

COLUMBIA SOUTHERN EDUCATION GROUP, F/K/A COLUMBIA SOUTHERN UNIVERSITY, INC.	§	APPEAL OF USE TAX REFUND DENIAL
P.O. BOX 3110	§	MAY 2003 – APRIL 2009
ORANGE BEACH, AL 36561,	§	TAX I.D. #351
Taxpayer,	§	
v.	§	
BALDWIN COUNTY, ALABAMA SALES & USE TAX DEPARTMENT.	§	

FINAL ORDER

Columbia Southern Education Group, f/k/a Columbia Southern University, Inc. (“Taxpayer”) petitioned for a refund of Baldwin County use tax for May 2003 through April 2009. The County denied the petition, and the Taxpayer timely appealed. The County requested and the Commissioner of Revenue agreed that the undersigned would hear and decide the case as an independent administrative law judge. A hearing was conducted on January 29, 2013. Don Johnson and Shirley Justice represented the Taxpayer. David Conner represented Baldwin County.

The Taxpayer is a privately owned for-profit university located in Baldwin County, Alabama. It opened in 1996. It currently has approximately 50 full time professors, 400 adjunct or part-time professors, and 500 support staff. The staff and the full-time professors work out of two buildings in Orange Beach, Alabama.

The Taxpayer offers a wide variety of post-secondary degrees, including criminal justice, finance, psychology, and marketing, to name only a few. The Taxpayer’s students are offered courses such as English, mathematics, science, history, and other traditional core courses as required for their particular fields of study.

The Taxpayer is primarily an “on-line” university. That is, its classes are conducted using computer technology. The students log onto the Taxpayer’s website from remote locations, and the professors thereafter conduct the classes over the Internet.

The Taxpayer is privately owned by members of one family located in Baldwin County. It has an eight member Board of Trustees, three of which are members of the family that owns the Taxpayer.

The Taxpayer had a use tax account with the County, but never filed use tax returns during the period in issue. The County audited the Taxpayer for the period and determined that the Taxpayer owed over \$103,000 in use tax, penalties, and interest for the period. The County subsequently waived the penalties for cause. The Taxpayer thereafter paid the tax and interest due as claimed by the County in September 2009.

The State Revenue Department began a State sales and use tax audit of the Taxpayer in late 2009 or early 2010. While the audit was being conducted, the Taxpayer applied to the Department for a State sales and use tax exemption certificate. The Department granted the application and issued the Taxpayer an exemption certificate in March 2010. The certificate indicated that the Taxpayer was exempt from sales and use tax as a “private school.”

The Taxpayer also petitioned the County in March 2010 for a refund of the use tax it had paid in September 2009.

The Revenue Department issued its audit report concerning the Taxpayer in April 2010. Noting that private schools are exempt from use tax, the audit report stated – “This entity is a private school and recently received an exemption number. A refund of

tax paid is due since this is an exempt entity.” Taxpayer’s Ex. 1, at 4.

The Taxpayer’s March 2010 refund petition was deemed denied by the County by operation of law in September 2010. See, Code of Ala. 1975, §40-2A-7(c)(3). The Taxpayer timely appealed to the County.

The threshold issue in this case is whether the Taxpayer, as a private school, is statutorily exempt from State and local sales and use tax in Alabama.

There is no Alabama statute that specifically exempts private schools from sales and use tax. Code of Ala. 1975, §40-23-62(16) does exempt certain school boards and educational institutions and agencies of the State from use tax. That statute exempts the following:

Tangible personal property stored, used or consumed by county and city school boards, independent school boards and all educational institutions and agencies of the State of Alabama, the counties within the state or any incorporated municipality of the State of Alabama.¹

The above exemption, which, as discussed below, was enacted in 1959, does not exempt private schools from use tax. Nonetheless, the Department promulgated Reg. 810-6-3-.47.02 in 1961. That regulation specifies that “[s]ales to private schools are specifically exempted from sales and use taxes.”

Alabama’s appellate courts have never addressed Reg. 810-6-3-.47.02 or the sales and use tax exemptions at §§40-23-4(a)(15) and 40-23-62(16), respectively. The Administrative Law Division has, however, done so in three cases.

¹ Code of Ala. 1975, §40-23-4(a)(15) contains an identical exemption relating to sales tax.

In *State of Alabama v. Roberts Cafeteria, Inc.*, Docket S. 87-179 (Admin. Law Div. Recommended Order 1/3/1989), the issue was whether a private college, Sanford University, was exempt from sales tax. The Division rejected Reg. 810-6-3-.47.02, and held that private schools are not exempt from sales tax in Alabama.

