W. C. RICE OIL COMPANY, INC. 2511 28th Street SW Birmingham, AL 35211,	'	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	'	DOCKET NO. MISC. 97-254
v.	'	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	'	

FINAL ORDER

The Revenue Department assessed wholesale oil license tax against W. C. Rice Oil Company, Inc. ("Taxpayer") for October 1992 through September 1995. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, '40-2A-7(b)(5)a. Dean Mooty, Jr. represented the Taxpayer. Assistant Counsel John Breckenridge represented the Department.

ISSUES

This case involves four issues:

(1) Is diesel fuel used in motor vehicles a Afuel oil@ within the scope of the wholesale oil license tax, Code of Ala. 1975, '40-17-174;

(2) If the motor fuel excise tax levied at Code of Ala. 1975, '40-17-2 was subsequently paid by another motor fuel distributor on the diesel in issue, should the Taxpayer be allowed to exclude that diesel from the measure of the '174 tax pursuant to the exclusion at '40-17-2;

(3) Section 40-17-174 was amended by Act 96-521 in 1996 to specify that the wholesale oil tax is levied on only the first wholesale sale of illuminating, lubricating or

fuel oil in Alabama. Should Act 96-521 be applied retrospectively to relieve the Taxpayer of liability during the subject period; and,

(4) Did the Department correctly assess the failure to timely pay penalty levied at Code of Ala. 1975, '40-2A-11(b). If so, should the penalty be waived for reasonable cause?

FACTS

The Taxpayer is a licensed motor fuel distributor in Alabama. The Taxpayer purchased diesel fuel at wholesale from a terminal in Alabama during the subject period. The terminal operator subsequently paid the '174 wholesale tax on that first wholesale sale of the diesel in Alabama.

The Taxpayer resold some of the diesel at wholesale to another licensed motor fuel distributor, Lomun Enterprises (ALomun@). Lomun resold most of the diesel at retail for taxable on-road use. Lomun also sold some of the diesel tax-free to an exempt school system.

The Taxpayer failed to report and pay the '174 wholesale tax on the diesel sold at wholesale to Lomun. The Department audited the Taxpayer and assessed the '174 tax on the diesel. The Taxpayer appealed.

ISSUE 1 - Is diesel fuel a Afuel oil@ within the scope of '174?

The '174 wholesale oil tax is levied on the sale of Ailluminating, lubricating or fuel oils at wholesale,...@ in Alabama. In Romaco, Inc. v. State of Alabama, Docket 84-114 (Admin. Law Div. 6/19/84), the Administrative Law Division held that diesel fuel was a

fuel oil subject to the '174 tax. On review, I am not sure that is correct.

All taxes relating to motor fuels, gasoline, oils, etc. are in Chapter 17 of Title 40. The excise tax on motor fuel used in on-road vehicles is found at '40-17-1, et seq. AMotor fuel@ is defined at '40-17-1 to specifically include diesel fuel.

The excise tax on gasoline used in internal combustion engines is levied at '40-17-30, et seq. AGasoline@ is defined at '40-17-30(1) to include Aliquid motor fuels@ used in internal combustion engines. Because diesel fuel is a motor fuel, it also constitutes gasoline as defined at '40-17-30(1). Section 40-17-30(1) also provides Athat nothing in this article shall be held to apply to those products known commercially as >kerosene oil=, >fuel oil=, or >crude oil= when used for lighting, heating, or industrial purposes.@

The '174 wholesale oil license tax is found in Article 4 of Chapter 17, which is entitled AOils, Greases, or Substitutes@. AFuel oil@ is not defined in Chapter 17, or elsewhere in Title 40. ALubricating oil@ is defined at '40-17-170(1) to include any products commonly used in lubricating or oiling engines or other machinery. Section 40-17-170(1) also states Athat nothing contained in this article (which includes '174) shall be held to apply to those products known commercially as >kerosene oil=, >fuel oil=, or >crude oil=.@ Despite that proviso, however, the '174 wholesale tax is levied specifically on fuel oil.

