

**COMMONWEALTH OF KENTUCKY
KENTUCKY BOARD OF TAX APPEALS
FILE NO. K08-R-36**

AK STEEL CORPORATION

APPELLANT

V.

ORDER NO. 20707

**FINANCE AND ADMINISTRATION CABINET
DEPARTMENT OF REVENUE**

APPELLEE

This appeal is before the Board, filed by taxpayer, AK Steel Corporation (AK) from a final order of the Department of Revenue (Dept.) Final Ruling dated October 9, 2008. That ruling denied a claim for refund of sales and use tax payments involving a specific enterprise zone.

FINDINGS OF FACT

The parties submitted the facts of an attenuated case by stipulation. The Dept. might have been better served to look at each item, many though they be. Both parties have moved for summary judgment.

The Board, in support of the following, finds that at all times pertinent, AK was a steelmaker with a primary works at Ashland, Kentucky. This operation exists in the north part of Boyd County and the south part of Greenup County along the Ohio River. In 1987 the area was included in an enterprise zone. This designation provided certain tax incentives to encourage economic development at the Ashland works. On February 10, 1988, the Ashland works was designated by the appropriate authority as a "qualified business" and thus entitled to the tax incentives.

In February of 2005 the Dept. audited the Ashland Works for the period from

October 1, 2000 through September 30, 2004. Ashland Works was a qualified business during this entire audited period.

The Dept. concluded that the Ashland Works was entitled to a refund of \$1,399,516.94 for overpayment of sales and use taxes during this period. This was repaid to Ashland Works on June 20, 2007. Seizing the day, the Ashland Works, a month later, claimed this refund was insufficient and that they were entitled to more.

In January of 2008 this protest was held in abeyance pending resolution of a similar case., Dupont Performance Enhancers LLC vs. Dept of Revenue, case no. 06-CI-03512. This decision was rendered on March 21, 2008. Ashland Works timely appealed from the final ruling dated October 9, 2008.

The parties agree that the amount of additional refunds in dispute for the audited period is \$6,217,372.56 plus interest. This amount is that amount of sales and use tax paid over the audit period for parts used in repair, replacement, modification, of existing equipment and machinery which machinery was within the enterprise zone and subject to its exemptions. Nothing in the record would appear to define or identify these items. But both parties stipulate their value and function.

The issue before the Board is whether the approximately 6.2 million dollars worth of component parts used therein by AK to repair, maintain and improve the Ashland Works fall within the purview of KRS 154.45-090 (3) which states "New and used equipment purchased and used by a qualified business within an enterprise zone shall be exempt from sales and use taxes." Under this statute, the items would be exempt and the refund due.

These terms are defined in KAR 306 1:010, promulgated by the Dept. in such a

way that the items would not be exempt from sales and use tax. The regulation cited was properly promulgated. Under this regulation, the items would not be exempt and the refund not due. This regulation appears to have been promulgated primarily to deny the exemption created by statute and as upheld in Dupont, supra.

All this, the agency can do. However, when a regulation appears to modify a statute out of existence in a given application, it must, in that application, give way. The Department has agreed that the items sought to be exempted are as defined in the statute above. Therefore, the Board is unable to pick and choose which were used in an exempt manner and for an exempt purpose and must grant the exemption for none or all.

It appears to the Board that a great many of the items for which exemption is sought would not, but for the stipulation in this case making them so, be eligible for exemption. The Dept. appears to have decided to count on its regulation modifying the statute and obliterating any exemption rather than actually identifying items and calculating any possible exemption based upon their actual use.

CONCLUSIONS OF LAW

The statute cited above KRS 154.45-090 (3) and its definitions control this case. Administrative regulations cannot define away the clear meaning of the statute. We find KAR 306 1:010 may not be used to define away the exemptions of KRS 154.45-090(3).

ORDER

Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW the Final Ruling of the Department no. 2008-80 is now and hereby reversed. The

Appellant is awarded the sum of \$6,217,372.56 plus interest, the amount of overpayment stipulated by the parties.

This is a final and appealable order. All final orders of this agency shall be subject to judicial review in accordance with the provisions of KRS Chapter 13B. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which an appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds upon which the review is requested. The petition shall be accompanied by a copy of the final order.

A party may file a petition for judicial review only after the party has exhausted all administrative remedies available within the agency whose action is being challenged, and within any other agency authorized to exercise administrative review.

A petition for judicial review shall not automatically stay a final order pending the outcome of the review, unless:

- (a) An automatic stay is provided by statute upon appeal or at any point in the administrative proceedings;
- (b) A stay is permitted by the agency and granted upon request; or
- (c) A stay is ordered by the Circuit Court of jurisdiction upon petition.

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Within twenty (20) days after service of the petition of appeal, or within further time allowed by the Circuit Court, the KBTA shall transmit to the reviewing court the original or a certified copy of the official record of the proceeding under review in compliance with KRS 13B.140(3).

DATE OF ORDER

AND MAILING: April 23, 2010

**KENTUCKY BOARD OF TAX APPEALS
FULL BOARD CONCURRING.**

**BILL HAYES
CHAIRMAN**