The revenue code does not exempt or exclude sales to private schools from sales or use tax liability. The provision coming the closest is §40-23-4(a)(15). That section exempts sales to "county and city school boards, independent school boards and all educational institutions and agencies of the state of Alabama, the counties within the state or any incorporated municipalities of the state of Alabama".

The phrase "independent school boards" as used in the context of subsection (15) cannot be construed to include private schools, especially in light of the fact that all public educational institutions are specifically exempted. The Legislature could have easily included private educational institutions in the exemption section if it had intended to exempt such institutions from tax. Sanford University is a private school, not an independent school board, and is not exempt by statute from sales or use tax.

The above conclusion is supported by the rule of construction that exemptions from taxation must be strictly interpreted, and any uncertainty in the language must be construed against the exemption. *Brundidge Milling Co. v. State*, 228 So. 2d 475.

However, Department Reg. 810-6-3-.47.02 unambiguously states that "[s]ales to private schools are specifically exempted from sales and use taxes". The Taxpayer argues that the regulation is sufficient to grant the exemption.

A long-standing interpretation of a statute by an administrative agency should be given considerable weight. However, where the interpretation is clearly contrary to the statute it deems to interpret, or is unsupported by any statutory authority, then the agency's erroneous pronouncement must be overruled. *East Brewton Materials, Inc. v. State Department of Revenue*, 233 So.2d 751; *Boswell v. Abex Corp.*, 317 So.2d 317; *Sand Mountain Bank v. Albertville Nat. Bank*, 442 So.2d 13.

Further, the Department cannot be estopped from properly administering the revenue code based on an erroneous interpretation of the law. *State v. Maddox Tractor and Equipment Co.*, 69 So.2d 426. Just as the Department cannot expand the scope of a tax levy or limit an exemption

by regulation, it cannot create an exemption from taxation by regulation where there is no statutory authority for the exemption.

Some cases do hold that an agency must abide by its own rules. *Cent. La. Elec. Co. v. La. Pub. Serv. Com'n.*, 377 So.2d 1188; *U.S. v. Nixon*, 418 U.S. 683 94 S. Ct. 3090. However, those cases involve either procedural rules or the delegation of authority by the agency. They do not hold that a substantive regulation must be upheld, even if clearly erroneous.

Roberts Cafeteria at 4 – 6.

The §40-23-4(a)(15) exemption was next discussed in *Ward International Trucks, Inc. v. State of Alabama*, Docket S. 00-216 (Admin. Law Div. F.O. 11/16/2000; F.O. on Taxpayer's App. for Rehearing 12/5/2000; F.O. Denying Department's App. for Rehearing 12/18/2000). *Ward International* did not involve private schools. Rather, the issue was whether sales to city school boards in Mississippi were exempt pursuant to §40-23-4(a)(15). The Division held that the exemption applied because it was not limited to only public school boards in Alabama. In response to an argument raised by the Department, the Division also stated that "*Roberts* was correctly decided. Private schools are not exempted by §40-23-4(a)(15), but school boards are. Whether it makes sense to exempt independent school boards from other states, and not private educational institutions in Alabama, is up to the Legislature to decided, not the Courts." *Ward International*, F.O. Denying Department's App. for Rehearing at 3.

Finally, in *Charles Little Kiddie College School, III, Inc. v. State of Alabama*, Docket S. 07-710 (Admin. Law Div. 6/27/2008), the issue was whether a private kindergarten was exempt from sales tax. In holding that the kindergarten was exempt, the Division stated that "[p]rivate and public schools in Alabama are exempt from Alabama sales and use tax. See, Code of Ala. 1975, §40-23-4(a)(15) and Dept. Reg. 810-6-3-.47.02,. . . ." *Charles Little Kiddie College*, F.O. at 2.

The Taxpayer in this case correctly points out that “[n]o mention was made in (*Charles Little Kiddie College*) that the Private School Exemption Regulation was invalid. Quite the contrary, the Administrative Law Division assumed the validity of the regulation in reaching its holding.” Taxpayer’s Post-Hearing Brief at 17.

Simply stated, in the words of comedian Steve Martin, “I forgot” when deciding *Charles Little Kiddie College* that I had previously ruled in *Roberts Cafeteria* and *Ward International* that private schools are not exempt, and that Reg. 810-6-3-.47.02 was incorrect.² I obviously failed to properly research the issue, and thus incorrectly relied on Reg. 810-6-3-.47.02 in deciding *Charles Little Kiddie College*. But that mistake does not somehow give credence to Reg. 810-6-3-.47.02.

