

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL
CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

VALLEYCREST LANDSCAPE
MAINTENANCE, INC.,
a Florida corporation,

Plaintiff,

v.

STATE OF FLORIDA, DEPARTMENT
OF REVENUE,

Defendant.

CASE NO.: 2016 CA 001146

Judge Terry Lewis

COMPLAINT

ValleyCrest Landscape Maintenance, Inc. ("ValleyCrest"), sues the Defendant, State of Florida, Department of Revenue ("the Department") and states:

1) This is an action contesting the decision of the Department dated March 24, 2016 denying two applications for motor fuel tax refunds submitted by ValleyCrest to the Department. (a copy of the Notice of Decision of Refund Denial is attached).

2) The court has jurisdiction under 72.011 (1), Florida Statutes.

3) Venue is proper in Leon County, Florida, under Section 72.011 (4), (a) (b), Florida Statutes.

4) ValleyCrest seeks a motor fuel tax refund in excess of \$15,000.

GENERAL ALLEGATIONS

5) ValleyCrest is a Florida corporation and is an integrated landscape maintenance company providing homeowners, public agencies and property managers with maintenance services. ValleyCrests' services include general landscaping and property maintenance such as mowing, trimming, and edging, as well as tree pruning, trimming and removal. ValleyCrest uses

a variety of equipment on its jobs that predominately use gasoline purchased from retail gasoline stations in Florida.

6) A significant amount of motor fuel purchased by ValleyCrest is used to propel off-road equipment that is used in the ValleyCrest maintenance operation. Also, a significant amount of the motor fuel purchase is used to propel ValleyCrest's fleet of trucks. The equipment used by ValleyCrest in its maintenance operation includes stand-on mowers, riding mowers, walk behind mowers, blowers, edgers, trimmers, chippers, vacuums, wide area mowers and other equipment used off-road for landscaping and property maintenance. This equipment is not classified as a motor vehicle under Chapter 320, Florida Statutes.

7) Sections 206.01-206.64 regulate the tax and sale of motor fuels in the State of Florida. Section 206.41, Florida Statutes, imposes various taxes on the sale and use of motor fuels in the State of Florida. Specifically, under section 206.41 (1), Florida Statutes, an excise tax of 2 cents per net gallon is levied pursuant to Article XII, section 9 (c) of the 1968 Florida Constitution. This tax is referred to as the "second gas tax" and is designated the "constitutional fuel tax." Other motor fuel taxes are authorized under Section 206.41 (1), Florida Statutes, designated as the "county fuel tax," the "municipal fuel tax," the "ninth-cent fuel tax", the "local option fuel tax", and other fuel taxes. The primary justification for and purpose for the imposition of these motor fuel taxes in Florida is to finance the construction and maintenance of the public highways in Florida. The gasoline sold in the State of Florida at retail service stations is formulated for use in motor vehicles licensed under Chapter 320, Florida Statutes, but can also be used for other purposes. The gasoline sold at retail service stations in Florida is gasoline intended for use by motor vehicles and is intended to be used to propel motor vehicles licensed under Chapter 320, Florida Statutes, or that would be licensed under Chapter 320, Florida

Statutes, if the owner of the motor vehicle was a resident of the State of Florida. All of the gasoline purchased by ValleyCrest in Florida is purchased at retail gasoline service stations.

8) No statutory provision contained within section 206.01-206.64, Florida Statutes, directly authorizes a tax refund for motor fuel used in off-road maintenance equipment by a consumer like ValleyCrest. However, numerous entities under various circumstances are authorized under Chapter 206 to claim a refund of motor fuel taxes paid to the State of Florida. For example, under Section 206.41 (4) (c) (1), Florida Statutes, any person who uses any motor fuel for agriculture, aquaculture, commercial fishing or commercial aviation purposes is entitled to a refund of such tax. This motor fuel is not being used to propel a motor vehicle on the public highways on the State of Florida. Indeed, Section 206.41 (4) (c) (2), specifically provides that for the purposes of the motor fuel tax refund regarding agriculture, aquaculture and commercial fishing, agriculture and aquaculture purposes means motor fuel used in any tractor, vehicle or other farm equipment which is used exclusively on a farm or for processing farm products on the farm and no part of which fuel is used in any vehicle or equipment driven or operated upon the public highways of this state. Likewise, under Section 206.41 (4) (c) 3, "commercial fishing and agricultural purposes" means motor fuel used in the operation of boats, vessels, or equipment used exclusively for the taking of fish, crayfish, oysters, shrimp, or sponges from salt or fresh waters under the jurisdiction of this state for resale to the public, and no part of which fuel is used in any vehicle or equipment driven or operated upon the highways of this state. Again, under Section 206.41 (4) (c) 4, commercial aviation purposes means motor fuel used in operation of aviation ground support vehicles or equipment, no part of which fuel is used in any vehicle or equipment driven or operated upon the public highways of this state.

