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STEVE CLARK
ATTORNEY GENERAL

OPINION NO. 85-81

March 13, 1985

Honorable Bill Clinton
Governor
State Capitol
Little Rock, AR 72201

Dear Governor Clinton:

This letter is in response to your request for an opinion regarding the exemption in Act 74 of 1983, the "Arkansas Enterprise Zone Act" of sales and use taxes on purchases of materials used in the construction of buildings for qualified business enterprises.

Your questions are as follows:

1. Are contractors eligible for a refund of sales and use tax which they have paid directly to the Revenue Division when they have passed the cost of that sales and use tax on to the owner, when the owner has been designated as eligible by AIDC and has, in fact, reimbursed the contractor for the cost of taxes paid?
2. Is a contractor eligible to receive a refund of sales and use tax paid directly to the Revenue Division when AIDC has certified the owner as having complied with the requirements of the Act, has designated the contractor as eligible to receive the refund, and when the contractor has not passed the cost of the sales and use tax on to the owner?
3. If the answer to Question 1 is no, can the Revenue Division refund taxes, which have been paid by the contractor, to the owner of the enterprise zone business without the contractor's consent?

In construing a statute, the cardinal rule is to discern and give effect to the legislative intent. Hice v. State, 268 Ark. 57, 593 S.W.2d 169 (1980). The intent as stated in the Act is to stimulate business and industrial growth in

depressed areas through tax incentives. Ark. Stat. Ann. §9-1702 (Repl. 1983). These incentives include an exemption from sales and use taxes imposed upon the purchases of material used in the construction of buildings, additions or improvements thereto to house any qualified business enterprise, and upon any machinery or equipment located in or in connection with the building. Ark. Stat. Ann. §9-1707(a) (Repl. 1983). This language creates an exemption from certain sales and use taxes. The location and use of the materials, equipment and machinery purchased rather than the identity of the claimant is the focus of the statute. Such language has been held to enable a contractor to claim the exemption where a contrary ruling would defeat the purpose of the act. Heath v. Research-Cottrell, Inc., 258 Ark. 813, 529 S.W.2d 336, 340 (1975). Contractors appear able to claim the sales and use tax exemption under Act 740 because the focus of the Act is on the use of the materials and the contractor by paying taxes and receiving a refund does not pass that cost on to the owner thereby achieving the purpose of the Act. Arkansas Enterprise Zone Act Program Regulation 5.02 provides that the contractor may qualify for this exception.

However, your Question 1 states the contractor claims a refund for taxes he paid and for which he has been reimbursed by the owner. Although the contractor may qualify for an exemption, a refund under these facts would appear to be contrary to the purpose of the Act. The business has absorbed the cost of the sales and use tax and would receive no benefit from the refund to the contractor. Yet the contractor who has paid taxes would be unjustly enriched by a double recovery, reimbursement from the owner and a refund from the State. Therefore, assuming the facts stated in Question 1, it appears the contractor would be ineligible for a refund because he had been reimbursed by the owner.

Your second question assumes a claim is filed by a contractor who has not passed the cost of the taxes on to the owner that has been certified as having complied with the Act. If the contractor is able to receive a refund in such a manner, the owner receives the maximum benefit from the Act as he never loses the use of his capital. Such a procedure fulfills the purpose of the Act and the nature of the transaction is within the scope of the statute. Accordingly, if the contractor can satisfactorily establish he has not passed on such taxes to the owner he should be entitled to a refund. See Regulations 5.02 and 5.06.01.

The third question presents the issue whether the owner's receipt of a tax refund is conditioned upon the consent of the contractor who paid the tax and has been reimbursed by the business. We understand this question assumes the same facts stated in Question 1. The legislature intended that the business enterprise receive certain tax incentives in order to stimulate business and industry, thereby improving the economy in depressed areas. To permit a contractor to prevent the business from receiving these incentives by withholding his consent appears to frustrate the purpose of the Act. The contractor has been repaid by the owner who would be unable to receive a refund without the contractor's consent. When the intent and purpose of the Act are considered, such an interpretation seems illogical and should be rejected in favor of a logical one. City of Ft. Smith v. Brewer, 255 Ark. 813, 502 S.W.2d 643 (1973), Berry v. Gordon, 237 Ark. 547, 865, 376 S.W.2d 279 (1964). Accordingly, it appears that the contractor's consent is not a condition precedent to the owner receiving a refund for sales and use taxes originally paid by the contractor and passed on to the business.

The foregoing opinion, which I hereby approve, was prepared by Assistant Attorney General Thomas S. Gay.

Sincerely,



STEVE CLARK
Attorney General

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