STATE OF ALABAMA DEPARTMENT OF REVENUE, vs. MORGAN PROPERTIES, INC. d/b/a Morgan Oil Company P. O. Box 988 Cullman, AL 35056-0988 Taxpayer.	§ § § § § § §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION DOCKET NO. MISC. 91-260

FINAL ORDER

The Revenue Department assessed motor fuel tax against Morgan Properties, Inc. (Taxpayer) for the period May, 1988 through April, 1991. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on April 30, 1992. Don Hale appeared for the Taxpayer. Assistant counsel Claude Patton represented the Department.

FINDINGS OF FACT

The Taxpayer is a licensed motor fuel distributor in Cullman, Alabama.

The Department audited the Taxpayer and assessed additional motor fuel tax based on (1) 211,148 gallons of diesel fuel sold tax-free to Jack's Truck Stop and Parker I-65 Truck Stop, and (2) 46,923 gallons sold tax-free to Brock Egg Farm and Fairview Farms. The Taxpayer concedes that tax is owed on the Brock Egg Farm and Fairview Farms sales, but objects that no tax is due on the disputed sales to the two truck stops. The relevant facts are set out below.

The Taxpayer prepaid motor fuel tax to the Department when it

purchased the diesel fuel in issue from its suppliers. The Taxpayer subsequently sold and delivered the diesel either tax included or tax-free to the two truck stops during the audit period.

The truck stops sold the fuel from common tanks and pumps for both on-road and off-road use. The pump meters were reset after each sale and each sale was individually recorded. The truck stops also individually invoiced the off-road sales showing the name and address of the purchaser, the date, the number of gallons sold, and that the fuel was sold for off-road use. The Department examiners reviewed the invoices for a two month period and testified that the invoices were adequate. See, transcript at p. 32.

The truck stops would accumulate the off-road invoices over several months and then order another tax-free delivery when the invoices approximately equalled the amount previously purchased tax-free. The Taxpayer would then deliver the next shipment tax-free and claim a lumpsum credit on its next motor fuel return with the Department.

The Department claims that the off-road sales must be taxed because they were not "separately metered" as required by §40-17-21. The Department also argues that even if the off-road sales were properly metered and recorded, the Taxpayer should have claimed a credit for the off-road sales in the month in which the sales occurred.

CONCLUSIONS OF LAW

This case involves two issues: (1) Were the off-road sales

"separately metered" as required by §40-17-21; and (2) Should the Taxpayer have claimed a credit for the off-road sales in the month that they occurred.

What constitutes "separately metered" pursuant to §40-17-21 is unclear and has caused much confusion in administering the motor fuel tax.

Department Reg. 810-8-1-46(2) recognizes that on-road and off-road sales can be made from a common pump and tank, but the regulation contradicts itself in paragraph (1) by requiring that separate pumps and tanks must be maintained. Paragraph (1) also requires that the off-road tank and pump must be away from the on-road tank and pump and must be specially marked "non-highway use only" in at least four inch high letters. The Department in its letter brief concedes that paragraph (1) of Reg. 810-8-1-46 is wrong and that off-road and on-road sales can be made from the same tank and pump. Nonetheless, the Department argues that "separately metered" requires that each pump must have two independent metering devices on which the off-road and on-road sales are separately metered.

A statute must be construed to carry out the intent of the Legislature. Chemical Waste Management, Inc. v. State, 512 So.2d 115. Section 40-17-21 was enacted in 1982 and was intended to accommodate retail dealers by allowing them to make both off-road and on-road sales from the same pump and the same tank as long as the exempt off-road sales are accurately recorded. The Legislature certainly did not intend to make all one meter diesel pumps

obsolete by requiring all retail dealers to buy new equipment with two meters on each pump. There is no evidence that such two meter pumps are even available.

"Separately metered" as used in §40-17-21 requires that the meter on a common pump must be reset after each sale so that each sale is separately recorded. Good records must also be maintained verifying the amount of each off-road sale and that the sale was for off-road purposes. Recently enacted Act 92-543 also requires that a retailer must prepare and maintain an off-road exemption certificate for all off-road sales.

The opportunity for abuse concerning the motor fuel tax is clear, but a purchaser can claim off-road use whether the fuel is sold through a pump with two meters or only one meter. The retailer must usually rely on the purchaser's statement in either case. All that a retailer can reasonably do is meter the gallons sold, keep an invoice of the sale, and attach the exemption certificate required by Act 92-543.

The Department argues that Ex Parte White, 477 So.2d 422, supports its contention that two separate metering devices must be maintained. I disagree. There is no Department regulation requiring two separate metering devices on each pump. Reg. 810-8-1-46(2) simply repeats the statute that the sale must be separately metered. It does not define what is meant by separately metered.

In any case, the regulation in Ex Parte White did not attempt to interpret a statute, but rather was a "bookkeeping" regulation

that set out a reasonable method for recording taxable and non-taxable utility services. This case turns on the statutory construction of the words "separately metered". Thus, even if a Department regulation defined "separately metered" as requiring two meters, the regulation would not be binding and must be set aside where a different construction is intended by the Legislature. Boswell v. Bonham, 297 So.2d 379; East Brewton Materials, Inc. v. State, Department of Revenue, 223 So.2d 751.

The Department objects that the Taxpayer should have claimed a credit for the off-road sales in the month that the sales were made. However, assuming that the accepted practice of a distributor prepaying the tax and then claiming a credit for all subsequent off-road sales is correct, there is no statute or Department regulation requiring a distributor to claim the credit in the month that the exempt sale is made. The Department is not harmed by a distributor waiting one or more months to claim a credit because the Department has use of the distributor's money in the interim.

The off-road invoices reviewed by the Department were adequate. If the Department questions the accuracy of the remaining invoices, the Department should review the invoices to insure that all off-road sales were properly recorded. All properly invoiced off-road sales at the two truck stops should be excluded from the assessment. The assessment, as adjusted, should then be made final. The Administrative Law Division will retain jurisdiction in case any questions arise concerning the invoices.

Entered on August 19, 1992.

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BILL THOMPSON
Chief Administrative Law Judge