9) The motor fuel utilized by ValleyCrest for which it seeks a tax refund is used for the purposes of operating off-road maintenance equipment that is in no way utilized in any vehicle or equipment driven or operated upon the public highways of this state. Effectively, there is no real distinction between these statutory provisions allowing tax refunds to entities using gasoline in equipment that is not operated or driven on the public highways of the State of Florida and the equipment used for off-road consumption by ValleyCrest.

10) The Department denied ValleyCrest's application for motor fuel tax refund on the basis that no provision in Chapter 206, Florida Statutes, directly authorizes such refund because no specific exemption from the payment of taxes on lawn maintenance equipment is contained within Chapter 206, Florida Statutes. However, no exemption is required in order for the Department to authorize a refund. Pursuant to Section 206.41 (4) (a), Florida Statutes, it is provided:

Nothing in this part shall be construed to change the legal incidence of the tax and the right to a refund by a qualifying ultimate consumer. The legal incident of the tax shall be on the ultimate consumer; however, the tax shall be precollected for administrative convenience prior to the sale to the ultimate consumer.

This provision authorizes ValleyCrest to seek a refund of motor fuel taxes imposed for administrative convenience but where no such tax is due or is constitutionally prohibited. (See also 215.26, Florida Statutes).

COUNT I

ARTICLE XII SECTION 9 (c)

11) ValleyCrest incorporates, as if fully set forth herein, the allegations of paragraphs 1-10 above.

12) The denial by the Department of ValleyCrest's applications for motor fuel tax refunds is in direct violation of Article XII Section 9 (c), Florida Constitution, in that the taxes imposed by the State of Florida is on motor fuel used by ValleyCrest in off-road equipment.

Article III, Section 9 (c), Florida Statutes, prohibits the imposition of taxes on motor fuel used for purposes other than to propel motor vehicles on the highways of the State of Florida. The motor fuel taxes imposed under Section 206.41, Florida Statutes, are limited to motor fuels used to propel motor vehicles on the public highways of Florida.

13) Denial of ValleyCrest's application for motor fuel tax refund under the above describe circumstances is in direct derogation of this constitutional provision and the purposes for which the motor fuel tax was imposed.

14) Section 206.41, Florida Statutes, as interpreted and applied by the Department, is unconstitutional under Article XII, Section 9 (c). Article XII, Section 9 (c) of the Florida Constitution prohibits the imposition of motor fuel taxes on motor fuels used for purposes other than to propel a motor vehicle on the public highways of Florida.

15) Since no motor fuel tax should be paid by ValleyCrest in derogation of Article XII, Section 9 (c), ValleyCrest is entitled to a refund of the motor fuel taxes paid on motor fuel used by ValleyCrest in the operation of its off-road equipment under 215.26 (1) (b), Florida Statutes, and Section 206.41 (4) (a), Florida Statutes.

WHEREFORE, ValleyCrest prays that this court take jurisdiction over this cause and the parties and enter a judgment declaring that the denial of the applications of ValleyCrest for motor fuel tax refunds under the above described circumstances is in violation of Articles XII, Section 9 (c), Florida Constitution; that section 206.41, Florida Statutes, is unconstitutional as applied and interpreted by the Department; and that the Department should refund the motor fuel taxes paid by ValleyCrest as demanded, and granting ValleyCrest its cost of suit and such other relief that the court deems just and reasonable.

COUNT II
EQUAL PROTECTION

16) ValleyCrest incorporates, as if fully set forth herein, the allegations of paragraphs 1-10 above.

17) Section 206.41, Florida Statutes, as applied to ValleyCrest by the Department, is unconstitutional and in violation of the equal protection clause of the 14th Amendment to the U.S. Constitution, in that, without reasonable rationale and justification, certain entities using motor fuel for off-road consumption and in vehicles and equipment that is not licensed as a motor vehicle under Chapter 320, Florida Statutes, are entitled to refunds of motor fuel taxes paid while ValleyCrest's use of the same fuel in its off-road equipment is not entitled to a refund.

18) Florida's motor fuel tax scheme violates the Equal Protection Clause of the 14th Amendment to the U.S. Constitution because ValleyCrest is not being treated equally with other persons/entities similarly situated and the unequal tax treatment does not advance any legitimate state interest. These entities are using the same gasoline as ValleyCrest in equipment that is not classified as a motor vehicle under Chapter 320, Florida Statutes, and the gasoline is being used in equipment that is not intended for use on the public highways of Florida.

WHEREFORE, ValleyCrest prays that this court take jurisdiction over this cause and the parties and enter a decree declaring that Section 206.41, Florida Statutes, as applied and interpreted by the Department to ValleyCrest, is unconstitutional in violation of the equal protection clause of the U.S. Constitution and requiring the Department to approve the refund applications for motor fuel taxes paid by ValleyCrest for use in its off-road equipment and granting ValleyCrest its cost of suit, and other such relief that the court deems just and reasonable.

COUNT III

FLORIDA MOTOR FUEL TAX SCHEME UNDER PART 1, CHAPTER 206, FLORIDA STATUTES

19) ValleyCrest incorporates, as if fully set forth herein, the allegations of paragraphs 1 through 18 above.

