Rel: May 17, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1180204

Ex parte Russell County Community Hospital, LLC, d/b/a Jack Hughston Memorial Hospital

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(In re: Russell County Community Hospital, LLC, d/b/a Jack Hughston Memorial Hospital

v.

State Department of Revenue)

(Russell Circuit Court, CV-16-900160; Court of Civil Appeals, 2170527)

SELLERS, Justice.

This Court granted a petition for a writ of certiorari seeking review of the Alabama Court of Civil Appeals' decision affirming a judgment of the Russell Circuit Court ("the trial court"), which ruled that a series of transactions involving the sale of computer software and accompanying equipment was subject to sales tax. See Russell Cty. Cmty. Hosp., LLC v. State Dep't of Revenue, [Ms. 2170527, November 16, 2018] ___ So. 3d ___ (Ala. Civ. App. 2018). We affirm the Court of Civil Appeals' judgment.

Between February 2012 and October 2014, Medhost of Tennessee, Inc. ("Medhost"), sold Russell County Community Hospital, LLC, d/b/a Jack Hughston Memorial Hospital ("the taxpayer"), computer software and accompanying equipment, which Medhost contracted to install in a hospital operated by the taxpayer. The software and equipment assists the taxpayer in operating various aspects of its hospital. Medhost collected a little less than $18,000 in sales tax in connection with the transactions, which it remitted to the Alabama Department of Revenue ("the Department").

Later, the taxpayer petitioned the Department for a refund of the sales tax it had paid on the transactions with

Medhost. The Department denied that request, and the taxpayer appealed to the Alabama Tax Tribunal ("the tax tribunal"), which reversed the Department's decision and directed the Department to grant the taxpayer's request for a refund. The Department then filed an action in the trial court requesting de novo review of the tax tribunal's decision. After a hearing, during which testimony was presented ore tenus, the trial court overturned the tax tribunal's decision and affirmed the Department's denial of the taxpayer's refund petition.[1] The taxpayer appealed to the Court of Civil Appeals, which affirmed the trial court's judgment. We granted the taxpayer's petition for a writ of certiorari.

In Alabama, sales tax is levied on the sale of tangible personal property. State Dep't of Revenue v. Wells Fargo Fin. Acceptance Alabama, Inc., 19 So. 3d 892, 894 (Ala. Civ. App.

[1]Section 40-2B-2(m)(4), Ala. Code 1975, provides, in part, that an "appeal to circuit court from a final or other appealable order issued by the Alabama Tax Tribunal shall be a trial de novo, except that the order shall be presumed prima facie correct and the burden shall be on the appealing party to prove otherwise." The parties do not provide significant argument as to the appropriate level of deference that a circuit court must afford a final order of the tax tribunal or as to which aspects of proceedings before the tax tribunal a circuit court must hear de novo. In its brief to this Court, the taxpayer concedes that the ore tenus rule applies to the trial court's findings.

2008) (citing § 40-23-2(1), Ala. Code 1975). This Court has defined "tangible personal property" as "'something that can be seen, felt, handled, sold commercially ... and has physical substance.'" State v. Advertiser Co., 257 Ala. 423, 429, 59 So. 2d 576, 580 (1952) (quoting a trial court's order with approval). See also Black's Law Dictionary 1412 (10th ed. 2014) (defining "tangible personal property" as "[c]orporeal personal property of any kind; personal property that can be seen, weighed, measured, felt, touched, or in any other way perceived by the senses").

The Court has decided two appeals involving taxation in connection with the sale of computer software. The first, decided in 1977, was State v. Central Computer Services, Inc., 349 So. 2d 1160 (Ala. 1977). The issue in that case was stated broadly as "whether computer 'software' constitutes tangible personal property for purposes of the state use tax." 349 So. 2d at 1161.[2] The software in Central Computer Services had been conveyed to the software user via magnetic tapes or punched cards that were "used to program [the user's]

[2]Section § 40-23-61(a), Ala. Code 1975, imposes a tax on, among other things, "the storage, use or other consumption in this state of tangible personal property."

computer which provide[d] data processing services for banks." Id. Upon receiving the tapes or cards, the user would transfer the "information" contained thereon to the user's own magnetic discs and would then return or discard the tapes and cards. This Court held that the software user had not purchased tangible property. Rather, "the essence of [the] transaction was the purchase of nontaxable intangible information." 349 So. 2d at 1162. The Court determined that the physical media that had been used to transfer that "information" was incidental to the sale of the information. In support of that reasoning, the Court noted that "this information can also be telephoned to the computer or brought into Alabama in the mind of an employee of [the software seller]." Id.

