

refund with the Revenue Discovery Systems (“RDS”) for all local sales taxes remitted to Dallas County, Alabama on the materials purchased to fulfill the contract with the South Dallas Water Authority. The petition asserts that the transactions were tax-exempt under the ALA. CODE § 40-23-4(a)(16) as equipment purchased primarily for pollution control.

ANALYSIS

ALA. CODE §§40-23-4(a)(16) and 40-23-62(18) (1975) provide that all tangible personal property “acquired primarily” or “used or placed in operation primarily” for pollution control purposes is exempt from Alabama state and local sales and use tax.

The Alabama Supreme Court held in *Chemical Waste Management v. State* that equipment used in a hazardous waste disposal facility was an integral and necessary part of the taxpayer’s profit-motivated business activity, and thus not exempt under the pollution control exemption. The Court reasoned that property which is acquired primarily for the production of goods or services and is integral to a profit-motivated business purpose or activity does not qualify for the pollution control exemption even when the property controls, reduces, or eliminates air or water pollution. 512 So.2d 115, 118 (Ala. Civ. App. 1987); *HLH Constructors, Inc. v. State Dept. of Revenue*, 902 So.2d 680, 686 (Ala. Civ. App. 2004). The primary purpose for which the property is acquired is controlling. Accordingly, the primary purpose of the property was not pollution control within the intended meaning of the statute; rather, it was part and parcel of the taxpayer’s business purpose, which is primarily to complete contracts with its customers and further business operations. *HLH*, 902 So.2d at 689.

The exemption does not apply to all property that performs a pollution control function. Rather, the exemption applies only if the property is acquired or placed in operation by the purchaser or user primarily for pollution control purposes. The primary purpose of the exemption is to ease the burden on businesses that are required to purchase extra, non-productive equipment necessary to comply with mandatory pollution control legislation. *Air Products & Chemicals, Inc v. State Dep’t of Revenue*, U. 95-359 (Admin. Law Div. 12/14/11) at 4. The fact that the contractor’s primary business involves contracts associated with pollution control does not allow them to purchase all the tools of their trade tax-free when used by the business directly in a profit-motivated activity. *Id* at 6.

In this instance, the taxpayer contracted to supply the South Dallas Water Authority with materials and products for installation into a waste water treatment plant. Although there is support to conclude that the materials purchased would eventually serve the function of controlling pollution or treating waste water, the distinction at this point is without legal consequence. The exemption does not apply if the property is acquired and used in a profit-motivated business activity, even if the property incidentally serves to control pollution. The

materials were purchased from a supplier by the taxpayer whose primary purpose for acquiring the materials was to fulfill a contract to provide a customer with a product, and the legislature did not intend to extend the pollution control exemption to allow businesses to purchase materials tax-free for use in fulfilling contracts for profit. Therefore, the exemption does not apply.

Additionally, the fact that the material could have been purchased directly by the contractor's customer also does not relieve the taxpayer of liability. The Alabama Supreme Court has recognized that property may be taxable if acquired for business purposes by one taxpayer, but tax-exempt if purchased primarily for pollution control by another. *Chemical Waste Management*, 512 So.2d at 118. There is a valid distinction between non-productive property acquired and used by a business to contain its own pollution, and property acquired and used by a business as a necessary and integral part of a profit-making activity. *State of Alabama Dep't of Revenue v. Industrial Safety Products, Inc.*, S. 90-257 (Admin. Law Div. 09/17/92) at 5. The tax in issue is levied against the purchaser or user of the equipment, not the customer. The fact that the economic burden of the tax is passed to an exempt entity, or an entity that could have purchased the material tax-free, does not contravene the intent of the legislature in passing the exemption, and does not absolve the taxpayer of liability. *State v. King & Boozer*, 314 U.S. 1, 12 (1941).

This conclusion is also supported by the well settled principle that taxation is the rule and exemption the exception. *Curry v. Reeves*, 195 So. 428 (Ala. 1940). In construing statutes granting exemption from taxation, the universal rule of construction is that exemptions from taxation, whether statutory or constitutional, are to be strictly construed, against the exemption and in favor of the right to tax. *Brundidge Milling Co. v. State*, 228 So.2d 475, 477 (Ala. Civ. App. 1969).

For similar holdings, see, *Lesaffre Yeast Corporation v. State of Alabama*, S. 03-1130 (Admin. Law Div. 6/16/04) (piping, pumps, and irrigation systems purchased directly by the taxpayer for the control and reduction of water pollution did not qualify for the exemption because they were a part of the taxpayer's profit-motivated agricultural business); *Air Products & Chemicals, Inc. v. State of Alabama*, U. 95-359 (Admin. Law Div. 12/14/95) (equipment purchased by a contractor to fulfill a contract was not exempt because it was necessary to and used in the contractor's profit-motivated business); *Industrial Safety Products, Inc. v. State of Alabama*, S. 90-257 (Admin. Law Div. 9/17/92) (filters, decontamination showers, respiratory equipment, protective glasses, goggles, boots, etc. used by a taxpayer in its asbestos removal business were not exempt because they were acquired primarily for use in the taxpayer's profit-motivated business) *affirmed on rehearing*, S. 90-257 (Admin. Law Div. 11/18/92); *Waste Away Group, Inc. v. State of Alabama*, U. 88-107 (Admin. Law Div. 2/16/90) (containers and trucks used by a taxpayer in its waste disposal business were not exempt because the equipment was acquired primarily for and used directly in a profit-motivated activity).

The refund petition filed for taxes paid to Dallas County, Alabama on the equipment supplied to the South Dallas Water Authority was properly denied. This opinion may be appealed to the circuit court within 30 days in accordance ALA. CODE § 40-2A-9(g), or the taxpayer may file an application for rehearing within 15 days pursuant to ALA. CODE § 40-2A-9(f).

A handwritten signature in blue ink, appearing to read "Jonathan Ford".

Entered April 18, 2011