

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

**ADMINISTRATIVE DECISION**

**IN THE MATTER OF** [REDACTED]

**GROSS RECEIPTS  
TAX ASSESSMENT  
ACCT. NO.:** [REDACTED]

**DOCKET NO.: 22-083**

**AUDIT ID:** [REDACTED]

**(\$ [REDACTED] )<sup>1</sup>**

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**RAY HOWARD, ADMINISTRATIVE LAW JUDGE**

**APPEARANCES**

This case is before the Office of Hearings and Appeals upon a written protest dated July 9, 2021, submitted by [REDACTED], on behalf of [REDACTED], the Taxpayer. The Taxpayer protested the assessment of Gross Receipts Tax (“sales tax”) resulting from an audit conducted by Elizabeth Isaac, Tax Auditor – Central Audit District, for the Department of Finance and Administration (“Department”). The audit period was from November 1, 2016, through November 30, 2020.

This case was submitted on written documents at the request of the Taxpayer. The Department was represented by W. Evan Lawrence<sup>2</sup> and Evelyn D. Gomez,<sup>3</sup> Attorneys at Law, Office of Revenue Legal Counsel. The Taxpayer was represented by [REDACTED], Attorney at Law ([REDACTED]). A Briefing Schedule was mailed to the parties on August 18, 2021.

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<sup>1</sup> The reflected amount included tax (\$ [REDACTED] ), penalty (\$ [REDACTED] ), and interest ([REDACTED] ).

<sup>2</sup> Filed the Department’s Opening Brief.

<sup>3</sup> Filed the Department’s Reply Brief.

The Department's Opening Brief was filed on August 24, 2021. The Taxpayer's Response Brief was filed on October 21, 2021. The Department's Reply Brief was filed on November 4, 2021. This matter was submitted for decision on November 22, 2021.

### **ISSUE**

Whether the assessment issued by the Department against the Taxpayer should be sustained? Yes.

### **FINDINGS OF FACT/CONTENTIONS OF THE PARTIES**

The Department's Opening Brief addressed the facts and legal issues involved in this case and stated, in part:

██ (the "Taxpayer") provides its customers with landscaping and lawncare services. The Taxpayer services both residential and commercial properties. Before the audit began, the Taxpayer was a non-filer for sales tax.[Footnote 1 stated, "See ARK. CODE ANN. § 26-18-306(e) (Repl. 2020) (providing that if taxpayer understates tax due by amount equal to or greater than twenty-five percent, the Secretary may assess tax due at any time prior to expiration from six years after return was required to be filed)."]

On or about December 4, 2020, the Arkansas Department of Finance & Administration (the "Department") notified the Taxpayer that the Department was going to perform an audit of the Taxpayer's records. During the course of the sales tax audit, the auditor reviewed the Taxpayer's purchase invoices, exemption certificates, and bank statements. Among other findings, the auditor discovered that the Taxpayer performed lawncare services for which the Taxpayer did not collect sales tax. The auditor prepared schedules and issued a Summary of Findings. On or about May 11, 2021, the Department issued a Notice of Proposed Assessment in a total amount of \$██████████, which included tax in the amount of \$██████████, penalty of \$██████████, and interest of \$██████████.[Footnote 4 stated, "See Notice of Proposed Assessment, attached as **Exhibit 3**."] The Taxpayer timely filed this protest.

Taxpayer is only protesting that a sales tax exemption should apply

to services provided to [REDACTED] and [REDACTED]. Specifically, Taxpayer is alleging that:

1. Taxpayer contracts with [REDACTED] [REDACTED] [REDACTED] to provide landscaping services, and [REDACTED] contracts with the [REDACTED] for the services provided by the Taxpayer, which renders the service sold by the taxpayer exempt from tax as either a sale for resale or as a sale to the United States Government; and
2. Taxpayer provides services to [REDACTED] (" [REDACTED] ") and [REDACTED] ultimately provides Taxpayer's services to [REDACTED], which renders the service soled by the taxpayer exempt from tax as a sale for resale.

...

