

MEMORANDUM

TO: Arkansas Legislative Council
Litigation Reports Oversight Subcommittee
Sen. Jim Dotson, Co-Chair
Rep. DeAnn Vaught, Co-Chair

FROM: Keith Linder, Managing Attorney
Arkansas Department of Finance & Administration

DATE: March 27, 2024

RE: ECS House Industries, Inc. v. Jim Hudson, Secretary, DFA
Cross County Circuit Court No. 19CV-23-84
REQUEST FOR REVIEW AND APPROVAL OF SETTLEMENT BY
THE LEGISLATIVE COUNCIL OF THE ARKANSAS GENERAL ASSEMBLY
Ark. Code Ann. § 10-3-312(d)

SETTLEMENT AGREEMENT

ECS House Industries, Inc. (“ECS”) sued the Department in Cross County contesting the assessment of sales tax on its sales of wastewater treatment equipment. ECS contends that the otherwise taxable equipment sales are exempt under Arkansas Code § 26-52-402(a)(3).

The Department filed an answer denying ECS’ entitlement to any judicial relief.

The parties reached a settlement agreement contingent on ALC approval. A copy of the Settlement Agreement is attached. ECS has agreed to pay the remaining tax due (\$38,168.07) in exchange for the Department’s waiver of all remaining interest (approximately \$16,525.17). If settlement is approved, the litigation will be dismissed per the terms of the settlement agreement.

The parties request that this matter be placed on the Legislative Council’s agenda for review at the earliest possible date.



State of Arkansas
Bureau of
Legislative Research

Marty Garrity, Director
Kevin Anderson, Assistant Director
for Fiscal Services
Tim Carlock, Assistant Director
for Information Technology
Matthew Miller, Assistant Director
for Legal Services
Estella Smith, Assistant Director
for Research Services

State Agency Litigation Notification Form

Dear Agency Director:

Arkansas Code § 10-3-312 requires that any agency or institution that is not represented by the Attorney General shall notify the Director of the Bureau of Legislative Research of pending litigation so that the appropriate legislative committee may "determine the action that may be deemed necessary to protect the interests of the General Assembly and the State of Arkansas in that matter."

In order to submit a report regarding pending litigation pursuant to Arkansas Code § 10-3-312, please complete the following form for each pending lawsuit, along with a cover letter to the Director of the Bureau of Legislative Research, and submit to desikans@blr.arkansas.gov.

DATE REPORTING:	
Agency:	Phone:
E-mail:	Contact:
1. STYLE OF THE CASE BEING LITIGATED	
2. IDENTITY OF THE TRIBUNAL BEFORE WHICH THE MATTER HAS BEEN FILED (COURT)	
3. BRIEF DESCRIPTION OF THE ISSUES INVOLVED	
3A. OTHER DESCRIPTION INFORMATION	
Docket Number	
Date Filed	
Defendant	
Defendant Attorney	
Plaintiff	
Plaintiff Attorney	
4. ANY OTHER RELEVANT INFORMATION	
4A. OTHER RELEVANT INFORMATION	
Case History	
Relief Sought	
Current Status	

A.C.A. § 10-3-312

Current through all laws of the 2017 Regular Session and 2017 First Extraordinary Session, including changes and corrections by the Arkansas Code Revision Commission.

- Arkansas Code Annotated
- Title 10 General Assembly
- Chapter 3 Committees
- Subchapter 3-- Legislative Council

10-3-312. NOTIFICATION OF LAWSUITS AFFECTING STATE.

