

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

vs.

ALABAMA OIL SUPPLY, INC.
P.O. Box 336
Bessemer, AL 35021,

Taxpayer.

§

§

§

§

§

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. MISC. 90-278

FINAL ORDER

An Opinion and Preliminary Order was entered in this case on May 4, 1993. That Order upheld the bulk of the assessment in issue, but directed the Department to reduce the assessment by allowing a credit of between \$9,600.00 and \$10,000.00, and also by deleting the months of November and December 1986.

As directed, the Department has reduced the assessment by \$9,974.40 as agreed by the parties at the hearing. The months of November and December 1986 have also been deleted. As a result, the tax due has been reduced from \$744,608.00 as originally assessed down to \$721,885.72.

The Taxpayer has raised two additional issues subsequent to entry of the Opinion and Preliminary Order. First, the Taxpayer argues that the 25% penalty for failure to file and failure to pay levied by §40-17-10 should not be assessed in this case because the Taxpayer filed returns for the audit period. Second, the Taxpayer argues that even if the penalty can be assessed, it should be waived for good cause.

The 25% penalty levied by §40-17-10 applies only if a

taxpayer both fails to file a return and fails to pay the tax due. Thus, the Taxpayer may be correct that the §40-17-10 penalty doesn't apply in this case because returns were filed during the subject period. However, if §40-17-10 doesn't apply, then I agree with the Department that the general failure to pay penalty levied at §40-1-5(h) must apply. Section 40-1-5(h) was in effect during the period in issue and provided that a 1% per month penalty shall be added to any tax more than 30 days delinquent.¹ If the 1% per month penalty is applied, it would be considerably more than the 25% penalty actually assessed by the Department because more than 48 months have passed since the last month of the audit period, October 1989. The Department has computed that the general 1% per month penalty would total \$449,520.67. Under the circumstances, the penalty of \$180,471.43 as levied by the Department is upheld.

The Taxpayer next argues that the penalty should be waived for cause because the Taxpayer's records were inadvertently destroyed. Also, two prior audits by the Department resulted in only minor adjustments in one and a refund to the Taxpayer in the other.

The last sentence of §40-17-10 provides that "[T]he commissioner of revenue may remit the penalty, otherwise the tax

¹ Sections 40-1-5(h) and 40-17-10 were both repealed by the Uniform Revenue Procedures Act found at §40-2A-7, et seq., effective October 1992. The general failure to file and failure to pay penalties are now set out at §40-2A-11(a) & (b).

and penalty shall be paid". The above penalty is mandatory, and discretion to waive the penalty is solely with the Department.

The Department's refusal to waive a penalty can only be set aside where the Department has contributed to or caused the circumstances that led to the penalty. State v. Mack, 411 So.2d 799. That did not happen in this case. Thus, although I believe that good cause may exist to waive the penalty, the Department's refusal to waive the penalty cannot be disturbed.

Judgement is entered against the Taxpayer for tax in the amount of \$721,885.72, penalty in the amount of \$180,471.43, and interest computed to December 20, 1993 in the amount of \$395,060.83. Total tax, penalty and interest due is \$1,261,417.98. This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on December 9, 1993.

BILL THOMPSON
Chief Administrative Law Judge

BT:ph604