electricity is then used throughout the mill and in the HO Plant. Thus, the electricity measured through breaker No. 6 is an incalculable mixture of APC and Taxpayer generated electricity and the Taxpayer cannot prove by separate metering or otherwise how much of the taxable APC electricity is used for the exempt purpose. Consequently, the

exemption must be denied.

The exemption also must be disallowed because the Taxpayer was not the "manufacturer or compounder" that used the electricity in the exempt process, The taxable Incidence is the furnishing of electricity by APC, and the exemption would apply only if the Taxpayer used the electricity in the electrolytic process. The HO Plant Is owned and operated by HO and thus all electricity used in the electrolytic process is used by HO and not the Taxpayer.

The above finding is used by HO and supported by the rule of construction that an exemption from taxation must be strictly construed against the exemption. Calvin v. U.S., 354 F.2d 202, . Brundidge Milling Company v. State, 288 So.2d 475.

This is a Final Order and may be appealed pursuant to Code of Ala. 1975, §41-22-20.

Entered this 13th day of March, 1991.