Arkansas Gross Receipts Tax Rule GR-9.2, promulgated to administer and clarify the levy of sales tax on lawncare and landscaping services, states:

**GR-9.2. SERVICES SUBJECT TO TAX - LAWN CARE AND LANDSCAPING:**

A. Any person engaged in the business of providing lawn care of nonresidential property ***or landscaping services of both residential and nonresidential property*** is required to collect and remit sales tax on the gross receipts derived from these services. ...

B. The business will collect state and local sales tax on the total consideration for landscaping services or nonresidential lawn care, whether provided as part of a general contract for building construction or as a separate agreement with the landowner. ...

**C. DEFINITIONS.**

1. "Landscaping" means the installation, preservation or enhancement of ground covering by planting trees, bushes, shrubbery, grass, flowers and other types of decorative plants. "Landscaping" does not include site preparation, cutting and filling, leveling, tree trimming or tree removal, or clearing a site of bushes and trees. "Landscaping" does include sodding, seeding and planting, as well as installing items such as landscape timbers, edging, planters, or

similar items. Landscaping performed on highway easements and right-of-ways is taxable. Landscaping is taxable whether it is done for decorative purposes or non-decorative purposes such as erosion or sediment control.

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 added).

*Emphasis added.*

Consistent with the statute, Arkansas Gross Receipts Tax Rule GR-9.2(A) explains that the service of providing landscaping services on residential and nonresidential property – as distinguished from nonresidential property only – is a taxable service. Consistent with the statute, subsection (B) provides that the seller must collect state and local sales tax on the total consideration for “landscaping services” or “nonresidential lawn care.”

Taxpayer does not allege that the services provided are not taxable but rather that an exemption applies to services provided to two customers.

### **Sales Tax Exemptions**

#### *Sale for Resale*

ARK. CODE ANN. § 26-51-401 (Repl. 2020) states that “there is specifically exempted from the tax imposed by this chapter the following . . .”:

(12)(A) Gross receipts or gross proceeds derived from sales for resale to persons regularly engaged in the business of reselling the articles purchased, whether within or without the state if the sales within the state are made to persons to whom gross receipts tax permits have been issued. . .

Arkansas Gross Receipts Tax Rule 53, promulgated to administer and clarify the exemption found in ARK. CODE ANN. § 26-51-401 (12)(A), states:

**GR-53. EXEMPTIONS FROM TAX – SALES FOR RESALE:**

The gross receipts or gross proceeds derived from sales for resale to persons regularly engaged in the business of reselling the articles or services purchased are exempt from tax provided that such sales are made to persons to whom a permit has been issued . . . A seller may accept a valid retail permit, or resale permit, issued by another state . . .

**B. PROOF OF ENTITLEMENT TO EXEMPTION**

1. The sale for resale exemption may be claimed through the use of the exemption certificate or the multistate certificate of exemption.
2. A purchaser may also claim the sale-for-resale exemption by providing information to the seller that otherwise establishes that the purchaser is reselling the articles purchased. Such information includes the purchaser's retail permit number or a written certification to the seller that the articles or services are purchased for resale. . . .

*Sales to the United States Government*

ARK. CODE ANN. § 26-51-401 (Repl. 2020) states that “there is specifically exempted from the tax imposed by this chapter the following. . .”:

(5) Gross receipts or gross proceeds derived from sales to the United States Government. . .

Arkansas Gross Receipts Tax Rule 47 implements § 26-51-401 (5). It states:

**GR-47. EXEMPTIONS FROM TAX – SALES TO THE UNITED STATES GOVERNMENT:**

The gross receipts or gross proceeds derived from sales to the United States Government are exempt from the tax. Contractors purchasing tangible personal property or taxable services pursuant to a contract with the United States Government are the consumers of such property or services and must pay the tax when they purchase the property or services. . . .

**Penalty**

In the case of a taxpayer's failure to file any return required by any state tax law on or before the date prescribed determined with regard to any extension of time for filing the return, unless it is shown that the failure is due to reasonable cause and not to willful neglect, the Department must add to the amount required to be shown as tax on the return five percent (5%) of the amount of the tax if the failure is not more than one (1) month, with an additional five percent (5%) for each additional month or fraction of a month during which the failure continues, not to exceed thirty-five percent (35%) in the aggregate.[Footnote 10 cited to, “ARK. CODE ANN. § 26-18-208(2)(A) (Repl. 2020).”] The maxim that ignorance of the law is no defense applies in equal force “to acts committed or omitted in violation of the criminal or civil laws of the land.

