**ALABAMA TAX TRIBUNAL**

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| NOBLE PETRO, INC.<br>NOBLE AMERICAS CORPORATION, | § | |
| Taxpayers, | § | DOCKET NOS. MISC. 15-121-LP<br>MISC. 16-568-LP |
| v. | § | |
| STATE OF ALABAMA<br>DEPARTMENT OF REVENUE. | § | |

## FINAL ORDER

A hearing on these consolidated appeals was conducted by Associate Judge Christy Edwards on April 20, 2017. Assistant Counsel Mary Martin Mitchell represented the Alabama Department of Revenue. Hugh Goodwin with DLA Piper, LLP, represented the Taxpayer. Briefs and separate stipulations of fact were filed.

This case is a consolidated appeal of two taxpayers, Noble Petro, Inc., and Noble Americas Corporation (the "Taxpayers").[1] The appeal concerns the final assessment of wholesale oil license fee entered by the Department for the periods October 2010 through September 2012 on Noble Petro, Inc., and the denial by the Department of a petition for refund of wholesale oil license fee paid by Noble Americas Corporation for the periods October 2009 through September 2012.

## FACTS

This appeal involves the wholesale oil license fee. The wholesale oil license fee was first imposed in 1935 and amended in 1996 and again effective October 1, 2012. As the tax periods at issue here are October 2009 through September 2012, the 1996 version applies, which was codified at Ala. Code § 40-17-174. The wholesale oil license fee is based on the gross initial wholesale

1The party in interest is now Vitol Inc., 2925 Richmond Avenue, Houston, Texas 77098, successor to the Taxpayers.

transaction sale of oil in Alabama; the determination period is the previous year, and the tax rate is 0.5 percent. The tax applies to sales of diesel fuel or illuminating and lubricating fuel products.[2]

Wholesale sales are sales made for resale. A sale from a refiner is not considered a wholesale sale. The subsequent sale of the fuel is the initial wholesale sale under the statute if made in Alabama. On sales where the Taxpayers sold imported fuel to Alabama license holders, the Department assessed the fee.

To determine such sales, the Department examined the Taxpayers' motor fuel returns[3] to assess purchases and sales of fuel by the Taxpayers. The returns indicated whether a purchase or sale was conducted with a holder of an Alabama license and whether a sale was shipped out-of-state. The Department then compared taxable transactions with invoices to obtain the gross sales figure.

The Department assessed the wholesale oil license fee on all sales from the Taxpayers to Alabama license holders where the Taxpayers purchased or imported the fuel from out-of-state. On purchases the Taxpayers made from in-state sellers, the Department did not assess the fee on the Taxpayers because the fee would have been due on either the seller who sold to the Taxpayers or a previous seller in the chain, whichever conducted the initial wholesale sale in Alabama.

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2 Neither Taxpayer maintained a wholesale oil license during the audit period. However, both did apply for an Alabama gasoline tax license. The gasoline tax license allows a holder to purchase gasoline and diesel fuel products tax free; the holder is then responsible for collecting and remitting tax to the State upon resale to a non-exempt purchaser if sold within the State. Because neither Taxpayer indicated on its gasoline tax license application that it would be dealing in diesel fuel or illuminating or lubricating fuel products, the Department did not issue either Taxpayer a wholesale oil license.

[3] The motor fuel return is separate from the wholesale oil license return.

The Department also received a general ledger of sales provided by the Taxpayers. All of the sales on which the Department assessed the fee were marked on the ledger as having a title transfer point in Alabama.[4]

The Taxpayers argue that for transactions where title passed while fuel was in transit in the Colonial Pipeline (the "Pipeline"), the Taxpayers were not subject to the wholesale oil license fee because the transactions occurred at a point in time when the fuel had been "entered with a common carrier for transportation to another State," and imposition of the fee would violate the Commerce Clause of Article 1, § 8 of the U.S. Constitution, as interpreted by the Alabama Supreme Court.

