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Department of Finance and Administration

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January 21, 2020

[redacted]

Attn: [redacted]

Re: Applicability of Waste Tire Rim Removal and Tire Import Fees to a Remote Tire Seller
Opinion Number 20190522

Dear [redacted],

Your request for a legal opinion concerning the applicability of Arkansas' Waste Tire Rim Removal and Waste Tire Import Fees for a company that has no physical presence in the State of Arkansas, and ships tires to customers within the State via common carrier, has been referred to me for reply.

Your letter describes [redacted] (the Taxpayer) as an online seller of tires, wheels, and related accessories with no physical presence within the State of Arkansas. You state that the Taxpayer conducts sales to customers through its website and through telephone calls received at a sales center located outside of Arkansas. The Taxpayer's customers include businesses purchasing products for resale as well as end users making purchases for themselves. The Taxpayer does not offer tire removal service and does not collect used tires within the State of Arkansas.

You state that it is the Taxpayer's understanding that it would not be responsible for collecting and remitting the three-dollar ($3.00) rim removal fee provided for in Ark. Code Ann. § 8-9-404(a)(2) because removal and retention of waste tires are not performed by the Taxpayer within the State of Arkansas. In addition, you note that Ark. Code Ann. § 8-9-404(c)(1)(A) addresses tires that are imported into the State but does not provide the definition of an imported tire.

Your letter requests clarification on two points: 1) to confirm whether or not the Taxpayer is responsible for collecting and remitting the one-dollar ($1.00) tire import fee, and 2) to confirm whether or not the Taxpayer is responsible for collecting the three-dollar ($3.00) rim removal fee on new tires sold remotely and shipped via common carrier to customers in Arkansas. I will address each question in turn.

Response

1. *Is the Taxpayer responsible for collecting and remitting the one-dollar ($1.00) Import Fee on new tires sold remotely and shipped via common carrier to customers in Arkansas?*

No.

Regarding the term "imported tire," which is not specifically defined in the Used Tire Recycling and Accountability Act (the Act), the first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Weiss v. McFadden*, 353 Ark. 868, 120 S.W.3d 545 (2003). We construe the statute so that no word is left void, superfluous, or insignificant; and meaning and effect are given to every word in the statute if possible. *Ozark Gas Pipeline Corp. v. Arkansas Pub. Serv. Comm'n*, 342 Ark. 591, 29 S.W.3d 730 (2000). When the language of the statute is plain and unambiguous, there is no need to resort to rules of statutory construction. *Weiss v. McFadden*, *supra*. When the meaning is not clear, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. *Id*.; *Macsteel, Parnell Consultants v. Arkansas Ok. Gas Corp.*, 363 Ark. 22, 210 S.W.3d 878 (2005); *see also* Ops. Att'y Gen. 2005-072 & 2004-339.

The interpretation of an administrative agency charged with the enforcement of a statute is highly persuasive, and will be upheld unless "clearly wrong."[1] *See Macsteel, Parnell Consultants*, 363 Ark., 210 S.W.3d; *see also McLane Co., Inc. v. Davis*, 353 Ark. 539, 110 S.W.3d 251 (2003); *Arkansas State Medical Board v. Bolding*, 324 Ark. 238, 920 S.W.2d 825 (1996); *and* Op. Att'y Gen. 2005-124. It has also been stated that "A court will not attempt to substitute its judgment for that of the administrative agency. [Citations omitted.] A rule is not invalid simply because it may work a hardship, create inconveniences, or because an evil intended to be regulated does not exist in a particular case." *Arkansas Health Svcs. Comm'n v. Regional Care Facilities, Inc.*, 351 Ark. 331, 338, 93 S.W.3d 672 (2002).

While the Act does not specifically define the term "imported tire," importing is defined in other chapters of the tax code. Specifically, regarding motor fuel and special motor fuels, importing means bringing distillate special fuel, liquefied gas special fuels, or motor fuel into the state of Arkansas. Ark. Code Ann. §§ 26-56-102 *and* 26-55-202(6). Given the legislature's definition of imported motor fuels as those being brought into the State of Arkansas, it is clear that the legislature intended imported tires to mean those that are brought into the State of Arkansas.

Your letter accurately references Ark. Code Ann. § 8-9-404(c)(1)(A) which states "Beginning on January 1, 2018, there is imposed an import fee of one dollar ($1.00) on each used tire that

[1] When an assessment of taxes or denial of refund made by the Arkansas Department of Finance and Administration is appealed to Circuit Court, Ark. Code Ann § 26-18-406(c)(3) protects the de novo nature of the review by clearly noting that no presumption attaches to the final assessment or denial of refund request that is being appealed. This protects the de novo review while maintaining the Arkansas courts' deference to agency expertise through rule making and other avenues.

is imported into Arkansas." Subparagraph (c)(2) of that section requires the import fee to be paid by the person who imports the used tire into the State of Arkansas. Based on the facts as stated in your letter, the Taxpayer sells new tires. Because the statute applies specifically to used tires only, the one-dollar ($1.00) per tire fee on used tires does not apply to the Taxpayer.