- (a) In order that the General Assembly may take whatever steps it deems necessary concerning lawsuits which may affect the State of Arkansas, its officials, or its financial resources:
 - (1) The Attorney General shall notify the Director of the Bureau of Legislative Research who is the Executive Secretary to the Legislative Council as soon as possible after the Attorney General becomes involved in such litigation;
 - (2) **When any state agency or any entity which receives an appropriation of funds from the General Assembly becomes involved in litigation without representation by the Attorney General, the director or administrative head of the agency shall notify the Director of the Bureau of Legislative Research as soon as possible.**
- (b) The notice given by the Attorney General or by the director or administrative head of a state agency to the Director of the Bureau of Legislative Research shall include the style of the case being litigated, the identity of the tribunal before which the matter has been filed, a brief description of the issues involved, and other information that will enable the Legislative Council or the Joint Budget Committee to determine the action that may be deemed necessary to protect the interests of the General Assembly and the State of Arkansas in that matter.
- (c) Upon receipt of the notice, the Director of the Bureau of Legislative Research shall during the interim between legislative sessions transmit a copy of the notice to the cochairmen of the Legislative Council and to the cochairmen of the Joint Budget Committee during legislative sessions in order that those committees may schedule that matter upon their respective agendas at the earliest possible date.
- (d) During the interim between legislative sessions, the Legislative Council shall determine, and during legislative sessions the Joint Budget Committee shall determine, whether the General Assembly has an interest in the litigation and, if so, take whatever action deemed necessary to protect the General Assembly's and the state's interest in that matter.

HISTORY

Acts 1987, No. 798, §§ 1, 2.

Arkansas Code of 1987 Annotated Official Edition
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A.C.A. § 10-3-312 (Lexis Advance through all laws of the 2017 Regular Session and 2017 First Extraordinary Session, including changes and corrections by the Arkansas Code Revision Commission)

**IN THE CIRCUIT COURT OF CROSS COUNTY, ARKANSAS
CIVIL DIVISION**

**ECS HOUSE INDUSTRIES, INC., an Arkansas
Corporation**

PLAINTIFF

v.

CASE NO. 19CV-23-84-2

**JIM HUDSON, IN HIS OFFICIAL CAPACITY
AS CABINET SECRETARY FOR DEPARTMENT OF
FINANCE AND ADMINISTRATION OF THE STATE
OF ARKANSAS; and ARKANSAS DEPARTMENT OF
FINANCE AND ADMINISTRATION**

DEFENDANT

AMENDED COMPLAINT

Comes now ECS House Industries, Inc., an Arkansas Corporation (“ECS”), by and through its counsel, Ray Slaton of Hyden Miron & Foster, PLLC, and for its Amended Complaint for a *de novo* trial of the Defendant’s assessment of sales and withholding taxes, and states as follows:

1. ECS is an Arkansas Corporation with a principal place of business in Cherry Valley, Arkansas.
2. Defendant, Jim Hudson, is the Cabinet Secretary for the Arkansas Department of Finance and Administration (“DFA”). Mr. Walther is named as Defendant in his representative capacity on behalf of DFA.
3. Defendant Arkansas Department of Finance and Administration is an agency of the State of Arkansas.
4. This Court has jurisdiction over the parties and the subject matter of this action pursuant to Arkansas Code Ann. § 26-18-406.
5. Venue is proper pursuant to A.C.A. § 26-18-406(c)(1)(A).

6. ECS manufactures agricultural, aquacultural and wastewater treatment equipment. It is a leading manufacturer of floating brush aerators used for wastewater treatment ponds.

7. ECS was audited for the period of March 1, 2016 – May 21, 2021, which resulted in the following proposed assessments against ECS:

- a. Gross Receipts Tax Assessment – Docket No. 22-640 in the amount of \$65,482.23 of tax and \$12,013.81 in interest for a total of \$77,496.04 (“Gross Receipts Audit”)
- b. Use Tax Assessment – Docket No. 22-640 in the amount of \$10,983.16 in tax and \$3,706.18 in interest for a total of \$14,689.34 (“Use Tax Audit”).

8. The Gross Receipts Audit and the Use Tax Audit were timely appealed to the DFA Office of Hearing and Appeals.

9. Prior to the hearing before the DFA Administrative Judge on November 17, 2022, ECS and DFA were able to compromise on and reduce the number of transactions to be considered by the Administrative Judge. At the hearing, ECS presented evidence and testimony for four invoices that it argued should have been exempt from the collection of gross receipts taxes:

- a. Invoice #13120 to the City of Marion in the amount of \$50,290.00;
- b. Invoice #13614 to the City of Manila in the amount of \$45,450.00;
- c. Invoice #13385 to the City of Des Arc Utilities Department in the amount of \$8,500; and
- d. Invoice #11827 to the City of Brookland Utilities in the amount of \$19,285.00.
- e. Copies of the invoices or the line item used by DFA are attached hereto as Exhibit A.

