STATE OF ALABAMA
ALABAMA TAX TRIBUNAL

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Association of County Commissions of Alabama
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Jeff Patterson
Chief Judge, Alabama Tax Tribunal

I. Introductory information concerning the Alabama Tax Tribunal:

A. Alabama's Tax Court

B. Began operating October 1, 2014

C. June 2019 – less than 5 years in operation – docketed 7000th appeal

D. Through June 2019, issued 6940 rulings – vast majority in income-tax cases

E. Very few local-tax appeals

F. Tax Tribunal currently has 2 judges – Leslie Pitman is Associate Judge
*Former Associate Judge Christy Edwards elected to Court of Civil Appeals 2018

G. Administrative notes of interest:

1. Tax Tribunal moved to Halcyon Summit in 2018 – away from downtown
2. Redesigning website for updated appearance and better search capability
3. Have begun remanding certain cases to Alabama Department of Revenue

II. Recent opinions of interest:

A. *Game Day Tents, LLC v. ADOR*, S. 17-358-JP (Op. & Prel. Order, 4/12/19)

B. *Limestone Co. Water & Sewer Authority v. ADOR*, S. 17-280-JP (Final Order, 8/28/18)

C. *Rikki D. Pickett dba American Rust Market v. ADOR*, S. 19-236-JP (Final Order, 5/7/19)

III. Q & A

ALABAMA TAX TRIBUNAL

GAME DAY TENTS, LLC,	§	
Taxpayer,	§	DOCKET NO. S. 17-358-JP
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND PRELIMINARY ORDER

The Taxpayer filed two petitions with the Alabama Department of Revenue requesting refunds of rental tax for the periods September 2014 through December 2015. In response, the Revenue Department audited the Taxpayer, denied the refund petitions, and entered a final assessment of rental tax against the Taxpayer for the periods January 2013 through June 2016. The Taxpayer timely appealed the refund denials and the assessment.

Questions Presented

Alabama has levied a tax on persons engaging "in the business of leasing or renting tangible personal property. . ." within this state. Ala. Code § 40-12-222(a). Here, the two questions are:

1) Whether customers of the Taxpayer's tailgating division exerted necessary control over tailgating items so as to trigger the rental tax.

2) Whether the Taxpayer proved that there were set-up and take-down charges for items such as tents, dance floors, and stages that should be removed from the taxable measure of the Special Events division of the Taxpayer.

Facts

The Taxpayer was formed in 2007, and it initially operated as a tailgating business at University of Alabama home football games in a large area on campus known as the "Quad." Specifically, the Taxpayer would provide tailgaters with a specific location for tailgating and also would provide tents, tables, chairs, and coolers, cups, ice, and televisions, among other items. Eventually, customers began requesting the Taxpayer to provide tents for events other than football games, such as for weddings and parties. To accommodate that different type of business, the Taxpayer created a separate division in 2011 called Special Events, through which it rented tents, tables, chairs, dance floors, stages, and other items to customers.

Customers of the Taxpayer's tailgating division chose from different packages at varying prices, with each package offering different levels of goods and services. When a customer was considering a particular package, the customer was shown a photograph of the items generally included in that package, although similar items sometimes were substituted at the Taxpayer's discretion. And those who purchased packages were assigned a specific, designated location on the Quad at which to tailgate.

On Fridays before home games, the Taxpayer would set up tents on the Quad, and the Taxpayer's third-party provider would put in place a corresponding number of televisions and satellite receivers. The next day, once the university provided power to the Quad, the television service provider would connect power to the televisions, download the viewing guide, and ensure that all of the units were working properly. Because of how easily satellite service could be lost in that environment, the Taxpayer arranged for the television service provider to remain on the Quad throughout the day so that interruptions in service could be fixed. In fact, the provider was assigned a spot on the Quad and a radio so that it could respond quickly to problems and restore service.

Also, the Taxpayer provided to its tailgating customers the option to coordinate catering from a list of approximately half a dozen caterers that had been interviewed by the Taxpayer. If customers chose this option instead of arranging their own catering, the Taxpayer assisted the preferred caterers by making sure that the food was delivered as timely as possible once the caterer arrived at the Quad. The Taxpayer did so by providing preferred caterers with a map of customers' tailgating locations and by providing those caterers with phone access to the Taxpayer's customer service representatives. The Taxpayer even had the use of carts on campus that sometimes were used to help deliver food. If customers arranged their own catering, the Taxpayer would tell those customers that there was no guarantee that the non-preferred caterers could deliver the food to the customers. Regardless of the option chosen by customers, the ordering and payment transactions were handled directly between customers and caterers, and did not involve the Taxpayer.

For customers whose packages came with coolers, the Taxpayer would deliver the coolers to the university's on-campus beverage provider prior to a game, and the provider would stock the coolers with beverages ordered by the customers. The provider then would deliver the coolers to the customers' tailgating locations on the Quad. The Taxpayer would check the coolers to ensure that the order had been filled properly and then would put ice in the coolers. Eventually, the beverage provider assigned a person to the Taxpayer's main customer service tent to handle problems with the fulfillment of orders.

Because of the largeness of the Quad, the Taxpayer began setting up customer-service tents throughout the area so that the Taxpayer could respond more quickly to its customers' needs. For example, if a customer lost television service or ran out of an item such as ice, the customer could go to a nearby tent to report the problem. A Taxpayer staff member at that tent would report the problem by radio to the Taxpayer's "command central" tent, which was located by Denny Chimes and which had supplies. A runner at the command tent would deliver the needed supplies, or the Taxpayer would inform the television service provider's representative of the need to restore service. Sam Brewer, an owner of the Taxpayer, testified that the Taxpayer delivered items such as ice, cups, and plates to its customers throughout the day.

On certain game days, the Taxpayer had as many as 20 staff members and representatives present to assist its customers on the Quad and in Presidential Park, which is a smaller area on campus that the Taxpayer also was allowed to utilize. Mr. Brewer testified that, throughout a game day, those persons visited every tailgate site every week to make sure that things were in order.