The Taxpayer argues that Reg. 810-6-3-.47.02 must be followed because it represents the Department’s longstanding interpretation of the law, and also because the exemption statute, §40-23-62(16), has been reenacted by the Legislature on numerous occasions without change. The above rules of statutory construction do support the Taxpayer’s case, but the overriding rule of statutory construction is that the intent of the Legislature, as expressed in the words used (or not used) in a statute, must control. *Old Republic Sur. Co. v. Auto Auction of Montgomery, Inc.*, 816 So.2d 1059

² You can be a millionaire and never pay taxes! You can be a millionaire, and never pay taxes! You say, "Steve, how can I be a millionaire, and never pay taxes?" First, get a million dollars. Now you say, "Steve, what do I say to the tax man when he comes to my door and says, 'You have never paid taxes?'" Two simple words. Two simple words in the English language: "I forgot!" How many times do we let ourselves get into terrible situations because we don't say "I forgot"? Let's say you're on trial for armed robbery. You say to the judge, "I forgot armed robbery was illegal." Let's suppose he says back to you, "You have committed a foul crime, you have stolen hundreds and thousands of dollars from people at random, and you say, 'I forgot?'" Two simple words: *Excuuuuuse me!!*" 1978, Season 3, Episode 9. Saturday Night Live Transcript.

(Ala. Civ. App. 2001); *Heater v. Tri-State Motor Transit Co.*, 644 So.2d 25 (Ala. Civ. App. 1994).

As discussed, §40-23-62(16) does not directly or indirectly exempt private schools from use tax. The Department's unsupported declaration in Reg. 810-6-3-.47.02 that private schools are exempt is thus clearly invalid and a wrongful usurpation of legislative authority by the Department. "It is not within the power of the State Department of Revenue to add or take from the statute by administrative construction. Only the legislative branch of our state government is vested by the Constitution with lawmaking power." *State v. Robinson Land & Lumber Co. of Ala.*, 77 So.2d 641, 647 (Ala. 1954).

Although an administrative agency's longstanding interpretation of a statute carries weight, if the interpretation is contrary to or not supported by the statute being interpreted, the erroneous interpretation must be rejected. *East Brewton Materials, Inc. v. State, Dept. of Revenue*, 233 So.2d 751 (Ala. 1970).

The correct rule is that an administrative interpretation of the governmental department for a number of years is entitled to favorable consideration by the courts; but this rule of construction is to be laid aside where it seems reasonably certain that the administrator's interpretation has been erroneous and that a different construction is required by the language of the statute. *State v. Wertheimer Bag Co.*, 253 Ala. 124, 43 So.2d 824; *Drennan Motor Co. v. State*, 279 Ala. 383, 185 So.2d 405; *East Brewton Materials, Inc. v. State Department of Revenue*, 45 Ala. App. 584, 233 So.2d 751.

Taxpayers have no vested right to rely upon an erroneous interpretation of the statute exempting them from taxation, and under Section 100 of the Constitution of Alabama of 1901, the taxing authority has no discretion in a matter of this kind. The reason for this rule is that in the assessment and collection of taxes, the State is acting in its governmental capacity and it cannot be estopped with reference to the enforcement of taxes, even when the taxpayer was advised that it was not responsible for a tax. Were this not the rule the taxing officials could waive most to the State's

revenue. *State v. Maddox Tractor & Equipment Co.*, 260 Ala. 136, 69 So.2d 426; *Crutcher Dental Supply Co. v. Rabren*, 286 Ala. 686, 246 So.2d 415.

Boswell v. Abex Corporation, 317 So.2d 317, 318 – 319 (Ala. 1975).

While defendant's assertion is true that reenactment of a statute without material change may be considered as legislative approval of departmental construction, such construction nonetheless is not binding upon a court. *Haden v. McCarty*, 275 Ala. 76, 79, 152 So.2d 141, 143 (1963). An administrative interpretation of long standing is normally entitled to favorable consideration by the courts, but “. . . this rule of construction is to be laid aside where it seems reasonably certain that the administrator's interpretation has been erroneous and that a different construction is required by the language of the statute.” *Boswell v. Abex Corp.*, 294 Ala. 334, 336, 317 So.2d 317, 318 (1975).

The Sand Mountain Bank v. Albertville National Bank, et al., 442 So.2d 13, 15 (Ala. 1984).

The Taxpayer argues that “[t]he statutory authority for the Private School Exemption Regulation is based upon Section (40-23-62(16)) relating to the exemption of independent school boards.” Taxpayer's Post-Hearing Brief at 15. I disagree. As explained below, the reference to “independent school boards” in §40-23-62(16) has nothing to do with private schools.

