

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION**

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H & S MAINTENANCE, INC**PLAINTIFF****VS.****NO. 60 CV-15-2379****LARRY WALTHER, Director of the Arkansas
Dept. Of Finance & Administration;
TIM LEATHERS, Commissioner
of Revenue of the State of Arkansas****DEFENDANTS****FIRST AMENDED COMPLAINT**

Comes now the Plaintiff, H & S MAINTENANCE, INC., and for its First Amended Complaint against the Defendants, Larry Walther, Director of the Arkansas Department of Finance and Administration (hereinafter "DFA"), and Tim Leathers, Commissioner of Revenues of the State of Arkansas, does hereby allege and states the following:

PARTIES

1. Plaintiff, H & S Maintenance, Inc., is an Arkansas corporation and taxpayer with its principal place of business in Garland County, Arkansas. It is in good standing as a corporation and holds a contractor's license.

2. Defendant Larry Walther, is the duly appointed and acting Director of the Arkansas Department of Finance and Administration. Defendant Tim Leathers is the duly appointed and acting Commissioner of Revenues of the State of Arkansas. Both are sued only in their official capacities.

SUMMARY OF ACTION AND JURISDICTION

3. This action constitutes a refiling of a complaint which was previously dismissed without prejudice.

4. The installation of sprinkler systems is specifically exempted from the Arkansas gross receipts tax by Ark. Code Ann. § 26-52-301(3)(B)(viii)(a) and, therefore, assessing and collecting gross receipts taxes on the installation of sprinkler systems is not legally authorized. Pursuant to the language of the Arkansas Code, the DFA treated the installation of sprinkler systems as exempt and issued numerous opinion rulings stating that position. Then, without a corresponding change in Arkansas law, the DFA unilaterally decided that the installation of sprinkler systems was, in fact, not exempt, and began issuing opinion rulings stating *that* position. The words "sprinkler systems" are not otherwise defined in the applicable Arkansas statutes, so these words have their ordinary and usually accepted meaning in common language.

5. This is an action to order an accounting and refund to Plaintiff of the amount of taxes illegally collected.

6. The Court's jurisdiction is found upon A.C.A. §26-18-406, which authorizes a tax payer to pay the entire amount due, after final determination by a hearing officer, and then to file suit to recover said amounts. H & S Maintenance has fully complied with this requirement.

FACTS

7. Plaintiff H & S Maintenance, Inc., is a for-profit Arkansas corporation in good standing. A primary aspect of its business involves landscaping services which, in turn,

involves the installation of sprinkler systems. Plaintiff is a “contractor” as that term is defined in Arkansas law, and is duly licensed as a contractor.

8. That Ark. Code Ann. §26-52-301(3)(B)(viii)(a) provides that gross receipts tax does not apply to the “initial installation, alteration, addition, cleaning, refinishing, replacement or repair of nonmechanical, passive or manually operated components of buildings or other improvements or structures affixed to real estate, including but not limited to, the following: . . . (18) Sprinkler Systems.” Prior to 2006, the Department of Finance and Administration has issued numerous opinions noting that the installation of sprinkler systems were not taxable. Beginning in approximately 2007, despite the fact that the statute in question had not changed, the DFA unilaterally began to issue opinions and make administrative determinations that the installation of sprinkler systems was taxable.

9. That Ark. Code Ann. §26-52-103(5) defines “Contractor” as “any person who contracts or undertakes to construct, manage, or supervise the construction, erection, alteration, or repair of any building or other improvement or structure affixed to real estate, including any of their component parts.”

10. That a “contractor” is deemed to be a “consumer or user of all tangible personal property used or consumed by the contractor in providing such nontaxable services” pursuant to Ark. Code Ann. §26-52-301(3)(B)(viii)(b). Further, a sale to a “contractor” of “services and tangible personal property, including materials, supplies and equipment, made to contractors who use them in the performance of any contract are declared to be sales to consumers and not sales for resale.” See Ark. Code Ann. §26-52-307(a)(1). Subsequent transfers of title or possession of such property in the performance

of a contract by contractors are not subject to the tax imposed by this chapter.” See Ark. Code Ann. §26-52-307(a)(2).

11. Notwithstanding the provisions of the foregoing Arkansas Code sections, the Arkansas Department of Finance and Administration has now unilaterally decided that “sprinkler systems” are not exempt and has levied a gross receipts tax against the named Plaintiff and as a “contractor” for the installation of sprinkler systems, without a corresponding change to Ark. Code Ann. §26-52-301(3)(B)(viii)(a).

