

MINUTES
SENATE AND HOUSE INTERIM COMMITTEES ON INSURANCE AND COMMERCE
UA Community College at Morrilton
537 University Blvd. – Koontz Room, Business Technology Center
Morrilton, Arkansas
Tuesday, November 19, 2013

The Senate and House Interim Committees on Insurance and Commerce met jointly Tuesday, November 19, 2013, at 10:00 a.m. at UA Community College at Morrilton, Koontz Room, Business Technology Center, Morrilton, Arkansas.

Committee members present: Senators Jason Rapert, Chair; Johnny Key and Representative Tommy Wren, Chair.

Non-Voting members present: Representatives Kelley Linck, James Ratliff, Nate Bell, Bruce Cozart, and Douglas House.

Also attending: Senators Missy Irvin, Bruce Maloch, Eddie Joe Williams, and Jane English. Representatives Bob Ballinger, Dan Douglas, Tommy Thompson, Ken Bragg, Stephen Meeks, Greg Leding, and Jon Eubanks.

Senator Rapert called the meeting to order.

REVIEW OF DEPARTMENT OF FINANCE AND ADMINISTRATION TAX AUDITS AFFECTING ARKANSAS SMALL BUSINESSES

Mr. Sam Ledbetter, Attorney, McMath, Woods, P.A., was recognized. [PowerPoint Presentation] He presented a PowerPoint presentation, “Application of Gross Receipts Tax to Oil and Gas Waste”. He stated Act 107 of the Second Extraordinary Session expanded the tax base to permit solid waste landfills to collect sales tax on solid waste delivered to landfills. He stated in the past two years the Department of Finance and Administration (DFA) decided transportation of liquid oil & gas wastes constitutes the “collection” of solid waste, and charges for this service are subject to the gross receipts tax. DFA has conducted audits and assessed back taxes, penalties and interest going back as much as five years in certain instances. Fluid haulers were unaware of DFA’s position prior to audits.

Mr. Ledbetter stated his view concerning the issue is:

- Liquid oil & gas wastes, like drilling fluids and salt water, are not “solid wastes.”
- Merely transporting oil & gas waste does not fit within the meaning of “collecting and disposing of solid wastes.”
- Permitted solid waste landfills collect and dispose of solid wastes, and they collect sales taxes when oil & gas wastes are disposed of in landfills.

- DFA's position is unfair because traditionally wastes from oil & gas production had not been regulated as solid wastes, and the industry was never notified that DFA had determined that the transportation of these wastes constituted the "collection of solid wastes."

Mr. Ledbetter stated DFA, in their Rule 9.6, adopted the Arkansas Department of Environmental Quality's (ADEQ) statutory definition of solid waste but not the definition of industrial solid waste that exempts oil and gas waste. He stated DFA's position is contrary to ADEQ's position because ADEQ's Regulation 22 requires businesses that are in the business of hauling solid waste to obtain a license. To his knowledge, no regional solid waste management board or district has required these companies that are transporting oil and gas waste to be licensed under this requirement.

Mr. Michael Parker, Tax Attorney, Dover, Dixon Horne PLLC, stated he represents both transportation companies as well as producers that are affected by this issue. He stated in 1991 the legislature didn't adopt a definition of solid waste and both the ADEQ, which is responsible for administering that law, along with DFA, issued regulations but did not pick a path in terms of the definition of solid waste at that time. They instead brought it back in front of the legislature in 1993, and at that time the legislature adopted a conservative restrictive definition of what solid waste meant for tax purposes. He noted DFA adopted the rule that is the source of this issue in 2004.

Mr. Mike Zinzer, ESS Transportation, was recognized and stated he and his brother and son own ESS Transportation, which is a local oilfield service company in the Fayetteville Shale. In 2007 ESS Transportation started with five employees and currently employs over 150 with a payroll that exceeds \$8,000,000 annually. The average employee earns \$50,000 a year. He stated since the decline of drilling activity, they have gone from 59 rigs in 2008 to 14 rigs today.