The use tax exemption in issue was enacted pursuant to Act 99 of the 1959 Second Special Session of the Alabama Legislature.³ That Act added the following exemption to Code 1958, Title 51, §789:

Tangible personal property stored, used or consumed by county and city school boards, and independent school boards as defined by Senate Bill No. 20 of the 1959 Second Special Session of the Legislature of Alabama and all educational institutions and agencies of the State of Alabama, the counties within the State, or any incorporated municipality of the State of

³ The corresponding sales tax exemption was enacted pursuant to Act 100 of that same special session.

Alabama.⁴

The enacting Legislature clearly intended by Act 99 to exempt only “independent school boards” as defined in Senate Bill 20 of that same Legislature. Senate Bill 20 of the 1959 Second Special Session of the Alabama Legislature was enacted as Act 39 in the above special session. That Act, entitled “Independent School District Act of 1959,” authorized an area within an existing school system in Alabama to withdraw from the system and create an independent school district. The Act also provided for the creation of a district board of education for any such independent school district.

The phrase “independent school boards,” as used in Act 99, is not mentioned in Act 39, but Section 3.(f) of Act 39 provided as follows:

District Board of Education shall mean the board of education having control and management of the educational interest in such Independent School District, as hereinafter provided.

It is clear from the language in Act 99 that the intent of the 1959 Legislature in exempting “independent school boards” from use tax was to exempt school boards that were to be created to control and manage independent school districts created pursuant to Act 39. Consequently, the Taxpayer’s argument that the phrase “independent school boards,” as used in §40-23-62(16), must be construed to include boards that govern

⁴ The phrase “as defined by Senate Bill No. 20 of the 1959 Second Special Session of the Legislature of Alabama” remained in the exemption statute through Act 593 of the 1977 Regular Session, which amended §40-23-4 to add an exemption for LP gas used by agricultural producers. Section 40-23-4 was next amended in 1980 by Act No. 80-625 to add an exemption for lubricating oils destined for out-of-state use. When the exemption in issue was recodified as part of Act No. 80-625, the language concerning Senate Bill 20 of the 1959 Second Special Session was for some reason deleted. But that in no way changes the fact that the phrase “independent school boards” was intended to apply to school boards created to control independent school districts created pursuant to Act 39 of the 1959 Second Special Session of the Legislature, not private school boards.

private schools is clearly erroneous.

The Taxpayer also contends that because the Revenue Department has issued a sales and use tax exemption certificate to the Taxpayer, and also because the Department found in its audit that the Taxpayer, as a private school, is exempt, then the County is bound by those determinations, citing Code of Ala. 1975, §§11-3-11.2(b) and 40-12-4(b). I again disagree.

Section 11-3-11.2(b) provides in part – “Any rules and regulations adopted by the county or its designee shall be consistent with the rules and regulations adopted . . . by the Department of Revenue for the corresponding state tax.” Section 40-12-4(b) provides in part – “Notwithstanding anything to the contrary herein, said (county) governing body shall not levy any tax hereunder measured by gross receipts, except a sales or use tax which parallels, except for the rate of tax, that imposed by the state under this title.”

The above sections do not support the Taxpayer in this case. Section 11-3-11.2(b) merely requires that any county regulation must be consistent with any Department regulation on the subject. There is no county regulation addressing the use tax exemption in issue. Consequently, there is no inconsistency. Likewise, §40-12-4(b) only requires a county’s sales and use tax laws to be parallel to the State sales and use tax laws. It is presumed that the County’s sales and use tax laws parallel the State sales and use tax laws, and it is undisputed that the State use tax exemption at §40-23-62(16) has been adopted by the County. Consequently, the County and State laws are parallel, and §40-12-4(b) is satisfied. Importantly, neither of the above statutes require or even suggest that a county or municipality is obligated to follow the Department’s

erroneous legal interpretation of a given statute.

The Alabama Supreme Court has also held that pursuant to the Local Tax Simplification Act of 1998, Act. No. 98-192, Ala. Acts 1998, all county and municipal governments are required to follow the procedures for assessing and collecting taxes as provided in the Alabama Taxpayers' Bill of Rights and Uniform Revenue Procedures Act, Code of Ala. 1975, §40-2A-1 et seq. See generally, *Pittsburgh & Midway Coal Mining Co. v. Tuscaloosa County, Alabama and the Tuscaloosa County Special Tax Board*, 994 So.2d 250 (Ala. 2008); *General Motors Acceptance Corporation v. City of Red Bay, et al*, 894 So.2d 650 (Ala. 2004); see also, Code of Ala. 1975, §§11-51-201 and 11-51-203, relating to municipalities, and §11-3-11.2, relating to counties. But again, the above code sections do not require or obligate a county or municipality to follow the Department's erroneous legal interpretation of a statute that is contrary to or not supported by Alabama law, as in this case.