12. That the Plaintiff has been assessed a total of \$70,601.57 in gross receipts taxes for tax periods commencing in August 2003 through July 2009. In addition to this figure, this assessment also included penalties for negligence, plus interest. The total, including penalty and interest, is in excess of \$97,145.19. The gross receipts taxes involved in this assessment included taxes upon the installation of sprinkler systems. The gross receipts tax, including the assessment of penalties and interest, were actually levied for tax years in which the DFA’s own opinions noted that the installation of sprinkler systems was not taxable. See Exhibit A to the original Complaint, incorporated herein by reference. Further, H & S Maintenance was a “contractor” in all years in question.

13. Prior to the filing of this lawsuit, Plaintiff exhausted its administrative remedies by bringing this matter before the Department of Finance Administration Office of Hearings and Appeals and, after the Administrative Law Judge found against Plaintiff, it further requested that Separate Defendant Leathers revise the administrative decision entered against Plaintiff, but that request was also denied. See Exhibits B and C, respectively, attached to the original Complaint and incorporated herein by reference.

14. That the Plaintiff paid the entire assessment, including penalties and interest, on May 11, 2011, that it paid the entire amount due within one year of the date of assessment, and that it brought suit to recover the amount within one year of the date of payment. See Exhibit D to the original Complaint, incorporated herein by reference. As such, Plaintiff has fully complied with Ark. Code Ann. §26-18-406(a)(1)(A) and, therefore, it is entitled to seek judicial relief from this Court, and the State is deemed to have waived its sovereign immunity. Subsequent to the payment of the original assessment, Plaintiff has continued to pay gross receipts tax for the installation of sprinkler systems (and has continued to be a “contractor”). H & S is continuing to make such payments, and is entitled to be reimbursed for such additional payments in an amount to be shown at trial.

LEGAL ARGUMENT

15. That the imposition of taxes upon the installation of sprinkler systems is not authorized, because the statute enacted by the Arkansas General Assembly specifically exempted “sprinkler systems” from the gross receipts tax. That the imposition of such taxes upon the Plaintiff as an entity that installs sprinkler systems is not authorized by law.

16. That the imposition of taxes upon the Plaintiff as a contractor is, likewise, not authorized by law, because the statutes enacted by the Arkansas General Assembly specifically exempt “contractors” from the provisions of the gross receipts tax. The Plaintiff, is a “contractor” within the meaning of Arkansas law.

17. That, in regard to both the imposition of gross receipts upon the sale or installation of “sprinkler systems” and upon “contractors”, the position of the DFA is contrary of Arkansas statute.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays that the Court enter orders and judgment findings as follows:

(A) That the Plaintiff is entitled to the refund of the entire sum which it has been compelled to pay (which includes interest and penalties) pursuant to the Department's contention that the installation of sprinkle systems is a taxable activity, namely \$97,145.19;

(B) That all tax payments made by the Plaintiff for subsequent tax years, involving the installation of sprinkler systems should be refunded;

(C) That the Plaintiff should have all other equitable and legal relief to which it is entitled;

(D) That the State of Arkansas be enjoined from the illegal collection of taxes for the installation of "sprinkler systems," which are specifically exempt from gross receipts taxes, from the Plaintiff;

(E) That the State of Arkansas be enjoined from the illegal collection of gross receipts taxes from the Plaintiff as a "contractor," who is specifically exempt from gross receipts taxes;

(F) That the State of Arkansas be enjoined from retaining any funds which it has illegally collected as gross receipts taxes, including interest and penalties collected, and such funds should be refunded to the Plaintiff, together with interest as provided by law;

(F) That the Court will grant other and further relief as it deems just and equitable.

Respectfully Submitted,



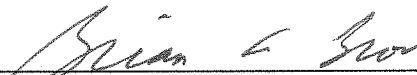
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CERTIFICATE OF SERVICE

I, Brian A. Brown, hereby certify that on the 13th day of July, 2015, I electronically filed the foregoing with the Pulaski County Circuit Clerk using the Arkansas Judiciary's e-filing website, which shall send notification of such filing to the following:

tim.howell@dfa.arkansas.gov

Mr. Tim Howell
Revenue Legal Counsel
P.O. Box 1272, Room 2380
Little Rock, AR 72203



BRIAN A. BROWN