

BELCHER OIL COMPANY, INC.
P.O. Box 310
Brent, AL 35034,

' STATE OF ALABAMA
' DEPARTMENT OF REVENUE
' ADMINISTRATIVE LAW DIVISION

OLON BELCHER LUMBER CO., INC.
P.O. Box 310
Brent, AL 35034,

' DOCKET NO. MISC. 96-491
'

' Taxpayers,
'

v. '
'

' STATE OF ALABAMA
' DEPARTMENT OF REVENUE.

FINAL ORDER

The Revenue Department assessed motor fuel excise tax against Belcher Oil Company, Inc. (ABelcher Oil@) for January 1991 through May 1991, and against Olon Belcher Lumber Co., Inc. (ABelcher Lumber@) for June 1991 through December 1992 and January 1993 through April 1993. Both corporations appealed to the Administrative Law Division pursuant to Code of Ala. 1975, ' 40-2A-7(b)(5)a. The cases were consolidated, and a hearing was conducted on August 19, 1998. Assistant Counsel John Breckenridge and Keith Maddox represented the Department. Lewis Hickman, Jr. represented Belcher Oil and Belcher Lumber, and also Brent Belcher (ATaxpayer@), the majority owner of both corporations.

ISSUES

This case involves two primary issues:

(1) The Department assessed Belcher Lumber for the tax due on diesel fuel purchased from Hunt Oil Company during the period June 1991 through April 1993. The

first issue is whether that tax should have been assessed against Belcher Oil, not Belcher Lumber.

(2) Belcher Lumber, Belcher Oil, and the Taxpayer were criminally prosecuted by the Department for motor fuel tax evasion. The parties entered into a plea agreement whereby the indictment was dismissed against Belcher Lumber. The agreement also required Belcher Oil to pay restitution of \$195,223.44 to be applied to the taxes assessed against both corporations. The second issue is whether that plea agreement affected the validity or amount of the final assessments in issue.

FACTS

Belcher Oil and Belcher Lumber are headquartered in Brent, Alabama. Brent Belcher is the majority owner of both corporations. He is vice-president and general manager of Belcher Lumber, and president of Belcher Oil.

The Revenue Department investigated Belcher Oil, Belcher Lumber, and the Taxpayer for possible criminal violations of Alabama's motor fuel tax laws. The investigation resulted in indictments against all parties. The Department also audited both corporations for motor fuel excise tax using the records of the corporations' primary supplier, Hunt Oil Company. The audit resulted in the final assessments in issue against Belcher Oil and Belcher Lumber.

The parties negotiated a plea agreement in the criminal case. The Department dismissed the indictments against Belcher Lumber and the Taxpayer. In return, Belcher Oil pled guilty to 19 counts of tax evasion. Belcher Oil also agreed to pay restitution of \$195,223.44, plus accrued interest. The agreement stated that the restitution shall be credited toward the total motor fuels liability assessed against Belcher Oil Company, Inc.

and/or Olon Belcher Lumber Company, Inc.@ Belcher Oil has failed to pay the restitution because, according to the Taxpayer, he cannot borrow money to pay as long as the Department has liens filed against Belcher Lumber.

ISSUE I - WAS TAX CORRECTLY ASSESSED AGAINST BELCHER LUMBER?

Belcher Oil was a licensed motor fuel distributor before May 1991. As a licensed distributor, Belcher Oil was allowed to purchase all motor fuel tax-free. Belcher Lumber is not a motor fuel distributor, but purchases diesel for use in treating lumber, which is a tax-free use. The Department thus issued Belcher Lumber a dual user's license, which allows it to purchase all motor fuel tax-free.

Hunt Oil is the major supplier for both corporations. Before the period in issue, Hunt Oil issued Belcher Oil and Belcher Lumber separate computer purchase cards that allowed them to purchase fuel tax-free at the Hunt Oil terminal.

All diesel purchased by both corporations was picked up at the Hunt Oil terminal in a Belcher Oil tank truck. The truck driver inserted the purchase card of the corporation making the purchase into a card reader at the pump. The card reader recorded on Hunt Oil's records the identity of the purchaser, the amount of the purchase, and that the purchase was tax-free. The driver paid for the diesel at the time of purchase using a pre-signed Belcher Oil check. The driver returned a copy of the check to the Belcher Oil bookkeeper for posting.

Before May 1991, Belcher Oil purchased on average approximately 90,000 gallons of tax-free diesel a month from Hunt Oil. Belcher Lumber purchased on average less than

10,000 gallons per month during the same period. The Department used that information to assess Belcher Oil for the period January through May 1991. The Taxpayer does not dispute the assessment against Belcher Oil.

The Department revoked Belcher Oil's license in May 1991 for non-payment of motor fuel tax. The Taxpayer claims he elected not to contest the revocation because he intended for Belcher Oil to begin paying all tax due when it purchased fuel from Hunt Oil. Hunt Oil was notified that it could no longer sell tax-free to Belcher Oil because Belcher Oil's license was revoked.

