

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

vs.

PETROLEUM SUPPLIERS, INC.
P.O. Box 30
Guntersville, AL 35976,

Taxpayer.

§
§
§
§
§
§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. MISC. 92-191

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed State, gasoline and motor fuel tax and Marshall County fuel tax against Petroleum Suppliers, Inc. (Taxpayer) for the period November 1988 through September 1991. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on September 30, 1991. Dean Mooty represented the Taxpayer. Assistant counsel John Breckenridge represented the Department.

The Taxpayer is a licensed gasoline and motor fuel distributor that sold gasoline and motor fuel in Marshall County and various other counties in North Alabama during the years in question.

This appeal involves issue: (1) Is the Taxpayer liable for motor fuel tax on the sale of motor fuel to an unlicensed retail dealer, Ollie Burroughs Grocery; (2) Is the Taxpayer liable for Marshall County fuel tax on the sale of gasoline commercial accounts for off-road use in Marshall County; (3) Is the Taxpayer liable for gasoline tax on the sale of gasoline to an unlicensed marina; and (4) Relating to issues (2) and (3) above, can the Department be estopped from collecting tax because the Department

had previously treated the transactions in issue as nontaxable.

Issue 1 - The taxability of motor fuel sold by the Taxpayer to an unlicensed retail dealer for resale.

The Taxpayer sold motor fuel to an unlicensed retail dealer, Burroughs Grocery, during the period in question. Burroughs failed to keep adequate records showing how much of the fuel was resold for exempt off-road use. The Department consequently assessed the Taxpayer on the entire amount sold to Burroughs.

The issue of when and in what amount a licensed distributor is liable for motor fuel sold to an unlicensed retail dealer has been the subject of several Administrative Law Division cases, most recently Department v. Mathews and Mathews, Inc., Docket No. Misc. 91-164, and Department v. Williams Oil Company, Docket No. Misc. 92-175.

The Department's position has consistently been that a distributor is liable for motor fuel tax on all motor fuel sold to an unlicensed dealer. However, if the dealer properly documents off-road sales (as required by Department regulations) and the sales are separately metered as required by §40-17-21, the distributor will be credited for those documented off-road sales.

In other words, the Department's position is that a distributor is liable for the retail dealer adequate records or separately meter the exempt off-road sales. As in Mathews and Mathews, Inc. and Williams Oil, Inc., I disagree.

The motor fuel tax is levied on the sale of motor fuel in Alabama, but only if the fuel is used in motor vehicles operated on the highways of Alabama. See, §§40-17-1, 40-17-2, 40-17-3, 40-17-5, and 40-17-11.

Pursuant to §40-17-11, a distributor is not liable for tax on the sale of motor fuel to an unlicensed dealer except under three circumstances: (1) Where the distributor pumps the fuel directly into a motor vehicle to be used on the highways of Alabama; (2) Where the distributor sells and delivers the fuel to a retail dealer that resells the fuel for on-road use only; and (3) Where the distributor sells the fuel knowing or having good reason to know that the fuel will be used on the highways of Alabama. In addition, all sales to a licensed retail dealer are exempt. See, last sentence of §40-17-11(3).

In other words, a distributor is not liable for fuel tax unless he knows or has reason to know at the time of sale that the fuel will be used for taxable on-road purposes. A distributor that sells fuel to an unlicensed dealer that subsequently resells the fuel for both on-road and off-road purposes cannot know when he sales the fuel to the retail dealer how the fuel will be used. Consequently, the distributor is not liable when he sales the fuel to the dealer.

Rather, the retail dealer that purchases the fuel should be licensed pursuant to §40-17-14, and the dealer is liable for all

fuel sold for taxable on-road purposes. The dealer is also required to keep adequate records establishing off-road sales, but in the absence of adequate records the dealer, not the distributor, should be liable for the tax.

The Taxpayer in this case is not liable for tax on the sales to Burroughs Grocery because it could not have known when it sold the fuel to Burroughs how much, if any, would be resold for taxable on-road use. Rather, Burroughs should be liable for the tax on all fuel for which there are no records showing that the fuel was sold for exempt off-road purposes.

The fact that a retail dealer is not licensed does not change the dealer's liability for the motor fuel tax. A retail dealer cannot avoid liability for a tax by failing or refusing to properly obtain a license from the Revenue Department.

Issue II - The Marshall County Tax Issue

The Taxpayer concedes that sales the fuel sold to commercial accounts in Marshall County isn't exempt from the Marshall County fuel tax. However, the Taxpayer does argue that the Department should be estopped from collecting the Marshall County tax because the Department did not consider similar transactions to be taxable prior to the audit period.

The Department should perhaps as a matter of policy notify a taxpayer when it intends to change its position and tax transactions that in the past were not taxed. However, the

Department cannot be estopped from collecting a tax that is legally owed because the Department failed to assess and collect the tax for prior periods. Boswell v. Abex, 317 So.2d 317. Department v. Maddox Tractor Company, 69 So.2d 426.

Issue III - The taxability of gasoline sold to an unlicensed marina.

The Taxpayer paid the gasoline tax on the sales of gasoline to marinas prior to the period in issue. However, the Taxpayer was subsequently informed by the Department that gasoline tax was not due on sales to marinas. Consequently, the Taxpayer failed to charge gasoline tax on its marina sales during part of the audit period.

The Alabama gasoline taxes levied at §§40-17-31 (\$.12 per gallon) and 40-17-221 (\$.04 per gallon) are levied on the use, sale, withdrawal, etc. of gasoline in Alabama. Unlike the motor fuel tax, the gasoline taxes are not limited to only gasoline used for on-road purposes. Rather, the taxes are due on the sale of all gasoline unless the sale is for resale to another licensed distributor, see, §40-17-32, or is made outside of Alabama, or is exempted under §40-17-220(d).

Section 40-17-220(b) exempts the sale of gasoline used in boats. However, since the sale of the gasoline is the taxable event, the above exemption applies only when the taxable sale is made directly for use in a boat. Consequently, although some if

not most of the gasoline sold to the marina in issue was subsequently used in boats, the exemption doesn't apply because the purchaser, the marina, was not using the gasoline for the exempt purpose.

Issue IV - Estoppel

The Taxpayer also argues that the Department should be estopped from assessing tax based on erroneous advice given by a Department employee. However, as in Issue II above the Department cannot be estopped from collecting the tax that is otherwise due based on the erroneous advice given by a Department employee. Boswell v. Abex, supra; State v. Maddox Tractor & Equipment Company, supra.

The Department is directed to recompute the assessments in issue in accordance with the above findings. A Final Order will then be entered setting out the amounts due. The Final Order, when entered, may be appealed to circuit court pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on February 10, 1994.

BILL THOMPSON
Chief Administrative Law Judge