

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

vs.

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

Taxpayer.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. MISC. 92-191

FINAL ORDER

The Revenue Department assessed Alabama gasoline and motor fuel tax and also Marshall County motor 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, 1993. Dean Mooty represented the Taxpayer. Assistant counsel John Breckenridge represented the Department.

The Taxpayer is a licensed gasoline and motor fuel distributor in North Alabama. This case involves three issues: (1) Is the Taxpayer liable for State motor fuel tax on the sale of motor fuel to an unlicensed retail dealer, Burroughs Grocery; (2) Is the Taxpayer liable for Marshall County fuel tax on the sale of gasoline to commercial accounts for off-road use in Marshall County; and (3) Is the Taxpayer liable for State gasoline tax on the sale of gasoline to an unlicensed marina.

Issue 1.

The Taxpayer sold motor fuel to an unlicensed retail dealer, Burroughs Grocery, during the period in question. Burroughs resold the fuel for both on-road and off-road use, but failed to keep adequate records verifying the non-taxable off-road sales. The

Department consequently assessed the Taxpayer on all of the motor fuel sold to Burroughs.

This issue turns on the extent of a distributor's liability on the sale of motor fuel to an unlicensed dealer.

The Department argues that a distributor is liable for tax on all motor fuel sold to an unlicensed retail dealer. However, the Department will allow the distributor a subsequent credit for the fuel resold by the unlicensed dealer for non-taxable off-road use, but only if the unlicensed dealer keeps adequate records and separately meters the off-road sales. If the dealer fails to keep adequate records, as in this case, the Department holds the distributor liable for the undocumented sales.

I disagree with the Department's position for the reasons stated below.

All sales of motor fuel to a licensed purchaser are tax-free. §40-17-11. Section 40-17-11 also provides that a distributor is not liable on the sale of motor fuel except under the specific circumstances set out in subparagraphs (1)(2) and (3) of §40-17-11.¹ Because all sales to a licensed purchaser are tax-free, the

¹ Section 40-17-11 provides in pertinent part as follows: ". . . the Department of Revenue shall permit the sale or use of motor fuels without liability on the part of the distributor or storer for the tax herein levied except: (1) Where the distributor or storer delivers motor fuel into the fuel supply tank of a motor vehicle for the propulsion thereof on the public highways of this state. (2) Where the distributor or storer delivers motor fuel into dispensing equipment of a retail dealer designed and used to supply motor fuel into the fuel supply tank of a motor vehicle for the propulsion thereof on the public highways of this state. (3) Where the distributor or storer sells or distributes

above provision of §40-17-11 can only be interpreted to mean that a sale to an unlicensed purchaser can be taxed only as provided in subparagraphs (1)(2) and (3). That is, motor fuel can be taxed only if sold to an unlicensed purchaser directly for on-road use, or the distributor must know or have reason to know at the time of sale that the fuel will be used or resold by the unlicensed purchaser for a taxable on-road purpose. Otherwise, a sale of motor fuel by a distributor to an unlicensed purchaser cannot be taxed.

The sale of motor fuel to an unlicensed dealer that resells the fuel for both on-road and off-road use cannot be taxed because the distributor making the sale cannot know or have reason to know at the time of sale how the fuel will ultimately be used. All Department regulations to the contrary, including Reg. 810-8-1-.36(3), are rejected. The same result was reached in several other recent Administrative Law Division cases. See Docket Nos. Misc. 92-175 and Misc. 91-164.

The Taxpayer in this case could not know or have reason to know whether Burroughs would resell the fuel in issue for a taxable or non-taxable purpose. Consequently, the sale of the fuel by the Taxpayer cannot be taxed, and Burroughs became responsible for tax on all fuel it resold for on-road use. The Department is correct that Burroughs was required to keep adequate records verifying the

motor fuel, knowing or having good reason to know that the motor fuel is to be used for propelling motor vehicles on the public highways of this state."

off-road sales. However, Burroughs is liable for tax on any undocumented sales, not the Taxpayer.

All retail dealers such as Burroughs that sell motor fuel for both on-road and off-road purposes should be licensed under §40-17-14. However, the fact that Burroughs was not licensed did not convert the non-taxable sales by the Taxpayer into taxable transactions.

Issue 2.

This issue involves the sale of gasoline to commercial accounts for off-road use in Marshall County.

The Taxpayer concedes that the sales were taxable, but argues that the Department should be estopped from collecting the tax for the period in question because the Department failed to assess the tax in prior audits.

However, the Department cannot be estopped from collecting a tax that is legally owed because the tax was not assessed on similar past transactions. Boswell v. Abex, 317 So.2d 317. Consequently, the Marshall County tax in issue was properly assessed.

Issue 3.

This issue involves the sale of gasoline by the Taxpayer to an unlicensed marina for resale to pleasure crafts.

Code of Ala. 1975, §40-17-220(d) exempts from the \$.04 per gallon gasoline tax all gasoline sold for use in ships. However, that exemption does not apply in this case because the taxable sale occurred when the Taxpayer sold the gasoline to the unlicensed

marina. Tax accrued at that point, and the fact that the marina subsequently resold the gasoline for an exempt purpose is irrelevant.

The Taxpayer again argues that the Department should be estopped from collecting the tax because the Department had not taxed similar transactions prior to the audit period. However, as before, the Department cannot be estopped from collecting a tax that is due because the Department failed to collect the tax on prior similar transactions. Boswell v. Abex, supra.

The above considered, the motor fuel tax assessment in issue is dismissed. The gasoline tax assessment is upheld and judgment is entered against the Taxpayer in the amount of \$6,979.30. The Marshall County fuel tax assessment is also upheld, and judgment is entered against the Taxpayer in the amount of \$1,288.03.

This Final Order may be appealed to circuit court within 30 days as allowed by Code of Ala. 1975, §40-2A-9(g).

Entered on March 31, 1994.

BILL THOMPSON
Chief Administrative Law Judge