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# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

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Alabama Department of Revenue

v.

W.A. Akins & Sons, Inc.

Appeal from DeKalb Circuit Court  
(CV-18-900237)

EDWARDS, Judge.

The Alabama Department of Revenue ("the Department") appeals from a judgment entered by the DeKalb Circuit Court ("the trial court")

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in favor of W.A. Akins & Sons, Inc. ("Akins & Sons"), regarding its appeal challenging final assessments entered by the Department. We dismiss this appeal because it is taken from a nonfinal judgment.

Akins & Sons operates three furniture stores. The Department audited Akins & Sons' records for the tax periods from January 1, 2014, through December 31, 2016, to confirm its compliance with state and local sales-tax and use-tax laws. Based on the audit, the Department determined that Akins & Sons had violated Alabama law by advertising that it would pay the sales tax for certain customers and by failing to add the sales tax to the price of sold items. According to the Department, Akins & Sons had also failed to collect and pay sales taxes or use taxes to counties and municipalities in Alabama other than DeKalb County ("the local taxing jurisdictions") in which Akins & Sons had delivered furniture. Further, the Department determined that Akins & Sons had failed to collect and pay taxes on the delivery fees charged for those deliveries. The deliveries at issue had been performed by Poppy's Delivery Contractor's, LLC, which was under contract to make deliveries for Akins & Sons.

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The Department issued preliminary assessments against Akins & Sons for taxes allegedly owed to the state and for taxes allegedly owed to the local taxing jurisdictions. Akins & Sons requested a review of the preliminary assessments, after which the Department sent Akins & Sons a letter stating that the Department could find no basis for an adjustment to the preliminary assessments. The Department then issued final assessments to Akins & Sons for the payment of state sales taxes, plus interest, totaling \$17,153.16 and for the payment of local-taxing-jurisdiction use taxes, plus interest, totaling \$83,689.06. Akins & Sons timely appealed the final assessments to the trial court and submitted payment of the final assessments to the Department. See Ala. Code 1975, § 40-2A-7(b)(5)b.; see also § 40-2A-7(b)(5)c.3. ("On appeal to the circuit court ..., the final assessment shall be prima facie correct, and the burden of proof shall be on the taxpayer to prove the assessment is incorrect.").

In a complaint filed along with its notice of appeal to the trial court, Akins & Sons contended that it had properly collected and remitted state sales taxes and that it owed no taxes to the local taxing jurisdictions. Also, Akins & Sons alleged that, "[e]ven if the local jurisdiction tax

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assessment [was] correct, [Akins & Sons was] due a credit for any and all taxes that were paid and remitted regarding out of state deliveries" and, thus, "[was] due a refund." The Department filed an answer denying Akins & Sons' contentions.

The trial court conducted ore tenus proceedings in December 2020. At trial, one dispute concerned the assessment of taxes on delivery fees, which had been included as part of the final assessments. The testimony and colloquies at trial reflect that the Department could determine how much of each final assessment was attributable to the taxes assessed on delivery fees by reviewing the schedules to the Department's audit, which were not admitted into evidence at trial but apparently had been provided to Akins & Sons by the Department. However, the Department indicated that it had to make calculations based on those schedules to determine the amount of taxes at issue, and it offered to provide that evidence to the trial court after trial. Akins & Sons agreed that that evidence, "a precise breakdown," could be submitted after trial, and the trial court directed the Department to provide a posttrial breakdown of the amounts at issue.

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Also, the trial court requested that the parties file posttrial briefs as to various legal issues.

The parties filed posttrial briefs with the trial court, but the Department did not submit exact figures regarding the taxes assessed on delivery fees. Instead, it stated in its posttrial brief that the taxes assessed on delivery fees could be computed by using a percent estimate as to each assessment amount, which it provided. In its posttrial brief, Akins & Sons conceded that the in-state delivery fees were taxable and were "properly included within the final assessment[s]." Nevertheless, Akins & Sons argued that it was not liable for any of the other taxes reflected in the final assessments.

On June 15, 2021, the trial court entered a judgment

"in [Akins & Sons'] favor on all issues except the issue of the taxes due on delivery fees and orders the [Department] to re-assess [Akins & Sons'] taxes based on this finding and orders that the [Department] refund to [Akins & Sons] any excess funds it holds for [Akins & Sons]."