I cannot explain the inconsistency between '40-17-174, which levies a tax on Afuel oils@, and '40-17-170(1), which specifies that nothing in Article 4, which includes '40-17-174, shall be held to apply to Afuel oil@. In any case, an overall analysis of Chapter 17

reveals that the Legislature intended for Amotor fuel@, which includes diesel fuel, to refer to a product used in on-road motor vehicles or internal combustion engines. See, ''40-17-1, 40-17-30(1), and 40-17-140(4). On the other hand, Afuel oil@, when viewed in the context of Article 4 of Chapter 17, and specifically '40-17-174, was intended to refer to

an oil, grease, or substitute therefor used for industrial purposes, which does not include diesel fuel.

For the above reasons, if I were working on a clean slate, I would hold that diesel fuel is not a fuel oil in the context of '174. That conclusion is supported by the rule of statutory construction that an ambiguous tax levy, as is '174 because Afuel oil@ is not defined, must be construed for the taxpayer and against the Department. Lepeska Leasing Corporation v. State, Dept. of Revenue, 395 So.2d 82 (1981). An analysis of the applicable statutes by the Alabama Attorney General in June 1995 also reached the same conclusion. AThus, it may be argued that, as used in the Act ('174), the term >fuel oil= did not include >diesel fuel=.@... ADiesel fuel...is not >fuel oil= within the contemplation of that term as used in ('174).@ See, A.G. Opinion No. 95-00236, issued June 14, 1995, at page 3.

On the other hand, however, I also must agree with the above Attorney General=s Opinion, at page 4, that a long-standing interpretation of a statute by the Revenue Department must be given favorable consideration. East Brewton Materials, Inc. v. State, Dept. of Revenue, 233 So.2d 751 (1970); State v. Deep Sea Foods, Inc., 477 So.2d 417 (1985). The Department has long interpreted the '174 wholesale oil tax to apply to the wholesale sale of diesel fuel. Consequently, I must conclude that diesel fuel is a fuel oil within the scope of the '174 wholesale oil license tax.

ISSUE 2 - Should the diesel on which Lomun subsequently paid the motor fuel excise tax levied at '40-17-2 be excluded from the measure of the '174 wholesale

oil license tax?

Section 40-17-2 levies an excise tax on motor fuel used in on-road vehicles. The statute also states -- "Provided further, that motor fuel subject to the excise tax levied by this article shall not be subject to any other excise tax levied by the state."

Citing the above proviso, the Taxpayer argues that because Lomun paid the '40-17-2 motor fuel tax when it sold the subject diesel for on-road use, the same diesel should be excluded from the measure of the '174 wholesale tax.

The first question is whether the '174 tax is an excise tax. I initially thought that an excise tax on the sale, use, or consumption of a product could be distinguished from a license or privilege tax on the privilege of conducting or engaging in a particular business or activity. Research reveals, however, that "excise tax" is synonymous with "license tax" and "privilege tax". See generally, "Excise", Black=s Law Dictionary, Revised Fourth Ed., at page 672. "The terms excise tax and privilege tax are synonymous." (cite omitted). "An >excise tax= is often used synonymous with >privilege= or >license tax=." (cite omitted). See also, State v. Pure Oil Co., 55 So.2d 843 (1951). The Department also conceded at the administrative hearing that there is no distinction between an excise tax

and a privilege tax. (Transcript, at 37). [1]

Consistent with its recognition that the '174 tax is an excise tax, the Department concedes that a wholesaler may exclude diesel sold at wholesale from the measure of the '174 tax if the '40-17-2 motor fuel tax is paid on the diesel, but only if the '40-17-2 tax is paid by the wholesaler. The Department argues that a wholesaler cannot exclude diesel from the '174 tax if the '40-17-2 motor fuel tax is subsequently paid by another dealer. Consequently, the Department contends that even if Lomun paid the '40-17-2 excise tax on the diesel, the Taxpayer still cannot exclude it from the measure of the '174 tax. The Department=s position is not supported by the statute.

Section 40-17-2 plainly provides that if the '40-17-2 tax is paid on motor fuel, Athat motor fuel@ shall not be subject to any other excise tax. The Department concedes that the '174 wholesale tax is an excise tax. Consequently, diesel fuel shall not be subject to the '174 excise tax if the '40-17-2 tax is ever paid on the fuel. The exclusion is not limited to only those instances in which the '40-17-2 tax is paid by the same wholesaler subject to the '174 tax.

