



**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
 BIRMINGHAM DIVISION**

ELBOW RIVER MARKETING LIMITED,
 PARTNERSHIP,
 Plaintiff,)
)
)
 V.) Case No.: CV-2014-000624.00
)
 BARNETT J THOMAS IN HIS OFFICIAL,
 CAPACITY AS DIR,
 CITY OF BIRMINGHAM ALABAMA,)
 Defendants.)

FINAL JUDGMENT

This appeal from a final assessment of City of Birmingham business license tax was tried before the Court on February 21-23, 2017. Based upon the testimony and other evidence presented at trial, the Court makes the following findings of fact and conclusions of law under Rule 52 and enters its final judgment.

FINDINGS OF FACT

1. In 2013, the City of Birmingham (“the City”) entered a final assessment of business license tax for the years 2008 through 2012 (“the audit period”) against Elbow River Marketing Limited Partnership (“Elbow River”). The amount of the assessment was \$140,331.96, inclusive of penalties and interest. Elbow River appealed the final assessment to the City’s administrative hearing officer who denied the appeal. Elbow River

thereafter filed a timely appeal of the final assessment to this Court. In connection with the appeal to this Court, Elbow River paid the City the amount of the final assessment (\$140,331.96) as is required by Alabama Code § 11-51-191(f) (incorporating the requirements for taking an appeal from an order of the Alabama Tax Tribunal). The parties agree that Elbow River's appeals of the final assessment have been timely filed and properly perfected, and that this court has jurisdiction.

2. The City of Birmingham assessed Elbow River for business license tax under Schedule 165 of Article I of the City's Business License Code. Schedule 165 is a sub-schedule under NAICS sector 452, which is entitled "General Merchandise Stores." As is set forth in the City's Business License Code, NAICS sector 452 encompasses stores that sell general merchandise from "fixed point of sale locations."

3. During the audit period, Elbow River was headquartered and conducted its operations in Calgary, Alberta, Canada. All of its employees were based in Canada. Its business consisted of selling hydrocarbon products to business customers across the United States and Canada. Its operations were conducted in Canada by its Calgary based employees. Elbow River never had any business location or physical address in Alabama, and never had any employees based in or conducting operations

in Alabama. Elbow River did not solicit sales or conduct sales or advertising activities in the City.

4. Elbow River's only contact or connection with the City during the audit period consisted of the sale of hydrocarbon products to two Alabama based customers – W.C. Rice Oil Company (and later to its affiliated company, Allied Energy Company, LLC) (collectively "Allied") and Jet Pep, Inc. ("Jet Pep"). Elbow River primarily sold ethanol to these customers, although some quantities of naphtha were also sold. The products were delivered at a location in the City per the customers' directions. Elbow River did not itself deliver any of the products or participate in the delivery process. Instead, the products were delivered by third-party rail or trucking carriers in the manner described below.

5. No Elbow River employees came to the City to facilitate any of the sales transactions or deliveries. Instead, Elbow River engaged in remote communications with Allied and Jet-Pep such as through telephone conversations and e-mail correspondence. Sales transactions were typically initiated by Allied and Jet-Pep when they placed an order with Elbow River. Elbow River would respond to such an order by sending a sales confirmation form along with its general terms and conditions. No evidence was presented that any Elbow River employee engaged in such negotiations

or discussions with the customers while present in the City.

6. Elbow River's sale of product to Allied and Jet-Pep took two different forms. At trial, the different types of sales were referred to by the parties as "import sales" and "purchase delivery sales." Each type of sale is described below.

7. In some transactions, Elbow River sold product directly to Allied and Jet-Pep. In these transactions, which the parties referred to as "import sales," Elbow River contracted directly with the customer for the sale of product, and arranged for the product to be delivered from outside Alabama by common carrier railroads. Elbow River arranged transportation with the railroads, and maintained title to the product while it was in the railroad tank cars during the rail journey to the City. When the railroad tank cars arrived in the City, they were brought to a transload facility where the product was offloaded into tanker trucks. Title to the product passed from Elbow River to the customer as it was offloaded from the railroad tank car onto the tanker truck. Elbow River's customers contracted with the transload facility, instructed Elbow River to have the railroad tank cars delivered there, and arranged for the tanker trucks that received the product at the transload facility.

8. In making import sales, Elbow River did nothing more than sell

products to two customers that were delivered into the City by railroad common carriers. Elbow River did not deliver the product itself, did not possess or control the product during shipment, and conducted no activities within the City in connection with the sales transactions or deliveries.

9. Some of Elbow River's sales to Allied and Jet-Pep involved third-party suppliers who arranged for the shipment of the product to Birmingham, and the parties referred to those sales as "purchase-delivery sales." In purchase-delivery sales, Elbow River contracted with Allied and Jet-Pep for the sale of product in the same manner as it did with import sales. But instead of directly arranging for the transportation of the product to the customer as was done in import sales, Elbow River arranged to purchase the product from third-party suppliers who then arranged for the shipment of the product to the customer. Deliveries in purchase-delivery sales transactions were either made by rail carrier in the manner described above, or by a trucking carrier. In purchase-delivery sales, title remained with the third-party supplier during the shipment. Upon the offloading of the product from the railroad tank car or the tanker truck, title to the product passed instantaneously from the third-party supplier to Elbow River and then to the customer. The testimony at trial was that this instantaneous passage of title is a function of the two sets of contracts

involved in a purchase-delivery sale: the contract between Elbow River and the customer, and the contract between Elbow River and the third-party supplier of the product. The purchase-delivery sales were akin to drop shipments in which a seller uses a third-party supplier to fulfill a customer's order.

