

D & D OIL COMPANY, INC. §
d/b/a Cowboys Food Mart §
83 Thomas Road §
Rome, GA 30161, §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

KENAN TRANSPORT COMPANY §
P.O. Box 2729 §
Chapel Hill, NC 27515-2729, §

DOCKET NOS. MISC. 02-809
MISC. 02-825

Taxpayers, §

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE. §

FINAL ORDER

The Revenue Department assessed D&D Oil Company, Inc. (“D&D”) for gasoline excise tax for December 20, 21, and 28, 2001 and January 2, 6, 13, 14, 24, and 28, 2002. It also assessed Kenan Transport Company (“Kenan”) for gasoline excise tax for December 20 and 28, 2001 and January 2, 6, 14, 24, and 28, 2002, and motor fuel excise tax for December 21, 2001 and January 13, 2002. D&D and Kenan appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. The appeals were consolidated and heard on January 22, 2003. John Scott represented D&D. Dean Mooty represented Kenan. Assistant Counsel John Breckenridge represented the Department.

ISSUE

This is a penalty case. The issue is whether the Department correctly assessed D&D and Kenan for the penalties levied at Code of Ala. 1975, §§40-12-198(e) and (m)(4)b, respectively. Those penalties are imposed for the failure to properly document the receipt and delivery of gasoline.

FACTS

Kenan transports gasoline for retail gasoline dealers in Alabama and 37 other states. D&D, d/b/a Cowboys, operates several retail gasoline outlets in Alabama, including one in Dothan, Alabama. Kenan is the exclusive transporter of gasoline to the D&D outlet in Dothan. Kenan obtains all of the gasoline delivered to the Dothan outlet from suppliers at a terminal in Bainbridge, Georgia.

Kenan monitors the fuel tank levels at the Dothan outlet. If the outlet needs gasoline, a Kenan dispatcher notifies a Kenan driver of the amount and type of fuel needed, the destination, i.e. Cowboys in Dothan, and the supplier that the driver should obtain the gasoline from at the Bainbridge terminal. The driver puts the above information on a drop ticket, and proceeds to the terminal.

At the terminal, the driver obtains a loading card and enters his driver ID number into the terminal's computerized system. Using the computer screen, the driver next selects the supplier, the customer, in this case D&D, the product to be loaded, and the destination state to which the product is to be delivered. The product is then loaded, and the terminal issues the driver a bill of lading showing the destination state and other pertinent information.

Kenan pulled gasoline from the Bainbridge terminal and delivered it to the Cowboys outlet in Dothan on numerous occasions during the period in issue. On nine of those occasions, the supplier that D&D had directed Kenan to obtain the product from did not include Alabama as a destination state option on the terminal computer screen. In those cases, the Kenan drivers selected Georgia as the destination state because they had to input some state in order to pull the fuel. Consequently, while the Kenan drop tickets

concerning those nine deliveries showed Alabama as the destination state, the terminal-issued bills of lading showed Georgia as the destination state.

After delivering the gasoline to the Dothan outlet, the Kenan drivers stapled the bills of lading behind the drop tickets and gave the documents to the outlet manager. The manager filed the documents in the outlet office.

A Revenue Department enforcement officer visited the Cowboys outlet in Dothan on January 28, 2002, and requested the location's fuel shipping records. The manager provided the officer with the drop tickets and attached bills of lading. The officer reviewed the bills of lading only, and discovered that ten had Georgia listed as the destination state.¹

He subsequently cited D&D for violating §40-12-198(e). That section provides that a retail dealer shall not "knowingly accept delivery of gasoline into storage facilities in Alabama if that delivery is not accompanied by a shipping document that sets out on its face Alabama as the state of destination of the gasoline." The Department subsequently entered the final assessments in issue against D&D based on those citations.

After being notified by D&D that some of the terminal-issued bills of lading included a wrong destination state, Kenan immediately applied for and obtained diversion numbers concerning the deliveries pursuant to §40-12-198(f). That section and related Department

¹Two bills of lading were issued concerning the January 28, 2002 delivery, one for premium gasoline and one for regular.

instructions require that if gasoline is legally diverted to another destination state after the terminal has issued a shipping document, the transporter must document the change by applying for a diversion number. The transporter must obtain the diversion number before the diversion occurs. Section 40-12-198(f).

The Department rejected the diversion numbers obtained by Kenan because they were obtained after the fact. It consequently assessed Kenan pursuant to §40-12-198(m)(4)b. That section levies a penalty for “[d]elivering fuel to a destination state other than that shown on the shipping document.”

ANALYSIS

Section 40-12-198 requires that gasoline transporters and retail outlets must properly document the delivery and receipt of gasoline. The transporter must carry on-board a shipping document issued by the terminal stating the destination state. Section 40-12-198(b). The transporter must provide to the retail outlet to which the gasoline is delivered a copy of the terminal-issued shipping document. Section 40-12-198(c). The retail outlet must retain the shipping document received from the transporter. Section 40-12-198(d). Finally, §40-12-198(e) prohibits the retail dealer from knowingly accepting the delivery of gasoline that is not accompanied by a shipping document showing the destination state of the gasoline. The penalty imposed for violating the above paragraphs is from \$500 to \$1,000 for the first violation, multiplied by the number of prior violations for each subsequent violation.