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[1]If a license tax is not an excise tax, then diesel on which the '40-17-2 motor fuel excise tax is paid would not be excluded from the '174 wholesale license tax.

The above conclusion is supported by a February 14, 1997 Attorney General=s Opinion submitted by the Taxpayer. That opinion clarified that the intended use of the diesel, either on-road or off-road, must be determined before deciding if the '174 wholesale tax applies. In other words, if diesel sold at wholesale is intended for on-road use, it will be subject to the '40-17-2 motor fuel tax, and thus should be excluded from the measure of the '174 wholesale tax.

I concede that the above interpretation complicates the reporting and paying of the '174 tax. The '174 tax is reported and paid annually on a distributor=s wholesale sales during the preceding year. As a practical matter, a wholesaler cannot in all cases follow the diesel it sells during the year to know if the '40-17-2 tax is ultimately paid on the diesel. The diesel may be sold several more times at wholesale, it may be commingled with other diesel, and the ultimate retail seller may sell some for taxable on-road use and some for non-taxable off-road use. Some of the diesel may also still be in storage at the end of the year, its ultimate use, taxable or non-taxable, yet to be determined. In short, a wholesaler may not know the intended use of the diesel at the time the '174 must be reported and paid. However, the exclusion provided at '40-17-2 cannot be ignored simply because it may be difficult to administer.

The burden of establishing a right to an exclusion is on the taxpayer claiming the exclusion. Brundidge Milling Co. v. State, 228 So.2d 475 (1969). Consequently, for the subject diesel to be excluded from the '174 levy, the Taxpayer must prove that the '40-17-2 motor fuel tax was subsequently paid on the diesel.

The Taxpayer claims that most of the diesel was sold by Lomun for on-road use. The Taxpayer concedes, however, that Lomun sold some of the diesel to an exempt school system. The '40-17-2 excise tax certainly was not paid on that diesel. The Taxpayer failed to prove what portion of the diesel was sold for taxable on-road purposes; and importantly, the Taxpayer failed to prove that Lomun actually paid the '40-17-2 tax on the diesel. Without evidence that the '40-17-2 motor fuel tax was paid on the diesel, and on what amount, no exclusion from the '174 wholesale oil tax can be allowed.

ISSUE 3 - Is the Taxpayer relieved of liability because of Act 96-521?

Act 96-521 amended '40-17-174 to provide --- AThe tax shall be paid on the first, and only the first, wholesale sales transaction of the oils sold in the state...the intent being that the tax shall be paid to the state but once.@ The effective date of Act 96-521 was May 17, 1996, after the assessment period in issue.

The Taxpayer claims that Act 96-521 clarified prior law that the '174 tax is levied only once on the initial wholesale sale in Alabama. If so, the Taxpayer is not liable for the tax in issue because the terminal operator that sold the diesel to the Taxpayer paid the '174 tax on the fuel. Unfortunately for the Taxpayer, its position is not supported by any language in the Act.

An amendment to a statute must be applied prospectively only, absent express language to the contrary. Mason v. U.S.A. Medical Center, 646 So.2d 90 (Ala.Civ.App.1994); Bonner v. State, Dept. of Human Resources, 676 So.2d 944 (Ala.

1995). There is no language in Act 96-521 indicating the Legislature=s intent that the Act should apply retrospectively. Consequently, Act 96-521 does not apply to the period in issue.

ISSUE 4 - The penalty issue.

The Department assessed the Taxpayer for the failure to timely pay penalty levied at '40-2A-11(b). That section levies a 1 percent per month penalty on any delinquent tax Ashown as due on a return.@ The penalty should not have been assessed in this case because the tax in issue was not reported on the Taxpayer=s returns during the subject periods. Even if the penalty applied, reasonable cause exists under the circumstances to waive the penalty.

Based on the above, the final assessment in issue, less the penalty, is affirmed. Judgment is entered against the Taxpayer for $40,746.94, 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).

Entered October 15, 1998.

BILL THOMPSON
Chief Administrative Law Judge

BT:ks

cc: John J. Breckenridge, Esq.
H. Dean Mooty, Jr., Esq.
Floyd Atkins