Approximately 20 years later, in Wal-Mart Stores, Inc. v. City of Mobile, 696 So. 2d 290 (Ala. 1996), this Court considered the type of software that was being sold in Wal-Mart retail discount stores in the mid 1990s, although the Court broadly stated the issue as "whether computer software is intangible personal property." 696 So. 2d at 290. The Court acknowledged that the reasoning underlying Central

Computer Services was that the purchaser of software was really purchasing intangible information. The Court noted, however, that, since that case was decided in 1977, "there ha[d] been a shift in the view of many courts." 696 So. 2d at 291.

> "One of the changes that has occurred in this state and elsewhere, which was perhaps not reasonably to be anticipated in 1977, is the proliferation of 'canned' computer software, such as is sold by stores like Wal-Mart. As a practical matter, the marketing of such 'canned' software presumes that the information sought will be conveyed by way of a tangible medium. In this sense, the merchandiser is making a sale of tangible property, like the sale of a book."

696 So. 2d at 291 (emphasis omitted). The Court thus relied on an assumption that the "information" making up canned software would necessarily be conveyed by way of a tangible medium. The Court, however, appeared to go further and to suggest that the "information" itself is tangible once it is recorded somewhere:

> "'The software itself, i.e., the physical copy, is not merely a right or an idea to be comprehended by the understanding. The purchaser of the computer software neither desires nor receives mere knowledge, but rather receives a certain arrangement of matter that will make his or her computer perform a desired function. This arrangement of matter, physically recorded

> on some tangible medium, constitutes a corporeal body.'"

669 So. 2d at 291 (quoting South Cent. Bell Tel. Co. v. Barthelemy, 643 So. 2d 1240, 1246 (La. 1994) (emphasis added)).

The taxpayer argues that this case, unlike Wal-Mart, does not involve canned software. Rather, the taxpayer asserts that it purchased nontaxable services in the form of "custom software programming." The taxpayer points to an administrative regulation promulgated by the Department, which provides, in part, that

> "[c]ustom software programming is not subject to tax regardless of the manner or medium of transfer to the customer since the charge for the custom software programming is a charge for professional services and the manner or medium of transfer is considered incidental to the sale of the service."

Ala. Admin. Code (Dep't of Revenue), Reg. 810-6-1-.37(5) ("the Regulation").[3] The Regulation defines "custom software programming" as "software programs created specifically for one user and prepared to the special order of that user." Id.

[3]The Court notes that the Regulation provides further that sales tax is to be collected "on the cost of the tangible medium for transferring the custom software programming to the customer." Ala. Admin. Code (Dep't of Revenue), Reg. 810-6-1-.37(6).

The term includes "programs that contain pre-existing routines, utilities, or other program components that are integrated in a unique way to the specifications of a specific purchaser." Id. Custom software programming also includes "modifications to a canned computer software program when such modifications are prepared to the special order of the customer," although "only to the extent of the modification[s]" and only to the extent the modifications are separately invoiced to the purchaser. Id. The Department concedes in its brief to this Court that "there is no doubt that paying someone to customize your software (or to write new software from scratch) is exempt from sales tax as a service."[4]