10. The Administrative Judge rendered a Decision affirming the Gross Receipts Audit and Use Tax Audit on January 20, 2023. A copy of the Decision is attached hereto as Exhibit B.

11. The Decision states ECS did not meet its burden of proof by a preponderance of the evidence that the equipment itemized in the invoices were used for the water treatment process.

12. A.C.A. § 26-52-402(a)(3) exempts gross receipts or proceeds derived from the sale of tangible personal property consisting of machinery and equipment required by state or federal law...to be installed and utilized by....cities or towns in this state to prevent or reduce air or water pollution.

13. Gross Receipts Rule 66 of the Arkansas Gross Receipts Rules (“GR-66”) contains additional authority on the issue.

14. GR-66.A states the gross receipts are exempt from the sale of pollution control equipment if: the equipment is utilized, either directly or indirectly, by cities and towns in Arkansas to prevent or reduce water pollution and the machinery and equipment is required to be installed and utilized to control pollution as evidenced by written documentation from the Arkansas Department of Environmental Quality (“ADEQ”).

15. The ADEQ issued permits for waste water treatment plants to Des Arc, Manila, Marion and Brookland that spelled out requirements for equipment to be used in carrying out the respective plans of these cities and towns. The permits for Brookland, Manila and Marion specifically mention the requirement for aerators. Attached as Exhibits C-F are the ADEQ permits issued to the four (4) cities and towns.

- a. Exhibit C – Marion – specifically mentions aeration/aerators on Page 6 of the Fact Sheet.
- b. Exhibit D – Manila – specifically mentions aerators/aeration on Page 8 of the Statement of Basis. The name and address of the mailing applicant on Page 1 of

the Statement of Basis (“City of Manila – Manila Wastewater Treatment Plant” at P.O. Box 595) matches the address on Invoice #13614 attached hereto.

- c. Exhibit E – Brookland – specifically mentions aerators/aeration on Page 4 of the Statement of Basis. Additionally, the applicant’s mailing address on Page 1 of the Statement of Basis (PO Box 7) matches the billing address for Invoice #11827.
- d. Exhibit F – Des Arc – demonstrates that Des Arc has a permit from the ADEQ.

16. ECS provided testimony regarding the pollution control industry in which it manufactures aerators, what the aerators are used for and that these aerators were sold to the cities and towns specifically for use by these cities and towns in their waste water treatment ponds.

17. Furthermore, the two invoices to Des Arc and Brookland are specifically addressed to and/or contain shipping directions to the utilities department associated with each city.

18. ECS met its burden by a preponderance of the evidence that the aerators sold were used in the reduction of water pollution and that the equipment was required as evidenced by a writing from the ADEQ.

19. To the extent possible, ECS requests a trial de novo on the issue of the four (4) invoices.

WHEREFORE, ECS specifically requests a bench trial to be held to determine if the Decision by the Administrative Judge regarding the specific sales to Brookland, Manila, Des Arc and Marion were erroneous, in whole or in part; that the Court rule on all disputed issues of law and find that the sales to Brookland, Manila, Marion and Des Arc are exempt from gross receipts tax; grant ECS its attorney fees and costs; and for all other just and proper relief.

DATED this 27th day of October, 2023.

Respectfully submitted,

By: 

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**IN THE CIRCUIT COURT OF CROSS COUNTY, ARKANSAS
CIVIL DIVISION**

**ECS HOUSE INDUSTRIES, INC., an Arkansas
Corporation**

PLAINTIFF

v.