2. *Is the Taxpayer responsible for collecting and remitting the three-dollar ($3.00) Rim Removal Fee on new tires sold remotely and shipped via common carrier to customers in Arkansas?*

Yes, for sales to end users.

A "tire retailer" is defined as a person who is (i) in the business of selling new and or used tires to the end consumer, or (ii) who is in the business of or receives compensation for removing tires from rims. Ark. Code Ann. § 8-9-402(18). Paragraph (B) of this definition excludes a person who sells tires to another person exclusively for the purpose of resale if the subsequent retail sale is subject to the import fee imposed under Ark. Code Ann. § 8-9-404.

Arkansas Code Annotated § 8-9-404(a)(1) imposes a rim removal fee upon the transaction of removing a tire from a rim that is related to the sale of a replacement tire by a tire retailer. Your letter accurately references Ark. Code Ann. § 8-9-404(a)(2) which states that the rim removal fee shall be charged by the retailer to a person who:

> (A) Purchases a replacement tire for a rim that necessitates the removal of a different tire from the same rim; or
> (B) Purchases the service of removal of a tire from a rim and replacement with a tire that was not purchased from the tire retailer if the person requesting the rim removal cannot show proof of payment of the rim removal fee under this section for the replacement tire.

As stated in your letter the Taxpayer supplies tires to customers in Arkansas as a remote seller and does not conduct the removal of tires from the rim as part of the transaction. You state that the Taxpayer sells its tires to a combination of customers including businesses that intend to re-sell the products to their customers and end users who make the purchase for themselves. Based on the facts presented in your letter the business customers who intend to re-sell the tires are the tire retailers who are responsible for collecting and remitting the three-dollar ($3.00) rim removal fee.

For sales to customers who are the end user of the tires who will be using the tires as replacement tires (necessitating a rim removal) the Taxpayer is the retailer and will be responsible for collecting and remitting the rim removal fee under certain circumstances. Sales and use tax is levied upon the gross proceeds or gross receipts derived from all sales of tangible personal property and certain enumerated services. Ark. Code Ann. §§ 26-52-301 (Supp. 2017) and 26-53-106 (Supp. 2017). Sections 17 and 18 of Act 822 of the 92nd General Assembly of Arkansas ("Act 822") require certain remote sellers and marketplace facilitators to collect sales and use tax on the sale of tangible personal property, taxable services, digital code, or specified digital products. Sections 17 through 19 of Act 822 became effective on July 1, 2019. Pursuant to those sections:

> a) A remote seller or a marketplace facilitator that sells or facilitates the sale of tangible personal property, taxable services, a digital code, or specified digital products for delivery into Arkansas shall collect and remit the applicable sales tax levied under this chapter or the applicable compensating use tax levied under the Arkansas Compensating Tax Act of 1949, § 26-53-101 et seq., if in the previous calendar year or in the current calendar year, the remote seller or the marketplace facilitator had aggregate sales of tangible personal property, taxable services, digital codes, or specified digital products subject to Arkansas sales or use tax within this state or delivered to locations within this state exceeding:
>
> (1) One hundred thousand dollars ($100,000); or
>
> (2) Two hundred (200) transactions.
>
> *Id*. at § 19.

The Department is continuing to evaluate the impact of Act 822 and further guidance or clarifications may be the subject of Departmental rulemaking. The rulemaking process includes an opportunity for public comment and the Department would invite you to contribute to that process so that it might have valuable feedback from the corporate community pursuant to the Arkansas Administrative Procedures Act of Ark. Code Ann. § 25-15-201 to 220 (Repl. 2014).

I also encourage you to visit the Department's website for additional information about remote sellers and marketplace facilitators at https://www.dfa.arkansas.gov/excise-tax/sales-and-usetax/remote-sellers/. This site provides guidance on frequently asked questions, along with information about Arkansas's simplified registration process for remote sellers.

In accordance with Arkansas Gross Receipts Tax Rule GR-75, this opinion is based upon my understanding of the facts as set out in your inquiry and as current Arkansas laws and rules govern those facts. Any changes in the facts or law could result in a different opinion. This opinion will not be binding upon the Department for any topic not specifically addressed herein. You may seek a supplemental opinion should you desire guidance in any topic not addressed within this opinion or if you have additional questions after reading this opinion. Please be advised that this opinion may only be relied upon by the specific and identified requestor, and will only be binding upon the Department for three (3) years from the date of issuance. See Arkansas Gross Receipts Tax Rule GR-75.

A copy of the Arkansas Gross Receipts Tax Rules referenced in this letter is available online at http://www.dfa.arkansas.gov/offices/policyAndLegal/Documents/et2008_3.pdf.

Sincerely,

Greg Ivester, Attorney
Revenue Legal Counsel