STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
v.	§	DOCKET NO. MISC. 93-155
WILLIAMS OIL COMPANY, INC. P.O. Box 220 Bridgeport, AL 35740,	§	
Taxpayer.	§	

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed gasoline and motor fuel tax against Williams Oil Company, Inc. ("Taxpayer") for the month of November, 1992. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on September 27, 1993. The Taxpayer was represented at the hearing by Sterling V. Frith and Teddi Lane Carte. Assistant counsel John Breckenridge represented the Department.

This case involves two primary issues: (1) Did the Department properly revoke the Taxpayer's gasoline distributors license effective August 28, 1992; and (2) If the license was properly revoked, did the Department properly assess the Taxpayer's entire inventory of gasoline and motor fuel previously purchased tax-free.

The facts are undisputed.

The Taxpayer is a gasoline and motor fuel distributor headquartered in Bridgeport, Alabama. Prior to August, 1992, the Taxpayer was properly licensed with the Department as a gasoline

distributor under Code of Ala. 1975, §40-12-195.[1]

The Department notified the Taxpayer by certified mail on July 31, 1992 that its license would be revoked if a delinquent motor fuel liability for February, 1991 was not paid by August 20, 1992. The letter was served by certified mail to the Taxpayer's business address, P.O. Box 220, Bridgeport, Alabama

As discussed below, although the July 31 notice letter was delivered to the Taxpayer's proper address, the Taxpayer was not aware of the letter and thus failed to contact the Department by the August 20 deadline. Consequently, the Department revoked the Taxpayer's gasoline license by letter dated August 28, 1992, effective that date. The August 28 revocation letter was also mailed to the Taxpayer's business address, P.O. Box 220, Bridgeport, Alabama.

The Taxpayer immediately contacted the Department and was instructed to pay the delinquent liability, which the Taxpayer did on September 8, 1992. The Taxpayer assumed that by paying the liability as instructed, its license was also reinstated.

The Taxpayer continued operating in Alabama and subsequently filed its November, 1992 motor fuel and gasoline tax returns with the Department. However, the checks submitted along with the

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[1]Section 40-12-195 is designated a gasoline distributors license. The Department's policy is that the single gasoline license is good for a distributor that also sells motor fuel. That is, a distributor that sells both gasoline and motor fuel must only have the one license required by §40-12-195, and not also the separate motor fuel license set out at §40-17-14.

returns were returned by the Taxpayer's bank for insufficient funds.

The Department subsequently assessed the taxable sales reported on the returns, and also the Taxpayer's entire inventory of previously untaxed gasoline and motor fuel. The Taxpayer concedes that tax is due as reported on the returns, but that its inventories of gasoline and motor fuel should not have been taxed. The Department argues that the inventories were properly taxed because the Taxpayer as an unlicensed distributor should not have been allowed to purchase any of the gasoline or motor fuel tax-free.

The Taxpayer first argues that its gasoline license was not properly revoked because the July 31, 1992 notice of intent to revoke letter was not properly served by the Department. I disagree.

During the period in issue, §40-12-195 authorized the Department to revoke a distributor's gasoline license "at any time upon 10 days written notice to the distributor . . .". Department Reg. 810-1-3-.03(3)(4) also required the Department to notify the distributor of the intended action and allow the distributor 15 days to request a contested case hearing before the Department's Administrative Law Judge.[2]

[2]Section 40-12-195 was amended effective October, 1992. Department Reg. 810-1-3-.03 was also repealed at that time and replaced by the procedures in §40-2A-8. The appeal procedures in §40-2A-8 are similar to the prior procedures in Reg. 810-1-3-.03,

except a taxpayer is now allowed 30 days to appeal to the Administrative Law Judge instead of 15.

Section 40-12-195 did not prescribe the method by which the written notice must be served on a distributor. Where the method of service is not specified by statute, §40-1-29 requires the Department to serve the notice by certified mail to the addressee's last known address. The Department thus properly served the July 31, 1992 letter in accordance with §40-1-29 by mailing the letter by certified mail to the Taxpayer's last known address, P.O. Box 220, Bridgeport, Alabama.

The Taxpayer contends that it failed to actually receive the notice because the letter was signed for by an employee of another company that shares the Taxpayer's post office box.

However, that employee, Harold Mosley, also signed for prior certified mail addressed to the Taxpayer (see State's Exhibit 1, a certified letter to the Taxpayer dated July 11, 1991, with Mosley's signature on the return receipt card), and Mosley also signed for the August 28, 1992 revocation letter. Obviously, Harold Mosley had at least implicit authority to sign for certified mail delivered to the Taxpayer's post office box. The Taxpayer cannot allow someone to receive its mail as a matter of course and then claim a lack of due process when that person fails to notify the Taxpayer that a certified letter has been received. In any case, the Department cannot be responsible for what happens to a letter after it is correctly delivered to a distributor's last known address.

The Taxpayer also argues that the Alabama Rules of Civil

Procedure apply and that the Department failed to properly serve the Taxpayer under those rules. I disagree.