CASE NO. 19CV-23-84

**JIM HUDSON, IN HIS OFFICIAL CAPACITY
AS CABINET SECRETARY FOR DEPARTMENT
OF FINANCE AND ADMINISTRATION OF
THE STATE OF ARKANSAS; and ARKANSAS
DEPARTMENT OF FINANCE AND ADMINISTRATION**

DEFENDANTS

ANSWER TO AMENDED COMPLAINT

Comes now Jim Hudson, in his official capacity as Cabinet Secretary for the Department of Finance and Administration of the State of Arkansas (the “Secretary”), and for his Answer states:

1. The Secretary lacks knowledge and information sufficient to determine the truthfulness of the allegations in paragraph 1.
2. In response to paragraph 2, the Secretary admits that he is the Cabinet Secretary for the Arkansas Department of Finance and Administration. The Secretary denies that the former Cabinet Secretary Larry Walther is named as defendant in his representative capacity on behalf of Arkansas Department of Finance and Administration (the “Department”).
3. The Secretary admits that separate defendant the Department is an executive branch agency of the State of Arkansas. The Secretary denies that the Department is a proper defendant

in this litigation. Any other allegations contained in paragraph 3 are denied.

4. The Secretary denies this Court has jurisdiction over separate defendant the Department. The Secretary lacks knowledge and information sufficient to determine the truthfulness of the remaining allegations of paragraph 4.

5. The Secretary lacks information and knowledge sufficient to determine the truthfulness of the allegations of paragraph 5.

6. The Secretary lacks information and knowledge sufficient to determine the truthfulness of the allegations of paragraph 6.

7. The Secretary admits that the Department conducted an audit of ECS House Industries, Inc. (“ECS”) for the period of March 1, 2016 through May 31, 2021. The Secretary admits that on March 21, 2022, the Department issued a Notice of Proposed Assessment assessing \$76,465.39 in sales and use tax and \$15,719.99 in interest. The Secretary denies any other allegations contained in paragraph 7.

8. The allegations of paragraph 8 are admitted.

9. The Secretary admits that ECS and the Department were able to compromise and reduce the number of transactions to be considered by the administrative hearing officer. The Secretary admits that ECS contended at the hearing that the four invoices identified in subparagraphs 9a-9d should have been exempt from tax. The documents addressed in subparagraph 9e speak for themselves. To the extent paragraph 9 makes any other allegations, those allegations are denied.

10. With respect to the allegations in paragraph 10, the Secretary admits that on January 20, 2023, the administrative hearing officer rendered a decision affirming the Department’s Notice of Proposed Assessment. Exhibit B to ECS’ Complaint speaks for itself.

11. Exhibit B to ECS' Complaint speaks for itself. The Secretary denies any characterization of Exhibit B in paragraph 11 that goes beyond the text of that document.

12. Arkansas Code Annotated § 26-52-402 speaks for itself. The Secretary denies any characterization of that code section in paragraph 12 that goes beyond the statutory text.

13. Gross Receipts Tax Rule GR-66 speaks for itself. The Secretary denies any characterization of that rule in paragraph 13 that goes beyond the rule's text.

14. Gross Receipts Tax Rule GR-66 speaks for itself. The Secretary denies any characterization of that rule in paragraph 14 that goes beyond the rule's text.

15. Exhibits C through F to ECS' Complaint speak for themselves. Any characterization of those documents in paragraph 15 that goes beyond their text is denied. To the extent paragraph 15 contains any other allegations requiring a response, those allegations are denied.

16. The Secretary admits that ECS provided testimony at the administrative hearing. The Secretary lacks knowledge and information sufficient to determine the truthfulness of the remaining allegations of paragraph 16.

17. The invoices attached to ECS' Complaint speak for themselves. The Secretary denies any characterization of those documents in paragraph 17 that goes beyond their text.

18. The Secretary denies the allegations in paragraph 18.

19. Paragraph 19 does not appear to require a response, but, to the extent a response is required, the allegations of that paragraph are denied.

20. The Secretary denies that ECS is entitled to any of the relief requested in the paragraph beginning with "WHEREFORE[.]"