The Taxpayer had an exclusive contract with the University of Alabama for operating a tailgating business on campus for paying customers. But, the Taxpayer did not have exclusive access to the entire Quad on game days. Instead, fans could tailgate on certain parts of the Quad if they could secure their own location and were willing to set-up, oversee, and take down their own items. No other company, though, had the university's authorization to handle such matters for customers. And individuals could not merely rent items from the Taxpayer and then use those items in their own tailgating spots.

By virtue of its exclusive contract with the university, the Taxpayer was required to follow certain rules and to ensure that its customers followed certain rules. For example, in a contract modification between the Taxpayer and the university, the Taxpayer's requests to drive on certain parts of campus were denied, although it was allowed to continue driving trailers onto the Quad for the set-up and take-down of equipment.

Also, the university did not allow the Taxpayer or its customers to affix banners to tents on campus for the purpose of displaying names of businesses, charities, churches, or political parties or candidates. Instead, such displays were limited to smaller items such as napkins, apparel, and brochures kept underneath the tents. And the Taxpayer's customers were not allowed to hand out brochures, cards, or souvenirs to persons outside their tent. The logos of opposing teams also could not be displayed on tents, flags, signage, or banners within the tailgating area.

The Taxpayer was required to monitor the items that its customers plugged into electrical outlets, because some items, such as crock pots, tripped the breakers and were prohibited. (The crock pots belonged to the customer, not the Taxpayer.) Even noise coming from tailgating sites was monitored to ensure that it did not exceed the allowed decibel level. And the Taxpayer also was required to monitor alcohol usage and the general behavior of its customers. If someone with the university noticed a problem, they would call the Taxpayer, and the Taxpayer would speak with the customer to educate them concerning the rules. If the problem continued, the Taxpayer would revisit the customer, accompanied by a university official. Several times, when customers still continued to violate the rules, the Taxpayer had university police officers remove those customers from the Quad. The Taxpayer then would take down the tent, and the party was over.

In addition to monitoring for the university, the Taxpayer also monitored the usage of its own equipment. As long as customers kept their assigned chairs and tables within their assigned tailgating area and did not infringe on anyone else's tailgating area or experience, the customers could reconfigure their space to suit their needs. But, tailgaters from one tent would go to another tent to tailgate and sometimes would take the Taxpayer's chairs with them. When that happened, the Taxpayer would take the chairs back to the tent where they belonged. The Taxpayer also prevented its customers from sharing the ice that had been provided by the Taxpayer with other tailgaters. And Mr. Brewer testified that he once asked a tailgater to not stand in one of the Taxpayer's chairs.

The university determined the time by which the Taxpayer could begin setting up equipment on campus and the time by which the Taxpayer had to remove the equipment. And only the Taxpayer could set up and take down its equipment. The Taxpayer's paying customers could not do so.

While the football games were being played, the Taxpayer's staff monitored the tailgating areas to make sure that everything was safe at the tents while their customers were inside the stadium. After the games, the Taxpayer would clean the tailgating areas so that its customers could go home without having to do that work themselves. According to Mr. Brewer, it was this aspect of the Taxpayer's tailgating business for which customers were most appreciative. In fact, he testified that customers primarily did business with the Taxpayer because of the premium location and the hassle-free tailgating that the Taxpayer provided. Mr. Brewer also stated that the equipment itself, such as tables, tents, and chairs, could have been purchased by its customers for a few hundred dollars, whereas the amounts charged by the Taxpayer for its tailgating packages were in the thousands. For example, as shown in Revenue Department Exhibit B, the amount charged by the Taxpayer for its "1st Down Package" for all seven home games in the 2015 season totaled just over $20,000 (before a possible 5% discount).

On the other hand, the equipment that was rented to customers by the Special Events division for weddings and parties was professional grade; *i.e.*, a higher grade than the tailgating equipment. For example, Special Events invoices and job orders specified that chairs ordered for a Special Events function could not be substituted.

Also, set-up was different concerning some Special Events equipment. Unlike with tailgating, Special Events customers could pick up rented tables and chairs from the Taxpayer's business and set up those items themselves. If asked, the Taxpayer would deliver the items (and would set them up if requested), but did not necessarily interact with customers and did not manage the experience of the event. Concerning pricing, Mr. Brewer testified that a chair rental was quoted at a certain price and that delivery and set-up charges were each quoted separately, if the customer wanted the Taxpayer to perform those functions. He also testified, though, that delivery and set-up charges were included in the rental price for large tents because those items could not be set up by customers. Although a customer could have rented a dance floor or stage without having the Taxpayer set up those items, Mr. Brewer did not know of a time when that occurred.

In its audit, the Revenue Department removed from the taxable measure all separately-stated set-up and delivery charges that appeared in the Taxpayer's invoicing software. The auditor testified, however, that she saw no documentation or option for customers to set up tents, dance floors, or stages. Therefore, no amounts for those items were removed. And Mr. Brewer stated that he did not know if there were invoices where set-up and breakdown charges were included as part of the overall cost but not separately stated, as they were on Revenue Department Exhibit D. (The separately-stated charges on that exhibit were removed by the Revenue Department from the measure of the tax.)

Instead, it was the auditor's understanding that the Special Events refund petition was based on a few wholesale rentals of tents and a theatrical stage by the Taxpayer to other rental companies, where the other companies were going to set up the items. According to the auditor, the Revenue Department's decision to deny the refund petition was predicated on an administrative rule which requires the existence of a separate, optional agreement between the lessor and the lessee concerning such charges as delivery and set-up, and which requires those charges to be separately stated.

Law and Analysis

Question One

Alabama's rental tax is levied "on each person engaging or continuing within this state in the business of leasing or renting tangible personal property. . ." § 40-12-222(a). For purposes of the levy, the code defines "leasing or rental" as "[a] transaction whereunder the person who owns or controls the possession of tangible personal property permits another person to have the possession or use thereof for a consideration and for the duration of a definite or indefinite period of time without transfer of the title to such property." § 40-12-220(5).

In *State v. Steel City Crane Rental, Inc., et al.*, 345 So.2d 1371, 1372 (Ala. Civ. App. 1977), Alabama's Court of Civil Appeals considered whether "the furnishing of cranes with operators is a lease or rental of tangible personal property within the meaning of Alabama's lease tax statute." The taxpayers were in the business of renting large cranes to the construction industry. At the option of the construction contractors, cranes were provided with or without operators. In situations where operators were not provided, it was agreed that lease tax was due.