[4]The taxpayer asserts that the definition of "custom software programming" in the Regulation is internally inconsistent. As noted, the Regulation provides that custom software programming includes "modifications to a canned computer software program when such modifications are prepared to the special order of the customer." Ala. Admin. Code (Dep't of Revenue), Reg. 810-6-1-.37(5). Also as noted, that provision is subject to the proviso that such modifications are nontaxable only to the extent of the modifications themselves and only to the extent the modifications are separately invoiced. Id. The taxpayer argues that the proviso conflicts with the provision in the Regulation that custom software programming "includes programs that contain pre-existing routines, utilities, or other program components that are integrated in a unique way to the specifications of a specific purchaser." Id. We are not convinced, however, by

Consistent with the Court's statements in Wal-Mart, we hold that all software, including custom software created for a particular user, is "tangible personal property" for purposes of Alabama sales tax. There are, however, nontaxable services that can accompany the conveyance of software. Those services include, but are not limited to, determining a particular software user's needs, designing and programming new software for a particular user,[5] modifying or configuring

---

the taxpayer's arguments that the cited portions of the Regulation are necessarily inconsistent. In any event, we are not bound by administrative regulations. See Ex parte Chesnut, 208 So. 3d 624, 640 (Ala. 2016) (indicating that, although the interpretation of a statute by an administrative agency charged with enforcing the statute is entitled to deference, courts will not "blindly follow" an interpretation that is unreasonable or unsupported by law). The taxpayer has not persuasively demonstrated that any alleged internal inconsistency in the Regulation prohibits the Department from taking the position that sales tax was owed in connection with the transactions at issue.

[5]As the Court of Civil Appeals acknowledged in State Department of Revenue v. Omni Studio, LLC, 222 So. 3d 367, 371 (Ala. Civ. App. 2016):

> "The amount of sales tax that a seller of tangible personal property owes is calculated as a percentage of 'gross proceeds of sales.' § 40-23-2(1)[, Ala. Code 1975]. 'Gross proceeds of sales' is defined, in part, as '[t]he value proceeding or accruing from the sale of tangible personal property ... without any deduction on account of ... labor or service cost ... or any other expenses whatsoever....' Ala. Code 1975, §

existing software programs to meet a particular user's needs, installing software, and training users to operate software. If the costs of such services are separately stated and invoiced, they are nontaxable. Charges for the software itself trigger the imposition of sales tax at the time the sale closes and the software is transferred to the purchaser.

Thus, there is no distinction for Alabama sales-tax purposes between canned or custom software. All software is tangible personal property and thus subject to sales tax. The pertinent distinction is how the transaction is documented and invoiced, and that is left strictly in the hands of the seller and purchaser. To the extent a seller tenders an invoice for computer software, the gross amount allocated to that software is subject to sales tax. However, a seller's invoice for

---

40-23-1(a)(6)."

This Court, however, has recognized that the services of a "learned professional," which ultimately result in the incidental transfer of tangible property, can be nontaxable. See Haden v. McCarty, 275 Ala. 76, 78, 152 So.2d 141, 142 (1963) ("[T]he transfer of dentures and other prosthetic devices from a dentist to his patient is not a sale within the meaning of the [Sales Tax] Act. It is ... a mere incident to the professional treatment rendered by dentists."). We view that proposition as applicable to the services involved in the design and creation of new computer software for a particular user.

services such as those identified above, when separately stated, is not subject to sales tax.

In the present case, the testimony presented to the trial court included that of Medhost's chairman and chief executive officer, Bill Anderson. Anderson's testimony supports a conclusion that Medhost sold the taxpayer preexisting software and equipment, which was available for purchase by any hospital, and that Medhost thereafter "implemented" the software and equipment at the taxpayer's hospital so that hospital personnel could operate it efficiently. Implementation of the software consisted of a determination of how the taxpayer's hospital functions; setting up hardware and similar equipment; data entry and selection of "configuration options" that exist within Medhost software to make it function efficiently with the hospital's existing work flows, software, and equipment; and training hospital personnel to operate the computer system.