21. The Secretary denies all allegations not specifically admitted herein.

22. This Court is to try this matter *de novo*. Arkansas Code Annotated § 26-18-406(c)(1)(A). This standard requires the entire case to be tried anew. *Lewis v. Benton Cnty.*, 2014 Ark. App. 316, 7, 436 S.W.3d 181, 184–85. Focus on, or review of, the administrative proceedings would be contrary to the *de novo* standard. *See Douglas Companies, Inc. v. Walther*, 2020 Ark. 365, 6, 609 S.W.3d 397, 400. This court should decline ECS’ invitation to review the administrative decision and this matter should be heard *de novo* as if this case originated in this Court.

23. The Department’s Notice of Proposed Assessment should be sustained.


24. ECS failed to comply (or even allege compliance) with the requirements of Arkansas Code Annotated § 26-52-517 and Arkansas Gross Receipts Tax Rule GR-79.

25. The Department’s Motion to Dismiss regarding ECS’ claim for attorney’s fees is incorporated herein by reference. ECS has failed to allege facts allowing for an award of attorney’s fees under Arkansas Code Annotated § 26-18-406(e)(1)(B).

WHEREFORE, Jim Hudson, in his official capacity as Cabinet Secretary for the Department of Finance and Administration of the State of Arkansas, prays that ECS’ Complaint be dismissed, that ECS take nothing, that the Department’s Notice of Proposed Assessment be sustained, and for all other relief to which he is now or may later become entitled.

Respectfully submitted,

ARKANSAS DEPARTMENT OF
FINANCE AND ADMINISTRATION

By: 

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 6th day of December 2023, the above foregoing Answer to Amended Complaint was served by the Court's electronic filing system, on the following:

Ray Slaton
HYDEN, MIRON & FOSTER, PLLC
901 North University
Little Rock, Arkansas 72207
ray.slaton@hmflaw.net

Attorney for Plaintiff

By: 

Keith K. Linder

SETTLEMENT AGREEMENT

This settlement agreement is entered into as of March 26th, 2024, by and between Jim Hudson, in his Official Capacity as Secretary of the Department of Finance and Administration (the "Department"), and ECS House Industries, Inc., an Arkansas Corporation ("ECS").

WHEREAS the Department issued a Final Assessment to ECS on March 3, 2023 bearing the Letter ID L1739715280 and assessing additional tax of \$38,168.07 and interest of \$12,316.30. No penalty was assessed;

WHEREAS ECS filed a lawsuit filed against the Department in the Circuit Court of Cross County, Arkansas, challenging that Final Assessment and having the case no. 19CV-23-84.

1. This agreement is conditioned on legislative approval. This settlement must be approved by the Legislative Council of the Arkansas General Assembly ("ALC"). The Department and ECS shall cooperate in seeking legislative approval. Should ALC not approve the proposed settlement, this agreement is null and void.
2. The parties agree to the following in full resolution of the Final Assessment and lawsuit:
 - a. ECS will pay an additional \$38,168.07 in satisfaction of the assessed tax and file a motion to dismiss its lawsuit as to all parties with prejudice. ECS must complete both actions within 60 days of ALC approval of the settlement; and
 - b. Upon ECS' full payment, as described in paragraph (2)(a) of this agreement, and dismissal of the lawsuit as to all parties with prejudice, the Department will waive all outstanding interest on the Final Assessment. The current interest owed is \$16,525.17 but is subject to increase based on the time required to acquire legislative approval of this settlement and dismissal of the lawsuit.
3. This document represents the whole agreement of the parties and can only be modified, altered, or superseded by written agreement of the parties.
4. Through their designated and authorized representatives, ECS and the Department have read this agreement; it has been explained to them by counsel; and they fully understand the terms and effect of the agreement.
5. This agreement may be executed in multiple counterparts, each of which shall be deemed an original, and all of which together shall constitute one agreement.
6. Each party shall bear its own attorneys' fees and costs.

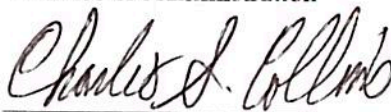
READ AND EXECUTED this 26th day of March, 2024.

ECS House Industries, Inc., an Arkansas
Corporation



By:
Title: CEO, Chad House

Charles S. Collins
Commissioner of Revenue, Department of
Finance & Administration



By: Charles S. Collins
Title: Commissioner of Revenue,
Arkansas Department of Finance &
Administration