ARCP Rule 4.1(c) governs service of process by certified mail and requires only that the document must be addressed to the person to be served. All letters were properly addressed to the Taxpayer in this case. The Department also complied with ARCP Rule 4(c)(6), cited by the Taxpayer in brief, which provides that a corporation may be served "by serving the corporation by certified mail at any of its usual places of business". That is exactly what the Department did in this case. In any case, Alabama's appellate courts have ruled that the Rules of Civil Procedure are not applicable to administrative proceedings by agencies of the State. Mitchell v. State, 351 So.2d 599; State v. Ladner and Company, Inc., 346 So.2d 1160.

Finally, the Taxpayer argues that its license should have been reinstated after it paid the delinquent taxes in September 1992 because the Department had previously allowed the Taxpayer in September 1991 to pay a delinquent liability after a proposed revocation deadline without revoking the Taxpayer's license. However, the two situations are not analogous.

The Department notified the Taxpayer in September 1991 that its license would be revoked if a delinquent liability was not paid by a certain date. The Department then agreed prior to the deadline to allow the Taxpayer to pay the liability after the

deadline without revoking the Taxpayer's license. The Taxpayer paid as agreed and the license was never revoked.

This case is not analogous to the September 1991 situation because the Taxpayer's license was actually revoked on August 28, 1992. The Department also never agreed or otherwise misled the Taxpayer into believing that the license would be reinstated if the subject liability was paid. Rather, the Taxpayer merely assumed, erroneously, that its license would be automatically reinstated if the tax was paid. It was not.

In summary, the Department properly revoked the Taxpayer's license, and the license was not reinstated because the Taxpayer later paid the tax in question. Rather, the Taxpayer should have applied for a new license with the Department as soon as the delinquent taxes were paid.

Did the Department properly assess the Taxpayer's entire inventories of motor fuel and gasoline as a result of the Taxpayer being an unlicensed distributor during the month in issue.

The sale of gasoline to an unlicensed purchaser in Alabama is taxable, with the exception of several exemptions not relevant to this case. Code of Ala. 1975, §§40-17-31 and 40-17-220. Consequently, the Taxpayer as an unlicensed distributor should not have been allowed to purchase gasoline tax-free or maintain an inventory of tax-free gasoline after August 28, 1992. The Department thus properly taxed the Taxpayer's inventory of gasoline, and the gasoline assessment in issue is upheld.

Concerning the motor fuel assessment, Code of Ala. 1975, §40-17-11 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. Because all sales to a licensed purchaser are tax-free, §40-17-11 must be interpreted to mean that motor fuel sold to an unlicensed purchaser can be taxed only under the circumstances in subparagraphs (1)(2) and (3). That is, the fuel must be 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.

The clear intent of the Legislature is that only motor fuel used for on-road purposes can be taxed. Thus, §40-17-11 specifies that a sale of motor fuel can be taxed only if the seller knows that the fuel will be used for a taxable on-road purpose. Otherwise, the sale of motor fuel to an unlicensed purchaser cannot be taxed. That same conclusion has been reached in several prior Administrative Law Division decisions, see Docket Nos. Misc. 92-175 and Misc. 91-164.

The Taxpayer in this case withdraws and resells motor fuel from its inventory for both taxable on-road and tax-free off-road purposes. The supplier selling to the Taxpayer thus could not have known whether the Taxpayer would resell the fuel for a taxable or non-taxable purpose. Consequently, the Taxpayer properly purchased the motor fuel in issue tax-free.

The Taxpayer, having properly purchased the motor fuel tax-free, then became liable for tax on that part of the fuel subsequently withdrawn from inventory and resold for a taxable on-road purpose, but tax accrued only when the fuel was withdrawn and resold by the Taxpayer for a taxable purpose, not while it was in inventory.[3] If the Department is allowed to tax the Taxpayer's entire inventory of motor fuel, then that portion of the fuel subsequently used off-road would also be taxed, which is clearly against the intent of the Legislature.

The Taxpayer as an unlicensed distributor is prohibited by law from operating in Alabama, and the Department is authorized to enjoin an unlicensed distributor from doing business under either Code of Ala. 1975, §§40-12-204, 40-17-20, or 40-17-49. The Department can also impose the penalty for operating without a license levied at Code of Ala. 1975, §40-12-196. However, the fact that the Taxpayer was unlicensed did not convert the tax-free purchases of motor fuel by the Taxpayer into taxable transactions.

The Department is directed to adjust the motor fuel assessment to include only the tax reported by the Taxpayer on its November 1992 return. The tax based on the Taxpayer's motor fuel inventory should be deleted. A Final Order will then be entered upholding

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[3]Code of Ala. 1975, §40-17-3 provides in part that "storers shall pay the tax computed on the basis of their withdrawals from storage." Thus, motor fuel properly purchased tax-free can only be taxed upon withdrawal from inventory, and then only if for a taxable purpose under §40-17-11(1)(2) or (3).

the gasoline assessment, and also setting out the Taxpayer's adjusted motor fuel liability. The Final Order, when entered, may be appealed to circuit court pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on April 12, 1994.

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BILL THOMPSON
Chief Administrative Law Judge