It appears undisputed that no sales tax was collected in connection with the separately stated charges for the services Medhost performed in implementing the software and accompanying equipment. In addition, the trial court found

that the items for which Medhost did charge sales tax constituted tangible property and not nontaxable services. Under the ore tenus rule, which the taxpayer has conceded is applicable here, "a judgment based on [ore tenus] evidence is presumed to be correct and will not be disturbed on appeal unless a consideration of the evidence and all reasonable inferences therefrom reveals that the judgment is plainly and palpably erroneous or manifestly unjust." Arzonico v. Wells, 589 So. 2d 152, 153 (Ala. 1991). Under that standard, the evidence is sufficient to support the trial court's judgment. Accordingly, the Court of Civil Appeals correctly affirmed that judgment, and we affirm its judgment.

AFFIRMED.

Mendheim, J., concurs.

Parker, C.J., and Bolin, Shaw, Stewart, and Mitchell, JJ., concur in the result.

Bryan, J., dissents.

BOLIN, Justice (concurring in the result).

I concur in the result. I agree that there is no distinction for Alabama sales-tax purposes between canned and custom software -- both are tangible personal property and subject to taxation. The main opinion notes that the pertinent distinction in determining taxability is how the transaction regarding sale of the software and the services rendered is documented, and that decision is left strictly in the hands of the seller and purchaser. I write specially to encourage the legislature to clarify how a transaction involving software and services is to be documented and invoiced. It should not be left to private entities to determine the taxability of a transaction for the State of Alabama.

SHAW, Justice (concurring in the result).

I concur in the result.

As noted in the main opinion, the parties dispute whether the computer software at issue in this case is taxable as "tangible personal property" under Alabama law. See Ala. Code 1975, § 40-23-2(1). In Wal-Mart Stores, Inc. v. City of Mobile, 696 So. 2d 290, 291 (Ala. 1996), this Court overruled State v. Central Computer Services, Inc., 349 So. 2d 1160 (Ala. 1977), and held that computer software is tangible personal property. Wal-Mart spoke in terms of "canned" software; in that case, the software at issue was apparently sold in the retail context directly to the consumer "by way of a tangible medium." 696 So. 2d at 291.

Regulations subsequently promulgated by the Alabama Department of Revenue ("the Department") drew a distinction between the "canned" software identified in Wal-Mart and software that is customized for the consumer. The customization of software or the creation of new software specifically for one consumer, the regulations appear to presume, are services that are not taxed.

However, the evidence in the record in the instant case shows that Russell County Community Hospital, LLC, d/b/a Jack Hughston Memorial Hospital ("the taxpayer"), purchased software and paid a tax on that software. As the Court of Civil Appeals noted: "According to [the software manufacturer's witness], the software at issue was purchased initially as a product that was available to multiple customers and was later implemented to meet the taxpayer's specifications. Thus, at the time the software was chosen and purchased by the taxpayer," the software was not "customized computer software" as that term is defined in the Department's regulations. Russell Cty. Cmty. Hosp., LLC v. State Dep't of Revenue, [Ms. 2170527, Nov. 16, 2018] ___ So. 3d ___, ___ (Ala. Civ. App. 2018) (emphasis added). After the purchase, the manufacturer of the software "implemented its software products to meet the individual needs of the taxpayer." Russell Cty. Cmty. Hosp, ___ So. 3d at ___. The taxpayer separately paid for those services, which were not taxed. It appears to me that the evidence supports the Court of Civil Appeals' determination. Essentially, under the terminology of the regulations, the evidence shows that "canned" software was

purchased and a tax paid; the subsequent "implementation" of the software, to the extent that implementation would be considered modification or customization of the software, or otherwise a service, was not taxed.

Under the facts of this case, I do not believe we are presented with the need to discern distinctions between "canned" and "customized" computer software and the apparently hazy area in between. It further appears to me that our prior caselaw dealing with distinctions between products and services, such as in the creation of dentures, Haden v. McCarty, 275 Ala. 76, 78, 152 So. 2d 141, 142 (1963), and when the transfer of property is an incidental part of services provided, Ex parte State of Alabama Department of Revenue, 222 So. 3d 375, 377 (Ala. 2016) (Shaw, J., dissenting) (discussing cases where "some transfers of tangible personal property are considered 'incidental' to the provision of services and are not taxed"), may not be appropriate in dealing with rapidly changing technology.[6] The legislature, which "has the exclusive domain to formulate public policy in Alabama," is best equipped to define tangible personal property and to

[6]The decision in Wal-Mart does not address these distinctions.

clarify any distinctions as to what should and should not be taxed; otherwise, uncertainty for taxpayers and artful invoicing will overshadow this State's tax policy. Boles v. Parris, 952 So. 2d 364, 367 (Ala. 2006).

