SONAT MARKETING CO., INC. Post Office Box 2563 Birmingham, Alabama 35202-2563,	'	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	'	DOCKET NO. S. 96-255
v.	'	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	'	

FINAL ORDER

The Revenue Department assessed utility gross receipts tax against Sonat Marketing Company, Inc. ("Taxpayer") for June 1992 through March 1995. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, '40-2A-7(b)(5)a. A hearing was conducted on November 7, 1996. Roy Crawford represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

The Taxpayer contracted to sell and deliver natural gas to Champion International in Courtland, Alabama during the audit period. The disputed issue is whether the transportation charges paid by Champion to the Taxpayer should be included in gross receipts subject to the utility gross receipts tax levied at Code of Ala. 1975, '40-21-80 et seq.

The Taxpayer and Champion executed a "Gas Sales Agreement" on October 1, 1993. The Agreement required the Taxpayer to sell and deliver natural gas to Champion at its Courtland, Alabama facility. The Agreement also provided - "Seller (Taxpayer) has arranged for firm transportation of the gas to be purchased from Seller

through the pipeline systems of Sonat Intrastate-Alabama Inc. ("SIA") and Northwest Alabama Gas District ("NWAGD") (collectively referred to as the "transporters")."

Sonat-Intrastate is primarily engaged in transporting natural gas in Alabama, but sometimes also sells gas to Alabama customers. Northwest Alabama Gas District owns gas pipelines in North Alabama, and has the feeder lines connecting to Champion's facility in Courtland.

Bill Lanter, the vice president of Sonat-Intrastate, testified that Sonat-Intrastate was initially interested in both selling and transporting gas to Champion at its Courtland facility. However, because Sonat-Intrastate could not guarantee the volume of gas Champion needed, Lanter approached the Taxpayer about selling the gas to Champion.

Sonat-Intrastate, through Lanter, negotiated with Champion, the Taxpayer, and Northwest Alabama Gas District concerning the gas price and transportation charges to be paid by Champion. However, because Champion wanted a single contract for the purchase and delivery of the gas, the Taxpayer and Champion entered into the Gas Sales Agreement on October 1, 1993 requiring the Taxpayer to both sell and transport the gas to Champion. On that same date, the Taxpayer separately contracted for Sonat-Intrastate and Northwest Alabama Gas District to deliver the gas. The transportation charges paid by Champion to the Taxpayer were passed through to the two transporters, without profit to the Taxpayer.

The Taxpayer failed to report and pay utility gross receipts tax on the amount received from Champion during the audit period because of a computer glitch. The Department notified the Taxpayer that tax was due, and the Taxpayer immediately paid the tax due on the gas. The Department waived the late penalty relating to that tax. However, the Taxpayer failed to pay tax on the transportation charges, arguing that those charges were not subject to the utility tax. I disagree.

The Alabama utility gross receipts tax is levied on the gross receipts from the furnishing of utility services in Alabama. Code of Ala. 1975, '40-21-82(a). "Gross receipts" is defined for utility tax purposes at Code of Ala. 1975, '40-21-80(a)(3), as follows:

> The value proceeding or accruing from the furnishing of utility services, all receipts actual and accrued, without any deduction on account of the cost of the utility services sold, the cost of the materials used, labor or service cost, interest paid, or any other expenses whatever, and without any deductions on account of losses.

The Taxpayer contracted with Champion to both sell and transport gas to Champion's Courtland facility. The total amount received by the Taxpayer for furnishing those utility services, including the transportation charges paid by Champion to the Taxpayer as a part of the sale, constituted taxable gross receipts as defined at '40-21-80(a)(3).

The Taxpayer argues that the transportation charges cannot be taxed because transportation was provided by separate entities, Sonat-Intrastate and Northwest

Alabama Gas District. The Taxpayer cites the Administrative Law Division's statement in State v. Gulf States Steel, Inc., S. 92-204 (Admin. Law Div. 7/12/93), that "where utility services are provided by one entity but transportation is provided by another entity, the transportation charges are not subject to the utility gross receipts tax." However, that statement must be read in the factual context of the Gulf States case.

Gulf States purchased natural gas from out-of-state sellers, and also separately contracted for Southern Natural Gas Corporation to transport the gas. Gulf States had a direct pay permit, which allowed it to purchase gas tax-free and then remit the utility tax directly to the Department. Gulf States paid the utility tax on both the cost of the gas and the transportation charges paid to Southern Natural. It later applied for a refund on the transportation charges, which the Department denied. Gulf States appealed.