The Taxpayer has not shown that its failure to file sales tax returns was due to reasonable cause and not to willful neglect. Therefore, the Department properly assessed the statutorily mandated failure to file penalty.

**Interest**

Interest is required to be assessed upon tax deficiencies for the use of the State’s tax dollars. Ark. Code Ann. § 26-18-508 (Repl. 2020).

. . .

**DISCUSSION**

The Taxpayer admits in its protest that it provides landscaping and lawncare services for its customers. Also, Taxpayer is not alleging that sales tax was improperly assessed but is instead alleging that the Department erred in denying Taxpayer’s claims for exemptions. Therefore, the Department has met its burden of proving the Taxpayer made taxable sales, and the burden now shifts to the Taxpayer to prove by a preponderance of the evidence that its sales

█ █ qualify for the exemption for sales to the United States Government and that its sales to █ █ qualify for the “sale for resale” exemption.

### **Exemption for Sale for Resale Transactions**

#### *Sales Tax Due on █ █ Transactions*

Taxpayer states that it contracts with █ █ to provide landscaping services. Taxpayer then alleges that █ █ contracts with or on behalf of the █ █. Taxpayer has provided no evidence to prove what type of business █ █ is engaged in.

As cited above ARK. CODE ANN. § 26-51-401 (Repl. 2020), allows for a sales tax exemption when the sales are derived from sales for resale ***to persons regularly engaged in the business of reselling the articles purchased*** . . . if the sales within the state are made to persons to whom gross receipts tax permits have been issued. For a taxpayer to prove entitlement to this exemption, as explained in GR-53, the exemption must be claimed through the use of an exemption certificate or the multistate certificate of exemption. Also, under GR-53, the purchaser may claim the sale for resale exemption by providing information to the seller which establishes that the purchaser is reselling the articles purchased (this includes the purchaser’s retail permit or a written certification to the seller that the articles or services are purchased for resale).

Here, the Taxpayer provided all permits and exemption certificates on file to the auditor and the auditor gave credit for exempt sales transactions. The Taxpayer has not provided to the auditor, nor to the Department during this proceeding, any evidence that █ █ has a valid permit or that █ █ provided a written certification that the services were purchased for resale.

Taxpayer makes a blanket statement in their protest which states that “[Taxpayer’s] gross receipts . . . from its sales of the [s]ervices to █ █ is exempt from Arkansas sales and use tax if █ █ is contracting with █ █ and █ █ is, in turn, contracting with the █ █.” This argument is incorrect, first as discussed above, Taxpayer did not provide any evidence that █ █ has a valid permit or is eligible for such permit. Also, Taxpayer did not provide any evidence that █ █ is ***regularly engaged in the business of reselling the articles purchased.*** █ █

██████████ would have to be regularly engaged in reselling landscaping or lawncare services and no evidence has been provided to prove this beyond a preponderance of the evidence.

Because Taxpayer did not prove entitlement to the sale for resale exemption the assessment of sales tax is proper.

*Sales Tax Due on ██████████ Transactions*

Using the same rules as discussed above, Taxpayer has not proven beyond a preponderance of the evidence that its services provided to ██████████ are exempt from sales tax.

Taxpayer states that it provides services to ██████████ through a series of subcontractor arrangements and ██████████ ultimately provides its services to ██████████.

Taxpayer has not provided any evidence which shows that ██████████ has a valid permit or provided a written certification to the Department showing that ██████████ is reselling the services that Taxpayer provided. Taxpayer also has not provided evidence showing that ██████████ is regularly engaged in the business of reselling landscaping and lawncare services.

Taxpayer, in its protest, states that “the gross proceeds . . . generated by a subcontract with ██████████ are not subject to Arkansas sales and use tax because such are generated through a sale by a wholesaler to a reseller.”

Here, Taxpayer does not cite any law to support its proposition. Taxpayer has not met its burden of proving entitlement to exemption by a preponderance of the evidence. Because Taxpayer did not prove entitlement to the sale for resale exemption the assessment of sales tax is proper.

