STATE OF ARKANSAS
DEPARTMENT OF FINANCE AND ADMINISTRATION
OFFICE OF HEARINGS & APPEALS

ADMINISTRATIVE DECISION

IN THE MATTER OF [redacted]	**GROSS RECEIPTS TAX ASSESSMENT PERIOD: AUGUST 2009 THROUGH MARCH 2015**
ACCT. NO.: [redacted]	
DOCKET NO.: 16-387	[redacted][1]

TODD EVANS, ADMINISTRATIVE LAW JUDGE

APPEARANCES

This case is before the Office of Hearings and Appeals upon a written protest dated November 16, 2015, submitted by [redacted] on behalf of [redacted], the Taxpayer. The Taxpayer protested the assessment of Gross Receipts (sales) Tax made by the Department of Finance and Administration ("Department"). The Audit No. is [redacted].

A hearing was held on May 12, 2016, at 2:00 p.m., in Little Rock, Arkansas. The Department was represented by Lisa Ables, Attorney at Law, Office of Revenue Legal Counsel ("Department's Representative"). Present for the Department was Dwain Griffis, Tax Auditor – Northeast Audit District and Jeri Rogers, Audit Supervisor – Northeast Audit District. [redacted] appeared at the hearing and represented the Taxpayer. [redacted] appeared at the hearing by telephone but did not participate. At the request of the Taxpayer, the record remained open for the Taxpayer to submit additional evidence after the

[1] This amount is not adjusted for concessions agreed to by the Department after the issuance of the assessment.

hearing in this matter. The Taxpayer's submission was received on June 13, 2016, and the Department's response was received June 23, 2016. This matter was submitted for a decision on June 24, 2016. This matter was originally assigned to Administrative Law Judge Jessica Duncan and was reassigned on September 12, 2016.

ISSUE

Whether the assessment in this matter should be sustained? Yes, after the adjustment of interest discussed below.

FINDINGS OF FACT/CONTENTIONS OF THE PARTIES

In his protest, the Taxpayer's Representative summarized the relevant facts and his legal analysis, stating as follow in pertinent part:

> As an introduction, [redacted] contracts with governmental bodies, utilities, [redacted] and businesses to eradicate swatches of vegetation. This is typically done be spraying commercial grade chemicals on the vegetation, and then inspecting the treatment later to verify that the eradication has occurred, and then reapplying if needed. The typical areas include rights of way, railroad track areas, parking lots, and large areas of property. The taxpayer does not do lawn care or landscaping in the traditional sense of the words, or as defined in the statute.
>
> . . .
>
> In the instant case of this taxpayer, the only activity that the taxpayer does is to eliminate unwanted vegetation by applying chemicals that kill vegetation. This is to emphasize *elimination* of the ground cover because for whatever reason, the client needs the ground cover eliminated. This can be because of the requirements of an easement or right of way, or other reasons important to the client. Elimination by definition is not maintenance, preservation or enhancement, as all of these are descriptions of growth or beautification, whereas elimination can hardly be considered making something grow or look better. The taxpayer does not do any of the other items mentioned in the statute, such as plant trees, shrubs flowers of grass, nor does it otherwise maintain ground covering by mowing, trimming, pruning, weeding (i.e. pulling weeds), etc.

> The taxpayer realizes that this is at odds with the definitions as provided in GR-9.2, but the source of GR-9.2 IS the Ark. Code Ann. Section 26-52-301(3)(D)(i), so additions to the definitions can only be made where authorized by statute. In fact, the only mention of "chemical spraying" occurs in GR-9.2 C 2 within the definition of Lawn Care, and is clearly including in a section where beautification is the goal (not *elimination* as described above):
>
> > mowing or raking the yard, chemical spraying, fertilizing, weed control or weed-eating, maintaining the ground cover in beds by adding additional rock, gravel, tree bark or other material used to provide ground cover in beds or in other places in the area to be maintained, and general lawn maintenance. Tree trimming or tree removal is not lawn care.
>
> This last sentence is important as well, because again, *eliminating* a tree is not lawn care. The taxpayer believes that the terms weed control and chemical spraying are intended to be read as in conjunction with the traditional notions of lawn care (making things more beautiful and grow better) as opposed to the eradication of large swaths of growth that is the taxpayer's business. This is true because these terms are not used in the text of 26-52-301 and are only added by the drafters of GR-9.2.
>
> Because of the above interpretations, the taxpayer does not believe that Section 26-52-301 applies to it, and so that the amount of the proposed tax and interest should be reduced to -0-.