Stewart, J., concurs.

BRYAN, Justice (dissenting).

The issue in this case is whether the software and the implementation of that software purchased by Russell County Community Hospital, LLC, d/b/a Jack Hughston Memorial Hospital ("the taxpayer"), is "custom software programming" under Regulation 810-6-1-.37(5), Ala. Admin. Code (Dep't of Revenue). Custom software programming is distinct from "canned software," which, under Regulation 810-6-1-.37(4), is considered tangible personal property and thus is subject to sales tax. Custom software programming is not considered to be personal tangible property and thus is not subject to sales tax. Reg. 810-6-1-.37(5). The key regulation, Reg. 810-6-1-.37(5), defines "custom software programming":

> "The term 'custom software programming' as used in this regulation shall mean software programs created specifically for one user and prepared to the special order of that user. The term 'custom software programming' also includes programs that contain pre-existing routines, utilities, or other program components that are integrated in a unique way to the specifications of a specific purchaser. Custom software programming also includes those services represented by separately stated charges for modifications to a canned computer software program when such modifications are prepared to the special order of the customer. Modification to a canned computer software program to meet the customer's needs is custom software programming only to the extent of the modification. Custom software

> programming is not subject to tax regardless of the manner or medium of transfer to the customer since the charge for the custom software programming is a charge for professional services and the manner or medium of transfer is considered incidental to the sale of the service."

This regulation is the basis of some dispute in this case. The Alabama Tax Tribunal, in ruling that the transaction at issue was nontaxable, stated that the regulation contains contradictory provisions. The Russell Circuit Court did not directly address the regulation in its judgment overturning the tax tribunal's decision. The Court of Civil Appeals, in affirming the circuit court's judgment, disagreed with the tax tribunal's statement that the provisions of the regulation are contradictory. And now, the main opinion, in affirming the judgment of the Court of Civil Appeals, states that it is unconvinced that the regulation contains contradictory provisions. ___ So. 3d at ___ n.4.

However, it does not appear to me that the main opinion relies on the regulation in reaching its decision to affirm the judgment of the Court of Civil Appeals. The main opinion "hold[s] that all software, including custom software created for a particular user, is 'tangible personal property' for purposes of Alabama sales tax" but that "nontaxable services

... can accompany the conveyance of software." ___ So. 3d at ___. Thus, the main opinion draws a bright-line distinction between software itself (of all types), which is taxable, and certain services related to the software, which are nontaxable if the services are separately stated and invoiced. That distinction regarding services basically reflects the third, fourth, and fifth sentences of Regulation 810-6-1-.37(5), which, as noted, provide:

> "Custom software programming also includes those services represented by separately stated charges for modifications to a canned computer software program when such modifications are prepared to the special order of the customer. Modification to a canned computer software program to meet the customer's needs is custom software programming only to the extent of the modification. Custom software programming is not subject to tax regardless of the manner or medium of transfer to the customer since the charge for the custom software programming is a charge for professional services and the manner or medium of transfer is considered incidental to the sale of the service."

However, by holding that "all software, including custom software created for a particular user, is 'tangible personal property' for purposes of Alabama sales tax," ___ So. 3d at ___ (emphasis added), the main opinion seems to essentially excise the first two sentences of the regulation. As noted, the first sentence provides that "[t]he term 'custom software

programming' as used in this regulation shall mean software programs created specifically for one user and prepared to the special order of that user." Reg. 810-6-1-.37(5) (emphasis added). The second sentence of the regulation similarly provides that "[t]he term 'custom software programming' also includes programs that contain pre-existing routines, utilities, or other program components that are integrated in a unique way to the specifications of a specific purchaser." (Emphasis added.) It is unclear to me whether the main opinion intends to essentially excise these two sentences, but that seems to be the consequence of the opinion.