**Exemption for Sales to the United States Government**

As stated above, Taxpayer alleges that its services to ██████████ under a subcontractor agreement are ultimately provided to the ██████████.

ARK. CODE ANN. § 26-51-401 (Repl. 2020), allows for a sales tax exemption for all gross receipts or gross proceeds derived from sales to the United States Government. GR-47 implements this statutory exemption and states that “[c]ontractors purchasing . . . taxable services pursuant to a contract with the United States



Government are the consumers of such property or services and must pay the tax when they purchase the property or services.

██████████ is a contractor purchasing taxable services (Taxpayer's services). Under this reasoning it is clear that ██████████, and not the United States Government, is the consumer and ██████████ should have paid sales tax on the services Taxpayer provided.

Taxpayer's sole argument for the proposition that this transaction is not subject to sales tax is based on two cases.

First, Taxpayer cites *Kern-Limerick v. Scurlock*, 347 U.S. 110 (1954). *Kern-Limerick* supports the proposition that purchases by the United States Government are exempt from state sales and use tax. The Department does not contest this assertion as the Department has promulgated administrative rules to implement the ruling of this case. Here, the United States Government is exempt from state sales tax but the contractor, ██████████, is not and therefore this argument fails. *United States v. New Mexico*, 455 U.S. 720 (1982).

Next, Taxpayer cites *Heath v. Research-Cottrell, Inc.*, 529 S.W.2d 336 (1975). Taxpayer states that *Heath* stands for the proposition that "a subcontractor is entitled to the same exemptions of its contracting principal." This proposition is mis-founded.

The correct interpretation of *Heath* is that the wording of the exemption at issue "reflects that it was based upon the nature of the transaction and not the identity of the taxpayer." The statute at issue in *Heath* was a statute allowing for a sales tax exemption for machinery and equipment "installed and utilized by manufacturing or processing plants or facilities[]." The Court held that this exemption could apply to the subcontractor as well as the contractor because the legislative intent was to make the transaction exempt, it was clear that the identity of the parties did not matter.

Here, the identity of the parties is the central issue meaning that *Heath* is not applicable. The sales tax exemption statute states that the United States Government must be the purchaser, it does not show, or have any plausible legislative intent, that shows the exemption was also meant for parties contracting with the federal government.

Because Taxpayer did not prove entitlement to the sales to the

United States government exemption the assessment of sales tax is proper.

**Penalty and Interest**

Here, penalty and interest were properly assessed.

Regarding the assessment of penalty, Taxpayer failed to remit sales tax as required by state law by the time prescribed. Taxpayer has not provided any evidence that the failure is due to reasonable cause and not willful neglect.

Regarding the assessment of interest, Taxpayer did not remit sales tax when it was due meaning that interest must be collected on the total tax deficiency from the date it was due until the date of payment. [Footnotes 2, 3, 5, 6, 7, 8, 9, 11, 12, 13, and 14 omitted, P. 1 – 10].

The Taxpayer's Response Brief asserted that the Taxpayer made sales of services exempt from tax as sales for resale and sales to the United States Government (a supporting Affidavit of the Taxpayer's co-owner was attached) and stated, in pertinent part, as follows:

**FACTS**

██████████ provides professional landscaping and lawn care services to residential and commercial properties. On December 4, 2020, the Arkansas Department of Finance and Administration (the "Department") reached out to ██████████ and informed ██████████ that the Department planned to perform an audit. ██████████ complied with the Department's requests, and ██████████ provided the Department with the applicable financial records that included bank statements, purchase invoices, and exemption certificates. The audit period covered November 1, 2016, to November 30, 2020.

On May 11, 2021, the Department issued a Notice of Proposed Assessment totaling \$ ██████████ against ██████████. The Department claimed that ██████████ owed \$ ██████████, while also claiming that ██████████ owed \$ ██████████ in interest and a penalty of ██████████. Subsequently, ██████████ timely filed its protest to the Department.

██████████ protests the Department's assessment of the tax, penalty, and interest because the sales tax exemption applied to ██████████ transactions.

...

### *Sales for Resale*

Arkansas Code Annotated § 26-52-401(12)(A) states in pertinent part that a taxpayers' "gross receipts or gross proceeds derived from sales for resale to a person regularly engaged in the business of reselling the articles purchased" are exempt from Arkansas sales and use tax.