It also was undisputed that, when crane operators were provided, the operators were the employees of the taxpayers. And it was the taxpayers who provided fuel for the cranes and who performed all maintenance and repairs on the cranes. For safety and other reasons, the operators determined where and how a crane was operated, although the court's opinion did not state what the other reasons were. The taxpayers were responsible for the security of the cranes, and the taxpayers could substitute cranes for a particular job. Although the operator was in physical control of the crane at all times, the manner in which a job was to be accomplished was discussed with the contractor. In short, the contractor "maintained control over the job and the operator maintained control over the crane; that the operation was a team effort." *Id*. at 1372.

The trial court had ruled that the transactions were not subject to rental tax, stating:

> From the above it may readily be seen that the crucial, decisive question is that of whether the subject arrangement constitutes a 'leasing or rental' within the Act. Also, basically, the solution to this question revolves around the words 'possession or use' as they appear in the Act.
>
> This Court holds that it is fundamental to common sense that before a person can exercise 'possession or use' of property he must have control thereof and the power to exercise dominion over it. There has never been any relinquishment of dominion and complete control over the subject property by the owners. Conversely, the owners have strictly avoided any semblance of relinquishment.
>
> Briefly, the arrangement constitutes a contract for the performance of a particular job or jobs and is not a 'lease or rental'.

Id. at 1373.

In affirming, the appellate court stated the following:

The basis of the decisions in Rice Bros., Inc. and Insurance Company of North America, supra, may be summarized as follows. The principal characteristic of a rental or lease is the giving up of possession to the lessee so that he, as opposed to the lessor/owner, exercises control over and uses the leased or rented property. The facts of these cases revealed insufficient relinquishment of control over the equipment by the 'lessor' to sustain a finding that the lessee was in possession of the equipment. Hence, there was no lease or rental.

As previously stated, the circumstances herein place this case within the holdings of Rice Bros., Inc. and Insurance Company of North America, supra. However, the State would distinguish these cases on the grounds that there was no statutory definition of lease or rental. Here, the State contends, a lease or rental is statutorily defined as a transaction not only where the owner allows another to have 'possession' of tangible personal property, but also where the owner permits another the 'use' of tangible personal property for consideration. In other words, since the statute declares that a lease or rental is a transaction whereby the owner permits another to have 'possession or use' of the property, either one--'possession' or 'use'--is sufficient to bring the transaction within the statute. Both possession and use are not required. The term 'use' is a broader term than possession and, in this instance, the State concludes the lease tax was properly applied. This contention is without merit.

A statute is to be construed so as to effectuate the intent of the legislature. *League of Women Voters v. Renfro*, 292 Ala. 128, 290 So.2d 167 (1974). In ascertaining the legislative intent, courts may construe the disjunctive conjunction 'or' and the conjunctive conjunction 'and' interchangeably. *In re Opinion of the Justices*, 252 Ala. 194, 41 So.2d 559 (1949). Additionally, taxing statutes are to be construed against the taxing power and in favor of the taxpayer. *State v. International Paper Company*, 276 Ala. 448, 163 So.2d 607 (1964). Interpreting Tit. 51, § 629(21) et seq. [which is a predecessor to § 40-12-220, et seq.] with due regard to the above principles compels a conclusion by this court that the legislature did not seek to expand the meaning of lease or rental beyond that normally ascribed to such terms. Hence, the transaction in question fails to fall within the levy of § 629(21) et seq.

Furthermore, even if we accepted the State's proposition with regard to the expanded interpretation of the statute, the ultimate result herein would remain unchanged, for the essence of the arrangement in question is not that of a lease. Rather, it is an agreement whereby one party has agreed to

> perform a particular task or tasks for another. It is a contract under which the taxpayers are obligated to perform services for a certain number of hours or until the completion of a given job. The contractor/lessee does not even specify which crane is to be utilized when he requests a crane with an operator. That decision remains within the sound discretion of the taxpayers. Granted, the contractor/lessee derives a benefit from the completion of the tasks by the crane. However, it is the taxpayers, not the contractor/lessee, who 'use' the cranes. The substance of taxpayers' contracts with the contractor/lessee are agreements to provide services for the contractor. Hence, in this instance, this court cannot accept the State's contention that such transactions are subject to the lease tax levied by Tit. 51, § 629(21) et seq., Code of Alabama (1973 Cum. Pocket Part).

Id. at 1373 – 74 (bracketed material added).

Steel City Crane has been relied upon by appeals courts in other states. In *City of Phoenix v. Bentley-Dille Gradall Rentals, Inc.*, 665 P.2d 1011 (Ariz. App. Div. 1 1983), the court considered whether the activities of the taxpayer, who provided Gradall machines (with operators) to construction projects, constituted contracting services or the rental of equipment. The classification determined which jurisdictions were entitled to the privilege tax. The court first stated that the phrase “to rent” meant “to obtain the possession and use of a place or article for rent.” *Id*. at 1013. The court then compared the facts in *Steel City Crane* with the facts in its case and held that the taxpayer “did not give up possession and control” of the equipment and thus was not engaged in rental activities for tax purposes. *Id*. at 1014.

In *Crane Service & Equipment Corp. v. U.S. Fidelity & Guaranty Co.*, 496 N.E.2d 833 (Mass. App. Ct. 1986), the insurance company (USF&G) disclaimed coverage for damage to a crane because, it argued, the crane had been “rented to,” “used by,” and “in the care, custody or control of” its insured (a general contractor). *Id*. at 667. In holding against USF&G, the court noted that the crane operator and oiler, who were employees of the crane company, had retained physical control over the crane and had secured it at the end of the work day. Also, the crane company had reserved the right to substitute cranes and crew members. To determine whether a particular transaction constitutes a rental, "courts look to who has possession and who has control of the property," *id*. at 668, citing *Steel City Crane*. The court then stated that "the dispositive factors of possession and control line up decisively in favor of construing the transaction as a service contract rather than an equipment lease." *Id.* Likewise, the court stated that the phrase "'used by' implies those same elements of responsibility for the damaged object which [USF&G's insured] did not have. [I]f the term 'use' is construed to embrace all its possible meanings and ramifications, practically every activity of mankind would amount to a 'use' of something. However, the term must be considered with regard to the setting in which it is employed." *Id*. at 669 (citations omitted).

