STATE OF ALABAMA, DEPARTMENT OF REVENUE, vs. FLETCHER OIL COMPANY, INC., 5190 College Parkway Eight Mile, AL 36613 Taxpayer.	§ § § § § §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION DOCKET NO. MISC. 92-143

FINAL ORDER

The Revenue Department separately assessed gasoline and motor fuel tax against Fletcher Oil Company, Inc., (Taxpayer) for the period May, 1987 through April, 1990. The Taxpayer appealed both assessments to the Administrative Law Division and a hearing was conducted in Mobile on May 22, 1990. John Crowley appeared for the Taxpayer. Assistant counsel Claude Patton represented the Department.

FINDINGS OF FACT

The Taxpayer is a licensed motor fuel distributor in Mobile, Alabama. The Department audited the Taxpayer and assessed additional motor fuel tax and gasoline tax for the period May, 1987 through April, 1990.

The Department assessed tax on motor fuel sold by the Taxpayer to the Mobile Transit Authority (MTA) for on-road use. The Taxpayer claims that those sales were exempt. The Taxpayer also argues that a portion of the assessment period is barred by the three year statute of limitations set out at §40-17-41 because (1) certain waivers purportedly keeping the assessment period open are invalid; and (2) the Department failed to commence an action for

recovery of the taxes within three years as required by the above statute. The relevant facts are set out below.

The Department started a motor fuel and gasoline tax audit of the Taxpayer sometime in May, 1990. The audit period covered the months of May, 1987 through April, 1990.

To allow the Department auditor more time to complete the audit, the Department and the Taxpayer executed a waiver of the statute of limitations on June 5, 1990 extending the statute until July 20, 1990. (The 3 year statute for May, 1987 would have expired on June 20, 1990, assuming that the May, 1987 return was filed on its due date of June 20, 1987). A second waiver was executed on July 10, 1990 extending the statute until September 20, 1990. A third waiver was signed by both parties but was undated by the Taxpayer and incompletely dated "September 1990" by the Department examiner. A fourth waiver was executed by the parties on December 12, 1990. That waiver when signed by the Taxpayer extended the statute until "December 20, 1990", but was later altered by the Department examiner to read "January 20, 1990". The Taxpayer was not informed of and did not consent to the alteration. A fifth waiver was dated January 18, 1991. The extended statute date on that waiver was originally "March 20, 1990", but was changed by the Department examiner to read "March 20, 1991". Again, the Taxpayer was not informed of and did not consent to the alteration. A sixth waiver was signed on March 20, 1991 extending the statute to May 31, 1991, and a final seventh waiver was

executed on May 13, 1991 extending the statute to September 30, 1991.

The Department entered a "Notice of Amount and Request for Payment (of) Motor Fuel Tax" (Notice) on June 18, 1991. A similar Notice was also issued on that date for additional gasoline tax. The Notices informed the Taxpayer that the Department "has tentatively determined that the following amounts may be due" for the assessment period. The Notices also scheduled an informal conference for July 10, 1991 to allow the Taxpayer to show cause why "such amounts should not be assessed".

The Taxpayer failed to pay the amounts claimed, and the Department subsequently entered both motor fuel and gasoline tax preliminary assessments against the Taxpayer on January 24, 1992. The assessments were entered for the original audit period May, 1987 through April, 1990 and state that the Department "has determined the following amounts to be due" for the assessment period. The Taxpayer timely appealed the preliminary assessments to the Administrative Law Division as required by Department regulation.

CONCLUSIONS OF LAW

The Taxpayer first argues that the motor fuel sold to the MTA is exempt under the rule of exemption set out in City of Anniston v. State, 91 So.2d 211. That case held that "when a tax levy is

made in general terms with nothing to indicate that it was intended to apply to a city or a county, it will be held not to so apply". See, City of Anniston, at page 212.

My research reveals that the above rule has not been cited as authority in any reported case since the City of Anniston case. The rule was argued by the taxpayer in Town of Hackleburg v. Northwest Alabama Gas District, 170 So.2d 792, and the Alabama Supreme Court rejected the rule, holding that "the state may tax cities as other persons, providing the intent to tax is clear, . . ." The issue then is whether the Legislature intended for cities and counties to be liable for the $.08 per gallon tax during the audit period.