### *Sales to the United States Government*

The Supremacy Clause prohibits state interference from the exercise of the federal government's constitutional powers. The Supremacy Clause forbids a State to lay a tax upon the United States directly. *Mayo v. United States*, 319 U.S. 441, 447 (1943). Furthermore, the United States Supreme Court has held that purchases by the United States Government are exempt from state sales and use-tax. *Kern-Limerick v. Scurlock*, 347 U.S. 110 (1954).

. . . Here, the State of Arkansas provides, "Gross receipts or gross proceeds derived from sales to the United States Government" are exempt from Arkansas sales and use tax. Also, the Arkansas Supreme Court has held that a subcontractor is entitled to the same exemptions of its contracting principal. *Heath v. Research-Cottrell, Inc.*, 258 Ark. 813, 529 S.W.2d 336 (1975).

## **DISCUSSION**

██████████ provides professional landscaping and lawn care services to residential and commercial properties. ██████████ disagrees with the Department's proposed assessment because there are exemptions for the services rendered to ██████████ and ██████████. In support, ██████████ provides the affidavit of ██████████, attached here to and incorporated herein as Exhibit 1.

### **1. Services to ██████████ and ██████████**

██████████ services to the ██████████ were exempt

from Arkansas sales and use tax because the gross proceeds were derived from sales for resale along with the end recipient being the federal government.

*Sales for Resale to [REDACTED]*

First, the [REDACTED] services were exempt because the gross proceeds were derived from sales that [REDACTED] resold to the [REDACTED]. The relationship between [REDACTED] and [REDACTED] lasted throughout the audit period. Also, [REDACTED] resold the services to the [REDACTED] throughout the entire audit period.

Based on the plain language and ordinary meaning of the statute, [REDACTED] is regularly engaged in the business of reselling [REDACTED] services to [REDACTED] because of the consistent reselling of [REDACTED] services to [REDACTED] throughout the audit period. Therefore, [REDACTED] gross receipts and gross proceeds from its sales of its services to [REDACTED] are exempt from Arkansas sales and use tax since [REDACTED] is contracting with [REDACTED], and [REDACTED] is contracting with the [REDACTED].

*Sales to the United States Government*

Alternatively, [REDACTED] gross proceeds and gross receipts are exempted from the Arkansas sales and use tax because [REDACTED] is contracting with the United States Government. The Supremacy Clause provides that states cannot interfere with federal government constitutional powers. The Tenth Amendment provides that states may provide more rights, so long as it is not precluded by the Constitution.

The Department admits that *Kern-Limerick* stands for the proposition that purchases by the United States Government are exempt from state sales and use tax. *Kern-Limerick v. Scurlock*, 347 U.S. 110 (1954). However, the Department mistakenly analyzes *Kern-Limerick* and *Heath* disjunctively rather than conjunctively.

*Heath* held that a subcontractor is entitled to the same exemption of its contracting principal. *Heath v. Research-Cottrell, Inc.*, 258 Ark. 813, 529 S.W.2d 336 (1975). Furthermore, the Department points to language in the *Heath* opinion that states the exemption was "based upon the nature of the transaction and not the identity of the taxpayer." However, two sentences later, the Court states, "To hold the exemption did not apply to contractors

would defeat the purpose of the Act[.]” This indicates that the Court applies some weight to the identity of the party.

Similarly, [REDACTED] contracted with [REDACTED] for over three years, and those services were being subcontracted to the [REDACTED]. The [REDACTED] is a federal government actor, and the Department does not deny otherwise. The statute's purpose was to prevent the federal government from being taxed and allowing taxation here would frustrate the spirit and purpose of the statute. Therefore, [REDACTED] provision of the landscaping services to [REDACTED] is not subject to Arkansas sales and use tax.

The Supremacy Clause provides that states cannot interfere with federal government's constitutional powers. The Tenth Amendment provides that states may provide more rights, so long as those rights are not precluded by the Constitution. Looking at *Heath* and *Kern-Limerick* conjunctively tracks with the sentiment of the Tenth Amendment, as *Heath* does not contradict *Kern-Limerick*, but it supplements that a subcontractor is entitled to same exemptions of its contracting principal. Thus, when combining precedent, the law is clear: sales to the federal government, whether they are direct or through a subcontractor, are exempt from the Arkansas sales and use tax.