A decade after *Steel City Crane*, our Court of Civil Appeals addressed whether the providing of cable television converter boxes to customers was subject to rental tax under § 40-12-222. *White v. Storer Cable Comm., Inc.*, 507 So.2d 964 (Ala. Civ. App 1987). After noting that the question was one of first impression in the state, the court summarized its *Steel City Crane* rationale; *i.e.*, that the principal characteristic of a rental transaction is the giving up of possession of the rental property so that it is the lessee and not the lessor who exercises control over that property. *Steel City Crane* at 966. And the court restated its rejection of the Revenue Department's claim that either the 'possession or use' of property by another was sufficient to trigger the rental tax. *Id*. at 966 – 67.

In *Storer Cable*, however, the Revenue Department argued that the transactions were subject to rental tax because the converters were in the "possession" of Storer's subscribers. This position was the reverse of the Revenue Department's position in *Steel City Crane* where it argued that the cranes were "used" by the general contractor/lessee.

Nevertheless, the *Storer Cable* court stated that "[t]he question remains whether Storer's subscribers have the 'use' of the converters." *Id*. at 967. The court began to answer that question as follows:

> 'Use' is defined as follows:
>
> 'The purpose served; a purpose, object or end for useful or advantageous nature. To put or bring into action or service; to employ for or apply to a given purpose. To avail oneself of; to employ; to utilize; to carry out a purpose or action by means of; to put into action or service, especially to attain an end.' (Citations omitted.)
>
> Black's Law Dictionary 1382 (5th ed. 1979). Thus, following Steel City, supra, we could hold that the converters are in the 'possession' of Storer's subscribers, but are still not subject to rental tax if the subscribers do not have the 'use' of them. As the following analysis will show, it is to what use the property in question is put (or can be put) that often determines whether the rental tax statute applies in cases like the instant one. This question of the property's 'use' is connected to the overall purpose of the contract in question.

Id.

After reviewing cases from other jurisdictions, the court stated:

> We think the issue to be one of determining the purpose of the transaction and what role the property in question plays in that transaction. We are concerned in this case with determining whether Storer's converters or its cable television service is the substance of the transaction. We do not think this basic concept is affected by statutory considerations of the sort proposed by the Department: the imposition of the rental tax must be based on Alabama statutes, not those of another state. One writer summarizes how such cases are to be analyzed:

> ‘If the article sold has no value to the purchaser except as a result of services rendered by the vendor, and the transfer of the article to the purchaser is an actual and necessary part of the services rendered, then the vendor is engaged in the business of rendering service, and not in the business of selling at retail. If the article sold is the substance of the transaction and the service rendered is merely incidental to and an inseparable part of the transfer to the purchaser of the article sold, then the vendor is engaged in the business of selling at retail....’
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> Ball, 9 Vand.L.Rev. at 235, 236 (1956) (quoting *Snite v. Department of Revenue*, 398 Ill. 41, 74 N.E.2d 877, 879-80 (1947)).

Id. at 968.

In affirming the trial court’s ruling that rental tax was not due, the court concluded by stating that “[t]he converters had no function apart from giving Storer subscribers access to the cable service. That is, they were ‘useless’ in and of themselves. The substance of the transaction was cable service; the converters were merely a means serving that end.” *Id*. As with *Steel City Crane*, the *Storer Cable* opinion has been relied upon by another state’s appellate court in holding that the true object of the transaction in question was the furnishing of services and not the tangible objects associated with those services. *See MCI Airsignal, Inc. v. State Bd. of Equalization*, 1 Cal.App.4th 1527 (Cal.Ct.App., 1st District, 1st Div. 1991).

In applying *Steel City Crane* and *Storer Cable* to the facts of this case, it is clear that the transactions between Game Day Tents and its tailgating customers were not subject to Alabama’s rental tax, for two reasons. First, the Taxpayer’s customers did not exert necessary control or dominion over the items provided by the Taxpayer. Second, the essence or purpose of the transactions was the provision of a service to the tailgaters and not the rental of tangible personal property.

As to the lack of control or dominion, the items provided by the Taxpayer to its customers could be substituted at the Taxpayer's discretion. And it was the Taxpayer who set up equipment for its customers, and third-party providers who put in place televisions and receivers and who established (and reestablished) satellite service.

Also, items that were provided by the Taxpayer could not be used outside of each customer's assigned tailgating area. Even within a customer's area, neither the Taxpayer nor the customer was allowed by the university to affix business or political banners to tents. Instead, such displays were limited to napkins, apparel, and brochures which had to be kept underneath the tent.

Customers were restricted as to the items that they could plug into electrical outlets within their tent areas, because some items were prohibited by the university. Customers also were restricted by the university as to their noise level, alcohol usage, and general behavior within their tailgating areas. If noncompliance with university rules continued, the tailgaters were removed from the Quad and their use of the tangible items provided by the Taxpayer abruptly ended.

The Taxpayer also monitored the usage of its equipment for its own purposes and not only for compliance with university rules. Tailgaters could reconfigure items within their space to suit their needs, as long as chairs and tables were kept within their assigned area. If tailgaters from one area took the Taxpayer's chairs to another tent, the Taxpayer would return the chairs to the original tent area. Tailgaters were not allowed to share ice with other tailgaters outside of their tent area, and were not allowed to stand in the Taxpayer's chairs.

Also, tailgaters could not set up or take down the Taxpayer's equipment. And tailgaters could not rent equipment from the Taxpayer and put that equipment anywhere on campus that they chose. While customers were inside the stadium during games, it was the Taxpayer's staff who monitored the tailgating areas.

As stated by the Court of Civil Appeals, "[t]he principal characteristic of a rental or lease is the giving up of possession to the lessee so that he, as opposed to the lessor/owner, exercises control over and uses the leased or rented property." *Steel City Crane* at 1373. The facts here show that the Taxpayer's customers did not exert the necessary control over tailgating items.

