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.	§	

ORDER ON APPLICATION FOR REHEARING

Code of Ala. 1975, §40-17-10 provides that if a taxpayer "shall fail to make the monthly returns prescribed herein and pay the excise tax" by the 20th of the next month, the Department "shall make return for 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% . . . ."

The entire statute, including the 25% penalty, is premised on the taxpayer's failure to file a return. Otherwise there would be no need for the language -- ''the department of revenue shall make return for such delinquent . . . ." After computing a non-filing taxpayer's liability based on the best information available, the Department is then authorized to add a penalty based on the taxpayer's failure to file a return. Failure to pay will as a matter of course follow if a taxpayer fails to file.

The Department argues that "This court's emphasize on the use of 'and' instead of 'or' is misplaced". I disagree. If the Legislature had intended for the penalty to apply to either the

failure to file or the failure to pay, it could have easily worded the statute that way. The Legislature used "and" and the plain language of the statute must be followed.

Section 40-17-10 does not put an affirmative duty on a taxpayer to file and pay. Section 40-17-5 does that. Rather, the intent of §40-17-10 is to allow the Department to compute the tax due and add a penalty where the taxpayer has failed to file a return (and pay the tax due).

The intent and scope of §40-17-10 cannot be gleaned from an analysis of the various other penalty provisions of Title 40. The Revenue Code contains a analysis of the various other penalty provisions in chapter 17 of Title 40. The Revenue Code contains a hodgepodge of inconsistent penalty provisions. For example, income tax has a 25% failure to file penalty at §40-18-49, but no failure to pay provision. Sales tax has a 10% penalty if a taxpayer files a return but fails to pay the full amount due within 30 days after being notified of the deficiency (§40-23-13); another 10% penalty for failure to timely pay by the due date (§40-23-14); a 25% penalty for failure to file a return within 30 days after being notified to do so by the Department (§40-23-15); and another delinquent penalty of 1% per month if the Department audits a taxpayer, determines an additional amount due, and the taxpayer fails to pay within 10 days after demand by the Department (§40-23-16). In addition, §40-1-5(g) levies a general 15% penalty for

failure to timely file any return, and §40-1-5(h) levies a general 1% per month delinquent penalty for failure to pay. Given the inconsistent nature of the penalties in Title 40, no hidden meaning should be given the fact that §40-17-44 and §40-17-10 levy a penalty for failure to file and pay whereas §40-17-183 levies a penalty for failure to file only. In any case, as stated, the penalties are in practical affect the same because if a taxpayer fails to file he will almost always also fail to pay.

I agree that the Department is not required to pay interest on motor fuel refunds. However, requiring the Department to give immediate credit for overpayments is not the same as paying interest to a taxpayer. A taxpayer should pay interest on only t-he net tax due. By doing so a taxpayer will be charged less interest than under the method used by the Department, but no interest will be paid on any overpayment.

The fact that motor fuel taxes are reported and paid in monthly increments does not prohibit the Department from crediting an overpayment in one month against an underpayment in another month. The issue is not whether a credit should be allowed, but

when.[1]

The Department allowed a credit for overpayments against underpayments, but only at the end of the audit period. I believe that the credit should be allowed effective when the overpayment is made. While not specifically authorized by statute, that method is not prohibited and is the fairest and most reasonable method for allowing a credit. This case illustrates the point. The Taxpayer underpaid tax by $4,089.16 during the audit period, yet the Department has assessed interest of $14,201.76 and penalty of $18,230.90. I do not believe that result was intended or would be approved by the Legislature.

I feel constrained to point out that §40-17-40 relating to

[1]If no credit was allowed, then technically the Department would be required to refund the gross amount overpaid pursuant to the automatic refund provision, §40-29-71, and then assess and collect the gross deficiency in a separate action against the Taxpayer.

gasoline tax and §40-17-180 relating to oil, greases and substitutes both specify that an overpayment may be refunded or credited against tax due in any subsequent month. The Department could argue that the absence of a similar provision in Article 1 of Chapter 17 relating to diesel fuel is a negative inference that no similar credit should be allowed. I disagree. As stated, the question is not whether a credit should be allowed, but when.

The Department is not required to audit a taxpayer for possible past overpayments any time that a spot adjustment is made to a taxpayer's return. To illustrate, if the Department spot checks a single return and discovers a deficiency, the Department is not required to go back three years and determine if the taxpayer has a previously undiscovered overpayment that can be used to offset the deficiency. The Department should simply assess the deficiency and any applicable penalty and interest. However, if the Department becomes aware of a prior overpayment, through an audit or otherwise, then a credit should be allowed effective when the overpayment was made.

The above considered, the Department's Application for Rehearing is denied and the Final Order entered on October 22, 1991 is upheld.

Entered on November 26, 1991.

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BILL THOMPSON

Chief Administrative Law Judge