During the Administrative Hearing in this matter, the Taxpayer's Representative asserted as follows: (1) the Department's Mission Statement roughly states that the Department should only collect the appropriate amount of tax from taxpayers; (2) Ark. Code § 26-52-301(3)(D)(i) (Repl. 2014) only taxes specifically enumerated services and does not tax services not listed as taxable in the relevant code sections; (3) a transaction must meet seven requirements to be taxable: a transaction must occur; the transaction cannot be a casual sale; the taxpayer must be acting as a "yard guy;" the customer must not be exempt; the activity must be taxable; the activity must be performed on qualifying property; and the activity must be performed for a qualifying reason (i.e. maintenance,

preservation, or enhancement of ground covering); (4) those seven requirements must be proven by the Department; (5) services that are performed for maintenance, preservation, or enhancement of ground cover are the only taxable lawn care and landscaping services; (6) the Taxpayer sprays chemicals on tracts of land for the purpose of elimination of ground cover (grass, weeds, plants, flowers, shrubs, and trees); (7) for the [redacted] invoices, the Taxpayer sprays weeds in a [redacted] to keep the area clear; (8) sometimes the Taxpayer performed services as one-time transactions for a particular customer; and (9) Taxpayer was not a nonfiler and a six year audit period was not appropriate.

In her Answers to Information Request, the Department's Representative asserts that: Arkansas Gross Receipts Tax Rule GR-9.2 includes "chemical spraying" in the definition of taxable lawn care services, and, consequently, the assessment should be sustained since the Taxpayer performs a chemical spraying service on nonresidential property. Addressing the Taxpayer's argument that GR-9.2 is in conflict with the statutory language, the Department's Representative argued as follows in her Answers to Information Request, in part:

> Taxpayer contends that the Arkansas Legislature did not levy a tax upon the services it provides because it does not provide the service of "lawn care" or "landscaping" in the traditional sense of the words, or as defined in Ark. Code Ann. § 26-52-301(3)(D)(i). As support, Taxpayer refers to certain terms used in the statute to define lawn care and landscaping; specifically, terms such as "maintenance, preservation, or enhancement." Taxpayer's contention that these terms describe "growth or beautification," and therefore cannot be considered in its services of "eliminating" vegetation because the elimination of something can never involve making something grow or look better, is illogical and circular. Taxpayer's argument is circular because it can easily be turned around and used against the Taxpayer, as follows: But for the elimination/eradication of the vegetation (weeds), the ground cover would fail to appear maintained, preserved, or enhanced. Moreover, terms such as

"elimination," "eradication," "vegetation," "growth and beautification," are not listed in the definition of lawn care and landscaping, and therefore exceed the authority of Taxpayer's argument. In addition, Schedule B, which is a direct download of Taxpayer's invoices, consistently describe the adjusted services as "Weed Control Service," "Bush Control Service," "Turf Management Service, and "Install New Plants." There is not one invoice reflecting "eradication/elimination of vegetation." While Taxpayer's argument may be somewhat creative, it is not persuasive.

In its protest letter, Taxpayer admits that its argument regarding lawn care is at odds with the definitions in GR-9.2, but argues instead that it is GR-9.2 that is at odds with Ark. Code Ann. *§* 26-52-301(3)(D)(i)(b). Essentially, the Taxpayer opines that the Department has exceeded its scope of authority by including the term "chemical spraying" in its definition of "lawn care," because such additions can only be made where authorized by statute.

