STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISIONS
v.	§	DOCKET NO. MISC. 93-107
LL&E PETROLEUM MARKETING, INC. P.O. Box 60350 New Orleans, LA 70160,	§	MISC. 93-151
Taxpayer.	§	

FINAL ORDER

The Revenue Department denied petitions for refund of gasoline excise tax filed by LL&E Petroleum Marketing, Inc. (Taxpayer) for the months of April, 1992 and September, 1992. The Taxpayer appealed and the cases were consolidated and heard together on July 27, 1993. Joseph J. DeSalvo, Jr. represented the Taxpayer. Assistant counsel John Breckenridge represented the Department.

The issue in this case is whether the Taxpayer is liable for Alabama gasoline tax on the withdrawal and subsequent sale of naphtha in Alabama during the subject months. That issue turns on two sub-issues: (1) Does the naphtha in issue constitute "gasoline" as defined at Code of Ala 1975, §40-17-30(1); and (2) Would taxing the naphtha violate the Commerce Clause of the United States Constitution.

The relevant facts are undisputed.

The Taxpayer is a licensed motor fuel distributor in Alabama. The Taxpayer sold 50,000 barrels of LSR naphtha to Dow Hydrocarbons and Resources, Inc. (Dow) on April 15, 1992. The Taxpayer delivered the naphtha to Dow at Mobile, FOB One Safe

Port/Berth, Mobile, Alabama. Dow subsequently arranged for transportation of the naphtha to Louisiana where it was resold. The Taxpayer remitted gasoline tax of $230,471.77 to the Department on the above withdrawal and sale of the naphtha in Alabama.

LSR naphtha is a highly volatile hydrocarbon normally used for feed to a cracking unit to make ethylene. The parties have stipulated that LSR naphtha is not commonly used in internal combustion engines.

The Taxpayer later sold 2,099,875 gallons of BTX reformer naphtha to Lyondell Petrochemicals Company (Lyondell) on September 18, 1992, and another 2,103,017 gallons to Lyondell on September 26, 1992. The Taxpayer delivered the naphtha to Lyondell in Mobile, FOB One Safe Port/Berth, Mobile, Alabama. Lyondell subsequently arranged for transportation of the naphtha to Texas, where it was used as a petrochemical feedstock. The Taxpayer remitted gasoline tax of $672,462.72 to the Department on the above withdrawal and sale of the naphtha in Alabama.

BTX reformer naphtha is a highly volatile hydrocarbon normally used as a feedstock for the production of benzene, toluene and xylene. The parties have stipulated that BTX reformer naphtha is not commonly used in internal combustion engines.

The Taxpayer subsequently petitioned for a refund of the gasoline tax paid on the above transactions. The Department denied the refunds and the Taxpayer appealed to the Administrative Law Division.

"Gasoline" is defined for gasoline tax purposes at Code of Ala. 1975, §40-17-30(1) as follows:

> (1) GASOLINE. Gasoline, naphtha, and other liquid motor fuels or any device or substitute therefor commonly used in internal combustion engines; . . . ".

The Taxpayer argues that the naphtha in issue is not gasoline as defined above because naphtha is not "commonly used in internal combustion engines". I disagree.

Section 40-17-30(1) defines "gasoline" in three parts, (1) "gasoline", (2) "naphtha", and (3) "other liquid motor fuels or any device or substitute therefor commonly used in internal combustion engines". Gasoline and naphtha are included within the definition regardless of how they are used or intended to be used. The phrase "commonly used in internal combustion engines" does not relate to gasoline or naphtha, but rather modifies only the phrase " . . . and other liquid motor fuels or any device or substitute therefor . . .". Consequently, naphtha is subject to the gasoline tax even though it is not commonly used in internal combustion engines.

The Taxpayer argues that naphtha was included in the definition of gasoline only because naphtha was at one time used in internal combustion engines. The Taxpayer may be correct on that point. However, the plain wording of the statute must govern, and §40-17-30(1) clearly includes naphtha as "gasoline", without stipulation as to how it is commonly used.

The Taxpayer's argument is also defeated by Code of Ala. 1975,

§40-17-32, which provides that the person withdrawing or distributing gasoline shall be liable for the tax "whether such withdrawals are for sale or for other use, whether (the gasoline) is used or consumed in this state in any manner or for any purpose . . . ." (underline added)

The Taxpayer next argues that taxing the transactions in issue violates the Commerce Clause of the United States Constitution because the naphtha was subsequently transported and used outside of Alabama. I disagree.

The Alabama gasoline tax is levied on the sale, use, consumption, distribution, storage or withdrawal of gasoline in Alabama. Consequently, the withdrawal and subsequent sale of the naphtha by the Taxpayer in this case can be taxed because both taxable events occurred within Alabama. Code of Ala. 1975, §40-17-32. Also, there is no evidence that the naphtha had entered the stream of interstate commerce when the Taxpayer delivered the naphtha and thereby completed the sales to the purchasers in Mobile. Rather, the purchasers, not the Taxpayer, arranged for transportation of the naphtha outside of Alabama after the sales were completed.

Also, even if the Commerce Clause is applicable, gasoline tax can still be assessed by the Department.

A state can still levy a tax on a transaction involving interstate commerce if the tax (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly

apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to services provided by the state. Complete Auto Transit, Inc. v. Brady, 97 S.Ct. 1076.

The Alabama gasoline tax clearly meets the four-pronged Complete Auto Transit test in this case. First, the taxable activity, the sale of the gasoline in Alabama, obviously has a substantial nexus with Alabama. The tax can be assessed only if the withdrawal and/or sale occurs within Alabama. Second, no apportionment of the tax is necessary because again the taxable event, the withdrawal and sale of the gasoline, must occur in Alabama for the tax to apply. Third, the tax does not discriminate against interstate commerce because it applies equally to all gasoline withdrawn and sold in Alabama, regardless of where the gasoline is subsequently used. The tax burden is the same on gasoline used both within Alabama and outside of Alabama. Finally, the tax is fairly related to services provided by Alabama to the Taxpayer.

The Taxpayer argues that the tax violates the fourth prong of the Complete Auto Transit test because it is not related to services provided to the purchasers, Dow and Lyondell. That argument is misguided. Rather, the tax must only be fairly related to the person and activity that is being taxed, the withdrawal and/or sale of the naphtha by the Taxpayer within Alabama. The Taxpayer as a licensed motor fuel distributor doing business within Alabama and can certainly be expected to pay its fair share of the

cost of State services relating to the storage, withdrawal and subsequent sale of the naphtha in Alabama. See generally, Commonwealth Edison Company v. Montana, 101 S.Ct. 2946, at pages 2955 - 2960.

Finally, the Taxpayer's analogy between the gasoline tax and the motor fuel tax levied at Code of Ala. 1975, §40-17-1, et seq. is also misguided. The motor fuel tax is levied only on motor fuel used "in the operation of any motor vehicle upon the highways of this state". Code of Ala. 1975, §40-17-2. There is no similar provision in the gasoline tax law. Rather, the gasoline tax is on all "gasoline", including naphtha, that is withdrawn, sold, etc. in Alabama, regardless of where or how it is subsequently used.

For the above reasons, the petitions for refund in issue were properly denied by the Department. This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on January 26, 1994.

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BILL THOMPSON
Chief Administrative Law Judge