10. The third-party suppliers that Elbow River purchased product from in connection with purchase-delivery sales all have their principal offices outside Alabama. Thus, whenever Elbow River ordered product from those third-party suppliers in connection with purchase-delivery sales, the communications with the supplier took place outside Alabama. The evidence presented at trial was that Elbow River did not send any purchase order for product to the City.

11. One of the issues raised in this litigation was the extent to which Elbow River had agents or representatives in the City. In connection with the audit and assessment, the defendants contended that the transload facility where product was offloaded from railroad tank cars to tanker trucks acted as an agent or representative of Elbow River. However, the evidence presented at trial established that it was Allied that contracted with and paid the transload facility, and that the transload facility was acting on Allied's behalf.

12. The parties also disputed during the litigation the extent to which Elbow River had property within the City. The evidence established that Elbow River did have title to the products at points in the delivery process as is described in more detail above. However, the evidence also established that Elbow River did not have possession of or control over the products in the City. At all times they were in the City, the products were in the care, custody and control of the rail or trucking carriers up until the time title passed to the customer.

CONCLUSIONS OF LAW

The extent to which Alabama municipalities can impose a business license tax is governed in the first instance by state law. *Alabama Code §§ 11-51-90 et seq.* grant municipalities certain powers related to the imposition of business license taxes, but those powers are subject to the limitations set forth in the statute. For example, *Section 11-51-90(a)(1)* provides that municipalities may only license trades, businesses or vocations “which may be engaged in or carried on in the municipality.” Pursuant to the authority granted by state law, the City has enacted a Business License Code that is generally consistent with the provisions of *Section 11-51-90*. For example, the City’s Business License Code provides for the imposition of business license tax on “diverse businesses, locations,

occupations and professions engaged in or carried on, in the City of Birmingham....” The primary issue in this appeal is whether Elbow River engaged in or carried on business in the City during the audit period so as to be subject to the City’s business license tax.

As is outlined above, the evidence presented at trial establishes that Elbow River engaged in no physical operations or activities in the City. It never had any place of business in the City, and none of its employees entered the City in connection with any of the sales transactions. It had no agents or representations in the City. The defendants have cited no authority that allows a municipality to impose a business license tax on out-of-state product sellers that do nothing more than ship their products into the municipality via a third-party rail or trucking carrier. The cases that have permitted the imposition of business license tax on product sellers have involved situations where the seller actually engaged in sales or delivery activities within the municipality. *American Bankers Life Assurance Co. of Florida v. City of Birmingham*, 632 So.2d 450 (Ala. 1993); *Town of Guntersville v. Wright*, 135 So. 634 (Ala. 1931). In this instant case, Elbow River engaged in no such activities.

The Court also notes the fact that the Alabama business license statutes were amended as part of the Municipal Business License Reform

Act of 2006. Part of that amendment included the enactment of a delivery license statute that governs the extent to which non-resident sellers who deliver their own products into a municipality may be subject to business license tax. *Ala. Code § 11-51-194*. The statute provides that even sellers who themselves deliver products within a municipality may not be subjected to business license tax if the amount of merchandise delivered falls under certain thresholds. Those taxpayers instead must be permitted to purchase a delivery license at a limited cost. *Id.* And the statute makes clear that sellers whose merchandise is delivered within a municipality by a common carrier cannot be subjected to business license tax at all. *Id. § 11-51-194(b)*.

In summary, Elbow River did not engage in a trade, occupation, or business within the City as is required both by state law and the City's Business License Code. The fact that Elbow River may have had title to the products for some period of time while they were in possession of the delivering rail or trucking carrier is not enough to allow the imposition of a business license tax. And Alabama law makes clear that a product seller that does nothing more than having its merchandise delivered into a municipality by means of a common carrier cannot be subjected to business license tax. *Ala. Code § 11-51-194(b)*.

The defendants also failed to assess Elbow River under an appropriate

NAICS sector in accord with the requirements of Alabama Code § 11-51-90.2. The sector used by the defendants in the final assessment-NAICS sector 452-is on its face inconsistent with the nature of Elbow River's business and operations. For both of the reasons described herein, the final assessment is contrary to both Alabama law and the City's Business License Code. It is clear that the city of Birmingham may regulate businesses; however, attempted regulation of Elbow River in this matter goes too far. Given the Court's ruling in this regard, the constitutional issues raised by Elbow River are not reached.

It is therefore ORDERED, ADJUDGED and DECREED as follows:

- (1) The City's final assessment of business license tax against Elbow River is contrary to law and is invalidated. The defendants are ordered to withdraw the final assessment and any associated preliminary assessments.
- (2) The defendants are ORDERED to refund the \$140,331.96 Elbow River paid to take this appeal together with interest at the same rate used by the defendants on business license tax delinquencies. Ala. Code § 11-51-192(c). Interest shall run from December 11, 2014, the date Elbow River tendered its payment.

Costs are hereby taxed as paid.

DONE this 17th day of March, 2017.

/s/ DONALD E. BLANKENSHIP
CIRCUIT JUDGE