The Department' s position is that the law taxes the service of "chemical spraying" so long as it is on "nonresidential" property and includes the "maintenance, preservation, **or** enhancement" of ground cover." As the agency charged with the interpretation of the statute, the Department is entitled to deference unless its interpretation is clear y erroneous. The Arkansas Supreme Court has recognized that administrative agencies are often required to interpret statutes and rules. In Walnut Grove School Distr. No. 6 of Boone County v. County Board of Education, 204 Ark. 354, 162 S.W.2d 64 (1942), the court's opinion stated, in part:

> *. . . the administrative construction generally should be clearly wrong before it is overturned. Such a construction, commonly referred to as practical construction, although not controlling, is nevertheless entitled to considerable weight. It is highly persuasive. Id. at 359, 162 S. W.2d at 66.*

The Department has consistently interpreted Ark. Code Ann. § 26-52-301(3)(D)(i)(b) and GR-9.2 as including "chemical spraying" of ground covering of non-residential property as a taxable service. Although Taxpayer's arguments may sound on point to the Taxpayer, the pertinent facts and legal construction of such arguments are incorrect, misapplied, misplaced, and circular in nature.

During the administrative hearing in this matter, the Department's Representative asserted as follows: (1) the burden is on the state merely to prove that the services qualify as taxable lawn care services; (2) GR-9.2 explicitly

includes chemical spraying and weed control as taxable lawn care services; (3) the Taxpayer is required to prove that any exemptions apply to the otherwise taxable services; (4) the Taxpayer was a nonfiler for state sales tax but was a filer for Arkansas use tax;[2] (5) Also, even if the Taxpayer was a sales tax filer, the Taxpayer was more than 25% underreported on those sales which makes the six year statute of limitations otherwise appropriate for the Arkansas Sales Tax assessment; and (6) the elimination of weeds is necessary to enhance any remaining ground covering.

The invoices provided after the hearing by letter recieved June 13, 2016 demonstrate that the Taxpayer's services can generally be divided into four categories:

1. Spraying of herbicide on vegetation for power utility companies to maintain rights of way;
2. Spraying of herbicide on [redacted] including the [redacted] and vegetation encroaching on either side;
3. Spraying of herbicide on vegetation on either side of roadways for county governments;
4. Spraying of herbicide on vegetation around buildings, fence lines, and lots; and
5. One invoice (Invoice No. [redacted]) involved the installation of new plants and debris removal.[3]

After a summary of the testimony provided in this proceeding, a discussion of the burdens of proof in tax proceedings, an analysis of the legal issues, and the conclusions of law shall be provided.

[2] A review of the Taxpayer's account demonstrates that the Taxpayer actually filed a combined sales/use tax return for the relevant periods but reported zero sales for Arkansas sales tax purposes.

[3] This invoice is not related to the Taxpayer's argument regarding lawn care services, is otherwise taxable as landscaping services under GR-9.2 and/or taxable as collection and disposal of solid waste under GR-9.6, and shall not be addressed in the remainder of the discussion contained in this decision.

The Tax Auditor testified as follows: (1) he performed an audit of this Taxpayer which covers the periods 8/2009 thru 3/2015; (2) he reviewed the Taxpayer's records in [redacted] and reviewed all purchase invoices involving items that were shipped into Arkansas; (3) all tax paid invoices were removed; (4) the only items that were improperly untaxed were invoices for taxable brush and weed control services performed by the Taxpayer in the State of Arkansas for various customers; (5) invoices labeled [redacted] by the Taxpayer involve weed control services performed on and beside [redacted]; (6) regular weed control services were also included in the untaxed invoices; (7) some assessed invoices also involved mowing and planting; (8) other assessed invoices involved killing vegetation on roadsides; (9) the spraying of chemicals to kill vegetation and manage land is taxable under GR-9.2 as lawn care services for nonresidential property; (10) any invoices involving the spraying of residential properties were not assessed; (11) sweeping off your own sidewalk is not taxable but it is taxable as lawn services if you pay someone else to do it; (12) if someone cleans your office and sprays cleaning chemicals while performing those cleaning services, the transaction is taxable as cleaning services and not as lawn care services; (13) fertilizing your own property is not taxable even if you are a commercial farmer but it is taxable if you pay someone else (who is a nonemployee) to do it; and (14) the clearing and leveling of ground to build homes or roads and the construction of roads is not taxable as lawn care or landscaping services.

CONCLUSIONS OF LAW

Standard of Proof

Ark. Code Ann. § 26-18-313(c) (Supp. 2015) provides, in pertinent part, as follows:

> The burden of proof applied to matters of fact and evidence, whether placed on the taxpayer or the state in controversies regarding the application of a state tax law shall be by preponderance of the evidence.