In its brief, the Revenue Department attempts to distinguish the facts in this case from the facts in *Steel City Crane* by arguing that, here, the Taxpayer's "customers were allowed unfettered usage" of the tangible items. However, as discussed, the facts show that the tailgaters' use of the Taxpayer's property was anything but unfettered.

Many of the facts concerning the tailgaters' lack of control over tailgating items also demonstrate that the essence or purpose of the transactions was the provision of a service, as do additional facts. Again, the Taxpayer set up tents and other items for its customers and arranged for a third-party provider to establish satellite television service. The Taxpayer also arranged for the television service provider to remain on campus to handle interruptions in service.

The Taxpayer interviewed caterers for the purpose of providing its customers with catering options, and assisted the caterers (and the Taxpayer's own customers) in the delivery of the food. (Payment for catered food was handled directly between customers and caterers.) And the Taxpayer delivered coolers to the university's beverage provider prior to a game so that the coolers could be stocked with the customers' chosen beverages. The Taxpayer checked coolers for accuracy in its customers' orders and then put ice in the coolers. Eventually, a person from the beverage provider was assigned to the Taxpayer's main customer service tent to address incorrect orders.

The Taxpayer had an exclusive contract with the university for operating its business on the campus's prime tailgating spots. Although fans could tailgate in other areas on campus without using the Taxpayer, fans had to do so by securing their own location and setting up, securing, and taking down their own equipment. The Taxpayer's customers, however, were assigned a specific, designated location on campus.

The Taxpayer's and the university's enforcement of tailgating rules provided an intangible benefit to the Taxpayer's customers by providing an enjoyable game-day experience without having to deal with unruly tailgating neighbors. And once a game ended, the Taxpayer cleaned the tailgating areas, which allowed its customers to leave as soon as they were ready instead of having to do the work themselves.

According to Mr. Brewer, the Taxpayer provided hassle-free tailgating on the campus's premium tailgating locations. And its customers paid a much higher price for that service than they would have paid to simply buy the items of tangible personal property and use those items to tailgate on their own. Here, as in *Storer Cable*, the substance of the transactions was the service provided by the Taxpayer, and the items of tangible personal property "were merely a means serving that end." *Id*. at 968. *See also Steel City Crane* at 1374.

The Revenue Department argues in its brief, however, that, "[u]nlike in [*Storer Cable*], the tents, chairs, coolers have use outside of the services rendered by [the Taxpayer] as the testimony indicated that the [Taxpayer's] inventory was merely consumer grade products that could be purchased at any sporting goods store." The point, though, is that these items provided by the Taxpayer could be used only within the Taxpayer's provision of services.

Also in its brief, the Revenue Department claims the following: "Alternatively, if the transactions are found not to be subject to the rental tax, then these transactions should be subject to the amusement tax levied pursuant to § 40-23-2(2), Ala. Code 1975, as the tailgating packages sold are essentially a fee paid in consideration for a designated tailgating space for amusement or entertainment purposes." This claim misses the mark.

First, the refund petition and the final assessment concerning the Taxpayer's tailgating business both involve rental tax, not amusement tax. Even if the Tax Tribunal believed that amusement tax applies to the Taxpayer's tailgating business (which the Tax Tribunal does not believe), the Tax Tribunal has no authority to simply substitute one tax for another and impose an alternative tax on the Taxpayer. *Cf*. § 40-2A-7(b)(1)a (authorizing the Revenue Department to "enter a preliminary assessment for the correct tax") with § 40-2A-7(b)(5)d.1. (stating that the "Alabama Tax Tribunal, circuit court, or the appellate court on appeal may increase or decrease the assessment to reflect the correct ***amount*** due"). (emphasis added) Second, if anyone is conducting or operating a place of amusement on the University of Alabama campus on certain Saturdays in the fall, it is not the Taxpayer. Rather, it is the university through its home football games.

<u>Question Two</u>

"Concerning the refund petitions, the burden is on a taxpayer to prove that a refund is due." *The Package Store #1, Inc., and The Package Store #2, Inc. v. Alabama Department of Revenue*, Docket No. S. 87-183, Admin. Law Div. (January 26, 1993). The burden also is on a taxpayer to prove that a final assessment is incorrect. Ala. Code § 40-2A-7(b)(5)c.3. Here the Taxpayer has not done so.

The Taxpayer seems to make two points. First, the provision of optional services, such as the delivery, set-up, and take-down of items, does not have to be addressed in a separate agreement for the receipts from those services to be excluded from the rental tax measure. Generally, the Taxpayer is correct. *See Brock Services, LLC v. Alabama Department of Revenue*, Docket No. S. 14-1236, Alabama Tax Tribunal (September 28, 2015).

Second, the Taxpayer's Special Events division rented large items, such as dance floors and tents, but did not separately state the charges for its optional services of delivery and set-up on those invoices. Thus, the Taxpayer claims that the portion of those invoices which included the optional service charges was not subject to rental tax.

But the evidence on this issue contradicts the Taxpayer's second point or, at best, is inconclusive. On direct and cross examination, Mr. Brewer testified that a Special Events customer could not set up a tent. Because the charges by Special Events for setting up and taking down tents (and, presumably, for delivering tents) were for services that were not optional, those charges could not be excluded from the rental tax measure, as correctly argued by the Revenue Department. *See Brock Services*, *supra*, and § 40-12-220(4) (defining rental tax "gross proceeds" to include labor charges).

Concerning dance floors and stages, Mr. Brewer testified that a customer had the option of setting up those items, but he did not know of an instance when a customer had done so. He also testified that he did not know whether there were any Special Events invoices that included set-up and break-down charges as part of the overall cost without separating those charges.

Suffice it to say that the record lacks evidence to support the Taxpayer's claim that the discussed charges should be removed from the taxable measure of its Special Events division.

Conclusion

The receipts from the Taxpayer's tailgating business were not subject to rental tax. However, the Taxpayer failed to prove that the taxable measure of its Special Events division contained non-taxable amounts. Apparently, the final assessment at issue contains rental tax relating to both of the Taxpayer's divisions.

