STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
v.	§	DOCKET NO. MISC. 91-130
LOWRY OIL COMPANY, INC. P.O. Box 520 Winfiled, AL 35594,	§	
Taxpayer.	§	

FINAL ORDER

The Revenue Department assessed motor fuel tax against Lowry Oil Company, Inc. (Taxpayer) for the period September, 1987 through June, 1990. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on September 19, 1991. This Final Order is based on the evidence and arguments presented at the hearing.

FINDINGS OF FACT

The Taxpayer is a motor fuel distributor subject to the motor fuel taxes levied at Code of Ala. 1975, §§40-17-2 and 40-17-220.

The Taxpayer timely filed monthly motor fuel returns during the subject period but erroneously reported and paid tax on collections during each month instead of monthly sales. As a result, the Taxpayer overpaid tax in some months of the audit period and underpaid distributions, withdrawals, etc.

The Department determined that the Taxpayer by a net total of $4,089.16 over the thirty-four audit period. However, the Department also added of $18,230.90 and interest of $14,201.76, for penalty and interest due of $36,521.82.

Penalty and interest was computed by the Department with each month standing alone. That is, penalty and interest was added to the amount due in each deficiency month without credit allowed for the amounts overpaid in other months. For example, if tax was overpaid by $1,000.00 in one month and underpaid by $1,000.00 in the next month, the Department added a 25% penalty and also interest on the $1,000.00 deficiency for the remainder of the audit period, even though no net tax was owed after the second month.

The Taxpayer objects to the penalty and interest and argues that the overpayments should have been credited against the underpayments which would have substantially reduced the penalty and interest due. The Taxpayer attempted to settle the matter by paying the tax and interest due as claimed by the Department and requesting the Department to waive the penalty. The Department refused and entered the preliminary assessment in issue for the penalty of $18,230.90 on March 8, 1991.

The Department argues that it has sole discretion to waive the penalty and that the Taxpayer in this case has failed to show good cause why the penalty should be waived.

CONCLUSIONS OF LAW

The Department assessed the 25% penalty levied at Code of Ala. 1975, §40-17-10. That section reads as follows:

> If any person covered by the provisions of this article shall fail to make the monthly returns prescribed herein and pay the excise tax hereby laid on or before the twentieth day of the calendar month following the sale,

> distribution or withdrawal, the department of revenue shall make return f or such delinquent upon such information as it may reasonably obtain, assess the excise tax thereon and add a penalty for failure to make such return and pay the tax herein laid of 25% of the tax due to the amount assessed by the commissioner of revenue. If, in the opinion of the department of revenue, a good and sufficient cause is shown for such delinquency, the commissioner of revenue may remit the penalty, otherwise the tax and penalty shall be paid. (underline added)

The above penalty applies only if a taxpayer fails to both file a return and pay the tax due by the 20th of the subsequent month. The penalty therefore cannot be applied in this case because the Taxpayer timely filed returns during the audit period. Instead, the applicable penalty is the general 1% per month delinquent penalty levied by Code of Ala. §40-1-5(h). That section reads as follows:

> (h) If any person shall be delinquent in the payment of any tax herein levied for more than thirty days after the due date thereof, there shall be collected a penalty of 1% per month for each month or fraction thereof that such tax remains delinquent.

The next question is whether the delinquent penalty (and interest) should be computed with each month standing alone, as argued by the Department, or on the net deficiency owed at the end of each subsequent month, as contended by the Taxpayer.

The purpose of §40-1-5(h) is to penalize a taxpayer that owes tax to the Department for longer than thirty days. There is no requirement in the statute or elsewhere that the penalty must be computed with each month standing alone. Rather, the penalty

should be computed on the cumulative net thirty day delinquent amount owed by a taxpayer after each month. A credit should be allowed for any tax overpaid by the taxpayer as of the date of the overpayment. An example -- a taxpayer overpays by $1,000.00 in one month and underpays by $1,000.00 in the next. The prior overpayment underpayment and penalty because no tax is due.

A second example -- a taxpayer underpays by $1,000.00 in one month and overpays by $500.00 in the next month. Assuming that the overpayment is made less than thirty days after the due date of the previous month's tax, the $500.00 overpayment in month two should be credited against the prior deficiency and penalty should be computed on only the net $500.00 delinquent amount owed by the taxpayer for more than thirty days. There is no thirty day grace period for interest. Consequently, interest would be due on the $1,000.00 deficiency from the due date and then on the balance of $500.00 due after credit is allowed for the overpayment.

A third example -- a taxpayer overpays by $10,000.00 in one month and underpays by $1,000.00 in each of the next five months. The prior overpayment should be credited to satisfy the monthly deficiencies and the $5,000.00 balance should be refunded to the taxpayer (without interest because no interest is paid on motor fuel tax refunds). Penalty and interest should not be charged because the State had use of the $10,000.00 during the entire audit period. The point is that neither the deficiency penalty nor

interest should be charged if no tax is owed.

The §40-1-5(h) delinquent penalty can be distinguished from various other penalties in Title 40 that can be assessed in full if a taxpayer fails to pay a tax and/or file a return by the due date. The general 15% late filing penalty levied at §40-1-5(g) is such a penalty and can be assessed in full if a taxpayer files a return one day (or one year) after the due date. Section 40-17-10 is also a one-time penalty that may be assessed if a taxpayer fails to timely file a motor fuel return and pay the tax due.[1] Unlike the delinquent penalty in issue, a one-time penalty can be assessed with each tax period standing alone.

The Department is directed to recompute the penalty and interest owed by the Taxpayer as indicated above. A final assessment should be entered for any additional amount due above the amount already paid, or for zero if no additional amount is due. Any amount overpaid should be refunded to the Taxpayer.

Entered on October 22, 1991.

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BILL THOMPSON
Chief Administrative Law Judge

[1]If a motor fuel distributor fails to timely file a return and pay the tax due, the Department should apply the specific penalty levied by §40-17-10 and not the general penalties levied by 6§40-1-5(g) and 40-1-5(h). A specific penalty provision should take precedence over a general provision.