20) Pursuant to Article XII Section 9 (c), of the Florida Constitution entitled **Motor Vehicle Fuel Taxes** it is stated under (1) therein:

A state tax, designated "second gas tax", of two cents per gallon upon gasoline and other like products of petroleum and equivalent tax upon other sources of energy being used to propel motor vehicles as levied by Article IX Section 16, of the Constitution of 1885, as amended, is hereby continued. The proceeds of said tax shall be placed monthly in the state roads distribution fund in the state treasury.

21) These motor vehicle fuel taxes as collected are to be placed monthly in the state roads distribution fund in the State Treasury and used for the construction and maintenance of the public highways of Florida.

22) Part I of Chapter 206, Florida Statutes, relates specifically to motor fuel taxes and sets forth the taxing scheme for the imposition of and taxing of motor fuels in the State of Florida.

23) Consistent with Article XII, Section 9 (c), of the Florida Constitution, the Florida legislature enacted Section 206.41 (1), Florida Statutes, for the specific purpose of imposing state taxes on motor fuel used to propel motor vehicles in the state on the public highways in the state.

24) Section 206.41 (1) (a) specifically refers to the tax referenced in Article XII, Section 9 (c) and designates the tax imposed under (a) as the "constitutional fuel tax". In addition, under (b), (c), (d) and (e), additional motor fuel taxes are imposed and have been

designated as the "county fuel tax", the "municipal fuel tax", the "ninth-cent fuel tax" and the "local option fuel tax". All of these taxes have been enacted for the purpose of supporting the public transportation system in Florida. (See sections 206.47, 206.60, 206.605, Article XII Section 9 (c), Florida Constitution, Section 336.025, Florida Statutes).

25) While the statutory scheme contained within Chapter 206, Part I, Florida Statutes, requires that taxes on motor fuel be collected at various levels of distribution, such as at a refinery, or by an importer or wholesaler, and requires these entities to pay motor fuel taxes on any gasoline product or any product blended with gasoline or any fuel placed in the storage supply tank of a gasoline-powered motor vehicle (see Section 206.01 (9), Florida Statutes), these taxes are imposed for administrative convenience and these gasoline products may be sold by terminal suppliers, importers, exporters and wholesalers for various purposes or uses. However, the gasoline/motor fuel sold at retail gasoline service stations are gasoline products specifically formulated for and intended for use by motor vehicles required to be licensed under Chapter 320, Florida Statutes. The gasoline sold at retail gasoline outlets is intended to be used to propel motor vehicles over the public highways of Florida and Florida's taxing scheme is based upon this concept.

26) Section 206.01 (23) defines "motor vehicle" to mean any vehicle, machine, or mechanical contrivance which is propelled by any form of engine or motor which utilizes motor or diesel fuel **and is required, or would be required, to be licensed under Chapter 320**, if owned by a resident. Most importantly, is that the term "use" is defined under Section 206.01 (24), Florida Statutes, to mean the placing of motor or diesel fuel into any receptacle on a motor vehicle in which fuel is supplied for the propulsion thereof.

27) The motor fuel/gasoline sold at retail service stations in the State of Florida are formulated and intended for use specifically to propel motor vehicles on the public highways of the State of Florida. As such, fuel purchased at these retail gasoline service stations for use other than to propel motor vehicles on the highways of the State of Florida are not taxable under Section 206.41, Florida Statutes.

28) When the various provisions of Part 1 of Chapter 206, Florida Statutes, as referenced herein are construed in pari-materia with Article XII, Section (9) (c), of the Florida Constitution, the only conclusion to be reached is that motor fuel taxes were not intended to be imposed on gasoline sold at retail gasoline service stations that is not used by motor vehicles on the public highways of the State of Florida.

29) Since no motor fuel tax should be paid by ValleyCrest on gasoline purchased by ValleyCrest at retail gasoline service stations in the State of Florida for use in equipment not classified as a motor vehicle under Chapter 320, Florida Statutes, ValleyCrest is entitled to a refund of taxes paid on the portion of motor fuel purchased by it for use only in its off-road maintenance equipment and not used in a motor vehicle.

WHEREFORE, ValleyCrest prays that this court take jurisdiction over this cause and the parties and enter a judgment declaring that motor fuel taxes are not imposed on gasoline purchased at retail gasoline service stations in Florida where such gasoline is used to operate equipment not classified as a motor vehicle under Chapter 320, Florida Statutes, and declaring

that the Department refund the motor fuel taxes paid by ValleyCrest as demanded, and granting ValleyCrest its cost of suit and such other relief that the court deems just and reasonable.

Respectfully submitted,

/s/ J. Riley Davis

J. Riley Davis, Esq.

Florida Bar Number: 118121

AKERMAN LLP

Suite 1200

106 East College Avenue

Tallahassee, FL 32301

Phone: (850) 224-9634

Fax: (850) 222-0103

Email: riley.davis@akerman.com

Email: angie.gaff@akerman.com