Therefore, the Revenue Department is directed to recalculate the final assessment based on this Opinion and Preliminary Order and inform the Tax Tribunal of its recalculations no later than **May 10, 2019**. The Tax Tribunal then will enter a Final Order concerning the final assessment and the Taxpayer's two refund petitions.

Entered April 12, 2019.

/s/ *Jeff Patterson*
JEFF PATTERSON
Chief Judge
Alabama Tax Tribunal

jp:dr
cc: Blake A. Madison, Esq.
Mary Martin Mitchell, Esq.

ALABAMA TAX TRIBUNAL

LIMESTONE COUNTY WATER & SEWER AUTHORITY,	§	
Taxpayer,	§	
v.	§	DOCKET NO. S. 17-280-JP
	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

In January 2017, the Limestone County Water & Sewer Authority ("Authority") applied with the Alabama Department of Revenue ("Revenue Department") for a sales and use tax exemption certificate concerning work to be performed on a water-line improvement project. The Authority submitted the application as a "governmental entity," pursuant to Act 2013-205, which is codified at Ala. Code § 40-9-14.1. If the Authority's application had been approved, the Authority's licensed contractor and subcontractors would have been authorized to purchase materials and supplies for the designated project on behalf of the Authority without having to pay sales or use tax.

The Revenue Department denied the application, however, by stating that "the term 'governmental entity' as defined in Section 40-9-14.1(a) does not include public corporations other than industrial or economic development boards or authorities which are specifically named." The Authority timely appealed.

ISSUE

The issue is whether the Authority, at the time it applied for the exemption certificate, met the legislature's definition of "governmental entity" in Act 2013-205, so as to utilize that particular process for making tax-free purchases.

LAW AND FACTS

The Authority was created pursuant to Ala. Code § 11-88-1, et seq. Thus, the Authority is "exempt from all taxation in the State of Alabama," pursuant to § 11-88-16. At the hearing of this appeal, the Revenue Department acknowledged the Authority's statutory tax exemption in Title 11.

As stated, though, the issue is not whether the Authority is exempt, but whether the Authority qualified under Act 2013-205 so that its contractor and subcontractors could purchase necessary materials and supplies tax fee. That issue depends upon the Act's definition of "governmental entity."

As initially filed in the 2013 Regular Session, the Act (as House Bill 419) defined "governmental entity" as follows:

> any governmental entity or a political subdivision, department, or agency of a governmental entity or a board, commission, or authority of a governmental entity which is tax exempt from sales and use taxes by virtue of its governmental status, including, but not limited to, all of the following: The State of Alabama, a county, a municipality, an industrial or economic development board or authority, and an educational institution of any of the foregoing including a public college or university, a county or city board of education, and the State Board of Education.

However, an amendment was introduced which revised the definition to the following:

> the State of Alabama and its political subdivisions, including a county, a municipality, and an industrial or economic development board or authority. A governmental entity shall also include an educational institution of any of the foregoing Alabama political subdivisions including a public college or university, a county or city board of education, and the State Board of Education.

When HB419 became law on May 9, 2013, as Act 2013-205, the phrase "governmental entity" was defined to mean the following:

> the State of Alabama and its political subdivisions, including a county, a municipality, and an industrial or economic development board or authority. A governmental entity shall also include an educational institution of any of the foregoing Alabama political subdivisions including a public college or university, a county or city board of education, and the State Board of Education.
>
> (underline in Act)

Subsequently, the Revenue Department amended Ala. Admin. Code r. 810-6-3-.77(1) to define "governmental entity" as follows:

> (a) The State of Alabama.
>
> (b) A county or incorporated municipality of the State of Alabama.
>
> (c) An educational institution of the State of Alabama, or a county or incorporated municipality of the State of Alabama.
>
> (d) An industrial or economic development board or authority that is exempt from the payment of Alabama sales and use taxes.
>
> (e) Other governmental agencies that are exempt from the payment of Alabama sales and use taxes excluding those agencies as provided in sections (2) and (3) below.
>
> (2) The exemption outlined in section (1) shall not apply to any of the following:
>
> (a) Purchases of tangible personal property by a contractor or subcontractor for storage, use, or consumption in conjunction with performing a contract with a governmental entity that is not itself exempt from Alabama sales and use taxes.
>
> (b) Purchases of tangible personal property by a contractor or subcontractor that are not incorporated into realty pursuant to the contract.
>
> (c) Purchases of tangible personal property for contracts with the federal government.

> (d) Purchases of tangible personal property made for any contracts for the construction of any highway, road or bridge for, or on behalf of, any governmental entity as outlined above.
>
> (e) Purchases of tangible personal property made pursuant to any contract entered into prior to January 1, 2014.
>
> (3) The exemption outlined in section (1) shall not apply to the sale to, or the storage, use, or consumption by, any contractor or subcontractor of any tangible personal property to be incorporated into realty pursuant to a contract with a state other than the State of Alabama, a county or incorporated municipality of a state other than the State of Alabama, an industrial development board created pursuant to the Constitution or general or local laws of a state other than the State of Alabama, an educational institution of a state other than the State of Alabama, or an educational institution of a county or incorporated municipality of a state other than the State of Alabama.

Based on Act 2013-205, the Authority submitted eight applications to the Revenue Department from February 2014 through July 2016 for certificates of exemption concerning various projects. All of those applications were approved.

In January 2017, the Authority submitted another application pursuant to the 2013 Act. Unlike the previous eight applications, however, the Department denied this request for an exemption certificate by stating that the Authority does not qualify as a "governmental entity" as defined in § 40-9-14.1(a). The Department also stated:

> We are aware that you have previously been issued an exemption certificate for a government entity project. However, after further review of the law and based on advice from legal counsel, we will not be issuing any new project exemptions for public corporations. Any active exemption certificates which you were already awarded will remain in effect until the project's completion.
>
> Please know that, if applicable, you may still utilize your organization's tax exempt status by entering into a purchasing agent appointment with the contractor. The purchasing agent appointment is simply an agreement between the contractor and the tax exempt entity. The purchasing agent agreement is not submitted to the Department of Revenue for review or approval as it is simply a contract between the two parties. With the purchasing agent agreement method, the contractor may purchase items on

> behalf of or in care of the tax exempt entity. However, the material invoices must be billed directly to the exempt entity and the payments must be made directly from the exempt entity's funds. The contractor may not use their own funds to purchase materials using a purchasing agent agreement.