Section 40-12-198(m)(4)b. also prohibits the delivery of fuel to a destination state other than that shown on the shipping document. The penalty for the first violation is twice the tax payable on the improperly documented fuel. For all subsequent violations, the

penalty is the greater of \$5,000 or five times the tax payable on the improperly documented fuel.

The Department argues that the shipping document referred to in all paragraphs of §40-12-198 must be the terminal-issued bill of lading. Consequently, it argues that D&D violated paragraph (e) because the bills of lading in issue show Georgia as the destination state. I disagree.

“Shipping document” is defined at Code of Ala. 1975, §40-12-190(7) as “[a]ny invoice, shipping paper, bill of lading or drop ticket which discloses the destination state.” Thus, by definition, the term “shipping document” is not limited to only a terminal-issued document.

Sections 40-12-198(b) and (c) make reference to “a shipping document issued by the facility where the gasoline was obtained” and “the terminal-issued shipping document,” respectively. However, paragraph (e) only refers to “a shipping document.” It is presumed that the Legislature knew when it enacted §40-12-198 that the term “shipping document” was broadly defined to include a document, i.e. a drop ticket, other than a terminal-issued bill of lading. Further, if the Legislature had intended for the shipping document referred to in paragraph (e) to be only the terminal-issued bill of lading, it would have so specified as it did in paragraphs (b) and (c). It failed to do so.

The Kenan drop tickets that showed Alabama as the destination state were shipping documents under Alabama law. Consequently, because D&D maintained a shipping document for all gasoline deliveries which showed Alabama as the destination state, it did not violate paragraph (e), or any other provision in §40-12-198. The final assessments

against D&D are voided.²

The penalties assessed against Kenan are a closer question. Section 40-12-198(m)(4)b. prohibits the delivery of fuel to any state other than the state shown on "the shipping document." In this case, however, there were two valid shipping documents for each delivery, the drop tickets showing the correct destination state, and the bills of lading showing an incorrect destination state.

A statute imposing a penalty must be strictly construed, and the penalty should not be imposed unless clearly mandated by the statute. *State of Alabama, Ex Rel, Charles A. Graddick v. Jebesen S. (U.K.) Ltd.; Amerada Hess Corp.; and Gulf Oil Corp.*, 377 So.2d 940 (Ala. 1979); *Comm. of Int. Rev. v. Acker*, 80 S.Ct. 144 (1959). Applying that rule of construction, the §40-12-198(m)(4)b. penalty does not apply in this case because Kenan delivered the gasoline to the destination state listed on the shipping documents, i.e. the drop tickets.

Kenan did, however, violate §40-12-198(b). As discussed, that section requires that a transporter must carry on-board a terminal-issued shipping document showing the

²Even if the Department's argument was correct, there would also be a question whether D&D knowingly accepted the shipments without a proper shipping document. The manager of the Cowboy's Dothan outlet testified that she was unaware that Alabama had to be listed as the destination state on the bills of lading. She simply signed for the gasoline, and then filed the documents away without knowing they were incorrect.

destination state. The terminal-issued bills of lading concerning nine of the deliveries in issue improperly showed Georgia as the destination state. Consequently, the penalty imposed by paragraph (b) applies to those nine deliveries.³

Kenan is liable for a \$500 penalty for both the first and second violations involving the Georgia destination bills of lading, \$1,000 for the third violation, \$1,500 for the fourth, \$2,000 for the fifth, \$2,500 for the sixth, \$3,000 for the seventh, \$3,500 for the eighth, and \$4,000 for the ninth, for a total penalty of \$18,500.

The documentation requirements of §40-12-198 are intended to prevent the bootlegging of untaxed gasoline between states. It is undisputed, however, that neither D&D or Kenan were engaged in any illegal scheme to avoid tax. D&D timely reported and paid all tax due on the gasoline in issue.

The problem arose only because the suppliers at the Bainbridge terminal did not give the Kenan drivers an Alabama destination option on the terminal computer screen. Kenan is at fault to the extent that it should have immediately obtained diversion numbers for the Georgia destination bills of lading. If failed to do so. Consequently, while the \$18,500 cumulative penalty is significant, it clearly applies in this case.

The Administrative Law Division is authorized to adjust a final assessment to reflect

³The ' 40-12-198(b) penalty applies to the failure to properly document a delivery of gasoline. Consequently, only one penalty applies to the January 28, 2002 delivery that involved separate bills of lading for premium and regular gasoline.

the correct amount owed. Code of Ala. 1975, §40-2A-7(b)(5)d.1. Consequently, the Kenan final assessments are adjusted as indicated above. Judgment is entered against Kenan for \$18,500. Additional interest is also owed pursuant to Code of Ala. 1975, §40-1-44.

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

Entered March 20, 2003.

BILL THOMPSON
Chief Administrative Law Judge