

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. S. 87-177

TENNESSEE VALLEY PRINTING  
COMPANY, INC. d/b/a The Decatur Daily  
P.O. Box 1527  
Decatur, AL 35602,

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Taxpayer.

FINAL ORDER

The Taxpayer, Tennessee Valley Printing Company, Inc., d/b/a The Decatur Daily, filed a petition for refund of sales tax concerning the period August 1, 1982 through January 31, 1987. The Department denied a portion of the petition and the Taxpayer appealed to the Administrative Law Division. The matter was submitted for decision based on the Department's position statement and the Taxpayer's response thereto, along with a joint stipulation of facts filed by the parties. Based thereon, the following recommended findings of fact and conclusions of law are hereby made and entered.

Findings of Fact

The relevant facts are undisputed.

On April 14, 1987, the Taxpayer filed a petition for refund of sales tax in the amount of \$4,598.99 concerning the period August 1, 1982 through January 31, 1987. The Department disallowed that portion of the refund relating to the period prior to March 1, 1984. The Department also disallowed that portion of the petition relating to the withdrawal from inventory of newsprint and ink which was used by the Taxpayer to print free distribution

newspapers during the periods October 1, 1986 through January 31, 1987 (\$463.26), and February 1, 1987 through April 30, 1987 (\$329.28).

#### CONCLUSIONS OF LAW

Two issues are presented for review, as set out in the joint stipulation of facts:

6. The parties agree that there are two legal issues to be resolved by this court: (a) Whether or not the statute of limitations provisions of §40-1-34, Code of Ala. 1975, provide a bar to the Taxpayer's claim for sales tax remitted more than three years prior to their filing of the Petition for Refund and (b) whether or not the withdrawal for use provisions of §40-23-1(a)(6) and (10), Code of Ala. 1975, have been restored to their former application for transactions occurring after the effective date of Act 86-689; September 29, 1986. In other words, whether ink and newsprint purchased at wholesale by the Taxpayer and taken out of inventory for use in printing newspapers not sold at retail are subject to sales tax under the withdrawal for use provisions of §40-23-1(a)(6) and (10), Code of Ala. 1975, as amended by Act 86-689 effective September 29, 1986.

On the first issue, the Department argues that any refund should be disallowed for the period prior to March 1, 1984 based on the three-year statute of limitations found at Code of Ala. 1975, §40-1-34. That section provides in pertinent part that "application (for refund) must be made within three years from the date of such payment".

In defense, the Taxpayer asserts in its response as follows:

We were directed by the State of Alabama Department of Revenue to continue paying the sales tax until a ruling was received. We filed for the refund almost immediately upon receiving notification of a favorable ruling. The sales tax should have been

escrowed while a ruling was being sought. The sales tax should have been immediately returned to the taxpayer (without the taxpayer having to file a petition for refund) when a ruling was granted by the Alabama Supreme Court.

The Taxpayer apparently agrees that the taxes paid before March, 1984 are outside of the statute of limitations. However, the Taxpayer contends that the Department should be estopped from denying the full refund because the Department had directed the Taxpayer to continue paying tax pending the outcome of an issue-related court case, Ex parte The Dothan Progress, 507 So.2d 515 (1987). Presumably, the Department advised the Taxpayer not to file a petition for refund until the Supreme Court had issued an opinion in the above case.

However, the Department cannot be required to grant an untimely refund claim even if the Taxpayer had delayed filing its refund petition at the suggestion of a Department employee. The Department cannot be estopped from collecting tax (or denying a refund) because the Taxpayer may have relied on misleading or incorrect information. State v. Maddox Tractor and Equipment Co., 69 So.2d 426 (1953). As stated by the Supreme Court in the above case:

But it is argued that the State should be estopped from taking the position which it has taken in this case and from assessing the tax when the appellees were advised that they were not responsible for the tax. In the assessment and collection of taxes the State is acting in its governmental capacity and it cannot be estopped with reference to these matters.

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In view of this provision of the constitution (section 100), the doctrine of estoppel cannot be applied against the State acting in its governmental capacity in the collection of taxes duly levied by the legislature of the State. *Union Bank & Trust Co. v. Phelps*, 228 Ala. 236, 153 So. 644.

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But taxpayers have no vested right to rely upon an erroneous interpretation of the statute exempting them from taxation and under §100 of the Constitution of Alabama of 1901, the taxing authority has no discretion in a matter of this kind.

On the second issue, the Taxpayer contends that the withdrawal of ink and newsprint from October 1, 1986 through April 30, 1987 was not taxable based on the ruling in The Dothan Progress. In that case, the Supreme Court determined that the withdrawal of ink and newsprint that was subsequently used to print free distribution newspapers was not taxable under §40-23-1(a)(10), as amended in July, 1983.

Prior to the 1983 amendment, Alabama's courts had consistently ruled that the withdrawal of property from inventory for personal use or consumption, without resale, constituted a taxable retail sale. Ex parte Alabama Precast Products, 357 So.2d 985 (1978); Home Tile and Equipment Co. v. State, 362 So.2d 236 (1978). Transfer of title was not a determining factor.

However, the 1983 amendment altered the withdrawal section by providing in part that an otherwise taxable withdrawal was not taxable if title to the subject property was subsequently transferred. Thus, the Supreme Court ruled in The Dothan Progress

that the withdrawal of ink and newsprint was not taxable because title to the newspapers was subsequently transferred to the readers, citing Ex parte Morrison Food Service of Alabama, Inc., 497 So.2d 136 (1986), and Ex parte Disco Aluminum Products Co., 455 So.2d 849 (1984).

The withdrawal section was again amended in 1986 and thereby returned to its pre-1983 language. The Legislature passed the 1986 amendment with the stated intention that pre-1983 case law should control.

The Department argues that The Dothan Progress rationale should not be applied for periods after the 1986 amendment (September 29, 1986). The Department is correct. The obvious intent and result of the 1986 amendment was to return the withdrawal statute to its pre-1983 construction. Transfer of title has been eliminated as a controlling factor. Rather, Alabama Precast, Home Tile and Equipment Co., and other pre-1983 cases should control. Accordingly, the withdrawal of ink and newsprint by the Taxpayer during October, 1986 through April, 1987 for use in printing newspapers is taxable under §40-23-1(a)(10), as amended effective September 29, 1986.

The above considered, the additional refund claimed by the Taxpayer should be denied.

Done this 26th day of May.