

**REVENUE DISCOVERY SYSTEMS – ADMINISTRATIVE HEARING OFFICER**

JT THORPE COMPANY )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 FLOMATON, ALABAMA )  
 )  
 Respondent, )  
 )  
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 )

**FINAL ORDER ON REFUND**  
**PETITION APPEAL**

**BACKGROUND**

The taxpayer, JT Thorpe Company, a Texas corporation located in Houston, Texas, is categorized as a, for-profit, industrial building and supply business operating in Alabama. The business contracted with Escambia Operating, LLC (“Escambia”), a Texas Limited Liability Corporation to supply them with certain industrial equipment, specifically a stack grid burner, which the taxpayer claims exclusively serves a function of pollution control. Escambia purchased the item pursuant to fulfilling their own contract for installation of the equipment within a facility located in Alabama. The taxpayer accrued and remitted the sales tax on the retail sale of the equipment at the time it was invoiced to Escambia. Escambia later notified the taxpayer that they believed the equipment was exempt from state and local sales and use tax under Ala. Admin. Code r. 810-6-3-.46. Thereafter, the taxpayer refunded the tax collected from Escambia, and timely filed a petition for refund from the jurisdiction of Flomaton in accordance with ALA. CODE § 40-2A-7(c)(2) (1975).

Revenue Discovery Systems (RDS) examined the refund petition on behalf of the self-administered jurisdiction of Flomaton, and denied the petition finding that the transaction failed to meet the qualifications for exemption because the primary purpose for the acquisition of the property was for a profit-motivated business purpose based upon ALA. ADMIN. CODE r. 810-6-3-.46(8).

The taxpayer subsequently appealed the denial of the refund petition under ALA. CODE §40-2A-7(c)(5). The taxpayer’s appeal primarily relies on the fact that the Alabama Department of

Revenue (“ADOR”) granted the refund for the State taxes paid on the same transaction. In support, the taxpayer provided emails from the ADOR evidencing the taxpayer’s responses to three questions posed regarding the taxpayer’s State petition for refund. The relevant ADOR question and taxpayer response regarding the primary purpose prong of the pollution control exemption was exchanged as follows:

Question: “Is the property acquired primarily for pollution control purposes and not for a profit motivated business?”

Taxpayer Response: “Pollution control, does not help the bottom line” [sic]

#### ANALYSIS

ALA. CODE §§40-23-4(a)(16) and 40-23-62(18) 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*, Admin. Law Div. Dkt. No. U. 95-359 (December 12, 1995) at 4. However, 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 Escambia with materials in a profit-motivated transaction which would later be used by Escambia in fulfilling a subsequent transaction for profit. Although there is support to conclude that the materials purchased would eventually serve the function of controlling pollution at a plant, 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 sold by the taxpayer whose primary purpose was to fulfill a contract to provide a customer, Escambia, with a product. The primary purpose for which Escambia acquired the product was to fulfill their own contract in a profit-motivated business activity, 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 Escambia'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.*, Admin. Law Div. Dkt. No. S. 90-257 (September 17, 1992) 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 of Alabama v. King & Boozer*, 314 U.S. 1, 12 (1941).

This conclusion is also supported by the well-known and 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).

The taxpayer's response to the question posed by ADOR stating that "pollution control does not help the bottom line" inferred that they themselves were acquiring the equipment primarily for pollution control. The response failed to accurately portray the substance of the transaction in issue. The underlying substance of the transaction was primarily a profit-motivated business activity, and not primarily for the purpose of pollution control. The petition for refund of the taxes remitted to Flomaton on the transaction was, therefore, properly denied by RDS.

For similar holdings, see, *Lesaffre Yeast Corporation v. State of Alabama*, Admin. Law Div. Dkt. No. S. 03-1130 (June 16, 2004) ( 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 taxpayers profit-motivated agricultural business); *Air Products & Chemicals, Inc. v. State of Alabama*, Admin. Law Div. Dkt. No. U. 95-359 (December 14, 1995) (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*, Admin. Law Div. Dkt. No. S. 90-257 (September 17, 1992) (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*, Admin. Law Div. Dkt. No. S. 90-257 (November 18, 1992); *Waste Away Group, Inc. v. State of Alabama*, Admin. Law Div. Dkt. No. U. 88-107 (February 16, 1990) (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 taxpayer may file an application for rehearing on this Final Order in accordance with ALA. CODE § 40-2A-9(f) within 15 days from the date of entry. This Final Order may be appealed to the circuit court in accordance ALA. CODE §40-2A-9(g)(1)a within 30 days from date of entry.

Entered August 4, 2011



Jonathan V. Gerth, Esq.  
Administrative Hearing Officer