The Administrative Law Division initially held that the transportation charges relating to the in-state transportation were taxable. The Department later learned that Southern Natural was only transporting the gas, not selling it, and consequently notified the Administrative Law Division that none of the transportation charges should be taxed. The Final Order stated in part as follows:

> An Opinion and Preliminary Order was entered on January 13, 1993 holding that tax was due on the in-state transportation charges only. However, since that time the Department has reviewed the case and has determined that none of the transportation charges are taxable because Southern Natural did not also provide (sell) the utility services. That is, where utility services are provided by one entity but transportation is provided by another entity, the transportation charges are not subject to the utility gross receipts tax levied at Code of Ala. 1975, '40-21-80, et

seq.

Gulf States, S. 92-204 at 1.

The transportation charges in Gulf States were not taxable because the seller was not also required to transport the gas as a part of the sale. Rather, Gulf States separately contracted to have Southern Natural deliver the gas. This case can be distinguished because the Taxpayer was legally obligated to both sell and deliver the gas to Champion's Courtland facility. The delivery was part of the providing of utility services. It is irrelevant that the Taxpayer subcontracted with Sonat-Intrastate and Northwest Alabama Gas District to actually deliver the gas. The total amount received by the Taxpayer from Champion, including the transportation charges included in the lump-sum price, were taxable receipts derived from the furnishing of utility services.

The Taxpayer also cites State v. Alabama Gas Corporation, S. 94-196 (Admin. Law Div. 8/15/95) in support of its position. But the facts in Alabama Gas are similar in substance to the facts in Gulf States, and thus can also be distinguished from this case. Alabama Gas purchased gas from out-of-state sellers as a designated agent for various Alabama customers. Alabama Gas separately contracted with Sonat to transport the gas into Alabama, and Alabama Gas completed delivery to the customers in its own pipelines. Alabama Gas paid the utility tax on the gas and transportation charges, but later petitioned for a refund relating to the transportation charges, citing

Gulf States. The Administrative Law Division granted the refund:

> The Department concedes that transportation services separately contracted for and provided by a party other than the seller are not subject to the utility gross receipts tax. See, State of Alabama v. Gulf States Steel, Inc., Admin. Docket No. S. 92-204 (decided July 12, 1993).
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> In Gulf States Steel, Gulf States had purchased gas directly from an out-of-state producer and separately contracted with Sonat to transport the gas into Alabama, and with Alabama Gas to complete delivery of the gas in Alabama. The Department agreed that the separately provided transportation charges were not subject to the utility tax.
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> This case is slightly different because while the customers still directly purchased the gas from the out-of-state producer, they did so through an agent, the Taxpayer. However, the principle established in Gulf States Steel is still applicable. That is, when a consumer buys gas directly from a producer, even through an agent, and the consumer or the consumer's agent then contracts with another company for transportation of the gas, the separately provided transportation services are not subject to the utility gross receipts tax.

Alabama Gas, S. 94-196 at 2-3.

Alabama Gas reaffirmed Gulf States that transportation charges are not taxable when the customer buys the gas from one party and then separately contracts with another entity to transport the gas. Again, this case can be distinguished because the Taxpayer was legally obligated to both sell and deliver the gas to Champion.

The Taxpayer contends that Alabama Gas is applicable because Sonat-Intrastate acted as agent for Champion in purchasing the gas. I disagree. No agency agreement was entered into, as in Alabama Gas, and while Sonat-Intrastate was active in arranging the transaction, Sonat-Intrastate did not act as agent for Champion. Rather, the Taxpayer directly sold and agreed to deliver the gas to Champion pursuant to the Gas Sales Agreement.

The Taxpayer also cites various sales tax statutes supporting its position.

Specifically, the Taxpayer cites Code of Ala. 1975, '40-23-1(a)(5), which provides that transportation charges are not subject to sales tax, "where billed as a separate item to and paid by the purchaser. . . ."

I agree that certain sales tax statutes and definitions are incorporated into the utility tax law. Code of Ala. 1975, '40-21-85(a). But those incorporated sales tax sections relate only to the procedures to be followed in administering the utility tax. The sales tax definition of "sale" at '40-23-1(a)(5), which addresses the taxability of separately stated transportation charges, is not applicable to the strictly procedural sales tax statutes listed in '40-21-85(a), and thus does not apply to the utility tax.

Even if '40-23-1(a)(5) did apply to utility tax, the transportation charges in issue would not be excluded from taxable gross receipts because the charges were not "billed as a separate item to and paid by the purchaser." The Taxpayer concedes that the transportation charges were not billed as a separate item on the invoice to Champion.

In addition, even for sales tax purposes, transportation charges are taxable if incurred as part of and before the close of the sale. East Brewton Material, Inc. v. State, 233 So.2d 751 (1970).