Hunt Oil's records show that after May 1991, its sales to Belcher Oil decreased drastically, with no recorded sales to Belcher Oil after August 1991. Belcher Lumber's tax-free purchases from Hunt Oil correspondingly increased beginning in June 1991. From June 1991 through December 1992, Belcher Lumber purchased from 60,000 to 130,000 gallons of diesel a month tax-free from Hunt Oil. The Department assessed the tax in issue against Belcher Lumber based on that Hunt Oil information.

The Taxpayer argues that despite Hunt Oil's records, Belcher Oil purchased the diesel in issue after June 1991. The Taxpayer testified that unknown to him, his truck driver unwittingly continued to use Belcher Oil's old tax-free card after May 1991. Hunt Oil thus sold the diesel tax-free. The Taxpayer contends that when Hunt Oil discovered it had improperly sold the diesel tax-free to Belcher Oil, it altered its records and recorded the purchases under Belcher Lumber's tax-free license number.

The Taxpayer argues he had no way of knowing that Belcher Oil was not paying

motor fuel tax at the time of purchase. He claims he never received an invoice from Hunt Oil because the truck driver was paying at the pump.

Other than the Taxpayer's testimony, there is no evidence to support his claims. The Department is not required to rely on the unsupported verbal assertions of a taxpayer. State v. Mack, 411 So.2d 799 (Ala.Civ.App.1982). There is no corroborating evidence that the truck driver used Belcher Oil's tax-free purchase card and not Belcher Lumber's card to purchase the diesel tax-free after May 1991. Importantly, there is no corroborating evidence that Hunt Oil initially recorded the purchases as being to Belcher Oil, but intentionally altered its records to show that the sales had been to Belcher Lumber. If Hunt Oil did so, it would be guilty of fraud and other motor fuel violations.

The Alabama motor fuel excise tax is 17 cents a gallon. Code of Ala. 1975, §§ 40-17-2(1) and 40-17-220(b). The federal motor fuel excise tax is approximately 20 cents a gallon. It is unbelievable that Belcher Oil purchased diesel tax-free from Hunt Oil for almost two years, yet failed to recognize that it was not paying the combined 37 cents per gallon State and federal motor fuel tax. Assuming that the pre-tax wholesale cost of diesel was 50 cents a gallon, and assuming that 3000 gallons were purchased at one time, the difference between the tax-free price of \$1500 and the tax-paid price of \$2610 would be \$1110. Certainly that discrepancy in price would have been recognized by an experienced distributor.

The evidence, when viewed in total, shows that Belcher Oil operated as usual after its license was revoked in May 1991. It picked up the diesel from Hunt Oil. It paid for the diesel with a Belcher Oil check. It resold the diesel to its customers. However, other

than the Taxpayer's testimony, there is no evidence that Hunt Oil improperly sold the diesel tax-free to Belcher Oil and then fraudulently altered its records to show that the sales had been to Belcher Lumber. The only alternative is that the Belcher Lumber card was used to purchase the diesel tax-free. Having used Belcher Lumber's license to purchase the diesel tax-free, the Taxpayer cannot now argue that Belcher Oil purchased the diesel. Consequently, the Department correctly assessed Belcher Lumber for the period June 1991 through April 1993.

ISSUE II - THE PLEA AGREEMENT

The Taxpayer argues that the plea agreement entered into in the criminal prosecution supports his claim that Belcher Oil is liable for the unpaid tax. I disagree.

The plea agreement settled the criminal case, but has no bearing on which corporation owes the civil liability. Paragraph seven of the agreement indicates that the \$195,223.44 restitution shall be credited toward the total motor fuels tax liability assessed against Belcher Oil Company, Inc. and/or Olon Belcher Lumber Co., Inc.®. Consequently, there was no dismissal of or change in the civil assessments against Belcher Lumber.

The Taxpayer does not otherwise contest the amount of the assessments. Consequently, the tax and interest assessed against both corporations is affirmed.

The Department included a penalty or penalties in all three final assessments. The penalty against Belcher Oil for January 1991 through May 1991 was assessed pursuant to Code of Ala. 1975, '40-17-10. The penalties against Belcher Lumber for June 1991

through December 1992 were assessed pursuant to Code of Ala. 1975, ' ' 40-17-10 and 40-17-11(d). The penalties against Belcher Lumber for January through April 1993 were

assessed pursuant to Code of Ala. 1975, ' ' 40-2A-11(b) and (c). All three final assessments were entered on November 27, 1996.

Code of Ala. 1975, ' 40-17-10 was repealed by Act 92-186, effective October 1, 1992. That 25 percent penalty was thus improperly assessed.

There has also never been a ' 40-17-11(d) in the Alabama Code. Consequently, any penalty assessed by the Department pursuant to that section was also improperly assessed.

The late payment and negligence penalties assessed pursuant to ' ' 40-2A-11(b) and (c) are affirmed.

The final assessments, less the penalties assessed pursuant to ' ' 40-17-10 and 40-17-11(d), are affirmed. Judgment is entered against Belcher Oil for \$40,531.53, plus applicable additional interest. Judgment is entered against Belcher Lumber for \$284,526.19 and \$67,792.01, plus applicable additional interest.

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

Entered February 2, 1999.

BILL THOMPSON
Chief Administrative Law Judge

BT:ks

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