## **2. Services to [REDACTED]**

Next, the services provided to [REDACTED] were exempt because the gross proceeds or receipts were derived from sales for resale to persons regularly engaged in the business of reselling. [REDACTED] provided and contracted [REDACTED] services to [REDACTED] who then resells [REDACTED] services to [REDACTED]. Also, [REDACTED] and [REDACTED] were engaged in [REDACTED] of these transactions over a [REDACTED], which is evidence to aid [REDACTED] in satisfying its preponderance burden that they were regularly engaged in the business of reselling.

Similar to the above, the gross receipts and proceeds generated by the subcontract with [REDACTED] are not subject to Arkansas sales and use tax because they are derived from sales for resale to persons regularly engaged in the business of reselling.

## **3. Penalty and Interest**

The penalty and interest were not properly assessed because the tax exemptions apply. Since Arkansas Code Annotated § 26-52-401 is applicable to [REDACTED] claim, the penalty and interest should not have been assessed to [REDACTED] account.

### **CONCLUSION**

The Arkansas Department of Finance and Administration's assessment of tax, penalty, and interest against [REDACTED] should be reversed because [REDACTED] were exempted from the Arkansas sales and use act under Arkansas Code Annotated § 26-52-401. [Footnotes omitted, P. 1 – 6.]

### **CONCLUSIONS OF LAW**

#### **Standard of Proof**

Ark. Code Ann. § 26-18-313(c) (Repl. 2020) 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.

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) (Repl. 2020). 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) (Repl. 2020). 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) (Repl. 2020).

### **Sales Tax Assessment**

Subject to the applicability of an exemption, a deduction, or a credit, sales tax is imposed on sales of tangible personal property or taxable services made by in-state vendors/sellers to in-state purchasers.<sup>4</sup> Landscaping and nonresidential lawn care are taxable services. See Arkansas Gross Receipts Tax Rules GR-9.2. A preponderance of the evidence supports a finding that the Taxpayer performed taxable landscaping and nonresidential lawn care services during the audit period. As the seller of taxable services, the Taxpayer was responsible for collecting, reporting, and remitting sales tax on the sales of the taxable services unless the purchasers of the taxable services claimed exemptions. See Arkansas Gross Receipts Tax Rules GR-79(A) and (C). In the instant case, the Department assessed the Taxpayer for failing to collect tax for sales of taxable services to certain customers and the Taxpayer claimed that the pertinent transactions were exempt from tax.

*Sales for resale exemption.* Arkansas Gross Receipts Tax Rule GR-53 addresses the sales for resale exemption and states, in part:

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<sup>4</sup> See Ark. Code Ann. § 26-52-101 et seq. (Repl. 2020).

A. The gross receipts or gross proceeds derived from sales for resale to persons regularly engaged in the business of reselling the articles or services purchased are exempt from tax **provided that such sales are made to persons to whom a permit has been issued as provided in Ark. Code Ann. § 26-52-201 et seq. and GR-72.** A seller may accept a valid retail permit, or resale permit, issued by another state. Sellers should refer to GR-79 for the general provisions concerning exemption claims and liability. [Emphasis added.]

The Taxpayer failed to provide sufficient identifying information for the purchasers of the assessed landscaping and nonresidential lawn care services. The case file does not contain a retail permit or a resale permit issued by the State of Arkansas (or any other state) to the purchasers of the Taxpayer's taxable services. Consequently, the Taxpayer failed to prove entitlement to the "sales for resale" exemption for any of the sales of the assessed landscaping and nonresidential lawn care services.<sup>5</sup>

*Sales to the United States Government.* Sales to the United States Government<sup>6</sup> and U. S. Governmental agencies<sup>7</sup> are exempt from sales taxes and use taxes. The Department's Reply Brief addressed the case law cited in the Taxpayer's Brief and stated, in part:

Taxpayer erroneously relies on a 1954 case, for the supposition that the Taxpayer should be exempted from tax as though it were the Federal Government. Likewise, The Taxpayer's assertion that the ruling in *Health v. Research-Cottrell, Inc.* exempts the Taxpayer is misplaced. The Taxpayer overlooks *United States v. New Mexico*, handed down nearly three decades after *Kern-Limerick*. In pertinent part, *United States v. New Mexico*, provides that, "Tax immunity is appropriate *only* when the state levy falls on the *United States itself*, or on an agency or instrumentality *so closely connected* to the Government that the two cannot realistically be

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<sup>5</sup> In light of this determination, exemption certificates (See Arkansas Gross Receipts Tax Rule GR-79(F)) are not addressed.