A preponderance of the evidence means the greater weight of the evidence. *Chandler v. Baker*, 16 Ark. App. 253, 700 S.W.2d 378 (1985). In *Edmisten v. Bull Shoals Landing*, 2014 Ark. 89, at 12-13, 432 S.W.3d 25, 33, the Arkansas Supreme Court explained:

> A preponderance of the evidence is "not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

The Department bears the burden of proving that the tax law applies to an item or service sought to be taxed, and a taxpayer bears the burden of proving entitlement to a tax exemption, deduction, or credit. Ark. Code Ann. § 26-18-313(d) (Supp. 2015). Statutes imposing a tax or providing a tax exemption, deduction, or credit must be reasonably and strictly construed in limitation of their application, giving the words their plain and ordinary meaning. Ark. Code Ann. § 26-18-313(a), (b), and (e) (Supp. 2015). If a well-founded doubt exists with respect to the application of a statute imposing a tax or providing a tax exemption, deduction, or credit, the doubt must be resolved against the application of the tax, exemption, deduction, or credit. Ark. Code Ann. § 26-18-313(f)(2) (Supp. 2015).

Assessment

Initially, the seven-part analytical framework proposed during the hearing and a subsequent flow chart provided by the Taxpayer must be rejected because it improperly conflates the imposition of a tax with the application of an exemption (i.e. the isolated sale exemption, that a customer is an exempt entity, that services are provided by employees of the recipient, etc.) and thus violates Arkansas law. As discussed above, Ark. Code Ann. § 26-18-313 (Supp. 2015) states that the Department bears the burden of showing that a tax generally applies to a transaction and the Taxpayer bears the burden of proving the applicability of an exemption. The Taxpayer's approach would require the Department to prove that a service is taxable and to disprove that any exemption would apply and, thus, is in error. Under Arkansas law, the Department need only prove that the services provided by the Taxpayer constitute taxable lawn care or landscaping services[4] and, if proven, the Taxpayer bears the burden of proving entitlement to an exemption.

Arkansas Gross Receipts (sales) Tax generally applies to all sales of tangible personal property and certain specifically enumerated services. Ark. Code Ann. § 26-52-301 (Repl. 2014). Lawn Care Services are specifically listed as taxable services and are defined as "the maintenance, preservation, or enhancement of ground covering of nonresidential property and does not include

[4] As part of the seven step analysis, the Taxpayer also argued that a Taxpayer must be a "yard guy" even if lawn services are performed. This argument appears to inquire whether a taxpayer is in the business of performing lawn services and is duplicative of the casual sale requirement. If the Taxpayer actually intended to further limit the taxation of lawn services to only those entities that operate as a general landscaping or lawn mowing companies, the relevant law levies a tax on the performance of the lawn care services and not only the performance of that service by general landscaping or lawn mowing companies; consequently, that requirement must be rejected. Language cannot be inserted into the statute that was not adopted by the legislature. *Stroud v. Cagle*, 87 Ark. App. 95, 102, 189 S.W.3d 76, 81 (2004); *May v. State,* 94 Ark. App. 202, 207, 228 S.W.3d 517, 521 (2006).

planting trees, bushes and shrubbery, grass, flowers, and other types of decorative plants." Ark. Code Ann. § 26-52-301(3)(D)(i) and (ii) (Repl. 2014). Arkansas Gross Receipts Tax Rule GR-9.2(C) was promulgated to enforce Ark. Code Ann. § 26-52-301(3)(D)(i)(*f)* (Repl. 2014) and provides the following relevant definitions:

2. "Lawn care" means the maintenance, preservation or enhancement of ground covering of nonresidential property and does not include planting trees, bushes, shrubbery, grass, flowers and other types of decorative plants. **Lawn care includes the following:** mowing or raking the yard, **chemical spraying**, fertilizing, **weed control or weed-eating**, maintaining the ground cover in beds by adding additional rock, gravel, tree bark or other material used to provide ground cover in beds or in other places in the area to be maintained, and general lawn maintenance. Tree trimming or tree removal is not lawn care.
3. "Residential" means a single-family residence used solely as the principal place of residence of the owner or occupant. Apartment buildings, condominiums, and duplexes are nonresidential property for purposes of this exemption. A single-family dwelling leased to the occupant is residential property for purposes of this exemption. [Emphasis Supplied.]