> When it was provided in Section 786(2)(f) (the sales tax definition of "gross proceeds" at '40-23-1(a)(6)) that the value proceeding or accruing from the sale of tangible personal property should include "any other expenses whatsoever," we are of the opinion that the legislature intended thereby that sales tax be charged upon the total invoice price, including transportation charges incident to delivery of the material sold to a customer, when such transportation was provided by the seller, not by common carrier, and the sale was not completed or title transferred

until delivery to the customer.

East Brewton Material, 233 So.2d at 756.

The Court distinguished in the above quote between delivery by the seller and delivery by a common carrier. The distinction was valid when the case was decided in 1970 because the general rule at the time was that title passed and a sale was closed when property was delivered by the seller to a common carrier before the actual transportation occurred. "And further, the general rule is that delivery of personal property by the seller to a common carrier to be conveyed to the purchaser is a delivery to the purchaser and the title to the property vests in the purchaser immediately upon its delivery to the carrier." East Brewton Material, 233 So.2d at 757, citing State v. Natco Corp., 90 So.2d 385. Consequently, when East Brewton Material was decided, if a sale item was delivered by common carrier, the transportation occurred after the sale was closed, and thus was not taxable. For example, the transportation charges in Natco were not taxed because the sale was F.O.B. origin, and the transportation by common carrier occurred after the close of the sale.

In 1986, the Legislature amended the sales tax definition of "sale" at '40-23-1(a)(5) to provide in part that a common carrier is deemed the agent of the seller. Consequently, under current law, title does not pass, and a sale is not closed, until delivery is completed by a common carrier to the purchaser. Common carrier charges

are thus incurred as a part of and prior to the close of a sale, and are taxable.[1] Provided, the 1986 amendment also specified that transportation charges are not a part of the selling price if "billed as a separate item to and paid by the customer . . . ." As previously discussed, however, even if '40-23-1(a)(5) was applicable to the utility tax, which it is not, the transportation charges in issue would still be taxable because the transportation charges were not separately billed to Champion.

The Taxpayer argues that if the transportation charges are taxable, the ruling should be applied prospectively only because the utility industry was misled by the Gulf States holding. The Taxpayer cites State v. Arch of Alabama, F. 90-173 (Admin. Law Div. 8/8/94), State v. American Fructose Decatur, Inc., F. 94-125 (Admin. Law Div. 12/14/94), and State v. TRMI Holdings, Inc., F. 94-177 (Admin. Law Div. 1/11/95) in support of its case.

The above cases can be distinguished, however, because they involved situations where the Department had been improperly allowing certain exclusions from capital for franchise tax purposes that were not authorized by statute. The Administrative Law Division rejected the unauthorized exclusions, but because all other foreign corporations doing business in Alabama had benefitted from the exclusions, the taxpayers in issue were also allowed to benefit for the periods in issue.[2] Otherwise, the taxpayers would have been treated unfairly relative to all other

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[1]See also, Code of Ala. 1975, '40-23-60(10), which specifically includes transportation charges in "sales price" for use tax purposes.

[2]Arch of Alabama involved an unauthorized netting of receivables against payables.

foreign corporations.

There is no evidence in this case that the Department failed to tax other utilities on similar transportation charges. Consequently, the Taxpayer would not be treated unfairly relative to other utilities if required to pay tax on the transportation charges.

Finally, I agree with the Taxpayer that the failure to timely pay penalty was improperly assessed by the Department. The failure to timely pay penalty is levied for failure to pay "the amount of tax shown and due on its return." Code of Ala. 1975, '40-2A-11(b). The Taxpayer in this case paid the amount due as shown on its return. Consequently, the failure to timely pay penalty is not applicable. In addition, even if applicable, reasonable cause exists to waive the penalty.

The final assessment, less the penalty, is affirmed. Judgment is entered against the Taxpayer for utility tax of $37,844.04 ($41,124.55 less penalty of $3,280.51), plus applicable interest.

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

The Department was directed to "discontinue its erroneous netting policy prospectively only so as to treat all foreign corporations equally." Arch of Alabama, F. 90-173 at 8.

American Fructose and TRMI involved an unauthorized exclusion allowed by Reg. 810-2-3-.03 relating to investments in subsidiaries. The exclusion was rejected, but the subject corporations were allowed the exclusion for the periods in issue because otherwise, they "would be denied equal protection if it was not also allowed the benefit of Reg. 810-2-3-.03 during the same period." American Fructose, F. 94-195 at 9.

Entered May 1, 1997.

BILL THOMPSON
Chief Administrative Law Judge