**LAW & ANALYSIS**

The 1996 version of § 40-17-174 reads:

> Each person, firm, corporation, or agency selling illuminating, lubricating, or fuel oils at wholesale in quantities of 25 gallons or more, shall pay to the Department of Revenue for the use of the state, within two weeks from the beginning of the fiscal year, the sum of one half of one percent on the gross sales, excluding all federal, state, and local excise taxes, for the preceding fiscal year. The payment to the Department of Revenue shall be accompanied by a sworn statement verified by the person having knowledge of the facts showing the amount of the gross sales of the oils sold in the state during the preceding fiscal year. No county license shall be charged under this section. The tax shall be paid on the first, and only the first, wholesale sales transaction of the oils sold in the state. The initial wholesale transaction shall be the only point at which the wholesale oil license fee is imposed on the oils sold in the state, the intent being that the tax shall be paid to the state but once. A copy of the statement shall at the same time be filed with the Department of

4 The Department auditor testified that Noble Petro also conducted "rack sales" – sales in which the fuel was removed from the Pipeline and stored at a terminal, in this case at a terminal in Birmingham; then the fuel was delivered by truck to Alabama customers. Noble Petro comingled the fuel in their storage terminals. Some was purchased from a refiner or imported by the Taxpayers and thus a subsequent transaction to an Alabama license holder in-state would have been subject to the fee. However, some of the fuel may have been initially purchased by an Alabama license holder and the subsequent sale by Noble Petro was not subject to the fee. Thus, the Department took the percentage of gallons subject to the fee and applied that percentage to the total rack sales made to Alabama license holders on Noble Petro's return. The assessment of tax on these sales are not contested by the Taxpayers.

Revenue.

§ 40-17-174, Ala. Code, 1975. The statute continues, laying out record-keeping requirements and consequences for failure to comply.

There are two types of transactions at issue here:

Type 1: Sales where fuel owned by the Taxpayers is imported into Alabama through the Pipeline and is then sold to out-of-state purchasers while in the Pipeline in a transaction that designates an Alabama location as the place where title passes.

Type 2: Transactions where the Taxpayers purchase fuel from Hunt Refinery and such fuel is inserted into the Pipeline by Hunt at Moundville and then is subsequently sold by the Taxpayers to out-of-state purchasers while in the Pipeline in a transaction that designates an Alabama location as the place where title passes.

For all sales, title passes under the relevant documents in Alabama, and the title passes while the fuel is in the possession of a common carrier – the Pipeline.

The Taxpayers argue that the fuel imported in the Pipeline and injected at Moundville is immediately bound for final movement out of Alabama because "there is no subsequent point in Alabama where the fuel can exit the Pipeline after being injected . . . at Moundville." (Amended Notice of Appeal, p. 6). It argues that fuel injected into the Colonial Pipeline in Moundville is necessarily in interstate commerce due to the fact that Colonial Pipeline does not list a tariff rate for fuel delivery with a point of origin in Moundville and a destination of other points in Alabama. However, the tariff schedule is not conclusive on this point. The lack of a tariff rate for intrastate delivery in Alabama is clear. The lack of intrastate delivery is not.

The Taxpayer also references an information booklet published by Colonial Pipeline

Company to claim that the only intrastate service of the Pipeline is in New Jersey. However, that conclusion cannot be drawn. The section referenced in the booklet states: "Intrastate movements in New Jersey are subject to the same policies and procedures as short-haul movements on the Colonial System. The rates and origin and destination points for intrastate movements in New Jersey are set forth in the below table." Nothing in that statement indicates that the only state in which the Pipeline conducts intrastate delivery is New Jersey.

The Taxpayers further argue that this circumstance falls under a nontaxable transaction as admitted by the Department since the Department had "the intent to not tax 'purchases from an Alabama refinery that were delivered out of State.'" (Amended Notice of Appeal, p. 7).

The Department argues that the sales at issue closed when title transferred, relying on the *Coastal Petroleum* Court's analysis of the sales tax statute to determine when the sale occurred (*State v. Coastal Petroleum Corporation*, 240 Ala. 254 (Ala. 1940)). The Department quotes section 40-23-1(a)(5) for the definition of a "sale" for sales tax purposes:

> Installment and credit sales and the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale. Provided, however, a transaction shall not be closed or a sale completed until the time and place when and where title is transferred by the seller or seller's agent to the purchaser or purchaser's agent…."

However, as the Taxpayers point out, that statute continues, stating that

> for purpose of determining transfer of title, a common carrier or the U.S. Postal Service shall be deemed to be the agent of the seller, regardless of any F.O.B. point and regardless of who selects the method of transportation, and regardless of by whom or the method by which freight, postage, or other transportation charge is paid. Provided further that, where billed as a separate item to and paid by the purchaser, the freight, postage, or other transportation charge paid to a common carrier or the U.S. Postal Service is not a part of the selling price.