The Arkansas Supreme Court has explained that "the interpretation of statutes by an administrative agency, while not conclusive, is highly persuasive." *Matter of Sugarloaf Min. Co. Permit No. P-272-M-Co,* 310 Ark. 772, 776, 840 S.W.2d 172, 174 (1992). In *Ford vs. Keith,* 338 Ark. 487, 494, 996. S.W.2d 20, 25 (1999), the Arkansas Supreme Court explained as follows: "The construction of a state statute by an administrative agency is not overturned unless it is clearly wrong."

Here, the Taxpayer's Representative limited his objections to whether the Taxpayer's weed control/eradication service constituted "maintenance, preservation, or enhancement of ground covering" under the definition of taxable

lawn care services provided in the governing statutes. The governing regulation (GR-9.2) explicitly includes weed control and chemical spraying in its listing of taxable lawn services. The Department's Representative argued that the eradication of unwanted vegetation is necessary to the enhancement and/or preservation of ground coverings. The Department's interpretation as promulgated in GR-9.2(C) was not shown to be clearly wrong and, consequently, must be sustained. The services at issue involve the application of herbicides for weed control purposes, which are listed as taxable lawn care services under GR-9.2(C). Further, the Taxpayer has not proven by a preponderance of the evidence that any tax exemption is applicable to its otherwise taxable lawn care services. Consequently, the Department correctly determined that these services were taxable under Ark. Code Ann. § 26-52-301(3)(D)(i)(*f*) (Repl. 2014) and the assessment of tax is sustained.

Additionally, the Taxpayer's Representative argued that the Taxpayer was not a nonfiler for Arkansas sales tax purposes. The Department's Representative argued, even if the Taxpayer did file its Arkansas sales tax return during the relevant periods, the Taxpayer underreported its sales tax liability by twenty-five percent (25%) or more and the six year assessment was appropriate under Ark. Code Ann. § 26-18-306(e) (Supp. 2015). A review of the Taxpayer's Account demonstrates that the Taxpayer filed its combined Arkansas sales and use tax returns during most of the relevant periods but reported zero sales for Arkansas sales tax purposes. Consequently, the Taxpayer did file for most of the relevant periods. The Taxpayer, however, did underreport its sales tax liability by twenty-

five percent (25%) or more for all periods by not taxing the sales of services discussed above. The application of the six year statute of limitation is sustained.

Interest must be assessed on tax delinquencies for use of the state's tax dollars. Ark. Code Ann. § 26-18-508 (Repl. 2012). However, more than 180 days has passed since the Taxpayer's protest of the assessment for reasons beyond the Taxpayer's control. Consequently, interest that accrues from the date of the Taxpayer's protest to the issuance of the final assessment must be waived under Ark. Code Ann. § 26-18-405(d)(1)(C) (Supp. 2015). Any remaining interest after this adjustment is sustained.

DECISION AND ORDER

The assessment is sustained after the interest adjustment discussed above. The file is to be returned to the appropriate section of the Department for further proceedings in accordance with this Administrative Decision and applicable law. Pursuant to Ark. Code Ann. § 26-18-405 (Supp. 2015), unless the Taxpayer requests in writing within twenty (20) days of the mailing of this decision that the Commissioner of Revenues revise the decision of the Administrative Law Judge, this Administrative Decision shall be effective and become the action of the agency. The revision request may be mailed to the Assistant Commissioner of Revenues, P.O. Box 1272, Rm. 2440, Little Rock, Arkansas 72203. The Commissioner of Revenues, within twenty (20) days of the mailing of this Administrative Decision, may revise the decision regardless of whether the Taxpayer has requested a revision. The Taxpayer may seek relief from the final decision of the Administrative Law Judge or the Commissioner of Revenues on a

final assessment by following the procedure set forth in Ark. Code Ann. § 26-18-406 (Repl. 2015).

OFFICE OF HEARINGS & APPEALS

TODD EVANS
ADMINISTRATIVE LAW JUDGE

DATED: October 10, 2016