

**REVENUE DISCOVERY SYSTEMS – ADMINISTRATIVE HEARING OFFICER**

JOHN ZINK COMPANY, LLC )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 CITY OF BREWTON, ALABAMA )  
 )  
 Respondent, )  
 )  
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**FINAL ORDER**

The taxpayer, John Zink Company, LLC, sold a methane gas flare package to BFI Waste Systems of Alabama, LLC (“BFI”) for use at their commercial landfill operation located in the taxing jurisdiction of Brewton, Alabama. The taxpayer accrued the taxes prior to receiving payment on the invoices, and remitted the amounts to the respective local taxing authority. BFI subsequently deducted the taxes from payment of the invoice to the taxpayer claiming the purchase was exempt from sales tax as material acquired primarily for the control, reduction, or elimination of air or water pollution under ALA. CODE § 40-23-4(a)(16). Thereafter, the taxpayer petitioned Revenue Discovery Systems (“RDS”) for a refund of the taxes paid to Brewton, Alabama on the transaction which BFI claimed was exempt. RDS denied the taxpayer’s petition for refund finding that the transactions failed to meet the qualifications for exemption because the primary purpose for the acquisition of the property was for a profit-motivated business purpose or activity based upon ALA. ADMIN. CODE r. 810-6-3-.46(8). The taxpayer appealed the denial of the refund petition in accordance with ALA. CODE §40-2A-7(c)(5)a claiming that the primary purpose for BFI’s acquisition of the methane gas flare was to comply with pollution control regulations related to landfill emissions, and not as an integral part of BFI’s landfill operation.

Sections 40-23-4(a)(16) and 40-23-62(18) of the Code of Alabama provide that the gross proceeds from the sale of all devices or facilities, and all identifiable components thereof, or materials for use therein, acquired primarily for the control, reduction, or elimination of air or water pollution is exempt from Alabama state and local sales and use tax.

The Alabama Court of Civil Appeals has repeatedly held that equipment used in various forms of air and water pollution control that was an integral and necessary component of the taxpayer's profit-motivated business activity is not exempt under the pollution control exemption. In doing so, 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 it serves a function of pollution control. *Chemical Waste Management, Inc. v. State*, 512 So.2d 115, 118 (Ala. Civ. App. 1987); *HLH Constructors, Inc. v. State Dep't of Revenue*, 902 So.2d 680, 686 (Ala. Civ. App. 2004). The primary purpose for which the property is acquired is controlling. Accordingly, when the primary purpose of acquiring the property is integral to the taxpayer's business purpose, which is to provide commercial services to its customers and further business operations, the property does not fall within the intended meaning of the statute, even when it controls, reduces, or eliminates air or water pollution. *HLH*, 902 So.2d at 689.

Consequently, 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*, No. U. 95-359, 1995 WL 755276 (Ala.Dept.Rev. Dec. 14, 1995). However, the fact that the taxpayer's primary business involves contracts or services 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 sold materials to a privately-operated solid waste landfill. Although there is support to conclude that the materials purchased by the operator contribute to the overall operation of the landfill, the facts also support that the acquisition of a methane gas flare at a solid waste landfill is necessary for regulatory control of air pollution in the form of methane gas. When landfill pits are covered with earth each day, conditions are ideal for the formation of methane, which is produced by the anaerobic (meaning "without oxygen") decomposition of trash. The methane gas can travel through air and porous ground and is explosive even at low concentrations. It is for these reasons that the emission levels of methane gas from municipal landfills are regulated under both federal and state laws.

The facts of this case are similar to those of *Chemical Waste Management* in that they draw focus on the most arduous distinction which can arise in applying the pollution control exemption. Whether the property sought to be exempt was purchased primarily for the purpose of pollution control, or whether the property is integral to the production of goods or services from which the taxpayer's profits are derived. While there can frequently be an overlap of

pollution control with the principal business function, 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 Dep't of Revenue v. Industrial Safety Products, Inc.*, No. S 90-257, 1992 WL 509514 (Ala.Dept.Rev. Nov. 18, 1992).

The commercial storage and disposal of solid waste in a landfill is not, in and of itself, primarily for the control, reduction, or elimination of air or water pollution as contemplated under the statutes. The primary purpose for which BFI is in the business of waste disposal is not based upon some altruistic desire to prevent air and water pollution, but to make a profit. But the fact that the disposal of solid waste creates a perception of pollution control makes the primary purpose distinction even more acute when applied to the acquisition of business assets for taxpayers such as BFI. The vast majority of BFI's property and equipment are used in solid waste management because that is the service they provide, and the very property from which its profits are derived. As such, the majority of their assets can be distinguished from ancillary equipment such as a methane gas flare which is not integral to BFI's stated purpose but is necessary for compliance with mandatory environmental regulations. Therefore, the purchase of a flare device in this instance falls within the intended purpose of the pollution control exemption, and the taxes paid on the transaction are due to be refunded to the taxpayer.

The significance of this distinction can be further illustrated by exploring the same transaction had the landfill purchased a methane gas flare recovery system. Landfills with collection and recovery systems can drill small wells and install compressors and pipes to remove the methane gas. The gas collects in pipes and is channeled to a central collection point where it may be treated to remove contaminants and moisture. It then can be converted into valuable biodiesel fuels, natural gas, feedstock, or oils for outside sale or used to generate energy as heat or steam to be used on site. *Landfill Gas-to-Energy Potential in California*, California Energy Commission (Sacramento, California, September 2002), pp. 6-7. Such a transaction would not likely qualify for the exemption because the primary purpose of acquiring the property would be attributed more to the overall operation of the landfill or the profit-motivated activities of the business, not pollution control.

It is well settled that taxation is the rule and exemption the exception. *Curry v. Reeves*, 195 So. 428 (Ala. 1940), and that exemptions are to be strictly construed against the exemption and in favor of the right to tax, and that no property is to be exempted unless the intention to exempt such property clearly appears in legislation. *Brundidge Milling Co. v. State*, 228 So.2d 475 (Ala. 1969). However, such exemption clauses are not to be so strictly construed as to defeat or destroy the intent and purpose of the statute, and no strained construction is to be given weight which would have that effect. *State v. Union Tank Car Co.*, 201 So.2d 402 (Ala. 1967).

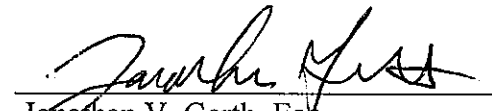


2317 Third Avenue North, Suite 200  
Birmingham, Alabama 35203

800.556.7274 • 205.324.0088 • 205.423.4099 fax  
www.revds.com

The overriding policy goal of pollution control exemptions is for the protection of the public and public interest. The exemption is by no means to be strained or extended to have the effect of subsidizing the cost of equipping and operating a commercial solid waste landfill, but should have the practical effect of assisting them in their immediate efforts to control pollution and comply with mandatory federal and state environmental regulations.

Entered February 10<sup>th</sup>, 2012

  
Jonathan V. Gerth, Esq.  
Administrative Hearing Officer