The June 2021 judgment did not adjudicate the amount of the taxes on delivery fees that were to be retained by the Department or the amount of purportedly wrongly paid taxes that the Department was to return to

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Akins & Sons. On July 26, 2021, the Department filed a notice of appeal to this court.

We pretermitted discussion of the merits of the Department's appeal because we lack jurisdiction over the appeal.

"It is a settled jurisprudential principle that an appellate court must initially consider whether it has jurisdiction to hear and decide an appeal: '[J]urisdictional matters are of such magnitude that we take notice of them at any time and do so even ex mero motu.' Nunn v. Baker, 518 So. 2d 711, 712 (Ala. 1987). Under Ala. Code 1975, § 12-22-2, an appeal will lie to the appropriate appellate court, within the time and in the manner prescribed by the Alabama Rules of Appellate Procedure, from any final judgment of a circuit court."

Alabama Dep't of Revenue v. WestPoint Home, LLC, 256 So. 3d 1197, 1199 (Ala. Civ. App. 2018).

Upon review of the record, this court requested that the parties file letter briefs addressing two potential issues regarding the finality of the June 2021 judgment. First, we asked them to address whether Akins & Sons had pursued its claim for a credit regarding taxes paid on out-of-state delivery fees, as opposed to the taxes paid on in-state delivery fees that Akins & Sons conceded it owed. As to that issue, we noted that

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there was some testimony at trial indicating that Akins & Sons had received a credit in the final assessments for the amount of taxes on out-of-state delivery fees that Akins & Sons had paid to the Department. Also, Akins & Sons presented no specific evidence as to the amount of any taxes it had paid on out-of-state deliveries, and it is unclear from the record whether any dispute remained as to that issue. We questioned whether Akins & Sons might have abandoned or waived that claim at trial. See Parker v. Harville, 58 So. 3d 1270, 1271 n.1 (Ala. Civ. App. 2010) (concluding that a claim was abandoned when the claimant "presented no evidence in support of [the claim] at trial").

Second, we asked the parties to address why this appeal should not be dismissed as having been taken from a nonfinal judgment based on the trial court's failure to determine the amount of the paid final assessments that the Department must return to Akins & Sons. We noted that, generally, a final judgment must include the amount of the award rather than simply indicating that a party is "'entitled to recover.'" Alabama Dep't of Revenue, 256 So. 3d at 1200. Otherwise, a judgment "does not amount to a conclusive determination of all the issues so as to amount to

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a final judgment." Id.; see also Jewell v. Jackson & Whitsitt Cotton Co., 331 So. 2d 623, 625 (Ala. 1976) ("All matters should be decided; damages should be assessed with specificity leaving the parties with nothing to determine on their own. A judgment for damages to be final must, therefore, be for a sum certain determinable without resort to extraneous facts.").

The parties have filed letter briefs in response to our request. It is undisputed that Akins & Sons paid the amounts due in the final assessments to the Department; that those payments included taxes on in-state delivery fees that were correctly assessed by the Department; and that, pursuant to the June 2021 judgment, only a portion of the amount Akins & Sons had paid to the Department to satisfy the final assessments was required to be returned to Akins & Sons. However, the trial court has not determined either the amount of the taxes on the delivery fees that the Department properly assessed and that Akins & Sons paid or the remaining amount (after reduction for the taxes paid on delivery fees) that the Department must return to Akins & Sons. Accordingly, the June 2021 judgment is not a final judgment.



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Further, as to the issue of taxes relating to out-of-state deliveries, the Department argues that a credit (or reduction) was given to Akins & Sons as part of the final assessments. Akins & Sons appears to take the position that the Department merely agreed that a credit was due to be given. It is not entirely clear from the record which position is correct, i.e., whether the final assessments incorporated a reduction or credit against Akins & Sons' tax liability or not. Nevertheless, in light of the record before us, some adjudication must be made as to that claim for any judgment to be final.

Based on the foregoing, this appeal is dismissed as having been taken from a nonfinal judgment.

APPEAL DISMISSED.

Thompson, P.J., and Moore, Hanson, and Fridy, JJ., concur.