Later, during the legislature's 2018 Regular Session, Governor Ivey signed HB35 into law as Act 2018-234. The 2018 Act amended the definition of "governmental entity" in § 40-9-14.1(a) to include "any public water or sewer authority, district, system, or board that otherwise is sales and use tax exempt." Importantly, the operative date for the additional language concerning water and sewer authorities was addressed as follows:

> (i) This section shall be operative for contracts entered into with governmental entities as defined in subsection (a), **not including public water or sewer authorities, districts, systems, or boards that otherwise are sales and use tax exempt, on January 1, 2014**, or thereafter, and shall not apply to any contract entered into prior to January 1, 2014. This section shall be operative for contracts entered into **with public water or sewer authorities, districts, systems, or boards that otherwise are sales and use tax exempt on January 1, 2019**, and thereafter, and shall not apply to any contract entered into with such entities prior to January 1, 2019. In addition, this section shall not apply to any contract change orders or contract extensions, including revised, renegotiated, or altered contracts, when the original contract was entered into prior to January 1, 2014, with a governmental entity. Nor shall this section apply to any contract change orders or contract extensions, including revised, renegotiated, or altered contracts with any public water or sewer authority, district, system, or board that otherwise is sales and use tax exempt, when the original contract was entered into prior to January 1, 2019.

(emphasis added)

ANALYSIS

"The cardinal rule of statutory interpretation is to determine and give effect to the intent of the legislature as manifested in the language of the statute. *Gholston v. State*, 620 So.2d 719 (Ala. 1993). Absent a clearly expressed legislative intent to the contrary, the language of the statute is conclusive." *Ex parte State Dep't of Revenue*, 683 So.2d 980, 983 (Ala. 1996).

Here, it is clear from Act 2013-205 that the Authority did not qualify as a "governmental entity" during the period at issue. First, water and sewer authorities simply are not listed within the definition of "governmental entity" in Act 2013-205. Instead, the only type of authority that is included in that definition is "an industrial or economic development board or authority." The legislature's inclusion of industrial or economic development authorities, but not water and sewer authorities, is controlling. *See*, *e.g.*, *In re Haas*, 48 F.3d 1153, 1156 (11th Cir. 1995), on remand 195 B.R. 933, rev'd on other grounds, 162 F.3d 1087 (11th Cir. 1998), stating that, "[w]here Congress knows how to say something but chooses not to, its silence is controlling." Here, Alabama's legislature demonstrated that it knew how to include a certain type of authority in the applicable definition. Its decision to not include water and sewer authorities in that definition is a clear manifestation of the legislature's intent to exclude those authorities.[1]

Second, water and sewer authorities were included in the definition of "governmental entity" in the original bill (HB419) that was introduced in the 2013 Regular Session. Specifically, the original definition included the phrase "authority of a governmental entity which is tax exempt from sales and use taxes. . ." As noted, however,

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[1] *See also*, § 40-9-14.2(a)(1), defining "governmental entity" to include "the Federal Government, the State of Alabama, Alabama public schools, Alabama public universities, **healthcare authorities**, Alabama counties and municipalities, and public corporations incorporated under any of the provisions of Chapter 50 of Title 11, Chapter 50A of Title 11, Chapter 5 of Title 37, or Chapter 7 of Title 39." (emphasis added)

that language was stricken from the bill prior to its passage. These events also show an intent by the legislature to not include water and sewer authorities in the applicable definition in Act 2013-205.

Third, the 2018 Act amended the definition of "governmental entity" in § 40-9-14.1 to include "any public water or sewer authority, district, system, or board that otherwise is sales and use tax exempt." But the legislature made it clear that its inclusion of these authorities in the definition does not begin until 2019. Again, the legislature's intent is very clear from the words that it used – and did not use – that the Limestone County Water & Sewer Authority was not a "governmental entity" during the period at issue.

In its brief, the Authority focuses on Ala. Admin. Code r. 810-6-3-.77(1)(e), in which the Revenue Department defines "governmental entity" as "[o]ther governmental agencies that are exempt from the payment of Alabama sales and use taxes excluding those agencies as provided in sections (2) and (3) below." The Authority states that the Revenue Department does not dispute that the Authority was formed pursuant to § 11-88-1, et seq., as a public corporation or that the Authority is tax exempt pursuant to §11-88-16. Therefore, according to the Authority, because it "is itself exempt from Alabama sales and use tax, Administrative Rule § 810-6-3-.77(1)(e), by its plain language, would make the Taxpayer eligible to obtain a certificate of exemption for its project."

In response, the Revenue Department cites various Alabama appellate cases for the proposition that public corporations such as the Authority are not governmental agencies. Specifically, the Revenue Department relies on a case involving this very Authority, in which the Alabama Court of Civil Appeals stated: "In other words, a public corporation is an 'instrumentality of the state' in the sense that it is created pursuant to the laws of the

State and for the public benefit, but it is 'independent' of the State and 'is not an agency of the State' because the State does not own or operate the corporation." *Limestone County Water & Sewer Authority v. City of Athens*, 896 So.2d 531, 543 (Ala. Civ. App. 2004), citing *Dobbs v. Shelby County Economic & Indus. Dev. Auth.*, 749 So.2d 425, 430 (Ala. 1999).

The Authority counters by arguing that the determination in its case involving the City of Athens was limited to whether the Authority was the alter ego of the State. Therefore, the Authority contends that the narrow holding in that case is not definitive in this appeal before the Tax Tribunal.

It is unnecessary, however, to resolve this contention between the parties, because Alabama law is clear that a rule of an administrative agency cannot enlarge the scope of a statute. "The provisions of a statute will prevail in any case of a conflict between a statute and an agency regulation. An administrative regulation must be consistent with the statutes under which its promulgation is authorized. An administrative agency cannot usurp legislative powers or contravene a statute. A regulation cannot subvert or enlarge upon statutory policy. [Revenue Department] Regulation 810-3-15-.05(10) therefore cannot override Ala. Code 1975, § 40-18-8(j)." *Ex parte Jones Mfg. Co., Inc.*, 589 So.2d 208, 210 (Ala. 1991) (citations omitted).