The $.08 per gallon tax levied at §40-17-2 was enacted in 1939 and applies to all motor fuel sold, used, consumed, etc., in Alabama. The $.04 per gallon tax levied at §40-17-220 was enacted in 1980. Sales to cities and counties were specifically exempted from the additional $.04 per gallon tax, see §40-17-220(d)(4). The fact that the Legislature specifically exempted cities and counties from the $.04 per gallon tax in 1980, but passed no similar exemption concerning the existing $.08 per gallon tax shows that the Legislature was aware of and intended for the $.08 per gallon tax to apply to cities and counties.

The Legislature exempted cities from the $.08 per gallon tax with passage of Act 91-665 (§40-17-250) in 1991. A specific

exemption would not have been necessary if cities (and counties) had not been subject to the tax to begin with. By not including counties in the 1991 exemption, the Legislature has expressed its intent that sales to counties are still subject to the $.08 per gallon tax.

Diesel fuel sold to counties for on-road use is subject to the $.08 per gallon tax. The sales by the Taxpayer to the MTA were thus properly included in the audit. The above holding is affirmed by the rule of construction that an exemption must be construed in favor of the Department and against the taxpayer. State v. Cheseborough-Ponds, Inc., 441 So.2d 598; Community Action Agency of Huntsville v. State, 406 So.2d 890.

Issues 2 and 3 concerning the validity of the waivers and when an action is commenced by the Department are interrelated and will be addressed together.

Section 40-17-41 is applicable to all motor fuel excise taxes and provides that "all actions by the state" for the recovery of additional tax "shall be commenced" within three years from when the return was filed.

There is no authority concerning when an action is commenced by the Department under §40-17-41. The Taxpayer argues that action was commenced when the preliminary assessments were entered on January 24, 1992. However, I agree with the Department that action was commenced for purposes of the statute of limitations when the Notices for additional tax due were issued by the Department on

June 18, 1991. The Notices formally declared the amounts owed by the Taxpayer and began a series of formal procedures by which the Taxpayer could challenge the amounts claimed, and, if not paid, the Department could assess and collect the tax due.

The amounts of tax claimed by the Department on the Notices are definite. Use of the terms "tentatively determined" and "tentative decision" in the Notices does not indicate that the Department has not instituted formal action against the Taxpayer, but only recognizes the Taxpayer's right to challenge the amounts claimed and that the amounts may be reduced if the Taxpayer can prove that they are excessive.

The above holding is supported by the rule of construction that a statute of limitations restricting the Department's ability to assess tax must be strictly construed in favor of the Department and against the taxpayer. Lucia v. United States, 474 F.2d 565; Badaracco v. C.I.R., 104 S.Ct. 756.

The next question is what part of the original audit period was still open for assessment when formal action was commenced on June 18, 1991. The Department concedes that the third waiver dated "September 1990" is incompletely dated and therefore invalid. I agree. The fourth and fifth waivers dated December 12, 1990 and January 18, 1991 are also invalid because they were materially altered by the Department agent without the consent or knowledge of the Taxpayer. The Department should generally be held strictly

accountable for the proper preparation and execution of all waivers. See also the cases cited in Taxpayer's brief.

The last two waivers dated March 20, 1991 and May 13, 1991 were properly executed and are not challenged by the Taxpayer. What is the effect of those valid waivers? Both parties agree that a subsequently executed valid waiver cannot revive a period that has already expired. Thus, all periods for which returns were filed prior to March 20, 1988 (3 years back from the March 20, 1991 valid waiver) are barred and should be deleted from the assessments. All periods for which returns were filed after March 20, 1988 were kept open by the March 20 waiver (and the subsequent May 13 waiver) and were thus open when the Notices were issued in June, 1991. Those periods should be included in the assessments. The assessments should be adjusted accordingly and then made final, plus applicable interest.

Entered on September 15, 1992.

BILL THOMPSON
Chief Administrative Law Judge