

STATE OF ALABAMA,  
DEPARTMENT OF REVENUE,

vs.

McPHERSON OIL COMPANY, INC.  
P. O. Box 1112  
Oneonta, AL 35121

Taxpayer.

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STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

DOCKET NO. MISC. 91-161

FINAL ORDER

The Revenue Department assessed motor fuel tax against McPherson Oil Company, Inc. for the period May, 1990. McPherson Oil appealed to the Administrative Law Division and a hearing was conducted on October 13, 1992. Assistant counsel John J. Breckenridge represented the Department. Gary Schiff represented McPherson Oil. The relevant facts are set out below.

In July, 1989, Marathon Oil sold 482,000 gallons of motor fuel to Bama Blenders, Inc. Bama Blenders is a dummy corporation established and used by McPherson Oil to take advantage of Marathon Oil's two-tiered pricing system. Bama Blenders has no employees or assets. Purchases made in the name Bama Blenders are paid for with checks bearing the name Bama Blenders, but the checking account is a joint McPherson Oil account and the funds in the account belong to McPherson Oil. All purchases in the name Bama Blenders are reported on McPherson Oil's monthly motor fuel returns.

Bama Blenders does not have a distributor's license and consequently purchased the fuel in issue using McPherson Oil's

motor fuel license number. The fuel was delivered by Marathon to McPherson Oil and subsequently resold by McPherson Oil for both on-road and off-road use.

Prior to July, 1989, Marathon Oil had always treated sales to Bama Blenders as tax-free sales to a licensed distributor. However, in early August, 1989 the Revenue Department notified Marathon Oil that Bama Blenders was not a licensed distributor and that all sales to Bama Blenders should be taxed. As a result, on August 7, 1989, Marathon Oil notified McPherson Oil that tax was due on the fuel in issue. McPherson Oil accordingly reported all of the fuel as taxable on its July, 1989 motor fuel tax return and then paid the tax to Marathon Oil in August, 1989. Marathon Oil subsequently remitted the tax to the Department.

McPherson Oil argues that tax was not due on that portion of the fuel in issue subsequently resold for off-road use. However, McPherson Oil waited to recover the overpaid tax pending a decision by the Administrative Law Division in a related case, State v. Bama Blenders, Inc., Docket No. MISC. 89-228. That case involved the wholesale oil license tax and a decision was issued in April, 1990 holding that Bama Blenders acted at all times as McPherson Oil's agent.

After the Bama Blenders ruling, McPherson Oil claimed a credit on its May, 1990 return for that portion of the tax previously paid on the off-road fuel. The Department denied the credit and

assessed additional tax plus interest and a 25% penalty. McPherson Oil subsequently appealed to the Administrative Law Division.

This case involves two issues: (1) Did McPherson Oil overpay tax on the fuel in issue, and (2) if tax was overpaid, should McPherson Oil have been allowed a credit for the overpayment on its May, 1990 return.

If Bama Blenders is considered an agent of McPherson Oil, the sale in issue was a tax-free sale to a licensed distributor (McPherson Oil) and tax should not have been paid until McPherson Oil later resold the fuel for on-road use. Also, even if Bama Blenders and McPherson Oil must be treated as separate entities for tax purposes, the sale again was not taxable because a sale to an unlicensed dealer (Bama Blenders) is taxable only if the seller (Marathon Oil) knows or has good reason to know at the time of the sale that the fuel will be used on-road, see, §40-17-11(1) (2) and (3). Marathon Oil could not have known when it sold the fuel what part (if any) of the fuel would be used on-road.<sup>1</sup> Again, tax

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<sup>1</sup> The Department's practice of taxing a distributor on all fuel sold to an unlicensed dealer and then allowing the distributor a credit for the fuel subsequently resold by the dealer for off-road use is rejected. Tax is not due under §40-17-11 until the seller knows that the fuel is to be used for on-road purposes. If the unlicensed dealer makes both on-road and off-road sales, then the distributor cannot know when he sells to the dealer if or how much of the fuel should be taxed. Consequently, tax is not due until the dealer resells the fuel for on-road purposes. Also, the Department's procedure of taxing all of the fuel up front and then allowing a subsequent credit creates the awkward situation where the distributor is dependent on the unrelated dealer to keep good records of on-road and off-road sales. A distributor's liability

should not have been paid until McPherson Oil resold the fuel for taxable on-road use.

In either case, tax was due only on that part of the fuel in issue used for taxable on-road purposes. Consequently, McPherson Oil overpaid tax on that part of the fuel used off-road. The issue then is whether the Department should have allowed McPherson Oil to claim a credit for the overpaid tax on its May, 1990 return.

The Department contends that tax periods must be treated separately and that a prior overpayment cannot be allowed as a credit in a subsequent period. I disagree.

While a credit is not specifically authorized by statute, it also is not specifically prohibited and the Department does have authority to issue automatic refunds without a petition pursuant to Code of Ala. 1975, §40-29-71. I see no practical difference in granting an automatic refund to a taxpayer and allowing the taxpayer to take a credit for the prior overpayment against subsequent tax due, as long as the credit is timely claimed.

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should not hinge on whether an unrelated third-party does or does not keep good records.

During the period in issue, a taxpayer had three years from the date of payment to recover an overpaid tax. See, Code of Ala. 1975, §40-1-34.<sup>2</sup> The tax in issue was overpaid in August, 1989. McPherson Oil claimed a credit for the overpayment in May, 1990, within the three year period. The credit was timely claimed and should be allowed.

Also, McPherson Oil appealed to the Administrative Law Division in May, 1991, again within the three year statute. McPherson Oil should not be penalized because the statute of limitations for filing a petition for refund expired while the case was on appeal.

The above considered, the tax overpaid by McPherson Oil on the off-road fuel in issue should be allowed as a credit against McPherson Oil's May, 1990 liability, and consequently no additional tax is due for that month. This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-

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<sup>2</sup> Code of Ala. 1975, §40-1-34 was repealed by passage of the Uniform Revenue Procedures Act effective October 1, 1992. Refunds and credits of all taxes are now governed by Code of Ala. 1975, §40-2A-7(c).

9(g).

Entered on February 1, 1993.

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BILL THOMPSON  
Chief Administrative Law Judge