

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

vs.

BRUNO'S, INC.
P. O. Box 2486
Birmingham, AL 35201,

Taxpayer.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. INC. 92-298

FINAL ORDER

The Revenue Department assessed Bruno's, Inc. (Taxpayer) for privilege license tax for the period October, 1989 through September, 1992. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on April 19, 1993. Peter Pillitteri, John Allen, and David Spradlin appeared for the Taxpayer. Assistant counsel John J. Breckenridge represented the Department.

The Taxpayer operated between 112 and 118 retail grocery stores in Alabama during the years in issue. The issue in dispute is whether the stores were subject to the annual wholesale soft drink license levied at Code of Ala. 1975 §40-12-70. Section 40-12-70 reads as follows:

Each person engaged in the business of selling at wholesale non-alcoholic, carbonated or other soft drinks, shall pay an annual license tax of \$50.00; provided, that bottlers who have taken out the bottle license for operating plants in this state shall not be liable under this section, nor shall bottlers be liable for any county or state license under §40-12-174, nor as transient vendors or dealers or peddlers.

The Taxpayer's stores sell primarily at retail, but also sell soft drinks and other items at wholesale if a customer presents a retail sales tax license which allows the customer to buy without paying sales tax. The Department audited the Taxpayer, discovered that the stores made occasional wholesale sales, and based thereon assessed each store for the annual wholesale soft drink license in issue.

The Taxpayer argues that the wholesale license is not due because its stores are not "in the business" of selling at wholesale. As stated, the stores sell at wholesale only if a customer presents a retail sales tax license allowing the customer to buy without paying sales tax. The Taxpayer does not advertise as a wholesaler and charges the same base price whether the sale is at wholesale or retail.

No evidence was introduced indicating how many soft drinks the stores sold at wholesale during the audit period. The Taxpayer presented evidence for the period November 17 - December 14, 1991 showing gross sales of \$118,150,170.06, of which \$610,624.08 or approximately 1/2 of 1% were tax-free wholesale sales. The Taxpayer was unable to identify what portion of the wholesale sales constituted wholesale soft drink sales.

The wholesale soft drink license was enacted as part of the General Revenue Act of 1935 (Acts 1935, No. 194, p. 256, see,

specifically Sch. 129 on p. 491). That statute exempted licensed bottlers from also paying the wholesale soft drink license.

The aforementioned bottlers license was also included in the 1935 Act, but as originally enacted the bottlers license statute did not mention that licensed bottlers were exempt from the wholesale soft drink license.

The bottlers license statute (now §40-12-65) was amended in 1945 (Act No. 504), and for the first time stated that licensed bottlers were exempt from the wholesale soft drink license. The added language read as follows:

Exemptions: -- Bottlers paying the license hereunder shall be exempt from payment of Transient Dealers license levied under Section 609, and Wholesale Bottlers license levied under Section 483, of this title. (underline added)

The bottlers license was amended again in 1953 (Act No. 704) and the exemption language was modified as follows:

Bottlers paying the license hereunder where such business is engaged in bottling drinks exclusively shall be exempt from payment of transient dealers license levied under Section 609, and wholesale bottlers license levied under Section 483 of this title. (underline added)

By referring to the wholesale soft drink license as a "wholesale bottlers license", the Legislature obviously understood that the license applied only to bottlers regularly engaged in the business of selling their product at wholesale in Alabama. Apparently, only bottlers sold soft drinks at wholesale when the above amendments were passed. Clearly the Legislature did not

envision that retail merchants would also be liable for the license. However, I would also include any other wholesaler regularly engaged in the business of selling soft drinks at wholesale.

Whether a person is regularly engaged in the business of selling at wholesale must be decided on the facts of each case. Engaging in business as a wholesaler is different from making occasional or incidental wholesale sales. In my opinion, a retail grocery store that does not hold itself out as a wholesaler, does not advertise as a wholesaler, and importantly, charges the same price on both wholesale and retail sales, is not in the business of selling at wholesale within the scope of the statute. A retail grocery store is not in business as a wholesaler simply because the retailer occasionally sells tax-free to another licensed retailer. Rather, the wholesale sales are incidental to the retailer's primary business activity of selling at retail.

If the Department is correct, then all retail grocery stores, convenience marts, and all other retail outlets that occasionally sell tax-free to another licensed retailer would be liable for the license. Again, I do not believe that was intended by the statute.

Accordingly, the Taxpayer's stores are not in the business of selling soft drinks at wholesale within the scope of the license statute, and the final assessment in issue is vacated.

The above conclusion is supported by the rule of statutory construction that a statute levying a tax must be strictly construed against the Department and in favor of the taxpayer. Hamm v. Business Music, Inc., 209 So.2d 663.

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

Entered July 12, 1993.

BILL THOMPSON
Chief Administrative Law Judge