He stated the impact of DFA implementing the sales tax on his company would require them to hire lawyers and accountants to review over 20,000 invoices that were generated each year. If DFA goes back five years, that's approximately 100,000 invoices they would be required to review and determine what is taxable. In addition to the taxes, the penalties and interest would be financially critical to a company that is already distressed by rising insurance premiums and other operational costs.

Senator Maloch asked Mr. Zinzer when his company was first notified by DFA to start collecting the sales tax. Mr. Zinzer stated he heard about it from other haulers, but never received any formal notice from DFA to start collecting taxes.

Mr. Rod Krug, Triple Transport, stated he is in the water hauling business in the Fayetteville Shale. He stated his company has not been audited by DFA, but he is worried he will get a certificate letter or a knock at the door and is notified that he owes sales tax on his gross revenue receipts. He stated if his company would have been notified to collect the tax they would have complied. There has never been an attempt to defraud the state.

Senator Rapert asked Mr. Krug if he was familiar with the "taxpayers bill of rights", which requires a notice to be sent to individuals being taxed in Arkansas. Mr. Krug stated he was not familiar with it.

Jason and Bree Boyster, RJ Price Heavy, stated their company is currently under an audit by DFA.

They have been in business for five years and were never notified by DFA to collect the taxes. They were only notified of the audit. They have a hearing date of January 23 and 24 to determine whether they have to pay sales tax on every invoice billed since 2008. He stated DFA came to their house and went through every invoice and at the end of the audit they presented them with a stack of invoices and said they owed taxes on all of them. Mr. Boyster stated his business has accountants to handle its finances, and if they knew they were supposed to collect the taxes they would have done so. Mr. Boyster stated the bill from DFA was approximately \$500,000.

Mr. Richard Weiss, Director, DFA, stated since the Fayetteville Shale activity began, DFA has complied with the statutory review to conduct audits and assessments against a variety of businesses providing services to the natural gas industry. In addition to audits of businesses that collect and dispose of the waste, audits have been performed on businesses that sell other goods and services used in the industry. They have also refunded over \$75 million to the industry in overpayments.

Representative Thompson asked if it was possible to suspend the audits until we have time to reach a decision on how this is going to be handled.

Mr. Weiss stated DFA knows the tax laws, and they administer these laws. If there is a provision in the law that lets us do that, we would consider doing that, but would have to rely on their attorney's advice on this issue.

Mr. Tim Leathers, Deputy Director, DFA, was recognized and stated there were several taxpayers who have been paying this tax for years; from the time the regulation was approved and they started doing business. He stated they have not singled out that particular industry to levy any particular tax. They audit them just like any others, and they have done substantial refunds to the tune of \$75 million. He noted if it is a true case of insolvency, then DFA has ways to work with a taxpayer --even to forgive the tax if it's going to lead to insolvency. The law is very strict and does not allow DFA to write off taxes, but in these kinds of cases DFA is willing to work in that area after the tax assessment is made.

Mr. Leathers noted that he checked and found out taxpayers were paying the tax and DFA had done the regulation when the law was passed and had gone to ADEQ to get the definition. When DFA does a regulation, that is what puts the taxpayers on notice.

Mr. Leathers stated there is some specific information about one of the companies here today that is contrary to the information DFA gathered. Information contrary to them having a tax liability, but DFA can't respond to that unless they are given permission by the company.

Mr. John Theis, Assistant Commissioner Policy and Legal, DFA was recognized and stated there have been approximately ten audits on haulers since 2007, and the total amount assessed is about \$5.8 million and \$4.4 million collected. The remaining \$1.4 million is in the administrative hearing stage. There is a statute which states collection of solid waste is taxable or solid waste collection disposal is taxable. DFA

has understood since 2004 solid waste included liquids from mining, and DFA has a statutory obligation to assess and collect the tax.

Senator Rapert stated he understands the intentions of the law, but hopes a fair solution can be reached, because these companies did not know they were to collect these taxes.

There was some discussion about including DFA rules and instructions and DFA contact information within the information packet provided by the Secretary of State's office when a company registers.

There being no further business, the meeting adjourned at 12:40 p.m.