In *Yelverton's, Inc. v. Jefferson County, Alabama*, 742 So.2d 1216 (Ala. Civ. App. 1997), the issue was whether a furniture retailer with a store outside of Jefferson County was liable for Jefferson County sales or use tax on furniture sold and delivered by the retailer to customers in the County. A sub-issue before the Court was whether the retailer had nexus with the County for due process purposes.

The *Yelverton's* Court noted that the Department had a local jurisdiction nexus regulation, Reg. 810-6-3-.51, which, according to the Court, specified that a seller located outside of a local taxing jurisdiction had nexus with the jurisdiction only if it had salesmen soliciting sales in the jurisdiction. The Court found that the regulation was reasonable and not contrary to a statute, and was thus valid. "In light of our review of

the sales and use tax statutes and of the Department's regulations, we cannot say that the Department's interpretation of those statutes and regulations is contrary to their plain wording." *Yelverton's*, 742 So.2d at 1221.

Having found the Department's local nexus regulation to be valid, the Court then addressed whether Jefferson County was required to follow the regulation. The Court noted that the Act that authorized Jefferson County to levy a sales and use tax, Act. No. 405, 1967 Ala. Acts, also required that such local taxes "are to be generally parallel to the provisions of the State sales and use tax. Act 405, §2." *Yelverton's*, 742 So.2d at 1222.⁵ The Court accordingly held that Jefferson County was required to follow the Department's valid local nexus regulation.

It is important that the Court in *Yelverton's* found that the Department's local nexus regulation was reasonable and not contrary to any statute. Clearly in such cases, a Department regulation must be followed because it is a correct interpretation of the underlying law. And it necessarily follows that because county and municipal sales and use tax laws must parallel the State sales and use tax provisions, any Department regulation that correctly interprets a State sales and use tax statute must also be followed for local tax purposes.

It does not follow, however, that a Department regulation that is contrary to or not supported by a statute must still be followed by the Department and all local taxing jurisdictions. To the contrary, as discussed, such a regulation must be rejected.

⁵ The "generally parallel" provision in Act 405 is identical in substance to §40-12-4(b), which, as discussed, also requires a county's sales and use tax laws to be parallel to the State sales and use tax laws.

To summarize, §§40-23-4(a)(15) and 40-23-62(16) do not directly or indirectly exempt private schools from sales or use tax, respectively. The Taxpayer's claim that the phrase "independent school boards" refers to private school boards has also been sufficiently rebutted above. And while local taxing jurisdictions must follow the procedures set out in the Taxpayers' Bill of Rights and Uniform Revenue Procedures Act, §40-2A-1 et seq., and local sales and use taxes must parallel the State sales and use tax provisions, there is no statute or court case holding that a county or municipality is bound by an incorrect interpretation of the law by the Revenue Department.

The Taxpayer's position is only supported by the rules of statutory construction that (1) a long-standing interpretation of a statute by a State agency must be given great weight, and (2) the reenactment of a statute by the Legislature without change signals the Legislature's approval of the Department's interpretation of the statute. Those rules have their place, but as discussed, the overriding rule is that the plain language of the statute must control. See again, *Boswell v. Abex Corp.*, supra; *East Brewton Materials v. Dept. of Revenue*, supra. The plain language of §§40-23-4(a)(15) and 40-23-62(16) does not support the regulation in issue.

Likewise, the exemption certificate issued by the Department to the Taxpayer is also unsupported by the law. In any case, the certificate cannot be relied on by the Taxpayer in this case because it was issued after the period in issue.

Finally, *Yelverton's* tells us that a county must follow a Department regulation, but only if the regulation is reasonable and in accordance with Alabama law, as the Court found the local nexus regulation to be in *Yelverton's*. If, however, the regulation is contrary to and unsupported by statute, as is the "private school" exemption regulation

in this case, then it must be rejected for both State and local tax purposes.

Simply put, there is no language in §§40-23-4(a)(15) and 40-23-62(16) or any other exemption statute in the sales and use tax laws, Code of Ala. 1975, §40-23-1 et seq., indicating that the Alabama Legislature has ever intended to exempt a for-profit private school from State or local sales and use taxes.

The County's denial of the use tax refund petition in issue is affirmed.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered May 30, 2013.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

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