<sup>6</sup> See Arkansas Gross Receipts Tax Rule GR-47.

<sup>7</sup> See Arkansas Gross Receipts Tax Rule GR-31(6).



viewed as separate entities, at least insofar as the activity being taxed is concerned.” 455 U.S. 720 at 721 (emphasis added). The Taxpayer has not provided any support to prove that they are so intertwined with the Government that the two cannot be viewed as separate entities and thus do not qualify for exemption from tax. The Taxpayer did not prove beyond a preponderance of the evidence that they are entitled to the exemption. Because the Taxpayer has failed to present evidence sufficient to refute the proposed assessment or to establish that the proposed assessment is in error, the assessment must be sustained.

The Department’s arguments are persuasive. The evidence presented does not support the Taxpayer’s position that sales of taxable services made by the Taxpayer to ██████████ were the equivalent of sales directly to the United States Government or a U. S. Governmental agency. The evidence presented does not establish that ██████████ was “an instrumentality so closely connected to the [United States] government that the two cannot realistically be viewed as separate entities.” See United States v. New Mexico, 455 U.S. 720, 734 (1982).

The controlling authority in this case is Arkansas Gross Receipts Tax Rule GR-47 which states that, “[c]ontractors purchasing tangible personal property or taxable services pursuant to a contract with the United States Government are the consumers of such property or services and must pay the tax when they purchase the property or services.”<sup>8</sup> The Taxpayer was responsible for collecting, reporting, and remitting sales tax on the sales of the taxable services made to ██████████ under Arkansas Gross Receipts Tax Rules GR-79(A) and (C).

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<sup>8</sup> The holding in Heath v. Research-Cottrell, Inc., 258 Ark. 813, 529 S.W.2d 336 (1975) addressed the tax exemption for manufacturing machinery and is not applicable in this case.

Consequently, the evidence presented supports a finding that the Department correctly assessed sales tax against the Taxpayer.<sup>9</sup>

### **Interest and Penalty**

Interest was properly assessed upon the tax deficiency for the use of the State's tax dollars. See Ark. Code Ann. § 26-18-508 (Repl. 2020). The failure to file penalty was also properly assessed against the Taxpayer under Ark. Code Ann. § 26-18-208 (Repl. 2020).

### **DECISION AND ORDER**

The proposed assessment is sustained.<sup>10</sup> 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 (Repl. 2020), 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. A revision request may also be faxed to the Assistant Commissioner of Revenues at (501) 683-1161 or emailed to [revision@dfa.arkansas.gov](mailto:revision@dfa.arkansas.gov). The Commissioner of Revenues, within twenty (20) days of the mailing of this Administrative Decision,

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<sup>9</sup> Since the Taxpayer was a non-filer, the expanded audit period was appropriate under Ark. Code Ann. § 26-18-306(e) (Repl. 2020).

<sup>10</sup> In light of this determination, it is not necessary to address the Department's arguments relating to Cook v. Sears Roebuck & Co., 212 Ark. 308, 206 S.W.2d 20 (1947).

may revise the decision regardless of whether the Taxpayer has requested a revision.

Ark. Code Ann. § 26-18-406 (Repl. 2020) provides for the judicial appeal of a final decision of an Administrative Law Judge or the Commissioner of Revenues on a final assessment or refund claim denial; however, the constitutionality of that code section is uncertain.<sup>11</sup>

**OFFICE OF HEARINGS & APPEALS**



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**RAY HOWARD**  
**ADMINISTRATIVE LAW JUDGE**

DATED: December 7, 2021

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<sup>11</sup> See Board of Trustees of Univ. of Arkansas v. Andrews, 2018 Ark. 12.