*Id.* The Taxpayers argue that an application of above sales tax statute would favor the Taxpayers. However, section 40-17-174 levies a privilege tax and not a sales tax. *State v. Pure Oil Co.*, 256 Ala. 534, 55 So.2d 843 (1951). The sales tax statutory requirements are not binding here.

The Department goes on to state that the common carrier rule relied upon by the Taxpayers is a default rule under the Uniform Commercial Code. The Department supports its position via Ala. Code § 7-2-401(2):

> (2) *Unless otherwise explicitly agreed* title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place, and in particular and despite any reservation of a security interest by the bill of lading:
>
> (a) If the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but
>
> (b) If the contract requires delivery at destination, title passes on tender there.

(Emphasis added.)

Thus, because the Taxpayers and purchasers contracted as to the physical location of the transfer of title, the default rule of a sale closing at the delivery location from a common carrier does not apply. The Department contends there was no interstate sale. As discussed herein, I agree.

The Department continues its argument, stating that Alabama law dictates that a sale is taxable in Alabama if it is closed in Alabama regardless of whether the buyer immediately transports the goods out of the state. Additionally, as stated in *International Harvester,* 322 U.S. 340 (1944), "where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local

transactions the same way." The Taxpayer argues that the Alabama Supreme Court's observation in *Ex parte Dixie Tool & Die Comp., Inc.*, 537 So.2d 923 (Ala. 1988), and *American Cast Iron Pipe v. Boswell*, 350 So.2d 438 (Ala. 1977), that the protection of the Commerce Clause, U.S. Constitution, Art. 1, § 8, begins when the goods commence their final movement for transportation from Alabama renders the sales at issue as nontaxable regardless of whether the sales closed in Alabama.

The Department argues that the Taxpayers' reliance on *Ex parte Dixie Tool* and *American Cast Iron Pipe*, is misplaced as the facts are different. I agree. While both of those cases follow the general rule that goods bound for out-of-state delivery are not taxable, the specific facts cannot be ignored. In *Dixie Tool*, the sale was found to have closed, at the earliest, upon delivery by the seller to the interstate carrier, resulting in interstate commerce. In the present case, the closing of the sale occurred at a specific time and place according to the contract.

The general rule from *American Cast Iron Pipe*, is that

> It is well established that a state may tax everything that is 'the general mass of property' of that state, and things intended to be sent out of a state, but which have not left it, may remain a part of that general mass and subject to state taxation. *Diamond Match Co. v. Village of Ontonagon*, 188 U.S. 82, 23 S.Ct. 266, 47 L.Ed. 394 (1903). The protection of the Commerce Clause begins at that moment when 'they commence their final movement for transportation from the state of their origin to that of their destination' …; *Coe v. Town of Errol*, 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715 (1886).

*American Cast Iron Pipe Co. v. Boswell*, 350 So.2d at 440. The Taxpayer hangs its hat on the "final movement for transportation" segment of the above quote. However, the Court in *American Cast Iron Pipe Co.* also quoted the following language from a previous case regarding the sale of cotton, which was removed from interstate commerce for compression before being returned to transportation:

> When [the cotton] comes to rest [at the warehouse], its interstate journey … comes to an end, and although in the ordinary course of business the cotton would ultimately reach points outside the state, its journey interstate does not begin and so it does not become exempt from local tax *until its shipment to points of destination* outside the state. Before shipping orders are given, it has no ascertainable destination without the state…Property thus withdrawn from transportation, whether intrastate or interstate, until restored to a *transportation movement interstate,* has often been held to be subject to local taxation. (citations omitted) (emphasis added).

*Id. quoting Federal Compress & Warehouse Co. V. McLean*, 291 U.S. 17, 21, 78 L.Ed. 622 (1934). While the fuel oil at hand was not withdrawn from transportation (i.e. the Pipeline), it nevertheless had "no ascertainable destination without the state" to cement its movement in interstate commerce.

Furthermore, the Department cites the Alabama Supreme Court to state that "[a]ctual delivery is considered of the greatest importance in determining whether there was an intention to pass title. But there may be a constructive delivery, and the intention of the parties, however disclosed, is conclusive on the question of whether title passed." *State v. Mobile Stove & Pulley Mfg. Co.*, 52 So.2d 693, 698 (Ala. 1950). Here, the intention of the parties clearly designated title to pass in Alabama. The Department further supports this point with the fact that the Taxpayers were not the owners of the fuel or holders of the risk of loss at the time the fuel commenced its final movement out of the state following the closing of the transaction.