If the main opinion essentially reworks a part of the regulation and excises the remainder, it provides no rationale for doing so. The main opinion does state that "we are not bound by administrative regulations," ___ So. 3d at ___ n.4, and cites Ex parte Chesnut, 208 So. 3d 624, 640 (Ala. 2016), for that proposition; however, that proposition does not follow from Chesnut. Chesnut states that, although we give weight to an administrative agency's interpretation of its own regulation, we are not bound by that interpretation. 208 So. 3d at 640 ("'Although a court should give deference to an

agency's interpretation of an agency rule or a statute implemented by the agency, that deference has limits.'" (quoting Alabama Dep't of Revenue v. American Equity Inv. Life Ins. Co., 169 So. 3d 1069, 1074 (Ala. Civ. App. 2015))). In saying that we are not bound by regulations, the main opinion seems to conflate a regulation with an agency's interpretation of the regulation. Regulations, of course, have the force of law and are "binding" on everyone, including this Court, in that sense. See Ex parte Wilbanks Health Care Servs., Inc., 986 So. 2d 422, 424 (Ala. 2007) ("'Rules, regulations, and general orders of administrative authorities pursuant to powers delegated to them have the force and effect of laws when they are of statewide application and so promulgated that information of their nature and effect is readily available or has become part of common knowledge.'" (quoting Hand v. State Dep't of Human Res., 548 So. 2d 171, 173 (Ala. Civ. App. 1988))). However, if a regulation is inconsistent with the underlying statute on which it is based, the regulation is not "good law" and thus is not binding. See Ex parte Southeast Alabama Med. Ctr., 835 So. 2d 1042, 1052 n.10 (Ala. Civ. App. 2002) ("An administrative regulation must be consistent with

the statute pursuant to which it was promulgated; it cannot usurp legislative power, and may neither subvert nor enlarge upon statutory policy."). This Court, of course, may decide whether a regulation is inconsistent with the underlying statute. However, the main opinion does not explicitly state that any part of Regulation 810-6-1-.37(5) runs afoul of any particular statute. Indeed, none of the parties appear to ask us to make such a decision.

As I have explained, it does not appear to me that the main opinion exactly applies Regulation 810-6-1-.37(5). What are we to do with that regulation? None of the parties appear to ask us to decide whether the regulation conflicts with any statute. Accordingly, I would simply try to apply the regulation as best we can to the facts here. In addition to the facts and the plain language of the regulation itself, my review is informed by a few points. First, although the circuit court held a trial "de novo" pursuant to § 40-2B-2(m)(4), Ala. Code 1975, the tax tribunal's order that was appealed to that court is to "be presumed prima facie correct." § 40-2B-2(m)(4). The Department of Revenue ("the Department") had the burden of proving that the tax tribunal's

order in favor of the taxpayer was wrong. Id. Further, Regulation 810-6-1-.37(5) provides the definition of "custom software programing" to articulate the meaning of tangible personal property, i.e., what is taxable, in the field of software. That is, the regulation helps define tangible personal property by defining what does not fit into that category. Definitional tax-levying statutes must be construed in favor of the taxpayer. State v. Reynolds Metals Co., 263 Ala. 657, 661, 83 So. 2d 709, 711-12 (1955). Although this case centers on a regulation and not a statute, I believe the same rule of construction would logically apply to the regulation, which, as noted, has the force of law.

