

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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J.F. ALLEN COMPANY,

Petitioner,

v.

No. 23-ICA-327

MATHEW IRBY, WEST VIRGINIA
STATE TAX COMMISSIONER,

Respondent.

Petitioner's Reply Brief

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I. COUNTERSTATEMENT OF THE FACTS

The Commissioner appears to misstate the Taxpayer's operations concerning the processing of limestone.

Darren Glover, CFO for the Petitioner, prepared a schedule of all repairs made to trucks used to take material from the crusher to the stockpile. Said schedule was attached to the Petition for Reassessment as Schedule 2. (Petitioner's Exhibit, 1 D.R 179)

Mr. Glover took the information on the Tax Department's assessment and broke it out so that we could identify each issue that we had for appeal. Schedule 2 was repairs to pieces of equipment that are used in our limestone quarry to take the material to the crusher and then to the stockpiles. (D. R. 85)

The first step in the production of limestone is to remove any overburden that is on top of the mineral. (D. R. 96)

Once the overburden is removed, the mineral is drilled and shot out of the rock on the side of the mountain. (D. R. 96)

The mineral is transported to the crusher, which processes it. (D. R. 97)

It is then transported to the stockpile, where it is stored, awaiting sale to the customer. (D. R. 99)

The equipment is used to take the material by truck from the face of the mine to the crushing operation, and then it is loaded into the crusher, processed, and, at the end of that process, it is dropped into another truck bed. Then, it gets hauled to a stockpile and sits in it until a customer needs it. (D. R. 87).

Mr. Glover personally reviewed each purchase contained in Exhibit 1, and each of those purchases was associated with the repair and maintenance of the vehicles used in that operation as described. (D. R. 87).

II. ARGUMENT

A. **THE OFFICE OF TAX APPEALS CORRECTLY DETERMINED THAT THE EQUIPMENT USED TO HAUL LIMESTONE FROM THE FACE TO THE CRUSHER TO THE STOCKPILE IS ALL DIRECTLY USED IN THE PRODUCTION OF NATURAL RESOURCES. W. VA. CODE § 11-15-9(b)(2).**

The governing statute exempts from consumers sales and service tax the sale of goods and the rendering of services “directly used or consumed in the activities of manufacturing, transportation, transmission, communication, production of natural resources, gas storage, generation or production or selling electric power; provision of a public utility service or the operation of a utility service or the operation of a utility business, . . .” W. Va. Code § 11-15-9(b)(2).

The limestone production is from the face of the quarry until it is placed in the stockpile, ready for sale. The tax department cannot provide any qualifying language to the statute or case law that would limit the production of limestone to any point less than the point of sale—the stockpile.

West Virginia Code § 11-15-9(b)(2) provides a broad exemption from sales tax for “[s]ales of services, machinery, supplies and materials directly used or consumed in the activit[y] of ... production of natural resources,” with the only specific exception to this broad exemption being purchases of gasoline or special fuel.

In applying the Direct Use Exemption to limestone activities, The production of natural resources means the performance by the owner of the natural resources, or another of the act or process of exploring, developing, severing, extracting, reducing to possession and loading for shipment for sale, profit, or commercial use of any natural resource products, and any reclamation, waste disposal or environmental activities associated with these activities. Persons engaged in the production of natural resources are subject to the direct use concept. Purchases of tangible personal

property and services which are directly used in the production of natural resources are exempt from sales and use tax.

The West Virginia Supreme Court of Appeals has repeatedly affirmed that Respondent may not alter, modify, limit, or restrict the plain language of the tax code through interpretation, including that contained in legislative rules. E.g., *Syncor Intl. Corp. v. Palmer*, 208 W. Va. 658, 542 S.E.2d 479 (W. Va. 2001). Thus, the State Tax Department is erroneous and applied an incorrect legal standard in attempting to limit the application of the exemption for the production of the natural resource to the point of the crusher.

The Petitioner's use of the equipment to haul the stone from the face to the crusher and then to the stockpile is the equivalent of a conveyor system of bringing coal from the face of the mine to the prep plant and then to a stockpile.

B. THE STATE TAX DEPARTMENT CANNOT REVERSE THE PRIOR SETTLEMENT ON THE ALLOCATION OF PURCHASES FOR EXEMPT AND NONEXEMPT PURPOSES.

J.F. Allen performs contracted services for a public utility as defined in West Virginia Code of State Rules §110-15J-3.3, which involves digging ditches, laying necessary piping, filling trenches with appropriate fill material, and manhole installation for municipalities and PSDs.

It is agreed that some purchases were consumed partially at the job site; this issue was dealt with in the prior audit. The state allows for the apportionment of materials used for exempt and nonexempt purposes between the exempt and nonexempt uses. W. Va. Code § 11-15-9e. This was the basis for the settlement of the prior audit, and the taxpayer has operated under that assumption since that audit.

The allocation that the Petitioner and Respondent agreed to was outlined in Petitioner's Exhibit 2 (D.R. 0184) and was memorialized in the letter dated June 9, 2016, from the legal division of the State Tax Department. (Petitioner's Exhibit 3, D.R. 0189)

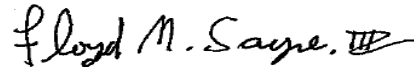
West Virginia Code § 11-15-9(b)2 “specifically exempts all sales of services, machinery, supplies, and materials directly used or consumed in the activities ... of a public utility service or the operation of a utility service or the operation of a utility business, in the businesses or organizations named in this subdivision” The uncontroverted testimony of the Petitioner was that they were providing services to a PSD, that the service was bid, and that the equipment used was identified in the bid.

III. CONCLUSION

For the preceding reasons, and those more fully laid out in its opening brief, the Petitioner respectfully submits that the administrative decision be upheld in part concerning the exemption for goods and services directly used in the production of natural resources and is in error concerning the disallowance of the allocation of the exempt purchases directly used for services to a public utility service and should be reversed and the assessment be abated in its entirety.

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By Counsel



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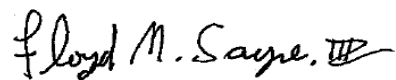
**MATHEW IRBY, WEST VIRGINIA
STATE TAX COMMISSIONER,**

Respondent.

CERTIFICATE OF SERVICE

I, Floyd M. Sayre, III, Esquire, do at this moment certify that a true and exact copy of the preceding *Petitioner's Reply Brief* has been served, December 26, 2023, upon the following, via file, on the following:

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