As discussed, the legislature has shown a clear intent that water and sewer authorities did not meet the applicable definition of "governmental entity" during the period at issue. Consequently, Ala. Admin. Code r. 810-6-3-.77(1)(e) cannot be read to include the Authority in that definition.

Understandably, the Authority emphasizes the fact that the Revenue Department did not arrive at its current interpretation of § 40-9-14.1(a) until the Authority's submission of its ninth application, with the first eight having been granted on the premise that the Authority was a "governmental entity." The Authority stated: "Naturally, the Taxpayer has relied upon the Department's proper granting of certificates of exemption for the Taxpayer's projects when planning for the project for which the Taxpayer's request for certificate of exemption has now been denied. The Taxpayer should be able to rely upon prior determinations of the Department." The only explanation offered by the Revenue Department was that, "after further review of the law and based on advice from legal counsel, we will not be issuing any new project exemptions for public corporations."

Again, any frustration of the Authority with the Revenue Department is completely understandable. As a matter of law, however, it has been well settled for decades by our state's highest court that the Revenue Department is not subject to estoppel in its enforcement of the tax laws.

> 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. In the case of Duhame v. State Tax Commission, 65 Ariz. 268, 171 A.L.R. 684, the court said:
>
>> It is true that during the time plaintiff was engaged in the contracting here in question he might have passed this tax on to the government had he not been misled, by an improper interpretation of the Act by the Commission, into believing no tax was due. Still, it is the settled law of the land and of this jurisdiction that as taxation is a governmental function, there can be no estoppel against a government or governmental agency with reference to the enforcement of taxes. Were this not the rule the taxing officials could waive most of the state's revenue.

State v. Maddox Tractor & Equipment Co., 69 So.2d 426, 429 (1953). Therefore, the Revenue Department's denial of the Authority's ninth application (which was the correct legal interpretation) was not precluded by its previous decisions.

After the hearing and initial briefing on the governmental-entity issue, the Tax Tribunal invited the Authority to file a brief and to participate in oral argument concerning a secondary issue involving the Alabama Administrative Procedure Act ("AAPA") that had been raised by a different taxpayer.[2] In its first brief regarding the AAPA question, the Limestone County Water & Sewer Authority argued that the Revenue Department's denial of the Authority's application did not implicate the AAPA. In a subsequent brief, however, the Authority argued just the opposite. The Tax Tribunal scheduled oral argument on the AAPA issue (and other issues) for August 22, 2018. On August 15, 2018, the Tax Tribunal received from the Authority a "Notice of Waiver of Oral Argument." (The Orange Beach Water, Sewer, and Fire Protection Authority had withdrawn its appeal by that time, and none of the other authorities responded to the Tax Tribunal's invitations concerning the AAPA issue.) Therefore, the AAPA issue is pretermitted.

CONCLUSION

As shown, the Authority did not meet the legislature's definition of "governmental entity" in Act 2013-205, so as to utilize that process for making tax-fee purchases during the period in question. Thus, the Revenue Department's denial of the Authority's application is upheld.

[2] There were four other appeals pending that involved this same governmental-entity issue. However, the AAPA issue was raised only by the Orange Beach Water, Sewer, and Fire Protection Authority in Docket No. S. 17-1016-JP.

This Final Order may be appealed to circuit court within 30 days, pursuant to Ala. Code § 40-2B-2(m).

Entered August 28, 2018.

____
JEFF PATTERSON
Chief Judge
Alabama Tax Tribunal

jp:dr
cc: D. Ashley Jones, Esq.
Mary Martin Mitchell, Esq.
Hilary Y. Parks, Esq.

ALABAMA TAX TRIBUNAL

RIKKI D. PICKETT d/b/a AMERICAN RUST MARKET,	§	
Taxpayer,	§	
	§	DOCKET NO. S. 19-236-JP
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Alabama Department of Revenue issued a final assessment of sales tax against the Taxpayer for $2,634.55 for the periods of October 2017 through May 2018. The tax portion of the assessment was exactly $2,000. The Taxpayer appealed to the Alabama Tax Tribunal (which is a separate state agency from the Alabama Department of Revenue) and stated that she never started her business as she had planned and that "I never opened or sold any items."

In its Answer, the Revenue Department stated that the Taxpayer had not filed returns and that "[e]stimated tax liabilities were entered by the Department's Collections Division." But the Revenue Department did not explain why sales tax liabilities had been estimated by its Collections Division instead of its Sales Tax Division. Nor did the Revenue Department elaborate on or even mention the information relied upon in coming to the $2,000 estimated amount.

The Revenue Department also stated as follows:

> While the Taxpayer states in the appeal no sales were made by the business, the Taxpayer does not state that no tax exempted purchases were made using the sales tax resale certificate. Any such purchases could be subject to sales/use tax.

The Revenue Department's Answer was completely lacking any information that would suggest that its assessment has any evidentiary basis or foundation. Instead, the Answer merely speculated that tax-exempt purchases, which the Revenue Department does not even allege were made, *could* be subject to a sales tax or a use tax (which apparently has not even been assessed).

The law is clear that an assessment of tax must be based on a minimum evidentiary foundation. *See*, *e.g.*, *Frontier Amusements, Inc. v. Alabama Department of Revenue*, Admin. Law Div., No. S. 10-947 (Fourth Preliminary Order Setting Hearing, November 30, 2011), citing *U.S. v. Janis*, 428 U.S. 433 (1976).

The Revenue Department was directed to amend its Answer to state whether it has an evidentiary basis for its assessment against the Taxpayer and, if so, exactly what that basis is. A copy of the Revenue Department's response is enclosed with the Taxpayer's copy of this Order.

The Revenue Department states that the final assessment should be voided. Judgment is entered accordingly.

This Final Order may be appealed to circuit court within 30 days, pursuant to Ala. Code § 40-2B-2(m).

Entered May 7, 2019.

/s/ *Jeff Patterson*
JEFF PATTERSON
Chief Judge
Alabama Tax Tribunal

jp:dr
cc: Rikki D. Pickett (w/enc.)
Margaret Johnson McNeill, Esq.