The Taxpayers disagree that the closing of the transaction is determinative and stress that a transaction can both close in Alabama and be part of interstate commerce. The Taxpayer quotes *Ex parte Hoover*: "Rightfully or wrongfully, the fact that a transaction is completed within a state's borders no longer is dispositive in determining whether the transaction constitutes interstate commerce." *Ex parte Hoover*, 956 So.2d 1149 (Ala. 2006). In context of the case, this quote is not

applicable here. In *Hoover*, the issue is one of the negative or dormant commerce clause, where the statute challenged was discriminatory on its face. The statute exempted Alabama governmental entities from the sales tax at issue but did not exempt out-of-state governmental entities. The Department argued that because certain Mississippi governmental entities purchased the goods in Alabama and took delivery in Alabama, the sale closed in Alabama and was taxable here. The Court made the above quote in response to this argument. The discriminatory nature of the tax exemption could not be ignored. That analysis does not apply here as there is no challenge regarding facial discrimination of the statute.

The Taxpayers also argue that the revision of Ala. Code § 40-17-174 in 2012, after the period in issue, "appears to reach local transactions only, with little or no possibility of infringing on transactions protected by interstate commerce." (Taxpayers' Dispute of the Department's Stipulated Facts, ¶ 8.) The Taxpayers imply that the amendment suggests the Legislature's intent that the 1996 version was not meant to tax the transactions at issue. Indeed,

> [w]hen statutes are amended or replaced by succeeding legislation, the Legislature often seeks to clarify previously ambiguous provisions. These subsequent acts by the Legislature must be considered in trying to determine the intent of the legislation. 73 Am.Jur.2d, Statutes, s 178.

*McWhorter v. State Bd. of Registration for Pro. Engineers & Land Surveyors ex rel. Baxley*, 359 So. 2d 769, 773 (Ala. 1978). Yet, this Tribunal would seek to divine legislative intent only where the applicable version of the statute is ambiguous. Here, the wording of the statute is straightforward.

> It is well settled that when the legislature makes a 'material change in the language of [an] original act,' it is 'presumed to indicate a change in legal rights.' 1A Norman J. Singer, Statutes and Statutory Construction § 22:30 (6th ed. 2002) (footnote omitted). In other

> words, the 'amendment of an unambiguous statute indicates an intention to change the law.' Id. (emphasis added). See State v. Lammie, 164 Ariz. 377, 379, 793 P.2d 134, 136 (Ariz.Ct.App.1990) ('when the legislature amends statutory language, it is presumed that it intends to make a change in existing law'); Matter of Stein, 131 A.D.2d 68, 72, 520 N.Y.S.2d 157, 159 (App.Div.1987) ('When the Legislature amends a statute, it is presumed that the amendment was made to effect some purpose and make some change in the existing law.... By enacting an amendment of a statute and changing the language thereof, the Legislature is deemed to have intended a *1065 material change in the law.... Moreover, a statute will not be held to be a mere reenactment of a prior statute if any other reasonable interpretation is attainable...."), appeal dismissed 72 N.Y.2d 840, 530 N.Y.S.2d 555, 526 N.E.2d 46 (1988).

*W.B.B. v. H.M.S.*, 141 So. 3d 1062, 1064–65 (Ala. Civ. App. 2013) *quoting Pinigis v. Regions Bank*, 977 So.2d 446, 452 (Ala.2007). Here, the 1996 wholesale oil license fee statute was not ambiguous, nor have the Taxpayers claimed it to be so. Instead, the Taxpayers claim an exception to the statute. Because the statute was not ambiguous, the revision indicated only "a change in legal rights." *Id.*

Therefore, for the reasons set forth above, the sales at issue were not sales in interstate commerce and were subject to the wholesale oil license fee in Alabama. The final assessment and denial of refund are affirmed. Judgment is entered accordingly.

This Final Order may be appealed to circuit court within 30 days, pursuant to Ala. Code § 40-2B-2(m).

Entered February 4, 2022.

/s/ Leslie H. Pitman
LESLIE H. PITMAN
Associate Tax Tribunal Judge

lhp:dr
cc: Hugh Goodwin, Esq.
David Avery, Esq.