The Department argues that Regulation 810-6-1-.37(5) addresses only "custom software programming," i.e., the act of creating "a sequence of instructions to enable a computer to do something." The Department's brief at 20. The Department argues that Regulation 810-6-1-.37(5) does not address software itself, i.e., the product created by the programming. Thus, the Department contends, the software purchased by the taxpayer does not fall under the definition in the regulation of what is nontaxable. However, recognizing that, "in a

narrow sense, 'software' is synonymous with 'program,'" Wal-Mart Stores, Inc. v. City of Mobile, 696 So. 2d 290, 291 n.1 (Ala. 1996), I struggle to see how the regulation, in addition to services, does not also address certain "software" that is customized for purchasers. The first sentence of the regulation states that "[t]he term 'custom software programming' ... shall mean software programs created specifically for one user and prepared to the special order of that user." Similarly, the second sentence provides that "[t]he term 'custom software programming' also includes programs that contain pre-existing routines, utilities, or other program components that are integrated in a unique way to the specifications of a specific purchaser." This is the key sentence on which the taxpayer relies in arguing that the programs it purchased from Medhost of Tennessee, Inc. ("Medhost"), are nontaxable programs under the regulation. I believe the evidence in this case supports the taxpayer's argument, as I will explain below.

Bill Anderson, the chairman and chief executive officer of Medhost, testified at trial about the health-care software Medhost sold the taxpayer. Anderson explained that Medhost

engages in a thorough implementation process designed to make the software work properly with each hospital that buys the software. Anderson said that simply loading the software at the hospital, without additional steps, "would be very inefficient for the customer," and, that, therefore, Medhost's software is "highly configurable." Anderson explained that, "as part of the implementation process, we ... go in and meet with members of the hospital, determine how their work flows work, and then we change various software switches to try to accommodate, as closely as possible, how the hospital likes to conduct business." Anderson further explained: "There is, also, a fairly extensive discovery effort where we go and sit down with the hospital as to how they actually run the hospital, and then to the extent possible, we configure our software to meet ... how they actually do things." Anderson stated that part of the implementation process involves ensuring that Medhost's software is "appropriately configured to work with the other modules [that hospitals] already have."

Anderson further testified about how the implementation process is a customized process:

> "A. [W]e do a custom implementation. There is no doubt about that.
>
> "Q. [By counsel for the taxpayer:] Okay. Each implementation you do is customized for each hospital?
>
> "A. Correct. That is the whole purpose of the, kind of, discovery phase so that we understand how to configure the hospital to -- and I will use the word, from a generic standpoint, to customize it for the work flows in the hospital."

Anderson also testified about how long a hospital should expect the installation process to take. He stated that the entire installation process, which includes the training of hospital personnel, should normally take roughly six months beginning from the day the contract is signed. Anderson further testified that health-care software is "very complicated." When asked to compare Medhost's software with standard tax software sold in retail stores, Anderson stated that the standard tax software "is not complex at all compared to what we do." He also noted that "tax software is much less configurable than health care IT software." Anderson testified that implementation of Medhost's software is "much more complex" than simply adding hospital letterheads and other hospital-specific information to forms. Anderson

observed that "people pay hundreds of thousands, if not millions, of dollars to implement" this type of software.

Anderson's testimony indicates that one of the definitions of nontaxable "custom software programming" under Regulation 810-6-1-.37(5) was satisfied here. The definition "includes programs that contain pre-existing routines, utilities, or other program components that are integrated in a unique way to the specifications of a specific purchaser." Anderson's testimony indicates that this happened here. Regarding the first part of the above-quoted provision, the programs Medhost sells certainly contain "pre-existing routines, utilities, or other program components." The second part of the provision -- the components are integrated in a unique way to the specifications of a specific purchaser -- is satisfied also. Anderson testified that the software, or programs, were "highly configurable," complex programs that were configured to meet the taxpayer's specific needs. The implementation of the programs is lengthy, expensive, and customized. It is also essential, because without it the software would be "very inefficient" for the taxpayer.

Thus, I agree with the tax tribunal's conclusion that a sales tax should not have been levied on the taxpayer in this case. I believe that the plain language of the regulation supports the tax tribunal's decision. Insofar as the language of the regulation as a whole may be unclear -- and it has caused some confusion in this case -- I would construe the regulation against the Department, i.e., the taxing authority. Reynolds Metals, 263 Ala. at 661, 83 So. 2d at 711-12.[7] Accordingly, I respectfully dissent.

[7]I agree with Justice Shaw that the legislature is best equipped to clarify what should and should not be taxed in this field.